IN THE SUPREME COURT OF OHIO
2024

STATE OF OHIO, Plaintiff-Appellant, -vs- NICHOLAS MUSARRA, Defendant-Appellee.	Case Nos. 24-540 24-541 On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals Nos. 113486/113487

MERIT BRIEF
OF AMICUS CURIAE OHIO PROSECUTING ATTORNEYS ASSOCIATION
IN SUPPORT OF APPELLANT STATE OF OHIO

Steven L. Taylor 0043876
Legal Research and Staff Counsel
Ohio Prosecuting Attorneys Association
196 East State Street, Ste. 200
Columbus, Ohio 43215
Phone: 614-221-1266
Fax: 614-221-0753
E-mail: taylor@ohiopa.org
Counsel for Amicus Curiae Ohio Prosecuting Attorneys Assn.

Cullen Sweeney 0077187
Cuyahoga County Public Defender
John T. Martin 0020606
(Counsel of Record)
Assistant Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, Ohio 44113
Phone: 216-443-7583
E-mail: jmartin@cuyahogacounty.us
Counsel for Defendant-Appellee

Michael C. O'Malley 0059592
Cuyahoga County Prosecuting Attorney
Daniel T. Van 0084614
(Counsel of Record)
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
Phone: 216-443-7800
Email:
dvan@prosecutor.cuyahogacounty.us
Counsel for State of Ohio

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

CONSTITUTIONAL PROVISIONS

STATEMENT OF AMICUS INTEREST

The Ohio Prosecuting Attorneys Association (OPAA) is a private, non-profit trade organization that supports the state's 88 elected county prosecutors. Its mission includes assisting prosecuting attorneys in the pursuit of truth and justice and advocating for public policies that promote public safety and help secure justice for victims.

In light of these considerations, OPAA has significant concerns with the *Keeton-Yates-Hampton* trilogy and their analysis of the question of whether the State can appeal from a "judgment of acquittal" invoking Crim.R. 29(A) and (C). See *State v. Hampton*, 134 Ohio St.3d 447, 2012-Ohio-5688; *State ex. rel. Yates v. Montgomery Cty. Court of Appeals*, 32 Ohio St.3d 30 (1987); *State v. Keeton*, 18 Ohio St.3d 379 (1985). The legal analysis does not hold up to scrutiny and suffers from numerous flaws on multiple levels.

In terms of legislative intent, it should have been significant in *Keeton* and *Yates* that the General Assembly enacted R.C. 2945.67(A) in 1978 after the adoption of Crim.R. 29 in 1973. The statute created a broad authority for the State to appeal, and it only bars the State from appealing from "the final verdict." Given the text of Crim.R. 29 as it existed in 1978, the rule would have provided background and context as *Keeton* and *Yates* were addressing the question of whether the General Assembly intended to preclude State's appeals from "judgments of acquittal" granted under the rule. The rule's own terminology should have provided an important reference point in attempting to understand what the General Assembly meant as to "the final verdict." Yet, neither decision grappled with what Crim.R. 29 itself actually stated in terms of differentiating "verdicts" from "judgments of acquittal."

This significant omission has become even more pronounced in light of recent

case law from this Court. In specific reference to R.C. 2945.67, this Court recently emphasized that "we apply the meaning of the statute at the time it was enacted" in November 1978, so that the statute should be construed in light of the pertinent criminal rule that was in place at the time. *State v. Ramirez*, 159 Ohio St.3d 426, 2020-Ohio-602, ¶ 23 (construing statute and former Crim.R. 33(A)(4) together). *Ramirez* also considered the state of double-jeopardy law at the time the statute was passed. *Ramirez*, ¶ 23.

But *Yates* intentionally turned a blind eye to double-jeopardy implications and simply missed the import of what Crim.R. 29 expressly stated at the time (and still states). The rule demonstrates that the "verdict" in this context is the jury's "verdict" and that a trial court's entry of a "judgment of acquittal" stands apart from the "verdict." Given that the rule itself juxtaposes the "verdict" as standing apart from the "judgment of acquittal," and given that the rule had been in existence for over five years before R.C. 2945.67(A) enacted the "the final verdict" language, it is fairly clear that the "judgment of acquittal" was not a "verdict" but, instead, was a "judgment," and therefore such "judgment" would not qualify as "the final verdict." And, even if such a judgment were treated as a "verdict," it would not qualify as a "final" verdict in *Yates* when, under double-jeopardy doctrine, the post-verdict judgment of acquittal in *Yates* could be appealed and reversed and the jury's guilty verdict could be reinstated without violating the defendant's double-jeopardy rights.

Hampton was built on the shaky *Keeton-Yates* foundation and added to the problems. *Hampton* concluded that a "judgment of acquittal" under Crim.R. 29(A) could be based on insufficiency of evidence on venue and that such ruling would be treated as a "final verdict" that barred the State from appealing. But the 4-3 majority in *Hampton*

notably failed to address case law and statutory indicators that sufficiency-of-evidence challenges under the rule are directed at the elements of the offense, and the rule itself focuses on the "offense," not the non-element of venue. Yet *Hampton* concluded that the sufficiency standard under Crim.R. 29 could address the non-element of venue.

The United States Supreme Court's recent decision in *Smith v. United States,* 599 U.S. 236 (2023), provides substantial reasons to question the logic underlying *Hampton*. Whether or not a court's venue-based ruling is called an "acquittal," it is not a true "acquittal" that triggers double-jeopardy protection and therefore would not be treated as the equivalent of a "verdict" of acquittal that would bar a State's appeal. To be sure, *Hampton* was silent on double-jeopardy implications and focused solely on its reading of what is a "final verdict" based on *Keeton* and *Yates*. But those decisions failed to fully assess what would qualify as "the final verdict," and, in particular, *Yates* and therefore *Hampton* failed to consider what would be "the final verdict" under the statutory language. It takes not just a "verdict" to bar the State's appeal. It takes a *final* verdict, and refusing to consider when double jeopardy would allow the State's appeal represents a refusal to consider the full import of what it takes for a "verdict" to be truly "final."

Nothing in law makes a Crim.R. 29(C) "judgment of acquittal" "the *final* verdict" other than the ipse dixit in *Yates* contending that the post-verdict judgment is "final." Even more so, nothing in law makes a venue-based "judgment of acquittal" "the final verdict" except an ipse dixit in *Hampton* elevating the non-element of venue to the status of an "acquittal" on the merits.

OPAA respectfully submits that a "judgment of acquittal" is not a "verdict" within the meaning of R.C. 2945.67(A) and that only a jury's not-guilty verdict would

qualify as "*the* final verdict" under that statute from which the State cannot appeal. And, even if a "judgment of acquittal" would qualify as a "verdict," it would not fall within "the final verdict" exception barring the State from appealing when double-jeopardy doctrine would allow the State to appeal, as it would when a post-verdict judgment of acquittal is granted or when the trial court concludes there was a lack of proof of venue.

Finally, venue should not be addressed through a motion for "judgment of acquittal" at all, as the import of a lack of venue is the inability of the court to reach any true verdict of "acquittal" on the elements of the offense. The defense can raise venue-based concerns through general motion practice, and the trial court can sustain the defense motion challenging the State's alleged failure to prove venue in its case-in-chief. But such a disposition would amount to a dismissal of the case at the defendant's request, rather than a merits "acquittal," and such ruling ought to be appealable as of right, just like any other non-acquittal that results in the pre-verdict termination of the trial at the defendant's request. *United States v. Scott,* 437 U.S. 82 (1978). The State's burden of persuasion beyond a reasonable doubt on venue does not mean that venue is cognizable under sufficiency review, just as the same burden of persuasion on self-defense does not turn self-defense into a basis for finding the evidence "insufficient" under Crim.R. 29. See *State v. Messenger,* 171 Ohio St.3d 227, 2022-Ohio-4562.

