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In the Supreme Court of Ohio

STATE OF OHIO ex rel. DOUGLAS PRADE, Relator, v. NINTH DISTRICT COURT OF APPEALS, and HON. JUDGE CHRISTINE CROCE Respondents.	Case No. 16-0686 Original Action for Writ of Prohibition

RELATOR DOUGLAS PRADE'S MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTIONS TO DISMISS

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I. INTRODUCTION

After careful review of the trial record and new DNA test results definitively excluding former Akron Police Captain Douglas Prade from all male DNA found where Dr. Margo Prade's killer bit her, Summit County Common Pleas Judge Judy Hunter was "firmly convinced that no reasonable juror would convict [Relator Douglas Prade] for the crime of aggravated murder with a firearm" and "conclude[ed] as a matter of law that [Relator Douglas Prade] is actually innocent." (1/29/13 Order (the "Exoneration Order") at 21 (Ex. A to Compl.)). Judge Hunter then "overturn[ed]" his conviction for aggravated murder, Mr. Prade was released from prison, and he was free for eighteen months. (*See id.*) For the past two years, however, Mr. Prade again has been incarcerated for the very crime as to which Judge Hunter found that he is "actually innocent."

Mr. Prade appears to be the only defendant in the history of the state to be incarcerated for a crime after a trial judge reviewed the evidence and made a factual determination that he was innocent. The reason that no other defendant *ever* has been incarcerated under these circumstances is not hard to discern. Namely, a trial court's ruling "grounded on a determination by the trial judge that the state produced insufficient evidence to convict" is a "final verdict" under R.C. 2945.67(A), and "R.C. 2945.67(A) prevents an appeal of *any* final verdict." *State ex rel. Yates v. Court of Appeals for Montgomery Cty.*, 32 Ohio St.3d 30, 32, 512 N.E.2d 343 (1987) (emphasis in original). Thus, apart from this case, the State has been barred from appealing, and appellate courts have been barred from reviewing, any and all "final verdict[s]."

In their motions to dismiss, Respondents the Ninth District Court of Appeals (the "Ninth District") and Honorable Judge Christine Croce ("Judge Croce") dispute neither that a writ of prohibition is the appropriate remedy when lower courts act without subject matter jurisdiction

nor that, if R.C. 2945.67(A) barred the State's appeal from the Exoneration Order, a writ of prohibition is warranted. The Ninth District's sole claim is that R.C. 2945.67(A)'s bar on the State appealing from "final verdicts" applies to only some rulings—appeals from "other decisions"—and not to certain others where, as with decisions granting petitions for postconviction relief such as the Exoneration Order, R.C. 2945.67(A) typically gives the State the ability to appeal "as a matter of right."

As discussed below at pages 5 to 14, however, this argument fails for many reasons. First, it conflicts with repeated holdings by this Court, including this Court's clear directive that "R.C. 2945.67(A) prevents an appeal of *any* final verdict." *Yates*, 32 Ohio St.3d at 32 (emphasis in original). Second, this reading of the statute is an unduly restrictive one, and the statute readily lends itself to the interpretation Relator advocates and that this Court repeatedly has articulated. Third, there is no reason why the Legislature would have, as the Ninth District suggests, intended to bar appeals by the State from only some "final verdicts" while allowing appeals from others. Finally, if the Court were to adopt the Ninth District's interpretation of R.C. 2945.67(A), R.C. 2945.67(A) still would bar the State's appeal because multiple "decisions" were subsumed within the Exoneration Order, and this Court regularly has found that R.C. 2945.67(A) permits appeals from some "decisions" in an order while simultaneously barring any appeal from an underlying "final verdict."

Separately, Judge Croce contends that (1) Judge Hunter's decision that "overturn[ed]" Mr. Prade's conviction was not a "final verdict" under R.C. 2945.67(A) and (2) Judge Hunter erred in overturning Mr. Prade's conviction because Mr. Prade failed to establish his "actual innocence." But, as discussed below at pages 4 to 5, Judge Croce does not point to a single substantive difference between, on the one hand, Judge Hunter's decision that "overturn[ed]" Mr.

Prade's conviction and, on the other, directed judgments of acquittal, and this Court repeatedly has found that the latter are "final verdict[s]" under R.C. 2945.67(A). And, as discussed below at pages 14 to 15, the claim that Judge Hunter erred in finding Mr. Prade actually innocent is legally irrelevant and factually wrong.

