

ORIGINAL

# In the Supreme Court of Ohio

STATE OF OHIO ex rel. DOUGLAS  
PRADE,  
Inmate No. A365399  
Allen Correctional Institution  
2238 North West Street  
Lima, Ohio 45801

Relator,

v.

NINTH DISTRICT COURT OF APPEALS,  
161 South High Street, Suite 504  
Akron, Ohio 44308

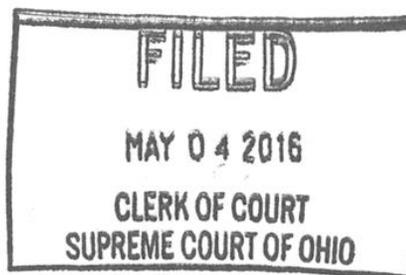
and

HON. JUDGE CHRISTINE CROCE  
Summit County Court of Common Pleas  
209 South High Street  
Akron, Ohio 44308

Respondents.

Case No. 16-0686

Original action for Writ of Prohibition



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## MEMORANDUM IN SUPPORT OF WRIT OF PROHIBITION

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## INTRODUCTION

Relator Douglas Prade has spent sixteen of the last eighteen years in prison for a crime for which, after hearing testimony from seven expert witnesses during a four-day evidentiary hearing and reviewing the voluminous trial record, Summit County Common Pleas Judge Judy Hunter found he is “actually innocent” because “no reasonable juror would convict” him. Order on Defendant’s Petition for Post-Conviction Relief or Motion for New Trial at 21, *State v. Prade*, Summit County Common Pleas Case No. CR 1998-02-0463 (Jan. 29, 2013) (Ex. A to Compl. Writ Prohibition) (the “Exoneration Order”). In granting Mr. Prade’s petition for postconviction relief in the Exoneration Order, Judge Hunter “overturn[ed]” Mr. Prade’s convictions for aggravated murder and ordered that he “be discharged from prison forthwith.” *Id.* Mr. Prade then was free for almost eighteen months, but again is incarcerated today because the Respondent Ninth District Court of Appeals allowed the State to appeal from the Exoneration Order in Ninth District Case No. 26775 and, based on its review and reweighing of the evidence, reversed.

This Court long and repeatedly has held that the statute permitting the State to appeal certain criminal matters—R.C. 2945.67(A)—bars the State from appealing from any factual determination of innocence grounded on a determination that the State produced insufficient evidence to convict, whether that determination is reflected in a jury’s verdict or a judge’s order. *See, e.g., State v. Hampton*, 134 Ohio St.3d 447, 2012-Ohio-5688, 983 N.E.2d 324, ¶ 25; *State ex rel. Yates v. Ct. App. Montgomery Cty.*, 32 Ohio St.3d 30, 32-33, 512 N.E.2d 343 (1987). Because R.C. 2945.67(A) prohibited the State from appealing from the acquittal underlying the Exoneration Order, the Ninth District patently and unambiguously lacked subject matter jurisdiction in Ninth District Case No. 26775. A writ of prohibition is necessary to correct the

Ninth District’s “prior jurisdictionally unauthorized actions.” *State ex rel. Mayer v. Henson*, 97 Ohio St.3d 276, 2002-Ohio-6323, 779 N.E.2d 223, ¶ 12 (per curiam).

After the Ninth District’s reversal of the Exoneration Order, Respondent Summit County Common Pleas Judge Christine Croce, replacing the then-retired Judge Hunter, ordered that Mr. Prade be reincarcerated and later reconsidered his motion for a new trial that Judge Hunter had granted and, in a March 11, 2016, order, denied that motion. But for the Ninth District’s *ultra vires* ruling, the proceedings before Judge Croce never would have taken place, the appeal currently before the Ninth District would not exist, and Mr. Prade—as to whom Judge Hunter made a factual determination that he is actually innocent—would be a free man.

This Court should grant the requested writs.