In terms of policy, one struggles to understand the antipathy that exists towards State's appeals as reflected in the *Keeton-Yates-Hampton* trilogy. Defendants routinely are afforded multiple appeals in their cases, serially appealing from the judgment of conviction, from the denial of post-conviction relief, from the denial of a delayed motion for new trial, and from the denial of "no name" motions when the time for pursuing the

other remedies has expired. On and on it goes, appeal after appeal after appeal in case after case after case. Repeated appeals by the defendant are a fact of life.

In contrast, in the context of purported "judgments of acquittal," the State is entirely denied the ability to pursue even a single, timely appeal from an order that could be grievously incorrect. To be sure, double jeopardy might bar a particular State's appeal, and double-jeopardy doctrine would work its will and lead to the dismissal of such an appeal. But the expansive terms of R.C. 2945.67(A) provide scant support for a narrow view of the State's ability to appeal. The State's authority to appeal is broad, not narrow, and treating a "judgment of acquittal" under Crim.R. 29 as falling within "the final verdict" exception disregards the clear demarcation in the rule between the jury's "verdict" and the judge's "judgment of acquittal." When the General Assembly chose to only bar State's appeals from "verdicts" and not "judgments," it would have taken note of that demarcation.

This conclusion applies with extra force when the "judgment of acquittal" is based solely on the claimed lack of proof of venue. Venue is not an element or an affirmative defense, and, if anything, a lack of venue signals an inability for the court to reach the merits to "acquit" the defendant. Granting a "judgment of acquittal" simply does not fit the issue of venue. As the United States Supreme Court has now recognized, a defendant's successful objection on venue grounds does not trigger double-jeopardy protection against retrial. A mid-trial objection to lack of venue would not implicate "the final verdict" exception and would not bar the State from appealing.

In the interest of aiding this Court's review herein, amicus curiae OPAA offers the present amicus brief in support of the State's appeal.

STATEMENT OF FACTS

Amicus OPAA adopts by reference the procedural and factual history as set forth in the State's merit brief.

ARGUMENT

> **Amicus Proposition of Law**: A trial court's purported grant of a Crim.R. 29(A) motion for judgment of acquittal based on lack of proof of venue is not "the final verdict" for purposes of the State's ability to appeal under R.C. 2945.67(A). A defendant's motion challenging proof as to venue does not properly invoke Crim.R. 29(A) and amounts to a mid-trial motion to dismiss, the granting of which can be appealed as of right by the State. Alternatively, the granting of a venue-based mid-trial motion would fall within the broad "any other decision" category of orders from which the State can appeal by leave of the court of appeals. Neither form of appeal would violate the defendant's double-jeopardy rights. (*State v. Hampton*, 134 Ohio St.3d 447, 2012-Ohio-5688, overruled)

R.C. 2945.67(A) sets forth the State's ability to appeal by listing certain types of orders as being appealable as of right, including orders of dismissal. The statute then provides that the State "may appeal by leave of the court to which the appeal is taken any other decision, except the final verdict, of the trial court in a criminal case or of the juvenile court in a delinquency case."

As can be seen, the State's authority to appeal is broadly stated, with a narrow exception barring appeal when the State would be appealing from "the final verdict."

A. Labels not Controlling

There is sometimes an initial problem in categorizing the trial court's ruling. The court might not specify the exact procedural vehicle it is employing in granting relief, and the relief that is being granted might be "all over the place" and thus might not easily

fit within one of the categories of orders that would allow an appeal of right. In some cases, this Court has been willing to look beyond the "label" used by the trial court and to allow an appeal because the order in question, whatever the label, was the functional equivalent of an order that would allow an appeal of right. *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, syllabus; *State v. Davidson*, 17 Ohio St.3d 132 (1985).

The State's appeal rights ought not be frustrated by the mere formalism of what label was used by the trial court, a label which itself could be erroneous. The very point of the appeal could be to rectify the court's use of the wrong legal mechanism for relief and/or to correct the trial court's misapplication of that mechanism. Focusing on the label alone "would improperly elevate form over substance, and would be unfaithful to the spirit and intent of * * * R.C. 2945.67," which was "enacted to facilitate the effective prosecution of crime and to promote fairness between the accuser and the accused." *Davidson*, 17 Ohio St.3d at 135.

This concept of looking beyond the "label" can have particular significance in the context of a court purporting to grant a Crim.R. 29 "judgment of acquittal." Even when the court claims to be granting a Crim.R. 29 motion, it may be readily apparent that the court was granting the "judgment of acquittal" for reasons other than insufficiency of the evidence, such as by giving weight to the jury's verdicts on other counts, or by considering other legal problems in the case, or by applying a de facto manifest-weight standard. And, in some cases, the purported grounds for the "judgment of acquittal" could be so divorced from "sufficiency" review that the "judgment of acquittal" ought to be viewed as the functional equivalent of granting a dismissal with prejudice, in which case the State would enjoy an appeal of right.

With the General Assembly having created the statutory authority allowing the State to appeal, this Court has recognized that the trial court cannot use methods that would frustrate the State's ability to appeal. *State v. Fraternal Order of Eagles Aerie 0337 Buckeye*, 58 Ohio St.3d 166, 169 (1991), syllabus; *In re. S.J.*, 106 Ohio St.3d 11, 2005-Ohio-3215, paragraph one of the syllabus; *State v. Bertram*, 80 Ohio St.3d 281, 284 (1997) (trial court and appellate court cannot second-guess prosecutor's certification). Likewise, the trial court should not be allowed to frustrate the State's appeal by choosing erroneous labels for what the court was actually doing. The substance of the court's ruling should control, not the label.

In this vein, a venue-based "judgment of acquittal" would be the functional equivalent of a dismissal, instead of being a true "acquittal."

B. Broad Legislative Intent, Narrow Statutory Exception

In assessing the reach of the leave-to-appeal part of the statute, what stands out initially is the breadth of the provision for the State to appeal by leave "any other decision." The word "any" casts the widest possible net.

"Any" means "all", i.e., "without limitation". *United States v. Gonzales*, 520 U.S. 1, 5 (1997); *Wachendorf v. Shaver*, 149 Ohio St. 231, 239-40 (1948). "The word *any* excludes selection or distinction." *Citizens' Bank v. Parker*, 192 U.S. 73, 81 (1904).

In *Risner v. Ohio Dept. of Natural Resources*, 144 Ohio St.3d 278, 2015-Ohio-3731, ¶ 18, this Court emphasized that the word "'[a]ny' means 'all'" and that such "broad, sweeping language" must be accorded "broad sweeping application." See, also, *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, ¶ 33 ("any" means "every" and "all"). Given the broad use of the phrase "any other decision," a trial court's order granting a

Crim.R. 29 motion for "judgment of acquittal" easily falls within the initial reach of the leave-to-appeal language. This Court has noted the "broad sense" in which this statutory language is phrased. *State ex rel. Leis v. Kraft*, 10 Ohio St.3d 34, 36 (1984).

The statute does provide a limited exception, indicating that the State can appeal any other decision by leave, "except the final verdict." But, to fall within this exception barring an appeal, the appealed decision must qualify as a "verdict," and it must be considered "final." In addition, given the use of the word "the" in the phrase "*the* final verdict," there would presumably be only one "final verdict" in the case. The definite article "the" particularizes the subject which it precedes and is a word of limitation. *Crosby-Edwards v. Ohio Bd of Embalmers & Funeral Directors*, 175 Ohio App.3d 213, 2008-Ohio-762, ¶ 29 (10th Dist).

