

In the  
Supreme Court of Ohio

OMAR K. JAMES, : Case No. 2015-1230  
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 :  
 Plaintiff-Appellee, : On Appeal from the  
 : Clark County Court of Appeals,  
 v. : Second Appellate District  
 :  
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 STATE OF OHIO, : Court of Appeals  
 : Case No. 2013-CA-28  
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 Defendant-Appellant. :

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MEMORANDUM IN OPPOSITION TO JURISDICTION OF  
PLAINTIFF-APPELLEE OMAR K. JAMES

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## STATEMENT OF THE CASE AND FACTS

Mr. James was indicted in September 1996 on four felony counts, including possession of crack cocaine, possession of powder cocaine, carrying a concealed weapon, and having a weapon under disability. *James v. State*, No. 2013-CA-28, 2014-Ohio-1.40 (2d Dist.). The drugs and firearms were discovered during a traffic stop. During a trial in June of 1997, when Mr. James was represented by retained counsel, the driver of the vehicle testified that the drugs and guns belonged to *him*, not Mr. James. Id. A jury convicted Mr. James of the charge of having a weapon under disability, but hung on the remaining three charges. After the June 1997 trial, Mr. James' attorneys withdrew, citing James's indigence. James, was sentenced to the maximum 12 months incarceration for having a weapon under disability.

A public defender was then appointed to represent Mr. James, but he did virtually no work and withdrew in May 1998 prior to Mr. James's retrial on the three remaining charges. A different attorney was then appointed to represent James. On the day trial was scheduled to begin, June 22, 1998, this attorney met with James and informed him that he was not prepared to go to trial that day, as he had not received discovery from the prosecutor, and that he intended to ask for a continuance. The trial court judge denied the attorney's request for a continuance. Following that, twice during the voir dire, Mr. James announced that he wanted to fire his attorney. The judge instructed James not to engage in any further outbursts, and that if he did, he risked being held in contempt, tried in absentia, or gagged. At this point, Mr. James' attorney moved to withdraw on the grounds that he could not properly represent Mr. James and get him a fair trial. The judge denied his request and then asked Mr. James if he wished to represent himself. At no time did the judge inquire into James's reasons for wanting to fire his attorney, nor

did he explain the risks and dangers of self-representation. The court then permitted James to represent himself, without finding that Mr. James's waiver of counsel was knowing or intelligent.

The jury convicted Mr. James on the three remaining counts, and he was sentenced to a total of 13 years incarceration, which was ordered to run consecutively with the 12-month sentence he had already served for the weapons under disability count. Mr. James filed an appeal in July 1998, raising several grounds, all of which were overruled in a decision by the Second District in February 1999. Mr. James sought leave to appeal to this Court which declined to accept jurisdiction in June of 1999. In May of 1999, he filed a Rule 26(B) application to reopen his appeal, which the Second District denied in August. Mr. James attempted to appeal that decision to this Court in September 1999, which declined to accept jurisdiction in November 1999. Mr. James then filed a habeas action in federal court in September 2000. Following an evidentiary hearing, the federal district court determined that Mr. James's waiver of counsel was not knowingly and intelligently made and granted Mr. James' petition for habeas relief. The final June 29, 2005 order of the district court stated: "The State of Ohio shall release Ahmad K. James from incarceration unless he is granted a new trial within the time allowed by the Ohio Speedy Trial Act from date on which final judgment is entered in this case."

The Warden appealed that decision to the Sixth Circuit Court of Appeals, which affirmed the grant of the writ. See, *James v. Brigano*, 470 F.3d 636 (6th Cir. 2006). The Sixth Circuit noted that the trial judge "summarily forced James to choose between self-representation and counsel that, by Stewart's own admission, was unprepared." *Id* at 642. The Court held that Mr. James' waiver was not made with "eyes wide open," and that the choice between unprepared counsel and self-representation is no choice at all. *Id.* at 644. The Sixth Circuit denied the State's subsequent petition for rehearing *en banc*. See, *James v. Brigano*, No. 05-4003, 2007 U.S. App.