### FACTS

In 1998, Mr. Prade was charged with and convicted of his ex-wife’s murder, and sentenced to life imprisonment. His ex-wife was fatally shot while parked in her van outside her Akron medical offices. She attempted to defend herself, and during the struggle, her killer bit her arm so hard that, through two layers of clothing, his teeth left a bite mark impression on her skin. *State v. Prade*, 126 Ohio St.3d 27, 2010-Ohio-1842, 930 N.E.2d 287, ¶ 3. That impression on Dr. Prade’s skin was “[t]he key physical evidence at trial” in that the State’s bite mark identification experts testified that either Mr. Prade made the bite mark or that it was consistent with his dentition. *Id.*

Although the State’s DNA testing expert testified at the trial that the killer’s bite mark was “the best possible source of DNA evidence as to her killer’s identity,” *id.* at ¶ 17, DNA testing technology at that time was limited. In this case it could not, for example, separate the victim’s DNA from her blood on the lab coat from the killer’s DNA left behind when he bit her arm. *Id.* at ¶ 18. But significant advances have been made since 1998, including the

development of Y-STR DNA testing technology that can detect even small amounts of male DNA within large quantities of female DNA. *Id.* at ¶¶ 20-23.

When these modern DNA testing techniques were applied to Dr. Prade's lab coat in 2011 and 2012, the testing showed (1) that there was male DNA on Dr. Prade's lab coat over where her killer viciously bit her; (2) that Mr. Prade was definitively excluded from the male DNA found where the killer bit her; and (3) in testing of four areas of the lab coat outside the area over the bite mark that was designed to assess whether the lab coat was contaminated with stray male DNA, that there was no other male DNA. (Exoneration Order at 7-9 (Ex. A to Compl.)) Based on this new DNA evidence, as well as her review of new evidence relating to the unreliability of the bite mark identification opinions provided in the 1998 trial and the trial record, Judge Hunter was "firmly convinced that no reasonable juror would convict [Mr. Prade] for the crime of aggravated murder with a firearm" and "conclude[d] as a matter of law that [Mr. Prade] is actually innocent of aggravated murder." *Id.* at 21. Accordingly, she "overturn[ed Mr. Prade]'s convictions for aggravated murder with a firearms specification, and" ordered that he "be discharged from prison forthwith." *Id.*

Although Judge Hunter entered an order making "a factual determination of innocence" that was "grounded upon insufficiency of [the] evidence"—an order that was a "final verdict" from which, under R.C. 2945.67(A), the State could not appeal under *State ex rel. Yates v. Court of Appeals of Montgomery County*, 32 Ohio St.3d 30, 32-33, 512 N.E.2d 343 (1987)—the State appealed to the Ninth District.<sup>1</sup> The Ninth District then, based on its own review and reweighing

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<sup>1</sup> As discussed below at pages 12 to 14, although Mr. Prade did not raise the jurisdictional issue presented in this complaint in the State's appeal to the Ninth District from the Exoneration Order, "objections to subject matter jurisdiction cannot be waived." *State v. Ketterer*, 140 Ohio St.3d 400, 2014-Ohio-3973, 18 N.E.3d 1199, ¶ 8 (citing *State v. Mbodji*, 129 Ohio St.3d 325, 2011-Ohio-2880, 951 N.E.2d 1025, ¶ 10). Mr. Prade presented the jurisdictional issue presented

of the evidence, found that she had abused her discretion and reversed. *State v. Prade*, 2014-Ohio-1035, 9 N.E.3d 1072 (9th Dist.), *appeal not allowed*, 139 Ohio St.3d 1483, 2014-Ohio-3195, 12 N.E.3d 1229.

If Judge Hunter's Exoneration Order had been left standing, subsequent developments in the case and the pending appeal never would have occurred. For one thing, Mr. Prade would not have been incarcerated since July 2014. For another, Judge Croce, would not have reconsidered and denied Judge Hunter's alternative ruling granting Mr. Prade a new trial. And for still another, Mr. Prade's appeal from Judge Croce's order denying his motion for a new trial would not now be before the Ninth District. Thus, because of the Ninth District's *ultra vires* consideration of the Exoneration Order, Mr. Prade has lost his freedom and significant judicial resources have been and continue to be expended.

