In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case Nos. 2024-0540 & 2024-0541
	:	
Appellant,	:	On Appeal from the
	:	Cuyahoga County
v.	:	Court of Appeals,
	:	Eighth Appellate District
NICHOLAS MUSARRA,	:	
	:	Court of Appeals
Appellee.	:	Case Nos. 113486 & 113487

MERIT BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL DAVE YOST IN SUPPORT OF APPELLANT STATE OF OHIO

MICHAEL C. O'MALLEY (0059592)
Cuyahoga County Prosecutor
DANIEL T. VAN (0084614)
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
dvan@prosecutor.cuyahogacounty.us

Counsel for Appellant
State of Ohio

CULLEN SWEENEY (0077187)
Cuyahoga County Public Defender
JOHN T. MARTIN (0020606)
Assistant Public Defender
Cuyahoga County Public Defender's Office
310 Lakeside Avenue, 2nd Floor
Cleveland, Ohio 44113
jmartin@cuyahogacounty.us

Counsel for Appellee
Nicholas Musarra

DAVE YOST (0056290)
Attorney General of Ohio

T. ELLIOT GAISER* (0096145)
Solicitor General
**Counsel of Record*
STEPHEN P. CARNEY (0063460)
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614.466.8980
614.466.5087 fax
thomas.gaiser@ohioago.gov

Counsel for *Amicus Curiae*
Ohio Attorney General Dave Yost

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes, Rules, and Constitutional Provisions

INTRODUCTION

Venue is about *where* a crime is committed, and thus where a defendant may be tried for that crime. That is a question of procedure. Acquittal is about *whether* sufficient evidence shows that a crime was committed at all. That is a question of substance.

This case asks what happens when those different concepts collide—that is, when a judge grants an acquittal motion based on finding a lack of venue. Specifically, this case asks whether the State can appeal such a procedural ruling—just as it may with procedural dismissals—or whether the "acquittal" label renders the decision a "final verdict" that cannot be appealed under R.C. 2945.67, the statute governing State appeals in criminal cases. To be sure, the Court answered that question in the negative twelve years ago, holding that such acquittals may not be appealed. *State v. Hampton*, 2012-Ohio-5688. But *Hampton* was wrong, and it should be overruled.

If the Court starts from statutory text and first principles, consults decades of *most* precedent, and harmonizes the appealability issue with the related question of whether such an order bars retrial under double-jeopardy principles, the correct answer is yes, the State may appeal. After all, although the State must show venue, it has long been true that "[v]enue is not a material element of any offense charged. The elements of the offense charged and the venue of the matter are separate and distinct." *State v. Draggo*, 65 Ohio St. 2d 88, 90 (1981). And of course, no one disputes that venue *can* be challenged

in a pretrial motion to dismiss, and that such a dismissal could be appealed under R.C. 2945.67—because a *dismissal* for lack of venue says nothing about substantive innocence.

Meanwhile, setting venue aside for a moment, the Court's holding against appealing acquittals was rooted in the idea that acquittals were "grounded upon insufficiency of evidence" of guilt. *State ex rel. Yates v. Court of Appeals for Montgomery County*, 32 Ohio St. 3d 30 (1987). R.C. 2945.67 does not mention acquittals or sufficiency-of-evidence findings by name, but it allows for appeals of orders that "dismiss" a count and of "any other decision, except the final verdict." An acquittal is a final verdict, said *Yates*, because "it is a factual determination of innocence," and is "as much a final verdict" whether under part (A) or (C) of Criminal Rule 29, which governs acquittals. Indeed, Rule 29 provides for acquittal "if the evidence is insufficient to sustain a conviction of such offense."

Combining those principles, a venue-based acquittal *should* be appealable, because it does not involve a "factual determination of innocence" or insufficiency of evidence that an offense was committed—it involves only *where* an offense occurred. Indeed, for similar reasons, a venue-based acquittal or appellate reversal does not trigger a double-jeopardy bar against *retrial* in another location with proper venue. *Smith v. United States*, 599 U.S. 236, 252 (2023); *State v. Moore*, 2024-Ohio-1736 (3rd Dist.), ¶18. That is so because "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.'" *Moore*, ¶18 (quoting *Smith*, 599 U.S. at 253). The "acquittal" label does not overcome the *substance* of the ruling.

