

IN THE SUPREME COURT OF OHIO

C.K.,	:	Case No. 2014-0735
	:	
Plaintiff-Appellee,	:	On Appeal from the
	:	Cuyahoga County
v.	:	Court of Appeals,
	:	Eighth Appellate District
STATE OF OHIO,	:	
	:	Court of Appeals
Defendant-Appellant.	:	Case No. 100193
	:	

MERIT BRIEF OF STATE OF OHIO

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INTRODUCTION

In 2010, a Cuyahoga County jury convicted Appellee C.K. for murdering Andre Coleman in C.K.'s own home. *C.K. v. State*, 8th Dist. Cuyahoga No. 100193, 2014-Ohio-1243, ¶ 3 (“Ap. Op.”). On appeal in August 2010, the Eighth District reversed C.K.’s conviction on the grounds that C.K.’s conviction was against the manifest weight of the evidence and remanded C.K.’s case for a new trial. On remand, the Cuyahoga County Prosecutor’s office elected to dismiss C.K.’s criminal case, without prejudice to re-filing. *Id.* In June 2012, C.K. filed a wrongful imprisonment action under R.C. 2743.48(A). *Ap. Op.* at ¶ 15. In July 2013, the trial court granted the State’s motion for summary judgment and denied C.K.’s motion for summary judgment. C.K. appealed the trial court’s decision to the Eighth District. On March 27, 2014, the Eighth District reversed the trial court’s decision on the grounds that trial court’s application of R.C. 2743.48(A) was “too narrow.” *Ap. Op.* at ¶ 25. Specifically, the Eighth District found that the trial court erred in dismissing C.K.’s motion for summary judgment because the State failed to produce evidence that future criminal proceedings were “factually supportable.” *Ap. Op.* at ¶ 30. This Court accepted the State’s discretionary appeal.

STATEMENT OF FACTS

C.K. executed a man in his house and was accordingly convicted of murder. *State v. [C.K.]*, 195 Ohio App.3d 343, 959 N.E.2d 1097 (8th Dist. 2011). (hereinafter “*State v. C.K.*”) It is undisputed that on or about September 20, 2009, C.K. purposely shot and killed the decedent, Andre Coleman. According to the testimony contained within the criminal trial transcript, Valerie McNaughton (the eyewitness to the crime and girlfriend of the decedent, Andre Coleman) left the C.K.’s home located at 19101 Cherokee Avenue, Cleveland, Ohio (where she allegedly resided as a tenant) between 4:30 A.M. and 5:00 A.M. with the decedent and two other individuals, a male and a female. After leaving C.K.’s residence the four people obtained money

and purchased crack cocaine before heading to the American Hotel. At some point in time, McNaughten, the decedent and the male individual left the hotel to obtain more crack. After the second round of crack was smoked, at approximately 8:00 A.M., McNaughten was ready to return to the Cherokee address. According to McNaughten, she pretended to know where to obtain more crack, as she believed the other male and the decedent did not want to stop partying. *State v. C.K.* at ¶ 6.

McNaughten convinced the decedent and the male individual to drop her off close to C.K.'s home on Cherokee and then, once McNaughton got out of the vehicle and away from the two men, she returned to C.K.'s house. *State v. C.K.* at ¶ 7. Realizing McNaughten was not going to return with more crack cocaine, the decedent and male individual went looking for her at the Cherokee address. The decedent began banging on the back door, kicked the bottom panel in and began to crawl through the bottom portion of the door. *State v. C.K.* at ¶ 14. When the decedent realized his ride was leaving, he backed out of the bottom part of the door and left.

After the decedent left, McNaughten went outside and locked herself in the garage. At some uncertain time after that, the decedent returned and confronted C.K. as to the whereabouts of McNaughten. Discovering that McNaughten was not there, the decedent left C.K.'s house and went to look for McNaughten at the neighbor's house. Still unable to locate McNaughten, the decedent returned to C.K.'s house. *State v. C.K.* at ¶ 16. Unable to find McNaughten, decedent was in the process of walking out of C.K.'s house when McNaughten appeared at the doorway. The decedent then turned and followed McNaughten from the kitchen area to the living room, yelling at her to give him money. Once in the living room, the decedent grabbed McNaughten's hair and threw her onto the ground. While the decedent was leaning over McNaughten she saw the decedent raise both his empty hands and heard him utter either, "Carl or Carl wait."

Immediately after observing this, McNaughten heard two shots fired. After hearing the two shots, McNaughten observed the decedent spin around and fall face first onto the ground. McNaughten jumped up and yelled, "Carl, stop" Id. at ¶ 28. McNaughten then witnessed C.K. run over to the decedent (who remained motionless on the ground) and shoot him four more times into the back. Id.

Thereafter a 911 call was placed and the decedent was transported to Huron Hospital where he was pronounced dead at 10:23 A.M. During the Deputy Coroner's examination, Dr. McCollum corroborated McNaughten's testimony that the decedent's left arm was raised at the time he was shot, as the trajectory path of the bullet demonstrated that the left scapula was rotated laterally. In addition, Dr. McCollum determined that gunshot wound number six to the left middle finger and the defect to the right fourth finger were most likely defensive wounds.

This evidence establishes that the decedent, Andre Coleman did not have a gun in his hands when he was shot anteriorly in the chest twice and in the back at minimum, four (4) times. During the course of the criminal investigation, a warrant, based on probable cause, was issued on September 21, 2009 by the Cuyahoga County Court of Common Pleas, authorizing law enforcement to search the premises for evidence of violations of the laws of the State of Ohio as it may relate to R.C. 2903 - *Homicide and Assault*. During the search of C.K.'s premises of 19101 Cherokee, digital images were taken of the interior of C.K.'s bedroom and of evidence in his bedroom that included a crack-pipe and four (4) National City Bank receipts depicting large withdrawals from his bank account in excess of \$10,000.00 between the dates of August 27, 2009 and September 4, 2009. On or about October 13, 2009, C.K. was indicted with one count of murder along with two counts of firearm specifications, in violation of R.C. §§ 2903.02(A); 2941.141(A), and; 2941.145(A) respectively. On August 23, 2010 a duly impaneled jury

returned a verdict of guilty of murder with a 1 year and 3 year firearm specification. On September 23, 2010, C.K. was sentenced to eighteen years to life.

On September 22, 2011, the Eighth District Court of Appeals reversed and remanded C.K.'s criminal case for a new trial, finding that the convictions were against the manifest weight of the evidence, *State v. C.K.*, 195 Ohio App. 3d 343; 2011-Ohio-4814. This Court denied the Cuyahoga County Prosecutor's Office leave to appeal, *State v. [C.K.]*, 131 Oho St. 3d 1439, 2012-Ohio-331, (Feb. 1, 2012). The Cuyahoga County Prosecutor's Office dismissed C.K.'s criminal case, without prejudice, to re-filing/re-indicting given the lack of a statute of limitations under R.C. 2901.13(A)(2). Currently, the criminal case of *State v. C.K.*, Case No CR-09-529206, Cuyahoga County, remains open for re-filing/re-indictment.

To obtain compensation for wrongful imprisonment, a claimant must prove that he meets the criteria outlined in R.C. 2743.48(A). The plain language of (A)(4) makes clear that a "wrongfully imprisoned individual" must prove all of the following requirements: 1) his or her conviction must be vacated, dismissed, or reversed on appeal; 2) a prosecuting attorney cannot or will not seek further appeals either by right or by leave of court; and 3) no criminal proceeding is pending, can be brought, or will be brought for any act associated with the conviction. R.C. 2743.48(A)(4). At issue here is the "no criminal proceeding is pending, can be brought, or will be brought" requirement contained in subparagraph (A)(4). To survive a motion for summary judgment, C.K.'s complaint must allege that, among other things, no criminal proceeding is pending, can be brought, or will be brought and meet the above stated standard by a preponderance of the evidence. *Dunbar v. State*, 136 Ohio St.3d 181, 2013-Ohio-2163, ¶ 11, citing *Doss v. State*, 135 Ohio St.3d 211, 2012-Ohio-5678 at paragraph one of the syllabus.

In August, 2010, C.K. was convicted of murder. “[He] admitted shooting Andre Coleman in self-defense.” *State v. [C.K.]*, 195 Ohio App.3d 343 at ¶ 2. The jury weighed the evidence, but still convicted him. A year later, the Eighth District reversed C.K.’s conviction on grounds that the conviction was against the manifest weight of the evidence and “reluctantly remanded the case for a new trial.” *State v. [C.K.]*, 195 Ohio App.3d 343 at ¶ 13. The State appealed the Eighth District’s reversal to this Court. After this Court denied review, the State elected to dismiss C.K.’s criminal case, without prejudice to re-filing.

**STATEMENT OF THE CASE: C.K. FILES A SUBSEQUENT
CIVIL CASE FOR WRONGFUL IMPRISONMENT**

On June 1, 2012, C.K. commenced a wrongful imprisonment action pursuant to R.C. 2743.48. In February 2013, both parties filed simultaneous motions for summary judgment and an oral hearing was conducted. After a thorough review, the trial court granted the State’s motion for summary judgment and denied C.K.’s motion for summary judgment. *Id.* at ¶ 15. The trial court correctly held that R.C. 2743.48(A)(4) may only be satisfied if the claimant proves, by a preponderance of the evidence, that “no criminal proceeding is pending, can be brought or will be brought by any prosecuting attorney...for any act associated with that conviction.” Accordingly, the trial court determined that C.K. failed to satisfy R.C. 2743.48(A)(4) because, “there was no statute of limitations for a charge of murder and it is therefore, within the State’s right to retry [C.K.] at any time.” *Tr. Ct. Op.*, Appx. 28. Furthermore, the trial court reasoned that the state reserved the opportunity to re-indict and retry C.K. by electing to dismiss C.K.’s criminal case without prejudice. *Id.* The trial court determined that C.K. was ineligible to recover from the wrongful imprisonment statute as a matter of law because the Cuyahoga County Prosecutor possessed the ability to bring another criminal proceeding against the C.K.

C.K. appealed, once again, to the Eighth District Court of Appeals. Not only did the Eighth District reverse the trial court's decision, it concluded that the "no criminal proceeding can...be brought" inquiry of R.C. 2743.48(A)(4) "contemplates not just whether another criminal proceeding associated with the prior conviction is legally permissible, but also whether such a criminal proceeding is *factually supportable*." See Ap. Op. at ¶ 28 (emphasis in original). The State of Ohio appealed to this Court to address the Eighth District's departure from the statutory text of R.C. 2743.48(A)(4). This Court accepted the State's discretionary appeal, to which the State now files this merit brief.

LAW AND ARGUMENT

The State of Ohio's Proposition of Law No. I: A claimant whose criminal case remains open, under investigation, and in which the state is capable of bringing charges against the claimant, is unable to satisfy the R.C. 2743.48(A)(4) requirement of a civil proceeding for wrongful imprisonment.

The current version of R.C. 2743.48 reads as follows:

(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) 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.

(Emphasis added, HB 59, § 101. 01, eff 9/29/2013).¹

The Eighth District reasoned that the trial court erred when the it interpreted the language of R.C. 2743.48(A)(4) to mean that the “mere possibility” of future prosecution precluded a claimant from recovering in a wrongful imprisonment action. See Ap. Op. at ¶ 25. Finding the trial court’s interpretation “too narrow,” the Eighth District determined that, “[t]he use of the phrase ‘no criminal proceedings can or will be brought’ was clearly intended by the Generally Assembly to bar recovery to a claimant against whom *criminal proceedings are still factually supportable and legally permissible* following reversal.” See Ap. Op. at ¶ 28 (emphasis in original). By adopting this interpretation, the Eighth District ignored the plain meaning of R.C. 2743.48(A)(4) and the judgment of the Eighth District should be reversed.