### ARGUMENT

Mr. Prade is entitled to a writ of prohibition against the Ninth District in Ninth District Case No. 26775, and as a consequence is also entitled to writs against Judge Croce in Summit County Common Pleas Case No. CR 1998-02-0463 and the Ninth District in Ninth District Case No. 28193. A writ of prohibition is appropriate when a lower court patently and unambiguously lacks jurisdiction, but nevertheless exercises judicial power over the relator. *See, e.g., State ex rel. McGinty v. Eighth Dist. Ct. App.*, 142 Ohio St.3d 100, 2015-Ohio-937, 28 N.E.3d 88, ¶ 12 (per curiam). The writ may issue both prospectively, "to prevent any future unauthorized exercise of jurisdiction," and retrospectively, "to correct the results of prior jurisdictionally

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(continued...)

here as one of three grounds upon which he sought to have this Court to accept jurisdiction and reverse the Ninth District's reversal of the Exoneration Order. That this Court declined jurisdiction over that appeal does not have *res judicata* effect here.

unauthorized actions.” *State ex rel. Mayer v. Henson*, 97 Ohio St.3d 276, 2002-Ohio-6323, 779 N.E.2d 223, ¶ 12 (per curiam). Mr. Prade’s complaint for writ of prohibition seeks both uses of the writ.

**I. MR. PRADE IS ENTITLED TO THE WRIT AGAINST THE NINTH DISTRICT IN NINTH DISTRICT CASE NO. 26775**

Mr. Prade seeks to use the writ retrospectively to correct the Ninth District’s prior jurisdictionally unauthorized actions in Ninth District Case No. 26775. There, the Ninth District erroneously considered the State’s appeal from the Exoneration Order, which had found Mr. Prade actually innocent of his ex-wife’s murder and exonerated him, and reversed. The writ is warranted because the Ninth District patently and unambiguously lacked subject matter jurisdiction to hear the State’s appeal in Ninth District Case No. 26775.

**A. The Ninth District Lacked Subject Matter Jurisdiction Because The Exoneration Order Was A “Final Verdict” From Which The State Could Not Appeal.**

Under Article IV of the Ohio Constitution, courts of appeals have subject matter jurisdiction over only those cases expressly provided by the legislature. *See* Ohio Const. art. IV, § 3(B)(2) (appeals courts “shall have such jurisdiction as may be provided by law”). “[T]he state has no absolute right of appeal in a criminal matter unless specifically granted such right by statute.” *State v. Fisher*, 35 Ohio St.3d 22, 24, 517 N.E.2d 911 (1988).

**1. R.C. 2945.67(A) Applies To And Limits Any Appeal By The State From An Order Granting Postconviction Relief.**

In criminal matters, the State may appeal only as provided by R.C. 2945.67(A), which states:

*A prosecuting attorney . . . may appeal as a matter of right any decision of a trial court in a criminal case, or any decision of a juvenile court in a delinquency case, which decision grants [a] a motion to dismiss all or any part of an indictment, complaint, or information, [b] a motion to suppress evidence, or [c] a motion for the return of seized property or [d] grants post conviction relief*

pursuant to sections 2953.21 to 2953.24 of the Revised Code, and *may appeal by leave of the court* to which the appeal is taken any other decision, ***except the final verdict***, of the trial court in a criminal case or of the juvenile court in a delinquency case.