Hampton's ruling cannot be squared with the nature of venue and acquittals, and the tension with *Smith* now makes *Hampton* untenable. The Court should overrule it.

STATEMENT OF *AMICUS* INTEREST

The Attorney General is Ohio's chief law enforcement officer and "shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested." R.C. 109.02. The State is directly interested in seeing justice done in Ohio, and in seeing valid prosecutions move forward. That includes allowing the State to appeal erroneous legal rulings that shut down prosecutions without a determination regarding the sufficiency of the evidence.

STATEMENT OF THE CASE AND FACTS

I. The State indicted Musarra for rape, and it presented evidence at trial regarding the location of the rape.

A Cuyahoga County grand jury indicted Nicholas Musarra for two counts of rape under R.C. 2907.02(A)(2) and R.C. 2907.02(A)(1)(c), and one count of sexual battery under R.C. 2907.03(A)(2). *See* Indictment, Cuyahoga C.P. No. CR-21-662718. Musarra did not challenge venue at the dismissal stage, and the case went to trial.

At trial, a woman who was Musarra's co-worker at a bar—identified here and in the indictment with the pseudonym "Jane Doe"—testified that he assaulted her after work one night. *See* Trial Transcript, Nov. 14, 2023 ("Tr."), 332–33. They had closed the bar together, clocking out around 11:20 PM. Tr. 312. Doe, Musarra, and another person drank together at the bar after hours. Tr. 317. Musarra proposed that, since he had no

car, he would drive himself and Doe to his home in her car, and that she could call an Uber ride from there. Tr. 321–22. She agreed, and they went.

Doe testified that, at Musarra's home, she passed out or fell asleep in the basement, and she awoke to find Musarra assaulting her. Tr. 332. Specifically, she awoke with her pants being pulled down, with Musarra on top of her and inside her. *Id.* She said that after the assault, she pulled her pants back on and ran out of the home. Tr. 333–34. She drove home in her own car after all. But, as she testified, before she had passed out or fallen asleep, she had tried to arrange a ride from an app on her phone. Tr. 334.

Corroborating her testimony as to location, the State showed records of a canceled Lyft ride from where Musarra lived—on LaSalle Road off East 185th in Cleveland. Tr. 334–35, Tr. Ex. 4. Police testified that OHLEG reported that he lived there. Tr. 744. 768. Hospital records, including records from a sexual-assault nurse-examiner ("SANE") documented Doe's statement that the incident occurred off East 185th. (However, the trial court declined to take judicial notice that LaSalle Road is indeed off East 185th in Cleveland.)

II. The trial court granted a mid-trial acquittal based on lack of venue.

After the State closed its case-in-chief, Musarra moved for acquittal under Criminal Rule 29, arguing that venue had not been established. He did not move for acquittal based on any claim of insufficiency of evidence otherwise. At first, the trial court denied the motion, but asked for further briefing, and "reserve[d] the right to revisit the ruling."

Journal Entry, Nov. 17, 2023. Revisit it did, and the next day, the trial court acquitted Musarra on all three counts, saying venue was lacking.

III. The State appealed, but the appeals court dismissed all avenues of appeal.

The State filed a notice of appeal, in which it asserted an appeal of right, but it also acknowledged that *Hampton* was adverse authority on appealability. *See* Notice of Appeal (As of Right), 8th Dist. Case No. 113487 (filed December 18, 2023). The State argued that the trial court's order was substantively a *dismissal* of the indictment, despite its label as an acquittal, thus triggering R.C. 2945.67's allowance of appeals of dismissals. The State filed a separate, alternative appeal, seeking leave to appeal. On that path, the State urged that the trial court's order was an order other than a "final verdict," triggering R.C. 2945.67's allowance of such appeals. *See* Notice of Appeal and Motion for Leave, 8th Dist. Case No. 113486 (filed December 18, 2023). Musarra moved to dismiss both.

The Eighth District, in one-line orders, dismissed the State's appeal asserting an appeal of right, and it denied leave to appeal, too. *See* Journal Entries in 8th Dist. Case Nos. 113486 and 113487 (both Mar. 4, 2024). Judge Gallagher dissented in both, explaining that the State should be allowed to brief the impact of *Smith v. United States* in Ohio, specifically, its holding that no double-jeopardy bar applied to a venue-based acquittal. *See id.*

The State appealed those dismissals to this Court, which granted review. *See 07/09/2024 Case Announcements*, 2024-Ohio-2576.