Given the broad reach of the "any other decision" language, and given the limited reach of "the final verdict" exception, it must be kept in mind that, when "a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision." *Commissioner v. Clark*, 489 U.S. 726, 739 (1989). "Exceptions to the operation of laws, whether statutory or constitutional, should receive strict, but reasonable, construction." *State ex rel. Keller v. Forney*, 108 Ohio St. 463 (1923), paragraph one of the syllabus. "[T]he presumption is that what is not clearly excluded from the operation of the law is clearly included in the operation of the law." Id. at 467. "Courts favor a general provision over an exception." *State ex rel. Hyter v. Teater*, 52 Ohio App.2d 150, 160 (6th Dist.1977).

C. Legislative Intent – Signs that "Judgment of Acquittal" is not "The Final Verdict"

When *Keeton* and *Yates* were decided, there were repeated (unacknowledged) indications in Title 29 and in this Court's rules demonstrating that a court's granting of a Crim.R. 29 motion is not a "verdict." Crim.R. 29 indicates that a motion thereunder results in a "judgment of acquittal," and the rule expressly differentiates between such a "judgment" and a "verdict." As stated in Crim.R. 29(B) & (C) at that time:

> **(B) Reservation of decision on motion.** If a motion for a judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a *verdict*, or after it returns a *verdict* of guilty, or after it is discharged without having returned a *verdict.*
>
> (C) Motion after *verdict* or discharge of jury. If a jury returns a *verdict* of guilty or is discharged without having returned a *verdict,* a motion for judgment of acquittal may be made or renewed within fourteen days after the jury is discharged or within such further time as the court may fix during the fourteen day period. If a *verdict* of guilty is returned, the court may on such motion set aside the *verdict* and enter judgment of acquittal. If no *verdict* is returned, the court may enter judgment of acquittal. It shall not be a prerequisite to the making of such motion that a similar motion has been made prior to the submission of the case to the jury.

(Emphasis added) Thus, Crim.R. 29 itself recognized that a "judgment of acquittal" is something other than a "verdict," and, in fact, a "judgment of acquittal" *sets aside* "the verdict" (when a "verdict" was returned). This same juxtaposition continues to exist after a 2022 amendment to Crim.R. 29(C), which still leaves all of the highlighted "verdict" language in place. Under the plain terms of the rule, there are two concepts at work in the rule, a "verdict" on the one hand and a "judgment of acquittal" on the other hand.

Also at the time of *Keeton* and *Yates*, Crim.R. 31(A) provided, and still provides,

that, in a jury trial, a verdict is the jury's unanimous written finding, "returned by the jury to the judge in open court." Crim.R. 31(A). Statutes likewise referred to the verdict in a jury trial as being the jury's verdict. R.C. 2945.171; R.C. 2945.77.

R.C. 2945.15 provided, and still provides, that the relief for insufficiency of evidence is a "discharge":

> An accused person, when there is not sufficient evidence to put him upon his defense, may be discharged by the court, but if not so discharged, shall be entitled to the immediate verdict of the jury in his favor. Such order of discharge, in either case, is a bar to another prosecution for the same offense.

This provision at most would result in a "verdict" when the court would direct the still-sitting jury to acquit at the end of the State's case-in-chief. But with the concept of directing a verdict during trial having been superseded by the "judgment of acquittal" approach in Crim.R. 29, the statute now would only provide for a "discharge." There is no directed "verdict" under Crim.R. 29, but, rather, the entering of a "judgment of acquittal," and Crim.R. 29 itself recognizes the difference.

Given these understandings of "verdict," *Keeton* and *Yates* erred in concluding that a ruling that a "judgment of acquittal" under Crim.R. 29 is "the final verdict." In a jury trial, the verdict is rendered by the jury and accepted by the court, and the granting of a Crim.R. 29 motion results in a "judgment," not a "verdict." The statute's singular use of the definite article "the" in referring to "*the* final verdict" buttresses this conclusion, given that there would only be one verdict, i.e., *the* jury's verdict.

Inasmuch as R.C. 2945.67 was first adopted in 1978, which was five years after adoption of the Criminal Rules, the General Assembly would have taken these

distinctions between "judgment" and "verdict" into account when it placed only "the final verdict" beyond the reach of a prosecution appeal. It makes sense to give special protection to jury verdicts, since, "[o]nce rendered, a jury's verdict of acquittal is inviolate," and its decision is thought to be "unreviewable." *McElrath v. Georgia*, 601 U.S. 87, 94 (2024). A jury's verdict involves the jury's plenary consideration of the facts and should be conclusive when it leads to a verdict of acquittal. On the other hand, the General Assembly could readily differentiate a judge's "judgment of acquittal," which under sufficiency review does not involve any weighing of the facts and presents a question of law. *State v. Dent*, 163 Ohio St.3d 390, 2020-Ohio-6670, ¶ 15 (question of law that receives de novo review); *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997).

In *Hampton*, the majority contended that "[t]his common-law concept of a directed verdict has now been memorialized through Crim.R. 29." *Hampton*, ¶ 21. But, in terms of assessing what the *General Assembly* would have intended by using the phrase "the final verdict," it would have been more probative that Crim.R. 29 had *done away* with the notion of the judge directing the jury to enter a "verdict." When Fed.R.Crim.P. 29(a) was enacted in 1946, it provided that "[m]otions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place." See *United States v. Bozza*, 155 F.2d 592, 596 & n. 10 (3d Cir.1946) (quoting rule). Even though no substantive alteration was intended vis-à-vis the roles of judge or jury in this process, and even though it was a "purely formal modification," see *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 573 (1977), the fact remains that the process transitioned from a "verdict"-based approach to a "judgment"-based approach. The same dynamic would have been at work when Ohio enacted Crim.R. 29 in 1973. The rule

abolished the "verdict" approach and replaced it with a "judgment" approach.

When the General Assembly enacted R.C. 2945.67 in 1978, it was working against this legal background in which there would no longer be any "directed verdict" but, instead, only "judgments of acquittal" under a rule clearly drawing a distinction between "verdict" and "judgment." It is significant, then, that the General Assembly only purported to bar a State's appeal from a "verdict" and did not purport to bar any appeal against a "judgment." "The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact." *Slingluff v. Weaver*, 66 Ohio St. 621 (1902).

Some subsequent cases also have recognized that, in a jury trial, the "verdict" springs from the jury's decision. In *State v. Lomax*, 96 Ohio St.3d 318, 2002-Ohio-4453, ¶ 23, this Court referred to the "verdict" as the jury's resolution of factual issues, or, in a jury-waived trial, the judge's resolution of such issues. In *State ex rel. Prade v. Ninth Dist. Court of Appeals*, 151 Ohio St.3d 252, 2017-Ohio-7651, ¶ 25, this Court was referring to the "final verdict" language in R.C. 2945.67(A) when it defined "verdict" as occurring "when guilt or innocence is determined *in the first instance*" and as "[a] *jury*'s finding or decision on the factual issues of a case." (Citing and quoting Black's Law Dictionary; emphasis added).

"The legislature could easily have used the word 'judgment' in place of or in addition to the term 'verdict' if that had been its intention. Instead, the statute refers only to verdicts, and this court may not assume that judgments are also encompassed in the statute's purview." *Yates*, 32 Ohio St.3d at 36 (Douglas, J., dissenting).

