Supreme Court of Ohio Clerk of Court - Filed May 20, 2016 - Case No. 2015-1230

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
	:	

REPLY BRIEF OF APPELLANT STATE OF OHIO

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INTRODUCTION

The Second District declared appellee Omar James to be a wrongfully imprisoned person because, *after* he was released from prison due to a trial error, the State did not retry him. The lower court's holding was mistaken, and James has not salvaged it.

The State's opening brief established that, to satisfy R.C. 2743.48(A)(5)'s "Error in Procedure" prong, claimants must show that a post-sentencing mistake in the legal proceedings resulted in their discharge from confinement. *See* State Br. 9-17. James's original theory, that a trial error satisfied the Error in Procedure prong, conflicts with *Mansaray v. State*, 138 Ohio St. 3d 277, 2014-Ohio-750. After this Court reversed that theory, the Second District acknowledged that *Mansaray* compelled the rejection of James's original claim, but still concluded that James's lack of retrial after his convictions were overturned on federal habeas review satisfied the Error in Procedure prong. This was not a qualifying "error in procedure" for two reasons. *First*, retrial was an option for the State, so the lack of retrial was not an "error." *See* State Br. 19-24. *Second*, the lack of retrial did not result in James's "release" from prison as the statute requires; it merely resulted in the dismissal of his indictment. *See id*. at 24-27.

In response, James attempts both to defend the Second District's decision, *see* James Br. 9-26, and to offer alternate "errors in procedure" to justify affirmance on other grounds, *see id*. at 27-35. His new theories, perhaps inspired by the weakness of the appeals court's ruling, are that various alleged errors *other than* the one relied on by the federal habeas court resulted in his release from prison. *See id*. at 27-35. The State's opening brief suggested that, in law as in life, the simplest explanation is often correct. James's six propositions of law are complicated, but this case is simple: The State's decision not to retry a defendant is not an "error." That is all the Court needs to decide today.

James's first theory (Propositions of Law Nos. 1-4) is a backdoor attempt at actual innocence, one where a lack of retrial "renders all the years of his imprisonment wrongful." *Id*. at 18. But James's brief does not dispute the powerful fact that the ordinary meaning of the word "release" refers to discharge from confinement—and that the lack of retrial came *after* he was released from prison. Nothing he cites overcomes this ordinary meaning, and his competing interpretation would divorce the "error in procedure" requirement from the statute's purpose.

James's second theory (Proposition of Law No. 5), that manifold "errors" caused his release, was properly rejected by the court below and fares no better. James acknowledges that "it is correct to say" that his waiver-of-counsel error "is what caused [his] release from prison." James Br. 4. He nevertheless asserts that *multiple* causes *contributed* to this—with an Ohio appellate court's denial of his Rule 26(B) petition to re-open his direct appeal being the "but for" cause of his release. *See id*. at 4-5. Aside from being factually wrong, James's causation argument gets it backwards. A 26(B) petition may allege only claims for ineffective assistance of appellate counsel. *See* App. R. 26(B)(1). To the extent the petition is successful, the relief rewarded is the re-opening of a petitioner's direct appeal, this time with effective counsel. App. R. 26(B)(6). The general rule is similar for ineffective assistance of appellate counsel in federal habeas. Thus, even if James could have shown some sort of appellate error, it would serve only as a gateway in habeas to review of a trial error, which in turn leads to invalidating the conviction. The trial error is what secured James a writ of habeas corpus, but that error is not a qualifying "error in procedure" under *Mansaray*, as this Court recognized when it reversed the Second District's original opinion. James invites the Court to turn wrongful-imprisonment suits into Habeas Part III, in which otherwise-unqualified claimants dig through their post-conviction proceedings to find a complex theory that fits the bill. The Court should decline his invitation.

ARGUMENT

A. James's lack of retrial was not an "error in procedure" within the meaning of R.C. 2743.48(A)(5).

The State's opening brief established that the phrase "error in procedure," as it appears in Ohio's wrongful-imprisonment statute, refers to a post-sentencing mistake in the legal process that adversely affects a defendant and ultimately results in his release from prison. *See* State Br. 10-17. James is not a wrongfully imprisoned individual because the thing that secured his "release" from prison was a pre-sentencing trial error. *See id*. at 18-19; *Mansaray v. State*, 138 Ohio St. 3d 277, 2014-Ohio-750. The Second District should be reversed on that basis alone.

