

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. :

MERIT BRIEF OF RESPONDENT NINTH DISTRICT COURT OF APPEALS

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INTRODUCTION

This is a case of statutory construction regarding whether the Ninth District had jurisdiction to consider the State’s appeal of a grant of post-conviction relief. Importantly, as Relator admits, this case does not implicate constitutional issues, such a double jeopardy. *See* Rel. Br. at 28 (“[D]ouble jeopardy is not implicated in this case . . .”).

Ohio Revised Code 2945.67(A) grants authority to the State to appeal in criminal cases. There are two different appeals described in that section: appeals as of right and appeals by leave. The State may appeal “as a matter of right” any decision that grants (1) a motion to dismiss all or part of an indictment, complaint, or information; (2) a motion to suppress; (3) a motion to return seized property; or (4) a post-conviction relief petition. R.C. 2945.67(A); *State v. Matthews*, 81 Ohio St.3d 375, 377, 691 N.E.2d 1041 (1998). Second, “[a]ll other appeals are by leave at the discretion of the court of appeals, except, of course, that the state may not appeal a final verdict.” *Matthew*, 81 Ohio St.3d at 377.

In an attempt to essentially get a second appeal by way of a writ of prohibition, Relator asks this Court to go against precedent and the unambiguous language of the statute to add a final-verdict exception into the appeal-by-right provision. This should not be allowed. This Court has held that the State has an *absolute* right to appeal under the by-right provision. *State v. Fraternal Order of Eagles*, 58 Ohio St.3d 166, 167, 569 N.E.2d 478 (1991). Further, as explained below, this Court’s cases make clear that the appeal-by-right and appeal-by-leave provisions in R.C. 2945.67(A) are two separate provisions.

Additionally, the rules of grammar demonstrate the clear meaning of the statute. The by-leave appeal reads: “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 propositional phrase “except the final verdict” clearly modifies “any

other decision.” Yet, Relator asks this Court to add the final-verdict exception to the appeal-by-right provisions, which have no exceptions. This the Court may not do. Courts may not add language to a statute, and they may not add requirements where there are none. *State v. Hughes*, 86 Ohio St.3d 424, 426-27, 715 N.E.2d 540 (1999).

Lastly, although the statute is unambiguous in granting authority to the State to appeal—and thus, giving the Ninth District jurisdiction over the appeal—even if the statute was ambiguous, Relator still fails. Relator seeks a writ of prohibition to correct an alleged error regarding the Ninth District’s jurisdiction over the State’s appeal of a grant of post-conviction relief. However, writs of prohibition may only be used in a corrective manner when the court patently and unambiguously lacks jurisdiction. If the statute is ambiguous, then Relator cannot show the unambiguous lack of jurisdiction needed for his writ.

Moreover, unless there is an unambiguous lack of jurisdiction, Relator’s claim for prohibition fails because he had an adequate remedy by way of appeal. Indeed, he did appeal to this Court the very issue he attempts to raise here. However, a relator may not use an “extraordinary writ in order to gain successive appellate reviews of the same issue.” *Agee v. Russell*, 92 Ohio St.3d 540, 547, 751 N.E.2d 1043 (2001).

Thus, Relator’s request for a writ of prohibition must fail. Either the statute clearly and unambiguously grants authority for the State to appeal and give jurisdiction to the Ninth District, and therefore, Relator fails to show that the Ninth District’s exercise of authority was unauthorized. Or, at worst, the statute is ambiguous, in which case, Relator fails to show the patent and unambiguous lack of jurisdiction needed in order to use prohibition as a corrective remedy and as a substitute for appeal. In either case, Relator fails, and this Court should enter judgment in favor of the Ninth District.