ARGUMENT

<u>*Amicus Curiae* Ohio Attorney General's Proposition of Law:</u>

> *Venue is a procedural requirement, and a failure to show venue does not implicate the sufficiency of the evidence that a crime has been committed. Thus, an acquittal order based on lack of venue is not a "final verdict" under R.C. 2945.67, and it may be appealed, just as any other procedural dismissal may be.*
>
> State v. Hampton, *2012-Ohio-5688, overruled.*

Hampton squarely addressed the precise issue here, and it rejected appealability, holding that "an acquittal order based on the failure to establish venue is a final verdict, and the state may not appeal from the order." 2012-Ohio-5688, at ¶2. The Attorney General, as *amicus*, joins the State in asking the Court to overrule *Hampton* and allow such appeals.

I. Venue is a procedural requirement regarding where a criminal case may be tried; it does not involve a defendant's culpability or whether a crime has been committed.

Venue is about *where* a crime was committed, and thus where a trial for that crime should be held. But it does not involve the question of *whether* a crime was committed. The Court has repeatedly noted that distinction, and several implications flow from it.

Ohio's venue requirements are constitutional, but implemented via statute. The Constitution provides that a criminal defendant "shall be allowed ... a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed." Ohio Const., Art. I, §10. That constitutional rule is put into practice by R.C.

2901.12, which sets rules for criminal venue. A criminal trial shall generally take place in the county where "the offense or any element of the offense was committed." *Id.*

Venue requirements typically protect a defendant from being tried far from home, and they prevent prosecutorial forum-shopping. *See United States v. Cores*, 356 U.S. 405, 407 (1958); *State v. Louks*, 28 Ohio App. 2d 77, 82 (4th Dist. 1971). To be sure, if a defendant commits a crime far from home, he will be tried there, but if home and the site coincide, the State cannot drag him somewhere far away. Venue rules also assist both parties in obtaining evidence and securing witnesses. *See People v. Simon*, 25 Cal. 4th 1082, 1095 (2001). And they protect each community's interest in passing judgment on the crimes committed within its borders. *Id.*

Typically, a lack of venue can and should be challenged pre-trial and decided by the judge. That is so because venue is a procedural matter—a question of law concerning the conduct of the trial for the court to decide. *See People v. Posey*, 32 Cal. 4th 193, 208 (venue is a "procedural prerequisite" to a criminal trial) (quoting 4 LaFave et al., Criminal Procedure (2d ed. 1999), § 16.1(g), pp. 498–99); *Wilkett v. United States*, 655 F.2d 1007, 1011 (10th Cir. 1981) ("Venue is wholly neutral; it is a question of procedure, more than anything else, and it does not either prove or disprove the guilt of the accused.").

Judicial, pretrial resolution of venue is the norm even if resolution of the procedural question requires the court to consider underlying questions of fact—just as judges decide other factbound procedural matters. For example, the trial court decides whether

to dismiss a case that is prosecuted too late to meet a defendant's speedy trial right, though such a decision requires factual determinations as to whether the delay involved prejudice or good cause. *State v. Triplett*, 78 Ohio St. 3d 566, 568–71 (1997). The trial court also decides, pretrial, whether to dismiss a count or all counts for lack of probable cause. *State v. Green*, 90 Ohio St. 3d 352, 365 (2000); *State ex rel. Mancino v. Campbell*, 66 Ohio St. 3d 217, 219 (1993).

Thus, Criminal Rule 12(J) expressly empowers a trial court to grant a motion to dismiss based on improper venue, and to order the defendant held in custody pending the filing of a new indictment. If improper venue belatedly becomes apparent at trial, Ohio law tells the court what to do: "the court *must* direct the defendant" to be held pending a warrant from the proper county "[i]f it appears, on the trial of a criminal cause, that the offense was committed within the exclusive jurisdiction of another county of this state." R.C. 2945.08 (emphasis added). Similarly, Criminal Rule 18(B) tells a court that it may *change* venue "when it appears that a fair and impartial trial cannot be held in the court in which the action is pending." That requires factual determinations about the effects of "prejudicial pretrial publicity" and the likelihood that a local jury will be fair and impartial. *State v. Johnson*, 88 Ohio St. 3d 95, 118 (2000) (quotation omitted).