James's first-line response is to defend the lower court's conclusion that an "error in procedure" resulted in his "release"—not due to the trial error by which he secured habeas relief, but due to "the State's failure to retry James before the deadline established by the federal court." *James v. State*, 2015-Ohio-623 ¶ 7 (2d Dist.) ("Remand Op.") (attached at Appx. Ex. 4); James Br. 9-26. His responses fail in two respects. *First*, he has not shown that his lack of retrial was an "error." *See* below Part A.1. *Second*, he has not shown that the lack of retrial "result[ed] in" his "release" from prison. *See* below Part A.2. James had been out of prison for over a year when the purported "error" occurred. The theory he espouses—that an (A)(5) "error in procedure" need not have any connection to the reason a claimant's imprisonment is deemed wrongful, *see* James Br. 18-19—is at odds with the statute's text, structure, and purpose.

1. James cannot satisfy the Error in Procedure prong of R.C. 2743.48(A)(5) because the lack of retrial was not an "error."

It was within the State's discretion to retry James, and not retrying him was not an "error in procedure," for two reasons. *See* State Br. 19-24.

The legal principles governing prosecutorial discretion and retrial support the conclusion that the lack of retrial in this case was not an error. *See id*. at 21-22. To say otherwise is to say

that the State was *required* to retry James. That cannot be. *See United States v. Mullet*, No. 15-3212, 2016 WL 2343163, at *5 (6th Cir. May 4, 2016) ("But that left the government, not us, with the choice of whether to seek a new trial. We did not order a new trial, and almost assuredly could not have done so. That was for the government to decide.").

No wonder, then, that the actual terms of the federal district court's July 2008 Order confirm that retrial was an option. *See* St. Br. 19-21. The Order gave the State two choices: it could "*either* retry [James] on or before October 27, 2008 *or* forego [sic] further retrial . . . on the criminal charges underlying this case." *James v. Brigano*, No. 3:00-cv-00491, 2008 WL 2949411, at *1 (S.D. Ohio July 30, 2008) (emphases added and deleted). The State did not err by not retrying—an option the federal court acknowledged. *Cf. Girts v. Yanai*, 600 F.3d 576, 585 (6th Cir. 2010) ("The problem with this argument is that the failure to retry Petitioner" did not violate the writ, as the "conditional writ clearly provides that [the State] could either retry him or release him . . . ."). James's responses to these points are mistaken.

a. James's factual arguments are irrelevant and ignore the crucial fact that, in this case as in all cases, retrial is discretionary.

James argues that the State erred due to its "delay in failing to retry" him after the district court granted a conditional writ in 2005. *See* James Br. 9-13. He complains that the State did not retry him as it defended its original convictions on appeal while the 2005 writ *was stayed*, *see id*. at 10, even though such an action likely would have mooted the State's appeal. *See Duke Power Co. v. Greenwood Cnty.*, 299 U.S. 259, 267 (1936) (per curiam) ("Where it appears upon appeal that the controversy has become entirely moot, it is the duty of the appellate court to set aside the decree below and to remand with the cause with directions to dismiss."). James also complains that the State did not bring him to trial after the Sixth Circuit issued its mandate. *See* James Br. 11-12. These factual points are irrelevant to the proposition of *law* this Court has

agreed to review: whether the lack of a retrial is an "error in procedure" within the meaning of R.C. 2743.48(A)(5). Because retrial is discretionary, the lack of one is not an error—regardless of whether the State defended its conviction in the federal courts, or whether facts *outside the record* suggest that the Assistant Attorney General representing the State in habeas proceedings believed that Clark County intended to retry James. *See State v. Hill*, 90 Ohio St. 3d 571, 572 (2001) (per curiam) ("[A]ppellate counsel cannot properly refer to facts outside the record.").

Even as he unearths the details of his federal habeas proceedings, James ignores—and thus does not dispute—three crucial facts. First, the July 2008 Order framed retrial as an option, such that the lack of a retrial could not be an "error." *See* State Br. 19-20. (Indeed, James conceded below that retrial was the State's choice. *See* T. Ct. R. 22 at 9, n.1.) Second, the record nowhere suggests that the Clark County Prosecutor took steps to retry James after the July 2008 Order. *See* State Br. 20-21. Third, the record nowhere suggests that the Clark County Prosecutor opposed James's motion to dismiss the indictment. *See id*. at 21. Put differently, James wants to argue about whatever happened—inside or outside of the record in *this* case—leading up to the July 2008 Order. But what matters are the terms of the July 2008 Order and the principles of prosecutorial discretion: Clark County took one of two options available to it by letting the district court's deadline for retrial pass without a fight. That was not an error.

b. James's legal arguments concerning speedy trial issues are mistaken.