D. Strict Construction Aids the State, not the Defendant, in Construing "The Final Verdict" Exception

It has been said that the State's ability to appeal is strictly construed. See *State v. Bassham*, 94 Ohio St.3d 269, 271 (2002). But this view arose in a context in which the general rule had been that the prosecution was prohibited from appealing, and statutes conferring the ability to appeal to the State were limited and were viewed as an exception to the general rule. *State v. Caltrider*, 43 Ohio St.2d 157 (1975), paragraph one of the syllabus. It is plain that such a "general" rule is no longer "general" and in fact stands repudiated. R.C. 2945.67(A) is plainly intended to create a new general rule providing for appeals of right and appeals by leave from the vast majority of orders that would be appealed. The bar on appeals from "the final verdict" represents an extremely-narrow exception in which a State's appeal is not allowed.

In any event, there is initially no construction needed, since the initial phrase allowing appeal of "*any* other decision" easily reaches a court's granting of a Crim.R. 29 "judgment of acquittal." What is being construed here is the meaning of "the final verdict" *exception*, and, as an exception, this language would receive a strict, but reasonable, construction, with "the presumption [being] that what is not clearly excluded from the operation of the law is clearly included in the operation of the law." *Keller*, 108 Ohio St. at 467 & paragraph one of the syllabus. Strict construction would interpret "the final verdict" exception narrowly, rather than extending it to rulings other than "verdicts."

Even when strict construction might work in the defendant's favor, the mere existence of real or possible ambiguity does not mean that the defendant always prevails. "[T]his Court has never held that the rule of lenity automatically permits a defendant to

win." *Muscarello v. United States*, 524 U.S. 125, 139 (1998). "The canon in favor of strict construction of criminal statutes is not an obstinate rule which overrides common sense and evident statutory purpose. The canon is satisfied if the statutory language is given fair meaning in accord with the manifest intent of the General Assembly." *State v. Sway*, 15 Ohio St.3d 112, 116 (1984). "[A]lthough criminal statutes are strictly construed against the state, they should not be given an artificially narrow interpretation that would defeat the apparent legislative intent." *State v. White*, 132 Ohio St.3d 344, 2012-Ohio-2583, ¶ 20 (citation omitted). "[S]trict construction is subordinate to the rule of reasonable, sensible and fair construction according to the expressed legislative intent, having due regard to the plain, ordinary and natural meaning." *In re Clemons*, 168 Ohio St. 83, 87-88 (1958).

In understanding the meaning of a particular word in a statutory provision, "[w]e consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme." *Bailey v. United States*, 516 U.S. 137, 145 (1995). "[S]tatutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of the Treasury*, 489 U.S. 803, 809 (1989). "We read words in a statute in the context of the whole statute." *State v. Bryant*, 160 Ohio St.3d 113, 2020-Ohio-1041, ¶ 17. Provisions must be construed together as an interrelated body of law. *State v. Moaning*, 76 Ohio St.3d 126, 128 (1996).

In construing a statute, a court also considers *other* statutes in pari materia that touch upon the same subject matter. *Johnson's Markets, Inc. v. New Carlisle Dept. of Health*, 58 Ohio St.3d 28, 35 (1991); *State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463 (1956), paragraph two of the syllabus; *State v. South*, 144 Ohio St.3d 295, 2015-Ohio-3930, ¶ 8.

In light of statutes and rules reflecting an understanding of "verdict" as standing apart from a "judgment of acquittal," including Crim.R. 29 itself, it was counter-textual for *Keeton* and *Yates* to broaden "the final verdict" exception to include "judgments of acquittal."

E. Only *Final* Verdicts Would Bar Appeal

In *Keeton*, the State was conceding under double-jeopardy doctrine that it could not obtain a reversal of the trial court's granting of the Crim.R. 29(A) motion for judgment of acquittal at the end of the evidence during trial. *Keeton* acknowledged that double jeopardy barred a reversal and retrial. *Keeton*, 18 Ohio St.3d at 381.

If a "judgment of acquittal" is deemed to be a "verdict," it would follow in *Keeton* that the judgment/verdict was "final." Double-jeopardy doctrine barred any reversal of the judgment of acquittal since it would have required the attachment of a second jeopardy in order to try the defendant again. "The *Keeton* rule functionally track[ed] double-jeopardy principles because when a judgment of acquittal is entered before sending a matter to a jury there is no jury verdict to reinstate, and hence, the court of appeals is powerless to provide relief to the state." *Ramirez*, ¶ 18. There was a constitutionally-imposed finality as to the judgment of acquittal in *Keeton*, and such double-jeopardy implications would naturally play a role in applying "the final verdict" exception, since "the final verdict" language was "owing to double jeopardy considerations * * *." *Leis*, 10 Ohio St.3d at 36.

In *Yates*, the appeal arose from the granting of a post-verdict Crim.R. 29(C) judgment of acquittal. Even if this was a "verdict," nothing in law required that it be treated as "final." At the time that R.C. 2945.67(A) was enacted, double-jeopardy doctrine *allowed* such appeals, since the objective of the appeal would be to reinstate the jury's guilty verdict

without the need for a second jeopardy. *United States v. Wilson*, 420 U.S. 332, 352-53 (1975). While finality attaches to a jury's *verdict* of acquittal, "[t]hese interests * * * do not apply in the case of a postverdict ruling of law by a trial judge. * * * [W]hen a judge rules in favor of the defendant after a verdict of guilty has been entered by the trier of fact, the Government may appeal from that ruling without running afoul of the Double Jeopardy Clause." *Wilson*, 420 U.S. at 352-53.

The 4-3 *Yates* majority acknowledged this double-jeopardy principle, see *Yates*, 32 Ohio St.3d at 32, but refused to take it into account, holding that the post-verdict judgment of acquittal was an unappealable "final verdict" regardless of the fact that double jeopardy would indicate there was no finality. The *Yates* majority contended that, since *Keeton* held that a mid-trial judgment of acquittal was a "final verdict," it followed that a post-verdict judgment of acquittal was a "final verdict" as well, since the standard for granting the judgment of acquittal was the same for both. *Yates* contended it would be "incongruous" to treat these judgments of acquittal differently. But this reasoning begged the question. Even if the sufficiency-of-evidence standard applicable to both judgments would justify treating each judgment as a "verdict," it does not follow that each judgment is equally "final."

Ultimately, the holding in *Yates* is untethered to any actual legal principle making a post-verdict judgment of acquittal "the *final* verdict." To be sure, *Yates* contended that "[t]he issue under Ohio law is not one of double jeopardy but rather whether a judgment of acquittal pursuant to Crim. R. 29(C) is a final verdict." *Yates*, 32 Ohio St.3d at 32. And *Yates* further stated that "R.C. 2945.67(A) prevents an appeal of *any* final verdict and is not tied to the Double Jeopardy Clause. Moreover, our opinion in *Keeton* draws no distinction between Rules 29(A) and 29(C)." Id. at 32. But even if double jeopardy provided no

relevant reference point for determining whether the judgment of acquittal had finality to be treated as "the final verdict," one is still left with no other reference point that *would* make it "final," and *Yates* did not suggest any such reference point. Likewise, it was a non-sequitur to observe that *Keeton* failed to distinguish the pre-verdict and post-verdict forms of the judgment of acquittal. *Keeton* had zero reason to opine on post-verdict judgments of acquittal under Crim.R. 29(C), since the case did not involve a post-verdict judgment.

As this Court recently acknowledged, "[t]he effect of *Yates* was to afford greater protection to criminal defendants than the Double Jeopardy Clauses provide. Without violating the Double Jeopardy Clauses, an order granting a Crim.R. 29(C) motion after a jury's guilty verdict could be appealed by the state and the jury verdict could be reinstated. But *Yates* held that such an appeal was precluded by R.C. 2945.67. Indeed, the *Yates* court explicitly rejected the idea that 'final verdict' should be understood as limited to cases where any relief on appeal would be blocked by double-jeopardy principles – as would be the case with a pre-jury-verdict Crim.R. 29(A) judgment of acquittal." *Ramirez*, ¶ 19.

