IN THE SUPREME COURT OF OHIO
2025

State of Ohio, Plaintiff-Appellant, -vs- Diamond King, Defendant-Appellee.	Case No. 24-1608 On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals Nos. 114315/114317

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
Francis Cavallo 0073428
(Counsel of Record)
Assistant Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, Ohio 44113
Phone: 216-443-8396
E-mail:
fcavallo@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

Other Counsel on
Certificate of Service

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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*, 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 more-

recent case law from this Court. In specific reference to R.C. 2945.67, this Court 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*, 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.

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. As this Court has confirmed, a State's appeal in that situation would not result in any "double" jeopardy, since it merely seeks to reinstate the jury's verdicts. *Ramirez* at ¶ 15. The State's purported inability to appeal flows only from the flawed ruling in *Yates* that a post-verdict "judgment of acquittal" constitutes "the final verdict."

Victims now also have a constitutionally-protected interest at stake when the trial court would overturn a jury's guilty verdict and enter a judgment of acquittal. The jury's guilty verdict often would provide the predicate for a full-and-timely restitution order that is mandatory under Marsy's Law. Article I, Section 10a(A)(7), Ohio Constitution. Moreover, Marsy's Law emphasizes that the victim's rights "shall be protected in a manner no less vigorous than the rights afforded to the accused . . .." Section 10a(A). Marsy's Law thus commands parity between the victim and defendant to the extent possible, but *Yates* creates a severe *lack* of parity in how the defendant's and victim's interests are treated. The defendant is allowed to appeal and to claim that the trial court erred in denying the motion for judgment of acquittal. But the State is prevented from seeking the same appellate review when the court has erred in granting the motion, even when the defendant's double-jeopardy rights would *not* bar the appeal. In defending the guilty verdict, and in seeking reversal of the post-verdict acquittal, the State would be protecting the victim's interests in justice just as much as the sovereign's interests.

Given the flaws in *Yates,* and given the intervening developments requiring parity under Marsy's Law, the *Yates* decision should be overruled.

Over a decade ago in *State v. Hampton*, 2012-Ohio-5688, this Court adhered to

Yates, contending that "[t]here is no reason to overrule the clear pronouncement in *Yates* that a judgment of acquittal is not appealable by the state as a matter of right or by leave to appeal pursuant to R.C. 2945.67(A)." *Id*. ¶ 17. But *Hampton* was a 4-3 decision that arose in the context of the trial court's mid-trial granting of a judgment of acquittal based on venue, and the flaws in *Yates* plainly take on more significance when the grant occurs after the jury's guilty verdict, as occurred here. This Court has accepted review of questions related to whether venue can serve as a proper ground for a Crim.R. 29(A) "acquittal" and whether such an "acquittal" amounts to a "final verdict," all of which brings into doubt the continued viability of *Hampton* and *Yates* after the decision in *Smith v. United States*, 599 U.S. 236 (2023). *See State v. Musarra*, Case Nos. 24-540/541. These doubts about *Hampton* provide even more of a reason to engage in a close review of *Yates*. And now with Marsy's Law, the legal landscape has significantly changed, and so the question of the viability of *Yates* is front and center.

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 in appeal after appeal.

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 would bar a State's appeal from a mid-trial "acquittal" based on insufficiency under Crim.R. 29(A), 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, 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 only to bar State's appeals from "verdicts" and not "judgments," it would have taken note of that demarcation.