James also mistakenly insists that the July 2008 Order applied Ohio's Speedy Trial Act, and that he suffered a speedy-trial violation of *some* sort when he was not retried. *See* James Br. 13-17. Factually, this is wrong. The district court's July 2008 Order, which James relied upon to dismiss his indictment, did not condition retrial on the Ohio Speedy Trial Act. *See* T. Ct. R. 14, Ex. C. Even if it had purported to do so, it would have been legally meaningless because this Court has held that the Speedy Trial Act does not apply to retrials. *See* State Br. 22.

First, no court (except for, maybe, the Second District on remand) has determined that James suffered a speedy-trial error. The July 2008 Order's instructions do not mention the Ohio Speedy Trial Act, and the federal district court *rejected* the argument that the reference to the Act in the 2005 conditional writ barred James's retrial. *See James*, 2008 WL 2949411 at *1, *5. In the 2005 writ, the reference to the Speedy Trial Act was part of the condition governing when the State was required to *release* James—not a consequence concerning *retrial*. "[I]n a typical case where a prisoner's conviction is vacated because a state fails to retry [him] by the deadline set in a conditional writ, *the state is not precluded from rearresting petitioner and retrying him under the same indictment*." *Eddleman v. McKee*, 586 F.3d 409, 413 (6th Cir. 2009) (internal quotation marks omitted). Ultimately, the district court concluded that "no reasonable jurist" could find that the 2005 writ barred retrial, and that in fact "James may have forfeited his rights to continue to litigate" those issues when he failed to object to the Magistrate Judge's Report & Recommendation. *See James v. Moore*, No. 3:00-cv-491, 2008 WL 4185969, at *1-2 (S.D. Ohio Sept. 3, 2008). James eventually abandoned his appeal of that decision. *See* Order, *James v. Brigano*, No. 08-4081 (6th Cir. Dec. 8, 2008) (granting motion to voluntarily dismiss appeal). Thus, to the extent that James contests the district court's ability to clarify or modify its 2005 conditional writ, *see* James Br. 16-17, the time for doing so has passed. (In fact, if James is serious about that argument, it only hurts him. The 2005 conditional writ required only *release* from prison, whereas the July 2008 Order conditionally barred retrial.)

Instead, the July 2008 Order imposed a specific deadline for the State to retry James, if it were to retry him at all, seemingly relying on the district court's authority under 28 U.S.C. § 2243 to "dispose of [habeas matters] as law and justice require." *See James*, 2008 WL 2949411 at *1, *3. When the state court dismissed the indictment on James's apparently unopposed

motion, it merely relied on the terms of the July 2008 Order. *See* T. Ct. R. 14, Ex. B (dismissing the indictment "[b]ecause there is no pending appeal and the State did not retry the Defendant within the *federally mandated* time").

Second, even if the July 2008 Order had tried to impose a Speedy Trial Act limit, it was up to the state trial court to decide whether a violation occurred. *See Eddleman*, 586 F.3d at 413 (finding that a "district court acted out of turn" when it barred reprosecution of a habeas petitioner because it "effectively . . . adjudicate[d] a speedy-trial claim that had never been presented to, much less ruled upon by, the Michigan state courts"). As the State noted in the habeas case, *see* James Br. 15, if James wanted speedy-trial relief, he should have sought recourse in the state court—not the federal court. Moreover, requiring the State to comply with Ohio's Speedy Trial Act would have been meaningless, because this Court has held that the Act does not apply to retrials. *See* State Br. 22.

Finally, the State is not estopped from asserting that the Ohio Speedy Trial Act did not apply to (and thus bar) James's retrial. *See* James Br. 17. This argument is meritless because the district court clarified on remand that the reference to the Speedy Trial Act in the 2005 writ did *not* bar retrial. *James*, 2008 WL 4185969 at *1-2. Thus, to the extent any argument about the Speedy Trial Act is precluded, it is James's.

In any event, the argument has long been forfeited. "It is 'well-established' that a party can 'waive waiver' implicitly by failing to assert it." *Norwood v. Vance*, 591 F.3d 1062, 1068 (9th Cir. 2009) (citation omitted). As James notes, the district court proceedings "both before and after the remand" involved disputes about the application of the Speedy Trial Act, with the State claiming, as it does now, "that [the Act] does not apply to retrials and that only the Ohio courts could decide when a reasonable time had expired to bar retrial." *See* James Br. 15. James

did not assert then that the State was barred from arguing about the application of the Act because it had not appealed that issue to the Sixth Circuit, thus forfeiting his waiver argument.

c. The Court need not add words to the statute to recognize that an "error in procedure" must be one that injures a claimant.