At bottom, *Yates* was unsupported by any legal principle that would make a post-verdict judgment of acquittal "the final verdict." While the State was pointing out that double jeopardy would allow the appeal to proceed, thereby showing a *lack* of finality, the *Yates* decision was silent on any countervailing legal principle that would point to finality. Indeed, there was none, and the citation to *Keeton* did not support that point either, since double jeopardy *did* impose finality in the context of the pre-verdict judgment in *Keeton*, a principle which simply did not apply to the post-verdict judgment at issue in *Yates*.

Some might contend that *Yates* was making an assumption that the General

Assembly was treating every "verdict" was "final." Under this thinking, once *Yates* concluded that the post-verdict judgment of acquittal was a "verdict," it would have followed as a matter of course that it was a "final verdict" too. But at the time that R.C. 2945.67(A) was being enacted, there was no basis to make that assumption unless it was a conclusive jury verdict or bench verdict in a jury-waived trial. Such verdicts *are* final under every known understanding of double-jeopardy doctrine. But if "verdict" includes "judgments of acquittal" too, then that assumption breaks down. If the General Assembly was thinking that "verdict" reached judgments of acquittal, then it also would have been been aware that post-verdict judgments of acquittal are *not* final.

In reaching its apparent conclusion that every "verdict" is also a "final verdict," *Yates* leaves no room for the word "final" to operate. If every verdict, and every judgment of acquittal, is "final," then "final" becomes a redundancy. The statute "must be construed as a whole and given such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative." *State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Edn.*, 95 Ohio St. 367, 372-73 (1917). Because it is presumed that "every word in a statute is designed to have *some* effect," every part of the statute "shall be regarded." *Ford Motor Co. v. Ohio Bureau of Employment Services*, 59 Ohio St.3d 188, 190 (1991) (emphasis sic).

Even if a "judgment of acquittal" qualifies as a "verdict," some such "judgments" are simply not "final" and therefore do not bar the State from appealing. *Yates* has been fundamentally flawed from the beginning.

F. Venue Issues Inapt to Sufficiency Review under Crim.R. 29 and Provide No Basis for "Judgment of Acquittal"

Hampton was built on the flaws of *Keeton* and *Yates* and, for that reason alone, *Hampton* has flaws as well. A "judgment of acquittal" granted under Crim.R. 29 is not a "verdict" under the narrow exception barring the State from appealing "the final verdict."

In addition to that flawed premise, though, *Hampton* committed additional mistakes in the analysis. *Keeton* and *Yates* were at least tethered to Crim.R. 29 and its review for sufficiency of the evidence as to the elements of the offense. *Keeton* and *Yates* only held that a ruling granting a judgment of acquittal based on sufficiency of the evidence at the end of the State's case or after trial based upon Crim.R. 29(A) or (C) is a "final verdict." *Keeton* and *Yates* were not addressing venue as a basis for Crim.R. 29 "acquittal," and nothing in those cases supports that conclusion.

Indeed, at the time of *Hampton*, and still now, there were strong indications that venue is *not* an essential or material element that would be addressed under sufficiency-of-evidence review. Key decisions by this Court had contended that challenges under Crim.R. 29 are limited to claims of insufficiency of evidence and that such claims are limited to a review of the "material elements" of the offense. This Court had specifically held in syllabus law that a material-elements standard applies under Crim.R. 29:

> Pursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each *material element* of a crime has been proved beyond a reasonable doubt.

State v. Bridgeman, 55 Ohio St.2d 261 (1978), syllabus (emphasis added). As stated in *Bridgeman*, "[i]t has long been established law in Ohio that a question is one for

determination by the jury when 'reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt ***.'" Id. at 263, quoting *State v. Swiger*, 5 Ohio St.2d 151 (1966), paragraph two of the syllabus.

This focus on material elements of the crimes extended beyond *Bridgeman*. This Court had expressly stated that the standard under Crim.R. 29 is the same as the sufficiency standard used for federal due process. *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, ¶ 37; *State v. Spaulding*, 151 Ohio St.3d 378, 2016-Ohio-8126, ¶ 164 ("same standard"). Under the due-process sufficiency standard, "'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶ 34, quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis added). This Court emphasized in *Hancock* that "[t]he *Jackson* standard of review 'must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law.'" *Hancock*, ¶ 38, quoting *Jackson*, 443 U.S. at 324 n. 16 (emphasis in *Hancock*). Sufficiency review under federal due process and under Crim.R. 29 focuses on the "material elements" or "substantive elements" of the crime.

The 4-3 *Hampton* majority notably failed to mention any of these cases limiting sufficiency review to material elements. But the majority did conclude that the "plain language" of the rule "does not distinguish between 'material' elements and 'immaterial' elements." *Hampton*, ¶ 22. *Hampton* contended "Crim.R. 29 is clear and straightforward and does not limit its application to elements of the offense alone – the trial judge may grant an acquittal when there is a failure of proof to sustain a conviction." Id. at ¶ 23.

This "sustain the conviction" logic does not hold up in relation to venue. The full

text shows that Crim.R. 29 is directed at entering a "judgment of acquittal *of one or more offenses* charged in the indictment * * *" and that such a judgment shall be entered if "the evidence is insufficient to sustain a conviction *of such offense or offenses*." Crim.R. 29(A) (emphasis added). Thus, under Crim.R. 29, the defendant is not awarded a generic "acquittal," but, rather, an "acquittal" as to specified offenses. As *Bridgeman* shows, this test is naturally focused on the material elements of those offenses.

Hampton's illogic also disregarded significant language in *State v. Draggo*, 65 Ohio St.2d 88 (1981), where this Court specifically stated that "[v]enue is not a material element of any offense charged." Id. at 90. "The elements of the offense charged and the venue of the matter are separate and distinct." Id. Further emphasizing what is an "element," this Court in *Draggo* stated that "[t]he elements of a crime are the constituent parts of an offense which must be proved by the prosecution to sustain a conviction. Elements necessary to constitute a crime must be gathered wholly from statute and not *aliunde*." Id. at 91. Under this language, venue is not even an "element," let alone a "material element," since venue is "separate and distinct" from the "elements."

Hampton's conclusions were questionable at the time in light of this Court's numerous other cases that limited sufficiency review under Crim.R. 29 to material elements and that recognized that venue is simply not an element. In light of these cases, it is somewhat jarring to see the language in *Hampton* touting "[o]ver a century of well-established jurisprudence [that] clearly mandates" venue be considered under the auspices of a motion for acquittal. *Hampton*, ¶ 24. Instead of "clearly mandat[ing]" that approach, much of the case law points *away* from a "judgment of acquittal" approach. It is telling that the *Hampton* majority never grappled with this contrary case law.

Subsequent developments have confirmed the existence of these errors in the *Hampton* analysis. One of *Hampton*'s points was that venue must be proven beyond a reasonable doubt, which justifies treating it as an "element" of the prosecution needed to sustain conviction. *Hampton*, ¶ 22. But this Court has recently held that sufficiency-of-evidence review does not apply to affirmative defenses even when the State has the burden of persuasion beyond a reasonable doubt. *Messenger*, ¶ 27. The State's beyond-reasonable-doubt burden does not transform self-defense into an "element" that is addressed in a sufficiency review. Id. ¶ 24, citing *Engle v. Isaac*, 456 U.S. 107, 120 (1982). It would likewise be true that venue does not become an "element" because the State has the burden of persuasion beyond a reasonable doubt.

