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Kris Jordan, Chair
General Government and Agency Review
Subcommittee Committee
1 Capitol Square
Columbus, OH 43215

Via E-mail only: ron.puff@ohiosenate.gov

Re: H.B. 49's Amendments to R.C. 2743.48(A), Wrongful Imprisonment Statute

Dear Chairman Jordan and Members of the Subcommittee:

I am writing to inform you that I oppose to the wholesale re-write of R.C. 2743.48, Ohio's wrongful imprisonment statute that is presently being considered by the Senate. I am adamantly opposed to these changes happening via the streamlined, "budget-bill process" with limited time for hearings or debate on these important issues.

As the lawyer who represented Ohio in *Mansaray v. State*,¹ from its inception in the trial court to the Ohio Supreme Court, I have an extensive knowledge of the history of Ohio's wrongful imprisonment statute. Via amendments being pushed by Rep. Seitz (R-Cincinnati), H.B. 49 attempts to repeal *Mansaray*, with "retroactive" language. A repeal of the Ohio Supreme Court's holding in *Mansaray* is an expensive mistake and would arguably make Ohio's wrongful imprisonment statute the most expansive in the nation.

Prior to 1986, Ohio law required a former convict had to convince an elected state representative or senator to sponsor a "moral claims" bill in the General Assembly. That bill eventually would need a governor's signature. As you might expect, obtaining taxpayers' money in this manner was quite an uphill battle.

Three decades ago, the legislature decided to give this job of declaring someone innocent to the courts. Qualifying claimants had to show five things by a preponderance of evidence: (1) a felony charge, (2) that they didn't admit to doing, (3) they went to prison, (4) the prosecutor couldn't retry him, (5) and they were innocent. In 2003, the legislature amended the final requirement to include

¹ *Mansaray v. State*, 138 Ohio St.3d 277, 2014-Ohio-750 (Available at: <https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2014/2014-Ohio-750.pdf>)

convicts who proved, “Subsequent to sentencing or during or subsequent to imprisonment, an error in procedure resulted in release...”

Former convicts argued that even though they committed the crime, if their convictions were overturned on appeal, they should get paid for their prison stay under this amendment. They argued that under the 2003 amendment, an error in procedure resulted in release. For instance, a jury convicted Yanko Mansaray of drug possession with a major drug offender specification, and having weapons under disability a decade ago. Prior to trial, he filed a motion to suppress the *large quantities* of Ecstasy pills found in his home, claiming that police violated his Fourth Amendment rights. Federal agents had an arrest warrant for someone known to live with Mansaray, but wasn't there that day. The federal agents, upon learning their man wasn't there, called Cleveland Police to investigate the drugs and weapons they saw in plain view in Mansaray's home. Cleveland police obtained a search warrant from a common pleas judge based on what federal agents saw (lots of drugs and a gun). The court denied Mansaray's motion to suppress that evidence. The jury convicted; the judge sentenced him to eleven years in prison.

In 2010, the Eighth District Court of Appeals found that the trial judge made the wrong decision on suppression.² The trial court should have thrown out the evidence and dismissed the charges. Upon his release, Mansaray wanted compensation for the roughly two years he spent in prison waiting for the reversal of his conviction.

In 2014, the Ohio Supreme Court held the 2003 amendment did not grant Mansaray the right to compensation. The Ohio House's recent budget bill expressly overrules this Ohio Supreme Court decision. The changes to R.C. 2743.48(A) found in H.B. 49 would arguably mean those convicted of crimes, but are fortunate enough to have their convictions overturned on appeal, shall be paid over \$50,000 per year in prison, plus attorney fees. This is not the law; nor should it be the law on wrongful imprisonment in Ohio. It is shocking that Ohio's majority party would knowingly authorize the wholesale re-write of Ohio's wrongful imprisonment laws in this fashion. The fact that H.B. 49 makes painful cuts to our state's Public Library Fund by a minimum of \$7.7m in FY '18,³ yet expands pay to former convicts in the same budget bill is absurd. There are other existing methods for “error in procedure” claimants to use to assert these claims: a 42 USC 1983 action in federal court, or the former “moral claims” process, mentioned above.