STATEMENT OF FACTS

In 1998, a jury convicted Relator of aggravated murder, and the trial court sentenced him to life in prison. Agreed Statement of Facts at ¶ 4. 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. *Id.* at ¶¶ 6-9. When the testing was complete, Summit County Common Pleas Court Judge Judy Hunter conducted an evidentiary hearing regarding the DNA analysis. *Id.* at ¶¶ 11-12. After the hearing, Judge Hunter granted Relator post-conviction relief and overturned Relator's conviction or, if the acquittal was overturned on appeal granted Relator a new trial in the alternative. *Id.* at ¶¶ 13-14; Agreed Evidence, Pt.1, Ex. I.

The State appealed, and, in 2014, the Ninth District reversed (Case No. 26775). Agreed Statement of Facts at ¶¶ 15-16. Relator sought discretionary review from this Court, and argued in part that the Ninth District did not have jurisdiction over the State's appeal because the trial court's order was a final verdict. *Id.* at ¶ 17; Agreed Evidence, Pt.2, Ex. O. This Court declined jurisdiction. Agreed Statement of Facts at ¶ 20. 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.* at ¶¶ 19, 25. On remand, Judge Croce was assigned to the case, and she denied Relator's request for a new trial. *Id.* at ¶¶ 21, 27.

Subsequently, Relator filed the instant complaint for a writ of prohibition to challenge the Ninth District's jurisdiction to review Judge Hunter's post-conviction-relief ruling.

ARGUMENT

I. THE NINTH DISTRICT'S PROPOSITION OF LAW NO. 1:

Only when there is a complete and unambiguous lack of jurisdiction may a writ of prohibition issue in a corrective manner and in the face of an adequate remedy.

In order to receive a writ of prohibition, the Relator has the burden of establishing 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.

There is no dispute here that the Ninth District already has exercised judicial power and that Relator is not seeking preventative relief. However, “[p]rohibition 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) (quotation omitted) (emphasis added). Generally, “[i]t cannot be used to review the regularity of an act already performed.” *Id.* (quotation omitted).

There is only one exception that allows a writ of prohibition to be used in a corrective manner: that is when “an inferior court *patently and unambiguously* lacks jurisdiction over the cause.” *State ex rel. Goldberg v. Mahoning Cty. Probate Court*, 93 Ohio St.3d 3d 160, 162, 753 N.E.2d 192 (2001) (quotation omitted) (emphasis added). The relator's burden to show a patent and unambiguous lack of jurisdiction must be greater than its normal burden of showing that the exercise of power is unauthorized. *Cf. Agee v. Russell*, 92 Ohio St.3d 540, 547, 751 N.E.2d 1043 (2001) (“[O]ur holding in *Hanning* does not warrant a finding that the juvenile court lacked jurisdiction, *much less* that it *patently and unambiguously* lacked jurisdiction” (first

emphasis added)). Otherwise, any showing of the power being unauthorized by law would allow the writ to be used as a corrective remedy. Because showing a patent and unambiguous lack of jurisdiction is an exception to the general rule that prohibition is preventive in nature, it must encompass a heavier burden than showing a potential lack of jurisdiction.

Furthermore, prohibition also will not issue if the relator possesses an adequate remedy in the ordinary course of law unless “there is a *patent and unambiguous* restriction on the jurisdiction of the court which *clearly* places the dispute outside the court’s jurisdiction.” *State ex rel. Ruessman v. Flanagan*, 65 Ohio St.3d 464, 466, 605 N.E.2d 31 (1992) (quotation omitted) (emphasis added). 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). “[T]he availability of an appeal by leave of court also constitutes an adequate remedy and will prevent the issuance of extraordinary relief.” *Gwin*, 64 Ohio St.3d at 248. Additionally, a relator may not use an “extraordinary writ in order to gain successive appellate reviews of the same issue.” *Agee*, 92 Ohio St.3d at 457.

