

In the Supreme Court of Ohio

STATE OF OHIO ex rel. DOUGLAS PRADE,

Relator,

v.

NINTH DISTRICT COURT OF APPEALS

and

HONORABLE JUDGE CHRISTINE CROCE,

Respondents.

Case No. 16-0686

Original Action for
Writ of Prohibition

REPLY BRIEF OF RELATOR DOUGLAS PRADE

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INTRODUCTION

In their merit briefs, Respondents the Ninth District Court of Appeals (the “Ninth District”) and Summit County Common Pleas Judge Christine Croce (“Judge Croce”) do not point to disputed facts that would preclude issuing the requested writs. They do not deny that Mr. Prade appears to be the only defendant in this State to be incarcerated for a crime after having been acquitted. And they recognize that this Court has said, again and again, that the State is barred from appealing a “final verdict” under R.C. 2945.67(A) whether the appeal was taken as a matter of right or by leave—a bar that, here, meant the Ninth District could not review or reverse Mr. Prade’s acquittal.

Nonetheless, Respondents ask this Court to ignore its many prior rulings because, in their view, the “except the final verdict” limitation in R.C. 2945.67(A) applies only to appeals that are taken by leave and can never apply to appeals taken as a matter of right. Respondents point to no decisions in which courts have allowed the State to appeal from “final verdict[s]” in as-a-matter-of-right appeals and do not dispute that, in every as-a-matter-of-right appeal in which there was an acquittal, the State was barred from appealing the acquittal. Respondents also fail to identify any reason why, as they contend, the Legislature would bar the State from appealing from only some, but not all, acquittals.

Instead, Respondents assert that the State’s appellate rights in as-a-matter-of-right appeals are somehow “absolute.” Yet, while the State plainly has a right to appeal certain decisions as-a-matter-of right under R.C. 2945.67(A), the scope of that right never has included a right to appeal from acquittals. Separately, Respondents argue that the rules of grammar dictate that R.C. 2945.67(A) must be interpreted consistent with their preferred

reading. But Respondents’ grammar-based arguments are demonstrably wrong, and R.C. 2945.67(A) readily lends itself to this Court’s repeated interpretation that the “except the final verdict” bar applies to both appeals as a matter of right and by leave. And that interpretation should prevail here not only because it is this Court’s, but because R.C. 2945.67(A) is an exception to the general rule that the State may not appeal in criminal matters, and thus must be strictly construed against the State.

Mr. Prade has demonstrated that the Ninth District and Judge Croce acted and are acting when they patently and unambiguously lacked, and lack, jurisdiction. Accordingly, this Court should issue the requested writs of prohibition.

ARGUMENT¹

I. THE LOWER COURTS’ LACK OF SUBJECT-MATTER JURISDICTION WAS “PATENT AND UNAMBIGUOUS.”

As outlined in Mr. Prade’s opening brief (at 8-10 (Relator’s Proposition of Law No. 1, subpart A)), a writ of prohibition should issue if the relator establishes “the exercise of judicial power, the lack of authority for the exercise of that power, and the lack of an adequate remedy in the ordinary course of law.” *State ex rel. Ford v.*

Ruehlman, ___ Ohio St.3d ___, 2016-Ohio-3529, ___ N.E.3d ___, ¶ 61 (per curiam)

(citations omitted). Neither Respondent disagrees, nor does either contest that, “[i]f the

¹ Respondents did not organize their merit briefs as responses to Mr. Prade’s three propositions of law. Instead, the Ninth District proposed four propositions of law of its own, and Judge Croce proposed two more. Thus, the Court now has nine propositions of law before it. While Mr. Prade believes that the three propositions of law in his opening brief provide the most useful analytical framework, this memorandum addresses Respondents’ arguments by general subject matter, rather than by proposition of law.

absence of jurisdiction is patent and unambiguous,” (1) the relator need not “establish . . . the lack of an adequate remedy at law,” *id.* at ¶ 62 (citation omitted), and (2) a writ of prohibition may be used to correct previous jurisdictionally unauthorized actions. *State ex rel. Lomaz v. Court of Common Pleas of Portage Cty.*, 36 Ohio St.3d 209, 212, 522 N.E.2d 551 (1988); *see also* Ninth Dist. Br. at 4.