LEXIS 13662 (6<sup>th</sup> Cir. May 15, 2007). It also ordered Mr. James to be released from state custody on an O/R bond. Upon remand after a hearing in the district court, Mr. James was finally discharged from prison. In light of the State's persistent failure to retry Mr. James, the district court issued an order interpreting its 2005 final judgment to mean that the State had until October 27, 2008 to retry Mr. James "or forego further retrial" on the criminal charges underlying the case. See, *James v. Brigano*, Case No. 3:00CV00491, 2008 U.S. Dist. LEXIS 91235 (S.D. Ohio July 30, 2008). The State failed to retry Mr. James by that date. Thereafter, Mr. James filed a motion to dismiss the indictment *with prejudice* in the Clark County Court of Common Pleas, which was granted on August 26, 2009.

Mr. James filed his wrongful imprisonment action on September 29, 2009 pursuant to R.C. 2743.48(A). Eventually, the court entered an unreasoned order granting the State's motion for summary judgment and overruling Mr. James' summary judgment motion. Mr. James appealed, and on January 17, 2014, the Second District entered an opinion and entry reversing the trial court's judgment and holding that Mr. James is a "wrongfully imprisoned individual." The State appealed. This Court reversed and remanded for application of Mansaray v. State, 138 Ohio St.3d 277, 2014 Ohio 750. See, James v. State, 139 Ohio St.3d 1401, 2014-Ohio-2245. On remand, the Second District again declared Mr. James to be a wrongfully imprisoned individual, following which the State moved for reconsideration. The court overruled the motion.

THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

**I. The Court of Appeals correctly applied Mansaray below, pursuant to this Court's remand instructions, and there is no great general or public interest in a reexamination of the manner in which it applied that decision.**

The State argues that its failure to retry Mr. James within the time prescribed by the federal district court did not constitute a violation of his speedy trial rights. Rather, the State posits that it simply voluntarily "chose" not to retry him. Based on this faulty premise, it sounds

a false alarm, insisting that if this Court does not accept review, then if the State chooses, for whatever reason, not to retry defendants whose convictions are reversed, they can all be declared wrongfully imprisoned individuals under R.C. 2743.48(A). The State further argues that any violation of Mr. James' right to a speedy trial does not constitute a qualifying "error in procedure" under R.C. 2743.48(A)(5), because the violation did not result in Mr. James' discharge from prison but only barred his re-prosecution. It claims the Second District's determination to the contrary radically alters the definition of an "error in procedure."

None of these contentions are correct. First of all, the State did not just "choose" not to retry Mr. James. The State continuously failed to retry him over a long period of time while insisting that it *fully intended* to do so. The speedy trial clock began to tick on June 29, 2005 when the federal district court ordered the State to "release" Mr. James "from incarceration unless he is granted a new trial within the time allowed by the Ohio Speedy Trial Act from the entry of final judgment in this case." Although the district court granted the State's belated motion to stay its June 29, 2005 order on January 18, 2006 (while the State appealed) -- nothing prevented it from retrying Mr. James before or after the stay. The Sixth Circuit affirmed the district court's grant of the writ on November 30, 2006. Yet the State continued to delay the retrial of Mr. James after that decision. The Sixth Circuit then denied the State's subsequent petition for rehearing *en banc* on May 15 2007, and on the same date ordered Mr. James to be released from state custody on an O/R bond. Nevertheless, the State neither released nor retried him, nor did it dismiss the charges pending in state court.

Thereafter, on June 22, 2007, after a hearing in the district court, *that court* ordered Mr. James released on a federal O/R bond. The State still did not dismiss the charges. Rather, the minutes of the hearing reflect the Assistant AG told the court that the State "will" retry Mr.

James. The State did not “choose” not to retry him; it affirmatively declared its intent to pursue charges. In fact, the State forced Mr. James to jump through every hoop at his disposal in an attempt to try to bar retrial and would not dismiss charges or release him of its own accord.