The Court should deny Respondents' motions to dismiss. Further, and because the undisputed facts show that the Ninth District and Judge Croce acted and are acting without jurisdiction, the Court should issue the requested writs of prohibition.

II. ARGUMENT

THE COURT SHOULD DENY THE MOTIONS TO DISMISS.

A. A Writ Of Prohibition Is The Appropriate Vehicle To Correct And Prevent Actions By Lower Courts That Patently And Unambiguously Lack Subject Matter Jurisdiction.

Both Respondents agree that a writ of prohibition should issue when a relator establishes that: "(1) the court or officer against whom it is sought is about to exercise judicial or quasi-judicial power; (2) the exercise of such power is unauthorized by law; and (3) it will result in injury for which no other adequate remedy exists." *State ex rel. Yates v. Ct. App. Montgomery County*, 32 Ohio St.3d 30, 33, 512 N.E.2d 343 (1987) (citations omitted); *see* Respondent Hon. Judge Christine Croce's Motion to Dismiss ("Croce MTD") at 8; Motion to Dismiss of Respondent Ninth District Court of Appeals ("9th Dist. MTD") at 3. And both Respondents implicitly acknowledge that the standard for a writ is satisfied here if the Ninth District acted with a patent and unambiguous lack of jurisdiction when it exercised judicial power over the Exoneration Order. (*See* Croce MTD at 9; 9th Dist. MTD at 7).

Significantly, this Court has held that the standard for a writ is met when lower courts purport to exercise jurisdiction over attempts by the State to appeal decisions that are not

appealable under R.C. 2945.67(A). *See, e.g., State ex rel. Steffen v. Court of Appeals, First Appellate Dist.*, 126 Ohio St.3d 405, 2010-Ohio-2430, 934 N.E.2d 906 (writ granted when, under R.C. 2945.67(A), there was no right to appeal trial court's decision to grant a new penalty-phase trial and any attempt to appeal by leave was untimely); *Yates*, 32 Ohio St.3d at 31 (writ granted when there could be no appeal of a final verdict under R.C. 2945.67(A)).[1] Thus, as explained in greater detail below, the standard is met here.

B. Judge Hunter's Decision Overturning Mr. Prade's Conviction Is A "Final Verdict" Under R.C. 2945.67(A).

While the Ninth District does not contest the fact that, under an unbroken string of this Court's decisions applying R.C. 2945.67(A), Judge Hunter's decision overturning Mr. Prade's conviction was a "final verdict" under R.C. 2945.67(A), Judge Croce argues that it was not. (Croce MTD at 11-12). Although the basis for this contention is not clear, Judge Croce's argument appears to be that because Judge Hunter's decision overturning Mr. Prade's conviction was entered in connection with her decision to grant his petition for postconviction relief, it is not a directed verdict of acquittal. (*Id.*). Judge Hunter's decision indeed was entered in connection with her grant of postconviction relief, but that fact is irrelevant to the determination of whether her decision overturning Mr. Prade's conviction constituted a "final verdict" under R.C. 2945.67(A).

As discussed in Relator's opening memorandum (Revised Memorandum in Support of Writ of Prohibition ("Mem. Supp.") at 10), classifying orders under R.C. 2945.67(A) "depends

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[1] The ability to pursue an appeal on the question of jurisdiction is irrelevant. As this Court explained: "[W]here an inferior court is without jurisdiction to act, the availability or adequacy of a remedy of appeal to prevent the resulting injustice is immaterial to the exercise of supervisory jurisdiction by a superior court to prevent usurpation of jurisdiction by the inferior court." *Yates*, 32 Ohio St.3d at 33 (citations omitted).

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, 135, 477 N.E.2d 1141 (1985). And this Court repeatedly has found that "final verdict[s]" under R.C. 2945.67(A) include, not only jury verdicts, but also trial court rulings that are "factual determination[s] of innocence" that are "grounded upon insufficiency of [the] evidence." *Yates*, 32 Ohio St.3d at 32-33; *accord State v. Hampton,* 134 Ohio St.3d 447, 2012-Ohio-5688, 983 N.E.2d 324, ¶ 25; *State v. Lomax*, 96 Ohio St.3d 318, 2002-Ohio-4453, 774 N.E.2d 249, ¶ 23; *State v. Bistricky*, 51 Ohio St.3d 157, 158, 555 N.E.2d 644 (1990); *State v. Keeton*, 18 Ohio St.3d 379, 481 N.E.2d 629 (1985), paragraph 2 of the syllabus.

