

IN THE SUPREME COURT OF OHIO

State ex rel. DOUGLAS PRADE, :
 :
 Relator, : Case No. 2016-0686
 :
 v. : Original Action in Prohibition
 :
 NINTH DISTRICT COURT OF APPEALS, :
 et al. :
 :
 Respondents. :

**MOTION TO DISMISS OF RESPONDENT
NINTH DISTRICT COURT OF APPEALS**

Mark A. Godsey (0074484)
Brian C. Howe (0086517)
THE OHIO INNOCENCE PROJECT
University of Cincinnati College of Law
P. O. Box 201140
Cincinnati, Ohio 45220-0040
Tel: 513-556-6805; Fax: 513-556-2391
markgodsey@gmail.com
brianchurchhowe@gmail.com

DAVID BOOTH ALDEN (0006143)*
* Counsel of Record
Lisa B. Gates (0040392)
Emmett E. Robinson (0088537)
Matthew R. Cushing (0092674)
JONES DAY
North Point, 901 Lakeside Ave.
Cleveland, Ohio 44114
Tel: 216-586-3939; Fax: 216-579-0212
dbalden@jonesday.com
lgates@jonesday.com
erobinson@jonesday.com
mcushing@jonesday.com

*Counsel for Relator,
Douglas Prade*

MICHAEL DEWINE (0009181)
Ohio Attorney General

TIFFANY L. CARWILE (0082522)*
*Counsel of Record
SARAH PIERCE (0087799)
Assistant Attorneys General
Constitutional Offices Section
30 E. Broad St., 16th Floor
Columbus, Ohio 43215
Tel: 614-466-2872; Fax: 614-728-7592
tiffany.carwile@ohioattorneygeneral.gov
sarah.pierce@ohioattorneygeneral.gov

*Counsel for Respondent,
Ninth District Court of Appeals*

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Pursuant to S.Ct.Prac.R. 12.04 and Civ.R 12(B)(6), Respondent the Ninth District Court of Appeals moves this Court to dismiss Relator’s petition for a writ of prohibition. A memorandum in support is attached.

Respectfully submitted,

MICHAEL DEWINE (0009181)
Ohio Attorney General

/s Tiffany L. Carwile

TIFFANY L. CARWILE (0082522)*

*Counsel of Record

SARAH PIERCE (0087799)
Assistant Attorneys General
Constitutional Offices Section
30 E. Broad St., 16th Floor
Columbus, Ohio 43215
Tel: (614) 466-2872; Fax: (614) 728-7592
tiffany.carwile@ohioattorneygeneral.gov
sarah.pierce@ohioattorneygeneral.gov

*Counsel for Respondent,
Ninth District Court of Appeals*

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Relator Douglas Prade brings this original action for an extraordinary writ of prohibition against the Ninth District Court of Appeals and Summit County Common Pleas Judge Christine Croce. As to the Ninth District Court of Appeals, Relator seeks an order vacating the Ninth District's prior ruling in Case No. 26775 and an order dismissing Case No. 21893, two appeals stemming from Relator's application for post-conviction relief. Although Relator contends the Ninth District lacked jurisdiction to hear these appeals, the plain language of statute and interpreting case law dictate otherwise. Moreover, because Relator had, and exercised, an adequate remedy at law, his complaint should be dismissed for failure to state a claim upon which this Court may grant relief.

II. STATEMENT OF FACTS

In 1998, a jury convicted Relator of aggravated murder, and the trial court sentenced him to life in prison. Compl., ¶ 14, *State v. Prade*, 139 Ohio App.3d 676, 683, 745 N.E.2d 475 (9th Dist. 2000). In 2008, Relator filed an application for post-conviction relief and requested that new DNA tests be performed on some of the evidence, which was ultimately granted. Compl., ¶¶ 1, 17, 25-27. After the testing was performed, Summit County Common Pleas Court Judge Judy Hunter conducted an evidentiary hearing regarding the DNA analysis. *Id.* ¶ 22. After the hearing, Judge Hunter granted Relator post-conviction relief and overturned Relator's conviction or, in the alternative, granted Relator a new trial. *Id.* ¶ 23.