As more fully explained below, Relator has not and cannot meet the burden to receive a writ of prohibition. First, R.C. 2945.67(A) clearly provided jurisdiction to hear the State’s appeal by right of Relator’s post-conviction petition. Because the Ninth District had jurisdiction, its exercise of power was not unauthorized, and Relator cannot show otherwise. Second, although the Ninth District argues that R.C. 2945.67(A) clearly provides jurisdiction, at the most, the statute is ambiguous regarding jurisdiction. If jurisdiction is ambiguous, then Relator may not use the writ of prohibition as a corrective remedy or as a substitute for appeal. Under either

scenario, Relator's claim for the writ fails, and judgment should be entered in favor of the Ninth District.

II. THE NINTH DISTRICT'S PROPOSITION OF LAW NO. 2:

Ohio Revised Code 2945.67(A) authorizes the State to appeal by right any decision granting post-conviction relief, even final verdicts; and therefore, the Ninth District had jurisdiction to hear the State's appeal.

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. (emphasis added).

In construing statutes, this Court's "paramount concern is the legislative intent in enacting it." *State ex rel. Mager v. State Teachers Retirement Sys. of Ohio*, 123 Ohio St.3d 195, 2009-Ohio-4908, 915 N.E.2d 320, ¶ 13 (quotation omitted). In discerning intent, courts must "read words and phrases in context according to the rules of grammar and common usage." *Id.*; *see also Engine Mfrs. Assn. v. S. Coast Air Quality Mgt. Dist.*, 541 U.S. 246, 252 (2004) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." (quotation omitted)). If a statute is unambiguous, courts must apply it as written. *State ex rel. Lee v. Karnes*, 103 Ohio St.3d 559, 2004-Ohio-5718, 817 N.E.2d 76, ¶ 23.

Here, the statute is unambiguous—the State may appeal “as a matter of right” *any* decision that grants post-conviction relief without exception. This unambiguous intent is seen in both the substance of the statute (dividing the appeals into by right and by leave) and in the grammatical make-up of the statute. Each perspective shows that the Ninth District had jurisdiction when it considered the State’s appeal.

A. The substance of R.C. 2945.67(A) shows that the Ninth District had jurisdiction to consider the State’s appeal as a matter of right.

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). 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. However, such a reading is not in accordance with this Court’s case law.

Although Relator argues that the case law supports his tortured misreading of the statute, those cases are either inapplicable or support the Ninth District having jurisdiction. First, Relator’s citations to *State v. Hampton*, 134 Ohio St.3d 447, 2012-Ohio-5688, 983 N.E.2d 324; *State ex rel. Yates v. Court of Appeals for Montgomery Cty.*, 32 Ohio St.3d 30, 512 N.E.2d 343 (1987); and *State v. Keeton*, 18 Ohio St.3d 379, 481 N.E.2d 629 (1985), are unavailing.

Both *Hampton* and *Yates* quote the sentence in *Keeton* that says: “A directed verdict of acquittal by the trial judge in a criminal case 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 at 381. This single sentence, taken out of context, does not resolve the matter, however. The *Keeton* Court clearly distinguished between

appeal by right and appeal by leave. *Id.* The Court stated: “[I]n addition to those ruling in which the state is granted an appeal as of right pursuant to R.C. 2935.67(A) 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.” *Id.* (emphasis added).

Thus, there are two separate inquiries: (1) is it an appeal by right; (2) if not, is a final verdict involved. With this understanding, the *Keeton* quote above is stating that a directed verdict is not appealable because (1) it is not appealable as of right, and (2) it involves a final verdict. *Keeton* did not hold that there is a *general* final-verdict exception to the State’s ability to appeal.