The State, then, from June 22, 2007, until July 30, 2008, over a year, continued to fail to retry Mr. James or dismiss the charges while opposing his every attempt to get the federal court to bar retrial. The State’s insistence that it “chose” not to retry Mr. James is belied by the facts and its declared intentions. In fact its failure to dismiss the charges or release Mr. James, *necessitated* the bond hearing. Moreover, if the State voluntarily chose not to retry him, it would not have virulently opposed all of the subsequent efforts by Mr. James to bar retrial. On July 30, 2008 the district court finally ordered the State to retry him by October 27, 2008 or forgo further prosecution. The State could have retried him then. Or, the State could have filed a motion to dismiss the charges “without prejudice” during the 90-day period. It did none of these things. If the State had done either of these things, Mr. James would have been prohibited from filing suit as a wrongfully incarcerated person pursuant to R.C. 2743.48(A)(4). The State continued to exacerbate the violation of Mr. James’ speedy trial rights.

Moreover, the October 2008 deadline was nothing more than a generous “last chance” opportunity for the State to try Mr. James. The State narrowly defines period commencing and ending in the small window from July 30 to Oct 27, 2008, as the time it exclusively had to retry him – when in fact this was *the tail end of the lengthy speedy trial/due process violation*. In fact, as a result of the state’s intransigence, it was necessary for Mr. James to move for a judgment dismissing the charges in the state court with prejudice, which was finally entered in 2009. Despite the State’s present claim that it “chose” not to retry, it never indicated any intent to do anything *but retry him*, forcing James to repeatedly attempt to obtain orders barring retrial.

In the federal court proceedings the State argued that Ohio Speedy Trial limits, for purposes of a retrial, meant “a reasonable period of time,” not a specific number of days. The district court seemingly adopted that view given that it was over six (6) months *after* its June 29, 2005 order requiring a retrial within Ohio’s speedy trial limits, when Judge Rose issued a stay on January 18, 2006. Moreover, the court gave the State nearly a year and a half *after the remand* from the Sixth Circuit to retry him. Thus, it was the error in failing to abide by Ohio’s Speedy Trial Act that caused Mr. James’ ultimate release in 2008 (not the State’s choice), which was reconfirmed with the state court’s dismissal of the charges in 2009.

The State’s position that the timing of the speedy trial error disqualifies it under R.C. 2743.48(A)(5) is also wrong, as the Second District correctly held. This Court held in *Mansaray v. State*, 138 Ohio St. 3d 277, 2014-Ohio-0750, that “[w]hen a defendant seeks a declaration that he is a wrongfully imprisoned individual and seeks to satisfy R.C. 2743.48(A)(5) by proving that an error in procedure resulted in his release, *the error in procedure must have occurred subsequent to sentencing and during or subsequent to imprisonment.*” *Id.* at the syllabus. (emphasis added). Thus, in order for one to be considered a wrongly incarcerated individual, the error in procedure which results in the individual’s release must occur on either of two occasions: 1) after sentencing and during imprisonment; or, 2) *subsequent to imprisonment*. Here we have an error that occurred *subsequent to imprisonment*, one of only two periods of time in which the error *must occur*, according to *Mansaray*, in order for the imprisonment to be wrongful. The State complains that an error in procedure which occurs *subsequent to imprisonment* by its very nature *cannot result in release from prison*, thereby implying that *Mansaray*’s holding makes no sense.