Here, Judge Hunter, after being provided with the new DNA test results definitively excluding Mr. Prade from all male DNA found where the killer made the bite, conducted a four-day evidentiary hearing with testimony from seven expert witnesses and reviewed the voluminous trial record. (Mem. Supp. at 3, 12; Exoneration Order at 7-9). Based on her comprehensive review, Judge Hunter was "firmly convinced that no reasonable juror would convict [Mr. Prade] for the crime of aggravated murder with a firearm," "conclude[d] as a matter of law that [Mr. Prade] is actually innocent of aggravated murder," "overturn[ed Mr. Prade's] convictions for aggravated murder with a firearms specification, and" ordered that he "be discharged from prison forthwith." (Exoneration Order at 21). Judge Hunter's decision overturning Mr. Prade's conviction is substantively indistinguishable from the directed verdicts of acquittal in *Hampton*, *Lomax, Bistricky*, *Yates*, and *Keeton* and, like the directed judgments of acquittal in those cases, is a "final verdict" under R.C. 2945.67(A).

C. "R.C. 2945.67(A) Prevents An Appeal Of *Any* Final Verdict." *Yates*, 32 Ohio St.3d at 32 (emphasis in original).

The sole basis for the Ninth District's motion is that, because Judge Hunter granted a petition for postconviction relief—a category of decision from which R.C. 2945.67(A) typically grants the State an appeal "as a matter of right"—R.C. 2945.67(A)'s prohibition on the State appealing from "final verdict[s]" does not apply. (9th Dist. MTD at 4-7; *see also* Croce MTD at 13-16). As detailed below, that claim is wrong because it (1) cannot be reconciled with multiple, on-point rulings from this and other courts, (2) misreads R.C. 2945.67(A), and (3) lacks any supporting basis in logic or public policy.

1. The Ninth District's Reading of R.C. 2945.67(A) Ignores Controlling Authority.

The Ninth District would have this Court ignore its many prior rulings— discussed in Relator's opening memorandum (at 7-10)—that the State cannot appeal from "final verdict[s]" because, according to the Ninth District, the appeals in those cases were not taken "as a matter of right." (9th Dist. MTD at 6-7). That is incorrect. As detailed in Relator's opening memorandum (at 7-8), *State v. Fraternal Order of Eagles Aerie 0337 Buckeye*, 58 Ohio St.3d 166, 569 N.E.2d 478 (1991), involved a single order entered during trial that granted a motion to suppress—one of the four types of orders that R.C. 2945.67(A) allows the State to appeal "as a matter of right"—and also acquitted the defendant for lack of sufficient evidence to convict. There, although the *Fraternal Order of Eagles* Court allowed the State to appeal the ruling on the motion to suppress "as a matter of right," it would "not set aside the judgment of acquittal." *Id.* at 168. This is exactly what the appellate court should have done here: allowed the State to appeal from a technical, collateral, or other aspect of the Exoneration Order's grant of the petition for postconviction relief "as a matter of right," but not Judge Hunter's judgment of acquittal—*i.e.*, her judgment "overturn[ing]" Mr. Prade's conviction.

The Ninth District's efforts to run from *Fraternal Order of Eagles* lead nowhere. Initially, the Ninth District points to the *Fraternal Order of Eagles* Court's comment 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.'" (9th Dist. MTD at 7 (quoting *Fraternal Order of Eagles*, 58 Ohio St.3d at 168-69)). But the fact that the *Fraternal Order of Eagles* Court chided the trial court judge for improperly ordering an acquittal is beside the point. What matters is that *Fraternal Order of Eagles* **barred the State from appealing from the (improper) acquittal even though, as here, R.C. 2945.67(A) gave the State an "absolute right" to appeal all other aspects of the order**. *Fraternal Order of Eagles*, 58 Ohio St.3d at 168. Indeed, the State's "absolute right" to appeal in *Fraternal Order of Eagles* was subject to and limited by the bar against the State appealing from "final verdict[s]," which demonstrates that *Fraternal Order of Eagles* cannot be reconciled with the Ninth District's interpretation of R.C. 2945.67(A).