Not only are venue decisions typically pretrial, but also, pretrial dismissals are the better common-sense way to address venue, for several reasons. If trial in the wrong place is a hardship on a defendant, it of course makes sense to cut it off at the earliest

possible point. Further, since a court wrongly hearing a case without venue has no power to decide any merits issues, it makes no sense to go further.

Thus, venue can and should be dealt with as a pretrial, judicial matter. Any resulting dismissal can, of course, then be appealed by the State under R.C. 2945.67, and no one contends otherwise. To be sure, in some cases, a lack of venue might not become apparent until mid-trial. But that possibility does not change the fact that the issue *should* be resolved earlier, and that it is a judicial decision.

If a lack of venue is discovered midtrial—and that late discovery was unavoidable by the defendant—then the trial court should declare a mistrial or belatedly dismiss the case without prejudice, not acquit the defendant. That is so for both practical and doctrinal reasons. As a practical matter, making acquittal available incentivizes defendants to sit on the issue and seek acquittal, rather than early dismissal or even mistrial, in hopes of achieving a permanent win. Indeed, that is why many States and federal circuits have held that venue defects are waived if knowable and not raised promptly in a motion to dismiss *State v. Johanson*, 156 N.H. 148, 155 (2007) ("[I]n the federal system and a substantial majority of states, ... venue can be waived.") (internal quotation marks omitted); *see also United States v. Grenoble*, 413 F.3d 569, 573 (6th Cir. 2005) ("objections to defects in venue are usually waived if not asserted before trial"); *United States v. Kelly*, 535 F.3d 1229, 1234 (10th Cir. 2008) ("A defendant can waive improper venue when it is apparent on the face of the indictment that the case should have been tried in another

jurisdiction, and yet the defendant allows the trial to proceed without objection."). This Court should join those jurisdictions if the opportunity arises; in fact, several Ohio courts of appeals have recognized this waiver rule already. *See State v. Bound*, 2004-Ohio-6530, ¶13 (5th Dist.); *State v. Kilton*, 2003-Ohio-423, ¶8 (8th Dist.); *State v. Otto*, 2001-Ohio-3193 (7th Dist.); *State v. Williams*, 53 Ohio App. 3d 1, 5 (10th Dist. 1988); *State v. Shrum*, 7 Ohio App. 3d 244, 245 n.2 (1st Dist. 1982).

As a doctrinal matter, any acquittal under Rule 29 is proper only "if the evidence is insufficient to sustain a conviction of such offense." But if the facts show that the crime *did* occur, but in a neighboring county, then it is literally not true that the "evidence is insufficient" to convict on that count. After all, the evidence could be sufficient to convict *in the right place.*

That is, a court's venue decision says nothing about a defendant's guilt or innocence. "Venue is not a material element of any offense charged. The elements of the offense charged and the venue of the matter are separate and distinct." *Draggo*, 65 Ohio St. 2d at 90; *State v. Headley*, 6 Ohio St. 3d 475, 477 (1983); *see United States v. Tzolov*, 642 F.3d 314, 318 (2d Cir. 2011) ("[V]enue is not an element of a crime."); *Posey*, 32 Cal. 4th at 208; *Turner v. Commonwealth*, 345 S.W.3d 844, 846 (Ky. 2011). Venue implicates the conduct of the trial, not a defendant's substantive criminal liability.

Further, acquittal, as a typically substantive resolution, makes no sense coming from a court that has just found that is does not have proper jurisdiction to continue with the

case. Without jurisdiction, it ought not be opining on any merits at all. In addition, a mistrial or dismissal order allows the court to hold the defendant for a warrant from the proper county, as R.C. 2945.08 provides—not something one would expect a court could do to an innocent person.

Many courts have found that dismissal, not acquittal, is the proper remedy even when a lack of venue is found midtrial. *See, e.g., United States v. Salinas*, 373 F.3d 161, 170 (1st Cir. 2004) (remanding "with instructions to dismiss the indictment without prejudice for lack of venue"); *United States v. Brennan*, 183 F.3d 139, 151 (2d Cir. 1999) (dismissing mail fraud indictment against corporate defendants without prejudice for lack of venue). *Cf. United States v. Perez*, 280 F.3d 318, 335 n.13 (3d Cir. 2002) (when defense objects at close of the government's case, trial court "has the discretion to allow the Government to reopen its case."); *United States v. Stewart*, 256 F.3d 231, 235 (4th Cir. 2001) (vacating convictions and sentences due to improper venue). In such cases, of course, appealability does not even arise as an issue, because the State can appeal a dismissal, or proceed with a new indictment. Thus, some form of dismissal is the better vehicle.