Subsequent to *Hampton*, this Court also has reiterated that venue is not a material element of the offense. *State v. Foreman*, 166 Ohio St.3d 204, 2021-Ohio-3409, ¶ 13. "The elements of the offense charged and the venue of the matter are separate and distinct." *State v. Jackson*, 141 Ohio St.3d 171, 2014-Ohio-3707, ¶ 143.

In the years since *Hampton*, this Court also has emphasized that sufficiency review is focused on the essential or material elements. As already indicated, *Messenger* reaffirmed the notion that sufficiency review is limited to the elements of the offense, see *Messenger*, ¶ 13, and this Court has repeatedly reaffirmed the elements-based nature of this review after *Hampton*. *State v. Bertram*, 173 Ohio St.3d 186, 2023-Ohio-1456, ¶ 8 ("essential elements of the crime"); *State v. Whitaker*, 169 Ohio St.3d 647, 2022-Ohio-2840, ¶ 61 (same); *State v. Worley*, 164 Ohio St.3d 589, 2021-Ohio-2207, ¶ 57 (same); *State v. Groce*, 163 Ohio St.3d 387, 2020-Ohio-6671, ¶ 7 (same); *State v. Hundley*, 162 Ohio St.3d 509, 2020-Ohio-3775, ¶ 59 (same). This focus on the essential elements of the

offense represents "the *key* inquiry" and "[t]he *key* question in a sufficiency-of-the-evidence case * * *." *Bertram*, ¶ 8 (emphasis added); *State v. Smith*, 167 Ohio St.3d 220, 2022-Ohio-269, ¶ 5 (emphasis added). Given that venue is not a material element and is actually separate and distinct from the elements, venue is a "square peg" that does not fit within the round hole of sufficiency review that controls whether a "judgment of acquittal" should be granted under Crim.R. 29.

Because sufficiency review under Crim.R. 29 is inapt to the venue issue, a defendant claiming lack of proof of venue at the end of the State's case-in-chief or at the end of all of the evidence would not proceed under Crim.R. 29 and therefore would not be seeking a "judgment of acquittal" under that rule. That was a key premise of *Hampton*, and that premise should be rejected as grievously flawed.

While Crim.R. 29 would be inapplicable to the venue issue, the defense would still have the ability to raise the lack of proof of venue during trial. Instead of shoehorning the venue issue into motion practice under Crim.R. 29, the defense could proceed under Crim.R. 47 by making an oral motion, which is allowed during trial, or by making a written motion.

If it is undisputed that the current county of prosecution is an improper venue and that the defense has not waived venue, the appropriate remedy would be to order a mistrial and to take steps under R.C. 2945.08 to commit the defendant to custody or to set bail while awaiting action by the proper county. Because R.C. 2945.08 plainly contemplates further prosecution in a county having venue, the court would dismiss the case without prejudice to the other county's ability to proceed.

If the evidence is simply lacking one way or another on whether the prosecution

is being properly pursued in the county in which the trial is being held, the court could allow the State to reopen its case-in-chief to address the venue issue further. See *State v. Schuyler*, 2d Dist. No. 11CA0046, 2012-Ohio-2801, ¶ 18 ("court could have allowed the State to reopen its case to offer evidence showing" venue).

Absent further proof, the State's failure to provide enough evidence to prove venue in the current county of prosecution could lead to a dismissal with prejudice barring further prosecution in that county. Notably, the "directed verdict" that was touted in *Hampton*, ¶¶ 19-22, as having occurred in *State v. Nevius*, 147 Ohio St. 263 (1947), *only* purported to bar a retrial in the original county of prosecution in Clark County. Id. at 286. *Nevius* expressly recognized that re-prosecution would be allowed in the proper venue of Montgomery County, id. at 268, which is yet another sign that a general "judgment of acquittal" is inapt when the lack of proof relates solely to venue.

Whether dismissed with or without prejudice, the State would have an appeal of right. *State v. Craig*, 116 Ohio St.3d 135, 2007-Ohio-5752 (appeal of right even as to dismissal without prejudice). In the State's appeal of right, the State could contend that the trial court's venue ruling was wrong because the issue was waived, because the trial court erred in excluding evidence as to venue or in failing to take judicial notice, or, ultimately, because the State in fact had provided enough direct and circumstantial evidence for the issue of venue to go to the jury. The defendant would have no entitlement to a "judgment of acquittal" that would be treated as "the final verdict" that bars a State's appeal altogether.

G. No Double Jeopardy Bar to State's Appeal Seeking Retrial

When a defendant decides "to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, [he] suffers no injury cognizable under the Double Jeopardy Clause" by his retrial. *Scott*, 437 U.S. at 98-99; *State v. Broughton*, 62 Ohio St.3d 253, 262-66 (1991) (following *Scott*). Venue is unrelated to factual guilt or innocence of the offense charged, and so the defense decision to seek a pre-verdict termination of the trial based on lack of venue would create no double-jeopardy bar to a retrial if the State's appeal would succeed.

The United States Supreme Court recently confirmed that a judicial resolution of a case on venue grounds does not trigger a double-jeopardy bar. In *Smith v. United States*, 599 U.S. 236 (2023), the federal court of appeals agreed with the defendant that he had been tried in the wrong venue, thereby reversing the conviction. But the court's remand order acknowledged that the reversal was without prejudice to the government's ability to retry the defendant in the correct venue.

The United States Supreme Court thoroughly debunked the claim that a retrial would be barred when there is a trial and conviction but then a reversal based on a venue error. The default principle in constitutional law is that a retrial is allowed following a reversal on a defendant's appeal, and there is nothing in the common-law history or in the text of the federal venue and vicinage provisions requiring a deviation from that default principle. In reaching this conclusion, the Court traced the analysis through the 16th, 17th, and 18th centuries and into early American practice, all of which recognized the availability of a retrial in a proper venue. *Smith*, 599 U.S. at 249-52. The Court even cited a decision of this Court as allowing retrial. Id. at 251 & n. 14, citing *Methard v.*

State, 19 Ohio St. 363, 367 (1869).

The *Smith* Court moved the analysis forward into the present day, emphasizing that retrial is the usual remedy for constitutional error, and it is only a narrow exception that would bar retrial based on double jeopardy.

> When a conviction is reversed because of a trial error, this Court has long allowed retrial in nearly all circumstances. We consider in this case whether the Constitution requires a different outcome when a conviction is reversed because the prosecution occurred in the wrong venue and before a jury drawn from the wrong location. We hold that it does not.
>
> * * *
>
> Except as prohibited by the Double Jeopardy Clause, it "has long been the rule that when a defendant obtains a reversal of a prior, unsatisfied conviction, he may be retried in the normal course of events." *United States v. Ewell*, 383 U. S. 116, 121 (1966); accord, *Bravo-Fernandez v. United States*, 580 U. S. 5, 18-19 (2016). Remedies for constitutional violations in criminal trials, we have explained, "should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States v. Morrison*, 449 U.S. 361, 364 (1981). When a conviction is obtained in a proceeding marred by harmful trial error, "the accused has a strong interest in obtaining a fair readjudication of his guilt," and society "maintains a valid concern for insuring that the guilty are punished." *Burks v. United States*, 437 U. S. 1, 15 (1978). Therefore, the appropriate remedy for prejudicial trial error, in almost all circumstances, is simply the award of a retrial, not a judgment barring reprosecution. See, *e.g.*, *Morrison*, 449 U. S., at 363, 365-367; *United States v. Blue*, 384 U. S. 251, 254-255 (1966).[footnote omitted]

Smith, 599 U.S. at 239, 241-42. "[A]lthough the [Venue and Vicinage] Clauses depart in some respects from the common law – most notably by providing new specifications about the place where a crime may be tried – there is no meaningful evidence that the

Constitution altered the remedy prescribed by common law for violations of the vicinage right." Id. at 248-49. "We have found – and Smith points to – no decision barring retrial based on a successful venue or vicinage objection in either the centuries of common law predating the founding or in the early years of practice following ratification. This absence alone is considerable evidence that the Clauses do not bar retrial of their own force." Id. at 251-52.