Next, the Ninth District quotes the *Fraternal Order of Eagles* Court's summary of R.C. 2945.67(A)'s purpose—"'to facilitate the effective prosecution of crime and to promote fairness between the accuser and the accused.'" (9th Dist. MTD at 7 (citation omitted)). But that has precisely nothing to do with the issue now before this Court. And the Ninth District simply inserts a string citation without further discussion of the two decisions where (1) juvenile courts both granted motions to suppress (one of the four types of decisions from which the State has an "as a matter of right" appeal under R.C. 2945.67(A)) and acquitted, and (2) appellate courts then barred appeal from the acquittal. (9th Dist. MTD at 6 (citing *In re D.R.*, 8th Dist. Cuyahoga, No. 100034, 2014-Ohio-832, and *In re N.I.*, 191 Ohio App.3d 97, 2010-Ohio-5791, 944 N.E.2d 1214 (8th Dist)).

The Ninth District's reading of R.C. 2945.67(A) also requires the Court to ignore *Hampton*, 134 Ohio St.3d 447, 2012-Ohio-5688, at ¶ 5. There, it became apparent during trial that the defendant was alleged to have committed the crime in a different county and, thus, venue was improper, which led the trial court to enter a directed judgment of acquittal. The State appealed both as a matter of right and by leave, and the Tenth District dismissed the appeal as of right and denied leave to appeal. This Court concluded 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*," and then affirmed "the judgment of the appellate court denying the state's motion for leave to appeal *and dismissing the appeal of right*." *Id.* at ¶ 25 (emphasis added). Contrary to the Ninth District's suggestion otherwise, *Fraternal Order of Eagles*, *Hampton*, *In re D.R.*, and *In re N.I.* all involved "as a matter of right" appeals. The cases stand indisputably for the proposition that the State cannot appeal from the "final verdict" aspect of a judgment, even when the procedural vehicle used to issue that final verdict is one from which, under R.C. 2945.67(A), the State typically can appeal "as a matter of right."

And this is by no means the full extent of the flaws in the Ninth District's argument. Crediting the Ninth District's argument would also require this Court to ignore its own clear directives in *Yates* that (1) "R.C. 2945.67(A) prevents an appeal of *any* final verdict" and (2) "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." *Yates*, 32 Ohio St.3d at 32, 33 (italics in original; underlining added). It would require this Court to ignore *Lomax*, 96 Ohio St.3d 318, 2002-Ohio-4453, 774 N.E.2d 249, ¶ 22, where this Court found it to be "clear that the state may not appeal, even by

leave of court, an order that is the 'final verdict' in the case." And it would require this Court to ignore its decision in *Keeton* that "[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." *Keeton*, 18 Ohio St.3d 379, paragraph 2 of the syllabus (emphasis added).

In sum, it is well established that "R.C. 2945.67(A) prevents an appeal of *any* final verdict." *Yates*, 32 Ohio St.3d at 32 (emphasis in original). This Court could not have been clearer in stating, again and again, that a "final verdict" is not appealable "as a matter of right." None of the Court's many statements of that fact was tied to or limited by particular facts or circumstances. And contrary to the Ninth District's assertion otherwise, Ohio courts repeatedly have held—in *Fraternal Order of Eagles*, *Hampton*, *In re D.R.*, and *In re N.I.*—that the State is barred from appealing the "final verdict" aspect of *any* ruling, even if the final verdict is arrived at by means of a procedural vehicle from which an appeal can typically be taken "as a matter of right." Because this Court repeatedly has found that the "final verdict" limitation applies to appeals taken "as a matter of right," it should deny the Ninth District's motion.

2. The Ninth District's Reading Of R.C. 2945.67(A) Is Contrary To The Statute's Text And Purpose.

The Ninth District first argues that Mr. Prade seeks improperly to "add language" to R.C. 2945.67(A). (9th Dist. MTD at 5). Not so. Mr. Prade simply reads the "except the final verdict" modifier to apply to both antecedents—appeals as a matter of right and appeals by leave—consistent with clear precedent from this Court. Not a single syllable is added or subtracted from the statute.