Furthermore, if *Keeton* (and *Yates* or *Hampton*) were opining on whether there is a final-verdict exception in appeals by right, such opinion would be dicta. None of those cases involved an appeal by right, but rather a motion for acquittal under Crim. R. 29. *See Hampton*, 2012-Ohio-5688, ¶¶ 5, 7; *Yates*, 32 Ohio St.3d at 31; *Keeton*, 18 Ohio St.3d at 381. Therefore, determining whether there was a final-verdict exception in an appeal of right was not at issue, and any opinion on that matter would be dicta. *State ex rel. DiFranco v. S. Euclid*, 138 Ohio St.3d 367, 2014-Ohio-538, 7 N.E.3d 1136, ¶ 24. As dicta, it “has no precedential force” and has “no binding effect on this court’s decision in this case.” *Id.*

That R.C. 2945.67(A) makes distinction between two types of appeals is further seen in other decisions by this Court. This Court has noted that there are four orders in which the State may appeal by right, and that the statute “further provides that with the exception of final verdicts, the state may appeal any other decision” by leave. *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629, ¶ 30. Additionally, this Court specifically stated that the statute “draws a distinction between an appeal as of right and an appeal by leave.” *State v. Matthews*, 81 Ohio St.3d 375, 377, 691 N.E.2d 1041 (1998). There are the four as-of-right

appeals. *Id.* at 377-78. Then, “[a]ll other appeals are by leave at the discretion of the court of appeals, except, of course, that the state may not appeal a final verdict.” *Id.* at 378. Thus, this Court’s precedent clearly shows that there is a distinction between the two types of appeal, and the final-verdict exception only applies to appeals by leave.

Lastly, Relator’s citation to *Fraternal Order of Eagles* and two Eighth District cases likewise is unavailable, as all three dealt with situations in which double jeopardy attached. In fact, *Fraternal Order of Eagles* supports the conclusion that the Ninth District has jurisdiction to consider by right appeals of final verdicts. When dealing with a motion to suppress ruling leading to acquittal, this Court stated:

We can discern no reason to permit the state *an absolute* appeal as of right from a pretrial grant of a motion to suppress, but deny the state an appeal from a grant of a motion to suppress that is entered after trial has begun. Hence, R.C. 2945.67(A) and Crim.R. 12(J) provide the state with *an absolute* right to appeal the grant of a motion to suppress, and *such right* should not be abolished by the entry of judgment of acquittal.

Fraternal Order of Eagles, 58 Ohio St.3d at 169 (emphasis added). This Court further stated that, when a motion to suppress is granted,

it is not for the trial court to determine the sufficiency of the state’s evidence to proceed with the prosecution and hence enter a judgment of acquittal. Rather, the state must be permitted to determine whether it will seek a stay of proceedings to exercise its right of appeal . . . or alternatively to proceed to a final verdict or judgment. The choice is that of the prosecution.

Id.

Thus, a State has the *absolute* right to appeal one of the four by-right determinations. *See also State ex rel. Leis v. Kraft*, 10 Ohio St.3d 34, 36, 460 N.E.2d 1372 (1984) (“[T]here are two types of appeals which may be available to the state. The first is *an absolute* right of appeal applicable only where the trial court’s decision falls within one of the four circumstances set forth in the statute.” (emphasis added)). This Court did not hold in *Fraternal Order of Eagles*

that the appellate court lacked jurisdiction to hear the case. Despite Relator’s claims to the contrary, this Court’s decision not to overturn the acquittal had nothing to do with it being a final verdict under R.C. 2945.67(A). Rather, this Court did not review the acquittal “insofar as this defendant cannot twice be put in jeopardy.” *Fraternal Order of Eagles*, 58 Ohio St.3d at 169.

The two Eighth District cases are the same, and dealt with a Juvenile Rule allowing a motion to dismiss for extraordinary circumstances after adjudication. *In re D.R.*, 8th Dist. Cuyahoga Nos. 100034, 100035, 2014-Ohio-832 (holding that Juv.R. 29(F)(2)(d) was the equivalent of an acquittal); *In re N.I.*, 191 Ohio App.3d 97, 2010-Ohio-5791, 944 N.E.2d 1214 (same). The court reasoned that the dismissal was the equivalent of a motion for acquittal—which is a by-leave appeal—and that jeopardy attached. *In re D.R.*, 2014-Ohio-832, ¶ 13; *In re N.I.*, 2010-Ohio-5791, ¶¶ 9, 13.