A. The General Assembly has created a comprehensive framework providing compensation for wrongful imprisonment.

In 1986, the General Assembly enacted R.C. 2743.48, creating a cause of action against the State for wrongful imprisonment. This statutory scheme “replac[ed] the former practice of compensating wrongfully imprisoned persons by *ad hoc* moral claims legislation.” *Walden v. State*, 47 OhioSt. 3d 47, 49 (1989). Each such claim is a two-step process. First, the claimant

¹ R.C. 2743.48(A)(4)’s version in effect when C.K. commenced his case is slightly different than the current version. It provided, “(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.” 128th General Assembly File No.52, HB 338, §1, eff. 9/17/2010. The bolded words found in this prior version were replaced with a comma in 2012. 2012 H 487, eff. 9/10/12.

must obtain a declaration from a common pleas court that he is a wrongfully imprisoned person as that term is defined in R.C. 2743.48(A). Second, upon securing this declaration, the claimant may file a civil action in the Court of Claims to recover damages. *Griffith v. City of Cleveland*, 120 Ohio St. 3d 35, 2010-Ohio-4905 ¶ 30; *see also Walden*, 47 Ohio St. 3d at 49-50. Intended to address “a narrow legal problem by providing compensation to innocent persons who have been wrongfully convicted and incarcerated for a felony, *** [t]he enactment of R.C. 2743.48 was necessary to authorize compensation because the state, even after the waiver of sovereign immunity in R.C. 2743.01, remained generally immune from lawsuits by persons who were wrongfully convicted and incarcerated.” *Bennett v. Ohio Dept. of Rehab. and Corr.*, 60 Ohio St.3d 107, 110 (1991).

To that end, R.C. 2743.48(A), as originally enacted in 1986 in Sub. H.B. 609, provided as follows:

(A) As used in this section, a “wrongfully imprisoned individual” means an individual who satisfies each of the following:

- (1) He was charged with a violation of a section of the Revised Code by an indictment or information prior to, or on or after, the effective date of this section, and the violation charged was an aggravated felony or felony.
- (2) He was found guilty of the particular charge or a lesser-included offense by the court or jury involved, and the offense of which he was found guilty was an aggravated felony or felony.
- (3) He was sentenced to an indefinite or definite term of imprisonment in a state penal or reformatory institution for the offense of which he was found guilty.
- (4) 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, including all lesser-included offenses, either was not committed by him or was not committed by any person.

141 Ohio Laws, Part III, 5351, 5351-52.

Reviewing that law as originally enacted, the Ohio Supreme Court explained that the General Assembly intended to require proof that the claimant was innocent so that the court of common pleas could “actively separate those who were wrongfully imprisoned from those who have merely avoided criminal liability.” *Walden v. State, supra*, 47 Ohio St.3d at 52. Indeed, even “a previous finding of *not guilty* is not sufficient to establish *innocence*. The petitioner seeking to establish a claim for wrongful imprisonment must produce more evidence than a judgment of acquittal, which is merely a judicial finding that the state did not prove its case beyond a reasonable doubt.” *Ellis v. State*, 64 Ohio St.3d 391, 393 (1992); *State ex rel. Tubbs Jones v. Suster*, 84 Ohio St.3d 70, 72 (1998) (emphasis sic.). Additionally, this Court held in *Gover v. State*, 67 Ohio St.3d 93 (1993), that a claimant seeking compensation for wrongful imprisonment must prove that at the time of the incident for which he was initially charged, he was not engaging in any other criminal conduct arising out of that incident. *Id.* at syllabus.

In 1989, R.C. 2743.48(A) was amended by Am. H.B. 623 which, following its adoption, provided as follows:

(A) As used in this section, a “wrongfully imprisoned individual” means an individual who satisfies each of the following:

(1) He 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.

(2) He 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 was found guilty was an aggravated felony or felony.

(3) He was sentenced to an indefinite or definite term of imprisonment in a state penal or reformatory institution for the offense of which he 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, it was determined by a court of common pleas that the offense of which he was found guilty, including all lesser-included offenses, either was not committed by him or was not committed by any person.

142 Ohio Laws 4675, 4675-76 (emphasis added to reflect statutory amendments).

The enactment of this additional, bolded, statutory language contained in 1989 required any individual seeking to be declared wrongfully imprisoned to prove, by a preponderance of the evidence that, “no criminal proceeding is pending, *can be brought*, or will be brought by any prosecuting attorney...for any act associated with that conviction.” *Id.* (emphasis added). Since the addition of R.C. 2743.48(A)(4) in 1989, various parts of R.C. 2743.48(A) have been altered, but subsection (A)(4) has remained essentially untouched. For instance, the General Assembly amended R.C.2743.48(A) in 1994 through Am. Sub. H.B. 571. However, those 1994 modifications only substituted the word “correctional” in place of the former expression, “penal or reformatory” in subsection (3). 145 Ohio Laws, Part IV, 6342, 6389. The language in subsection (4) was not altered. In 2003, Substitute Senate Bill 149 amended R.C. 2743.48(A) to modify subsection (A)(5). Again, the language of R.C. 2743.48(A)(4) remained untouched. 149 Ohio Laws, Part II, 3545, 3545-46. Despite several opportunities to do so, the General Assembly left the language of R.C. 2743.48(A)(4)² substantively unchanged since its enactment in 1989.

With that historic background as to the law in question, it is appropriate now to explore more fully the issue presented in the proceedings below.

² All uncategorized references to any subsection of R.C. 2743.48 in this brief refer to 128th General Assembly File No.52, HB 338, §1, eff. 9/17/2010, which was in effect the day C.K. filed his Complaint seeking to be declared a wrongfully imprisoned person on June 1, 2012.

B. The Eighth District's interpretation of R.C. 2743.48(A)(4) departed from a plain reading of the statutory language.

In the proceedings below, the Eighth District improperly constructed R.C. 2743.48(A)(4) without ever declaring it ambiguous. Its review of the trial court's decision, the Eighth District determined that the trial court's application of R.C. 2743.48(A)(4) was "too narrow." See Ap. Op. at ¶ 25. Accordingly, the Eighth District determined that the trial court erred because the State failed to show that criminal proceedings against C.K. were "factually supportable." By reversing the trial court's correct interpretation of R.C. 2743.48(A)(4), the Eighth District effectively disregarded the plain language of the statute. For this reason, the State respectfully urges this Court reverse the Eighth District's decision.

1. A plain reading of R.C. 2743.48(A)(4) fails to show ambiguity in the text of the wrongful imprisonment statute.

Reviewing the text of R.C. 2743.48(A)(4) again as it is written, it states that "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.*" R.C. 2743.48(A)(4) (emphasis added). Contrary to the Eighth District's decision, even if an individual is granted a new trial after his murder conviction was vacated, that individual would still be ineligible for wrongful conviction compensation if a new criminal proceeding "can be brought" by the State. In the instant case, a plain reading of R.C. 2743.48(A)(4) clearly shows that C.K. is not an eligible claimant for wrongful imprisonment compensation as a matter of law.

2. "Can," as used in R.C. 2743.48(A)(4), is used to indicate "possession of a specified power, right or privilege" or "possibility or probability."

Pursuant to R.C. 1.42, addressing rules of statutory construction, "words and phrases shall be read in context and construed according to the rules of grammar and common usage."

R.C. 1.42. The word “can” is defined in the Oxford American Dictionary as to “be able to” or to “have the opportunity or possibility to.” “Can”, *Oxford Dictionaries*, Oxford University Press, http://www.oxforddictionaries.com/us/definition/american_english/can (accessed October 3, 2014). The word “can” is commonly used to indicate “possession of a specified power, right or privilege” or to indicate “possibility or probability.” “Can”, *The Free Dictionary*, <http://www.thefreedictionary.com/can> (accessed October 3, 2014). If the State is “able to” or “has the opportunity or possibility to” to bring a criminal proceeding against an individual, the State “can” bring a criminal proceeding against that individual. Black’s Law Dictionary 9th Ed., 2009, defines the word as follows:

- Can:**
1. To be able to do something (you can lift 500 pounds).
 2. To have permission (as often interpreted by courts); MAY (no appeal can be filed until the filing fee is paid).

The Eighth District disregarded the common usage of the word “can” for its own extreme interpretation, and without declaring R.C. 2743.48(A)(4) ambiguous. In R.C. 2743.48(A)(4), the word “can” is used in the phrase, “no criminal proceeding...*can* be brought” to describe the requirements an individual must meet in order to qualify as a wrongfully imprisoned individual. Applying the plain meaning of “can” to the statutory language, it is clear that if the State is able to, or has the opportunity to, bring criminal proceedings against the claimant, he is not eligible for compensation. A claimant must show that the state is “*not* able to” or “does *not* have the permission” to bring criminal proceedings against him in order to satisfy the “no criminal proceeding...can be brought” requirement. Accordingly, in order to satisfy R.C. 2743.48(A)(4), an individual must show that the State is *not* “able” to bring criminal proceedings against the claimant.

3. When a statute is clear and definite, a reviewing court must apply the statute according to its terms.

It is well established that, if the meaning of the statute is unambiguous and definite, courts must apply the statute as written. *State ex rel. Savarese v. Buckeye Local School Dist. Bd. Of Ed.*, 74 Ohio St. 3d 543, 545 (1996). In considering the statutory language, it is the duty of the court to give effect to the words used in a statute, not to delete words used or to insert words not used. See *Baily v. Republic Engineered Steels, Inc.*, 91 Ohio St. 3d 38, 40 (2001); *Cleveland Elec. Illum. Co. v. Cleveland*, 37 Ohio St. 3d 50 (1988). Settled Ohio law establishes that when the terms of a statute “convey a clear, unequivocal, and definite meaning, interpretation comes to an end, and the statute must be applied according to its terms.” *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, 882 N.E.2d 400, ¶ 19. This Court has continuously held that while the primary goal in statutory interpretation is to give effect to the intent of the legislature, the Court must look first to the plain language of the statute. *Christe v. GMS Mgt. Co., Inc.*, 88 Ohio St. 3d 376, 377 (2000); *Provident Bank v. Wood*, 36 Ohio St. 2d 101, 105 (1973). The rules of statutory construction provide additional guidance as to how courts are to interpret statutory language. R.C. 1.42 states that, “[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.” Furthermore, “[t]he preeminent canon of statutory interpretation requires us to presume that [the] legislature says in a statute what it means and means in a statute what it says there.” *Miller v. Miller*, 132 Ohio St.3d 424, 2012-Ohio-2928, ¶48 (Internal quotations omitted). Specifically regarding R.C. 2743.48(A), this Court well established that “we must apply the [wrongful imprisonment] statute as it is written.” *Dunbar v. State*, 136 Ohio St.3d 181, 2013–Ohio-2163, ¶ 17. The Tenth District has repeatedly determined

that, “[t]he plain language of [R.C. 2743.48(A)(4)] contains no qualifications and permits no exceptions.” *Kern v. State*, 10th Dist. No. 12AP-1018, 2014-Ohio-1740, ¶ 11. See also, *LeFever v. State*, 10th Dist. No. 12AP-1034, 2014-Ohio-4606, ¶¶ 26-27. (summary judgment in State’s favor affirmed where “the statute of limitations has not yet run on the charge of attempted aggravated murder and that the existing evidence supports such a charge. Thus, in the context of this case, the State has conclusively demonstrated that appellant cannot prove a critical element of her claim.”). Earlier this year, this Court declined Lefever’s request for discretionary review. *LeFever v. State*, 138 Ohio St.3d 1493, 2014-Ohio- 2021 (Jan. 24, 2014).

4. The Eighth District’s extreme departure from the requirements in R.C. 2743.48(A)(4) impermissibly added words to the statute.

The crux of the Eighth District’s reasoning is two-fold. First, that the trial court erred because its interpretation of R.C. 2743.48(A)(4) rendered subsection (A)(4) meaningless because the “mere possibility of prosecution” could theoretically include improper or untimely charges. Second, the trial court erred because its interpretation of R.C. 2743.48(A)(4) precluded claimants from wrongful conviction compensation by the mere fact that there is no statute of limitations for murder. The Eighth District’s reasoning is that a literal interpretation of the word “can” renders the language in the statute virtually meaningless. See Ap. Op. at ¶ 27. (“Theoretically, the prosecutor *can* always bring a charge, whether in good faith or not, even where the criminal charge may be outside of the statutory time, in violation of a defendant’s speedy trial right, or barred by double jeopardy.”).

Based on this extreme interpretation, the Eighth District determined that the trial court’s plain language application of R.C. 2743.48(A)(4) was “too narrow” and reversed the trial court’s decision. By doing so, the Eighth District effectively disregarded the statutory language of R.C. 2743.48(A)(4). In fact, the Eighth District *added* statutory language to R.C. 2743.48(A)(4). It

reasoned, “[t]he ‘cannot/will not’ inquiry contemplates not just whether another criminal proceeding associated with the prior conviction is legally permissible, but also whether such a criminal proceeding is *factually supportable*.” See Ap. Op. at ¶ 28.

