

In the
Supreme Court of Ohio

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

BRIEF OF APPELLANT STATE OF OHIO

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INTRODUCTION

This case presents the question of whether plaintiff-appellee Omar James is a “wrongfully imprisoned individual” within the meaning of Ohio’s wrongful-imprisonment statute—specifically, whether James satisfies R.C. 2743.48(A)(5). James’s theory of how he does so has shifted as his case has wound through the courts. He initially pleaded (but quickly abandoned) a theory of “actual innocence.” He then prevailed in the Second District on the theory that a trial error was an “error in procedure” that resulted in his release from prison. After that decision was reversed by this Court for application of *Mansaray v. State*, 138 Ohio St. 3d 277, 2014-Ohio-750, the Second District conceded that James’s trial error cannot satisfy the statute. Instead of reinstating the trial court’s grant of summary judgment to the State on remand, however, the appellate court changed horses and determined that a *different* “error in procedure” applied. Now, it is James’s lack of a retrial after he was released from prison on a writ of habeas corpus that makes James a “wrongfully imprisoned individual.” Sensing that this new error might not do the trick, James alternatively argues that yet *another* error related to his post-conviction proceedings was the one that resulted in his release from prison.

Occam’s razor teaches that the simplest explanation is usually the correct one. That principle aids the Court here. The Second District’s initial opinion identified the true “error in procedure” that “result[ed]” in James’s “release” from prison: the trial court’s failure to ensure that James’s waiver of counsel was knowing and voluntary. But that error did not occur “subsequent to sentencing and during or subsequent to imprisonment,” so this case can be resolved on a straightforward application of *Mansaray*.

The lower court’s post-remand attempt to still shoehorn the facts of this case into the wrongful-imprisonment statute fails in two key respects. *First*, not retrying a defendant after a conviction has been reversed or vacated is an option within the State’s prosecutorial discretion

(one must criminal defendants would gladly welcome)—not an “error.” The contrary conclusion below rests on legal and factual mistakes. It also creates a windfall for defendants who in fact benefit from an exercise of discretion which may be unrelated to considerations of innocence or guilt. *Second*, even if the lack of retrial was an “error in procedure,” it cannot satisfy R.C. 2743.48(A)(5) because it did not “result[] in” James’s “release” from prison. James had been free from prison for over a year when the purported “error” of no retrial occurred. To get around this fact, the decision below stretches the meaning of the term “release” well beyond its breaking point. In doing so, it creates a loophole for claimants, like James, who are ineligible for wrongful-imprisonment compensation under *Mansaray* but who benefit when the State declines to retry them after their convictions are reversed or vacated.

The court below determined that James was a wrongfully imprisoned individual because of the State’s purported “error” in not retrying him, even though James did not spend a day in prison due to that error. This creates a disconnect between wrongful imprisonment as a concept (as set forth in R.C. 2743.48(A)) and wrongful-imprisonment compensation (as set forth in R.C. 2743.48(E)(2)). The Court should reverse the Second District’s judgment.

STATEMENT OF THE CASE AND FACTS

A. Omar James was convicted of several drug and weapons charges.

James was arrested in September 1996 after an incident in which he was purportedly found to possess, among other things, a loaded handgun and cocaine. *See State v. James*, No. 98-CA-54, 1999 WL 76815, at *1 (2d Dist. 1999), *grant of habeas corpus affirmed in James v. Brigano*, 470 F.3d 636 (6th Cir. 2006). James was initially tried on four counts: two cocaine-possession counts (one for crack cocaine and a second for cocaine), one count of carrying a concealed weapon, and one count of having a weapon while under a disability. *James v. State*, 2014-Ohio-140 ¶¶ 3-4 (2d Dist.) (“App. Op.”) (attached at Appx. Ex. 6). After a June 1997 trial

during which James was represented by retained counsel, a jury convicted James on the weapons-while-under-a-disability charge but hung on the other charges. *Id.* ¶ 4; *James*, 470 F.3d at 638. James did not appeal, and he served a one-year prison term. App. Op. ¶ 4.

The State retried James on the indictment's remaining three counts in June 1998. *Id.* ¶ 5. A public defender was appointed to represent James, but he withdrew before the second trial. *See James*, 470 F.3d at 638. The court appointed another lawyer to defend James. *Id.* On the day of trial, the new lawyer informed James that he was not prepared for trial, and that he intended to seek a continuance. *Id.* The trial judge denied the request for a continuance, and the case proceeded to trial. *Id.* at 639. During voir dire, James twice announced in the jury's presence that he wanted to fire his lawyer. *Id.* At a sidebar conference, the assistant prosecutor "suggested that James was 'play[ing] the same trick' his half-brother had three weeks earlier, by engaging in spontaneous outbursts during jury selection, which led to a mistrial." *Id.* James's lawyer moved to withdraw, but the trial court denied his motion. *Id.* The judge then asked James if he wished to represent himself. *Id.* James proceeded to represent himself at his second trial. *Id.*

A jury convicted James on the three counts, and the court sentenced him to thirteen years in prison. App. Op. ¶ 5. On direct appeal, the Second District affirmed, *James*, 1999 WL 76815, and this Court declined jurisdiction, *State v. James*, 86 Ohio St. 3d 1414 (1999). James continued to attack his convictions by filing a Rule 26(B) application to reopen his appeal. The court of appeals denied his application, and this Court declined review in November 1999. *State v. James*, 87 Ohio St. 3d 1451 (1999).

B. James was freed from prison after obtaining federal habeas relief, based on an error in waiving his right to counsel at trial, and he was not retried.

James next sought habeas relief in federal court, arguing in part that his waiver of the right to counsel was not knowing and voluntary. *See James*, 470 F.3d at 643. A federal district judge granted a conditional writ in June 2005. *Id.* at 640; Ct. App. R. 51, Ex. 2 (stating that “James’ Petition for Writ of Habeas Corpus is CONDITIONALLY GRANTED; the State of Ohio is ORDERED to release . . . 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”). The State appealed to the Sixth Circuit, and in January 2006 the district court issued a stay of the conditional writ. *See James v. Brigano*, No. 3:00-cv-00491, 2008 WL 2949411, at *1-2 (S.D. Ohio July 30, 2008) (recounting history of federal habeas proceedings).

The Sixth Circuit affirmed in November 2006 on the grounds that “the state trial judge [did not] ensure that James’s waiver of appointed counsel was knowing and voluntary,” nor did he “make an explicit finding that James’s waiver was knowing and intelligent.” *James*, 470 F.3d at 643-44. Judge Batchelder concurred in the result, but disagreed with the lead opinion’s view that James had not been engaging in dilatory tactics during his criminal proceedings. *See id.* at 644-45 (Batchelder, J., concurring). Judge Batchelder had “no doubt that this is what James was up to,” but she agreed “with the lead opinion that it was incumbent upon the trial judge to do more than he did to ensure that James’s demand to proceed without counsel was knowing and voluntary.” *Id.* at 645.

The State petitioned for rehearing, which the Sixth Circuit denied in May 2007. The Sixth Circuit issued its mandate on May 31, 2007, and the case returned to the district court. *James*, 2008 WL 2949411 at *2. James was released from the State’s custody in June 2007. *Id.* at *3; *see also* Ct. App. R. 51, Ex. 3. The habeas proceedings remained open in the district court

as James filed motions in June 2007 and February 2008. *See generally James v. Warden*, No 3:00-cv-00491 (S.D. Ohio). A federal magistrate judge issued a Report and Recommendation addressing these filings in July 2008. *James*, 2008 WL 2949411 at *1-5.

In July 2008, the federal district court adopted the magistrate judge's recommendations and ordered that James be "released from the bond and its accompanying conditions." *Id.* at *1; *see also* T. Ct. R. 14, Ex. C. The Order concluded with the following direction: "The State of Ohio is directed to either retry Petitioner on or before October 27, 2008 or forego [sic] further retrial of Petitioner on the criminal charges underlying this case." *James*, 2008 WL 2949411 at *1; T. Ct. R. 14, Ex. C. The State never retried James. App. Op. ¶ 6. James eventually moved to dismiss the indictment, *see id.* ¶ 7, and the record in this case contains no suggestion that the State opposed that motion. In August 2009, the state trial court dismissed the remaining counts of the indictment with prejudice. *Id.* ¶ 7; T. Ct. R. 14, Ex. B.

C. James sued for wrongful imprisonment, and the trial court denied relief, but the Second District reversed.

After the habeas writ led to his 2007 release from prison, and after the State did not retry him in 2008, James sued the State, alleging that he was a "wrongfully imprisoned individual" under R.C. 2743.48(A). App. Op. ¶ 8. On cross-motions for summary judgment, he pursued the theory that the trial court's Sixth-Amendment violation was an "error in procedure" that resulted in his release within the meaning of R.C. 2743.48(A)(5). *See* T. Ct. R. 22 at 6. The trial court granted the State's motion and denied James's. *James v. State*, No. 09CV1251 (Feb. 15, 2013) (attached at Appx. Ex. 7). On appeal, the Second District reversed and ordered that summary judgment be entered for James. App. Op. ¶ 25. It determined that James satisfied R.C. 2743.48(A)(4) even though he was not "otherwise innocent" due to his 1997 weapons-under-

disability conviction. *See id.* ¶¶ 14-19. It also determined that James satisfied the “Error in Procedure” prong of R.C. 2743.48(A)(5). *See id.* ¶¶ 20-23.

As relevant to this appeal, the court reasoned that the self-representation error during James’s second trial “ultimately led to the vacation of James’s convictions” and thus satisfied subsection (A)(5). *Id.* ¶ 20. Adopting a view that this Court later rejected in *Mansaray v. State*, 138 Ohio St. 3d 277, 2014-Ohio-750, it held that the error in procedure need not *occur* after sentencing, as “the phrase ‘[s]ubsequent to sentencing and during or subsequent to imprisonment’ . . . describes the timing of the individual’s release, or the court’s determination that no offense was committed.” App. Op. ¶ 23 (citing *Hill v. State*, 2013-Ohio-1968 (10th Dist.), *rev’d*, 139 Ohio St. 3d 451, 2014-Ohio-2365).

D. This Court reversed the Second District’s grant of summary judgment to James, and remanded to apply *Mansaray*.

The State appealed the Second District’s decision. Just after the jurisdictional filing, this Court decided *Mansaray*. That opinion held that if a wrongful-imprisonment claimant “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.” 2014-Ohio-750, at syl. The Court then granted the State’s appeal, and reversed and remanded the case “for application of *Mansaray*.” *See James v. State*, 139 Ohio St. 3d 1401, 2014-Ohio-2245 (attached at Appx. Ex. 5).

E. On remand, the Second District redefined the relevant error and ruled for James.

The appeals court limited its consideration on remand to whether James met the (A)(5) requirements in light of *Mansaray*. *James v. State*, 2015-Ohio-623 ¶¶ 1, 3 (2d Dist.) (“Remand Op.”) (attached at Appx. Ex. 4). It reached the same result as in 2013, but this time for a new reason. The court had earlier said that the waiver-of-counsel error led to James’s release. App.

Op. ¶ 20. On remand, it conceded that such an error does not satisfy subsection (A)(5). Remand Op. ¶ 7. It held instead that a *different* error applied, as “the State’s failure to retry the case prior to the deadline was a procedural error that occurred after sentencing and imprisonment, within the meaning of R.C. 2743.48(A)(5).” *Id.* ¶ 10. The “deadline” was the date the federal habeas court had set for the prosecutor to retry James, well after James had been released from prison due to the waiver-of-counsel error.

The State sought reconsideration, objecting to the court’s new theory on several grounds. It argued that the lack of retrial, if it even qualified as an “error,” did not lead to James’s release, as the earlier waiver-of-counsel error was the basis for the habeas relief invalidating James’s convictions. Ct. App. R. 48. The State added that James had actually been physically released long before the “error” of failure-to-retry, so that later event could not have caused his release. *Id.* The State also asked the court to revisit its 2013 holding regarding R.C. 2743.48(A)(4), which the court had re-incorporated into the remand decision. *See* Remand Op. ¶ 3.

The Second District denied the State’s motion. *See* Decision and Entry, June 11, 2015 (“Recon. Op.”) (attached at Appx. Ex. 2). It reaffirmed its view that the lack of retrial, which occurred *after* James’s release from prison, was an error in procedure that resulted in James’s “release.” *Id.* at 2-3. The court reconciled this apparent impossibility by interpreting the term “release” in (A)(5) “to mean action that is more inclusive than just a discharge from prison.” *Id.* at 3. Rather, in its view, “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 also declined to reconsider its previous holding on (A)(4). *Id.*

The State appealed the Second District’s ruling on both the (A)(4) and (A)(5) grounds. This Court accepted the State’s first Proposition of Law, which asks whether an “error in procedure” occurs for the purposes of R.C. 2743.48(A)(5) when the State does not retry a defendant whose conviction has been overturned. *See 12/30/2015 Case Announcements, 2015-Ohio-5468.*

ARGUMENT

Appellant State’s Proposition of Law:

No “error in procedure” occurs for purposes of R.C. 2743.48(A)(5) when the State does not retry a defendant whose conviction has been vacated, because lack of retrial is not an error and because it does not cause release from confinement.