In denying the State's motion for reconsideration below, the Second District noted that R.C. 2743.48(A)(5) "specifically provides that the procedural error may occur 'subsequent to imprisonment,' which supports an interpretation of the "release" to mean action that is more inclusive than just a discharge from prison." State's Exh. 1, p. 3. The Court further stated, "Construing the term 'release' as that term is used in R.C. 2743.48(A)(5) *in pari material* with the language of R.C. 2743.48(A)(1) and (2), which refers to 'charges' and with R.C. 2743.48(A)(4), which requires a finding that no charges can be brought against the claimant, we conclude that the term 'release' within the meaning of subsection (A)(5) of the wrongful imprisonment statute may include a release from all "charges," in addition to a discharge from confinement. *Id.* The Court thus correctly applied *Mansaray*'s interpretation of the statute by holding that "release" cannot mean only freedom from physical confinement if the procedural error must occur either during imprisonment or "subsequent to imprisonment." Even without *Mansaray*, i.e. if the error is required only to *result* in release either during imprisonment or "subsequent to imprisonment," rather than to have *occurred* at those times (which is *Mansaray*'s holding), the statute still only makes sense if "release" is more inclusive than physical discharge. Any other interpretation would prevent someone who is say, paroled, but who is fully exonerated only *after his release from prison* -- from obtaining any relief under the statute. This does not make sense. The State urges this Court to craft a new timing requirement even more stringent than *Mansaray*, so that no procedural error claimant can ever meet it. No great general or public interest would be served by this.

**II. Because the Second District's decision may be upheld on other grounds, given that additional errors in procedure occurred during Mr. James' imprisonment which directly resulted in his discharge from prison, the Court should not accept jurisdiction even if it disagrees with the lower court's analysis.**

The Second District considered but did not agree that there were errors at the state appellate level which occurred during Mr. James's incarceration which led to his release from actual confinement. However, these errors clearly meet the requirements of R.C. 2743.48(A)(5) under *Mansaray* and should cause the Court to affirm the judgment even if it disagrees with the Second District's analysis of the speedy trial error. The Second District's conclusion that Mr. James a wrongfully imprisoned individual is correct for reasons other than those it relied upon and its decision should not therefore be disturbed.

The procedural error which caused Appellee's convictions to be vacated by a federal court occurred in the Second District when that court denied Mr. James' motion to reopen his appeal under Ohio App. R. 26(B) due to the ineffective assistance of appellate counsel. See, *James v. Brigano*, 470 F.3d 636, 640-44 (6th Cir. 2005). Both the ineffective assistance of appellate counsel and the Ohio Court of Appeals' errors "occurred subsequent to sentencing and during or subsequent to imprisonment" and thus subsection (A)(5) is satisfied. Mr. James had been sentenced and was imprisoned on the three felony counts for which he was declared a wrongfully imprisoned individual *when the errors in procedure occurred*, unlike in *Mansaray* where the error occurred at trial and not after sentencing or during imprisonment.

Specifically, the Sixth Circuit decided that the Ohio Court of Appeals erred in unreasonably applying clearly established federal law when it denied Mr. James' motion to reopen his appeal under Ohio Rule 26(B) due to appellate counsel's failure to raise the constitutionally defective waiver of trial counsel issue. See *James v. Brigano*, 470 F.3d at 640-41, 643-44 (6th Cir. 2005). The underlying error, appointed appellate counsel's failure to raise the defective waiver on direct appeal, *also occurred after sentencing and during* Mr. James' imprisonment. In federal habeas proceedings, a petitioner is subject to extremely rigorous

procedural and substantive obstacles. One such requirement is that a petitioner must raise the claimed federal error in state court at every appellate level, including (for purposes of Ohio) the filing of a notice of appeal and memorandum in support of jurisdiction in this Court. This requirement is known as "the exhaustion of state remedies doctrine." See, 28 U.S.C. § 2254(b); *Duncan v. Walker*, 533 U.S. 167, 178-79 (2001) (exhaustion requirement of § 2254(b) ensures that state courts have the opportunity fully to consider federal law challenges to a state custodial judgment before the lower federal courts may entertain a collateral attack upon the judgment.). So, the error the federal habeas court *reviews* is not what occurred at the state trial court level. In federal habeas proceedings, the court analyzes the last reasoned state court decision, and then will only grant a writ if the state court which issued *that decision* unreasonably applied clearly established federal law in denying relief to the petitioner. See, 28 U.S.C. § 2254(d)(1); *Joseph v. Coyle*, 469 F.3d 441, 450 (6th Cir. 2006).