Judicial interpretation of statutory language does not require courts to interpret the language of the statute to such extremes. Rather, as described above, R.C. 1.42 states that, “[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage.” R.C. 1.42. The common usage of “can” means possession of a specified power, right or privilege or the possibility or probability of a certain thing occurring. Given the common usage of the word “can,” the Cuyahoga County Prosecutor can indict C.K. for additional, future, charges associated with this case. Accordingly, the Eighth District’s decision once again constitutes an impermissible re-write of the wrongful imprisonment statute.

Furthermore, courts have a duty to interpret statutory language plainly in the context of the General Assembly’s intent of the statute. If the meaning of the statute is unambiguous and definite, it must be applied as written. *State ex rel. Savarese v. Buckeye Local School Dist. Bd. Of Ed.*, 74 Ohio St. 3d 543, 545 (1996). In considering the statutory language, it is the duty of the court to give effect to the words used in a statute, not to delete words used or to insert words not used. See *Baily v. Republic Engineered Steels, Inc.*, 91 Ohio St. 3d 38, 40 (2001); *Cleveland Elec. Illum. Co. v. Cleveland*, 37 Ohio St. 3d 50 (1988). This Court has continuously held that while the primary goal in statutory interpretation is to give effect to the intent of the legislature, the Court must look first to the plain language of the statute. *Christe v. GMS Mgt. Co., Inc.*, 88 Ohio St. 3d 376, 377 (2000); *Provident Bank v. Wood*, 36 Ohio St. 2d 101, 105 (1973). If the statute conveys a clear, unequivocal, and definite meaning, interpretation comes to an end, and

the statute must be applied according to its terms.” *Columbia Gas Transm. Corp v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, ¶ 19.

Curiously, despite the duty of the court to refrain from inserting words when interpreting a statute, the Eighth District expressly admitted to doing just that. The appeals court added the language “factually supportable” to R.C. 2743.48(A)(4) and departed from the plain language drafted by the General Assembly. This Court routinely rejects this type of judicial interpretation that disregards a statute’s plain language. Furthermore, this Court “previously ha[s] cautioned against ‘judicial legislation’ by adding words to [the Revised Code] and we reiterate that caution again.” *State ex rel. Carna v. Teays Valley Loc. School Dist. Bd. Of Edn.*, 131 Ohio St.3d 478, 2012-Ohio-1484, ¶ 24 (internal citations omitted). There is no plausible reason to read additional words into R.C. 2743.48(A)(4) when a plain reading and common usage of grammar reads the meaning of R.C. 2743.48(A)(4) unambiguous. The Eighth District’s extreme interpretation of the wrongful imprisonment statute’s clear statutory language must be rejected.

By determining “that the ‘cannot/will not’ inquiry contemplates...whether such a criminal proceeding is *factually supportable*” the Eighth District’s ruling below ignored the plain language of R.C. 2743.48(A)(4). Ap. Op. ¶ 30, (italics in original). In doing so, the Eighth District failed to apply R.C. 2743.48(A)(4) by its clear and definite terms. A plain reading of R.C. 2743.48(A)(4) shows that, to be eligible for wrongful imprisonment compensation, a claimant must show that “no criminal proceeding...can be brought” by the State. This requires a claimant to demonstrate that the State is unable to bring a future criminal proceeding, a criminal proceeding is not possible, or the State does not have the specified power to prosecute the claimant. In the instant case, the State dismissed C.K.’s criminal case without prejudice, he admits to killing a man, and remains a suspect in that case. Therefore, the State *can* bring

criminal proceedings against C.K. Thus, C.K. was unable to satisfy R.C. 2743.48(A)(4) as a matter of law.

Furthermore, although the statute of limitations is only six years for most criminal violations, the statute of limitations for murder has no expiration date. R.C. 2901.13. In one of the seminal cases interpreting Ohio's wrongful imprisonment statute, this Court expressly recognized the appropriateness of an unlimited statute of limitations for murder by stating, "[t]he Marilyn Sheppard murder case remains open. *** there is no statute of limitations on murder." *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 79 (1998). Oftentimes, additional evidence comes to light years later which reveals new information impacting a prosecutor's decision to pursue criminal charges previously dismissed without prejudice. *State v. New*, 9th Dist. No. 12CA010305, 2013-Ohio-3193, ¶ 12. (35-year delay in bringing murder prosecution); *State v. Brown*, 12th Dist. No. CA89-09-079 (1990) (two year delay). In the instant case, because there is no statute of limitations for murder and the State reserved the right to prosecute C.K. should new evidence come to light. In reversing the trial court's decision, Eighth District improperly included words in the statute that were not there and ignored the words that were there.

Moreover, a plain reading of R.C. 2743.48(A)(4) clearly shows that the central inquiry is whether the State is capable of bringing charges against a claimant. Regardless of whether the statute of limitations is six years or for unlimited amount of time, analysis of whether an individual satisfies the language of R.C. 2743.48(A)(4) is the same. If the State is capable of bringing charges against the claimant, the claimant is barred from receiving wrongful imprisonment compensation. Accordingly, a straightforward reading of R.C. 2743.48(A)(4) mandates that any individual seeking to be declared wrongfully imprisoned must prove, "no criminal proceeding is pending, can be brought, or will be brought" against them for any action

associated with his conviction. Until C.K. proves he is innocent, C.K. cannot claim he was wrongfully imprisoned because he had may very well been *rightfully* imprisoned if he is later found guilty. Therefore, the Eighth District erred in reversing the trial court's decision and the claimant is ineligible for wrongful imprisonment compensation because the state is not barred from bringing future charges against C.K.

C. Should this Court find R.C. 2743.48(A)(4), is ambiguous, it may construe the statute in accordance with the tools of statutory construction found in R.C. 1.49.

If, however, this Court rejects the trial court's plain reading of 2743.48(A)(4), it is subject to the tools of statutory construction pursuant to R.C. 1.49. R.C. 1.49 provides as follows:

If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

- (A) The object sought to be attained;
- (B) The circumstances under which the statute was enacted;
- (C) The legislative history;
- (D) The common law or former statutory provisions, including laws upon the same or similar subjects;
- (D) The consequences of a particular construction;
- (E) The administrative construction of the statute.

Upon construing the statute, it is evident that the State's and trial court's interpretation of the language of R.C. 2743.48(A)(4) is the one that prevails. To begin, this Court may consider legislative history to determine the General Assembly's intent when a statute is ambiguous.

State v. Jordan, 89 Ohio St. 3d 488, 492 (2000).

- 1. The fact that the General Assembly has chosen not to re-write subsection (A)(4) of the wrongful imprisonment statute further demonstrates that the legislature sees no ambiguity therein and,**

thus, there is no need for the Eighth District to interpret the wrongful imprisonment statute.

Initially, this Court should be very reluctant to declare R.C. 2743.48(A)(4) ambiguous. By not redrafting R.C. 2743.48(A)(4), it is clear that the General Assembly did not find ambiguity in the language of the wrongful imprisonment statute. Had the General Assembly found such ambiguities, it would have modified the language of R.C. 2743.48(A)(4) to clarify its legislative intent. Despite several opportunities to modify or add language to subsection (A)(4), R.C. 2743.48(A)(4) has remained unchanged for 25 years since its enactment in 1989. Thus, it is clear that the General Assembly intends R.C. 2743.48(A)(4) to stand as it is written. As it stands, the statutory language of R.C. 2743.48(A)(4) plainly contemplates that the eligibility of a claimant's for wrongful imprisonment compensation is contingent on the finality of the proceedings against that claimant. A claimant must show that there is finality in the proceedings against him to be eligible for wrongful imprisonment compensation. The language of subsection (A)(4) breaks down this "finality aspect" into three parts: 1) a claimant's conviction must be vacated, dismissed, or reversed on appeal; 2) the prosecuting attorney cannot or will not seek further appeals either by right or by leave of court in the claimant's case; and 3) no criminal proceeding is pending, can be brought, or will be brought for any act associated with the conviction against the claimant.

The legislative intent behind that finality aspect is readily apparent. If an individual was truly innocent, the prosecution has discretion to determine whether that individual is entitled to compensation. The only way to determine whether an individual was wrongfully imprisoned is *after* it is clear that no further proceedings can be brought against him. This finality can manifest as a merit-based finding of innocence, a dismissal with prejudice, or the inability for the prosecution to bring future proceedings due to the statute of limitations. To hold that individuals

can recover without finality in the proceedings against him would enable those individuals whose factual innocence has yet been determined to recover monetary compensation from the public. Simply put, without finality of proceedings, it is impossible to determine whether the claimant was wrongfully imprisoned or *rightfully* imprisoned. Accordingly, the General Assembly wrote (A)(4) to exclude those whom a possible murder indictment can be brought. If later evidence comes to light that proves that C.K. was in fact guilty of murdering Andre Coleman, C.K.'s prior imprisonment cannot be characterized as anything but *rightful* imprisonment. By entitling C.K. to compensation before a merit-based finding of innocence, the Eighth District's reasoning could compel the State to award C.K. for a crime that he committed. The General Assembly did not intend to provide monetary compensation to those individuals who may be factually guilty of the crimes of which they were charged, but the State has yet proven that guilt. Such a finding would be inconsistent with this Court's holding in *Walden v. State*, which required proof of innocence so the common pleas court could "actively separate those who were wrongfully imprisoned from those who have merely avoided criminal liability." *Walden v. State*, 47 Ohio St.3d at 52.

At bottom, C.K.'s complaint seeking to be declared a wrongfully imprisoned individual was fatally flawed under R.C. 2743.48(A)(4) and thus properly dismissed by the trial court. The record here establishes that C.K. cannot qualify for such a declaration under that provision of R.C. 2743.48(A)(4) as a matter of law. "It is presumed that the General Assembly is fully aware of any prior judicial interpretation of an existing statute when enacting an amendment." *Clark v. Scarpelli*, 91 Ohio St.3d 271 (2001). By not re-drafting R.C. 2743.48(A)(4) since its enactment in 1989, this Court should conclude that our legislature meant what it said. Accordingly, the Eighth District's "liberal construction" analysis should be retooled to conform to the statute's

existing language and plain meaning. No construction, liberal or otherwise, can change that “an unambiguous statute means what it says.” *Hakim v. Kosydar*, 49 Ohio St. 2d 161, 164 (1977). Here, by choosing *not* to modify subsection (A)(4) for 25 years, the legislature emphatically maintained that the plain language in (A)(4) means what it says.

2. An alternative reading deletes words from R.C. 2743.48(A)(4).

Moreover, to the extent the Eighth District’s interpretation of R.C 2743.48(A)(4) requires the State to show future criminal proceedings are “factually supportable,” that interpretation would effectively delete, or at least make utterly superfluous, the “no criminal proceeding...can be brought” clause of R.C 2743.48(A)(4). The trial court found that, because C.K.’s criminal case was dismissed without prejudice and there is no statute of limitations for murder, future criminal proceedings *can* be brought against C.K. By reversing the trial court’s decision, the Eighth District effectively deleted the “no criminal proceeding...can be brought” clause from the Ohio Revised Code.

But it is a cardinal rule of statutory interpretation that a court may not interpret a statute in a manner that effectively deletes words from the statute. In *State ex rel. Citizens for Open, Responsive, & Accountable Government v. Register*, 116 Ohio St.3d 88, 2007-Ohio-5542, where the court recognized that a township fiscal officer’s duty under R.C. 507.07 to incorporate the annual township financial statement in the township board minutes and to post copies at polling places arose “only ‘after the township officers have made their annual settlement of accounts,’” this Court refused to read the statute so as “to delete the statutory prerequisite and impose an unconditional duty” on township fiscal officers because that would have required the court to delete words from the statute. *Id.* at ¶¶ 40-42. See also, *In re Foreclosure of Liens for Delinquent Land Taxes v. Parcels of Land Encumbered with Delinquent Tax Liens*, Slip Op. No.