This Court should reverse the Second District’s holding that James has satisfied the Error in Procedure prong of R.C. 2743.48(A)(5) and is a “wrongfully imprisoned individual.” (All references to R.C. 2743.48 are to the statute as in force in September 2009, when James filed his Complaint. *See* Appx. Ex. 8.) James no longer argues that he is “actually innocent” under subsection (A)(5), *see* Ct. App. R. 10, at 4, and this Court has declined to review the Second District’s determination that James satisfies subsection (A)(4) despite his unchallenged weapons-under-disability conviction. The parties agree that James meets the requirements of subsections (A)(1)-(3) of the wrongful-imprisonment statute. Thus, this appeal is limited to the “Error in Procedure” prong of subsection (A)(5). To prevail, James must show that an “error in procedure” occurred “[s]ubsequent to sentencing and during or subsequent to imprisonment” and “resulted in [his] release.” *See* R.C. 2743.48(A)(5). James cannot meet this burden.

First, the original—and true—error identified by the Second District was the trial court’s failure to ensure that James’s waiver of counsel was knowing and voluntary. *See* App. Op. ¶ 20. This error occurred pre-sentencing and cannot satisfy R.C. 2743.48(A)(5) under this Court’s

decision in *Mansaray*. The court of appeals was mistaken in concluding on remand that not retrying James after he had been granted habeas relief was an “error in procedure.”

Second, the “new” error identified by the Second District—“the State’s failure to retry James before the deadline established by the federal court” at the conclusion of habeas proceedings—does not satisfy (A)(5) for two reasons. *See* Remand Op. ¶¶ 7, 10. For one thing, the lack of retrial cannot be called an “error.” For another, the lack of retrial did not result in James’s release from prison.

Third, James’s alternative arguments have no basis in fact and must fail. He argued in his Memorandum in Opposition to Jurisdiction that the federal courts relied on a *different* procedural error when they granted habeas relief: the state appellate court’s denial of his Rule 26(B) application. *See* Opp. Jur. at 8-10. The Sixth Circuit plainly affirmed the district court’s grant of habeas relief on the grounds that “James’s waiver [of counsel] was not made knowingly and intelligently.” *James*, 470 F.3d at 644. The court below rightly rejected this alternative theory. *See* Remand Op. ¶ 5.

In short, James has a pre-sentencing trial error that resulted in his release from prison, and he has a post-sentencing non-error that resulted in the dismissal of the State’s indictment. Neither one is enough to declare him a wrongfully imprisoned individual.

A. James cannot satisfy the Error in Procedure prong of R.C. 2743.48(A)(5) because he cannot identify a post-sentencing mistake in the legal proceedings that resulted in his release from confinement.

James is not a “wrongfully imprisoned individual” within the meaning of the statute because he does not meet the requirements of R.C. 2743.48(A)(5). James was released from prison after a federal court granted him a writ of habeas corpus on the grounds that the state trial court had failed to ensure that James’s waiver of counsel “was not made knowingly and intelligently.” *James*, 470 F.3d at 644. This trial error is not an “error in procedure” within the

meaning of R.C. 2743.48(A)(5) because it did not occur “subsequent to sentencing and during or subsequent imprisonment.” See *Mansaray*, 2014-Ohio-750 at syl. And although the State had an opportunity to retry James after he was granted habeas relief, the lack of a retrial likewise fails to satisfy subsection (A)(5).

1. The text of Subsection (A)(5) requires a claimant to show that a post-sentencing error in procedure led to that claimant’s release from prison.

The Court should begin with the text. When construing a statute, “[t]he words must be afforded their usual, normal, and/or customary meanings.” *Medcorp, Inc. v. Dep’t of Job and Family Servs.*, 121 Ohio St. 3d 622, 2009-Ohio-2058 ¶ 9. This Court has routinely interpreted the wrongful-imprisonment statute by examining its plain terms. See *Bundy v. State*, 143 Ohio St. 3d 237, 2015-Ohio-2138 ¶ 30; *Mansaray*, 2014-Ohio-750 ¶ 8; *Dunbar v. State*, 136 Ohio St. 3d 181, 2013-Ohio-2163 ¶ 19 see also *C.K. v. State*, Slip. Op. No. 2015-Ohio-3421 ¶ 26 (Lanzinger, J., concurring). Chapter 2743 does not define the terms “release” or “error in procedure,” so it is appropriate for the Court to look to context and other sources to construe their meaning. See *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 407 (2011); *State ex rel. Turner v. Eberlin*, 117 Ohio St. 3d 381, 2008-Ohio-1117 ¶ 14 (per curiam). To that end, this Court has “‘often applied definitions from Black’s Law Dictionary to determine the meaning of undefined statutory language’” that is legal in nature. *State ex rel. Steffen v. Myers*, 143 Ohio St. 3d 430, 2015-Ohio-2005 ¶ 19 (per curiam) (citation omitted).

Error in Procedure. At bottom, an (A)(5) “error in procedure” must involve a mistake in the legal process that adversely affects a defendant, and that occurs “[s]ubsequent to sentencing and during or subsequent to imprisonment.”

In the legal sense, an “error” is generally defined as “[a] mistake of law or of fact in a tribunal’s judgment, opinion, or order.” *Black’s Law Dictionary* 582 (8th ed. 2004) [hereinafter

Black's Law Dictionary (8th ed.)). This Court has acknowledged that this is “the commonly accepted definition of the term ‘error.’” *Steffen*, 2015-Ohio-2005 ¶ 19. In litigation, for example, an appellant who wishes to correct an unfavorable flaw or mistake in a lower-court decision makes assignments of *error*. See, e.g., S. Ct. Prac. R. 10.01(A)(2) (“The notice of appeal shall . . . set forth the claimed errors.”). “Procedure” means “[a] specific method or course of action” or “[t]he judicial rule or manner for carrying on a civil lawsuit or criminal prosecution.” *Black's Law Dictionary* (8th ed.), *supra*, at 1241. More specifically, a “procedural error” is “[a] mistake in complying with the rules or steps in the legal process.” *Black's Law Dictionary* 660 (10th ed. 2014) [hereinafter *Black's Law Dictionary* (10th ed.)].

This conception of an “error” as a mistake—something that requires correction—conforms to the ordinary meaning of the word. See *The American Heritage Dictionary of the English Language* 605 (5th ed. 2011) (defining “error” as “[a]n act, assertion, or belief that unintentionally deviates from what is correct, right or true,” or “[a] mistake”); *New Oxford American Dictionary* 588-89 (3d ed. 2010) (“a mistake”; “a mistake of fact or of law in a court’s opinion, judgment or order”); *Oxford English Dictionary* (online ed.), <http://goo.gl/4be2Y2> (defining “error” as “[a] mistake in the making of a thing; a miscarriage, mishap; a flaw, malformation”).

Context instructs that the “error in procedure” must be significant and must adversely affect a prisoner, as it must be one whose correction “*resulted in* the individual’s release.” See R.C. 2743.48(A)(5) (emphasis added). Whether you view the term “release” to mean “release from confinement” (as the State does, *see infra* at 12-14), or to mean “release from all ‘charges’” (as the Second District did, *see Recon. Op.* at 3), the error must have some capacity to alter the

underlying conviction. Indeed, because the statute requires causation (“resulted in”), the error must have actually done so.

Finally, the text instructs when the “error in procedure” must occur. The statute contemplates an error that occurs “[s]ubsequent to sentencing and during or subsequent to imprisonment.” R.C. 2743.48(A)(5); *see also Mansaray, 2014-Ohio-750* at syl. Trial errors that ultimately result in the reversal of a conviction do not qualify as “errors in procedure” within the meaning of subsection (A)(5). *See Mansaray, 2014-Ohio-750* ¶ 16 (holding that claimant whose convictions were reversed due to trial court’s admission of unsuppressed evidence did not qualify as a “wrongfully imprisoned individual”). Thus, a defendant must prove that a mistake in the legal proceedings occurred post-sentencing, and that the mistake adversely affected him.

Release. The word “release” in subsection (A)(5) refers to discharge from confinement. In the criminal context, “release” means “[t]he action of freeing or the fact of being freed from restraint or confinement,” or “[a] document giving formal discharge from custody.” *See Black’s Law Dictionary* (8th ed.), *supra*, at 1316; *see also id.* (defining “conditional release” as “early discharge of a prison inmate”); *id.* (defining “unconditional release” as “[t]he final discharge of a prison inmate from custody”). This legal meaning is confirmed by the ordinary understanding of the word “release.” As a verb used in the criminal context, to “release” is “[t]o set free from confinement or bondage” or “[t]o set free from physical restraint or binding; let go.” *American Heritage Dictionary, supra*, at 1483. As a noun in the same context, “release” means “[d]eliverance or liberation, as from confinement.” *Id.* All of these definitions tie the concept of a “release” to a discharge from confinement.

The statute’s context and purpose support interpreting the term “release” to mean discharge from confinement. “Words and phrases shall be read in context and construed

according to . . . common usage.” R.C. 1.42; *In re M.W.*, 133 Ohio St. 3d 309, 2012-Ohio-4538 ¶ 21. Although dictionaries also define the word “release” to mean, for example, to “remit or discharge (a debt),” see *New Oxford American Dictionary* 1474, or “[l]iberation from an obligation, duty, or demand,” see *Black’s Law Dictionary* (8th ed.), *supra*, at 1315, this meaning arises in the civil—not criminal—context. In a statute addressing wrongful *imprisonment*, the term “release” must be given its meaning associated with criminal confinement.

The wrongful-imprisonment statute’s purpose is to compensate those who are wrongfully *imprisoned*, not those who are merely wrongfully charged. The factors in R.C. 2743.48(A) define “a ‘wrongfully imprisoned individual.’” Although subsection (A)(4) refers to “pending” or potential “criminal proceeding[s],” this language serves a distinct purpose: “to filter out those claimants who have had their convictions reversed, but were committing a different offense at the time that they were engaging in the activity for which they were initially charged.” *Gover v. State*, 67 Ohio St. 3d 93, 95 (1993); see also *C.K.*, 2015-Ohio-3421 ¶ 27 (Lanzinger, J., concurring). Because subsection (A)(4) already addresses whether other charges are pending or possible, (A)(5)’s use of the term “release” must mean something different—namely, discharge from actual imprisonment, not just the dismissal of charges.

The statute’s overall structure should be a guide. “Statutory construction ‘is a holistic endeavor,’ and, at a minimum, must account for a statute’s full text, language as well as punctuation, structure, and subject matter.” *U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (citation omitted). Here, the compensation provided by the statute turns in part on the length of time a person has been imprisoned, not the length of time a person has lived under the cloud of indictment. See, e.g., R.C. 2743.48(E)(2)(b) (a wrongfully imprisoned individual is entitled to funds “[f]or each full year of imprisonment,” or a pro-rated

amount “for each part of a year of being so imprisoned”); *see also* R.C. 2743.48(E)(2)(a) (providing for attorney’s fees and expenses incurred “in connection with obtaining the wrongfully imprisoned individual’s discharge from confinement”). Given that this compensation is the cornerstone of the statute, it makes sense that the “error in procedure” would turn on the fact of the claimant’s imprisonment, and not the fact of charges that are, without imprisonment, largely irrelevant. Any other interpretation creates an inconsistency between the wrongful imprisonment conceived in R.C. 2743.48(A) and the wrongful imprisonment compensated in R.C. 2743.48(E)(2).

2. This Court and others have confirmed that subsection (A)(5) requires proof that a post-sentencing error resulted in a defendant’s release from prison.

This Court has interpreted the terms of subsection (A)(5) in a manner consistent with their plain meaning, and lower courts have followed suit. These judicial interpretations require wrongful-imprisonment claimants to show a post-sentencing mistake in the legal process that, once corrected, resulted in their release from confinement.