The State appealed, and, in 2014, the Ninth District reversed (Case No. 26775). *Id.* ¶ 34. Relator sought discretionary review from this Court, which was denied. *Id.* ¶¶ 35-36. In a separate appeal by the State, the Ninth District also held that Judge Hunter's alternative grant of a new trial could be reconsidered on remand. *Id.* ¶ 37. On remand, Judge Croce was assigned to

the case, and she denied Relator's request for a new trial. *Id.* ¶¶ 36, 38. Relator appealed the denial of a new trial on April 7, 2016, and that appeal is still pending (Case No. 21893). *Id.* ¶ 38.

Subsequently, Relator filed the instant complaint for a writ of prohibition. In the complaint and accompanied memoranda, Relator relies on a misreading of R.C. 2945.67(A) to argue that the Ninth District did not have jurisdiction to consider the State's appeal of Judge Hunter's order. *See generally id.* In relevant part, Relator requests an order vacating the Ninth District's 2014 order reversing Judge Hunter's ruling and an order dismissing the 2016 appeal currently before the Ninth District. *Id.* at 17.

III. ARGUMENT

A. Standard of Review

A motion to dismiss for failure to state a claim upon which a court can grant relief challenges the sufficiency of the complaint itself, not evidence outside of the complaint. *Volbers-Klarich v. Middletown Mgmt, Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, 929 N.E.2d 434, ¶ 11. When considering the factual allegations of the complaint, a court must accept incorporated items as true, and the plaintiff must be afforded all reasonable inferences possibly derived therefrom. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). Finally, a court must find that the plaintiff's complaint does not provide relief on any possible theory. Civ.R. 12(B)(6); *State Auto. Mut. Ins. Co. v. Titanium Metals Corp.*, 108 Ohio St.3d 540, 2006-Ohio-1713, 844 N.E.2d 1199, ¶ 8.

B. Relator's Request for a Writ of Prohibition Must Fail.

For Relator to be entitled to the requested writ, he must establish that (1) the Ninth District is about to exercise judicial or quasi-judicial power, (2) that the exercise of that power is unauthorized by law, and (3) the court's denial of the writ will result in injury for which no other adequate remedy exists in the ordinary course of law. *State ex rel. Hamilton Cty. Bd. of*

Commrs. v. Hamilton Cty. Ct. of Common Pleas, 126 Ohio St.3d 111, 2010-Ohio-2467, 931 N.E.2d 98, ¶ 18.

Prohibition is a preventative writ rather than a corrective remedy, designed to *prevent* a tribunal from proceeding in a matter that it is not authorized to hear and determine. *State ex rel. LTV Steel Co. v. Gwin*, 64 Ohio St.3d 245, 248, 594 N.E.2d 616 (1992) (emphasis added). Such writ can only be used as a corrective measure if a court acted “completely without jurisdiction.” *Id.* Prohibition will not issue if the relator possesses an adequate remedy in the ordinary course of law. *State ex rel. Dannaher v. Crawford*, 78 Ohio St.3d 391, 393, 678 N.E.2d 549 (1997). Absent a patent and unambiguous lack of jurisdiction, a party challenging the court’s jurisdiction has an adequate remedy at law by appeal. *State ex rel. Enyart v. O’Neill*, 71 Ohio St.3d 655, 656, 646 N.E.2d 1110 (1995); *State ex rel. Kreps v. Christiansen*, 88 Ohio St.3d 313, 316, 725 N.E.2d 663 (2000).