But even if "acquittal" is used as the vehicle for what is essentially a midtrial dismissal, such an acquittal ought to be recognized for what it is: a non-substantive order placed under that "acquittal" heading for alleged lack of a better option. But such an acquittal ought not automatically carry all the implications of typical, sufficiency-based

acquittals. Before turning to that final question, the Attorney General reviews next how typical acquittals work.

II. Acquittal is typically based on insufficiency of evidence, and the no-appeal rule for acquittals was based on that insufficiency.

The nature of acquittal governs the effect of acquittal, and its nature has to do with legal innocence—namely, a lack of sufficient evidence that a crime has been committed. Criminal Rule 29 says just that, providing for acquittal "if the evidence is insufficient to sustain a conviction of such offense." Thus, acquittal is appropriate only if proof is lacking as to "the essential elements of the crime." *State v. Williams*, 74 Ohio St. 3d 569, 576 (1996). An acquittal based on insufficiency has twin consequences: the acquittal (1) may not be appealed, and (2) creates a double-jeopardy bar against any retrial.

This Court, in holding that acquittals cannot be appealed under R.C. 2945.67, explained that acquittals were "grounded upon insufficiency of evidence" of guilt. *Yates*, 32 Ohio St. 3d at 32. R.C. 2945.67 does not expressly list acquittals or sufficiency-of-evidence findings as appealable or not. But the statute allows for appeals of right of orders that "dismiss" a count, and it allows for appeals by leave of court of "any other decision, except the final verdict." R.C. 2945.67. *Yates* explained that an acquittal is a final verdict, because "it is a factual determination of innocence," and is "as much a final verdict" whether under part (A) or (C) of Criminal Rule 29, which governs acquittals. *Yates*, 32 Ohio St. 3d at 32–33. Thus, whether an acquittal comes from a jury verdict, or

from a judicial decision stepping in the jury's shoes, it is a finding of innocence, and those are final and not appealable.

An acquittal based on insufficiency also bars any retrial under the state and federal Double Jeopardy clauses. The federal Double Jeopardy Clause says that no one shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const., amend. 5. Likewise, the Ohio clause says that "[n]o person shall be twice put in jeopardy for the same offense." Ohio Const., Art. I, Sec. 10; *See State v. Uskert*, 85 Ohio St.3d 593, 594–95 (1999). The clauses do not literally forbid *any* second trial, however. *See State v. Kareski*, 2013-Ohio-4008, ¶14. "In general, if the reversal is based on an error that occurred at trial, a retrial is appropriate." *Id.* That is so because a reversal grounded in a procedural trial error "implies nothing with respect to the guilt or innocence of the defendant,' but is simply 'a determination that [the defendant] has been convicted through a judicial process which is defective in some fundamental respect.'" *Id.* (quoting *Lockhart v. Nelson*, 488 U.S. 33, 40 (1988)).

In sharp contrast, "[t]he constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal." *State v. Hancock*, 2006-Ohio-160, ¶139 (quoting *Arizona v. Washington*, 434 U.S. 497, 503 (1978)). That barrier arises regardless of who acquits at the trial court—judge or jury—or whether an appellate reversal is based on insufficient evidence. *Any* determination that "the evidence presented by the state is 'insufficient to establish criminal liability for an offense' amounts

to an acquittal." *City of Girard v. Giordano*, 2018-Ohio-5024, ¶¶9–10 (quoting *Evans v. Michigan*, 568 U.S. 313, 318–19 (2013)).

Notably, that retrial barrier does not require the label "acquittal" or use of Rule 29, as an appellate insufficiency finding is not such an acquittal, but it has the same consequence. Thus, an order *functions* as an acquittal for double-jeopardy purposes so long as it is any "'ruling by the court that the evidence is insufficient to convict'" and "'any other 'rulin[g] which relate[s] to the ultimate question of guilt or innocence.'" *State v. Street*, 2023-Ohio-4405, ¶56 (7th Dist.) (quoting *United States v. Scott*, 437 U.S. 82, 99 and n.11 (1978)). The flip side of the coin: an order that is *labeled* an acquittal, but is *not* based on factual innocence or insufficiency, does not trigger the double-jeopardy bar to retrial.