Error in Procedure. Courts have mostly defined an “error in procedure” by identifying what it is not. This Court’s leading case on (A)(5)’s Error in Procedure prong is *Mansaray*. That opinion addressed the timing of the “error in procedure,” holding that it “must have occurred subsequent to sentencing and during or subsequent to imprisonment.” *Mansaray*, 2014-Ohio-750 ¶ 12 (admission of evidence that should have been suppressed not an “error in procedure” within the meaning of the statute). Guided by the plain text, the Court concluded that the defendant’s contrary view—that the error could occur pre-trial, so long as the judicial determination was post-sentencing—would create an expansion in wrongful-imprisonment liability not apparent from the statute. *Id.* ¶ 10. On the heels of *Mansaray*, the Court reversed several lower court opinions on authority of that decision. *See Hill v. State*, 139 Ohio St. 3d 451,

2014-Ohio-2365 (failure to suppress inadmissible evidence); *D'Ambrosio v. State*, 139 Ohio St. 3d 1416, 2014-Ohio-2487 (*Brady* violation); *Jenkins v. State*, 140 Ohio St. 3d 1449, 2014-Ohio-4414 (speedy trial). Lower courts have followed *Mansaray* to conclude that trial errors cannot be the basis for wrongful imprisonment under the Error in Procedure prong. *See Davis v. Clark Cnty. Bd. of Comm'rs*, 2015-Ohio-3794 ¶ 17 (2d Dist.); *Williams v. State*, 2015-Ohio-3771 ¶ 6 (8th Dist.); Remand Op. ¶ 7; *Holloway v. State*, 2014-Ohio-2971 ¶¶ 16-18 (8th Dist.); *Worley v. State*, 2014-Ohio-1429 ¶ 15 (8th Dist.).

These cases implicitly recognize that an “error in procedure” is an error that is *against* a prisoner’s interest. The errors they considered—the admission of inadmissible evidence, the State’s failure to disclose *Brady* material—were mistakes that adversely tainted the claimants’ legal proceedings to such an extent that those proceedings had to be undone. *See, e.g., Mansaray*, 2014-Ohio-750 ¶ 3. (Granted, however, that the timing of those errors disqualified them under the statute’s terms. *See, e.g., id.* ¶ 16.) A mere mistake that might actually *benefit* a defendant or prisoner—like a prosecutor failing to object to hearsay evidence, or a prisoner’s early but erroneous discharge from confinement—is not an “error in procedure” that makes a person wrongfully imprisoned. Thus, these cases also recognize that the correction of the error—the remedy to the wrong—is what leads to “release.” In other words, it is not the error *itself* that benefits the claimant, but the elimination of the harmful effects of the error.

Release. Courts have also held or implied that the error must result in a defendant’s release *from prison*. In *Mansaray*, the Court ultimately concluded “that the error in procedure, if that is what led to Mansaray’s release *from prison*, did not occur subsequent to sentencing and during or subsequent to imprisonment.” 2014-Ohio-750 ¶ 16 (emphasis added). At least one

other court has implied a similar view of the statute. *See Williams*, 2015-Ohio-3771 ¶ 6 (“The alleged error in procedure that resulted in his release from prison occurred before sentencing.”).

In a recent decision, the Twelfth District specifically rejected an error-in-procedure argument because the alleged error did not result in the claimant’s release from prison. *See Honeycutt v. State*, 2015-Ohio-3938 ¶¶ 12-13 (12th Dist.), *appeal not accepted for review in 02/24/2016 Case Announcements*, 2016-Ohio-652. In *Honeycutt*, the claimant argued that an “error in procedure” occurred when the Warren County Clerk of Courts issued a post-sentencing “warrant to convey” him from the county jail to a state prison. *See id.* ¶ 12. His convictions were later overturned due to the State’s failure to prove venue at trial, and he argued in his wrongful-imprisonment suit that the venue error eliminated the Clerk’s power to issue the warrant. *Id.* The Twelfth District rejected this argument, reasoning that “the Clerk of Court’s act of issuing the warrant to convey was not an ‘error in procedure’ as contemplated by R.C. 2743.48(A)(5), since that act did not *result* in appellant’s release from prison.” *Id.* ¶ 13. Rather, it was the trial error that freed the claimant, and the attachment of double jeopardy that “bar[red] the state from reprosecuting the charges” against him. *Id.*

Although it is difficult to satisfy the Error in Procedure prong in R.C. 2743.48(A)(5), that is perhaps by design. As this Court has observed, “[n]ot every person who is released from prison because of a successful appeal is entitled to compensation.” *Doss v. State*, 135 Ohio St. 3d 211, 2012-Ohio-5678 ¶ 22. The Court has already refused to read Subsection (A)(5) expansively, and indeed explicitly invited the General Assembly “to enact such legislation upon learning that we do not think it has already done so.” *Mansaray*, 2014-Ohio-750 ¶ 10. Two justices recently made a similar invitation in the context of subsection (A)(4). *See C.K.*, 2015-Ohio-3421 ¶ 28 (Lanzinger and French, JJ., concurring) (“It may well be that the General

Assembly does not intend to foreclose compensation to one who has been imprisoned under circumstances such as these. If that is so, the statute should be amended to say so.”). The General Assembly has not acted to abrogate these interpretations of the plain text. The Court should therefore abide its prior interpretations.

3. James does not meet the requirements of R.C. 2743.48(A)(5) because he cannot identify a post-sentencing error in the legal process that resulted in his release from prison.

James’ claim for wrongful imprisonment must fail because the thing that secured his release from prison was the trial court’s failure—*before* sentencing and *before* imprisonment—to ensure that his waiver of counsel was knowing and voluntary.

A person seeking a declaration that he is “a ‘wrongfully imprisoned individual’ under R.C. 2743.48 must prove all of the factors in R.C. 2743.48(A) by a preponderance of the evidence before seeking compensation from the state for wrongful imprisonment.” *Doss*, 2012-Ohio-5678, syl. ¶ 1. When he or she seeks to satisfy (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.” *Mansaray*, 2014-Ohio-750 at syl. James must show a legal mistake that occurred post-sentencing and that adversely affected him by resulting in his release from prison.

The remand decision below concluded that the State’s failure to retry James satisfies (A)(5)’s Error in Procedure prong, but that theory does not even get James out of the gate. As explained more fully in Part B, *infra*, the lack of retrial cannot be considered an error. Not retrying James was an option for the State, both under the terms of the federal court’s July 2008 Order and as a matter of general prosecutorial discretion. It was not a “mistake in complying with the rules or steps in the legal process.” See *Black’s Law Dictionary* (10th ed.), *supra*, at 660. Moreover, the passing of the deadline for retrial did not harm James, as the wrongful-

imprisonment statute suggests that an “error in procedure” must. It in fact helped him by allowing him to move to dismiss the indictment with prejudice. And finally, this purported “error” did not result in James’s “release” from prison because the lack of retrial occurred well after James had been discharged from the State’s custody.

The “error in procedure” that resulted in James’s release from prison was a pre-sentencing trial error. After James represented himself at trial, a Clark County jury convicted James of two counts of possessing cocaine and one count of carrying a concealed weapon. App. Op. ¶ 5. The trial court sentenced him to thirteen years in prison as punishment. *Id.* A federal district court later granted James habeas relief, and the Sixth Circuit affirmed on the grounds “that James’s waiver of counsel was not made knowingly and intelligently.” *James*, 470 F.3d at 638. As the Second District initially acknowledged, the “error [that] ultimately led to the vacation of James’s convictions” and his release from prison occurred “when the trial court proceeded to trial without obtaining from James a knowing and intelligent waiver of his right to counsel at trial.” *See* App. Op. ¶ 20. After the Sixth Circuit’s mandate issued in May 2007, James was released from prison. *See James*, 2008 WL 2949411 at *3; Ct. App. R. 51, Ex. 3. Thus, the error in procedure that prompted the federal habeas grant, and that led to James’s release from prison, was the waiver-of-counsel trial error.

This case tracks the facts of *Mansaray*, and the Second District’s opinion should be reversed under that decision. Like *Mansaray*, James was released from prison due to a trial error. *Cf. Mansaray*, 2014-Ohio-750 ¶ 3. Because their respective errors did not occur “[s]ubsequent to sentencing and during or subsequent to imprisonment,” they are not “error[s] in procedure” within the meaning of R.C. 2743.48(A)(5). *See Mansaray*, 2014-Ohio-750 ¶ 16. The opinion

below should therefore be reversed, and the trial court’s grant of summary judgment to the State should be reinstated.

B. The Second District’s contrary view was mistaken.

The Court should reject the appellate court’s conclusion that James is a wrongfully imprisoned individual within the meaning of R.C. 2743.48(A). The Second District’s error-in-procedure analysis is mistaken for two reasons. *First*, James’s lack of retrial was not an “error in procedure” because it was within the State’s discretion not to retry James. And *second*, even if the lack of retrial was an error in procedure, that “error” did not “result in [James’s] release”; James had been out of prison for over a year when the federal habeas court’s “deadline” for retrial passed.

1. James’s lack of retrial was an option, not an “error.”

The Second District made both legal and factual mistakes when it determined that “the State’s failure to retry the case prior to the deadline was a procedural error that occurred after sentencing and imprisonment, within the meaning of R.C. 2743.48(A)(5).” Remand Op. ¶ 10. Far from an error, the decision not to retry a defendant—and the manner in which the State implements that decision—is the State’s own prerogative.

a. The Second District’s conclusion that James’s lack of retrial was an “error in procedure” is premised on factual mistakes.

The Second District’s remand opinion misstates the contents of the federal district court’s July 2008 Order. In reaching its conclusion, the court of appeals stated that “the trial court was directed by the federal court to retry James within a set period of time, pursuant to the Speedy Trial Act.” Remand Op. ¶ 9. This does not reflect what the district court actually ordered. A more precise reading of the July 2008 Order shows that the State did not violate it, thus precluding the possibility that an “error” ever occurred.

The Second District wrongly interpreted the federal district court’s July 2008 Order as directing the State “to retry James within a set period of time.” *See id.* ¶ 9. It is more accurate to say that the federal district court gave the State the *option* to retry James by October 27, 2008; not retrying James was the flip-side of that option. Specifically, the district court “directed [the State] to *either* retry [James] on or before October 27, 2008 *or* forego [sic] further retrial of [James] on the criminal charges underlying this case.” *James*, 2008 WL 2949411 at *1 (emphases added and deleted); T. Ct. R. 14, Ex. C at 2 (same). By not bringing James to trial before October 27, 2008, the State took one of two options available to it.

In the proceedings below, James himself conceded that this was a choice. *See* T. Ct. R. 22 at 9, n.1 (“On rare occasions, *such as here*, the State *chooses to do nothing* despite being given a time limit by a federal court to retry a person.” (emphases added)). He now argues that the State “continuously failed to retry him over a long period of time while insisting that it fully intended to do so.” *See* Opp. Jur. at 4 (emphasis deleted). In support, he cites the minutes of a June 2007 hearing before a federal Magistrate Judge, claiming that “the Assistant AG told the court that the State ‘will’ retry Mr. James.” *Id.* at 4-5. But the document simply states that “*Court advises* Petitioner that Clark County will retry him and that he needs to advise Clark County Clerk’s Office of his address.” Ct. App. R. 51, Ex. 3 (emphasis added). It is true that the State (represented by the Attorney General in habeas proceedings) opposed James’s efforts to bar retrial based on the terms of the district court’s 2005 Order—a position that the district court determined was indisputably correct. *See James*, 2008 WL 2949411 at *1, *5; *see also James v. Moore*, No. 3:00-cv-491, 2008 WL 4185969, *2 (S.D. Ohio Sept. 3, 2008) (“[R]easonable jurists could not find it debatable that the conditional writ . . . issued on June 29, 2005 . . . did not, and has not, become an absolute writ of habeas corpus.”). But that is irrelevant. The record in this

case contains no suggestion that the State (represented by the Clark County Prosecutor in the underlying criminal case) either attempted to retry James in the Fall of 2008, or that it opposed his motion to dismiss the indictment. Thus, the State did not commit an “error” within the meaning of the district court’s July 2008 Order when it did not retry James.

The Second District also erred when it stated that the federal district court ordered the State “to retry James within a set period of time, pursuant to the Speedy Trial Act.” Remand Op. ¶ 9. The July 2008 Order itself makes no mention of Ohio’s Speedy Trial Act, and instead set a specific deadline for retrial. *See James*, 2008 WL 2949411 at *1; T. Ct. R. 14, Ex. C. The underlying Report and Recommendation, which the district court adopted, discusses the Speedy Trial Act, but in reference to an *earlier* 2005 Order of the district court. *See James*, 2008 WL 2949411 at *1-5. That 2005 Order had granted a conditional writ of habeas corpus, and had “ordered the State of Ohio ‘to release . . . James . . . 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.’” *Id.* at *1 (quoting June 2005 Order). The 2005 Order was later stayed during the State’s appeal to the Sixth Circuit. The district court’s *July 2008 Order* imposed its own deadline, and did not specify that the deadline was pursuant to Ohio’s Speedy Trial Act.

b. The Second District’s conclusion that the lack of retrial was an “error in procedure” was legally unsound.