² *State v. Mansaray*, 8th Dist. No. 93562, 2010-Ohio-5119 (Available at: <https://www.supremecourtsohio.gov/rod/docs/pdf/8/2010/2010-ohio-5119.pdf>)

³ Ohio Library Council, State Budget Update <http://olc.org/wp-content/uploads/2017/05/State-Budget-Update-Webinar-05.08.17.pdf> (May 8, 2017 at p. 8 stating: “Minimum of \$7.7 million Cut in FY '18).

Rep. Seitz's Amendments also repeal the 2012 changes to R.C. 2743.48(B)(1) which sensibly required a Claimant to bring his declaratory judgment action "in the court of common pleas in the county where the underlying criminal action was initiated." (Amended by 129th General Assembly, 2011 Ohio H.B. 487 eff. 9/10/2012). Why, exactly, is the General Assembly repealing this provision enacted five years ago? Who knows. There was not a public hearing on these extensive changes. The Seitz Amendments in H.B. 49 are not similar "clarifications" or "tweaks" to R.C. 2743.48(A) as done in 2012. They are the most significant, substantive changes since the statute was enacted in 1986. These proposed changes will likely have initial costs in the \$10's of millions, and ongoing costs in the range of \$1-2 million every year. Ohio taxpayers deserve that these proposals are considered in an orderly and sober manner -- not jammed through as a rider on the fiscal year 2018-19 House Biennial Budget Bill. The manner in which these changes are advancing at warp speed raises constitutional concerns about log-rolling.

No other state in our nation defines "wrongful imprisonment" as expansively as the statutory definition buried in H.B. 49 on page 870 of its 4675 total pages of text. Across the United States, a narrow majority of 27 states have enacted wrongful imprisonment statutes, along with the District of Columbia and the federal government. *Nelson v. State*, 2010-Ohio-1777, ¶ 27. Last year, the Iowa Supreme Court compared various states' statutory criteria to be determined "wrongfully imprisoned." *Rhoades v. State*, 880 N.W.2d 431, 440-42 (Iowa 2016) (rejecting wrongful imprisonment claim because "the best interpretation of Iowa Code section 663A.1(1)(b) is that it categorically excludes all persons who plead guilty.")⁴ "The discretionary decision of the State to dismiss the case does not establish actual innocence." *Rhoades*, supra. citing *Wilson v. New York*, 127 A.D.3d 743, 7 N.Y.S.3d 217, 219 (App. Div. 2015).

Not even the proposed Model Legislation drafted by the Innocence Project would afford Yanko Mansaray, and other "error-in-procedure" claimants relief, because (like Maryland) it requires a "pardon" as a precondition. *Rhoades*, supra. at 442 citing Model Legislation: An Act Concerning Claims for Wrongful Conviction and Imprisonment⁵; See also, Donna McKneelen, "Oh Lord Won't

⁴ Available at <http://law.justia.com/cases/iowa/supreme-court/2016/151169.html>

⁵ Available at https://www.innocenceproject.org/wp-content/uploads/2016/06/innocence_project_compensation_report-6.pdf (Last accessed 5-11-17) at Appx. B, p. 2 stating: "Sec. 2 On grounds not inconsistent with innocence: a. **He was pardoned** for the crime or crimes for which he was sentenced and which are the grounds for the complaint; b. The statute, or application thereof, on which the accusatory instrument was based, violated the Constitution of the United States or the [State]; c. The judgment of conviction was vacated; or d. The judgment of conviction was reversed..."

You Buy Me a Mercedes Benz?" 15 Scholar 185, 198 n. 104 (2013).⁶ It is absurd that the Ohio may adopt the most liberal wrongful imprisonment scheme in the nation via H.B. 49, *an appropriations bill*. A statute even more liberal than Model Legislation put forth by the leading lobbying group for exonerated individuals, The Innocence Project. This new statutory method for which taxpayer money would compensate former criminal defendants, successful on appeal, would be introduced by Rep. Seitz (R-Cincinnati), passed by Republican majority in both houses of the General Assembly whose members generally profess to be "fiscal conservatives," and signed into law by a Republican Governor – an equally strange event.