The State's opening brief drew on the text to explain that "an 'error in procedure' is an error that is against a prisoner's interest," and looked to court opinions implicitly recognizing that it is the remedy to the error—not the error itself—that results in the prisoner's release. *See* State Br. 11, 15. In response, James attempts to show that an option that benefited him nevertheless made him a "wrongfully imprisoned individual." *See* James Br. 23-24. That is wrong. When the State, in its discretion, "chooses to do nothing despite being given a time limit by a federal court to retry," *see* T. Ct. R. 22 at 9, n.1, the defendant who walks away suffers no "error" as that term is legally understood. James contends that this view is inconsistent with *Mansaray*, but that is mistaken.

The State's point does not contradict *Mansaray* and does not require the Court to go outside the text. In *Mansaray*, the Court agreed that the "error in procedure" must occur post-sentencing because the statute expressly requires it; unlike the "Actual Innocence" prong, the Error in Procedure prong does not turn on the timing of "a judicial determination that an error in procedure occurred." 2014-Ohio-750 ¶ 9 (internal quotation marks omitted). By urging a commonsense understanding of the word "error," the State does not violate *Mansaray*'s principles, because this understanding is already part of that term's legal meaning. In appellate procedure, for example, "[a]ppeals are not allowed for the purpose of settling abstract questions, but only to correct errors *injuriously* affecting the appellant." *Ohio Contract Carriers Ass'n v. Pub. Utils. Comm'n*, 140 Ohio St. 160, syl. (1942) (emphasis added). But an appellant does not make assignments of "injurious error" on appeal; the "injurious" requirement is baked in. Thus,

a post-sentencing error in procedure still "result[s] in" a claimant's "release"; the State's analysis of that term merely recognizes that the error's corresponding remedy accomplishes this.

d. James's theory wrongly divorces the "error in procedure" requirement from the statute's text and purpose.

Even if the Court finds some type of speedy-trial error in 2008, this occurred *after* James was released from prison and has nothing to do with the 1998 trial error that invalidated his convictions and sentence. James argues that a person may be wrongfully imprisoned under (A)(5)'s Error in Procedure prong even if the purported "error in procedure" did not cause the person's imprisonment to be wrongful. *See* James Br. 18-19 (arguing that nothing in "the text of the statute . . . requires that the 'error in procedure' be the direct or actual cause of the wrongful imprisonment"). But that is exactly what the statute's text requires—whether looking at the terms of (A)(5) itself or at the complete definition of "wrongfully imprisoned individual." James's own Proposition of Law acknowledges this weakness, conceding that his purported error is only "sufficiently connected to the harm which R.C. 2743.48 is designed to remedy." *See id.* at 18. A lack of retrial does not convert a defendant into a "wrongfully imprisoned individual" where the defendant would not otherwise qualify as one.

First, start with the text. The "error in procedure" must have "*resulted in* the individual's release." R.C. 2743.48(A)(5). The word "result," means "[t]o come about as a consequence," or "[t]o end in a particular way." *American Heritage Dictionary of the English Language* 1487 (4th ed. 2000). Thus, the "error in procedure" must "end in" the prisoner's "release." The concepts of "error" and "release" are linked.

Second, the statute's structure confirms that the error in (A)(5) is linked to the concepts in (A)(4). Subsection (A)(5) should be considered with regard to its role in defining a "wrongfully imprisoned individual." *See Boley v. Goodyear Tire & Rubber Co.*, 125 Ohio St. 3d 510, 2010-

Ohio-2550 ¶¶ 21-22 ("When the statute is read in its entirety, the legislative intent . . . is apparent."). R.C. 2743.48(A) defines the term "wrongfully imprisoned individual" through five elements. Each element acts as a building block to define the person that the General Assembly has decided to compensate for imprisonment it deems "wrongful."

The Error in Procedure prong is not just floating in space, as James's view assumes. It must be considered in light of the other four elements of a "wrongfully imprisoned individual." Subsections (1) through (3) establish that a wrongfully imprisoned individual is someone who was charged with a felony, R.C. 2743.48(A)(1), was convicted of ("but did not plead guilty to") a felony, R.C. 2743.48(A)(2), and was sentenced to prison in a state correctional facility for that conviction, R.C. 2743.48(A)(3). Subsection (4) establishes that the conviction was invalidated, and that the claimant was "not engaging in any other criminal conduct arising out of the incident for which [he was] initially charged." *Gover v. State*, 67 Ohio St. 3d 93, 95 (1993). But "[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. Subsection (A)(5), then, answers the question of *why* this person deserves compensation. In some cases, it will be because the person is actually innocent of the offense. R.C. 2743.48(A)(5). In others, it will be because the claimant suffered an "error in procedure" that warrants recompense. *Id*. James's view that such an error needs no "link" to "the reversal of the conviction in (A)(4)," James Br. 19, ignores the keystone role that (A)(5) plays.