For four reasons, it was not a legal error for the State to take no steps to retry James.

First, a prosecutor has discretion over whether to retry a defendant after a conviction has been vacated or habeas relief has been granted. “The decision whether to prosecute a criminal offense is generally left to the discretion of the prosecutor.” *State v. Lamar*, 95 Ohio St. 3d 181, 2002-Ohio-2128 ¶ 43. The exercise of that discretion—in *the defendant’s favor*, no less—is not an error. To be sure, the State could have filed a nolle prosequi, or an entry of dismissal of the

indictment. But it accomplished the same objective by taking no action, and the State should not suffer wrongful-imprisonment liability as a result.

Second, Ohio’s Speedy Trial Act, R.C. 2945.71, does not apply to retrials, so it cannot be the basis of an “error in procedure” in this scenario. The Act “does not apply to criminal convictions that have been overturned on appeal.” *State v. Hull*, 110 Ohio St. 3d 183, 2006-Ohio-4252, syl. ¶ 1; *see also State v. Fanning*, 1 Ohio St. 3d 19, 21 (1982) (holding that “R.C. 2945.71 is not applicable to retrials”). At least one intermediate appellate court has rejected the argument that the Speedy Trial Act governs retrials after a federal court grants habeas relief. *See State v. Rose*, No. CA85-11-087, 1986 WL 14121 at *1 (12th Dist. 1986). And rightly so, as the Act’s text forecloses any argument that it applied to James’s potential retrial. As this Court has observed, “the statute does not include any reference whatever to retrials.” *Fanning*, 1 Ohio St. 3d at 21. “In situations where the legislature has not expressed its intent for R.C. 2945.71 to apply, the time limitation for bringing the appellant to trial is governed by” the United States and Ohio Constitutions. *Hull*, 2006-Ohio-4252 ¶ 20. In those cases, the standard is whether the defendant was retried within “a reasonable period consistent with constitutional standards.” *Id.* (quoting *Barker v. Wingo*, 407 U.S. 514, 523 (1972)). Although the Act may be a guide for determining whether a constitutional violation has occurred on retrial, it does not itself govern.

Thus, because the Speedy Trial Act did not apply to him in 2008, James cannot claim that a statutory speedy-trial error was an “error in procedure” that resulted in his “release.” Nor can he claim that a constitutional violation of the same sort resulted in the dismissal of his charges. The common pleas court dismissed the State’s indictment in August 2009—and the record shows no opposition from the State—“[b]ecause there is no pending appeal and the State did not retry [James] within the federally mandated time.” T. Ct. R. 14, Ex. B. The common pleas court did

not cite the Speedy Trial Act or any related constitutional provision. *Id.* And because the district court’s July 2008 Order presented retrial as an option, *see id.*, Ex. C, the stated reason for the dismissal of the indictment cannot constitute an error.

Third, when a federal court grants habeas relief, the accompanying deadline generally does not mean that retrial is *barred* after that date, but means only that the prisoner must be *released* from state custody if not retried by that date—with the State able to retry after release. “In a typical case in which a prisoner is released because a state fails to retry the prisoner by the deadline set in a conditional writ, ‘the state is not precluded from rearresting petitioner and retrying him under the same indictment.’” *Satterlee v. Wolfenbarger*, 453 F.3d 362, 370 (6th Cir. 2006) (quoting *Fisher v. Rose*, 757 F.2d 789, 791 (6th Cir. 1985)). A conditional writ that directs the State to release a prisoner unless he is retried within a certain period—like James’s June 2005 conditional writ that was stayed pending appeal, *see* Ct. App. R. 51, Ex. 2—thus does not bar retrial, and indeed, cannot bar retrial except in “‘extraordinary circumstances’” not present here. *See Satterlee*, 453 F.3d at 370; *see also Fisher*, 757 F.2d at 791 (“[W]e disapprove of *Martin*’s conclusion that the state’s failure to retry petitioner within ninety days bars further prosecution.”). If the State had attempted to retry James at all, “[t]he responsibility of ensuring that he received not only a fair trial, but a timely one, [would have] passed to the” Clark County Common Pleas Court “in the first instance.” *See Eddleman v. McKee*, 586 F.3d 409, 413 (6th Cir. 2009).

Fourth, the Second District’s Remand Opinion relied on two intermediate appellate decisions—*Nelson v. State*, 2007-Ohio-6274 (5th Dist.) and *Nelson v. State*, 183 Ohio App. 3d 83, 2009-Ohio-3231 (10th Dist.)—but those cases provide no support for the ruling below. The court below cited *Nelson* for the proposition that (A)(5)’s “Error in Procedure” prong may be

“satisfied . . . when a conviction [is] reversed because of a speedy trial violation.” *See* Remand Op. ¶ 8. But the *Nelson* opinions did not confront the meaning of (A)(5). *See Nelson*, 2007-Ohio-6274 ¶¶ 15-34 (addressing the statute of limitations in wrongful-imprisonment cases); *Nelson*, 2009-Ohio-3231 ¶¶ 20-22 (addressing the Court of Claims’ jurisdiction under R.C. 2743.03(A)(1)). To the extent that the 2009 opinion suggests that a speedy-trial error may be an (A)(5) “error in procedure,” this point is no longer good law after *Mansaray*. Indeed, this Court recently reversed a lower court’s determination that a speedy trial error was an (A)(5) “error in procedure.” *Jenkins*, 2014-Ohio-4414 (reversing “on the authority of *Mansaray*”).

2. Even if the lack of retrial was an “error in procedure,” it did not result in James’s release from prison.

Even if the Court concludes that James’s lack of retrial was an “error in procedure,” James cannot satisfy R.C. 2743.48(A)(5) because this “error” did not “result[] in” his “release” from prison. The deadline for retrial set by the federal habeas court was over a year after James had been released from state prison. James was discharged from confinement in June 2007, shortly after the Sixth Circuit denied en banc review and issued its mandate. *James*, 2008 WL 2949411 at *2-3; *see also* Ct. App. R. 51, Ex. 3. He was not imprisoned when the federal district court’s July 2008 Order directed the State to “either retry” James “or forego [sic] further retrial.” *James*, 2008 WL 2949411 at *1. Nor was he imprisoned when the October 27, 2008 deadline passed. And he had been walking free for over two years when the common pleas court dismissed the State’s indictment in August 2009. The lack of retrial, far from disadvantaging James, actually *benefited* him because it allowed him to move to dismiss the State’s indictment with prejudice. *See* T. Ct. R. 14, Ex. B. The Second District’s contrary conclusion that the word “release” in this context means something other than release from confinement is wrong, for several reasons.

First, the Second District wrongly concluded that the phrase “subsequent to imprisonment” requires the conclusion that the term “release” in subsection (A)(5) “may include a release from all ‘charges,’ in addition to a discharge from confinement.” Recon Op. at 3. “The statute,” it reasoned, “specifically provides that the procedural error may occur ‘subsequent to imprisonment,’ which supports an interpretation of the term ‘release’ to mean action that is more inclusive than just a discharge from prison.” *Id.* In the criminal context generally and within R.C. 2743.48(A) specifically, the word “release” means discharge from confinement. *See supra* at 12-14.

Second, the court below misapplied the *in pari materia* canon. *See* Recon. Op. at 3. It reasoned that the references to charges and proceedings in R.C. 2743.48(A)(1), (2) and (4) supported its interpretation that “release” means release from charges. *Id.* Far from complementing the other provisions in R.C. 2743.48(A), the Second District’s definition of “release” would in fact swallow one of them. Subsection (A)(4) requires a person to show that his conviction was reversed or vacated, and that “no criminal proceeding is pending, can be brought, or will be brought . . . for any act associated with that conviction.” In other words, it requires a person to show that the original charges against him have been dismissed, which is what the Second District interpreted the Error in Procedure prong of (A)(5) to mean. This would render the Error in Procedure prong of (A)(5) superfluous of (A)(4)—a scenario that this Court has already rejected. *See Mansaray*, 2014-Ohio-750 ¶ 11. Moreover, the references to charges in subsections (A)(1) and (A)(2) serve the distinct purposes of establishing the type of violation that qualifies under the statute, along with the fact of conviction, both of which are necessary predicates to *imprisonment*.

Third, the Second District’s interpretation conflicts with the larger context of the wrongful-imprisonment statute. The statute’s compensation is based on imprisonment, not living under the threat of charges. For example, a successful claimant may recover a specific sum “[f]or each full year of *imprisonment* in the state correctional institution for the offense of which the wrongfully imprisoned individual was found guilty.” R.C. 2743.48(E)(2)(b) (emphasis added). A successful claimant may also recover attorney’s fees and related expenses for costs incurred during the underlying criminal proceedings, as well as “in connection with obtaining the wrongfully imprisoned individual’s *discharge from confinement* in the state correctional institution.” R.C. 2743.48(E)(2)(a) (emphasis added). But if the “error in procedure” that makes an ex-prisoner a wrongfully imprisoned person is not the one that resulted in his or her discharge from confinement, wrongful imprisonment as a concept becomes disconnected from wrongful-imprisonment compensation.

Indeed, the Second District’s decision could revive claims for those whose claims have been correctly rejected. Take the plaintiff in *Mansaray* as an example. An appeals court reversed his convictions due to a trial error and remanded his case to the trial court for further proceedings; the charges against him were eventually dismissed. *Mansaray*, 2014-Ohio-750 ¶ 3. He could not recover under the statute because, like James, the error that resulted in his release from prison occurred prior to sentencing. *Id.* ¶ 16. But suppose, on remand, the State had made a paperwork error in dismissing the charges against him. Under the Second District’s theory, this “error” could convert his failed wrongful-imprisonment claim into a successful one, and open a door to damages that previously had been locked shut. The better reading is to harmonize the conceptions of a “wrongfully imprisoned individual” in R.C. 2743.48(A) with the wrongful-imprisonment compensation in R.C. 2743.48(E).

Indeed, the Second District's Reconsideration Decision hints at some uncertainty with where its interpretation leads. *See Recon. Op.* at 2. It suggested that James may not be entitled to *any* compensation for imprisonment, stating that “[t]he determination of the amount of compensation James may recover for the time wrongfully spent in prison, *if any, as a result of the procedural error that led to the release of all charges against him, is*” to be decided by the Court of Claims. *Id.* The court knew, of course, that James had not spent *any* time in prison as a result of State's lack of retrial after the July 2008 Order. *See id.* The fact that a person could be deemed a wrongfully imprisoned individual but potentially not entitled to compensation for “the time wrongfully spent in prison” suggests that the lower court's interpretation is amiss.

C. James's alternative argument is unavailing.

James's alternative argument, set forth in his Memorandum in Opposition to Jurisdiction, fares no better. He argues that “[t]he procedural error which caused [his] conviction to be vacated by a federal court occurred in the Second District when that court denied Mr. James's motion to reopen his appeal under Ohio App. R. 26(B) due to the ineffective assistance of appellate counsel.” *Opp. Jur.* at 8. But in plain terms, the Sixth Circuit “affirm[ed] the district court's grant of habeas relief on James's claim that he did not knowingly and intelligently waive counsel.” *See James*, 470 F.3d at 644. James's theory has no basis in fact, and the court below correctly rejected it. *See Remand Op.* ¶ 5.

The district court's 2005 Order had granted relief on two grounds relating to James's second trial: first, “that [James's] Sixth Amendment rights were violated because the state trial court failed to inquire into the reasons for his dissatisfaction with appointed counsel prior to removing said counsel,” *see James*, 470 F.3d at 643; and second, because James's “waiver of appointed counsel before the state trial court was not made knowingly and intelligently,” *see id.*

at 643-44. The Sixth Circuit rejected the first basis, *see id.* at 643, but affirmed the district court on the second claim, *id.* at 643-44.

Before reaching the merits of James's claims, the Sixth Circuit first had to determine that they were not procedurally defaulted. *See id.* at 640-42. James had failed to raise his claims on direct appeal, and instead raised them for the first time in the context of ineffective-assistance claims in his 1999 Rule 26(B) application. *Id.* at 639-40. The Sixth Circuit concluded that James's waiver-of-counsel claim had been preserved in that proceeding, even though the Second District had considered it in the context of an ineffective-assistance claim. *Id.* at 641. The Second District's opinion "denying James's motion to reopen [did] not frame its rejection of James's underlying claims as a failure to find prejudice or on procedural grounds, but instead reject[ed] those claims on their merits." *Id.* Thus, under the Sixth Circuit's precedents, James's claims were "not procedurally barred for habeas purposes." *Id.* at 642. The court then proceeded to address James's claims on the merits.