(Emphasis and bracketed lettering added). Although other, more general statutes may, at least on their face, appear to provide that certain orders are final judgments that may be appealed by any party, the State's right to appeal in criminal matters always is subject to, and always is limited by, R.C. 2945.67(A). For example, in *State ex rel. Steffen v. Judges of the Court of Appeals for the First Appellate District*, 126 Ohio St.3d 405, 2010-Ohio-2430, 934 N.E.2d 906, the State claimed that R.C. 2905.03(A), which provides that “[e]very final order, judgment, or decree of a court . . . may be reviewed on appeal,” afforded the State a right to appeal in a criminal matter that was not limited by or subject to R.C. 2945.67(A). Rejecting that argument, this Court found that “[w]hile R.C. 2505.03 generally provides that every final order or judgment may be reviewed on appeal, R.C. 2945.67(A) specifically governs appeals by the state in criminal and juvenile delinquency proceedings.” *Id.* at ¶ 21 (quoting *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629, ¶ 30); *see also State v. Matthews*, 81 Ohio St.3d 375, 691 N.E.2d 1041 (1998) (same); *Fisher*, 35 Ohio St.3d at 24 (former R.C. 2953.05's general grant of a right to appeal “did not grant a right of appeal to the state,” which was required to appeal under R.C. 2945.67(A)).

Similarly, while the postconviction relief statute appears on its face to provide both the State and defendants an unlimited right to appeal in R.C. 2953.23(B),<sup>2</sup> this Court found in *Fisher*, 35 Ohio St.3d at 25, that the statute allows only “*defendants* to appeal from convictions that are

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<sup>2</sup> R.C. 2953.23(B) provides:

An order awarding or denying relief sought in a petition filed pursuant to section 2953.21 of the Revised Code is a final judgment and may be appealed pursuant to Chapter 2953. of the Revised Code.

defective.” (Emphasis added). And, if there were any doubt as to whether R.C. 2945.67(A) applies to appeals by the State from decisions granting petitions for postconviction relief, it would be removed by R.C. 2945.67(A)’s express language, which includes decisions granting postconviction relief among the types of decisions that are subject to the statute. R.C. 2945.67(A) (addressing appeals from any decision that “grants post conviction relief pursuant to sections 2953.21 to 2953.24 of the Revised Code”).

**2. Although R.C. 2945.67(A) Permits The State To Appeal From Orders Granting Postconviction Relief “As A Matter Of Right,” R.C. 2945.67(A)’s Bar Against Appeals From A “Final Verdict” Applies To Any Such Appeals.**

The State may assert that appeals from decisions granting the four types of relief that R.C. 2945.67(A) allows to be taken “as a matter of right”—one of which is a decision granting postconviction relief—are not subject to R.C. 2945.67(A)’s bar against an appeal by the State from a “final verdict.” But R.C. 2945.67(A)’s language makes no such distinction. Instead, it divides appeals by the State into those that do and do not require leave, yet its “except the final verdict” limitation applies equally to both. And there is no reasoned basis why the legislature would have intended to permit appeals from some “final verdicts” and barred appeals from others.

That R.C. 2945.67(A)’s bar against the State appealing from any “final verdict” applies to all appeals by the State—including those that R.C. 2945.67(A) permits the State to take “as a matter of right”—is not surprising because there is no tension between, on the one hand, R.C. 2945.67(A) giving the State the right to appeal from some decisions “as a matter of right” and, on the other hand, R.C. 2945.67(A) barring the State from appealing any “final verdict.” Appeals by the State under R.C. 2945.67(A) regularly seek rulings that apply prospectively, but do not disturb an acquittal in the underlying case from which the appeal was taken. *See State v. Edmondson*, 92 Ohio St.3d 393, 396, 750 N.E.2d 587 (2001) (“R.C. 2945.67(A) grants discretion

to the courts of appeals to allow appeals by the state of a trial court's 'substantive law rulings made in a criminal case which result in a judgment of acquittal *so long as the judgment itself is not appealed.*'") (citation omitted) (emphasis added); *State v Bistricky*, 51 Ohio St.3d 157, 555 N.E.2d 644 (1990) (same); *State v. Arnett*, 22 Ohio St.3d 186, 188, 489 N.E.2d 284 (1986) (same); *State v. Keeton*, 18 Ohio St.3d 379, 381, 481 N.E.2d 629 (1985) (same). Here, R.C. 2945.67(A) provided the State with an appeal "as a matter of right" from the Exoneration Order and the underlying postconviction proceedings (*e.g.*, an order denying a *Daubert* challenge to the defense experts' opinions, had there been such a challenge), but R.C. 2945.67(A) also barred the State from appealing from the Exoneration Order's acquittal of Mr. Prade.