Most important here, any finding of lack of venue, *even if labeled an acquittal*, does not create a double-jeopardy bar, so retrial *is allowed* after an acquittal or appellate reversal based on lack of venue. The United States Supreme Court held precisely that just last year in a unanimous opinion. *Smith v. United States*, 599 U.S. 236, 239 (2023). As the *Smith* Court explained, that followed because a finding of lack of venue, "even when styled as a 'judgment of acquittal' under Rule 29, plainly does not resolve 'the bottom-line question of "criminal culpability."'" *Id.* at 253 (quoting *Evans*, 568 U.S. at 324 n.6); *see also United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977) ("[W]hat constitutes an 'acquittal' is not to be controlled by the form of the judge's action."). *See also United States v. Petlechkov,* 922 F.3d 762, 771 (6th Cir. 2019) ("A dismissal on venue grounds does not

qualify as an "acquittal" for double jeopardy purposes. Though venue is a factual issue that the government must prove, it is not an element of the underlying criminal offense.").

While this Court has not yet addressed *Smith*'s application in Ohio, the result should be straightforward: Ohio follows federal suit. The Court has long held that "[t]he protections afforded by the Ohio and United States Constitutions' Double Jeopardy Clauses are coextensive." *State v. Mutter*, 2017-Ohio-2928, ¶15 (citing *State v. Martello*, 2002-Ohio-6661, ¶7); *see also, e.g., State v. Ramirez*, 2020-Ohio-602, ¶10. Thus, not surprisingly, the Third District held just this year that *Smith* applies and that the Ohio Double Jeopardy Clause does not bar retrial after an acquittal or appellate reversal for lack of venue. *Moore*, 2024-Ohio-1736, at ¶35.

Turning back from retrial to appealability, the same distinction—between venue as a procedural flaw and insufficiency of evidence—ought to likewise mean that venue-based acquittals are not immune from appeal, either. However, this Court said otherwise in *Hampton.* That inconsistency means that the Court should overrule *Hampton*, as explained below.

III. The Court should overrule *Hampton* and hold that the State may appeal acquittals based on a lack of venue.

The Court held in *Hampton* that "an acquittal order based on the failure to establish venue is a final verdict, and the state may not appeal from the order." 2012-Ohio-5688, ¶2. That holding was wrong then, and cases since—especially *Smith* and this Court's decision in *Girard*—show that *Hampton* is unworkable, both doctrinally and practically.

Thus, the Court should overrule it, and it should hold instead that purported acquittals for lack of venue *are* appealable under R.C. 2945.67.

While *stare decisis* deserves respect, it is not a barrier to overruling a case that was wrongly decided and has been shown to be doctrinally and practically unworkable and harmful. Because the issue here is criminal and procedural, as well as touching on constitutional issues, the "*Galatis* test" does not apply. *State v. Henderson*, 2020-Ohio-4784, ¶29 (describing test as unnecessary for "procedural rules" or "constitutional questions"); *see id.* at ¶81 (Kennedy, J., concurring in judgment only) (noting "there is no binding test for overruling precedent in criminal cases"); *see Westfield Ins. Co. v. Galatis*, 2003-Ohio-5849. In any event, *Hampton* should go under any approach.

The principles explained above—regarding the procedural nature of venue and the insufficiency basis of typical acquittals—together show why the Court should find appealability if it were starting without *Hampton.* Appealability is barred under *Yates* not because of the *label* of "acquittal," but because the *basis* for such an order is "a factual determination of innocence." *Yates,* 32 Ohio St. 3d at 32–33. Because a finding of lack of venue does not include such a "factual determination," it provides no "final verdict" to trigger the appeal bar.

Hampton's contrary resolution was based on several errors. The *Hampton* Court erred not only regarding the *effect* of a venue-based acquittal, but also by accepting that acquittal was the right vehicle to address lack of venue. To its credit, the Court began by

describing the order at issue as a "judgment of a court purporting to grant an acquittal based on lack of venue," *id.* at ¶1, and it did review the separate question of whether acquittal can even be based on lack of venue, *id.* at ¶¶18–24. But it erred in resolving that question, with the mistaken conclusion resting on two analytical errors.