Double jeopardy does not attach to post-conviction proceedings, which are collateral civil attaches on the judgment. *See United States v. Tateo*, 377 U.S. 463, 463-64 (1964) (holding that a retrial after a conviction is overturned in a collateral proceeding “does not infringe the constitutional protection against double jeopardy”); *State v. Calhoun*, 86 Ohio St.3d 279, 281, 714 N.E.2d 905 (“[A] postconviction proceeding is not an appeal of a criminal conviction but, rather, a collateral civil attack on the judgment.”). Relator even admits that double jeopardy is not implicated by the State’s appeal in this case. Rel. Br. at 28. Thus, like the appeal in *Fraternal Order of Eagles*, this case involves a by-right appeal to which there is an *absolute* right to appeal. However, unlike in *Fraternal Order of Eagles*, double jeopardy does not attach to Relator and the Ninth District had jurisdiction over the appeal and could review the acquittal determination. Any other result would require ignoring the plain language of the statute and this Court’s precedent.

B. The structure of the statute shows that the Ninth District had jurisdiction over the State’s appeal.

“The preeminent canon of statutory interpretation requires us to ‘presume that [the] legislature says in a statute what it means and means in a statute what it says there.’” *Lee*, 2004-Ohio-5718, ¶ 27, quoting *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (alteration in original). Thus, “[if] the statute is unambiguous, [courts] must apply it as written. *Id.* at ¶ 23. Pursuant to 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 or words 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; *Lee*, 2004-Ohio-5718, ¶ 25. Moreover, this Court will not infer a requirement when the legislature did not provide for one. *Lee*, 2004-Ohio-5718, ¶ 27.

Here, the rules of grammar dictate that “except a final verdict” modifies only “any other decision . . . of the trial court.” The “except a final verdict” is a prepositional phrase. *Chicago Manual of Style*, Section 5.174 (16th Ed. 2010). A preposition “is a word or phrase that links an object [here, final verdict] and an antecedent [any other decision] to show the relationship between them.” *Id.*, Section 5.169. When used as an adjective, as it is in R.C. 2945.67(A), the prepositional phrase “should be as close as possible to the word it modifies to avoid awkwardness, ambiguity, or unintended meanings.” *Id.*, Section 5.175. Following this rule, “except a final verdict” modifies only “any other decision” and does not modify the by-right appeals.

Although there can be an exception to the proximity rule if the preposition modifies elements in a compound construction (*i.e.* “the date, the place, and the budget for the wedding have been decided”), *see id.*, Section 5.175, the statute here involves two independent clauses, not a compound construction. When two compound predicates are joined with a conjunction, no comma is used before the conjunction. *Id.*, Section 6.29. However, when two independent

clauses are joined with a conjunction, a comma is used before the conjunction. *Id.*, Section 6.28. In R.C. 2945.67(A), the two parts of the sentence—the appeal-by-right provision and the appeal-by-leave provision—are joined with a conjunction and a comma, making them independent clauses, not a compound construction. Therefore, the exception to the proximity rule does not apply, and final verdict modifies only “any other decision.”

Additionally, “except a final verdict” was placed in the middle of the direct object of the second independent clause—*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 cannot not redraft the statute to conform to Relator’s misreading.

Furthermore, Relator’s citation to *Sutherland Statutes and Statutory Construction* to invoke the last-antecedent rule does not change this analysis. *See* Rel. Brief at 22 (citing also *Davis v. Devanlay Retail Group, Inc.*, 785 F.3d 359 (9th Cir. 2015)). Relator attempts to argue that because “except the final verdict” is set off by commas that it applies to every part of the sentence. *Id.* However, this reading ignores other aspects of the sentence and grammatical construction. First, *Sutherland* itself says that the last antecedent rule is “not inflexible and uniformly binding.” 2A Singer & Singer, *Sutherland Statutory Construction*, Section 47:11 (7th Ed. 2014).