The Ninth District, however, contends that a writ should not issue if this Court finds the text of R.C. 2945.67(A) ambiguous because, in that event, the lack of jurisdiction purportedly would not be “patent and unambiguous.” (Ninth Dist. Br. at 2, 4-5 (Ninth Dist. Proposition of Law No. 1), 14-16 (Ninth Dist. Proposition of Law No. 3)). This argument fails for two reasons. First, R.C. 2945.67(A)’s text and this Court’s decisions applying it establish that R.C. 2945.67(A) barred the State’s appeal at issue here because “R.C. 2945.67(A) prevents an appeal of *any* final verdict.” *State ex rel. Yates v. Ct. App. Montgomery Cty.*, 32 Ohio St.3d 30, 32, 512 N.E.2d 343 (1987) (emphasis in original). Thus, having already been given a definitive interpretation by this Court, R.C. 2945.67(A) is not ambiguous.

Second, the Ninth District’s premise is incorrect: the interpretive method by which this Court decides that R.C. 2945.67(A) barred the State’s appeal does not affect whether the lack of jurisdiction was “patent and unambiguous.” It is the “absence of jurisdiction” that must be “patent and unambiguous,” *Ford*, 2016-Ohio-3529, ¶ 62, and not, when jurisdiction turns on the meaning of a statute, the statute’s clarity or this Court’s method of interpreting it. If this Court finds that R.C. 2945.67(A) barred the State’s appeal at issue here (as it should), then, because there are no disputed jurisdiction-

related facts, the Ninth District’s lack of jurisdiction was “patent and unambiguous.” That is so no matter the method by which this Court interprets R.C. 2945.67(A).

This is borne out in *State ex rel. Ruessman v. Flanagan*, 65 Ohio St.3d 464, 605 N.E.2d 31 (1992), a case upon which the Ninth District relies. (Ninth Dist. Br. at 5). There, this Court denied a writ challenging the lower court’s jurisdiction due to contested facts relating to personal jurisdiction, which meant the lack of jurisdiction was not “patent and unambiguous.” *Id.* at 466-68. Similarly, in *Yates* the issue was whether R.C. 2945.67(A)’s “final verdict” bar prohibited the State’s appeal from a directed verdict of acquittal entered after a guilty verdict. There, “the appellate court was *patently and unambiguously* ‘without jurisdiction to act’” and, thus, “the availability of a remedy by appeal did not prevent issues of a writ of prohibition.” *State v. Ross*, 128 Ohio St.3d 283, 2010-Ohio-6282, 943 N.E.2d 992, ¶ 17 (emphasis added) (discussing and citing *Yates*, 32 Ohio St.3d at 33).

Ohio law as set forth in R.C. 2945.67(A) either barred the State’s appeal from Judge Hunter’s decision exonerating Mr. Prade or it did not (and it did). Thus, unlike *Ruessman*, where there were disputed predicate facts, and as in *Yates*, the lack of jurisdiction here was “patent and unambiguous.”

II. THE LACK OF SUBJECT-MATTER JURISDICTION WAS NOT WAIVED.

As detailed in Mr. Prade’s opening brief (at 10-11 (Relator’s Proposition of Law No. 1, subpart B)), a lower court’s lack of subject-matter jurisdiction may be raised at any time and, in this instance, was not waived. Respondents suggest otherwise, arguing that Mr. Prade is somehow improperly seeking “a second appeal by way of a writ of

prohibition” and that “the issue of a final verdict has previously been before by [sic] this Court.” (Ninth Dist. Br. at 1; *see also* Croce Br. at 16). Respondents are mistaken.

The jurisdictional question at issue here was not raised below and, instead, first was raised in Mr. Prade’s jurisdictional appeal to this Court from the Ninth District’s reversal of the Exoneration Order, but this Court declined jurisdiction. Thus, the issue now before the Court was not previously decided by this Court or the courts below, and this Court’s refusal to take the earlier appeal does not establish law of the case. *State v. Davis*, 119 Ohio St.3d 422, 2008-Ohio-4608, 894 N.E.2d 1221, ¶¶ 25, 28 (“When this court determines whether or not to accept jurisdiction in a particular case, it is not rendering a decision on the merits” and therefore denial of leave had no *res judicata* effect); Rep.Op.R. 4.1 (“The refusal of the Supreme Court to accept any case for review shall not be considered a statement of opinion as to the merits of the law.”).

Further, Respondents simply ignore multiple decisions from this Court finding that subject-matter jurisdiction cannot be waived and may be challenged at any time because actions by courts that lacked subject-matter jurisdiction are void *ab initio*. *See, e.g., Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, ¶ 11 (subject-matter jurisdiction “may be challenged at any time”); *State ex rel. Tubbs Jones v. Suster*, 84 Ohio St.3d 70, 75, 701 N.E.2d 1002 (1998) (actions by court lacking subject-matter jurisdiction are void *ab initio*). Accordingly, the issues raised in this original proceeding are neither repetitive nor untimely.