The Sixth Circuit set forth the standard for review in the case *sub judice* as follows: "[t]he Ohio Court of Appeals must have applied the law in an 'objectively unreasonable' manner in order for this court to grant relief under the AEDPA standards." *James v. Brigano*, 470 F.3d at 643. The Court went on to fault the Ohio Court of Appeals because it "explicitly accepted the idea that James was attempting to delay trial" and failed to address the "question of waiver even though courts should indulge every reasonable presumption against waiver of fundamental constitutional rights." *Id.* at 643-44. The Court further determined that the Ohio Court of Appeals' finding that Mr. James "knowingly and intelligently waived appointed counsel was a failure to apply clearly established Supreme Court precedent." *Id.* at 644. Because Mr. James' appellate attorney failed to specifically raise the defective waiver of counsel error during the direct appeal, Mr. James filed a motion to reopen his appeal under Ohio App. Rule 26(B). See,

*State v. James*, Case No. 98-C:A-54, 1999 Ohio App. Lexis 506 (2nd Dist. Clark Co. Feb. 19, 1999); *State v. James*, App. Case No. 98-CA-54, slip op. at 8-9 (2nd Dist. Clark Co. Aug. 26, 1999). It was the Second District's denial of *this motion* which resulted in the federal district court granting the writ and ordering Mr. James to be released or retried.

The Magistrate's R&R, which was adopted in its entirety by the district court, also repeatedly identified the state court of appeals' error as the cause of the writ being granted. In pointing out the procedural error, the Magistrate Judge held, "The Ohio Court of Appeals' rejection of James' Sixth Amendment claim constituted an unreasonable application of clearly established Sixth Amendment law as determined by the United States Supreme Court." *R&R at 30-31.* (emphasis added). Judge Rose, in his order adopting the R&R *in its entirety*, reaffirmed that the errors occurred at the appellate level. He faulted "[t]he state appellate court" for making "no finding as to whether James had knowingly and intelligently waived this right." And he agreed with the Magistrate that state appellate court "unreasonably applied Sixth Amendment law as determined by the United States Supreme Court, as well as unreasonably determined facts such as attributing fault to James for his first two attorneys' decisions to withdraw, when one withdrew after a trial when James was unable to pay for further services and another was unable to proceed in light of the trial court's refusal to order the provision of discovery." Mr. James was incarcerated when the court of appeals error occurred, and he was incarcerated when his first appellate attorney ineffectively failed to raise the defective waiver of counsel issue on direct appeal. Thus, Mr. James satisfies subsection (A)(5) as it has been interpreted by this Court in *Mansaray*. In *Mansaray*, as in the vast majority of cases where a reversal of a conviction occurs, there was no procedural error which occurred *after trial*. Here there is, and it directly resulted in Mr. James' release from incarceration.

**III. The Court should not accept review to resolve any issue arising under R.C. 2743.48(A)(4), as the decision below does not address that subsection, per this Court's order which reversed and remanded for application of Mansaray which strictly involves subsection (A)(5).**

The State urges this Court to review its argument that the Second District, in its 2014 decision, misapplied subsection (A)(4) by not requiring Mr. James to prove his actual innocence of every act related to his vacated convictions. When the Court reversed the 2014 decision, and remanded, it could have, but did not order the Second District to do anything other than apply Mansaray, which involves only the timing of an error in procedure under R.C. 2743.48(A)(5). The Second District declined to exceed the scope of the remand, and its 2015 decision which the State seeks to appeal, does not address any subsection (A)(4) issue. "Absent extraordinary circumstances, such as an intervening decision by the Supreme Court, an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case." Nolan v. Nolan (1984), 11 Ohio St.3d 1, paragraph one of the syllabus. The reversed and vacated 2014 decision which resolved the subsection (A)(4) question unfavorably for the State, is not presently before the Court. Furthermore, the State's argument is erroneous for the reasons discussed *infra*.

**Appellee's Response to Appellant's Proposition of Law No. I:** An "error in procedure" exists pursuant to R.C. 2743.48(A)(5) where the State declares its intent to retry an individual whose convictions have been vacated, and then over a lengthy period, fails to dismiss the charges while obstructing the individual's every effort to prevent retrial until he obtains an order barring retrial on speedy trial grounds releasing him from future charges; moreover, a state waives any issue concerning the timing of an error in procedure in a wrongful imprisonment action which it raises for the very first time in the Supreme Court of Ohio.