Third, James's interpretation undermines the statute's purpose because it would create a back door to actual innocence that is inconsistent with this Court's cases. He argues that his lack of retrial "renders all the years of his imprisonment wrongful," and that the State could have avoided this by successfully retrying him. *Id*. at 18. This is "actual innocence" by another name.

In *Doss*, the Court rejected a wrongful-imprisonment claimant's attempt to show actual innocence by merely relying on the fact of his vacated conviction. 2012-Ohio-5678 ¶ 17. Similarly, James should not be allowed to rely on the fact of his lack of retrial to satisfy (A)(5).

Moreover, James's approach would alter the calculus of prosecutorial discretion in a way that harms defendants and wastes state resources. If the State risks wrongful-imprisonment liability every time it does not retry a defendant whose conviction has been reversed or vacated, the State will retry even where prudential considerations counsel against it. This benefits no one.

2. James cannot satisfy the statute's Error in Procedure prong because the lack of retrial did not "result[] in" his "release" from prison.

James's claim that his lack of retrial makes him a wrongfully imprisoned individual fails for another reason: It did not "result[] in" his "release" *from prison*. *See* State Br. 24-27; R.C. 2743.48(A)(5). James had been out of prison for over a year when the federal court's deadline for retrial arrived. The State's opening brief established that the meaning of the word "release," in ordinary usage and in the context of a statute awarding compensation for wrongful *imprisonment*, is discharge from *confinement*. *See* State Br. 12-14, 15-17, 24-27. "Unless words are otherwise defined or a contrary intent is clearly expressed, [this Court] gives words in a statute their plain and ordinary meaning." *Hughes v. Dep't of Commerce*, 114 Ohio St. 3d 47, 2007-Ohio-2877 ¶ 14. James does not dispute that this is the ordinary meaning of the word "release," but insists that the statute's surrounding text requires the word to assume a less natural meaning. *See* James Br. 19-26. That interpretation would eviscerate the statute's purpose by allowing claimants to recover compensation for harmless "errors" that have nothing to do with their release from prison. His responses are mistaken.

a. James wrongly argues that the State's interpretation renders the phrase "subsequent to imprisonment" superfluous.

The State's interpretation not only gives effect to each word of the statute, it is faithful to the statute's purpose. James and the court below suggest that the statute requires a "release" to happen "subsequent to imprisonment." *See* James Br. 20-22; Decision and Entry, June 11, 2015 ("Recon Op.") (attached at Appx. Ex. 2). Relying on the surplusage canon, James contends that the State's interpretation ignores and renders superfluous the phrase "subsequent to imprisonment." *See* James Br. 21. Not so. His view would unnecessarily torture the statute in order to pair the word "release" with the modifying phrase "subsequent to imprisonment."

This Court interprets statutes "as a whole," instructing that "[n]o part should be treated as superfluous unless that is manifestly required," and that courts "should avoid that construction which renders a provision meaningless or inoperative." *Boley*, 2010-Ohio-2550 ¶ 21. "'[L]ike all other canons, this one must be applied with judgment and discretion, and with careful regard to context.'" *Meinhard v. State*, -- P.3d --, 2016 WL 1165670, at *7 n.5 (Utah Mar. 23, 2016) (quoting A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 176 (2012)).

Giving the word "release" its ordinary meaning does not render the phrase "subsequent to imprisonment" superfluous because that phrase still modifies the Actual Innocence prong of subsection (A)(5). A claimant may satisfy R.C. 2743.48(A)(5) in one of two ways: by proving either that "an error in procedure resulted in the individual's release," or by proving that the claimant was actually innocent of the charged offense. *See Mansaray*, 2014-Ohio-750 ¶ 7. Before 2003, (A)(5) contained only an "actual innocence" requirement, and read as follows: "Subsequent to his sentencing and during or subsequent to his imprisonment, it was determined by a court of common pleas . . . that the offense of which he was found guilty . . . either was not committed by him or was not committed by any person." *See* R.C. 2743.48(A)(5) (2002). In

2003, the General Assembly inserted the Error in Procedure prong between the two clauses. *See* 149 Ohio Laws 3545, 3546 (Appx. Ex. 8.). At all times, the phrase "subsequent to imprisonment" has modified the Actual Innocence prong by allowing recovery when a claimant's innocence is "determined by [a] court" post-sentencing. *See id*. It is not, therefore, rendered purposeless or meaningless. Because the phrase "subsequent to imprisonment" modifies the Actual Innocence prong, the Court is not required to assign the word "release" an unnatural meaning simply to make it fit that phrase.