III. JUDGE HUNTER’S ACQUITTAL WAS A “FINAL VERDICT” UNDER R.C. 2945.67(A).

Mr. Prade’s opening brief discussed why, like a directed verdict of acquittal, Judge Hunter’s acquittal—her decision finding that Mr. Prade is actually innocent based on the insufficiency of the evidence—was a “final verdict” under R.C. 2945.67(A). (Prade Br. at 14-15 (Relator’s Proposition of Law No. 3, subpart A)). That is because how an order is characterized for purposes of R.C. 2945.67(A) is based on “the type of relief” granted in the order and not its title, *State v. Davidson*, 17 Ohio St.3d 132, 135, 477 N.E.2d 1141 (1985), and it is well established that “final verdict[s]” under R.C. 2945.67(A) include not only jury verdicts but also trial courts’ “factual determination[s] of innocence” that are “grounded upon insufficiency of [the] evidence.” *Yates*, 32 Ohio St.3d at 32-33.

Respondents do not dispute that Judge Hunter’s acquittal of Mr. Prade is a “final verdict” under R.C. 2945.67(A). In fact, the Ninth District twice refers to Judge Hunter’s actual innocence decision as an “acquittal.” (Ninth Dist. Br. at 3, 10). Accordingly, Judge Hunter’s acquittal of Mr. Prade was a “final verdict” under R.C. 2945.67(A).

IV. “R.C. 2945.67(A) PREVENTS AN APPEAL OF ANY FINAL VERDICT.” *YATES*, 32 OHIO ST.3D AT 32 (EMPHASIS IN ORIGINAL).

As they did in their motions to dismiss, Respondents ask the Court to find that, while the State is barred from appealing some final verdicts (those in appeals by leave) it may appeal others (those in appeals as a matter of right). Thus, Respondents invite the Court to ignore (1) its decisions interpreting and applying R.C. 2945.67(A); (2) that their artificially narrow reading of the “final verdict” exception violates the rule that R.C. 2945.67(A) must be strictly construed against the State; and (3) the fact that their

interpretation of R.C. 2945.67(A) lacks any policy rationale and, in fact, would authorize constitutionally barred appeals. (Ninth Dist. Br. at 6-14; Croce Br. at 10-11). The Court should, as it did in denying Respondents’ motions to dismiss, decline these invitations.

A. This Court Repeatedly Has Found That R.C. 2945.67(A) Bars The State From Appealing All Final Verdicts, Including In Appeals Taken As A Matter Of Right.

As detailed in Mr. Prade’s opening brief (at 16-19), this Court has repeatedly made clear that “[a] ‘final verdict’ within the meaning of R.C. 2945.67(A), [is] a judgment that is ‘not appealable by the state as a matter of right or by leave to appeal pursuant to that statute.’” *State v. Hampton*, 134 Ohio St.3d 447, 2012-Ohio-5688, 983 N.E.2d 324, ¶ 15 (citation omitted). “The state ha[s] no right to have [an] order of acquittal reviewed.” *Id.* at ¶ 16. Thus, “a judgment of acquittal is not appealable by the state as a matter of right or by leave to appeal pursuant to R.C. 2945.67(A).” *Id.* at ¶ 17. Here, it is undisputed that Judge Hunter’s Exoneration Order included a final verdict acquitting Mr. Prade (*see* Ninth Dist. Br. at 3, 10), and this Court has clearly and repeatedly stated without qualification that final verdicts of acquittal may not be appealed by the State. That is the end of the matter.

Before addressing Respondents’ efforts to evade the daunting uniformity and clarity of this Court’s prior rulings, it is important to note what Respondents fail to do. Specifically, they do not identify a single instance in which this or any other court has (1) said that the State may appeal from an acquittal in an as-a-matter-of-right appeal or (2) allowed the State to appeal from an acquittal, whether in an as-a-matter-of-right

appeal or one by leave, when jurisdiction was contested.² Thus, Respondents ask this Court to, for the first time, conclude that the State may appeal from an acquittal.