James now wrongly asserts that "the Sixth Circuit decided that the Ohio Court of Appeals erred . . . when it denied Mr. James's 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." *Opp. Jur.* at 8. But the Sixth Circuit did not consider an ineffective-assistance claim; it considered James's actual waiver-of-counsel claim. *See James*, 740 F.3d at 643 ("James's other claim for habeas relief is that his waiver of appointed counsel before the state trial court was not made knowingly and intelligently."). The error it located was not the appellate court's decision to deny James's Rule 26(B) application, but rather the trial court's failure to ensure that waiver of counsel was knowingly and voluntary:

[A]t no time did the state trial court judge ensure that James's waiver of appointed counsel as knowing and voluntary. At no time did the state trial judge explain to

James the risks and dangers of proceeding *pro se*. And at no time did the state trial judge make an explicit finding that James's waiver was knowing and intelligent.

Id. To the extent that the Sixth Circuit referred to the Rule 26(B) opinion, it was because that was the state court decision that addressed the merits of James's waiver-of-counsel claim. *Id.* at 641. While James is correct that a federal habeas court reviews "the last reasoned decision" of a state court, *see Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991), it grants relief for violations of the Constitution or federal law, *see* 28 U.S.C. § 2254(a). The constitutional violation that served as the basis for James's release from prison was a *trial* error, not an appellate error. Thus, James's argument that ineffective assistance of appellate counsel was the error in procedure that resulted in his release must fail.

CONCLUSION

For the above reasons, the Court should reverse the Second District's judgment.

Respectfully submitted,

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Attorney General of Ohio

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief of Appellant State of Ohio was served by U.S. mail this 14th day of March, 2015, upon the following counsel:

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Counsel for Plaintiff-Appellee
Omar K. James

/s Eric E. Murphy
Eric Murphy
State Solicitor

In the
Supreme Court of Ohio

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

**NOTICE OF APPEAL OF
DEFENDANT-APPELLANT STATE OF OHIO**

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State of Ohio

**NOTICE OF APPEAL OF
DEFENDANT-APPELLANT STATE OF OHIO**

Defendant-Appellant State of Ohio gives notice of its jurisdictional appeal to this Court, pursuant to Ohio Supreme Court Rule 5.02 and 7.01, from a decision of the Second District Court of Appeals captioned *Omar K. James v. State of Ohio*, No. 2013-CA-28 issued on February 20, 2015 and journalized on February 25, 2015. A timely application for reconsideration was filed on March 2, 2015. The Second District denied the application for reconsideration on June 11, 2015 and journalized that decision on June 12, 2015.

Date-stamped copies of the Second District's Decision and Entry denying reconsideration, the Second District's Judgment Entry and Opinion, an earlier Second District decision in this case, and the Court of Common Pleas Entry are attached as Exhibits 1 through 6, respectively, to the Appellants' Memorandum in Support of Jurisdiction.

For the reasons set forth in the accompanying Memorandum in Support of Jurisdiction, this case raises questions of public and great general interest.

Respectfully submitted,

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Attorney General of Ohio

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State Solicitor

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Appeal of Defendant-Appellant State of Ohio was served by U.S. mail this 27th day of July, 2015, upon the following:

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CLARK COUNTY
COURT OF APPEALS

JUN 12 2015

FILED
RONALD E. VINCENT, CLERK

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

OMAR K. JAMES

Petitioner-Appellant

v.

STATE OF OHIO

Respondent-Appellee

:
: Appellate Case No. 2013-CA-28

:
: Trial Court Case No. 09-CV-1251

:
: (Civil Appeal from
: Common Pleas Court)

.....
DECISION AND ENTRY

Rendered on the 11th day of June, 2015

PER CURIAM:

This matter comes before the Court upon the State of Ohio's application for reconsideration. When reviewing a motion for reconsideration filed pursuant to App. R. 26(A), we look to see whether the motion demonstrates an obvious error in our decision or raises an issue that was either not considered or not fully considered by the court. *City of Columbus v. Hodge*, 37 Ohio App. 3d 68, 523 N.E. 2d 515 (10th Dist. 1987). The motion for reconsideration may not raise new issues not previously raised. *Fenton v. Time Warner Entertainment Co.*, 2d Dist. Montgomery No.19755, 2003-Ohio-6317, ¶ 2 citing *Hodge*.

On February 20, 2015, we rendered a decision in James's favor after remand from the Supreme Court of Ohio, *James v. State*, 139 Ohio St. 3d 1401, 2014-Ohio-2245, 9 N.E.3d 1060, finding that James was a "wrongfully imprisoned individual" for purposes of the wrongful incarceration statute, R.C. 2743.48(A). The State filed this application for reconsideration, contending that our decision contained two errors. First, the State argues that James does not meet the requirements of the statute because the error we identified as "an error subsequent to sentencing or imprisonment" was not the error that resulted in James's release from prison. The State further argues that at the time the error we identified as "an error subsequent to sentencing or imprisonment" was made, James had already been released from prison. The State also asks us to reconsider the issue of whether James met the requirement of R.C. 2743.48(A)(4), which was not addressed in our decision on remand.

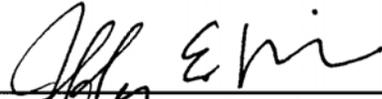
James responds with a factual argument that the initial federal court decision granting a conditional writ ordering his release or retrial was issued in 2005, he was discharged from imprisonment in 2008, and then he was subject to a bond for over a year and not released from all charges until 2010. James acknowledges that a stay of the writ was issued by the federal court in 2006, until the Sixth Circuit affirmed the district court in November, 2006. However, none of these factual allegations were necessary to the determination that James met the requirements of R.C. 2743.48(A)(1) through (5). The determination of the amount of compensation James may recover for the time wrongfully spent in prison, if any, as a result of the procedural error that led to the release of all charges against him, is within the jurisdiction of the Court of Claims, pursuant to R.C. 2743.48(E). Additionally, the Court of Claims will decide what amount, if any, that

James is entitled to recover for other expenses and losses incurred in connection with all associated criminal proceedings and appeals. R.C. 2743.48(E)(2)(a).

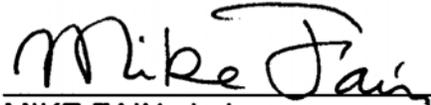
If our decision inaccurately refers to facts supporting a finding that the procedural error directly resulted in James's release from prison, this reference to a potentially erroneous conclusion in the factual record is harmless. The statute, R.C. 2743.48(A)(5) specifically provides that the procedural error may occur "subsequent to imprisonment," which supports an interpretation of the term "release" to mean action that is more inclusive than just a discharge from prison. Construing the term "release" as that term is used in R.C. 2743.48(A)(5) *in pari materia* 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.

We also conclude that the remand from the Supreme Court of Ohio did not require us to reconsider our previous finding that James met the requirement of R.C. 2743.48(A)(4). The remand required us to apply the holding of *Mansaray v. State*, 138 Ohio St. 3d 277, 2014-Ohio-750, 6 N.E. 3d 35, to reconsider whether James met the requirement of R.C. 2743.48(A)(5). We sufficiently addressed this issue in our discussion of the trial court's "Entry and Order of Dismissal, *with Prejudice*" (emphasis added), which establishes in the record that the charges against James cannot be refiled, meeting the requirement of R.C. 2743.48(A)(4). As we previously determined, James has established all five requirements of the wrongful incarceration statute, and should now be able to proceed with his claim in the Court of Claims of Ohio.

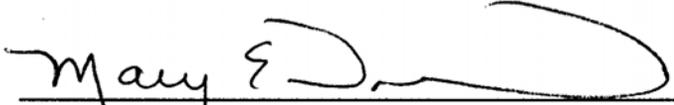
Accordingly, the State's application for reconsideration is denied.



JEFREY E. FROELICH, Presiding Judge



MIKE FAIN, Judge



MARY E. DONOVAN, Judge

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CLARK COUNTY
COURT OF APPEALS

FEB 25 2015

FILED
RONALD E. VINCENT, CLERK

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

OMAR K. JAMES

Petitioner-Appellant

v.

STATE OF OHIO

Respondent-Appellee

Appellate Case No. 2013-CA-28

Trial Court Case No. 09-CV-1251

(Civil Appeal from
Common Pleas Court)

FINAL ENTRY

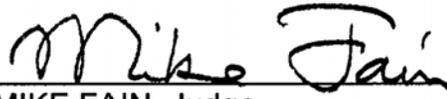
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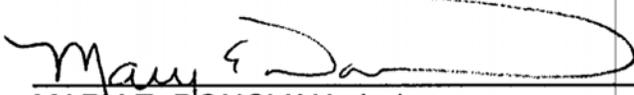
Pursuant to the opinion of this court rendered on the 20th day
of February, 2015, the judgment of the trial court is **Reversed**, and
this cause is **Remanded** for further proceedings in accordance with the opinion.

Costs to be paid as stated in App.R. 24.

Pursuant to Ohio App.R. 30(A), it is hereby ordered that the clerk of the Clark County
Court of Appeals shall immediately serve notice of this judgment upon all parties and make
a note in the docket of the mailing.


JEFFREY E. FROELICH, Presiding Judge


MIKE FAIN, Judge


MARY E. DONOVAN, Judge

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{¶ 1} This matter is before the court on remand from the Supreme Court of Ohio, *James v. State*, 139 Ohio St. 3d 1401, 2014-Ohio-2245, 9 N.E.3d 1060. Petitioner-appellant Omar K. James initiated this civil action for wrongful incarceration in 2009. In 2013, the trial court sustained a motion for summary judgment, dismissing the action. We reversed. *James v. State*, 2d Dist. Clark No. 2013-CA-28, 2014-Ohio-140. The Supreme Court of Ohio accepted an appeal, our judgment was reversed, and this cause was remanded to us for application of *Mansaray v. State*, 138 Ohio St. 3d 277, 2014-Ohio-0750, 6 N.E.3d 35. Therefore, the sole issue before this court is whether James is a “wrongfully imprisoned individual” for purposes of the wrongful incarceration statute, R.C. 2743.48(A), as construed in *Mansaray*.

I. The Course of Proceedings

{¶ 2} The pertinent facts and procedural history were recited in our first decision, as follows:

In 1996, James was indicted on one count of Possession of Crack Cocaine in an amount greater than twenty-five grams, a first degree felony in violation of R.C. 2925.11; one count of Carrying a Concealed Weapon, a fourth-degree felony in violation of R.C. 2923.12; one count of Having Weapons While Under Disability, a fifth degree felony in violation of R.C. 2923.13; and one count of Possession of Cocaine in an amount exceeding five grams, but less than twenty-five grams, a fourth-degree felony in violation of R.C. 2925.11(C)(4). All of the counts in the indictment related to events that transpired on Sept. 7, 1996.

In June 1997, James was tried on the four counts in the indictment. A jury found him guilty of Having Weapons While Under Disability. The jury could not reach a verdict on the remaining three counts of the indictment. James was sentenced to a prison term of twelve months. He did not appeal from his conviction and served his prison term.

A second trial on the remaining three counts of the indictment commenced in June 1998. On the first day of trial, James told the trial court that he wanted to represent himself. The jury trial proceeded with James representing himself. The jury returned guilty verdicts on the remaining three counts, and the trial court sentenced James to thirteen years in prison. James appealed; we affirmed. *State v. James*, 2d Dist. Clark No. 98-CA-54, 1999 WL 76815 (Feb. 19, 1999). James then sought to appeal to the Supreme Court of Ohio, which declined to hear the appeal. *State v. James*, 86 Ohio St. 3d 1414, 711 N.E.2d 1010 (1999).

James subsequently sought a writ of habeas corpus in the United States District Court for the Southern District of Ohio, challenging the three felony convictions that resulted from the second trial. In June 2005, the United States District Court granted James a conditional writ of habeas corpus. *James v. Brigano*, 201 F. Supp. 2d 810 (S.D. Ohio 2002). The State appealed. In November 2006, the United States Court of Appeals for the Sixth Circuit affirmed the district court's decision insofar as it held that James did not knowingly and intelligently waive his right to counsel at trial. *James v. Brigano*, 470 F. 3d 636, 644 (6th Cir. 2006). The District Court

then ordered the State to retry James on or before October 27, 2008. *James v. Brigano*, S.D. Ohio No. 3:00CV00491, 2008 WL2949411 (July 30, 2008). The State failed to retry James by this deadline.

James thereafter moved in the court of common pleas to dismiss the remaining three counts of the indictment, with prejudice. In August 2009, the trial court sustained the motion and dismissed the remaining counts of the indictment, with prejudice.

In September 2009, James brought this action in the court of common pleas, alleging that he was a “wrongfully imprisoned individual” pursuant to R.C. 2743.48(A). James and the State both moved for summary judgment. The trial court overruled James’s motion and granted the State’s motion, dismissing the action.