First, the Court erred in how it looked at the nature of venue, focusing on its aspect as something factual that must be proven. *Id.* at ¶¶19–22. It seemed to compare that to any other sufficiency issue. But not everything involving a factual determination is an element of a crime for sufficiency purposes—for example, as noted above, other situations involving factual determinations are in separate silos, such as speedy-trial decisions. *See* above at 7–8. But a speedy-trial decision is not immune from appeal. The Court also shoehorned that view into Rule 29's text, suggesting that a failure of venue means that the "'the evidence is *insufficient to sustain a conviction* of such offense.'" *Hampton* at ¶22 (quoting Crim.R.29 (emphasis added by *Hampton*)). But that is literally not true, as the evidence could be sufficient to sustain "a" conviction in *the proper venue*, and it is merely insufficient to sustain a conviction from *the wrong venue.*

Second, the Court mistakenly seemed to assume only two binary choices for addressing a venue problem—pretrial dismissal or midtrial acquittal—and found that *pretrial dismissal* could not be the sole avenue. "Nothing in the Constitution, statutes, or rules requires a defendant to raise the issue of venue before trial," the Court said. *Id.* at ¶23. That is true enough, but the Court apparently did not consider the options of either

a midtrial order cast as a dismissal, or a mistrial. So it landed on acquittal as the only way left, when that is not so.

Correcting that mistake would mean that courts would not even label venue-based orders as acquittals, thus bypassing the Court's categorical holding that all acquittals are immune from appeal. That is what the Court should have done, and should do today.

But even assuming that acquittal is a proper vehicle, *Hampton* still erred in holding that *all* acquittals are categorically immune from appeal, without looking at the basis of the acquittal. Notably, the Court's analysis *began* with first holding that "An Order of Acquittal Is Not Appealable," resolving it on a categorical level, and only then turned to the venue-specific issue. *Compare id.* at ¶¶11–17 (holding all acquittals are non-appealable), *with* ¶¶18–24 (holding that acquittal can be used to address venue). So the Court never truly addressed whether venue-based acquittals, if allowed, are subject to the same non-appealability rule—it simply reasoned that it followed because they were acquittals.

Notably, the Court mistakenly said that the State's position would require *Yates* and progeny to be overruled. *Id.* at ¶10. That was wrong then, and it is wrong now. The State's position does not require the Court to reverse *Yates* and hold that acquittals are categorically *all* appealable instead of being categorically *all* non-appealable. It simply requires the Court to *distinguish* the subcategory of *venue-based acquittals* (to the extent they are even properly called acquittals) from typical sufficiency-based acquittals. (The

Attorney General notes that it, along with the State through the Cuyahoga County Prosecuting Attorney, does seek to overrule *Yates* on a separate basis in the pending case of *State v. Wolf*, No. 2024-1140. However, that basis differs from this one, as it involves the difference between Rule 29(C) and 29(A), not the venue-based distinction at issue here.)

Indeed, the *Hampton* dissent explained that in its view, "neither *Keeton* nor *Yates* answers the question of whether a judgment of acquittal based on failure to establish venue is a final verdict, nor do those cases explain whether appellate courts should look to the form or the substance of an order in determining whether it is, in fact, an acquittal." 2012-Ohio-5688, at ¶36 (opinion of O'Donnell, J., joined by Lundberg Stratton and Cupp, JJ.). The dissent noted that "both *Keeton* and *Yates* dealt with acquittals based on insufficiency of the evidence attributed to the elements of the offenses and lack of evidence of guilt." *Id*.

The dissent had the better of it then, and developments since have proven *Hampton* to be unworkable as well as wrong. First, the double-jeopardy cases—the United States Supreme Court's *Smith* decision and the Third District's correct *Moore* decision—hold that venue-based acquittals do not bar retrial in another venue, and that creates both doctrinal and practical tension. On doctrine, the same distinction that drives the double-jeopardy analysis—again, that venue-based acquittals are not like sufficiency-based

acquittals—should mean that not all acquittals are immune from appeal, just as not all acquittals trigger a double-jeopardy bar.

The practical contradiction is even worse, as it means that whether a defendant is convicted or goes free depends on the happenstance of which court concludes that venue is lacking. Consider the *Moore* case as an example. In *Moore,* the defendant—an inmate in a Marion County prison, who tried from there to have his wife killed in Erie County—was first tried and convicted in Erie County. While the trial court had allowed the case to proceed, both the Sixth District and *this* Court held that venue was improper in Erie County. So that conviction was reversed. *See State v. Moore*, 2022-Ohio-1460, ¶1. But the *Marion* County prosecutor then stepped in and prosecuted, and, following *Smith,* both the trial and appeals court allowed that new trial to proceed, rejecting Moore's double-jeopardy claim. *Moore*, 2024-Ohio-1736, at ¶36. In the end, the system worked: venue was reviewed on appeal, and trial ended up in the right place.