Reasonable people could debate whether Yanko Mansaray and others like him deserve compensation. That is precisely why we have a General Assembly and its members should cast recorded votes on a single topic. Surreptitiously sticking these amendments in the budget bill cannot stand. If H.B. 49's changes to the wrongful imprisonment statute do make it into law, let me suggest Ohio add one more. Change our state motto as follows, "With God the budget bill, all things are possible."

Ohio's wrongful imprisonment statute should not be expanded to impose strict liability anytime someone claims a legal error sent them to prison. Thank you for taking the time to consider my concerns on the proposed amendments to Revised Code, Chapter 2743 contained in H.B. 49. I urge you recommend removal of these misguided proposals.

Very truly yours,

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⁶https://docs.google.com/viewerng/viewer?url=http://lawspace.stmarytx.edu/files/original/STMU_The_ScholarStMarysLRev_v15i2p0185_McKneelen.pdf noting that Maryland "(allow[s] an individual to bring a claim subsequent to a pardon finding that the conviction was conclusively an error)"

date of an appraisal, if necessary under section 2329.68 of the Revised Code, or the issuance of a writ of execution.

An interest, as determined under division (D) (1) or (2) of this section, shall not include the amount of any lien otherwise valid pursuant to section 2329.661 of the Revised Code.

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

(1) 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, or misdemeanor.

(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, or misdemeanor.

(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~~ or during or subsequent to imprisonment, an error in procedure was discovered that occurred

prior to, during, or after sentencing, that violated the 27082
individual's rights to a fair trial under the Ohio Constitution or 27083
the United States Constitution, and that resulted in the 27084
individual's release, or it was determined by ~~the~~ a court of 27085
common pleas ~~in the county where the underlying criminal action~~ 27086
~~was initiated~~ either that the ~~charged~~ offense of which the 27087
individual was found guilty, including all lesser-included 27088
offenses, ~~either~~ was not committed by the individual or that no 27089
offense was ~~not~~ committed by any person. The provisions of this 27090
division regarding discovery of an error in procedure as they 27091
exist on and after the effective date of this amendment apply with 27092
respect to any such discovery that occurs on or after the 27093
effective date of this amendment and with respect to any 27094
individual whose action to be declared a wrongfully imprisoned 27095
individual was barred or dismissed on or after March 5, 2014, and 27096
prior to the effective date of this amendment based on the 27097
provisions of this division as they existed prior to that 27098
effective date. 27099

(B)(1) A person may file a civil action to be declared a 27100
wrongfully imprisoned individual in ~~the~~ a court of common pleas ~~in~~ 27101
~~the county where the underlying criminal action was initiated.~~ 27102
That civil action shall be separate from the underlying finding of 27103
guilt ~~by the court of common pleas~~. Upon the filing of a civil 27104
action to be determined a wrongfully imprisoned individual, the 27105
attorney general shall be served with a copy of the complaint and 27106
shall be heard. 27107

(2) When ~~the~~ a court of common pleas ~~in the county where the~~ 27108
~~underlying criminal action was initiated~~ determines ~~in a separate~~ 27109
~~civil action~~ that a person is a wrongfully imprisoned individual, 27110
the court shall provide the person with a copy of this section and 27111
orally inform the person and the person's attorney of the person's 27112
rights under this section to commence a civil action against the 27113

state in the court of claims because of the person's wrongful 27114
imprisonment and to be represented in that civil action by counsel 27115
of the person's own choice. 27116