James v. State, 2014-Ohio-140, ¶ 3-8.

{¶ 3} In our first decision we sustained James’s sole assignment of error, concluding that the trial court should have rendered summary judgment in his favor, because James had satisfied all five elements of the wrongful incarceration statute, R.C. 2743.48(A)(1) through (5). *Id.* at ¶ 24. The Supreme Court of Ohio accepted the State’s appeal, reversed, and remanded the cause to us for disposition in light of its holding in *Mansaray v. State*, 138 Ohio St. 3d. 277, based on a different interpretation of the factor found in R.C. 2743.48(A)(5). The Supreme Court held that to meet the requirement in R.C. 2743.48(A)(5), the error in procedure must have occurred after the defendant is sentenced and imprisoned. *Id.* at ¶ 12. Therefore, we will incorporate our judgment from the first appeal on the factors required by R.C. 2743.48(A)(1) through(4), and reexamine

the issue of whether James has presented sufficient evidence to meet the requirement set forth in R.C. 2743.48 (A)(5).

II. James Established by the Preponderance of the Evidence that a Procedural Error Occurred after his Sentencing and Imprisonment

{¶ 4} R.C. 2743.48(A)(5) requires a petitioner, seeking compensation as a “wrongfully imprisoned individual” to prove that “[s]ubsequent to sentencing and during or subsequent to imprisonment, an error in procedure resulted in [his] release***.” In our first decision, we found that James met the requirements of this section of the statute by presenting sufficient evidence proving that he was released from prison, subsequent to his trial and sentencing, when the federal court granted his habeas corpus petition based on an error that occurred during his trial. The Supreme Court of Ohio in *Mansaray, supra*, held that to meet the requirements of R.C. 2743.48(A)(5), the petitioner must prove that a procedural error occurred after sentencing, not during trial. James now argues that he has met the requirements of the statute by showing two different procedural errors that occurred after his sentencing and imprisonment.

{¶ 5} First, James argues that a procedural error was established when his habeas petition was granted on the basis of ineffective assistance of counsel during the appeal of his conviction, not during the jury trial. However, the federal court did not grant the habeas relief upon a finding of ineffective assistance of appellate counsel. *James v. Brigano*, 470 F. 3d 636, 644 (6th Cir. 2006). The Sixth Circuit decision specifically found that the ineffective assistance of appellate counsel was not “procedurally defaulted” because the claim was addressed on its merits, and rejected, in our decision on James’s

App. R. 26 motion to re-open his appeal. Our decision on James's direct appeal from his conviction, *State v. James*, 2d Dist. Clark No. 98-CA-54, 1999 WL 76815 (Feb. 19, 1999), confirms that the defective waiver of the right to counsel issue was not initially addressed, but we did address the waiver issue as part of the ineffective assistance of counsel argument in our decision denying the App. R. 26 motion. The Sixth Circuit decision affirming the grant of the habeas petition was based on a constitutional claim that James's waiver of trial counsel was not made knowingly, intelligently and voluntarily. *James v. Brigano*, 470 F. 3d at 636, 644 (6th Cir. 2006).

{¶ 6} Secondly, James argues that a procedural error occurred, after sentencing and imprisonment, when the federal court directed the trial court to retry James within a set period of time, but the trial court failed to reschedule the trial in a timely manner, which led directly to a dismissal of the charges, with prejudice, and James's release from prison. These facts were addressed in our first decision in this case, as part of the proof required to meet the requirement of R.C. 2743.48(A)(4), and are not in dispute. We agree that the timing and scheduling of a trial is a procedural matter, and a court's failure to schedule a trial within the time frame set by statute, rule or as directed by a remand would constitute an error in procedure within the meaning of R.C. 2743.48(A)(5).

{¶ 7} Applying the rule of law established by the Supreme Court of Ohio in *Mansaray*, we conclude that the alleged procedural error regarding a defective waiver of the right to counsel is insufficient to meet the requirements of R.C. 2743.48(A)(5), because the error occurred at the time of trial, not after sentencing and imprisonment. Thus, the only error which may qualify as a procedural error for the purposes of meeting the requirements of R.C. 2743.48(A)(5), is the State's failure to retry James before the

deadline established by the federal court.

{¶ 8} The “error in procedure” requirement was deemed satisfied in a claim brought under the wrongful incarceration statute when a conviction was reversed because of a speedy trial violation in *Nelson v. State*, 5th Dist. Tuscarawas No. 2006-AP-0061, 2007-Ohio-6274. Nelson was charged with attempted murder, and the court erroneously instructed the jury that felonious assault was a lesser included offense of attempt to commit murder. *State v. Nelson*, 122 Ohio App. 3d 309, 701 N.E.2d 747 (5th Dist. 1996). After the jury found Nelson not guilty of attempted murder but guilty of felonious assault, his conviction was vacated on appeal. *Id.* Thereafter, Nelson was indicted on two counts of felonious assault, and convicted after entering a plea of no contest to one count of felonious assault, but the conviction was reversed on appeal. *State v. Nelson*, 5th Dist. Tuscarawas No. 2001AP-02-16, 2001 WL 1913811 (Sept. 27, 2001). The court found that since Nelson had remained incarcerated from the time of his initial indictment, through the appeal process and up to the day of his plea, he had been incarcerated more than 500 days, which was well in excess of the 270 day limit set forth in the Speedy Trial Act, R.C. 2945.71. *Id.* Nelson then proceeded with a civil suit, and was successful in obtaining a declaration that he was a wrongfully incarcerated person pursuant to R.C. 2743.48. *Nelson v. State*, 183 Ohio App. 3d 83, 2009-Ohio-3231, 915 N.E.2d 729 (10th Dist.). Following the two step process set up in the wrongfully incarcerated statute, Nelson then pursued his claim in the Court of Claims of Ohio, a trial was commenced on April 6, 2011, and Nelson was awarded \$249,627.99, which included an award of attorney fees in the sum of \$101,132.66.¹

¹ <http://cases.ohiocourtsofclaims.gov/cgi->

{¶ 9} In the case before us, the trial court was directed by the federal court to retry James within a set period of time, pursuant to the Speedy Trial Act. The State did not dispute that the re-trial was not scheduled before the deadline. The trial court's "Entry and Order of Dismissal, with Prejudice," filed August 26, 2009 states:

This matter is before the Court on Defendant's Motion to Dismiss with prejudice. After originally issuing a Writ of Habeas Corpus on July 29, 2005, the United States District Court for the Southern District of Ohio entered a Decision and Order on July 30, 2008, ordering the State to retry the Defendant "on or before Oct. 27, 2008."

Although the State unsuccessfully appealed the July 29, 2005 order granting the writ, cited as *James v. Brigano*, (6th Cir. 2006) 470 F. 3d 636, it did not appeal the July 30, 2008 order ordering a retrial by Oct. 27, 2008.

Because there is no pending appeal and the State did not retry the Defendant within the federally mandated time as stated above, it is the ORDER of this Court that the above titled case be and is hereby DISMISSED WITH PREJUDICE and terminated from the docket of this Court.

{¶ 10} We find that the State's failure to retry the case prior to the deadline was a procedural error that occurred after sentencing and imprisonment, within the meaning of R.C. 2743.48(A)(5). Therefore, James has established all five requirements of the wrongful incarceration statute, and should now be able to proceed with his claim in the Court of Claims of Ohio.

III. Conclusion

{¶ 11} Upon reconsideration of James's sole assignment of error, in accordance with the remand from the Supreme Court of Ohio, that assignment of error is sustained, the judgment of the trial court is Reversed, and this cause is Remanded for the trial court to enter summary judgment in James's favor.

.....

FROELICH, P.J., and DONOVAN, J., concur.

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Peter L. Jamison
Hon. Douglas M. Rastatter

FILED

MAY 28 2014

CLERK OF COURT
SUPREME COURT OF OHIO

The Supreme Court of Ohio

Omar K. James, aka Ahmad K. James

v.

State of Ohio

Case No. 2014-0318

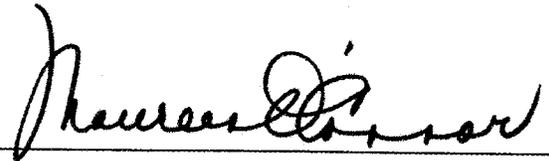
JUDGMENT ENTRY

APPEAL FROM THE
COURT OF APPEALS

Upon consideration of the jurisdictional memoranda filed in the case, the court accepts the appeal. The judgment of the court of appeals is reversed and this cause is remanded for application of *Mansaray v. State*, 138, Ohio St.3d 277, 2014-Ohio-0750.

It is further ordered that a mandate be sent to and filed with the clerk of the Court of Appeals for Clark County.

(Clark County Court of Appeals; No. 2013-CA-28)



Maureen O'Connor
Chief Justice

FAIN, J.

{¶ 1} Plaintiff-appellant Omar K. James appeals from a summary judgment rendered in favor of defendant-appellee the State of Ohio on James's complaint for wrongful imprisonment. James contends that the trial court erred by granting the State's motion for summary judgment and in not finding that he was a "wrongfully imprisoned individual" pursuant to R.C. 2743.48(A).

{¶ 2} We conclude that the trial court erred in rendering summary judgment in favor of the State; it should have rendered summary judgment in favor of James. Accordingly, the judgment of the trial court is Reversed, and this cause remanded for the trial court to enter judgment for James.

I. Course of the Proceedings

{¶ 3} In 1996, James was indicted on one count of Possession of Crack Cocaine in an amount greater than twenty-five grams, a first-degree felony in violation of R.C. 2925.11; one count of Carrying a Concealed Weapon, a fourth-degree felony in violation of R.C. 2923.12; one count of Having Weapons While Under Disability, a fifth-degree felony in violation of R.C. 2923.13; and one count of Possession of Cocaine in an amount exceeding five grams, but less than twenty-five grams, a fourth-degree felony in violation of R.C. 2925.11(C)(4). All of the counts in the indictment related to events that transpired on September 7, 1996.

{¶ 4} In June 1997, James was tried on the four counts in the indictment. A jury found him guilty of Having Weapons While Under Disability. The jury could not reach a verdict on the remaining three counts of the indictment. James was sentenced to a prison term of twelve months. He did not appeal from his conviction and served his prison term.

[Cite as *James v. State*, 2014-Ohio-140.]

{¶ 5} A second trial on the remaining three counts of the indictment commenced in June 1998. On the first day of trial, James told the trial court that he wanted to represent himself. The jury trial proceeded with James representing himself. The jury returned guilty verdicts on the remaining three counts, and the trial court sentenced James to thirteen years in prison. James appealed; we affirmed. *State v. James*, 2d Dist. Clark No. 98-CA-54, 1999 WL 76815 (Feb. 19, 1999). James then sought to appeal to the Supreme Court of Ohio, which declined to hear the appeal. *State v. James*, 86 Ohio St.3d 1414, 711 N.E.2d 1010 (1999).

{¶ 6} James subsequently sought a writ of habeas corpus in the United States District Court for the Southern District of Ohio, challenging his three felony convictions that resulted from the second trial. In June 2005, the United States District Court granted James a conditional writ of habeas corpus. *James v. Brigano*, 201 F.Supp.2d 810 (S.D. Ohio 2002). The State appealed. In November 2006, the United States Court of Appeals for the Sixth Circuit affirmed the district court's decision insofar as it held that James did not knowingly and intelligently waive his right to counsel at trial. *James v. Brigano*, 470 F.3d 636, 644 (6th Cir. 2006). The District Court then ordered the State to retry James on or before October 27, 2008. *James v. Brigano*, S.D. Ohio No. 3:00CV00491, 2008 WL 2949411 (July 30, 2008). The State failed to retry James by this deadline.

{¶ 7} James thereafter moved in the court of common pleas to dismiss the remaining three counts of the indictment, with prejudice. In August 2009, the trial court sustained the motion and dismissed the remaining three counts of the indictment, with prejudice.

{¶ 8} In September 2009, James brought this action in the court of common pleas, alleging that he was a "wrongfully imprisoned individual" pursuant to R.C. 2743.48(A). James and the State both moved for summary judgment. The trial court overruled James's motion and

granted the State's motion, dismissing the action. From this judgment, James appeals.

**II. James Established by a Preponderance of the Evidence that He
Was a Wrongfully Imprisoned Individual Pursuant to R.C. 2743.48(A)**

{¶ 9} James's sole assignment of error states:

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT
RELIEF TO THE STATE AND IN FAILING TO SUSTAIN APPELLANT'S
MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF WHETHER
APPELLANT IS A WRONGFULLY IMPRISONED INDIVIDUAL UNDER
R.C. 2743.48(A)(5).

{¶ 10} When reviewing a summary judgment, an appellate court conducts a de novo review. *Village of Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996).