Here, Relator’s request for corrective remedy—vacating a prior opinion—requires Relator to show that the Ninth District acted when it patently and unambiguously lacked jurisdiction, a showing he cannot satisfy. Section 3(B)(2), Article IV of the Ohio Constitution provides that the courts of appeals “shall have such jurisdiction as may be provided by law.” Therefore, the Ninth District would have jurisdiction to consider the State’s appeal if such jurisdiction was provided in statute.

This appellate jurisdiction is provided in 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, . . . which decision grants a motion to dismiss all or any part of an indictment, complaint, or information, a motion to suppress evidence, or a motion for the return of seized property or *grants post conviction relief* pursuant to sections 2953.21 to 2953.24 of the Revised Code, and may appeal *by leave of 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.

The plain language of this statute sets forth two rights to appeal: (1) as a matter of right, *any decision of the trial court* in four specific circumstances, including the grant of post-conviction relief; and (2) by leave of the court, *any other decision of the trial court, except the final verdict*. *State v. Fraternal Order of Eagles*, 58 Ohio St.3d 166, 167, 569 N.E.2d 478 (1991); *see also State v. Keeton*, 18 Ohio St.3d 379, 381, 481 N.E.2d 629 (1985) (noting that “in addition” to being granted an appeal as of right, “the state may, by leave of the appellate court, appeal any decision of a trial court in a criminal case which is adverse to the state, except a final verdict”).

Under the plain language of this statute, the Ninth District clearly had jurisdiction to consider Judge Hunter’s grant of post-conviction relief. Attempting to avoid this obvious result, Relator advocates a misreading of the statute to argue that the phrase “except the final verdict” applies to both as-of-right appeals and by-leave appeals. Such a tortured reading, however, is supported by neither the Ohio Revised Code or by case law.

Under R.C. 1.42, “[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage.” Additionally, courts may not add language to a statute. *State ex rel. Steffen v. Ct. of Apps., 1st App. Dist.*, 126 Ohio St.3d 405, 2010-Ohio-2430, 934 N.E.2d 906, ¶ 26. The rules of grammar dictate that “except a final verdict” modifies only “any other decision . . . of the trial court.” This is particularly true here when the exception has been placed in the middle of the direct object of the sentence—*i.e.* any other decision of the trial court—and not at the beginning or end of the entire sentence. Importantly, Relator’s misreading of the statute would require this Court to add language to the appeal-by-right part of the sentence, such that it would in essence read: “may appeal as a matter of right any decision, *except the final verdict*, of a trial court.” That, however, is not how the legislature drafted R.C. 2945.67, and this Court should not redraft the statute to conform to Relator’s misreading.

Moreover, none of the case law cited by Relator reaches a different result. First, the majority of Relator's cases involve jury or bench verdicts, judgments of acquittal under Crim.R. 29, or a juvenile equivalent of an acquittal under Juv.R. 29(F)(2)(d). See *State v. Hampton*, 134 Ohio St.3d 447, 2012-Ohio-5688, 983 N.E.2d 324 (judgment of acquittal under Crim.R. 29); *State v. Edmondson*, 92 Ohio St.3d 393, 750 N.E.2d 587 (2001) (bench trial finding of guilty on lesser-included offense was a finding of not guilty on higher offense); *State v. Bistricky*, 51 Ohio St.3d 157, 555 N.E.2d 644 (1990) (judgment of acquittal under Crim.R. 29); *State ex rel. Yates, v. Ct. of Apps. Montgomery Cty.*, 32 Ohio St.3d 30, 512 N.E.2d 343 (1987) (judgment of acquittal under Crim.R. 29); *State v. Arnett*, 22 Ohio St.3d 186, 489 N.E.2d 284 (1986) (jury verdict); *Keeton*, 18 Ohio St.3d at 380 (judgment of acquittal under Crim.R. 29); *In re D.R.*, 8th Dist. Cuyahoga Nos. 100034, 100035, 2014-Ohio-832 (holding that Juv.R. 29(F)(2)(d) was the criminal equivalent of an acquittal); *In re N.I.*, 191 Ohio App.3d 97, 2010-Ohio-5791, 944 N.E.2d 1214 (same as *In re D.R.*). Another case involved a motion for a new trial under Crim.R. 33. *Steffan*, 126 Ohio St.3d 405.