The Court can and should read the "subsequent to imprisonment" requirement to apply to the Actual Innocence prong but not the Error in Procedure prong. Common sense and ordinary rules of grammar teach that a modifier or word combination may apply to only a portion of a sentence where it does not make sense to apply it to another part of the sentence. *Cf. United States v. Correa*, 740 F.2d 1475, 1480-82 (11th Cir. 1985) (reading a modifying clause as applicable to only one part of the sentence where doing so "best reconciled" legislative intent and legal principles). For example, a federal statute provides that "[a]ny person, livestock company, or transportation corporation engaged in breeding, grazing, driving, or transporting livestock may construct reservoirs upon unoccupied public lands of the United States." 43 U.S.C. § 952. Few would read that sentence to suggest that Congress believes there exists a trucking company that engages in breeding and grazing cattle. Ordinary grammar teaches that the word combinations intended are the ones that make sense.

The introductory clause "[s]ubsequent to sentencing and during or subsequent to imprisonment" modifies the two prongs (error-in-procedure and actual-innocence) that follow. R.C. 2743.48(A)(5). The introductory clause contains two parts: (1) the "subsequent to sentencing" part; and (2) the "during or subsequent to imprisonment" part. "Because the two

conditions are joined by an 'and,' meaning 'in addition to,' both conditions must be met." *Colonial Mortgage Serv. Co. v. Southard*, 56 Ohio St. 2d 347, 349 (1978). With respect to the first part, then, (A)(5)'s qualifying event must always occur "subsequent to sentencing."

With respect to the second part ("during or subsequent to imprisonment"), "[t]he legislature's use of the word 'or,' a disjunctive term, signifies the presence of alternatives." *See In re Estate of Centorbi*, 129 Ohio St. 3d 78, 2011-Ohio-2267 ¶ 18. It is sensible to read the statute as providing that a judicial determination of innocence may occur either "during or subsequent to" a prisoner's sentence. It is also a sensible reading of the statute that an "error in procedure" that causes a petitioner's "release" may occur "during . . . imprisonment." It is not, however, sensible to suggest that a prisoner may be released from prison "subsequent to imprisonment." Instead of twisting the statute's words at the expense of its purpose to make this combination work, the Court should instead recognize that "subsequent to imprisonment" modifies the Actual Innocence prong, but simply does not apply to the Error in Procedure prong.

b. James's reliance on other statutory canons is misplaced.

If James's textual arguments seem superficially interesting on a micro level, they fall apart when the statute is examined as a whole. He asserts that the State's interpretation violates the presumption that different words used in proximity mean different things. *See* James Br. 25-26. He also restates the Second District's application of the *in pari materia* canon, without offering any response to the State's point that doing so swallows a part of subsection (A)(4). *See id*. at 22-23. Ultimately, these textual arguments cannot overcome the plain meaning of the word "release" in both normal usage and in the overall context of the statute.

Presumption of consistent usage. James argues that the wrongful-imprisonment statute's use of the phrase "discharge from confinement" in another provision suggests that the General Assembly intended the word "release" in subsection (A)(5) to mean something different. *See id*.

at 25-26 (discussing R.C. 2743.48(E)(2)(a)). But the presumption on which he relies "readily yields to context." *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441 (2014) (internal quotation marks omitted). Because legislatures "'sometimes use[] slightly different language to convey the same message,' . . . [courts] must be careful not to place too much emphasis on the marginal semantic divergence between . . . terms." *DePierre v. United States*, 564 U.S. 70, 83 (2011). Here, the phrase "discharge from confinement" was part of the wrongful-imprisonment statute's compensation provisions when it was originally passed in 1986. *See* 141 Ohio Laws 5351, 5354. Nearly 20 years later, when amending a different part of the statute, the General Assembly used a synonym that succinctly conveys the same meaning. *See* State Br. 12; *Black's Law Dictionary* 1316 (8th ed. 2004) (defining "release" as "[t]he action of freeing or the fact of being freed from restraint or confinement"). Such a "slight inconsistency in nomenclature is insufficient reason to adopt [James's] interpretation." *DePierre*, 564 U.S. at 83.

In pari materia. James repeats the Second District's conclusion that the *in pari materia* canon supports his interpretation of the word "release," *see* James Br. 22-23, but musters no response to the State's argument, *see* State Br. 25, that this use of the canon was incorrect. The State's opening brief showed that defining "release" to mean "release from all charges" would render the Error in Procedure prong of (A)(5) superfluous of (A)(4), which also requires a claimant to show that "no criminal proceeding is pending." *See id.*; R.C. 2743.48(A)(4). Thus, it is James's reading that creates surplusage problems, but his brief is silent on this point. The better interpretation "reveal[s] the General Assembly's intent" by reading the provisions of R.C. 2743.48(A) "in their entirety." *See Boley*, 2010-Ohio-2550 ¶¶ 24-25.

c. The State's interpretation does not create unjust results.