The Ninth District also vaguely relies on unspecified "rules of grammar" to argue that the "except the final verdict" language applies only to appeals by leave. (9th Dist. MTD at 5). This,

too, is incorrect. "A qualifying phrase separated from antecedents by a comma is evidence that the qualifier is supposed to apply to all the antecedents instead of only to the immediately preceding one." 2A Norman Singer & Shambie Singer, *Sutherland Statutes and Statutory Construction* ("*Sutherland*") § 47:33 (7th ed. Westlaw 2015); *accord Davis v. Devanlay Retail Grp., Inc.*, 785 F.3d 359, 364 fn. 2 (9th Cir. 2015) (same); *AIG, Inc. v. Bank of Am. Corp.*, 712 F.3d 775, 782 (2d Cir. 2013) (same). This rule of statutory construction squarely applies here because the qualifying phrase—"except the final verdict"—is separated from the two antecedents (*i.e.*, appeals as of right and appeals by leave) by a comma.

Moreover, as the United States Supreme Court recently observed, the construction espoused by the Ninth District should not be applied "where 'there is no reason consistent with any discernable purpose of the statute to apply' the limiting phrase to the last antecedent alone." *Lockhart v. United States*, ___ U.S. ___, 136 S.Ct. 958, 965, 194 L.Ed.2d 48 (2016) (quoting *United States v. Bass*, 404 U.S. 336, 341, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971)). "When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348, 40 S.Ct. 516, 64 L.Ed. 944 (1920) (citations omitted). And, "where the sense of the entire act requires that a qualifying word or phrase apply to several preceding or even succeeding sections, the qualifying word or phrase is not restricted to its immediate antecedent." 2A *Sutherland* § 47:33.

Here, there is no conceivable substantive reason to construe the express "final verdict" exception to apply solely to discretionary appeals and not to appeals as of right. As discussed immediately below at page 12, the Ninth District does not even attempt to explain why the Legislature would have intended the absurd and awkward result the Ninth District advocates (*i.e.*,

permitting appeals from some "final verdicts," while barring appeals from others). That is because there is no logical explanation for the Ninth District's approach.

Moreover, the relatively narrow appellate rights granted to the State under R.C. 2945.67(A) were enacted as an *exception* to the longstanding rule that "[u]nless permitted by statute, the weight of authority in this country is against the right of the government to bring error in a criminal case." *State v. Simmons*, 49 Ohio St. 305, 307, 31 N.E. 34 (1892). For over one hundred years, "it has been well established that the state may not prosecute error in criminal cases, absent a grant of express authority to do so." *State v. Brenneman*, 36 Ohio St.2d 45, 46, 303 N.E.2d 873 (1973); *see also Butler v. Jordan*, 92 Ohio St.3d 354, 357, 750 N.E.2d 554 (2001) ("'Expressly' means 'in direct or unmistakable terms: in an express manner: *explicitly, definitely, directly*.'" (quoting *Webster's Third New International Dictionary* (1986)) (*Butler* court's emphasis)). The bedrock principle that the State may not appeal in criminal matters without express authorization is key to proper interpretation of R.C. 2945.67(A) and, along with the above-cited rules of statutory interpretation, provides further support for reading the "final verdict" modifier broadly rather than narrowly.

Indeed, although R.C. 2945.67(A)'s "final verdict" limitation extends beyond the limits of the Fifth Amendment's Double Jeopardy Clause, *see Yates*, 32 Ohio St.3d at 32, one reason for R.C. 2945.67(A)'s bar against the State appealing from "final verdict[s]" is that the Double Jeopardy Clause often bars such appeals. If, as the Ninth District contends, R.C. 2945.67(A)'s "final verdict" limitation does not apply to the four types of decisions as to which the State may appeal "as a matter of right," then R.C. 2945.67(A) authorizes the State to appeal from "final verdict[s]" underlying such decisions even when the Double Jeopardy Clause bars the appeal. In that respect, the Ninth District's reading of R.C. 2945.67(A) runs afoul of R.C. 1.47(A)'s

directive that "[i]n enacting a statute, it is presumed that: (A) Compliance with the constitutions of the state and of the United States is intended."

Moreover, the absence of any reasoned or rational basis to treat "final verdicts" within decisions that may be appealed "as a matter of right" differently from those within decisions that may be appealed by leave would violate Mr. Prade's right to Equal Protection under the Fourteenth Amendment. *See generally State v. Bevly*, 142 Ohio St.3d 41, 2015-Ohio-475, 27 N.E.3d 516, ¶¶ 2-19. And construing the statute in a way that denies an acquitted defendant such as Mr. Prade his freedom is unreasonable or unjust, also in contravention of R.C. 1.47.