"De Novo review means that this court uses the same standard that the trial court should have used, and we examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland City Schools Bd. Of Edn.*, 122 Ohio App.3d 378, 383, 701 N.E.2d 1023 (8th Dist.1997), citing *Dupler v. Mansfield Journal Co.*, 64 Ohio St.2d 116, 413 N.E.2d 1187 (1980). Therefore, the trial court's decision is not granted any deference by the reviewing appellate court. *Brown v. Scioto Cty. Bd. Of Commrs.*, 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993).

{¶ 11} R.C. 2743.48, the wrongful imprisonment statute, authorizes civil actions against the State, for specified monetary amounts, in the court of claims by wrongfully imprisoned individuals. *Doss v. State*, 135 Ohio St.3d 211, 2012-Ohio-5678, 985 N.E.2d 1229, ¶ 10.

Under the statutory scheme, a claimant must first be determined to be a “wrongfully imprisoned individual” by the court of common pleas before seeking compensation from the State in the court of claims. R.C. 2305.02 and R.C. 2743.48(B)(2); *Doss* at ¶ 10.

{¶ 12} R.C. 2743.48(A) defines a “wrongfully imprisoned individual” as “an individual who satisfies each of the following:

(1) The individual was charged with a violation of a section of the Revised Code by an indictment or information, and the violation charged was an aggravated felony or felony.

(2) The individual was found guilty of, but did not plead guilty to, the particular charge or a lesser-included offense by the court or jury involved, and the offense of which the individual was found guilty was an aggravated felony or felony.

(3) The individual was sentenced to an indefinite or definite term of imprisonment in a state correctional institution for the offense of which the individual was found guilty.

(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 court, and no criminal proceeding is pending, can be brought, or will be brought by any prosecuting attorney, city director of law, village solicitor, or other chief legal officer of a municipal corporation against the individual for any act associated with that conviction.

(5) Subsequent to sentencing and during or subsequent to imprisonment,

an error in procedure resulted in the individual's release, or it was determined by the court of common pleas in the county where the underlying criminal action was initiated that the charged offense, including all lesser-included offenses, either was not committed by the individual or was not committed by any person.

{¶ 13} A claimant must satisfy all five criteria in R.C. 2743.48(A), by a preponderance of the evidence, to be declared a “wrongfully imprisoned individual.” *Gover v. State*, 67 Ohio St.3d 93, 95, 616 N.E.2d 207 (1993). The trial court failed to identify which of the five criteria James had failed to establish, as a matter of law. The parties agree that James established the first three criteria pursuant to R.C. 2743.48(A), but disagree over whether James established the last two criteria in R.C. 2743.48(A)(4) and (5). Based on our review of the record, we agree with the parties that James established the criteria in R.C. 2743.48(A)(1) through (3). We will now address whether he established the criteria in R.C. 2743.48(A)(4) and (5).

{¶ 14} In 1993, the Supreme Court of Ohio interpreted R.C. 2743.48(A)(4), holding: “claimants seeking compensation for wrongful imprisonment must prove that at the time of the incident for which they were initially charged, they were not engaging in any other criminal conduct arising out of the incident for which they were initially charged.” *Gover* at syllabus. The Supreme Court explained the rationale behind its interpretation of R.C. 2743.48(A)(4):

The requirement that “no criminal proceeding * * * can be brought * * * against the individual for any act associated with that conviction” is of critical importance. This statutory language is intended to filter out those claimants who have had their convictions reversed, but were committing a different offense at the time that they were engaging in the activity for which they were initially charged.

When the General Assembly enacted Ohio's wrongful imprisonment legislation, it "intended that the court of common pleas actively separate those who were wrongfully imprisoned from those who have merely avoided criminal liability."

Id. at 95, quoting *Walden v. State*, 47 Ohio St.3d 47, 52, 547 N.E.2d 962 (1989).

{¶ 15} It is undisputed that James was charged with, and convicted of, Having Weapons While Under Disability for a criminal act that occurred at the same time as the criminal acts forming the basis of the remaining three counts of the indictment, which resulted in the subsequent thirteen-year prison sentence for which James claims he was wrongfully imprisoned. At first glance, the Supreme Court's holding in *Gover* appears to require that James's conviction for Having Weapons While Under Disability precludes him, as a matter of law, from satisfying R.C. 2743.48(A)(4). However, this result would ignore the particular facts addressed by the *Gover* court and the 2003 Amendment to R.C. 2743.48(A).

{¶ 16} At the time of *Gover*, R.C. 2743.48(A)(5) stated:

Subsequent to his sentencing and during or subsequent to imprisonment, it was determined by a court of common pleas that the offense of which he was found guilty, including all lesser-included offense, either was not committed by him or was not committed by any person.

{¶ 17} In December 2002, the 124th General Assembly enacted Sub.S.B. No. 149, which added language allowing a claimant to satisfy R.C. 2743.48(A)(5) by demonstrating an error in procedure that resulted in the individual's release. By adding this language, the General Assembly provided an alternative to the condition that a claimant either had not committed the offense or that the offense had not been committed by any other person. In other words, a

claimant no longer had to prove actual innocence in order to satisfy (A)(5). This amendment to (A)(5) became effective April 9, 2003.

{¶ 18} In *Hill v. State*, 10th Dist. Franklin No. 12AP-635, 2013-Ohio-1968, the Court of Appeals for the Tenth District recently addressed the effect of the 2003 amendment in relation to the *Gover* court's interpretation of R.C. 2743.48(A)(4). The Tenth District explained, at ¶ 26-30:

In *Gover*, the Supreme Court specifically interpreted subsection (4) of R.C. 2743.48, as in effect in 1993. Gover, the WI claimant, had been charged and convicted of the crime of safecracking based on his conduct on September 13, 1988. On that date, Gover was arrested after a police officer observed him emptying his pockets of coins, costume jewelry, and other items that had earlier been part of a restaurant display that apparently resembled, but was not, a safe. *See State v. Gover*, 67 Ohio App.3d 384 (1st. Dist.1990). The restaurant's general manager had previously observed Gover in the restaurant moving in a crouched position and exiting the restaurant with bulging pockets. On appeal, the court of appeals reversed the conviction as the state could not prove the existence of an actual safe or vault. Accordingly, the state had not proven all elements of the crime of safecracking of which Gover had been convicted, and the court of appeals reversed that conviction.

Gover subsequently filed an action seeking adjudication as a wrongfully imprisoned individual. The Supreme Court acknowledged that Gover had not committed the offense of safecracking with respect to his conduct on September

13, 1988, but opined that Gover “was nevertheless committing other criminal offenses,” *Gover v. State* at 96, and suggested that the prosecutor might have charged him with burglary, rather than safecracking. The Supreme Court remanded the wrongful-imprisonment case to the civil trial court for it to determine whether Gover had committed offenses other than safecracking on the date of the alleged criminal conduct.[] In an opinion written by Justice Pfeifer, the Supreme Court explained that subsection (4) is “intended to filter out those claimants [for compensation] who have had their convictions reversed, but were committing a different offense at the time that they were engaging in the activity for which they were initially charged.” *Id.* at 95. Similarly, consistent with the statute as then in effect, the court concluded that “[w]hen the General Assembly enacted Ohio's wrongful imprisonment legislation, it ‘intended that the court of common pleas actively separate those who were wrongfully imprisoned from those who have *merely avoided criminal liability.*’ ” (Emphasis added.) *Id.*, citing *Walden* at 47 Ohio St.3d 52. These observations were made in 1993, prior to the 2003 amendment to R.C. 2743.48(A)(5) and at a time when a WI claimant was required to prove actual innocence.

In the case before us, the state argues that Hill, by pleading no contest, admitted that he was in possession of crack cocaine and that he therefore “merely avoided criminal liability” based on application of the exclusionary rule. The state relies on the Supreme Court's statements in *Gover* and Hill's plea of no contest after the trial court denied his motion to suppress. It argues that Hill may not be

deemed to be a wrongfully imprisoned individual because his lack of actual innocence on December 19, 2009 precludes a finding that Hill satisfied subsection (A)(4) of R.C. 2743.48. In making this argument, the state seeks to graft the innocence component of subsection (5) of R.C. 2743.48(A) into subsection (4) based on *Gover*'s description of the overarching purpose of the wrongful-imprisonment statute as in effect in 1993. But, as discussed earlier in this decision, and as recognized by the Supreme Court of Ohio in *Doss*, the General Assembly in enacting Sub.S.B.No. 149 in 2002 effected a substantive change to the statutory wrongful-imprisonment compensation scheme. It “expanded the criteria by which a claimant could establish that he or she is a wrongfully imprisoned individual.” *Griffith* [*v. Cleveland*], [128 Ohio St.3d 35,] 2010-Ohio-4905, ¶ 21. After that statutory change, a released prisoner may establish his status as a wrongfully imprisoned individual without proving his innocence if he can instead establish that he was released as the result of an error in procedure. *See Griffith* at ¶ 29 (describing the addition of the “error in procedure” provision of R.C. 2743.48(A)(5) as establishing an “alternative” to the determination whether the claimant “committed the offense”).

In determining whether Hill established the R.C. 2743.48(A)(4) criterion, we must apply the current text of that provision, rather than decide the case based on observations made in *Gover* concerning the pre-2003 version of the statute. That is, we must determine whether Hill proved by a preponderance of the evidence[] that “no criminal proceeding is pending, can be brought, or will be

brought by any prosecuting attorney, city director of law, village solicitor, or other chief legal officer of a municipal corporation against the individual for any act associated with that conviction” and not whether Hill’s release from prison represented merely the avoidance of criminal liability. In short, comments in *Gover* based on the text of a prior version of R.C. 2743.48(A) simply cannot prevail over contradictory text in the current version of the statute.

{¶ 19} We agree with the Tenth District’s analysis in *Hill*. Consequently, James’s conviction for Having Weapons While Under Disability does not preclude James from satisfying R.C. 2743.48(A)(4) if James can establish that his convictions on the other charges have been vacated and the prosecuting attorney cannot pursue further criminal proceedings on those charges. R.C. 2743.48(A)(4). It is undisputed that James’s convictions were vacated as a result of federal habeas corpus proceedings. Furthermore, the State cannot re-try James on those underlying charges because the trial court dismissed those three charges with prejudice in 2009. Therefore, James has established, through a preponderance of the evidence, that he has satisfied the criteria in R.C. 2743.48(A)(4).

{¶ 20} Next, James must satisfy R.C. 2743.48(A)(5). Pursuant to this section, James must establish that “[s]ubsequent to sentencing and during or subsequent to imprisonment, an error in procedure resulted in [his] release * * * .” The “error in procedure” occurred when the trial court proceeded to trial without obtaining from James a knowing and intelligent waiver of his right to counsel at trial. This error ultimately led to the vacation of James’s convictions. We conclude that this satisfies R.C. 2743.48(A)(5).

{¶ 21} The State contends that only “structural error” can qualify as “procedural error”

pursuant to R.C. 2743.48(A)(5). We do not agree. The plain language of R.C. 2743.48(A)(5) does not limit the term “procedural error” to structural error. If the General Assembly had intended that only structural errors could satisfy R.C. 2743.48(A)(5), then the General Assembly presumably would have used the term structural error, rather than procedural error. Furthermore, a failure to obtain a knowing and intelligent waiver of a defendant’s right to counsel at trial arguably satisfies even the more strict structural error standard, since the result is that the defendant is totally deprived of counsel at trial. *See State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, 816 N.E.2d 227, ¶ 54-56 (Moyer, C.J., concurring in judgment only).

{¶ 22} The State also contends that the error in procedure that occurred must have occurred after sentencing. According to the State, the error of procedure in this case occurred during trial, and therefore cannot satisfy R.C. 2743.48(A)(5). We do not agree. As the *Hill* court explained, at fn. 4:

[W]e note that the initial phrase of R.C. 2743.48(A)(5) provides that “[s]ubsequent to sentencing and during or subsequent to imprisonment” (emphasis added), an error in procedure resulted in the prisoner's release or a trial court determined that the claimant was actually innocent. The text emphasized above existed in the statute prior to the 2003 amendment, and we do not believe that this modifying language relates to the timing of the commission of errors of procedure. We are unaware of any procedural error that could conceivably result in a convict's release from prison if the error occurred after conviction and sentencing. To read the phrase as including only post-sentencing procedural errors would render the amendment meaningless. * * * Rather, we believe that the “subsequent

to sentencing” phrase modifies the timing of the convict's release, i.e., it mandates that the individual be released from prison subsequent to sentencing, based on an error of procedure that occurred before sentencing. We further note that the Legislative Service Commission in its Final Bill Analysis of Sub.S.B. No. 149, described the bill as including a new provision that “an error in procedure resulted in the individual's release as an alternative to the condition that subsequent to sentencing and during or subsequent to imprisonment it was determined by the court of common pleas that the offense of which the individual was found guilty was not committed by the individual or by any other person.”