This Court has recognized that the wrongful-imprisonment statute has limited application. *Doss*, 2012-Ohio-5678 ¶ 22. James argues that the State's interpretation creates

unjust results, in that some prisoners might complete their sentences (and thus be released from prison) before prevailing on an "error in procedure" issue. *See* James Br. 24-25. But "[n]ot every person who is released from prison because of a successful appeal is entitled to compensation." *Doss*, 2012-Ohio-5678 ¶ 22. After all, before 2003, the statute covered only those who could prove their actual innocence. *See, e.g.*, 141 Ohio Laws 5354. Even today, a person who pleads guilty to the charged offense is not eligible to recover under the statute, even if the guilty plea is later vacated on appeal. *See Dunbar v. State*, 136 Ohio St. 3d 181, 2013-Ohio-2163, syl. Similarly, it appears that a person who is pardoned would not satisfy subsection (A)(4), which requires the conviction to be "vacated, dismissed, or reversed on appeal." *Cf. id*. ¶ 19 (noting that "exceptions for individuals whose guilty pleas have been vacated" are explicit in certain statutes, but that no such exception "appears in the wrongful-imprisonment statute"). And most whose murder convictions are overturned are unable to recover, as the lack of a statute of limitations on murder means they cannot overcome subsection (A)(4). *C.K. v. State*, -- Ohio St. 3d. --, 2015-Ohio-3421. James's complaint should be heard in the General Assembly, not in this Court. *See id*. ¶¶ 27-28 (Lanzinger, J., concurring).

James also argues that the State's interpretation makes it impossible for a person to be declared wrongfully imprisoned if a procedural error occurs after imprisonment. *See* James Br. 25. Because the State has shown that the phrase "subsequent to imprisonment" should be read to modify only the Actual Innocence prong of subsection (A)(5), this argument lacks merit.

B. James's alternative argument, that he was granted habeas relief due to an error other than the waiver-of-counsel error, was correctly rejected by the court below.

James's long-form explanation of what really happened in post-conviction proceedings cannot overcome the straightforward fact that the federal courts granted him habeas relief due to a trial error. After *Mansaray* rendered meritless James's original theory, he now argues that a

different error (or errors) did the trick. *See* James Br. 27-35. Acknowledging that "it is correct" that the trial error "caused [his] release from prison," he suggests that this is just "a very shorthand and abbreviated way of describing the circumstances." *Id*. at 4. He says that several events were stepping-stone "errors" on his way to release from prison, and specifically contends that the Sixth Circuit granted habeas relief because, while he was imprisoned, an appellate court improperly denied his application to re-open his direct criminal appeal, which was filed pursuant to Rule 26(B) of the Rules of Appellate Procedure. *See id*. at 28. This is backwards—the Sixth Circuit was able to rule on the merits of the *trial* error because it was preserved in the 26(B) petition—and the Second District correctly rejected this argument as factually incorrect. *See* Remand Op. ¶ 5; *see also* State Br. 27-29. James's argument is legally meritless, too. At day's end, only one error secured his writ, and that was a trial error that is ineligible under *Mansaray*.

1. The Sixth Circuit granted habeas relief based on one error: the trial court's failure to ensure that James's waiver of counsel was knowing and voluntary.

The opinion granting James habeas relief is plain about the grounds on which it affirmed the writ. James's argument conflates the Sixth Circuit's merits review with the procedural-default analysis that is required *before* a federal court may reach the merits of a habeas claim. For the following reasons, the Court should reject his contention that appellate errors "led more proximately to his release from confinement." James Br. 4.

First, the plain terms of the Sixth Circuit's opinion show that it granted relief based on a *trial* error, not an appellate error. *See* State Br. 27-29. The court "affirm[ed] the district court's grant of habeas relief on James's claim that he did not knowingly and intelligently waive counsel." *James v. Brigano*, 470 F.3d 636, 644 (6th Cir. 2006). The Sixth Circuit did not even consider an ineffective-assistance claim, much less rule on one.