3. The Ninth District's Reading of R.C. 2945.67(A) Lacks Any Supporting Policy Basis.

The Ninth District does not even attempt to explain why, as it contends, the Legislature may have intended to permit appeals from some "final verdict[s]," while barring appeals from others. The Ninth District's silence on this point is not hard to explain—there is absolutely no reason why the Legislature would have intended to allow the State to appeal from "final verdicts" underlying the four types of orders from which R.C. 2945.67(A) allows the State to appeal "as a matter of right," while barring appeals from "final verdict[s]" underlying "any other decision." To be sure, "final verdict[s]" connected with these four types of appeals are rare. But as seen in *Fraternal Order of Eagles*, *In re D.R.*, *In re N.I.*, and the instant case, they do occur.

4. If The Court Adopts The Ninth District's Interpretation of R.C. 2945.67(A), The Exoneration Order's "Final Verdict" Still Could Not Be Appealed.

If the Court were to disregard its precedents and accept the Ninth District's interpretation of R.C. 2945.67(A), the State still could not appeal from Judge Hunter's decision "overturn[ing]" Mr. Prade's conviction. That is because R.C. 2945.67(A) divides—not "orders," "final orders," "judgments," or "final judgments"—but "decisions" into those that are appealable "as a matter of right" and "by leave," and the Exoneration Order—a single order—included multiple

"decision[s]." The State, had it chosen to do so, could have appealed "as a matter of right" from the raft of evidentiary rulings, legal rulings, and factual determinations—all of which were "decisions" that went into the grant of the petition for postconviction relief.[2] But Judge Hunter's decision that "overturn[ed]" Mr. Prade's conviction can be viewed as, for purposes of R.C. 2945.67(A), both an "other decision" separate from the grant of the petition for postconviction relief and a "final verdict" from which the State could not appeal. Judge Hunter's decisions granting the petition for postconviction relief and overturning Mr. Prade's conviction plainly are related, but the one did not require the other. Judge Hunter could have elected to grant the petition for postconviction relief and, rather than overturning the conviction, ordered some other form of postconviction relief such as, for example, a new trial only.

Splitting single orders or rulings into "decision[s]" that may and may not be appealed is a regular practice in appeals by the State under R.C. 2945.67(A). "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." *State v. Edmondson*, 92 Ohio St.3d 393, 396, 750 N.E.2d 587 (2001) (quotation omitted). For example, when the State appeals from directed verdicts of acquittal,

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[2] Judge Hunter's Exoneration Order not only granted Mr. Prade's petition for postconviction relief, but also granted his motion for a new trial in the event the exoneration was reversed—an "other decision" under R.C. 2945.67(A) as to which the State unsuccessfully sought leave to appeal in early 2013. But the Ninth District (1) dismissed the State's 2013 motion for leave to appeal because the new trial ruling was contingent on the acquittal being overturned and (2) after the acquittal was overturned, dismissed the State's 2014 motion for leave to appeal from the grant of the new trial motion based on its conclusion that, even though the sole contingency no longer existed, the order granting the new trial motion still was somehow "contingent" and, thus, was not a final order and could be reconsidered by the trial court. Following Judge Hunter's retirement, the case was assigned to Judge Croce, who held a second evidentiary hearing in November 2015 and, largely quoting from the Ninth District's decision reversing the Exoneration Order, undid Judge Hunter's new trial motion on March 11, 2016. Mr. Prade's appeal from Judge Croce's March 11, 2016, order is pending in the Ninth District.

which are "other decision[s]" under R.C. 2945.67(A) that require leave, courts regularly divide those unitary rulings into (1) those portions of the ruling that the State may appeal and (2) the acquittal, which cannot be appealed. *See, e.g.*, *Bistricky*, 51 Ohio St.3d at 159; *State v. Arnett*, 22 Ohio St.3d 186, 188, 489 N.E.2d 284 (1986); *Keeton*, 18 Ohio St.3d at 381. Accordingly, even if the Court adopts the Ninth District's reading of R.C. 2945.67(A), R.C. 2945.67(A) barred the State's appeal from Judge Hunter's decision "overturn[ing]" Mr. Prade's conviction because *that* portion of her ruling was both a "final verdict" and an "other decision" for purposes of R.C. 2945.67(A).