Respondents do, however, try their best to muddy the waters, claiming that the case law does not mean what it says. This is no surprise, given that the case law, left unmuddied, unquestionably shows that Respondents acted without jurisdiction. The Court should reject Respondents' attempts to rewrite clear precedent. In this Court's words, "[t]here is no reason to overrule the clear pronouncement . . . that a judgment of acquittal is not appealable by the state as a matter of right or by leave to appeal pursuant to R.C. 2945.67(A)." *Hampton*, 2012-Ohio-5688, at ¶ 17.

Respondents have nothing of substance to say about either *Yates* or *Hampton*. Instead, they focus exclusively on *State v. Keeton*, 18 Ohio St.3d 379, 481 N.E.2d 629 (1985). (See Ninth Dist. Br. at 7-8). They acknowledge, as they must, the pronouncement in *Keeton*'s syllabus 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." 18 Ohio St.3d 379, paragraph 2 of the syllabus. But though they give lip service to this blanket rule that final verdicts are not appealable

² Recently, the State appealed from a trial court's actual innocence finding based on the insufficiency of the evidence in *State v. Apanovitch*, 8th Dist. Cuyahoga No. 102618, 2016-Ohio-2831. The defendant there neither raised the jurisdictional issue that is the focus here nor needed to do so because the Eighth District affirmed and, thus, mooted any issue relating to its jurisdiction to hear the appeal. *Id.* at ¶¶ 46-47. On May 5, 2016, the State noticed an appeal to this Court in *Apanovitch* (Case No. 2016-0696), and the defendant did not cross-appeal or raise the jurisdictional issue in his memorandum opposing jurisdiction. As of the time this reply was filed, this Court had not yet decided whether to accept jurisdiction in *Apanovitch*.

“*as a matter of right* or by leave to appeal,” *id.* (emphasis added), they purport to divine a separate, contrary rule hidden in *Keeton*—that final verdicts *can in fact be appealed* so long as they are part of an appeal by right. They offer no support for this contradictory theory other than a passing reference from *Keeton* stating that opportunities for appeals of right under R.C. 2945.67(A) are “in addition” to appeals by leave. (Ninth Dist. Br. at 8).

Not only does *Keeton* itself not support Respondents’ novel theory, but this Court’s later precedents make its ruling in *Keeton* even clearer. Two years after *Keeton*, this Court stated in *Yates* that “R.C. 2945.67(A) prevents an appeal of *any* final verdict.” 32 Ohio St.3d at 32 (emphasis in original). No exception was made for appeals as a matter of right.

Further, and as noted above, this Court reaffirmed the principle yet again in *Hampton*: “There is no reason to overrule the clear pronouncement in *Yates* that a judgment of acquittal is not appealable by the state as a matter of right or by leave to appeal pursuant to R.C. 2945.67(A).” 2012-Ohio-5688, at ¶ 17. Indeed, in *Hampton* the State noticed appeals both as a matter of right and by leave, *id.* at ¶ 6, yet this Court did not waste a single drop of ink discussing whether or not the order appealed from was appealable as of right or only by leave because that inquiry is irrelevant. Rather, because the State is barred from appealing “*any* final verdict,” *Yates*, 32 Ohio St.3d at 32 (emphasis in original), the dispositive issue for this Court was “whether [the trial] court’s order [was] a ‘final verdict’ for purposes of R.C. 2945.67(A).” *Hampton*, 2012-Ohio-5688, at ¶ 14. It was a final verdict, the Court held, and so the State’s appeal was barred.

Here, as discussed above at page 6, the Ninth District concedes that Judge Hunter’s Exoneration Order included a final verdict of acquittal. *Yates* and *Hampton* could hardly be clearer that the State is barred from appealing *any* final verdict, including in an as-a-matter-of-right appeal. It is therefore not surprising that Respondents do not even attempt to deal with the substance of *Yates* and *Hampton* in their briefs. In the end, it is not Mr. Prade’s interpretation and application of R.C. 2945.67(A) and *Keeton* with which Respondents take issue, but rather this Court’s.³

The Ninth District’s discussion of *State v. Fraternal Order of Eagles Aerie 0337 Buckeye*, 58 Ohio St.3d 166, 569 N.E.2d 478 (1991)—a decision involving an as-a-matter-of-right appeal—also misses the mark. The Ninth District makes much of the fact that this Court said in *Fraternal Order of Eagles* that the State had an “absolute” right to appeal from the trial court’s decision granting the defendant’s motion to suppress. (Ninth Dist. Br. at 9). But that does not change the fact that, while the State was permitted to appeal the motion-to-dismiss aspect of the trial court’s order in *Fraternal Order of Eagles* for purposes of testing the soundness of that decision, it was *barred* from appealing the acquittal itself, which was left undisturbed. So, too, here: While the State