Moreover, the claim that R.C. 2945.67(A)'s "final verdict" bar somehow does not apply to appeals taken "as a matter of right" ignores multiple instances where this Court has, without distinction, observed that R.C. 2945.67(A)'s "final verdict" bar applies to both appeals taken as a matter of right and those taken with leave. For example, in *State v. Hampton*, 134 Ohio St.3d 447, 2012-Ohio-5688, 983 N.E.2d 324, ¶ 25, the State appealed both as of right and by leave. In affirming the appellate court's dismissal of the appeal, this Court found that "[a] court order purporting to acquit a defendant due to the state's failure to establish venue is a 'final verdict' as that term is used in R.C. 2945.67(A), and *therefore the state may not appeal as of right* from the order." (Emphasis added). And in *State ex rel. Yates v. Court of Appeals for Montgomery County*, 32 Ohio St.3d 30, 32-33, 512 N.E.2d 343 (1987), this Court observed that "R.C. 2945.67(A) prevents an appeal of *any* final verdict" and then held "that a judgment of acquittal by a trial judge pursuant to Crim. R. 29(C) is a final verdict within the meaning of R.C. 2945.67(A), and is not appealable by the state as a matter of right or by leave to appeal pursuant to that statute." (Italics in original; underlining added); *accord Keeton*, 18 Ohio St.3d

379, paragraph 2 of the syllabus (“A directed verdict of acquittal . . . is a ‘final verdict’ within the meaning of R.C. 2945.67(A) which *is not appealable by the state as a matter of right* or by leave to appeal pursuant to that statute.”) (emphasis added).

Consistent with R.C. 2945.67(A)’s language and purpose, as well as this Court’s decisions interpreting and applying it, lower courts have found that “as a matter of right” appeals by the State under R.C. 2945.67(A) are subject to R.C. 2945.67(A)’s bar against the State appealing a “final verdict.” For example, in *In re D.R.*, 8th Dist. Cuyahoga No. 100034, 2014-Ohio-832, ¶ 15, and *In re N.I.*, 191 Ohio App.3d 97, 2010-Ohio-5791, 944 N.E.2d 1214, ¶ 9 (8th Dist.), juvenile courts had granted motions to dismiss complaints—a type of decision as to which the State may appeal “as a matter of right” under R.C. 2945.67(A)—yet the appellate court dismissed the appeals because the State was attempting to appeal “final verdict[s]” that could not be appealed.

In sum, the claim that, because R.C. 2945.67(A) affords the State the opportunity to appeal some decisions “as a matter of right,” R.C. 2945.67(A)’s “final verdict” bar somehow does not apply to those appeals is flatly wrong. The “final verdict” bar applies to *all* appeals contemplated by R.C. 2945.67(A).

**3. The Exoneration Order, Which Found Mr. Prade To Be Actually Innocent And Exonerated Him After A Review Of The Evidence, Was A “Final Verdict” Under R.C. 2945.67(A) From Which The State Could Not Appeal.**

The State may assert that the Exoneration Order, which found Mr. Prade to be “actually innocent” after Judge Hunter’s detailed review of the evidence, is not a “final verdict” under R.C. 2945.67(A). As an initial matter, when assessing orders for purposes of R.C. 2945.67(A), “[t]he determination . . . does not depend on what [the order] is labeled;” instead, it “depends on the type of relief” sought because “[a]ny other result would improperly elevate form over substance.” *State v. Davidson*, 17 Ohio St.3d 132, 134-35, 477 N.E.2d 1141 (1985). And this

Court regularly has observed that the determination of what is a “final verdict” under R.C. 2945.67(A) is not dictated by the limits of the Double Jeopardy Clause because “[t]he issue under Ohio law is not one of double jeopardy but rather whether” the decision in question “is a final verdict.”<sup>3</sup> *Yates*, 32 Ohio St.3d at 32; accord *State v. Ross*, 128 Ohio St.3d 283, 2010-Ohio-6282, 943 N.E.2d 992, ¶ 16, cert. denied, \_\_\_ U.S. \_\_\_, 135 S.Ct. 1859, 191 L.Ed.2d 737 (2015).