(3) The court described in division (B) (1) of this section 27117
shall notify the clerk of the court of claims, in writing and 27118
within seven days after the date of the entry of its determination 27119
that the person is a wrongfully imprisoned individual, of the name 27120
and proposed mailing address of the person and of the fact that 27121
the person has the rights to commence a civil action and to have 27122
legal representation as provided in this section. The clerk of the 27123
court of claims shall maintain in the clerk's office a list of 27124
wrongfully imprisoned individuals for whom notices are received 27125
under this section and shall create files in the clerk's office 27126
for each such individual. 27127

(4) Within sixty days after the date of the entry of the 27128
determination by ~~the a~~ court of common pleas ~~in the county where~~ 27129
~~the underlying criminal action was initiated~~ that a person is a 27130
wrongfully imprisoned individual, the clerk of the court of claims 27131
shall forward a preliminary judgment to the president of the 27132
controlling board requesting the payment of fifty per cent of the 27133
amount described in division (E) (2) (b) of this section to the 27134
wrongfully imprisoned individual. The board shall take all actions 27135
necessary to cause the payment of that amount out of the emergency 27136
purposes special purpose account of the board. 27137

(5) If an individual was serving at the time of the wrongful 27138
imprisonment concurrent sentences on other convictions that were 27139
not vacated, dismissed, or reversed on appeal, the individual is 27140
not eligible for compensation as described in this section for any 27141
portion of that wrongful imprisonment that occurred during a 27142
concurrent sentence of that nature. 27143

(C) (1) In a civil action under this section, a wrongfully 27144
imprisoned individual has the right to have counsel of the 27145

individual's own choice. 27146

(2) If a wrongfully imprisoned individual who is the subject 27147
of a court determination as described in division (B)(2) of this 27148
section does not commence a civil action under this section within 27149
six months after the entry of that determination, the clerk of the 27150
court of claims shall send a letter to the wrongfully imprisoned 27151
individual, at the address set forth in the notice received from 27152
the court of common pleas pursuant to division (B)(3) of this 27153
section or to any later address provided by the wrongfully 27154
imprisoned individual, that reminds the wrongfully imprisoned 27155
individual of the wrongfully imprisoned individual's rights under 27156
this section. Until the statute of limitations provided in 27157
division (H) of this section expires and unless the wrongfully 27158
imprisoned individual commences a civil action under this section, 27159
the clerk of the court of claims shall send a similar letter in a 27160
similar manner to the wrongfully imprisoned individual at least 27161
once each three months after the sending of the first reminder. 27162

(D) Notwithstanding any provisions of this chapter to the 27163
contrary, a wrongfully imprisoned individual has and may file a 27164
civil action against the state, in the court of claims, to recover 27165
a sum of money as described in this section, because of the 27166
individual's wrongful imprisonment. The court of claims shall have 27167
exclusive, original jurisdiction over such a civil action. The 27168
civil action shall proceed, be heard, and be determined as 27169
provided in sections 2743.01 to 2743.20 of the Revised Code, 27170
except that if a provision of this section conflicts with a 27171
provision in any of those sections, the provision in this section 27172
controls. 27173

(E)(1) In a civil action as described in division (D) of this 27174
section, the complainant may establish that the claimant is a 27175
wrongfully imprisoned individual by submitting to the court of 27176
claims a certified copy of the judgment entry of the court of 27177

common pleas associated with the claimant's conviction and 27178
sentencing, and a certified copy of the entry of the determination 27179
of the court of common pleas that the claimant is a wrongfully 27180
imprisoned individual under division (B)(2) of this section. No 27181
other evidence shall be required of the complainant to establish 27182
that the claimant is a wrongfully imprisoned individual, and the 27183
claimant shall be irrebuttably presumed to be a wrongfully 27184
imprisoned individual. 27185

(2) In a civil action as described in division (D) of this 27186
section, upon presentation of requisite proof to the court of 27187
claims, a wrongfully imprisoned individual is entitled to receive 27188
a sum of money that equals the total of each of the following 27189
amounts: 27190