³ The Ninth District also points to *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629, and *State v. Matthews*, 81 Ohio St.3d 375, 691 N.E.2d 1041 (1998), for the proposition that R.C. 2945.67(A) draws a “distinction” between those decisions which may be appealed as of right and those which may only be appealed by leave of court. (Ninth Dist. Br. at 8-9). This is, of course, correct so far as it goes. R.C. 2945.67(A) indeed discusses *both* appeals as a matter of right and appeals by leave. But that has nothing to do with whether the State may appeal a final verdict. As this Court has made clear, final verdicts may *not* be appealed, regardless of whether they are part of a decision that can otherwise be appealed as of right or, rather, part of a decision that can otherwise be appealed only by leave of court.

is free to use its “absolute” right to appeal Judge Hunter’s decision granting postconviction relief for purposes of testing the legal soundness of that decision (which appeal could provide useful precedent for future cases), the acquittal itself—a final verdict—must remain undisturbed, as appellate review of the acquittal is barred by R.C. 2945.67(A). See *In re N.I.*, 191 Ohio App.3d 97, 2010-Ohio-5791, 944 N.E.2d 1214, ¶ 14 (8th Dist.) (“Even when there is a final verdict [that the State is barred from appealing], however, an appellate court may review substantive rulings of law when it is presented with an underlying legal question that is capable of repetition yet evading review.” (citing *State v. Bistricky*, 51 Ohio St.3d 157, 555 N.E.2d 644 (1990), syllabus)).

The Ninth District also observes that this Court “did not hold in *Fraternal Order of Eagles* that the appellate court lacked jurisdiction to hear the case.” (Ninth Dist. Br. at 9-10). That is true, but irrelevant. Again, what matters here is that *Fraternal Order of Eagles* held that the court of appeals was barred from disturbing *the acquittal*. In the same way, then, while R.C. 2945.67(A) and this Court’s precedent did not bar the Ninth District from hearing other aspects of the State’s appeal from the Exoneration Order, the Ninth District *was* barred from disturbing Mr. Prade’s acquittal.⁴

⁴ The Ninth District also tries to distinguish *Fraternal Order of Eagles* and the juvenile cases—*In re D.R.*, 8th Dist. Cuyahoga Nos. 100034 & 100035, 2014-Ohio-832, and *In re N.I.*, 191 Ohio App.3d 97, 2010-Ohio-5791, 944 N.E.2d 1214 (8th Dist.)—on the grounds that double jeopardy concerns were also implicated there. (Ninth Dist. Br. at 10). But that does not matter, as R.C. 2945.67(A) bars State appeals of all final verdicts, regardless whether the double jeopardy concerns are at play. See *Yates*, 32 Ohio St.3d at 32 (“R.C. 2945.67(A) prevents an appeal of *any* final verdict and is not tied to the Double Jeopardy Clause.”) (emphasis in original); accord *State v. Ross*, 128 Ohio

B. R.C. 2945.67(A)'s Text Bars Appeals From All "Final Verdict[s]," Including In Appeals Taken "As A Matter Of Right."

In his opening brief, Mr. Prade explained that R.C. 2945.67(A) must be strictly construed against the State and that, consistent with multiple cases in which this Court and others have interpreted statutes, R.C. 2945.67(A)'s text supports applying the bar against the State appealing "final verdict[s]" to both "by leave" and "as a matter of right" appeals. (Prade Br. at 19-26). Neither Respondent takes issue with the fact that R.C. 2945.67(A) "must be strictly construed" against the State because it is an "exception to the general rule prohibiting appeals by the state in criminal proceedings." *State v. Basham*, 94 Ohio St.3d 269, 271, 762 N.E.2d 963 (2002) (citation omitted); *see also State v. Rucci*, 7th Dist. Mahoning, No. 13 MA 65-72, 2014-Ohio-1396, ¶ 1. Accordingly, Respondents must establish that their interpretation of R.C. 2945.67(A) can survive strict construction against the State, which, as detailed below, they cannot do.

The Ninth District argues at some length that the rules of grammar somehow compel the conclusion that the "except the final verdict" limitation can apply only to by-leave appeals and not to as-a-matter-of-right appeals. (Ninth Dist. Br. at 11-13). This argument rests on two underlying premises, both of which are wrong. First, the Ninth District asserts that Mr. Prade is invoking the "last antecedent rule." (*Id.* at 12). But Mr. Prade is invoking an *exception* to the last-antecedent rule known as the series-modifier

(continued...)