Significantly, this Court long has held that a “final verdict” under R.C. 2945.67(A) is not limited to a jury’s verdict and, instead, includes orders entered by a judge after weighing the evidence and finding the defendant not guilty. For example, in paragraph two of the syllabus in *Keeton*, this Court held that “[a] directed judgment of acquittal by the trial judge in a criminal case” entered under Crim. R. 29(A) before the jury’s verdict “is a ‘final verdict’ within the meaning of R.C. 2945.67(A) which is not appealable by the state as a matter of right or by leave to appeal pursuant to that statute.” *Keeton*, 18 Ohio St.3d 379, 481 N.E.2d 629.

Similarly, this Court found in *Yates* that a trial judge’s order granting a directed verdict of acquittal entered under Crim. R. 29(C) after a jury’s guilty verdict was a “final verdict” that, under R.C. 2945.67(A), cannot be reviewed on appeal. *Yates*, 32 Ohio St.3d at 33. There, this Court observed that a post-verdict directed judgment of acquittal under Crim. R. 29(C), like the pre-verdict directed judgment of acquittal under Crim. R. 29(A) at issue in *Keeton*, is “grounded on a determination by the trial judge that the state produced insufficient evidence to convict.” *Id.* at 32. Continuing, *Yates* explained that “[t]he judgment of acquittal in the case *sub judice*, though entered after a jury verdict and upon the authority of Crim. R. 29(C), was grounded upon insufficiency of the evidence. It is a factual determination of innocence and as much a final

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<sup>3</sup> Because the jury in his 1998 trial returned a guilty verdict—albeit one rendered without the new DNA evidence that Judge Hunter found established Mr. Prade’s innocence—Mr. Prade does not contend that the Double Jeopardy Clause is implicated in these circumstances. See *Smith v. Massachusetts*, 543 U.S. 462, 467, 125 S.Ct. 1129, 160 L.Ed.2d 914 (2005).

verdict as any judgment of acquittal granted pursuant to Crim R. 29(A).” *Id.* at 32-33 (footnote omitted); *see also Hampton*, 2012-Ohio-5688, ¶ 17 (“[t]here is no reason to overrule the clear pronouncement in *Yates*”). And this Court found in *Bistricky* and *Hampton* that directed judgments of acquittal that were based, not on the insufficiency of the evidence that the defendant committed that crime, but on allegedly erroneous interpretations of law (*Bistricky*) or improper venue (*Hampton*) were “final verdicts” that, under R.C. 2945.67(A), could not be reviewed on appeal. *Bistricky*, 51 Ohio St.3d at 158; *Hampton*, 2012-Ohio-5688, ¶ 25.

Further, the fact that Judge Hunter’s Exoneration Order—an order entered in the docket of a criminal case (*i.e.*, Summit County Common Pleas Case No. CR-98-020463)—granted a petition for postconviction relief does nothing to change the analysis. While postconviction relief actions are, procedurally speaking, “quasi-civil,” *State v. Nichols*, 11 Ohio St.3d 40, 41-42, 463 N.E.2d 375 (1984), they are substantively criminal and, if successful, may, as here, result in setting aside a criminal judgment. *State v. Broom*, \_\_\_ Ohio St.3d \_\_\_, 2016-Ohio-1028, \_\_\_ N.E.3d \_\_\_, ¶ 28 (a postconviction relief proceeding is “a collateral, civil attack on a criminal judgment”) (citations omitted). R.C. 2945.67(A) expressly refers and applies without distinction to orders granting postconviction relief along with other types of orders that, for purposes of R.C. 2945.67(A), are in a “criminal case.” Indeed, juvenile delinquency proceedings are “civil rather than criminal in character,” yet R.C. 2945.67(A) expressly applies to them because, like postconviction proceedings, they “have inherently criminal aspects.” *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629, ¶ 26 (citations omitted).