2014-Ohio-3656, ¶ 14 (rejecting appellate court’s interpretation of R.C. 5721.25 that in effect deleted the term “any person” and inserted the phrase, “property owner”); *State ex rel. Asti v. Ohio Dept. of Youth Servs.*, 107 Ohio St.3d 262, 2005-Ohio-6432, ¶ 29 (rejecting appeals court’s interpretation of R.C. 124.11(D) that would in effect delete statutory language that person appointed to unclassified service “shall retain the right to resume the position and status held by the person in the classified service immediately prior to the person’s appointment to the position in the unclassified service”); *State ex rel. Dispatch Printing v. Johnson*, 106 Ohio St.3d 160, 2005-Ohio-4384, ¶ 29 (court could not delete statutory prerequisite that document must be a “record” under R.C. 149.011(G) before it can be subject to release as a public record); *State ex rel. Steele v. Morrissey*, 103 Ohio St.3d 355, 2004-Ohio-4960, ¶ 30 (refusing to interpret R.C. 731.32 so as to delete the word “attesting” from definition of “certified copy”); *Erb v. Erb*, 91 Ohio St.3d 503, 506-507, 2001-Ohio-104, (rejecting appellate court’s interpretation of R.C. 742.47 that in effect deleted the term “person” and inserted the phrase, “member of the fund”).

The trial court’s interpretation of R.C. 2743.48(A)(4) is that an individual whose murder conviction is vacated, subsequently dismissed without prejudice, is ineligible to recover wrongful imprisonment compensation. This interpretation properly accounts for all of the text of R.C. 2743.48(A)(4). The Eighth District’s reversal, however, removes the “no criminal proceeding...can be brought” clause of R.C. 2743.48(A)(4) from the analysis and allows individuals whose innocence has yet been determined to recover monetary compensation.

3. An alternative reading sets up conflicts within the statute.

The Eighth District’s reversal of the trial court’s decision is fundamentally inconsistent with the overall structure of the statutory scheme. In particular, ever since the 1989 amendment to R.C. 2743.48(A) effectuated by Am. H.B. 623, a wrongful imprisonment claimant has had to

prove, among other things, that “no criminal proceedings...can be brought” against him. R.C. 2743.48(A)(4). The mere fact that an individual’s criminal conviction was vacated, whose case was remanded and dismissed without prejudice does not establish that the State can no longer bring criminal proceedings against that individual. On the contrary, a conviction that was vacated, remanded, and dismissed without prejudice establishes the exact opposite proposition to the Eighth District’s findings: that the State *can* bring future criminal proceedings against that individual.

Yet the Eighth District’s interpretation of R.C. 2743.48(A)(4) would effectively relieve a wrongful imprisonment claimant from having to establish a critical element as required by the statute. In establishing separate and discrete elements necessary to be declared a “wrongfully imprisoned individual,” the Ohio General Assembly plainly sought to require claimants to prove not just that their conviction “was vacated or was dismissed, or reversed on appeal” but also that “no criminal proceeding...can be brought” by the State. R.C. 2743.48(A)(4). The mere fact that there is no statute of limitations for the crime of murder does not automatically mean reviewing courts are permitted to depart from the wrongful imprisonment statute’s plain language.

The Eighth District’s holding below effectively reads the “no criminal proceeding...can be brought” requirement out of the definition of a “wrongfully imprisoned individual.” Such a finding is inconsistent with this Court’s prior interpretation of the overarching purpose of the wrongful imprisonment statute to “actively separate those who were wrongfully imprisoned from those who have merely avoided criminal liability.” *Walden v. State*, 47 Ohio St.3d at 52. In reading the “no criminal proceeding...can be brought” clause out of subsection (A)(4), the Eighth District effectively rewrote that subsection of the wrongful imprisonment statute in a way that contradicts the overall purpose of the statute.

The General Assembly presumably enacted R.C. 2743.48(A)(4) to accomplish some purpose. As stated above, the rules of statutory interpretation require that the statute be read as it is written. *State ex rel. Savarese v. Buckeye Local School Dist. Bd. Of Ed.*, 74 Ohio St. 3d 543, 545 (1996). Reading R.C. 2743.48(A)(4) as it is written, the trial court properly found that C.K. failed to satisfy R.C. 2743.48(A)(4) and is ineligible to recover wrongful imprisonment compensation as a matter of law. In reversing the trial court's decision, the Eighth District's Opinion failed to honor the plain language of R.C. 2743.48(A)(4) and improperly construed the statute without ever declaring it ambiguous. The Eighth District acknowledged the above statutes but cast them aside. It is true that, because there is no statute of limitations of murder, an individual is ineligible for wrongful imprisonment compensation when their criminal case is dismissed without prejudice. Contrary to the Eighth District's reasoning, this is exactly how the legislature intended the wrongful imprisonment statute to operate for the past 25 years. Instead of applying the statute as it was written, the Eighth District impermissibly substituted its judgment for that of the General Assembly when it declared that the state must show that future criminal proceedings are "factually supportable." Ap. Op. ¶ 30. Therefore, the Eighth District's judgment should be reversed.

D. The Eighth District is Already Straining to Distinguish the Instant Case.

Most notably, the Eighth District is itself already straining to distinguish its finding in the case below with decisions in its own district. In *Holloway v. State*, 8th Dist. No. 100586, 2014-Ohio-2971, the Eighth District held that a claimant was not eligible for wrongful imprisonment compensation where "the prosecution can bring a criminal prosecution against Holloway for this act until November 2015." Id. at ¶ 12. The facts in *Holloway* are strikingly similar to the instant case. In *Holloway*, the claimant sought to be declared wrongfully imprisoned after his

kidnapping and related convictions were reversed on appeal. *State v. Holloway*, 8th Dist. No. 95703, 2011-Ohio-3586. On remand, Holloway's charges were dismissed *without* prejudice.

In January 2013, Holloway sought wrongful imprisonment compensation for the time spent in prison awaiting his successful appeal. The trial court granted the State's motion for judgment on the pleadings, "[b]ecause the prosecutor may bring a criminal proceeding for acts associated with the original kidnapping conviction, Plaintiff cannot, as a matter of law, satisfy ORC 2743.48(A)(4)." Mere months after releasing the decision below in *C.K.*, the Eighth District affirmed judgment on the pleadings in *Holloway*. Utilizing the same logic as it does in the case herein, the Eighth District reached the exact opposite result. In *Holloway*, the Court of Appeals seemed to imply that Holloway should have waited to commence his wrongful imprisonment case until after the six year statute of limitations had run.

Although Holloway's conviction for kidnapping was reversed by this court in *Holloway*, the trial court dismissed the charge without prejudice on remand. Further, R.C. 2901.13(A)(1)(a) provides that the statute of limitations to commence a felony prosecution is six years after an offense is committed. Holloway committed the kidnapping offense in November 2009 and, therefore, not even considering the tolling events of the appeal and other actions, **the prosecution can bring a criminal prosecution against Holloway for this act until November 2015**. Accordingly, Holloway cannot meet the fourth prong of the statute and, as such, he can prove no set of facts entitling him to relief.

Id. at ¶ 12 (Emphasis added).

The *Holloway* Court attempted to distinguish its prior opinion in *C.K.* by suggesting that "the substance of Holloway's convictions were not reversed." Id. at ¶ 14. In doing so, the Eighth District, now through the *Holloway* case, improperly added *even more* language to the statute. This additional language not only requires the State to produce evidence showing that criminal proceedings are "factually supportable," it now calls for an inquiry into the "substance" of the crime(s). This language does not appear anywhere within the statutory text of R.C.

2743.48(A)(4). The *Holloway* Court further distinguished the opinion below by reasoning that, “unlike C.K., there is a [definite] statute of limitations period for Holloway, which will expire on a date certain.” *Id.* at ¶ 15, fn2. As discussed above, this distinction overlooks the central reasoning of R.C. 2743.48(A)(4): whether the prosecution is capable of bringing criminal proceedings against a claimant. As there is no statute of limitations for murder and C.K.’s criminal case was dismissed without prejudice, the prosecutor can bring criminal proceedings against C.K. Therefore, C.K. is ineligible for wrongful imprisonment compensation as a matter of law. Because the Eighth District’s judgment failed to properly apply the plain statutory language of R.C. 2743.48(A)(4) the decision below was an impermissible re-write of the statute by the judiciary. Thus, the Court of Appeal’s decision should be reversed.

The State of Ohio’s Proposition of Law No. II: A claimant who engaged in contemporaneous criminal conduct arising out of the offense for which the claimant was originally charged is unable to satisfy the R.C. 2743.48(A)(4) requirement of a civil proceeding for wrongful imprisonment.

C.K. also cannot satisfy the statute’s fourth element because his contemporaneous criminal activity bars recovery. *Gover v. State*, 67 Ohio St.3d 93, 95 (1993). In 1986, R.C. § 2743.48 was enacted to authorize wrongfully imprisoned individuals to bring civil actions against the state for specified monetary damages. The wrongful imprisonment statutes were intended to compensate the innocent for wrongful imprisonment. *Jones v. State of Ohio*, 2011 Ohio 3075, 2011 Ohio App. LEXIS 2616, citing *Walden v. State* (1989), 47 Ohio St. 3d 47, 49. The statutes were never intended to compensate “those who have merely avoided criminal liability.” *Jones supra* at **7, citing to *Gover v. State of Ohio*, (1993) 67 Ohio St. 3d 93, 95, quoting *Walden v. State*, 47 Ohio St. 3d at 52.

On March 17, 1989, amendments to R.C. § 2743.48 were put into effect, pursuant to Am. H.B. No. 623. The 1989 amendments *inter alia*, required claimants to prove 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.” R.C. § 2743.48(A)(4).

Consequently, during the same time-period that claimants were already required to prove by a preponderance of the evidence that they were actually innocent of the crime of their conviction, they (post this amendment) were then also required to prove they were not engaging in any criminal conduct. This Court best explained the reasoning for not compensating individuals who engaged in criminal activity in *State ex rel. Ferguson, v. Court of Claims, et al.*, 98 Ohio St. 3d 399; 2003 Ohio 1631, ¶ 32 (2003). In *Ferguson*, this Court found:

The rationale to conserve governmental resources by generally excluding persons associated with crime is apparent on the face of the law. Conserving scarce resources is a legitimate purpose, and excluding persons convicted or otherwise shown to have committed felonies promotes that purpose.

In *Gover v. State*, 67 Ohio St.3d 93, 95 (1993) this Court recognized that the “requirement that ‘no criminal proceeding *** can be brought *** against the individual for any act associated with that conviction’ is of critical importance.”

County common pleas and appellate courts routinely hold that:

[S]tatutes demand that “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 criminal conduct arising out of the incident for which they were initially charged”. Citing to *Gover v. State* (1993), 67 Ohio St. 93.

Brown v. State, 6th Dist. No. L-05-1050, 2006 Ohio 1393, ¶ 24; 2006 Ohio App. LEXIS 1260. In *Ramirez v. State*, 2004 Ohio 480; 2004 Ohio App. LEXIS 418, Justice Lanzinger, then a judge on Sixth District Court of Appeals, wrote that “the trial court did what was required of it when determining if the plaintiff met his burden of proof, it reviewed the evidence to see whether the

plaintiff proved by a preponderance of the evidence that he was innocent of any criminal activity during the incident that give rise to his original charges.” *Id.* at *8 (Emphasis supplied) .

In the instant matter, evidence of C.K.’s criminal conduct as it involves the use and possession of crack cocaine and criminal tools was confirmed when he filed, in response to receiving Crim. Rule 16 discovery (R., State’s Response to Request for Discovery Under Rule 16, attached as Exhibit A to State’s Mot. Sum. J.), a motion in limine in his criminal case, seeking to prohibit the state from introducing “evidence during the trial ... that [C.K.] frequently used crack cocaine and spent large sums of money on crack cocaine in the week leading up to the death of Andre Coleman”, (R., Motion in Limine filed in *State v. C.K.*, Case No. CR-09-529206, attached as Exhibit B to State’s Mot. Sum. J., and; Kirvel Affidavit, Exhibit C attached thereto, ¶¶ 6, 7, 14). When C.K. purchased and possessing crack cocaine and drug paraphernalia, and evidence established that he intentionally shot Andre Coleman four more times, emptying his .38 revolver into his back, (despite the fact that Coleman was no longer a threat and lying motionless on the ground) C.K. eradicated any hope of ever being declared wrongful imprisoned.

Thus, as evidence demonstrates C.K. engaged in criminal activity as prohibited under *Gover*, and he is barred from being declared wrongfully imprisoned.