D. Judge Croce's Contention That Judge Hunter Erred In Overturning Mr. Prade's Conviction Is Legally Irrelevant And Factually Wrong.

Judge Croce asserts that Judge Hunter erred in entering the Exoneration Order because Mr. Prade "never set forth clear and convincing evidence of his actual innocence." (Croce MTD at 11). This argument is legally irrelevant and factually wrong. It is legally irrelevant because, when assessing whether a lower court's ruling was a "final verdict," the issue is "'whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.' . . . A ruling of acquittal based on insufficiency of the evidence is just such a final resolution, and may not be appealed by the state." *Bistricky*, 51 Ohio St.3d at 159 fn. 1 (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977)); *see also Fraternal Order of Eagles*, 58 Ohio St.3d at 169 (State could not appeal acquittal even when lower court erred in entering judgment of acquittal).

Factually, there was abundant, clear, and convincing evidence supporting Judge Hunter's decision to overturn Mr. Prade's conviction. The only physical evidence tying Mr. Prade to the crime at trial—bite mark identification experts' opinions that Mr. Prade either made the bite

mark or that it was consistent with his dentition—carries little weight because, in light of scientific advances since the trial, "the overall scientific basis for bite-mark identification" now is subject to "serious question." (Exoneration Order at 13). And the new DNA test results—tests that identified male DNA from which Mr. Prade was definitively excluded at the exact location where Dr. Prade's killer bit her—were compelling evidence of innocence. The State's argument that the new DNA test results reflected only meaningless contamination from unknown males touching the lab coat was unpersuasive because, among other things, (1) saliva is a rich DNA source and touch is a weak one, so "it is far more plausible that the male DNA found in the bite-mark section of the lab coat was contributed by the killer rather than by inadvertent contact;" (2) the State's own testing of the lab coat outside the bite mark, which was "expressly designed . . . to test for contamination[,] . . . failed to find any male DNA, thereby suggesting a low probability of contamination;" and (3) the State had no plausible explanation for how the killer's DNA could have disappeared and the lab coat could have become contaminated with only stray male DNA.[3] (*Id.* at 9). The Court should reject Judge Croce's legally irrelevant and factually flawed challenge to the Exoneration Order.

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[3] Indeed, it was the Ninth District's findings in the State's improper appeal from the Exoneration Order that lack record support. For example, a primary basis for the Ninth District's decision to dismiss the new DNA evidence was the Ninth District's finding that "there was never a shred of evidence . . . that the killer actually deposited saliva on the lab coat." *State v. Prade*, 2014-Ohio-1035, 9 N.E.3d 1072, ¶ 117 (9th Dist.), *appeal not accepted*, 139 Ohio St.3d 1483, 2014-Ohio-3195, 12 N.E.3d 1229. That is flatly wrong, as there was a great deal of such evidence. The State's and the defense's DNA experts all agreed that (a) Dr. Prade's killer bit her with such force that, through two layers of clothing, it left an impression on her arm; (b) the killer's vicious bite would have been a rich source of saliva; and (c) the first test of the lab coat over the bite mark identified both the enzyme in saliva and nucleated skin cells (*i.e.*, cells containing DNA). Similarly, the Ninth District dismissed the new expert testimony challenging the bite mark identification experts' opinions at trial because "the jury [at trial] was essentially presented with the entire spectrum of opinions on the bite mark at trial." *Id.* at ¶ 129. But that is precisely the problem—the jury heard opinions tying Mr. Prade's dentition to the bite mark—

III. CONCLUSION

Judge Hunter's decision overturning Mr. Prade's conviction was a "final verdict" under R.C. 2945.67(A) and, thus, R.C. 2945.67(A) barred the State's appeal to the Ninth District because "R.C. 2945.67(A) prevents an appeal of *any* final verdict." *Yates*, 32 Ohio St.3d at 32 (emphasis in original). The Court should deny Respondents' motions to dismiss and grant the requested writs of prohibition.

Dated: June 13, 2016

Respectfully submitted,

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opinions that could not be offered today because they violate professional standards or, if offered, would be excluded as unreliable under Evid.R. 702 and *Daubert*.

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of June 2016, a copy of the foregoing Memorandum in Opposition to Respondents' Motions to Dismiss was served by first class mail via the U.S. Postal Service upon the following:

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