But consider what would have happened if Marion County had gone first, and if that trial court had *mistakenly* held that Marion County was an *improper* venue, thinking Erie was better. In the State's view, that would be appealed, and a Marion prosecution would be reinstated. But under *Hampton,* that mistaken venue-based acquittal would be non-appealable and permanent, and Moore would walk. Sure, the State could pursue Moore in Erie instead, after a Marion acquittal—but that would not work when Marion was the

right answer. The power to re-try, and eventually end up in the right place, works only if appeals can resolve which place is correct after all.

To be sure, this case, unlike *Moore* and *Hampton*, does not involve a dispute over proceeding in County A or B, but simply whether to proceed in Cuyahoga or not at all. That makes this case even worse, as the retrial right of *Smith* and *Moore* does the State no good—it is Cuyahoga or bust. True, that makes the trial court's ruling all the more puzzling, as it is hard to see where venue *should* be. But that makes the State's need to appeal all the more important, so that it has the chance to prosecute Musarra in the proper venue.

This Court's 2018 decision in *Girard v. Giordano* is in further tension with *Hampton*. *See* 2018-Ohio-5024. The precise *Girard* issue was a bit different—it asked whether a double-jeopardy bar arose after an appellate reversal of a no-contest plea, based on a failure to comply with the explanation-of-circumstances requirement that applies to such pleas. *Id.* at ¶1. The Court held that no bar applied. *Id*. *Girard*'s reasoning carries over to this context. For example, the Court explained that whatever the type of order, the result should be the same regardless of whether the trial court or an appeals court reaches the relevant conclusion. *Id.* at ¶10. A defendant who obtains an appellate decision of insufficiency should not receive less protection than a defendant who obtains a trial-court acquittal for the same reason; after all, the appeals court in such a case simply says that "the trial court *should* have entered a judgment of acquittal." *Id.* (quoting *Lockhart*, 488

U.S. at 39 (emphasis in *Lockhart*)). That parity principle also extends logically to *unwarranted* relief—just as a defendant who obtains proper relief from a trial judge should not be better off than one who needs an appeals court to fix his problem, a defendant who obtains *unwarranted* trial-court relief should not be able to pocket it permanently simply because a trial court did it. But that is the asymmetry created by the no-appeal rule: while an appellate lack-of-venue decision could be further appealed to *this* Court, a trial-court decision is the end of the road. There is no principled basis for that disparity.

Finally, another inconsistency remains between those who obtain venue-based dismissals and venue-based acquittals. If the court catches it early for a pretrial dismissal, or simply chooses by discretion to use a different midtrial vehicle—dismissal or mistrial—that defendant faces a State appeal and possible reinstatement of a prosecution. But *only* those defendants who obtain an "acquittal" doing the same thing—throwing out the case for lack of venue—get an irrevocable get-out of-jail-free card. That is wrong, and the Court should say so.

The Court should overrule *Hampton,* and it should hold that the State may appeal venue-based "acquittals" under R.C. 2945.67.

CONCLUSION

For the above reasons, the Court should reverse the Eighth District.

Respectfully submitted,

DAVE YOST
Attorney General of Ohio

/s T. Elliot Gaiser

T. ELLIOT GAISER* (0096145)
Solicitor General
**Counsel of Record*
STEPHEN P. CARNEY (0063460)
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614.466.8980
614.466.5087 fax
thomas.gaiser@ohioago.gov

Counsel for *Amicus Curiae*
Ohio Attorney General Dave Yost

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above Merit Brief of *Amicus Curiae* Ohio Attorney General Dave Yost in Support of Appellant was served this 1st day of October, 2024, by e-mail on the following:

Daniel T. Van
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
dvan@prosecutor.cuyahogacounty.us

John T. Martin
Assistant Public Defender
Cuyahoga County Public Defender
310 Lakeside Avenue, 2nd Floor
Cleveland, Ohio 44113
jmartin@cuyahogacounty.us

/s T. Elliot Gaiser
T. Elliot Gaiser
Solicitor General