"A supreme court not only has the right, but is entrusted with the duty to examine its former decisions and, when reconciliation is impossible, to discard its former errors." *State ex rel. Cincinnati Enquirer v. Bloom*, 2024-Ohio-5029, ¶ 27, quoting *Westfield Ins. Co. v. Galatis*, 2003-Ohio-5849, ¶ 43. This concept applies to questions of statutory law too, as shown by the cases overruling earlier decisions that had attached an erroneous "jurisdictional" gloss to sentencing errors under the void-sentence doctrine. As recognized in *State v. Harper*, 2020-Ohio-2913, ¶ 38, stare decisis is "not intended to effect a petrifying rigidity, but to assure the justice that flows from certainty and stability. If, instead, adherence to precedent offers not justice but unfairness, not certainty but doubt and confusion, it loses its right to survive, and no principle constrains us to follow it." (Cleaned up). *Yates* does not withstand scrutiny and constitutes an "unreasoned prior precedent" (*see Bloom* at ¶ 31) that should be overruled. Adhering to the flawed *Yates* ban on State's appeals from post-verdict judgments of acquittal offers not justice but unfairness to victims and the prosecution, and *Yates* should be overruled.

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 brief.

ARGUMENT

> **Amicus Proposition of Law**: A trial court's post-guilty-verdict granting of a motion for judgment of acquittal under Crim.R. 29 is not "the final verdict." The State can appeal such a ruling as of right or by leave of court under R.C. 2945.67(A). (*State ex rel. Yates v. Court of Appeals for Montgomery Cty.*, 32 Ohio St.3d 30 (1987), 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. Reasons Supporting State's Appeals of Post-Verdict Acquittals

The plain legislative intent underlying the adoption of R.C. 2945.67(A) was to afford an avenue for the State to raise trial-court errors and to allow appellate courts to reverse those erroneous judgments and orders from which the State would be appealing. It is therefore appropriate at the outset to discuss what might prompt the State to appeal from the granting of a post-verdict judgment of acquittal and why it would be important for the State to have such review.

A number of things can "go wrong" when the court grants the post-verdict judgment of acquittal, and, in fact, a post-verdict judgment of acquittal would almost

always raise alarm bells. It will often be the case that a court granting a judgment of acquittal under Crim.R. 29(B) and (C) after guilty verdicts will have already *denied* motion(s) for acquittal during trial. But the standard for sufficiency review does not change from the in-trial context to the post-trial context. Even *Yates* conceded that the "sufficiency" standard under Crim.R. 29(C) is the same standard that applies to in-trial motions under Crim.R. 29(A). *Yates,* 32 Ohio St.3d at 32-33; *see also State v. Beehive Ltd. Partnership,* 89 Ohio App.3d 718, 723 (8th Dist. 1993) ("identical"); *State v. Harris*, 2017-Ohio-5594, ¶ 16 (1st Dist.); *State v. Clellan*, 2010-Ohio-3841, ¶ 33 (10th Dist.). Since every motion for judgment of acquittal is controlled by the same sufficiency standard, a considerable tension is created when the court has denied earlier in-trial motion(s) and yet granted a post-verdict judgment of acquittal.

The present case serves as a prime example of the trial court "blowing hot and cold" on the sufficiency issue. In denying the motion at the end of the State's case-in-chief, the court recognized that "I have to take the evidence in the light most favorable to the State and not weigh the evidence." (Transcript Excerpt, at 8) The defendant's later testimony in the defense case-in-chief would not have changed this outcome since, as a matter of law, the evidence still must be construed in the State's favor even after such testimony. But, in the aftermath of the jury's acquittal of the defendant on other counts, the court now decided to sustain the motion for acquittal on the counts resulting in guilty verdicts, but providing no explanation justifying the different ruling. There is a basic question of whether the court was truly and accurately applying the sufficiency standard, and a State's appeal would test whether it did so.

Beyond this problem of basic error in applying the sufficiency-of-evidence

standard, there could be various explanations for a changed ruling after trial, and some of them would represent obvious legal error that also would warrant appellate review. "[T]he sole purpose of a Crim.R. 29 motion is to test the sufficiency of the evidence and, when that evidence is insufficient, to take the case from the jury." *Harris*, 2017-Ohio-5594, at ¶ 26 (1st Dist.). When "[t]he errors do not challenge the sufficiency of the evidence adduced by the state," "a Crim.R. 29 motion is not the proper vehicle for raising them." *Id.* ¶ 27. Yet the defense might seek "acquittal" based on improper grounds other than insufficiency, and the court might grant the "acquittal" on such non-sufficiency grounds, even when those grounds do not support an "acquittal." When the court purports to grant an "acquittal" based on non-sufficiency grounds not supporting acquittal, an appeal is essential to overturning that legal error.