Importantly, none of these cases involved one of the four circumstances in which the State may appeal as of right. Indeed, the Court in *Yates* did not even quote the as-of-right language when discussing the pertinent law. 32 Ohio St.3d at 31. Thus, it is unsurprising that the Court held that the State could not appeal any of these orders as of right or that the Court considered whether there was a final verdict for the by-leave analysis.

Relator also cites to one case that does touch upon one of the four circumstances for an as-of-right appeal—*Fraternal Order of Eagles*. This case, however, supports a distinction between as-of-right and by-leave appeals. First, when detailing the four as-of-right circumstances, the Court does not qualify any of them as not applicable when there is a final

verdict, but the Court does note that the exception applies to by-leave appeals. *Fraternal Order of Eagles*, 58 Ohio St.3d at 167. The Court held that the State had an “absolute right” to appeal from one of the four circumstances, and that “such right should not be abolished by the entry of a judgment of acquittal.”¹ *Id.* at 168-69. In reaching this holding, the Court noted that the purpose of R.C. 2945.67 was “to facilitate the effective prosecution of crime and to promote fairness between the accuser and the accused.” *Id.* at 168.

Based on the case law and the plain language of R.C. 2945.67, the Ninth District did not act patently and unambiguously without jurisdiction when it reviewed Judge Hunter’s grant of post-conviction relief. The statute expressly authorized such appeal without exception, and the case law does not suggest otherwise. Because Relator cannot establish a patent and unambiguous lack of jurisdiction, Relator had an adequate remedy by way of appeal, which he exercised. *State ex rel. Enyart*, 71 Ohio St.3d at 656; *State ex rel. Kreps*, 88 Ohio St.3d at 316. Accordingly, because Relator had an adequate remedy, he has failed to state a claim for a writ of prohibition. *State ex rel. Dannaher*, 78 Ohio St.3d at 393.

¹ The Court did note that, while it was resolving the issue regarding the State’s right to appeal, the Court would not set aside the judgment of acquittal, presumably on Double Jeopardy grounds. *Fraternal Order of Eagles*, 58 Ohio St.3d at 168. However, here Relator does not contend that Double Jeopardy concerns are implicated. Compl. at 6 n.1.

IV. CONCLUSION

For the above reasons, Respondent, the Ninth District Court of Appeals, respectfully requests that this Court dismiss the Relator's complaint.

Respectfully submitted,

MICHAEL DEWINE (0009181)
Ohio Attorney General

/s/ Tiffany L. Carwile

TIFFANY L. CARWILE (0082522)*

*Counsel of Record

SARAH PIERCE (0087799)

Assistant Attorneys General
Constitutional Offices Section
30 E. Broad St., 16th Floor
Columbus, Ohio 43215

Tel: (614) 466-2872; Fax: (614) 728-7592
tiffany.carwile@ohioattorneygeneral.gov
sarah.pierce@ohioattorneygeneral.gov

*Counsel for Respondent,
Ninth District Court of Appeals*

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served by first class mail via the U.S. Postal Service on June 3, 2016, upon the following:

Mark A. Godsey (0074484)
Brian C. Howe (0086517)
THE OHIO INNOCENCE PROJECT
University of Cincinnati College of Law
P. O. Box 201140
Cincinnati, Ohio 45220-0040

David Booth Alden (0006143)
Lisa B. Gates (0040392)
Emmett E. Robinson (0088537)
Matthew R. Cushing (0092674)
JONES DAY
North Point, 901 Lakeside Ave.
Cleveland, Ohio 44114

*Counsel for Relator,
Douglas Prade*

/s Tiffany L. Carwile

TIFFANY L. CARWILE (0082522)
Assistant Attorney General