St.3d 283, 2010-Ohio-6282, 943 N.E.2d 992, ¶¶ 48, 51 (R.C. 2945.67(A) barred State's appeal from acquittal although double jeopardy did not apply).

rule. It is the Ninth District that is relying on the last-antecedent rule, which it incorrectly calls the “proximity rule.” (*Id.* at 11-12). Thus, Mr. Prade agrees with the Ninth District that “*Sutherland [Statutes and Statutory Construction]* itself says that the last antecedent rule is ‘not inflexible and uniformly binding.’” (*Id.* at 12 (citations omitted)). Likewise, Mr. Prade agrees with the Ninth District that “there can be an exception to the proximity [last-antecedent] rule if the preposition modifies elements in a compound construction.” (*Id.* at 11 (citing *Chicago Manual of Style* § 5.175 (16th ed. 2010)); *see also Chicago Manual of Style* § 5.175 (“If a prepositional phrase equally modifies all the elements of a compound construction, the phrase follows the last element in the compound.”)). Indeed, that exception is the basis of Mr. Prade’s textual argument. (Prade Br. at 19-26).

Second, the Ninth District claims that the two types of appeals in R.C. 2945.67(A) are contained in two independent clauses and are not subject to a compound construction, which in turn means that the “except the final verdict” limitation applies only to appeals by leave. (Ninth Dist. Br. at 11-13). This is the very foundation of the Ninth District’s grammar-based argument, as it argues that (1) because “the two parts of the sentence . . . are joined with a conjunction and a comma,” they are “*independent clauses*, not a compound construction;” (2) “‘except the final verdict’ was placed in the middle of the direct object of the *second independent clause*;” (3) the exception on which Mr. Prade relies “is not meant to apply to *independent clauses* that are separated by a comma and a conjunction;” and (4) “[t]here are two *independent clauses*: an appeal-by-right clause separated by a comma from the appeal-by-leave clause.” (*Id.* at 11-13 (emphasis added)).

Once again, however, the Ninth District’s basic premise is wrong. An independent clause is a group of words with a subject and verb that can stand alone as a sentence.⁵ The relevant sentence in R.C. 2945.67(A) is a single independent clause because it has one subject—the State. *See* R.C. 2945.67(A) (“A prosecuting attorney, village solicitor, city director of law, or the attorney general . . .”). Thus, contrary to the Ninth District’s claims that the two types of appeal in R.C. 2945.67(A) are contained in “independent clauses” and are “not [subject to] a compound construction” (Ninth Dist. Br. at 11), the relevant sentence in R.C. 2945.67(A) does have a “compound construction.” This is in part because it has “two . . . verbs having the same subject, as distinct from two independent clauses.” *Chicago Manual of Style* § 6.29 (defining compound predicates).

To be clear, R.C. 2945.67(A) has two verb phrases—(1) “may appeal as a matter of right” and (2) “may appeal by leave”—that, again, share a single subject: the State. Thus, the relevant sentence is a single independent clause with a “compound construction.” Tellingly, the Ninth District says not one word about the instances identified in Mr. Prade’s opening brief where this Court and the United States Supreme Court have, as should be done here, applied limiting phrases appearing at the end of a series to the entire series when the statute at issue is, like this one, amenable to such an interpretation. (*See* Prade Br. at 22-25 (discussing *Wohl v. Swinney*, 118 Ohio St.3d 277,

⁵ *See* Purdue University Online Writing Lab, Identifying Independent and Dependent Clauses (Definitions), <https://owl.english.purdue.edu/owl/resource/598/01/> (last visited Sept. 21, 2016) (“An independent clause is a group of words that contains a subject and verb and expresses a complete thought. An independent clause is a sentence.”).

2008-Ohio-2334, 888 N.E.2d 1062; *Moore v. State Auto. Ins. Co.*, 88 Ohio St.3d 27, 723 N.E.2d 97 (2000), and *Paroline v. United States*, ___ U.S. ___, 134 S.Ct. 1710, 188 L.Ed.2d 714 (2014)).

The Ninth District also argues that Mr. Prade’s interpretation of R.C. 2945.67(A) somehow requires adding words to the statute. (Ninth Dist. Br. at 14). But it does not. Just as this Court and others have done regularly in, for example, *Wohl*, *Moore*, and *Paroline*, Mr. Prade’s interpretation of R.C. 2945.67(A) simply applies basic grammar canons to conclude, as this Court consistently has, that “except the final verdict” applies to both as-a-matter-of-right and by-leave appeals.