The Court also rejected the notion that a reversal based on venue error would be a double-jeopardy-barring reversal based on insufficiency of evidence.

> A judicial decision on venue is fundamentally different from a jury's general verdict of acquittal. When a jury returns a general verdict of not guilty, its decision "cannot be upset by speculation or inquiry into such matters" by courts. *Dunn v. United States*, 284 U. S. 390, 393–394 (1932); see *United States v. Powell*, 469 U. S. 57, 66–67 (1984). To conclude otherwise would impermissibly authorize judges to usurp the jury right. See *ibid.*; cf. *United States v. Martin Linen Supply Co.*, 430 U. S. 564, 572–573 (1977). And because it is impossible for a court to be certain about the ground for the verdict without improperly delving into the jurors' deliberations, the jury holds an "'unreviewable power . . . to return a verdict of not guilty'" even "'for impermissible reasons.'" *Powell*, 469 U. S., at 63, 66–67; see *Dunn*, 284 U. S., at 393–394.
>
> This rationale is consistent with the general rule that "[c]ulpability . . . is the touchstone" for determining whether retrial is permitted under the Double Jeopardy Clause. *Evans v. Michigan*, 568 U. S. 313, 324 (2013). When a trial terminates with a finding that the defendant's "criminal culpability had not been established," retrial is prohibited. *Burks*, 437 U. S., at 10. This typically occurs with "'a resolution, correct or not, of some or all of the factual elements of the offense charged.'" *Smith v. Massachusetts*, 543 U. S. 462, 468 (2005); see, *e.g.*, *Martin Linen*, 430 U. S., at 572. But it also extends to "essentially factual defense[s]" that negate culpability by "provid[ing] a legally adequate justification for otherwise criminal acts."

> *United States v. Scott*, 437 U. S. 82, 97-98 (1978); see *Burks*, 437 U. S., at 5, 10 (insanity defense).
>
> Conversely, retrial is permissible when a trial terminates "on a basis unrelated to factual guilt or innocence of the offence of which [the defendant] is accused." *Scott*, 437 U. S., at 99. For example, the Double Jeopardy Clause is not triggered when a trial ends in juror deadlock, see *Blueford v. Arkansas*, 566 U. S. 599, 610 (2012), or with a judgment dismissing charges because of a procedural issue like preindictment delay, see *Scott*, 437 U.S., at 84. In these circumstances, the termination of proceedings is perfectly consistent with the possibility that the defendant is guilty of the charged offense.

Smith, 599 U.S. at 252-53. Even when characterized as an "acquittal," a judicial ruling based solely on venue does not trigger a double-jeopardy bar to retrial.

> The reversal of a conviction based on a violation of the Venue or Vicinage Clauses, even when styled as a "judgment of acquittal" under Rule 29, plainly does not resolve "the bottom-line question of 'criminal culpability.'" *Evans*, 568 U. S., at 324, n. 6; see also *Martin Linen*, 430 U. S., at 571 ("[W]hat constitutes an 'acquittal' is not to be controlled by the form of the judge's action"). Instead, such a reversal is quintessentially a decision that "the Government's case against [the defendant] must fail even though it might satisfy the trier of fact that he was guilty beyond a reasonable doubt." *Scott*, 437 U. S., at 96. In this case, then, the Eleventh Circuit's decision that venue in the Northern District of Florida was improper did not adjudicate Smith's culpability. It thus does not trigger the Double Jeopardy Clause.

Smith, 599 U.S. at 253-54.

Overall, the decision in *Smith v. United States* represents a resounding rejection of the view that a judicial ruling in the defendant's favor on venue would bar a retrial. *Smith* rejects that conclusion on all fronts – historically, textually, and by referring to judicial precedents dating to the late 1500's. A judicial ruling in the defendant's favor on

venue "does not trigger the Double Jeopardy Clause" because the ruling implicates mere "trial error" and "plainly does not resolve 'the bottom-line question of "criminal culpability."'" *Smith*, 599 U.S. at 253-54. While *Smith* was addressing a scenario in which the venue issue led to judicial ruling on appeal, as opposed to a ruling in the trial court during or after trial, the logic as to venue is the same for double-jeopardy purposes.

The test is the same when determining whether a State's appeal would be barred by double jeopardy. When the trial court's finding of insufficient evidence during trial resulted in an early termination of the trial without a verdict, double jeopardy would prevent a retrial, and, thus, would bar the State's appeal seeking a retrial because a retrial cannot be ordered. But when the trial court's action merely related to an issue of "trial error" that resulted in an early termination of the trial without a verdict, then there is no bar on seeking a retrial, and the State can seek full relief in a timely appeal claiming that the trial court erred in terminating the trial. Per *Smith*, venue is a "trial error" issue, not a sufficiency-of-evidence issue related to criminal culpability. The State can appeal without violating the defendant's double-jeopardy rights. And if a retrial would be ordered as a result of the State's appeal, it will be because the trial court erred in granting the defense motion to begin with, and the need for a retrial would be the result of the defense's own motion that sought (incorrectly) the early termination of the original trial without a verdict.

H. *Smith* Analysis Provides More Reason to Overrule *Hampton*

While *Smith* controls the federal constitutional analysis, the defense will likely contend that it provides no basis to reconsider the state-law rulings in *Hampton*, which held that venue can be addressed under Crim.R. 29 and that the resulting "judgment of

acquittal" is a "final verdict" for purposes of R.C. 2945.67(A). This would be correct: the federal constitutional ruling in *Smith* does not directly compel an abandonment of the state-law rulings in *Hampton*, and, indeed, the *Hampton* majority said nothing about double jeopardy. See *State v. Moore*, 3d Dist. No. 9-23-25, 2024-Ohio-1736, ¶¶ 31-34. *Hampton* was only opining on the meaning of the rule and the statute when it stated that "[t]he failure to establish venue in a criminal felony trial is a basis for acquittal, and therefore, an acquittal order based on the failure to establish venue is a final verdict, and the state may not appeal from the order." *Hampton*, ¶ 2.

Even so, this Court's own case law indirectly creates a connection between Crim.R. 29 and the federal constitutional analysis that *Smith* addresses. This Court insists that the federal sufficiency-of-evidence standard governs Crim.R. 29 motions as a matter of state law. *Tenace*, ¶ 37; *Spaulding*, ¶ 164. Based on the federal sufficiency standard, this Court recently confirmed that sufficiency review does not reach affirmative defenses like self-defense, even when the State bears the burden of persuasion on that issue beyond a reasonable doubt. *Messenger*, ¶ 27. The federal sufficiency standard is "baked in" to the standard controlling Crim.R. 29 motions in Ohio.

Given that connection, the *Smith* ruling takes on much significance for purposes of Crim.R. 29. *Smith* plainly rejects the notion that venue is tied to criminal culpability. Venue is not tied to one of the elements of the offense that could serve as a basis for finding the evidence insufficient under Crim.R. 29. For good measure, *Smith* also emphasizes that venue creates no defense, justification, or excuse as to criminal culpability for the offense either. Venue is *divorced* from the notions of criminal culpability altogether. Equally so, venue would be divorced from the federal sufficiency

standard that this Court applies to Crim.R. 29 motions.