Second, the Sixth Circuit did not determine the merits of an ineffective-assistance claim that was not actually presented for review. As the State's opening brief showed, the Rule 26(B) opinion was relevant to show that James's *trial-error* claim had not been defaulted, and because that was the only state court opinion to address the merits of his *trial* claim. *See* State Br. 28-29. The only reason the Sixth Circuit reached the trial claim was because it determined that the 26(B) court did *not* actually rule on ineffective-assistance grounds: The 26(B) court did "not frame its rejection of James's underlying [trial] claims as a failure to find prejudice," as would be required for ineffective-assistance, "but instead reject[ed] those claims on their merits." *James*, 470 F.3d at 641. James cites the federal opinions' references to the 26(B) opinion as proof to the contrary, James Br. 30, but these references concern James's trial claim, not appellate errors.

2. Even if the federal court had relied on James's purported appellate error(s), it would not qualify as an "error in procedure" under the statute.

Even taking James's factual arguments as correct, his theory would not satisfy the wrongful-imprisonment statute because the denial of James's Rule 26(B) appeal not an "error in procedure" that "resulted in" his "release."

The denial of the Rule 26(B) petition did not "result[] in" James's "release." As explained above, the statute's text and overall structure require the alleged error to be the thing that caused the claimant's release from prison. *See* above at 9-11. Thus, an error not actually relied on by a reviewing court cannot cause a claimant's release. Although it is impossible to say what might have been, a finding of ineffective assistance of appellate counsel likely would not have led to James's release from prison.

Allegations of ineffective assistance on appeal are gateway errors that generally afford petitioners only the opportunity to pursue an underlying trial error; they do not, by themselves, generally result in release from prison. Indeed, release from prison is not a remedy afforded by

Rule 26(B) itself. *See* App. R. 26(B)(5)-(6). Similarly, in federal habeas review, "the appropriate remedy" for ineffective assistance of appellate counsel generally will be "an opportunity to pursue [the petitioner's] direct appeal with effective assistance of counsel." *Mapes v. Tate*, 388 F.3d 187, 195 (6th Cir. 2004); *United States v. Morrison*, 449 U.S. 361, 364 (1981) (remedies for Sixth Amendment violations "should be tailored to the injury suffered from the constitutional violation"). Thus, even if James had shown ineffective assistance of appellate counsel, it likely would only have gotten him back to his trial error, and his trial error cannot satisfy subsection (A)(5) under *Mansaray*.

James's theory would be unworkable, and this case shows why. The Sixth Circuit granted relief based on a trial error, and the record shows that James was released from prison thereafter, *see James*, 2008 WL 2949411 at *3, and that his indictment was dismissed when he was not retried, *see* T. Ct. R. 14, Ex. B. What if the federal courts had relied on ineffective assistance of appellate counsel instead? James's theory would turn wrongful-imprisonment suits into extensions of habeas proceedings—ones where guesswork, and not the record, rules the day.

C. The Court of Appeals properly considered arguments concerning the application of *Mansaray* pursuant to this Court's summary reversal and remand order.

James claims that, by applying *Mansaray* on remand, the Second District strayed from this Court's remand order, which reversed the Second District's first opinion and "remanded for application of *Mansaray*." *See James v. State*, 139 Ohio St. 3d 1401, 2014-Ohio-2245; James Br. 35-37. James argues that the State waived arguments relating to the timing of his "error in procedure," *see* James Br. 35-37, but this Court should reject that argument for several reasons.

First, the Court has already implicitly rejected James's argument. *Mansaray* was decided after the State had filed its memorandum seeking jurisdiction in its first appeal from the Second District, but before James had filed his response. *See* State Br. 6. In opposing jurisdiction,

James urged the Court to "decline to accept jurisdiction and reverse based upon *Mansaray*" for the same reasons he now cites. *See James v. State*, No. 2014-0318, James Mem. Resp. to Jur. 6. Despite James's argument, the Court nevertheless reversed the decision and ordered the Second District to apply *Mansaray*. *See James*, 2014-Ohio-2245. Two years ago, then, this Court determined that James's case should be resolved according to *Mansaray*.

Second, the Second District properly followed this Court's remand order. That order was not to consider whether *Mansaray* applied, it was "for application of *Mansaray*." *See id*. James cites cases reciting the general rule that "'[o]rdinarily, reviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed.'" *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St. 3d 78, 81 (1997) (per curiam) (citation omitted). But none of those cases dealt with a scenario in which the Supreme Court *itself* ordered the appellate court to apply an intervening and dispositive decision. It would be unreasonable to ask the lower court to proceed without the benefit of briefing and argument about how *Mansaray* applied to the facts of James's case, or with the State's hands tied behind its back. In any event, both parties had the same opportunity to present arguments, the court below considered and ruled on those arguments, and this Court is now presented with that decision for review.

CONCLUSION

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

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief of Appellant State of Ohio was served by U.S. mail this 20th day of May, 2015, upon the following counsel:

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