C.K.’s argument that he can circumvent his criminal conduct by implying the statute’s fourth requirement can be satisfied as long as the criminal conduct a claimant is engaging in is not related to the crime of conviction is sorely misplaced. Not only is C.K. unable to cite to any supporting law, but his argument has no merit, especially at a time when this Court is consistently holding that “not 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-5768, ¶ 22. Rather, it is only those individuals who prove all of the factors in R.C. 2743.48(A) by a

preponderance of the evidence, who can rightfully be declared wrongfully imprisoned. *Id.* The mere fact that a reviewing court reverses a criminal conviction does not alleviate a subsequent civil trial court from its duty in determining whether or not a claimant has satisfied all five requirements of R.C. § 2743.48(A), including whether or not he or she was engaging in any criminal conduct at the time of the incident. *Id.* citing to *Rodriguez v. Petro*, 8th Dist. No. 87548, 2006-Ohio-5572, ¶ 11 citing to *Ratcliff v. State*, 94 Ohio App.3d 179, 640 N.E. 560 (1994).

In *Doss*, this Court referenced *Walden v. State*, 47 Ohio St. 3d 47, 547 N.E.2d 962 (1989) in asserting there are qualitative differences between criminal and civil actions which “militate against giving criminal judgments preclusive effect in civil or quasi-civil litigation.” *Id.* at 52. *Health Adm’rs of Am., Inc. v. Am. Med. Sec., Inc.*, 2001 Ohio App. LEXIS 1469 (Ohio Ct. App., Delaware County Mar. 29, 2001).

The mere fact that the Eighth District reversed C.K.’s murder conviction under its interpretation of Ohio’s new Castle Doctrine does not automatically mean C.K. can circumvent the statutory mandate of proving all elements of Ohio’s wrongful imprisonment statute. In *Dunbar v. State*, 136 Ohio St.3d 181, 2013-Ohio-2163, this Court determined that “a claimant in a civil case for wrongful imprisonment must satisfy all five factors by a preponderance of the evidence before he or she can be declared a ‘wrongfully imprisoned individual.’” *Id.* at ¶11 citing *Doss*, 135 Ohio St.3d 211, 2012- Ohio-5678, 905 N.E.2d 1229, at paragraph one of syllabus. The State maintains the statutory authority to re-indict and offer evidence in a retrial to rebut the Castle Doctrine's presumption of self-defense by showing that neither C.K. nor McNaughten were in any imminent danger after C.K. fired his two initial rounds into Andre Coleman. *See, e.g., State v. Darby*, 10th Dist. No. 10AP-416, 2011-Ohio-3816.

In *Darby*, the Tenth District held that self-defense was not available to the convict, who shot the victim in the stomach, leg, and back. *Id.* at ¶ 42. The Tenth District noted that, even if the victim initially posed a threat to the appellant, “at a minimum, any threat of imminent danger had dissipated after appellant's initial shots hit Ms. Mankins in the leg and stomach.” Instead, the appellant “continued to shoot Ms. Mankins as she attempted to run away.” *Id.* The court held that the force used there was disproportionate under the circumstances. *Id.* In fact, a purported claim of self-defense necessarily fails when the accused continues “shooting in the back of a victim moving away from the [accused].” *State v. Butler* (July 11, 1985), 10th Dist. No. 84AP-60. Because R.C. 2743.48(A)(4) bars wrongful imprisonment compensation to those committing other offenses, such as engaging in drug possession or felonious assault, the Eighth District erred by sidestepping this issue. The appellate court’s judgment should accordingly be reversed.

CONCLUSION

The Eighth District has had repeated difficulties in applying the plain language of Ohio’s wrongful imprisonment statute which this Court has recently corrected. See *Doss*,³ *Dunbar*,⁴ *Mansaray*.⁵ In less than two years, this Court has rejected three different individuals certified as “wrongfully imprisoned” by reversing the Eighth District Court of Appeals. This case is no different. Ohio’s present statutory wrongful imprisonment system “is a waiver of the state’s common-law sovereign immunity and has no parallel in the ancient dual system of law and equity.” *Walden*, *supra.* at 53. In waiving that sovereign immunity, the legislature never intended to compensate defendants fortunate enough to have their convictions vacated on appeal, but having not yet proved their innocence. R.C. 1.47(C) presumes that the legislature desired “a

³ *Doss v. State*, 135 Ohio St.3d 211, 2012-Ohio-5678 (Dec. 6, 2012).

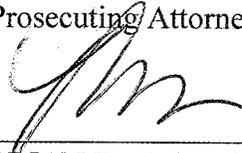
⁴ *Dunbar v. State*, 136 Ohio St.3d 181, 2013-Ohio-2163 (May 30, 2013).

⁵ *Mansaray v. State*, 138 Ohio St.3d 277, 2014-Ohio-750 (Mar. 5, 2014).

just and reasonable result.” The General Assembly never intended to compensate murder suspects, who admit they killed another human being and were convicted by a jury of their peers. Murder has no statute of limitations. Where the prosecutor maintains a claimant is still a homicide suspect and that a future indictment may happen, wrongful imprisonment compensation is barred. For these reasons, this Court should reverse.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to S.Ct.Prac.R. 3.11 (B)(1) and 3.11(C)(1)(a), a copy of the foregoing Merit Brief of the State of Ohio was served via e-mail this 6th day of October, 2014 upon the following counsel:

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APPENDIX

ORIGINAL

IN THE SUPREME COURT OF OHIO

C.K.,	:	Case No. <u>14-0735</u>
	:	
Appellee,	:	On Appeal from the
	:	Cuyahoga County
v.	:	Court of Appeals,
	:	Eighth Appellate District
STATE OF OHIO,	:	
	:	
Appellant.	:	Court of Appeals
	:	Case No. 100193
	:	

NOTICE OF APPEAL OF DEFENDANT-APPELLANT STATE OF OHIO

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FILED

MAY 09 2014

CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO

Now comes Defendant-Appellant State of Ohio and hereby gives Notice of Appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate Judicial District entered in Case No. 100193 on March 27, 2014.

This case is one of public interest.

Respectfully submitted,

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I certify that a copy of the foregoing Notice of Appeal of Defendant-Appellant, State of Ohio was served by U.S. mail and via e-mail this 9th day of May, 2014, upon the following counsel:

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[Cite as *C.K. v. State*, 2014-Ohio-1243.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100193

C.K.

PLAINTIFF-APPELLANT

vs.

STATE OF OHIO

DEFENDANT-APPELLEE

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-12-784160

BEFORE: McCormack, J., Keough, P.J., and Kilbane, J.

RELEASED AND JOURNALIZED: March 27, 2014

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TIM McCORMACK, J.:

{¶1} Plaintiff-appellant C.K. appeals from a decision of the Cuyahoga County Court of Common Pleas granting summary judgment in favor of the state as to his complaint for wrongful imprisonment brought pursuant to R.C. 2743.48.

{¶2} C.K.'s murder conviction was overturned on appeal for being against the manifest weight of the evidence. This court determined that the evidence showed he acted in self defense, permitted by Ohio's Castle Doctrine. The wrongful imprisonment statute requires claimants to prove that no criminal proceeding "can be brought, or will be brought" by the prosecutor against them for any act associated with their conviction. In this case, the state does not claim it intends to, or there is any new evidence, to retry C.K. for murder. The trial court, however, held that, as a matter of law, C.K. is unable to prove no criminal proceeding "can be brought, or will be brought" against him because the offense of murder does not have a statute of limitations. After a thorough and careful review of the case law and the record before us, we conclude that the unique circumstances in this case have created a genuine issue of material fact regarding whether C.K. is eligible for a declaration of wrongful imprisonment. The trial court prematurely concluded this matter in granting summary judgment in favor of the state.

Substantive Facts and Procedural History

{¶3} C.K., a laid off engineer and part-time community college professor, as well as a U.S. Air Force veteran, was indicted for murdering Andre Coleman in C.K.'s own home. His first trial, in March 2010, ended in a mistrial because of an inappropriate question by the prosecutor at trial. A second jury trial was held in August 2010, and the jury found him guilty. On appeal, a unanimous panel of this court reversed the conviction, holding that the Castle Doctrine applied in this case and C.K.'s murder conviction was against the manifest weight of the evidence. In the following, we summarize the evidence adduced at the second trial as described by the prior panel, in *State v. [C.K.]*, 195 Ohio App.3d 343, 2011-Ohio-4814, 959 N.E.2d 1097 (8th Dist.), *appeal not accepted*, *State v. [C.K.]*, 131 Ohio St.3d 1439, 2012-Ohio-331, 960 N.E.2d 988.

{¶4} C.K. was laid off from his job with Sprint in 2008. In June 2009, he rented the upstairs of his house to a tenant, who was a friend of Valerie McNaughton ("McNaughton"). After the tenant left, McNaughton began renting the upstairs unit. She then asked C.K. to allow her boyfriend Andre Coleman ("Coleman") to move into the house. C.K. consented. McNaughton had a tumultuous relationship with Coleman, and the relationship was fraught with physical abuse. Coleman and McNaughton argued and fought constantly, and Coleman would beat McNaughton violently when he was coming down from a crack cocaine high. By the end of August 2009, the fighting between Coleman and McNaughton became so frequent and disruptive that C.K. ordered Coleman to leave his house. C.K. escorted Coleman off of his property and told him not to return.

Coleman was uncooperative, and a loud argument ensued. Coleman eventually left after neighbors summoned the police.

{¶5} After Coleman left, McNaughton warned C.K. about Coleman's violent past. She showed C.K. information on Cuyahoga County's website, which indicated Coleman had been convicted in 1990 for involuntary manslaughter. He had also been convicted with carrying a concealed weapon and numerous drug-related offenses.

{¶6} McNaughton testified that around 4 a.m., on September 20, 2009, she and Coleman were with two others smoking crack cocaine in a motel room. After consuming all the crack cocaine they had purchased, they bought more, returned to the motel, and imbibed more. Once the crack cocaine ran out, Coleman encouraged McNaughton to make sexual advances towards one of the other two individuals in an effort to influence that person to buy more drugs. McNaughton refused, and Coleman became angry. As a ruse to leave the motel, McNaughton told Coleman that she knew someone who had agreed to advance her drugs that she needed to meet. The foursome drove to a parking lot near C.K.'s home. McNaughton exited the vehicle while the others remained inside; she then surreptitiously slipped away and made her way back home. Once home, McNaughton told C.K. that she just left Coleman a few streets away and that Coleman was very upset and would be looking for her.

{¶7} A short time later, McNaughton observed Coleman exiting the vehicle. McNaughton began yelling hysterically that Coleman had arrived and that they should lock the doors. At that point, Coleman began banging on the locked back door. He then

kicked out the bottom panel of the door and entered the house. C.K. told Coleman he was not allowed on the property, but Coleman pushed passed him and came towards McNaughton in the living room. McNaughton yelled that the police had been called, which prompted Coleman to leave. McNaughton then hid in the garage.

{¶8} While McNaughton hid in the garage and C.K. was repairing the door, Coleman returned. C.K. demanded that he leave, but Coleman brushed passed him, asked if C.K. wanted to "shoot it out," and proceeded to search for McNaughton. As C.K. testified, Coleman held one hand behind his back signaling that he had a gun. Coleman left after he could not find McNaughton in the house.

{¶9} Coleman returned a third time while C.K. was still repairing the broken door. Again, C.K. demanded that Coleman leave, at which time McNaughton came back to the house, thinking it was safe to return after hiding in the garage for ten minutes. Coleman immediately started yelling at McNaughton to give him money, followed her into the living room, grabbed her by the hair, threw her to the ground, and began beating her. According to McNaughton's testimony, while Coleman was beating her, C.K. fired two shots, hitting Coleman, who spun around and fell to the ground. C.K. shot Coleman several more times.

{¶10} C.K. testified that when McNaughton yelled for help, he demanded that Coleman stop the assault. When Coleman reached behind his back for his gun, C.K. pulled his revolver and shot Coleman. C.K. testified that after he shot Coleman, Coleman spun around, fell to the ground, and began to twitch, which prompted C.K. to fire several more times. C.K. described his thoughts at the moment of the shooting: "I thought I was

dead. I thought, I was panicking, I thought it just about, I thought he was going to shoot me.

My gun was brand new, I never tried it. I didn't even know if it would work. I was afraid it would fail me and he was going to shoot me. I was pretty much panicking at the time."