Here, Judge Hunter, after being provided with the new DNA test results, conducted a four-day evidentiary hearing at which she heard testimony from seven expert witnesses and reviewed the voluminous trial record. Then, after weighing all the evidence and “conclud[ing] as

a matter of law that [Mr. Prade] is actually innocent,” she “overturn[ed]” his criminal “conviction for aggravated murder” in the Exoneration Order granting Mr. Prade’s petition for postconviction relief. (Exoneration Order at 21 (Ex. A to Compl.)) The Exoneration Order, like the directed judgment of acquittal in *Yates*, was a “factual determination of innocence” that was “grounded upon insufficiency of the evidence.” *Yates*, 32 Ohio St.3d at 32-33. It is substantively identical to, and substantively indistinguishable from, the trial judges’ directed judgments of acquittal at issue in *Hampton*, *Bistricky*, *Yates*, and *Keeton*.

In short, the Exoneration Order was “final verdict” under R.C. 2945.67(A) and, because the statute “prevents an appeal of *any* final verdict,” *Yates*, 32 Ohio St.3d at 32 (emphasis in original), the State could not appeal the portion of the Exoneration Order finding Mr. Prade “actually innocent.” Accordingly, the Ninth District lacked jurisdiction to hear the State’s appeal from the Exoneration Order in Ninth District Case No. 26775.

**B. A Retrospective Writ of Prohibition Should Issue Because the Ninth District Patently and Unambiguously Exceeded Its Jurisdiction**

When a lower court patently and unambiguously lacked subject matter jurisdiction in a case, the writ of prohibition can be used retrospectively as a corrective matter. “[A] court which has jurisdiction to issue the writ of prohibition . . . has plenary power, not only to prevent excesses of lower tribunals, but to correct the results thereof and to restore the parties to the same position they occupied before the excesses occurred.” *State ex rel. Lomaz v. Ct. Common Pleas Portage Cty.*, 36 Ohio St.3d 209, 212, 522 N.E.2d 551 (1988) (quoting *State ex rel. Adams v. Gusweiler*, 30 Ohio St.2d 326, 330, 285 N.E.2d 22 (1972)).

That is because “a writ of prohibition ‘tests and determines “solely and only” the subject matter jurisdiction’ of the lower court,” *State ex rel. Tubbs Jones v. Suster*, 84 Ohio St.3d 70, 73, 701 N.E.2d 1002 (1998) (citations omitted), and a defect in a court’s subject matter jurisdiction

never can be waived because subject matter jurisdiction “is a ‘condition precedent to the court’s ability to hear the case’” and thus “may be challenged at any time.” *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, ¶ 11 (citations omitted). Indeed, this Court has held that the subject matter jurisdiction of a court of appeals considering a criminal appeal by the State under R.C. 2945.67(A) may be attacked collaterally—and even then, may be raised *sua sponte* by the court when the defendant fails to brief the issue. *See State v. Lomax*, 96 Ohio St.3d 318, 2002-Ohio-4453, 774 N.E.2d 249, ¶¶ 16-17; *Gates Mills Inv. Co. v. Parks*, 25 Ohio St.2d 16, 19-20, 266 N.E.2d 552 (1971) (“The failure of a litigant to object to subject-matter jurisdiction at the first opportunity is undesirable and procedurally awkward. But it does not give rise to a theory of waiver.”).

That the writ can be sought in a collateral attack flows from the fact that actions taken by a court without subject matter jurisdiction are void *ab initio*. *Tubbs Jones*, 84 Ohio St.3d at 75. In that circumstance, “[i]t is as though such proceedings had never occurred . . . and the parties are in the same position as if there had been no” such proclamation. *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254, ¶ 27 (citations omitted). Thus, an “appeal is immaterial,” *State ex rel. Willacy v. Smith*, 78 Ohio St.3d 47, 51, 676 N.E.2d 109 (1997), and the writ can be used “to correct the results of prior jurisdictionally unauthorized actions.” *Mayer*, 2002-Ohio-6323, ¶ 12.