Even *Yates* had demanded some connection to a "factual determination of innocence" as its predicate for concluding that the "judgment of acquittal" also qualified as a "final verdict" barring a State's appeal. *Hampton* claimed to be based on *Yates*, but *Yates* emphasized the "significance of a factual insufficiency" and argued that a Crim.R. 29(C) acquittal "is a factual determination of innocence and as much a final verdict as any judgment of acquittal granted pursuant to Crim.R. 29(A)." *Yates*, 32 Ohio St.3d at 32-33 & n. 1.

Smith confirms that the issue of venue does not implicate the merits of guilt or innocence, and, more pointedly, *Smith* further confirms that a finding of improper venue cannot be deemed an "acquittal" for double-jeopardy purposes, *even when the court characterizes it as an "acquittal.* In this respect, *Smith* and *Yates* are on the same page in requiring a connection of evidentiary insufficiency as to criminal culpability before treating an order as an "acquittal," and it is *Hampton* that is the outlier in treating venue as being worthy of an "acquittal." In the end, *Hampton*'s approval of granting a motion under Crim.R. 29 based on venue is inconsistent with the sufficiency standard that governs such motions and inconsistent with the notions of factual innocence that should underlay such motions.

Ultimately, addressing venue under sufficiency review under Crim.R. 29 is at odds with the "judgment of acquittal" that is awarded under the rule. A judicial ruling in the defendant's favor on venue simply does not qualify as an "acquittal." In the aftermath of *Smith*, a noted treatise has concluded: "Assuming the defendant objects and that venue is improper, the remedy is not for the defendant to be granted a judgment of

acquittal but rather to be retried in the proper venue." Wright, Henning, Welling, *Federal Practice and Procedure,* Vol. 2A, § 466, at 83 (2024 Supplement); see, also, *United States v. Morris,* 2024 U.S. App. LEXIS 18943, at *8 (8th Cir. 2024) ("While Morris raised the issue of venue in his Rule 29 motion for acquittal, the Supreme Court recently held that acquittal is not the appropriate remedy for a prosecution completed in an improper venue, even when styled as a motion for judgment of acquittal under Rule 29."; "The proper remedy is retrial.").

When *Hampton* extended *Yates* beyond insufficiency acquittals to include venue-based "acquittals," *Hampton* cut loose the *Keeton-Yates* "final verdict" case law from its moorings. A judge's lack-of-venue conclusion is no more a "verdict" on the merits of guilt or innocence than would be a ruling on speedy trial or jurisdiction. The conclusion in *Hampton* that sufficiency review under Crim.R. 29 can reach "immaterial" elements demonstrates the wide chasm that exists between *Hampton* and even the reasoning in *Yates* and *Keeton*. *Smith* demonstrates the existence of that chasm even more.

I. Ohio Constitutional Limits on Having a Procedural Rule Control Statutory Analysis

The State's authority to appeal is a matter of substantive law. *State v. Wallace,* 43 Ohio St.2d 1, 2 (1975) ("substantive legislative grant"). Given that this Court's rule-making authority is limited to matters of procedure, a rule cannot add to or subtract from or modify any such substantive provision. *State v. Hughes,* 41 Ohio St.2d 208, 210 (1975). To be sure, procedural rules can help provide context and background for understanding what the substantive statute was aiming to do, but, ultimately, the reach of the statute is governed by its own terms, not by a judicial gloss on a mere procedural rule.

The "judgment of acquittal" characterization as to venue from *Hampton* would

arise solely from the Court's interpretation of what can qualify as an "acquittal" under Crim.R. 29. But the interpretation that venue can provide a basis for "acquittal" is at best a procedural interpretation that the General Assembly could not have expected, even if it was otherwise expecting that a "judgment of acquittal" would qualify as "the final verdict." Substantive statutory law does not bear the weight of the outlier interpretation of Crim.R. 29 that was imposed by *Hampton*.

A court's reading of a mere procedural rule cannot create or expand on substantive rights or modify substantive law. Article IV, Section 5(B), Ohio Constitution. "Rules promulgated pursuant to this constitutional provision must be procedural in nature. * * * Conversely, a rule may not abridge, enlarge, or modify any substantive right and a statute will control a rule on matters of substantive law." *State v. Slatter*, 66 Ohio St.2d 452, 454 (1981) (citations omitted). "We have defined 'substantive' in this context as 'that body of law which creates, defines and regulates the rights of the parties.'" *Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838, ¶ 17 (quoting another case). "The word substantive refers to common law, statutory and constitutionally protected rights." *Havel v. Villa St. Joseph*, 131 Ohio St.3d 235, 2012-Ohio-552, ¶ 16 (quoting another case); *Slatter*, 66 Ohio St.2d at 455.

Even a rule appearing to be "procedural" can have a "substantive effect" if it amounts to a de facto abrogation or modification of substantive law. *State v. Greer*, 39 Ohio St.3d 236, 246 (1988). A provision can be considered "substantive" even though "packaged in procedural wrapping." *Havel*, ¶¶ 28-29.

In light of the foregoing, a judicial gloss on a mere procedural rule cannot modify what would qualify as "the final verdict" for purposes of the State's substantive authority

to appeal.

In arriving at their conclusion that a judgment of acquittal under Crim.R. 29 qualifies as a "final verdict," *Keeton* and *Yates* were at least connected to the notion that the insufficiency was tied in some way to the defendant's guilt or innocence. But, as indicated, *Hampton* went far beyond this point by treating venue as a basis for "acquittal," a conclusion which was wholly untethered to sufficiency review. Calling the venue ruling a "verdict," and calling it "final," is particularly at odds with R.C. 2945.08, which expressly recognizes that the start of a trial in the wrong venue does not preclude prosecution in the correct venue.

Treating venue as creating a "final verdict" conflicts with how venue operates anyway. The *Hampton* majority notably failed to address how a trial court could purport to render any "verdict" if it was affirmatively finding that venue exclusively lay elsewhere, as had occurred in *Hampton*. An affirmative finding of bad venue denotes the inability of *any* decisionmaker in that county, whether it be the jury or the judge, to entertain the issues of guilt or innocence. Venue embodies "the geographic division where a cause can be tried." *Morrison v. Steiner,* 32 Ohio St.2d 86, 88 (1972). Given an affirmative finding that the current prosecution is in the wrong venue, a judge would have no more power to try and thereby "acquit" the defendant than would a jury in that county. The *Hampton* majority had no response to the basic problem of how a court could purport to "acquit" the defendant when the court is sustaining the defendant's objection to improper venue, since the very purpose of the objection is to have the court recognize that it is not the proper tribunal to entertain the lawsuit.

In the end, *Hampton* not only conflicted with the concept of what qualifies as an

"acquittal" or a "verdict." It also conflicted with the very core of how venue itself operates as a legal concept, which is another substantive matter that would not be controlled by an outlier interpretation of a procedural rule like Crim.R. 29. *Hampton* should be overruled in all respects.

CONCLUSION

For the foregoing reasons, amicus curiae OPAA respectfully urges that this Court reverse the Eighth District's judgments and remand the State's appeals to the Eighth District for further consideration in light of this Court's opinion allowing the State to appeal as of right or by leave from the trial court's venue-based "judgment of acquittal."

Respectfully submitted,

/s/ Steven L. Taylor
STEVEN L. TAYLOR 0043876
Counsel for Amicus Curiae OPAA

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was e-mailed on September 30, 2024, to the following counsel of record: John T. Martin, Assistant Public Defender, 310 Lakeside Avenue, Suite 200, Cleveland Ohio 44113, jmartin@cuyahogacounty.us; Daniel Van, Assistant Prosecuting Attorney, The Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, dvan@prosecutor.cuyahogacounty.us.

/s/ Steven L. Taylor
STEVEN L. TAYLOR 0043876