Contrary to what it now claims, the State did *not decide not to retry Mr. James*, but it violated his right to a speedy trial by announcing its intent *to retry* him in June of 2007, and obstructing his efforts to bar retrial for nearly a year and a half. Mr. James was forced to obtain two federal court orders discharging him from prison on bond in 2007, and after much lengthy struggle, managed to obtain a federal court order that put an end to the stalling tactics of the

State, which barred retrial after October 27, 2008. After that date passed, the State still did not dismiss the charges, so Mr. James was forced to obtain a court order from the state judge dismissing his indictment with prejudice. The 2008 order barring retrial resulted in Mr. James' "release" from all charges in that he was no longer subject to re-arrest, re-incarceration or post-release control. The order which released him from all charges was a direct result of the speedy trial error. Thus, the Second District Court's reasoning is correct and its judgment should not be disturbed. Mansaray holds that R.C. 2743.48(A)(5) requires that the error in procedure *which results in release* "must occur subsequent to sentencing and during imprisonment or subsequent to imprisonment." *Id.* at the syllabus. As the Second District held, the term "release" must be more inclusive than mere discharge from prison or Mansaray and the statute make no sense. Even if the Second District's analysis is not correct, Mr. James was released from actual confinement due to errors which occurred *while he was incarcerated*, to wit: ineffective assistance of appellate counsel for failing to raise his defective waiver of trial counsel error and the erroneous denial of his Ohio App. R. 26(B). See, *James v. Brigano*, 470 F.3d 636, 640-44 (6th Cir. 2005).

The State argues for the first time that the federal court lacked authority to bar a retrial. In a typical case where a prisoner is released because a state fails to retry him by the deadline set in a conditional writ, "the state is not precluded from re-arresting petitioner and retrying him under the same indictment." Satterlee v. Wolfenbarger, 453 F.3d 362, 370 (6<sup>th</sup> Cir. 2006). However, "In extraordinary circumstances, such as when the state inexcusably, repeatedly, or otherwise abusively fails to act within the prescribed time period or if the state's delay is likely to prejudice the petitioner's ability to mount a defense at trial, a habeas court may forbid reprosecution." Id., 453 F.3d at 370 (citations omitted). Mr. James' case certainly meets this

criteria, and the State never appealed the district court's order or the state trial court's order, which are *res judicata* and constitute the law of the case.

Moreover, the State is not entitled to raise any issue arising under *Mansaray* because it did not argue either at trial or in the appellate court briefings (that preceded the Second District's 2014 decision) that Mr. James was precluded from being declared a wrongfully imprisoned individual due to the timing of any error in procedure. This issue was discussed for the first time during oral arguments prior to the 2014 decision. *Mansaray* was then pending. The State made other arguments, but absolutely nothing about the timing of the error in procedure under subsection (A)(5) upon which *Mansaray* turned. The Second District discussed the issue in its 2014 opinion perhaps because it came up at oral arguments. However, Mr. James never had an opportunity during summary judgment proceedings at trial or in the appellate briefings to address the issue. The State waived any argument about the timing of the procedural error. "A fundamental rule of appellate review is that an appellate court will not consider any error that could have been, but was not, brought to the trial court's attention." *Schade v. Carnegie Body Co.* (1982), 70 Ohio St.2d 207, 210; See also, *State v. Awan* (1986), 22 Ohio St.3d 120, 123.

**Appellee's Response to Appellant's Proposition of Law No. II:** The General Assembly did not amend R.C. 2743.48(A)(4) when it added language to R.C. 2743.48(A)(5), but the Appellant misconstrues subsection (A)(4) to mean something other than what it plainly says.