{¶ 23} We agree with the Tenth District’s reasoning in *Hill*. The only logical interpretation of the phrase “[s]ubsequent to sentencing and during or subsequent to imprisonment” is that this phrase describes the timing of the individual’s release, or the court’s determination that no offense was committed. R.C. 2743.48(A)(5).

{¶ 24} James’s sole assignment of error is sustained.

IV. Conclusion

{¶ 25} James’s sole assignment of error having been sustained, the judgment of the trial court is Reversed, and this cause is Remanded for the trial court to enter summary judgment in James’s favor.

.....

FROELICH, P.J., and DONOVAN, JJ., concur.

Copies mailed to:

Michael DeWine
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D. Andrew Wilson
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Derek A. Farmer
Hon. Douglas M. Rastatter

In the Court of Common Pleas of Clark County, Ohio

**OMAR K. JAMES
Aka AHMAD K. JAMES**

Plaintiff/Petitioner,

CASE NO: 09CV1251

vs.

STATE OF OHIO

Defendant/Respondent

ENTRY

RASTATTER, JUDGE

This matter came on for consideration on the plaintiff's motion for summary judgment and defendant's motion for summary judgment.

Upon a review of the case file, trial transcripts, motions and memorandum of the parties and construing the evidence most strongly in favor of the plaintiff, the Court finds, there are no genuine issues as to any material fact; therefore, plaintiff's motion for summary judgment is hereby **OVERRULED and defendant's motion for summary judgment is **SUSTAINED**.**



Douglas M. Rastatter, Judge

**cc:
D. Farmer
L. Babich/A. Pickering**

CLERK OF COURT
COMMON PLEAS COURT
CLARK COUNTY, OHIO

2013 FEB 15 PM 1:05

FILED

EXHIBIT 7

(124th General Assembly)
(Substitute Senate Bill Number 149)

AN ACT

To amend section 2743.48 and to enact sections 117.52 and 2743.49 of the Revised Code to increase the amount that a wrongfully imprisoned individual, in an action brought in the Court of Claims, is entitled to for each year of imprisonment, to provide for cost of living adjustments of that amount by the Auditor of State, and to allow the wrongfully imprisoned individual to recover any cost debts the wrongfully imprisoned individual paid the Department of Rehabilitation and Correction while in its custody or under its supervision.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That section 2743.48 be amended and sections 117.52 and 2743.49 of the Revised Code be enacted to read as follows:

Sec. 117.52. The auditor of state shall make the adjustment, as described in section 2743.49 of the Revised Code, of the amount that a wrongfully imprisoned individual, in an action brought in the court of claims pursuant to section 2743.48 of the Revised Code, may receive for each full year or part of a year of imprisonment and shall perform all of the functions relating to that adjustment as specified in section 2743.49 of the Revised Code.

Sec. 2743.48. (A) As used in this section and section 2743.49 of the Revised Code, a "wrongfully imprisoned individual" means an individual who satisfies each of the following:

(1) He The individual was charged with a violation of a section of the Revised Code by an indictment or information prior to, or on or after, September 24, 1986, and the violation charged was an aggravated felony or felony.

EXHIBIT 8

(2) He The individual was found guilty of, but did not plead guilty to, the particular charge or a lesser-included offense by the court or jury involved, and the offense of which he the individual was found guilty was an aggravated felony or felony.

(3) He The individual was sentenced to an indefinite or definite term of imprisonment in a state correctional institution for the offense of which he the individual was found guilty.

(4) The individual's conviction was vacated or was 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 court, and no criminal proceeding is pending, can be brought, or will be brought by any prosecuting attorney, city director of law, village solicitor, or other chief legal officer of a municipal corporation against the individual for any act associated with that conviction.

(5) Subsequent to his sentencing and during or subsequent to his imprisonment, an error in procedure resulted in the individual's release, or it was determined by a court of common pleas that the offense of which he the individual was found guilty, including all lesser-included offenses, either was not committed by him the individual or was not committed by any person.

(B)(1) When a court of common pleas determines, on or after September 24, 1986, that a person is a wrongfully imprisoned individual, the court shall provide the person with a copy of this section and orally inform him the person and his the person's attorney of his the person's rights under this section to commence a civil action against the state in the court of claims because of his the person's wrongful imprisonment and to be represented in that civil action by counsel of his the person's own choice.

(2) The court described in division (B)(1) of this section shall notify the clerk of the court of claims, in writing and within seven days after the date of the entry of its determination that the person is a wrongfully imprisoned individual, of the name and proposed mailing address of the person and of the fact that the person has the rights to commence a civil action and to have legal representation as provided in this section. The clerk of the court of claims shall maintain in his the clerk's office a list of wrongfully imprisoned individuals for whom notices are received under this section and shall create files in his the clerk's office for each such individual.

(C)(1) In a civil action under this section, a wrongfully imprisoned individual has the right to have counsel of his the individual's own choice.

(2) If a wrongfully imprisoned individual who is the subject of a court determination as described in division (B)(1) of this section does not commence a civil action under this section within six months after the entry of that determination, the clerk of the court of claims shall send a letter to him the wrongfully imprisoned individual, at the address set forth in the notice received from the court of common pleas pursuant to division (B)(2) of this section or to any later address provided by the wrongfully imprisoned individual, that reminds him the wrongfully imprisoned individual of his the wrongfully imprisoned individual's rights under this section. Until the statute of limitations provided in division (H) of this section expires and unless the wrongfully imprisoned individual commences a civil action under this section, the clerk of the court of claims shall send a similar letter in a similar manner to him the wrongfully imprisoned individual at least once each three months after the sending of the first reminder.

(D) Notwithstanding any provisions of this chapter to the contrary, a wrongfully imprisoned individual has and may file a civil action against the state, in the court of claims, to recover a sum of money as described in this section, because of his the individual's wrongful imprisonment. The court of claims shall have exclusive, original jurisdiction over such a civil action. The civil action shall proceed, be heard, and be determined as provided in sections 2743.01 to 2743.20 of the Revised Code, except that if a provision of this section conflicts with a provision in any of those sections, the provision in this section controls.

(E)(1) In a civil action as described in division (D) of this section, the complainant may establish that he the claimant is a wrongfully imprisoned individual by submitting to the court of claims a certified copy of the judgment entry of the court of common pleas associated with his the claimant's conviction and sentencing, and a certified copy of the entry of the determination of a court of common pleas that he the claimant is a wrongfully imprisoned individual. No other evidence shall be required of the complainant to establish that he the claimant is a wrongfully imprisoned individual, and he the claimant shall be irrebuttably presumed to be a wrongfully imprisoned individual.

(2) In a civil action as described in division (D) of this section, upon presentation of requisite proof to the court, a wrongfully imprisoned individual is entitled to receive a sum of money that equals the total of each of the following amounts:

(a) The amount of any fine or court costs imposed and paid, and the reasonable attorney's fees and other expenses incurred by the wrongfully imprisoned individual in connection with all associated criminal proceedings and appeals, and, if applicable, in connection with obtaining his the wrongfully imprisoned individual's discharge from confinement in the state penal or reformatory correctional institution;

(b) For each full year that ~~he was imprisoned~~ of imprisonment in the state correctional institution for the offense of which ~~he~~ the wrongfully imprisoned individual was found guilty, ~~twenty-five~~ forty thousand three hundred thirty dollars ~~or the adjusted amount determined by the auditor of state pursuant to section 2743.49 of the Revised Code,~~ and for each part of a year that ~~he was~~ of being so imprisoned, a pro-rated share of ~~twenty-five~~ forty thousand three hundred thirty dollars ~~or the adjusted amount determined by the auditor of state pursuant to section 2743.49 of the Revised Code;~~

(c) Any loss of wages, salary, or other earned income that directly resulted from his the wrongfully imprisoned individual's arrest, prosecution, conviction, and wrongful imprisonment;

(d) The amount of the following cost debts the department of rehabilitation and correction recovered from the wrongfully imprisoned individual who was in custody of the department or under the department's supervision:

(i) Any user fee or copayment for services at a detention facility, including, but not limited to, a fee or copayment for sick call visits;

(ii) The cost of housing and feeding the wrongfully imprisoned individual in a detention facility;

(iii) The cost of supervision of the wrongfully imprisoned individual;

(iv) The cost of any ancillary services provided to the wrongfully imprisoned individual.

(F)(1) If the court of claims determines in a civil action as described in division (D) of this section that the complainant is a wrongfully imprisoned individual, it shall enter judgment for the wrongfully imprisoned individual in the amount of the sum of money to which ~~he~~ the wrongfully imprisoned individual is entitled under division (E)(2) of this section. In determining that sum, the court of claims shall not take into consideration any expenses incurred by the state or any of its political subdivisions in connection with the arrest, prosecution, and imprisonment of the wrongfully imprisoned individual, including, but not limited to, expenses for

food, clothing, shelter, and medical services.

(2) If the wrongfully imprisoned individual was represented in the civil action under this section by counsel of his the wrongfully imprisoned individual's own choice, the court of claims shall include in the judgment entry referred to in division (F)(1) of this section an award for the reasonable attorney's fees of that counsel. These fees shall be paid as provided in division (G) of this section.

(3) The state consents to be sued by a wrongfully imprisoned individual because his the imprisonment was wrongful, and to liability on its part because of that fact, only as provided in this section. However, this section does not affect any liability of the state or of its employees to a wrongfully imprisoned individual on a claim for relief that is not based on the fact of his the wrongful imprisonment, including, but not limited to, a claim for relief that arises out of circumstances occurring during his the wrongfully imprisoned individual's confinement in the state correctional institution.

(G) The clerk of the court of claims shall forward a certified copy of a judgment under division (F) of this section to the president of the controlling board. The board shall take all actions necessary to cause the payment of the judgment out of the emergency purposes special purpose account of the board.

(H) To be eligible to recover a sum of money as described in this section because of his wrongful imprisonment, a wrongfully imprisoned individual shall not have been, prior to September 24, 1986, the subject of an act of the general assembly that authorized an award of compensation for his the wrongful imprisonment or have been the subject of an action before the former sundry claims board that resulted in an award of compensation for his the wrongful imprisonment. Additionally, to be eligible to so recover, the wrongfully imprisoned individual shall commence a civil action under this section in the court of claims no later than two years after the date of the entry of the determination of a court of common pleas that he the individual is a wrongfully imprisoned individual.

Sec. 2743.49. (A)(1) In January of each odd-numbered year, the auditor of state, in accordance with this division and division (A)(2) of this section, shall adjust the actual dollar figure specified in division (E)(2)(b) of section 2743.48 of the Revised Code or the actual dollar amount determined pursuant to this section. The adjustment shall be based on the yearly average of the previous two years of the consumer price index for all urban consumers or its

successive equivalent, as determined by the United States department of labor, bureau of labor statistics, or its successor in responsibility, for all items, Series A. Using the yearly average for the immediately preceding even-numbered year as the base year, the auditor of state shall compare the most current average consumer price index with that determined in the preceding odd-numbered year and shall determine the percentage increase or decrease. The auditor of state shall multiply the percentage increase or decrease by the actual dollar figure specified in division (E)(2)(b) of section 2743.48 of the Revised Code or the actual dollar figure determined for the previous odd-numbered year under this section and shall add the product to or subtract the product from its corresponding actual dollar figure, as applicable, for the previous odd-numbered year.

(2) The auditor of state shall calculate the adjustment under division (A)(1) of this section on or before the thirty-first day of January of each odd-numbered year. The auditor of state shall base the adjustment on the most current consumer price index that is described in division (A)(1) of this section and that is in effect as of the first day of January of each odd-numbered year.

(B)(1) The auditor of state shall certify the calculations made under division (A) of this section on or before the thirty-first day of January of each odd-numbered year.

(2) On or before the fifteenth day of February of each odd-numbered year, the auditor of state shall prepare a report setting forth the amount that a wrongfully imprisoned individual is entitled to for each full year of imprisonment in the state correctional institution for the offense of which the wrongfully imprisoned individual was found guilty as provided in division (E)(2)(b) of section 2743.49 of the Revised Code and as calculated in accordance with this section. The report and all documents relating to the calculations contained in the report are public records. The report shall contain an indication of the period in which the calculated amount applies, a summary of how the amount was calculated, and a statement that the report and all related documents are available for inspection and copying at the office of the auditor of state.

(3) On or before the fifteenth day of February of each odd-numbered year, the auditor of state shall transmit the report to the general assembly and to the court of claims.

SECTION 2. That existing section 2743.48 of the Revised Code is hereby repealed.