Finally, the Ninth District ignores the fact that the last antecedent doctrine on which it relies “will not be adhered to where extension to a more remote antecedent is clearly required by a consideration of the entire act. A slight indication of legislative intent to extend the reach of the relative term is sufficient. Where several words are followed by a clause that is as much applicable to the first and other words as to the last, the clause should be read as applicable to all.” 82 C.J.S. *Statutes* § 443 (Westlaw 2016) (footnotes omitted). In this case, as discussed immediately below, the “indication of legislative intent” requires applying the final verdict exception to appeals as of right as well as appeals by leave.

C. Respondents’ Interpretation Of R.C. 2945.67(A) Has No Supporting Policy Justification And Would Authorize Unconstitutional Appeals.

In his opening brief, Mr. Prade argued that “there is absolutely no reason why the Legislature would have permitted the State to appeal from ‘final verdict[s]’ 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.’” (Prade Br. at 26). In response, neither Respondent offers any reason why the Legislature might have intended to bar the State from appealing only some, and not all, “final verdict[s].” (See Ninth Dist. Br. at 13-14 (discussing legislative intent)). This inability to offer any underlying policy rationale that would support their novel reading of R.C. 2945.67(A) highlights the poverty of Respondents’ position.

Moreover, Respondents do not dispute that, under their reading of R.C. 2945.67(A), the statute would have authorized the State to appeal from the trial judges’ “final verdict[s]” acquitting the defendants in *Fraternal Order of Eagles, In re D.R.*, and *In re N.I.*, all of which were barred by double jeopardy. In fact, the Ninth District asks this Court to embrace the proposition that, in appeals “as a matter of right,” R.C. 2945.67(A) “authorizes the State to appeal . . . any decision . . . , *even final verdicts.*” (Ninth Dist. Br. at 6 (Ninth Dist. Proposition of Law No. 2) (emphasis added)). That plainly is wrong, and the Ninth District does not and cannot explain why the Legislature would have sought to authorize appeals that are constitutionally barred. Indeed, though its “final verdict” limitation extends farther than double jeopardy, R.C. 2945.67(A) was enacted to, at the bare minimum, bar the State from appealing when double jeopardy applied. See *Yates*, 32 Ohio St.3d at 35 (Holmes, J., dissenting) (in R.C. 2945.67(A), Legislature sought to “not run afoul of[] the double jeopardy prohibition”).

Further, the Ninth District’s reading of R.C. 2945.67(A) to authorize appeals that are barred by double jeopardy cannot be reconciled with R.C. 1.47(A)’s directive that,

“[i]n enacting a statute, it is presumed that: . . . [c]ompliance with the constitutions of the state and of the United States is intended.” And the Ninth District does not explain why, if, as its argument presumes, the Legislature intended to simply rely on the double jeopardy provisions of the Ohio and United States Constitutions to, by themselves, bar improper appeals by the State, the “except the final verdict” limitation on the State’s right to appeal is anything more than useless surplusage. *See* R.C. 1.47(B) (“In enacting a statute, it is presumed that: . . . (B) The entire statute is intended to be effective.”).

Finally, the Ninth District does not explain how its reading of R.C. 2945.67(A) is consistent with R.C. 1.47(C)’s directive that statutes should be interpreted to yield a “just and reasonable result.” If Judge Hunter had presided over Mr. Prade’s trial in 1998, heard the new DNA and bite mark evidence along with the evidence from the original trial that she considered in the postconviction proceedings, and then entered a Crim.R. 29 directed verdict of acquittal, R.C. 2945.67(A) plainly would have barred an appeal by the State. The fact that the evidence available now was unavailable in 1998 and, thus, Judge Hunter’s acquittal was part of her granting postconviction relief, rather than a directed verdict of acquittal, is a distinction without a difference and is no reason for Mr. Prade to be the only defendant in this State *ever* to be incarcerated for a crime after being acquitted of the crime by a trial judge.

V. IF THE COURT ADOPTS RESPONDENTS’ INTERPRETATION OF R.C. 2945.67(A), THE EXONERATION ORDER’S “FINAL VERDICT” STILL COULD NOT BE APPEALED.