[C.K.], 195 Ohio App.3d 343, 2011-Ohio-4814, 959 N.E.2d 1097, at ¶ 4 -17.

{¶11} C.K. added, "After I fired and he fell, I walked over to see if he was moving or if I hit him. I tried to see if he was moving or if I hit him. I tried to see if I had actually hit him or if I missed or what * * *." *Id.* at ¶ 28. Describing what was going through his mind when he looked over Coleman as he lay on the ground, C.K. testified "Well I am looking over close. I did have my gun there pointing, holding it right next to him just to make sure, in case I just grazed him or he's about to jump back up at me. I saw movement and I panicked and pulled the trigger again, and I don't know if the gun actually went off or if I had shot all the rounds already or if I did fire again." *Id.*

{¶12} The jury found C.K. guilty of murder and a firearm specification. In September 2010, he was sentenced to 15 years to life for his murder conviction and three years for the firearm specification.

{¶13} A year later, on September 22, 2011, this court reversed C.K.'s conviction based on the conviction being against the manifest weight of the evidence. This court explained that under the recently-strengthened R.C. 2901.09(B),¹ which codifies Ohio's

¹R.C. 2901.09 ("When there is no duty to retreat before using force in self-defense, defense of another, or defense of residence") states: "(B) For purposes of any section of the Revised Code that sets forth a criminal offense, a person who lawfully is in that person's residence has no duty to retreat before

“Castle Doctrine,” there is no longer a duty to retreat inside one’s home, and the statute creates a rebuttable presumption and the state had the burden to prove C.K. was not acting in self-defense. *Id.* at ¶ 24. Reviewing the evidence, this court found that C.K. “established all three elements of the affirmative defense of self-defense and the Castle Doctrine fully applies to the facts of the instant case.” *Id.* at ¶ 30. We also found that “the jury appeared confused about the jury instruction as evidenced by questions regarding the definition of ‘unlawful entry’ and ‘Castle Doctrine.’ Further, the jurors queried whether the Castle Doctrine applied to both self-defense of the owner of the home and anyone in the home.” *Id.* We therefore concluded that the jury lost its way and C.K.’s convictions were against the manifest weight of the evidence. We reluctantly remanded the case for a new trial because we were “restrained by the standard of review under the manifest weight of the evidence and cannot discharge C.K.” *Id.* at ¶ 31.

{¶14} The state appealed this court’s judgment to the Supreme Court of Ohio, which denied review on February 1, 2012, in *C.K.*, 131 Ohio St.3d 1439, 2012-Ohio-331, 960 N.E.2d 988. Four weeks later, on February 28, 2012, the prosecutor dismissed the criminal matter “without prejudice.” In the meantime, C.K. also filed an application to seal all official records. The trial judge, who had presided over the jury trial, granted his application for expungement. The state appealed the expungement decision to this court, arguing that because the murder offense has no statute of limitations, the expungement

using force in self-defense, defense of another, or defense of that person’s residence, * * *.”

should be denied. This court found the argument lacking in merit and affirmed the expungement order in *State v. C.K.*, 8th Dist. Cuyahoga No. 99886, 2013-Ohio-5135.

{¶15} On June 1, 2012, C.K. commenced this wrongful imprisonment action pursuant to R.C. 2743.48, seeking a declaratory judgment that he was wrongfully imprisoned. Both parties filed cross motions for summary judgment. The state submitted an affidavit by an assistant prosecutor, who stated that the case “remains open * * * to re-filing /re-indicting, given the lack of statutory limitations [for murder] under R.C. 2901.13(A)(2).”

{¶16} The trial court granted summary judgment in favor of the state, based *solely* on the fact that the murder offense does not have a statute of limitations. The trial court found that the “mere possibility” of being reindicted precludes C.K. from being found to have been wrongfully imprisoned pursuant to R.C. 2743.48(A).

Summary Judgment

{¶17} An appellate court reviews summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Accordingly, we afford no deference to the trial court’s decision and must independently review the record to determine if summary judgment was appropriate. *Brown v. Scioto Cty. Bd. Commrs.*, 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993). Summary judgment is appropriate where it appears that: (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the

motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co., Inc.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978); Civ.R. 56(C).

{¶18} “Since summary judgment denies the party his or her ‘day in court’ it is not to be viewed lightly as docket control or as a ‘little trial.’ The jurisprudence of summary judgment standards has placed burdens on both the moving and the nonmoving party.” *Welch v. Zicarelli*, 11th Dist. Lake No. 2006-L-229, 2007-Ohio-4374, ¶ 40. The moving party seeking summary judgment “bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party’s claims.” *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). A moving party does not discharge this initial burden under Civ.R. 56 by simply making a conclusory assertion that the nonmoving party has no evidence to prove its case. *Id.* Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that the nonmoving party has no evidence to support its claims. *Id.*

{¶19} In the first assignment of error, C.K. contends the trial court erred in granting the state’s motion for summary judgment. In its second assignment of error, he contends the trial court erred in denying his motion for summary judgment. As the assignments of error are related, we address them together.

Wrongful Imprisonment Statute

{¶20} In 1986, R.C. 2743.48 was enacted by Sub.H.B. 609 to allow wrongfully imprisoned individuals to bring civil actions against the state for monetary damages. “The statute was designed to replace the former practice of compensating those wrongfully imprisoned by ad hoc moral-claims legislation.” *Doss v. State*, 135 Ohio St.3d 211, 2012-Ohio-5678, 985 N.E.2d 1229, ¶ 10. The statute envisions a two-step process to compensate those who have been wrongfully imprisoned. The first step is an action in the common pleas court seeking a preliminary factual determination of wrongful imprisonment; the second step is an action in the Court of Claims to recover money damages. *Id.*

{¶21} The wrongful imprisonment statute, R.C. 2743.48, states the following:

(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) 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.

(Emphasis added.)

{¶22} The statute enumerates five factors and a claimant must satisfy all five factors by a preponderance of the evidence before he or she can be declared a wrongfully imprisoned individual. *Dunbar v. State*, 136 Ohio St.3d 181, 2013-Ohio-2163, 992 N.E.2d 1111, citing *Doss* at paragraph one of the syllabus.

{¶23} Turning to the instant case, it is undisputed that C.K. meets the first three prongs of the statute. C.K. claims he also meets the fourth prong (R.C. 2743.48(A)(4)) and fifth prong (R.C. 2743.48(A)(5)) and therefore is entitled to summary judgment. The trial court granted summary judgment in favor of the state, finding that, because the offense of murder does not have a statute of limitations, C.K. could not satisfy the fourth prong as a matter of law, and the fourth prong disposed of this case. Thus, this appeal only concerns whether the trial court properly granted summary judgment based on its ruling that C.K. could not satisfy the fourth prong as a matter of law.

The Fourth Prong: Whether No Criminal Proceeding "Can Be Brought, or Will be Brought"

{¶24} The fourth prong set forth in R.C. 2743.48(A)(4) requires the claimant to prove that "** * * no criminal proceeding is pending, can be brought, or will be brought by

any prosecuting attorney * * * against the individual for any act associated with that conviction.” Here, it is undisputed that “no criminal proceeding is pending” against C.K.; therefore, this appeal turns on whether no criminal proceeding for any act associated with his murder conviction “can be brought, or will be brought” against him.

{¶25} The trial court, in granting the state summary judgment, reasoned that because there is no statute of limitations for murder, it is within the state’s right to retry C.K. at any time. The trial court stated that the “mere possibility” of being reindicted due to a lack of statute of limitations thus precluded C.K. from being able to satisfy the fourth prong, rendering him ineligible from recovery under the wrongful imprisonment statute, as a matter of law. As we explain in the following, the trial court’s interpretation of the statute is too narrow.

{¶26} The statute makes no mention of the statute of limitations. Rather, the statute employs common words “can” and “will,” which suggests a broader inquiry, for which the statute of limitations is but one factor.

{¶27} Furthermore, we do not read the word “can” as denoting “mere possibility,” as the trial court seemed to believe. Theoretically, the prosecutor *can* always bring a charge, whether in good faith or not, even where the criminal charge may be outside of the statutory time, in violation of a defendant’s speedy trial right, or barred by double jeopardy. Therefore, interpreting the word “can” in its literal sense renders the phrase at issue virtually meaningless.

{¶28} Rather, we agree with the Tenth District's interpretation of the phrase in a recent wrongful imprisonment case, where the court stated "[t]he use of the phrase 'no criminal proceedings * * * can * * * or will be brought' was clearly intended by the General Assembly to bar recovery to a claimant against whom *criminal proceedings are still factually supportable and legally permissible* following reversal." (Emphasis added.)

LeFever v. State, 10th Dist. Franklin No. 12AP-1034, 2013-Ohio-4606, ¶ 26.

{¶29} Hypothetically, if C.K. were to have been retried upon remand after this court reversed his conviction as against the manifest weight of the evidence *and* subsequently acquitted by the jury, C.K. would have been able to show that the prosecutor "cannot, or will not" bring another criminal proceeding, because another criminal proceeding for any act associated with his prior murder conviction would have been legally impermissible due to the protection of double jeopardy. Under this scenario, C.K. would be able to satisfy the fourth prong, despite that his offense lacks a statute of limitations.

{¶30} C.K., however, cannot show another criminal proceeding is legally impermissible, because, upon remand, the state elected not to retry him but instead dismissed his case "without prejudice." We agree with the Tenth District, however, that the "cannot/will not" inquiry contemplates not just whether another criminal proceeding associated with the prior conviction is legally permissible, but also whether such a criminal proceeding is *factually supportable*.

{¶31} In *LeFever*, the defendant was accused of poisoning her husband with amitriptyline and nortriptyline and convicted of aggravated murder. Her conviction was

later reversed because the state's toxicologist had lied about his qualifications. The prosecutor dismissed her indictment without prejudice. The defendant then sought a wrongful imprisonment declaration. The trial court granted summary judgment in favor of the state based on the fourth prong of R.C. 2743.48, just as in this case. The Tenth District affirmed, after determining that the state presented evidence "establishing that the prosecutor had not abandoned his effort to prosecute appellant for the death of her husband and that such a prosecution was both factually sustainable and legally permissible following reversal." *Id.* at ¶ 16.

{¶32} The Tenth District pointed to evidence that included the prosecutor's press release issued after dismissing the case without prejudice. The press release detailed the prosecutor's intent to reindict the defendant when future scientific advancements would allow for the testing of the biological samples to detect the timing, mode and/or manner of administration of the poisons, which the prosecutor explained could not be done with the current state of scientific know-how. The prosecutor also testified in his deposition testimony that "he still believed that he had at least 'a fair chance of getting [the defendant] convicted of at least aggravated attempted murder.'" *Id.* at ¶ 18. According to the prosecutor, the defendant's children had indicated they were willing to give testimony implicating their mother regarding her attempt to poison their father with a fumigant. In addition, one other witness had come forward since the reversal of appellant's conviction to offer testimony that would corroborate the children's account. The prosecutor also testified that his assessment of the chances of a conviction for attempted aggravated murder

was based upon the evidence he received since the defendant's conviction were reversed, the testimonial evidence presented in the first trial, and the remaining physical evidence uncovered in the search of the defendant's home.

{¶33} Based on the evidence presented by the state on the wrongful imprisonment case, the Tenth District concluded summary judgment in the state's favor was warranted because the evidence conclusively demonstrated that another criminal proceeding — for attempted aggravated murder — is not only legally permissible but also factually supportable; as such, the defendant failed to prove the fourth prong and was precluded from recovery under the wrongful imprisonment statute. *Id.* at ¶ 27.

{¶34} *LeFever* provides an interesting contrast to the instant case. Here, C.K. pointed to the lack of new evidence for a new trial and the inactive status of the investigation to support his claim that he has satisfied the fourth prong. The state claimed the murder case is still under investigation and remains open. However, to support its claim, the state only submitted an affidavit by an assistant prosecutor, who stated merely that the case "remains open * * * given the lack of statutory limitations" for a murder offense. (Emphasis added.) Thus, in contrast to *LeFever*, the only reason provided by the prosecutor for C.K.'s case being "open" is a lack of a statute of limitations for murder. There was no evidence presented by the state as to whether the prosecutor has discovered new evidence or interviewed new witnesses relating to C.K.'s claim of self-defense; neither was there sworn testimony from the prosecutor that there is an ongoing investigation. Therefore, even if retrying C.K. for murder is legally permissible due to a lack of a time

limitation for murder, the state certainly has not presented any evidence to show that bringing another criminal proceeding for murder against C.K. is factually supportable.