(a) The amount of any fine or court costs imposed and paid, 27191
and the reasonable attorney's fees and other expenses incurred by 27192
the wrongfully imprisoned individual in connection with all 27193
associated criminal proceedings and appeals, and, if applicable, 27194
in connection with obtaining the wrongfully imprisoned 27195
individual's discharge from confinement in the state correctional 27196
institution; 27197

(b) For each full year of imprisonment in the state 27198
correctional institution for the offense of which the wrongfully 27199
imprisoned individual was found guilty, forty thousand three 27200
hundred thirty dollars or the adjusted amount determined by the 27201
auditor of state pursuant to section 2743.49 of the Revised Code, 27202
and for each part of a year of being so imprisoned, a pro-rated 27203
share of forty thousand three hundred thirty dollars or the 27204
adjusted amount determined by the auditor of state pursuant to 27205
section 2743.49 of the Revised Code; 27206

(c) Any loss of wages, salary, or other earned income that 27207
directly resulted from the wrongfully imprisoned individual's 27208
arrest, prosecution, conviction, and wrongful imprisonment; 27209

(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.

(3) The court of claims shall deduct any known debts owed by the wrongfully imprisoned individual to the state, as defined in division (A) of section 2743.01 of the Revised Code, or a political subdivision, as defined in division (B) of section 2743.01 of the Revised Code, from the sum of money described in division (E) (2) of this section, and those deducted amounts shall be paid to the state or political subdivision, whichever is applicable.

(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. The 27241
court shall reduce that sum by the amount of the payment to the 27242
wrongfully imprisoned individual described in division (B) (4) of 27243
this section. 27244

(2) If the wrongfully imprisoned individual was represented 27245
in the civil action under this section by counsel of the 27246
wrongfully imprisoned individual's own choice, the court of claims 27247
shall include in the judgment entry referred to in division (F) (1) 27248
of this section an award for the reasonable attorney's fees of 27249
that counsel. These fees shall be paid as provided in division (G) 27250
of this section. 27251

(3) The state consents to be sued by a wrongfully imprisoned 27252
individual because the imprisonment was wrongful, and to liability 27253
on its part because of that fact, only as provided in this 27254
section. However, this section does not affect any liability of 27255
the state or of its employees to a wrongfully imprisoned 27256
individual on a claim for relief that is not based on the fact of 27257
the wrongful imprisonment, including, but not limited to, a claim 27258
for relief that arises out of circumstances occurring during the 27259
wrongfully imprisoned individual's confinement in the state 27260
correctional institution. 27261

(G) The clerk of the court of claims shall forward a 27262
certified copy of a judgment under division (F) of this section to 27263
the president of the controlling board. The board shall take all 27264
actions necessary to cause the payment of the judgment out of the 27265
emergency purposes special purpose account of the board. 27266

(H) To be eligible to recover a sum of money as described in 27267
this section because of wrongful imprisonment, both of the 27268
following shall apply to a wrongfully imprisoned individual: 27269

(1) The wrongfully imprisoned individual shall not have been, 27270
prior to September 24, 1986, the subject of an act of the general 27271

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.

(2) 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 the court of common pleas that the individual is a wrongfully imprisoned individual under division (B)(2) of this section.

Sec. 2743.75. (A) In order to provide for an expeditious and economical procedure that attempts to resolve disputes alleging a denial of access to public records in violation of division (B) of section 149.43 of the Revised Code, except for a court that hears a mandamus action pursuant to that section, the court of claims shall be the sole and exclusive authority in this state that adjudicates or resolves complaints based on alleged violations of that section. The clerk of the court of claims shall designate one or more current employees or hire one or more individuals to serve as special masters to hear complaints brought under this section. All special masters shall have been engaged in the practice of law in this state for at least four years and be in good standing with the supreme court at the time of designation or hiring. The clerk may assign administrative and clerical work associated with complaints brought under this section to current employees or may hire such additional employees as may be necessary to perform such work.

(B) The clerk of the court of common pleas in each county shall act as the clerk of the court of claims for purposes of accepting those complaints filed with the clerk under division (D)(1) of this section, accepting filing fees for those complaints, and serving those complaints.