Second, Relator’s reading ignores that fact that the appeal-by-right section and the appeal-by-leave section are also set off by a comma. One only has to look to the case cited by Relator to see the significance of the additional comma: “Here, ‘request’ is set apart from ‘or require as a condition to accepting the credit card as payment’ by a comma. This would

normally indicate that the clause ‘as a condition to accepting the credit card as payment’ does not modify ‘request.’” *Davis*, 785 F.3d at 364.

Third, as seen by the other case cited by Relator, the antecedent rule referenced by Relator applies when there is a list of nouns, and one is attempting to determine whether the phrase applies to the entire list or just one member of the list. *Am. Intern. Group, Inc. v. Bank of Am. Corp.*, 712 F.3d 775, 781-82 (2d Cir. 2013) (“One of the methods by which a writer indicates whether a modifier that follows *a list of nouns or phrases* is intended to modify the *entire* list, or only the immediate antecedent, is by punctuation” (emphasis added)). It is not meant to apply to independent clauses that are separated by a comma and a conjunction.

Here, the appeal-by-right section is set off from the appeal-by-leave section by a comma. As *Davis* articulated, this shows an intention that these are separate categories. Additionally, there is no *list* of nouns or phrases. There are two independent clauses: an appeal-by-right clause separated by a comma from the appeal-by-leave clause. Thus, Relator’s proposed grammatical rule is inapplicable to the statute at issue.

Moreover, the placement of the final-verdict exception in the middle of the by-leave appeals could inform the courts on the meaning of final verdict. The statute makes clear division between as-of-right appeals and by-leave appeals, and includes post-conviction relief, which is a collateral, civil attack on the criminal conviction, in the as-of-right appeals. Post-conviction relief can lead to judgments of acquittal, but the legislature did not put an exception next to post-conviction relief for those situations. This division and lack of an explicit exception for post-conviction acquittals indicates that the legislature did not intend for “final verdict” as used in the statute to include post-conviction rulings.

If the General Assembly had intended an exception for final verdicts for all types of appeals, the General Assembly would have included it not only in the appeal-by-leave provision but in the appeal-by-right provision. *Cf. Lee*, 2004-Ohio-5718, ¶26 (“Had the General Assembly intended the factual requirement espoused by the sheriff, it would have included it in R.C. 2923.1213(A)(1)(a).”). “[T]he General Assembly could have specifically provided [that the final verdict exception apply to appeals by right], but since the legislature did not, the courts cannot.” *State v. Hughes*, 86 Ohio St.3d 424, 426-27, 715 N.E.2d 540 (1999).

Relator’s reading of the statute would require this Court to either violate the rules of grammar or to add words to the statute—neither of which is an option. Thus, even if strictly construed against the State, not only does the substance of the statute give the Ninth District jurisdiction, but under the rules of grammar and common usage, the Ninth District had jurisdiction over the State’s appeal.

III. THE NINTH DISTRICT’S PROPOSITION OF LAW NO. 3:

Any ambiguity in the statute means that Relator cannot establish a patent and unambiguous lack of jurisdiction such that Relator may not use a writ of prohibition in a corrective manner or as a substitute for appeal.

In his brief, Relator makes an appeal to policy considerations; however, not only is such an appeal inappropriate, it shows why Relator is not entitled to a writ of prohibition. As noted above, Relator cannot receive a writ of prohibition to correct a remedy or as substitution for appeal unless the Ninth District patently and *unambiguously* lacked jurisdiction. *See supra* at 3-4. Thus, if there is any ambiguity in the statute authorizing jurisdiction, Relator cannot use prohibition to correct an alleged error and may not use it as a substitution for appeal.

As previously noted, a court’s “paramount concern in construing a statute is legislative intent.” *Lee*, 2014-Ohio-5718, ¶ 23. However, the intent of the legislature “is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express

plainly, clearly and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation.” *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, 804 N.E.2d 471, ¶ 12 (quotation omitted). Indeed, the “question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed, and hence no room is left for construction.” *Id.* (quotation omitted).