{¶35} Therefore, the trial court's granting of summary judgment for the state based solely on the fourth prong is erroneous. Under the unique circumstances of this case, there is a factual question as to whether C.K. satisfies the fourth prong. Additional evidentiary inquiry is necessary to determine whether another criminal proceeding in connection with his prior murder conviction "can be brought, or will be brought" against C.K., in other words, whether reindicting or retrying him is both legally permissible and factually supportable.

{¶36} In its attempt to prove C.K. could not satisfy the fourth prong, the state advances another theory. It asks us to interpret R.C. 2743.48(A)(4) as requiring C.K. to prove that he was not engaging in "any criminal conduct" at the time of the shooting incident, whether relating to the murder charge or not. In its motion for summary judgment, the state alleged C.K. was engaged in criminal conduct, to wit, abusing drugs, "in the week leading up to" the incident. For proof, the state submitted an affidavit of a detective who stated that during a search of C.K.'s home the day after the shooting, the police found drug paraphernalia (a pipe) inside a bank envelope and four bank receipts dated several weeks before the incident showing withdrawals over \$10,000.² The state also submitted pictures of the various items referenced in the affidavit.

²In the criminal trial, C.K. filed a motion in limine to exclude the evidence and the trial court granted the motion.

{¶37} The state argues that its interpretation of R.C. 2743.48(A)(4) is consistent with the the Supreme Court of Ohio's analysis in *Gover v. State*, 67 Ohio St.3d 93, 95, 616 N.E.2d 207 (1993). Our reading of *Gover* shows otherwise.

{¶38} In *Gover*, the defendant entered a restaurant and stole money from its safe. He was convicted of safecracking. The appellate court, however, reversed the conviction due to insufficient evidence, because it found the safe was not a safe as defined in the safecracking statute. The defendant then sought a wrongful imprisonment declaration.

{¶39} Interpreting R.C. 2743.48(A)(4), the Supreme Court of Ohio stated that claimants 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.*" (Emphasis added.) *Id.* at 95.

{¶40} Applying R.C. 2743.48(A), the court in *Gover* concluded that the claimant failed to prove he satisfied the fourth prong, because, while not committing safecracking, he was nevertheless committing burglary; while the prosecutor incorrectly chose to indict the defendant for safecracking, he might also have been charged with burglary for his conduct in the incident. The court emphasized that the 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." *Id.* at 95. Thus, the defendant in *Gover* could not satisfy the fourth prong, because he could not prove that no criminal proceeding "can be brought" for his act associated with his safecracking conviction.

{¶41} In contrast to *Gover*, the state's claim in this case that C.K. could not satisfy the fourth prong because of his criminal conduct, namely, drug abuse, "in the week leading" to the shooting incident, appears to be disingenuous. We fail to see how C.K.'s alleged illegal drug use, even if it were true, could be construed as "criminal conduct arising out of" the shooting incident, or "associated with" his murder conviction. The state essentially asks us to interpret the statute as requiring a wrongful imprisonment claimant to prove that he or she did not engage in any criminal conduct, whether or not contemporaneous with the incident for which the individual was initially charged. There is no case law authority that would support such an interpretation of the statute. The state's allegation that C.K. engaged in illegal drug activity would appear to be, at best, a red herring and, at worse, an attempt to create a bias against C.K. in this wrongful imprisonment action.

{¶42} We emphasize again that this appeal only concerns the fourth prong of the statute. After a careful review of the case law and the record before us, and applying the summary judgment standard, we conclude the circumstances of this case have created a genuine issue of material fact regarding the fourth prong, i.e., whether, more likely than not, another criminal procedure "can or will be" brought against C.K. for the shooting incident. The trial court properly denied C.K.'s motion for summary judgment, but it improperly granted summary judgment in favor of the state based solely on its conclusion that C.K. is precluded from seeking recovery because he could not satisfy the fourth prong of the wrongful imprisonment statute due to a lack of a statute of limitations for murder.

{¶43} We are fully aware that “[n]ot every person who is released from prison because of a successful appeal is entitled to compensation.” *Doss*, 136 Ohio St.3d 181, 2013-Ohio-2163, 992 N.E.2d 1111, at ¶ 21. However, under the unique circumstances of this case, the trial court’s narrow interpretation of the statute prematurely concluded this wrongful imprisonment matter. Finally, we note that C.K. still must prove all five prongs of the wrongful imprisonment statute, by a preponderance of evidence. If C.K. is able to demonstrate the fourth prong upon further proceedings, he still must prove the fifth prong. Because the trial court has not addressed the fifth prong, we do not reach that issue in this appeal.³

³ Regarding the fifth prong, in *Doss, supra*, the Supreme Court of Ohio explained that “when a person claiming compensation for wrongful imprisonment has obtained a judgment of acquittal, that judgment is not to be given preclusive effect, because an acquittal is a determination that the state has not met its burden of proof. It is not necessarily a finding that the accused is innocent. For this reason, a claimant advancing a wrongful-imprisonment claim ‘must affirmatively prove her innocence by a preponderance of the evidence.’” (Citation omitted.) *Doss* at ¶ 14. The court added that in enacting the statute, the General Assembly intended that the court of common pleas “actively separate those who were wrongfully imprisoned from those who have merely avoided criminal liability.” (Citation omitted.) *Id.* When a defendant seeks a declaration that he is a wrongfully imprisoned individual and seeks to satisfy R.C. 2743.48(A)(5) by proving that an error in procedure resulted in his release, the error in procedure must have occurred subsequent to sentencing and during or subsequent to imprisonment. The latest wrongful imprisonment case from the Supreme Court of Ohio, *Mansaray v. State*, Slip Opinion No. 2014-Ohio-750, also concerned the fifth prong. The court held that when a 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. *Id.* at syllabus.

{¶44} For the foregoing reasons, the first assignment of error is sustained and the second assignment of error is overruled. This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover of said appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

TIM McCORMACK, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
MARY EILEEN KILBANE, J., CONCUR



IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

C. K. ██████████)
PLAINTIFF)
vs.)
THE STATE OF OHIO)
DEFENDANT)

CASE NO. CV-12-784160
JUDGE MAUREEN CLANCY
JOURNAL ENTRY

Judge Maureen Clancy:

This cause came on for consideration upon the cross motions of Plaintiff, C. K. ██████████ ("K. ██████████"), and Defendant, the State of Ohio ("the State"), for summary judgment. After careful review of the motions, briefs in opposition, replies, the record and the transcript of the oral hearing held on 6/6/2013, the Court, having considered the evidence presented and having construed the evidence most strongly in favor of each of the non-moving parties, determines that reasonable minds can come to but one conclusion. The Court finds that there are no genuine issues of material fact, and that Defendant is entitled to judgment as a matter of law.

Background

On September 20, 2009, K. ██████████ admittedly shot and killed Andre Coleman, the boyfriend of Valerie McNaughton, who was K. ██████████'s tenant at the time. K. ██████████ argued that he shot Coleman, a home intruder, in self-defense, however, the State argued that K. ██████████ shot Coleman without justification. After his first trial resulted in a mistrial, K. ██████████ was convicted in August 2010 of the murder of Andre Coleman, and sentenced to 15 years in prison. K. ██████████ appealed his conviction. In *State v. K. ██████████*, 195 Ohio App. 3d 343, 2011-Ohio-4814, 959 N.E.2d 1097, the court of appeals reversed his conviction. K. ██████████ subsequently filed an action

for declaratory judgment, pursuant to R.C. 2743.48, in which he sought compensation from the State, arguing that he had been wrongfully imprisoned.

Law and Analysis

The General Assembly has developed a two-step process to compensate those who have been wrongfully imprisoned. The first step is an action in the common pleas court seeking a preliminary factual determination of wrongful imprisonment; the second step is an action in the Court of Claims to recover money damages. *Griffith v. Cleveland*, 128 Ohio St.3d 35, 2010-Ohio-4905, 941 N.E.2d 1157, paragraph two of the syllabus.

The wrongful-imprisonment statute, R.C. 2743.48, was added to the Revised Code in 1986 by Sub.H.B. No. 609 "to authorize civil actions against the state, for specified monetary amounts, in the Court of Claims by certain wrongfully imprisoned individuals." 141 Ohio Laws, Part III, 5351. The statute was designed to replace the former practice of compensating those wrongfully imprisoned by ad hoc moral-claims legislation. *Walden v. State*, 47 Ohio St.3d 47, 49, 547 N.E.2d 962 (1989). Under the statutory scheme, a claimant must be determined to be a "wrongfully imprisoned individual" by the court of common pleas before being permitted to file for compensation against the state of Ohio in the Court of Claims. R.C. 2305.02 and 2743.48(B)(2); *Griffith v. Cleveland*, paragraph two of the syllabus.

R.C. 2743.48 provides:

(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) 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.

Thus, a plaintiff in a civil case for wrongful imprisonment must first prove that he or she is a "wrongfully imprisoned individual." In this case, proof of the factors in R.C. 2743.48(A)(1) through (3) is undisputed. K██████ was convicted of a felony, to which he did not plead guilty, and he was sentenced to a prison term. Whereas K██████ claims to have met his burden for factors (4) and (5), the State disagrees.

Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp*, 73 Ohio St.3d 679, 1995-Ohio-286, 653 N.E.2d 1196, paragraph three of the syllabus (1995). The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264, 273-274 (1996).

The State opposes K [REDACTED]'s motion on two primary bases: first, that K [REDACTED]'s conviction was reversed on the basis of manifest weight and therefore, the State could bring future criminal proceedings, and secondly, that K [REDACTED] has failed to prove his actual innocence. The Court finds R.C. 2743.48(A)(4) to be dispositive in the instant case.

The fourth factor of R.C. 2743.48(A) may only be fulfilled if:

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.

Although K [REDACTED] is correct that his conviction was reversed on appeal, the court of appeals unambiguously reversed K [REDACTED]'s conviction based on a manifest weight standard, not a sufficiency standard. Whereas a reversal on sufficiency would have prevented the State from ever retrying K [REDACTED], a reversal on the basis of manifest weight does not preclude the State from the possibility of pursuing charges against K [REDACTED] in the future. Despite the 8th District's dicta regarding K [REDACTED]'s self-defense argument, the court's instructions are clear: "We reluctantly *remand the matter for a new trial* because we are restrained by the standard of review under the manifest weight of the evidence and cannot discharge K [REDACTED]. *Thompkins; Tibbs.*" *State v. K [REDACTED]*, 195 Ohio App. 3d 343, 2011-Ohio-4814, 959 N.E.2d 1097, at ¶31.

Thus, although K [REDACTED]'s conviction was vacated and reversed on appeal, there is no evidence that the prosecuting attorney will not bring future criminal proceedings in this case. There is no statute of limitations for a charge of murder and it is, therefore, well within the State's right to retry K [REDACTED] at any time. The case was voluntarily dismissed without prejudice, affording the State the continued opportunity to reindict and retry K [REDACTED] at any time.

The Court finds that the mere possibility of being reindicted and retried precludes K [REDACTED] from being found to have been wrongfully imprisoned pursuant to R.C. 2743.48(A), having failed to satisfy R.C. 2743.48(A)(4).

Conclusion

This Court, having considered the evidence presented, determines that reasonable minds can come to but one conclusion, that there are no genuine issues of material fact, and that Defendant State of Ohio is entitled to judgment as a matter of law.

Therefore, Plaintiff's motion for summary judgment is hereby denied. Whereas, it is ordered, adjudged and decreed that Defendant's motion for summary judgment is hereby granted, and that Plaintiff Carl K [REDACTED]'s claims be dismissed with prejudice as against Defendant, the State of Ohio.

7/1/2013


Judge Maureen Clancy

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CUYAHOGA COUNTY
CLERK OF COURTS
By  Deputy

ACTION AGAINST STATE FOR WRONOFUL IMPRISONMENT

2743.48 Action against state for wrongful imprisonment; notice of rights; amount of damages; eligibility

(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) 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.