In his opening brief (at 29-31), Mr. Prade explained that, if the Court concludes that R.C. 2945.67(A)’s final verdict bar does not apply to appeals as a matter of right

from decisions granting postconviction relief, it nonetheless applied here because the acquittal decision, like Judge Hunter’s alternative ruling granting Mr. Prade a new trial, is an “other decision” under R.C. 2945.67(A) as to which the final verdict bar plainly applies. The Ninth District responds that the “finding regarding innocence was not a separate decision but the underlying finding that lead [sic] to the two remedies: postconviction relief or a possible new trial.” (Ninth Dist. Br. at 17). This is incorrect.

Judge Hunter could have granted postconviction relief and ordered a new trial, rather than acquitting. *See State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77 (trial court’s postconviction remedy was a new trial). Thus, the acquittal was not a necessary part of granting postconviction relief and, in that respect, was an “other decision” under R.C. 2945.67(A) that was separate from the grant of postconviction relief.

Moreover, the acquittal was “the underlying finding that” led to the “possible new trial” ruling. (Ninth Dist. Br. at 17). That new trial ruling plainly was an “other decision” under R.C. 2945.67(A) in that the State twice sought leave to appeal it.

Finally, the Ninth District ignores the fact that, where the State has appealed from directed verdicts of acquittal under R.C. 2945.67(A), courts regularly have split those unitary rulings into the acquittal, which could not be appealed, and other issues, which could be. *E.g.*, *State v. Ross*, 128 Ohio St.3d 283, 2010-Ohio-6282, 943 N.E.2d 992, ¶ 51; *State v. Bistricky*, 51 Ohio St.3d 157, 159, 555 N.E.2d 644 (1990); *State v. Arnett*, 22 Ohio St.3d 186, 188, 489 N.E.2d 284 (1986). That is what the Ninth District should have done here—permitted the State to appeal from any aspect of the grant of postconviction relief except the “other decision” to acquit.

VI. JUDGE CROCE'S REMAINING ARGUMENTS HAVE NO MERIT.

Judge Croce advances four additional arguments that, while not easily categorized, lack merit. First, she argues that the State's appeal from the Exoneration Order was authorized by multiple statutes—R.C. 2945.67(A), R.C. 2953.21, and R.C. 2953.23—and, thus, the “mandate to read statutes consistently whenever possible” means that the State's appeal was permissible. (Croce Br. at 7-11). Yet even though, for example, R.C. 2953.23(B) provides that an order granting postconviction relief “is a final judgment and may be appealed,” R.C. 2945.67(A) expressly addresses such appeals and, “[a]bsent R.C. 2945.67, the state has no substantive right to appeal trial-court decisions in criminal cases.” *In re M.M.*, 135 Ohio St.3d 375, 2013-Ohio-1495, 987 N.E.2d 652, ¶ 22 (footnote and citation omitted); *accord State ex rel. Steffen v. Court of Appeals, First Appellate Dist.*, 126 Ohio St.3d 405, 2010-Ohio-2430, 934 N.E.2d 906, ¶ 21.

Second, she argues that postconviction relief proceedings are not criminal proceedings, but rather are collateral civil attacks on criminal judgments. (Croce Br. at 11-13). While correct, the argument leads nowhere. The fact that postconviction proceedings are a civil-criminal hybrid is irrelevant given that R.C. 2945.67(A) expressly applies to decisions granting petitions for postconviction relief.

Third, Judge Croce notes that the Exoneration Order made provision for a possible appeal from the grant of postconviction relief. (Croce Br. at 12). But a trial judge's attempt to predict an appellate court's actions does not create appellate jurisdiction.

Finally, Judge Croce notes that many of the cases cited in Mr. Prade's opening brief did not involve petitions for postconviction relief. (Croce Br. at 13-15). That is

correct but beside the point. Those cases are instructive in that they provide the legal framework through which this Court should determine whether a writ should issue here.

CONCLUSION

Judge Hunter's decision in the Exoneration Order finding Mr. Prade actually innocent based on the insufficiency of the evidence was a "final verdict" under R.C. 2945.67(A), and that statute bars "an appeal of *any* final verdict." *Yates*, 32 Ohio St.3d at 32 (emphasis in original). The Ninth District lacked jurisdiction to review and reverse the decision in the Exoneration Order finding that Mr. Prade is actually innocent, and all subsequent actions by the Ninth District and Judge Croce, including Judge Croce's order that Mr. Prade be reincarcerated, were without jurisdiction. This Court should issue the requested writs of prohibition to the Ninth District and Judge Croce.

Dated: September 21, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of September 2016, a copy of the foregoing Reply Brief of Relator Douglas Prade was served by first class mail via the U.S. Postal Service upon the following:

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