Here, as demonstrated above, the Exoneration Order, which found Mr. Prade to be “actually innocent” and exonerated him, was a “final verdict” for purposes of R.C. 2945.67(A), and therefore the Ninth District patently and unambiguously lacked subject matter jurisdiction over the State’s appeal from that order. Consequently, the Ninth District’s reversal of Judge

Hunter's Exoneration Order was void, and that court's extra-jurisdictional actions should be corrected by retrospective application of the writ.

**II. MR. PRADE ALSO IS ENTITLED TO WRITS AGAINST THE HONORABLE JUDGE CHRISTINE CROCE IN SUMMIT COUNTY COMMON PLEAS CASE NO. CR-98-02-0463 AND AGAINST THE NINTH DISTRICT IN NINTH DISTRICT CASE NO. 28193**

For the reasons discussed above, Mr. Prade also is entitled to retrospective application of the writ to correct the Honorable Judge Christine Croce's order directing that Mr. Prade be reincarcerated and her ruling on his motion for a new trial, and prospective application against the Ninth District in Ninth District Case No. 28193, the appeal from Judge Croce's new trial ruling.

These uses of the writ are dependent upon this Court applying the writ to correct the Ninth District's prior jurisdictionally unauthorized actions in Ninth District Case No. 26775, as discussed above. Because R.C. 2945.67(A) prohibited the State from appealing from Judge Hunter's Exoneration Order, the Ninth District patently and unambiguously lacked subject matter jurisdiction over the State's appeal. Without subject matter jurisdiction, the Ninth District's decision reversing Judge Hunter's Exoneration Order was "void" *ab initio*, *Tubbs Jones*, 84 Ohio St.3d at 75, and, thus, as a matter of law "[i]t is as though such proceedings had never occurred . . . and the parties are in the same position as if there had been no" such reversal. *Bloomer*, 2009-Ohio-2462, ¶ 27. Without the Ninth District's reversal, the Exoneration Order that both exonerated Mr. Prade and set him free would remain standing. And if Judge Hunter's Exoneration Order properly had been deemed one from which the State could not appeal, Judge Croce would patently and unambiguously have lacked jurisdiction to order that Mr. Prade be reincarcerated and reconsider Judge Hunter's alternative grant of Mr. Prade's request for a new

trial, and the Ninth District would not have jurisdiction to consider an appeal of that new trial ruling.

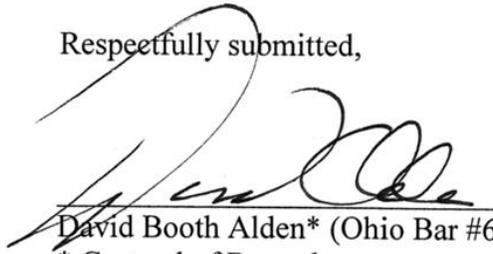
Therefore, writs of prohibition are necessary to correct the results of Judge Croce's order directing that Mr. Prade be reincarcerated and her new trial ruling, neither of which would have occurred but for the Ninth District's *ultra vires* decision in Ninth District Case No. 26775, and to prevent the parties and courts from wasting additional resources in pursuing an appeal of Judge Croce's new trial ruling before the Ninth District in Ninth District Case No. 28193.

## CONCLUSION

For the foregoing reasons, Mr. Prade is entitled to writs of prohibition against (1) the Respondent Ninth District Court of Appeals in Ninth District Case No. 26775, (2) the Respondent Honorable Judge Christine Croce in Summit County Common Pleas Case No. CR 1998-02-0463, and (3) the Respondent Ninth District Court of Appeals in Ninth District Case No. 28193.

Dated: May 4, 2016

Respectfully submitted,



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