(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 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 sentencing and during or subsequent to 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 the individual was found guilty, including all lesser-included offenses, either was not committed by 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 the person and the person's attorney of the person's rights under this section to commence a civil action against the state in the court of claims because of the person's wrongful imprisonment and to be represented in that civil action by counsel of 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 the clerk's office a list of wrongfully imprisoned individuals for whom notices are received under this section and shall create files in 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 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 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 the wrongfully imprisoned individual of 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 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 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 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 the claimant's conviction and sentencing, and a certified copy of the entry of the determination of a court of common pleas that the claimant is a wrongfully imprisoned individual. No other evidence shall be required of the complainant to establish that the claimant is a wrongfully imprisoned individual, and 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 the wrongfully imprisoned individual's discharge from confinement in the state correctional institution;

(b) For each full year of imprisonment in the state correctional institution for the offense of which the wrongfully imprisoned individual was found guilty, 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 of being so imprisoned, a pro-rated share of 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 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 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 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 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 the wrongful imprisonment, including, but not limited to, a claim for relief that arises out of

circumstances occurring during 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 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 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 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 the individual is a wrongfully imprisoned individual.

(2002 S 149, eff. 4-9-03; 1994 H 571, eff. 10-6-94; 1988 H 623, eff. 3-17-89; 1986 H 609)

Uncodified Law

2002 S 149, § 3, eff. 4-9-03, reads:

Sections 117.52, 2743.48, and 2743.49 of the Revised Code, as amended or enacted by this act, apply to civil actions for wrongful imprisonment in the Court of Claims commenced on or after the effective date of this act, or commenced prior to and pending on the effective date of this act.

1988 H 623, § 3, eff. 3-17-89, reads: The amendments to section 2743.48 of the Revised Code that are made in Section 1 of this act do not

apply to any person who, prior to the effective date of this act, has been determined by a court of common pleas to be a wrongfully imprisoned individual, as defined in division (A) of section 2743.48 of the Revised Code as it existed prior to the effective date of this act, and who, because of that determination, has the right to commence a civil action against the state in the court of claims to recover an amount of money as described in section 2743.48 of the Revised Code.

Historical and Statutory Notes

Amendment Note: 2002 S 149 added "and section 2743.49 of the Revised Code" to the first paragraph of division (A); added "an error in procedure resulted in the individual's release, or" to division (A)(5); substituted "correctional" for "penal or reformatory" in division (E)(2)(a); substituted "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" for "twenty-five thousand dollars" twice in division (E)(2)(b); added division (E)(2)(d); and made changes to reflect gender neutral language.

Amendment Note: 1994 H 571 substituted "correctional" for "penal or reformatory" throughout.

Cross References

Auditor shall make adjustment of damage amount for wrongful imprisonment, 117.52

Jurisdiction to hear action for wrongful imprisonment, 2305.02

Library References

False Imprisonment ¶8, 16.
Index ¶111, 215.
Westlaw Topic Nos. 168, 360.

C.J.S. False Imprisonment §§ 2, 20, 30 to 35.
C.J.S. States §§ 311 to 312, 588 to 591.

Research References

Encyclopedias
OH Jur. 3d Courts & Judges § 281, Jurisdiction in Special Cases.
OH Jur. 3d Courts & Judges § 296, Damages for Wrongful Imprisonment.
OH Jur. 3d False Imprisonment & Malic. Prosecution § 3, False Imprisonment—Who is a Wrongfully Imprisoned Individual? Entitled to Recover Against State.

OH Jur. 3d False Imprisonment & Malic. Prosecution § 24, State of Ohio.
OH Jur. 3d False Imprisonment & Malic. Prosecution § 42, Excessiveness or Inadequacy.
OH Jur. 3d False Imprisonment & Malic. Prosecution § 43, Generally.
OH Jur. 3d False Imprisonment & Malic. Prosecution § 59, Sufficiency of Evidence.

FISCAL NOTE



BILL	Sub. H.B. 609	DATE	June 3, 1986
STATUS	As Enacted - Effective September 24, 1986	SPONSOR	Rep. Sykes

Fund & Time	Revenue	Expenditures	Appropriations
General Revenue Fund -Annual	-0-	Indeterminate effect	-0-

This act creates a "generic" moral claims statute that permits specified wrongfully imprisoned individuals to file civil actions against the state in the Court of Claims. The act eliminates the need for the General Assembly to consider and enact distinct moral claims bills for such individuals.

EXPLANATION OF ESTIMATE:

This specific act has no immediate fiscal effect, however the provisions it contains governing future wrongful imprisonment claims could change the state's liability for wrongful imprisonment. According to the act, the state would be required to pay a wrongfully imprisoned individual for (1) any fine or court costs imposed and paid by the individual and reasonable attorney's fees and expenses associated with criminal proceedings, appeals, and discharge from the state penal or reformatory institution; (2) \$25,000 for each full year of imprisonment and a pro-rata share of that amount for each partial year; (3) any loss of wages, salary, or other earned income that directly resulted from his arrest, prosecution, conviction, and erroneous imprisonment. No other damages, such as mental anguish, shame, humiliation, reputation, etc., could be recovered from the state by the individual. Also, the state would be prohibited from deducting any expenses associated with the arrest, prosecution, and imprisonment of the individual (i.e. food, clothing, shelter, and medical services).

This act provides a standard award formula for wrongfully imprisoned individuals. Two recent cases were settled for widely disparate judgments.

FISCAL NOTE



BILL	Am. H.B. 623	DATE	November 17, 1988
STATUS	As Enacted - Effective March 17, 1989	SPONSOR	Rep. Gilmore

Fund & Title	Revenues	Expenditures	Appropriations
State GRF - annual	-0-	Potential indeterminate decrease	-0-

This act prevents someone who pleads guilty of an offense from collecting damages from the state for wrongful imprisonment.

EXPLANATION OF ESTIMATE:

By preventing people who originally pleaded guilty to a felony from bringing civil action against the state through the Court of Claims for wrongful imprisonment, the state could save money. The amount saved would depend on how many determinations of wrongful imprisonment are made by Courts of Common Pleas and how many of those people found to be wrongfully imprisoned pleaded guilty to the offense for which they were imprisoned.

A victim of wrongful imprisonment is currently entitled to recover \$25,000 for each year that he was incarcerated, any lost wages from the period while incarcerated, and legal fees associated with the case before the Court of Claims.

It is difficult to predict future legal liability. Before September of 1986, each person winning a wrongful imprisonment claim against the state received the money through a special bill enacted by the General Assembly. Under that procedure, awards were typically between \$40,000 and \$90,000, but have been as high as \$717,000. According to the Court of Claims, there have been five people who have claimed wrongful imprisonment against the state since the current generic moral claims law was enacted in September of 1986. Of those five, one had pleaded guilty with the rest being found guilty at jury trials. One of the five cases has been settled (for \$130,401.40). Any money that the state would owe in a settlement would be paid through the Emergency Purposes Account in the Controlling Board.

FR

Am. H.B. 623
(As Reported by S. Judiciary)

Reps. Gilmore, Davis, T. Johnson

Sen. Watts

Excludes from the coverage of the Generic Moral Claims Statute any person who pleaded guilty to the offense for which he is imprisoned.

Provides further limitations on those persons who may qualify as being wrongfully imprisoned under the statute.

CONTENT AND OPERATION

Existing law

Civil action. The Generic Moral Claims Statute (GMCS) (sec. 2743.48 of the Revised Code) creates a civil action against the state for "wrongfully imprisoned individuals." The Court of Claims has exclusive, original jurisdiction over such actions, which must be brought within two years after a court of common pleas determines that the individual is a "wrongfully imprisoned individual." (Sec. 2743.48(B), (D), (F)(3), and (H).)

Definition. "Wrongfully imprisoned individual" is defined as an individual who satisfies all of the following (sec. 2743.48(A)):

1. He was charged with an aggravated felony or felony;
2. He was found guilty of the charged aggravated felony or felony or of a lesser-included offense that was an aggravated felony or felony;
3. He was sentenced to a state penitentiary or reformatory institution as a result of the conviction.

Court of common pleas functions. The courts of common pleas have exclusive, original jurisdiction to hear and determine any action or proceeding brought by a person who satisfies the first three conditions of the definition of "wrongfully imprisoned individual" and who seeks a determination of whether the offense of which he was found guilty, including all lesser-included offenses, either was not committed by him or was not committed by any person (thus qualifying under the fourth condition of the definition) (sec. 2305.02). When a court of common pleas makes such a determination that a person is a wrongfully imprisoned individual, it must provide him with a copy of the GMCS and orally inform him and his attorney of his rights under it. It also must notify the Clerk of the Court of Claims, in writing and within seven days, of the name and proposed mailing address of the individual and of the fact that he has the right to bring an action under the GMCS. (Sec. 2743.48(B).)

Clerk of Court of Claims functions. The Clerk of the Court of Claims must maintain a list of wrongfully imprisoned individuals for whom he has received notices from courts of common pleas and create files for each individual (sec. 2743.48(B)(2)). The Clerk must send an individual who does not bring an action under the GMCS within six months of the determination by the court of common pleas a notice of his rights under that statute and continue such notices every three months (sec. 2743.48(C)).

Procedures in Court of Claims. A civil action under the GMCS is determined in the same manner as other actions in the Court of Claims unless the GMCS provides a different controlling procedure. A person bringing such an action can establish that he is a "wrongfully imprisoned individual" by submitting a certified copy of the judgment entry of the court of common pleas making such a determination. No other evidence is necessary to establish his status. (Sec. 2743.48(D) and (E)(1).)

Recoverable damages. A wrongfully imprisoned individual is entitled to recover, upon presentation of necessary proof, the amount of any fines or court costs paid and attorney's fees incurred in the original proceedings and in his leading to his wrongful imprisonment and in obtaining his release from imprisonment; \$25,000 for each full year of wrongful imprisonment and a pro-rata share for each part of a year; and any loss of earnings, including any benefits, which resulted from his wrongful imprisonment; and any other damages which he may be entitled to recover under any law.

Excluded individuals. The GMCS does not apply to any person who, prior to the enactment of the GMCS, was the subject of a moral claims act or an action before the former Sundry Claims Board for his wrongful imprisonment (sec. 2743.48(H)).

The bill

Definition of wrongfully imprisoned individual. The bill would amend the definition of wrongfully imprisoned individual as follows (sec. 2743.48(A)):

1. To exclude individuals who pleaded guilty to the offense for which they were imprisoned. Under the bill, a person who is imprisoned for an offense that he did not commit or that was never committed but who pleaded guilty to the offense would not qualify as being wrongfully imprisoned under the GMCS.

2. To include an individual only if his conviction is vacated or dismissed, or reversed on appeal, the prosecuting attorney in the case cannot or will not seek any further appeal, and no criminal proceeding is pending, can be brought, or will be brought by any prosecuting attorney against the individual for any act associated with that conviction.

Jurisdiction of courts of common pleas. Under the bill, the court of common pleas would continue to have exclusive, original jurisdiction to determine whether the offense of which a person was found guilty, including all lesser-included offenses, either was not committed by him or was not committed by any person; however, that jurisdiction only would exist if the person, in addition to the three conditions required by existing law to vest jurisdiction in the court, meets the additional conditions set forth in the revised definition of "wrongfully imprisoned individual." (Sec. 2305.02.)

Applicability. Section 3 of the bill states that its changes do not apply to any person who was determined to be a wrongfully imprisoned individual by a court of common pleas, as that term was defined before the bill's effective date, and who thus has a right to bring a claim under the GMCS.

ACTION	DATE	JOURNAL ENTRY
introduced	10/01/77	p. 1285

Am. H.B. 623
(As Passed by the House)

Reps. Gilmore, Davis, T. Johnson

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Definition. "Wrongfully imprisoned individual" is defined as an individual who satisfies all of the following (sec. 2743.48(A)):

1. He was charged with an aggravated felony or felony;
2. He was found guilty of the charged aggravated felony or felony or of a lesser-included offense that was an aggravated felony or felony;
3. He was sentenced to a state penal or reformatory institution as a result of the conviction;
4. He remained in the institution during or subsequent to his confinement.

The bill

Definition of wrongfully imprisoned individual. The bill would amend the definition of wrongfully imprisoned individual as follows (sec. 2743.48(A)):

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ACTION	DATE	JOURNAL PAGE
Introduced	10-05-87	pp. 130-131
Reported, H. Judiciary & Criminal Justice	03-09-88	pp. 130-131
Passed House (51-41)	03-17-88	pp. 130-131