Thus, the first inquiry is whether R.C. 2945.67(A) is ambiguous. *Id.* at ¶ 13. If it is not ambiguous, then there is no need for interpretation or other means of discerning intent. *Id.* Only if it is ambiguous, does a court need to “interpret the statute to determine the General Assembly’s intent.” *Id.*

As argued above, R.C. 2945.67(A) unambiguously provided jurisdiction for the Ninth District to consider the State’s appeal in this matter. Thus, resort to any other means beyond the words of the statute is not appropriate. However, if this Court determines that the statute is ambiguous and resort to other means of interpretation—such as policy considerations—is necessary, the Relator still fails. If the statute is determined to be ambiguous, Relator cannot meet his burden of showing a patently and *unambiguous* lack of jurisdiction.

If there is no *unambiguous* lack of jurisdiction, then Relator cannot use a writ of prohibition as a corrective remedy. *See supra* at 3-4. Furthermore, Relator cannot use the writ as a substitute for appeal. *Agee*, 92 Ohio St.3d at 457. Relator already appealed the Ninth District’s opinion to this Court. *See Agreed Evidence, Pt. 2, Ex. O.* He even raised the alleged jurisdictional issue he attempts to raise here. *See id.* However, this Court declined jurisdiction. *See id.*, Ex. P. Relator’s appeal to this Court “constitute[d] an adequate remedy and [prevents] the issuance of extraordinary relief.” *Gwin*, 64 Ohio St.3d at 248.

Accordingly, Relator has not and cannot meet his burden of proving entitlement to a writ of prohibition, and this Court should rule his favor of the Ninth District.

IV. THE NINTH DISTRICT’S PROPOSITION OF LAW NO. 4:

R.C. 2945.67(A) authorized the State to appeal by right the trial court’s order granting Relator’s post-conviction relief petition.

In a last effort to overcome the obvious language of R.C. 2945.67(A), Relator attempts to argue that the trial court’s order granting his post-conviction petition contained both decisions for which the State could appeal by right and by leave. *See* Rel. Br. at 29-31. Relator relies on the fact that the State attempted to appeal the trial court’s alternative grant of Relator’s motion for a new trial. *Id.* Relator then seems to argue that there were multiple “decisions” in the trial courts order—one granting post-conviction relief and another declaring Relator innocent. Relator then attempts to argue that the grant of post-conviction relief is appealable but not the innocence declaration. However, Relator’s argue fails.

The trial court’s order is clear. There was one finding that no reasonable jury would find Relator guilty. Agreed Evidence, Pt.1, Ex. I. This one finding lead to two “decisions”: “Therefore, the Defendant’s *Petition for Post-conviction Relief* for aggravated murder with a firearms specification is approved. In the alternative, should this Court’s order *granting post-conviction relief* be overturned pursuant to appeal, then the Motion for New Trial is granted.” *Id.* (emphasis added). Clearly, there were two “decisions” in this entry—one granting post-conviction relief and one granting the motion for a new trial in the alternative. The State could appeal by right the granting of post-conviction relief. R.C. 2945.67(A). Additionally, because the grant of a new trial does not involve a final verdict, the State could obtain leave to appeal the grant of a new trial. There was not a third category of “decision” that was a non-appealable final verdict.

The finding regarding innocence was not a separate decision but the underlying finding that lead to the two remedies: post-conviction relief or a possible new trial.

Relator's confusing argument that the trial court's order contained more than those two decisions is unsupported by the record, and thus, fails. Because appeal of either decision was authorized by R.C. 2945.67(A), the Ninth District had jurisdiction to consider the State's appeal.

CONCLUSION

For these reasons, Relator has failed to establish the requirements for a writ of prohibition; and therefore, the Ninth District respectfully asks this Court to grant judgment in its favor.

Respectfully submitted,

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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 September 14, 2016, upon the following:

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