The State argues that subsection (A)(4) "prohibits wrongful-imprisonment compensation if the prisoner committed *other* criminal acts associated with the crimes eventually overturned on appeal." It then contends that Mr. James cannot satisfy R.C. 2743.48(A)(4) because he was found guilty of having a weapon under disability during the first trial and he did not challenge that conviction. The Appellant's so-called "Otherwise Innocent" requirement does not exist. Notably, the State avoids actually quoting subsection (A)(4), whose language demonstrates the

fallacy of its made-up doctrine. R.C. 2743.48(A) provides in relevant part that in order to be declared a wrongfully imprisoned individual, the following criteria must be met: (4) The individual's conviction was vacated, dismissed, or reversed on appeal, the prosecuting attorney in the case cannot or will not seek any further appeal of right or upon leave of the court, and no criminal proceeding is pending, can be brought, or will be brought by any prosecuting attorney...against the individual for any act associated with that conviction.

The State does not argue that any prosecuting attorney can or will bring a criminal proceeding against Mr. James for any act associated with his convictions, nor does it argue that any such proceeding is pending. Rather, it urges the Court to add text to the plain language of statute so that it in effect reads as follows: "no criminal proceeding...has *been brought ... against* the individual for any act associated with [the convictions] *which resulted in a conviction which remains in effect.*" However, the General Assembly clearly, carefully and concisely chose its words to describe the temporal nature of the prosecution at issue to encompass only prosecutions for acts "associated" with the conviction which are either *pending* (present tense) or which *may occur in the future*. If it had wanted to add language preventing claimants from obtaining relief on the basis of acts "associated with" overturned convictions for which they have *already been prosecuted and served time*, the General Assembly could have easily done so. It did not.

After a conviction is reversed on appeal or vacated in collateral proceedings, more often than not, the possibility of a retrial on the original charges or a lesser included (and/or related) offense exists, in which case the defendant may not be declared a wrongfully imprisoned under R.C. 2743.48(A)(4). At this point, he remains ineligible to be declared wrongfully imprisoned because, in that scenario, a court will be unable to determine if he might be imprisoned in the future on concurrently-run counts or the same counts, or lesser included

offenses or related counts. See, R.C. 2743.48(A)(4) & (B)(5); *Lafever v. State*, 2013 Ohio 4606 (10<sup>th</sup> Dist.). Thus, contrary to the State's contentions, subsection (A)(4) is a pragmatic device which was implemented to avoid this uncertainty in calculating the wrongful imprisonment period, and that is why it only precludes a person from being declared wrongfully imprisoned if *future* charges for related criminal conduct may be brought or charges *are pending*; it *does not* preclude a wrongful imprisonment declaration where a person *has already been* convicted of an unchallenged count and has already served his sentence on that count, but was convicted of other consecutively-run counts which were vacated or reversed *and for which he may not be retried*.

Indeed, subsection (A)(4) goes hand in hand with R.C. 2743.48(B)(5) which provides: If an individual was serving at the time of the wrongful imprisonment concurrent sentences on other convictions that were not vacated, dismissed, or reversed on appeal, the individual is not eligible for compensation as described in this section for any portion of that wrongful imprisonment that occurred during a concurrent sentence of that nature. Mr. James is not seeking to be declared a wrongfully imprisoned individual for the 12-month sentence he served on the weapon under disability count, and so the limitation of subsections (A)(4) and (B)(5) do not apply to him. Additionally, the State's reliance on *Gover v. State*, 67 Ohio St.3d 93 (1993) is misplaced because *Gover* involved a claim of actual innocence under the 1993 version of the statute when it was not possible to be declared a wrongfully imprisoned individual due to an "error in procedure." A claimant does not need to establish that a procedural error occurred *with respect to every single count of an indictment* in order to show he was wrongly imprisoned due to procedural errors on vacated counts for which he may never be retried.

#### CONCLUSION

The Court should decline jurisdiction and dismiss the appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent via ordinary U.S. mail to Eric E. Murphy, State Solicitor and Counsel of Record, 30 E. Broad Street, 17th Floor, Columbus, Ohio 43215, on this 26<sup>th</sup> day of August, 2015.

/s Derek A. Farmer  
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