One of the improper grounds after trial can relate to the jury's resolution of other counts. The court might improperly give weight to the jury's not-guilty verdict(s) on other counts, even though a not-guilty verdict on one count does *not* establish evidentiary insufficiency on other counts. Even when a not-guilty verdict on one count is truly "inconsistent" with a guilty verdict on another count, the not-guilty verdict provides zero basis for an "insufficiency" acquittal on the guilty-verdict count. *United States v. Powell*, 469 U.S. 57, 67 (1984); *Jackson v. Virginia*, 443 U.S. 307, 319 n. 13 (1979); *State v. Williams*, 1999 Ohio App. LEXIS 1961, at *8 (10th Dist. 1999). "As long as sufficient evidence supports the jury's verdict at issue, other seemingly inconsistent verdicts do not undermine the otherwise sufficient evidence." *State v. Crabtree*, 2010-Ohio-3843, ¶ 19 (10th Dist.).

Even when the trial court purports to invoke "sufficiency" review, its underlying

logic can reveal that the court was acting improperly in invoking Crim.R. 29. Review for "sufficiency" under Crim.R. 29 does not extend to affirmative defenses, *see State v. Hancock*, 2006-Ohio-160, including self-defense, *see State v. Messenger*, 2022-Ohio-4562, and so a court would err as a matter of law if it purported to grant a post-verdict acquittal based on insufficiency as to an affirmative defense. In addition, the court's explanation could reveal that the court was engaging in improper manifest-weight review, which is different from the sufficiency review that applies under Crim.R. 29. *See State v. Thompkins*, 78 Ohio St.3d 380, 387-88 (1997), quoting *Tibbs v. Florida*, 457 U.S. 31, 41-43 (1982).

A flawed post-verdict grant of a judgment of acquittal could implicate jurisdictional and separation-of-powers concerns as well. The trial court has no general jurisdiction to try the facts; it takes a properly-executed jury waiver to give the court jurisdiction to hear and determine the facts. *State ex rel. O'Malley v. Collier-Williams*, 2018-Ohio-3154, ¶ 25. When the court deviates from sufficiency-of-evidence review and grants a "judgment of acquittal" based on some non-sufficiency-based assessment of the facts, it is exceeding its jurisdiction. Separation of powers also is implicated when a court, for whatever reason, purports to grant an "acquittal" on grounds not allowing such relief. Such action could amount to a de facto clemency for the offender, but clemency is an Executive Branch function. *State v. Ware*, 2014-Ohio-5201, ¶ 20.

The present case reveals another reason for allowing review of post-verdict grants of acquittal. In its post-trial discussion of the Crim.R. 29 motion, the trial court notably failed to provide any explanation for why the evidence was now insufficient after it had ruled that the evidence was sufficient during trial. The court instead disclosed that it had

spoken to the "jury" after the verdicts and that "they" had made some statements.

> THE COURT: * * * We did speak to the jury yesterday, and it had no part in my bearing, but I just wanted to put on their thoughts. And they said that they found the defendant guilty on Counts 5 and 6 because they read "abuse" and they – they did not believe that there was any physical abuse, but thought that yelling would constitute abuse, because they read that to mean the definition of – under abuse, and it could be mental. That it could be mental.
>
> So it was interesting. I just wanted to spread that on the record.
>
> In talking to them they said they reached a compromise verdict on that, but that that was the basis for Counts 5 and 6, was yelling and the condition of the home, and it did not pertain to any sort of physical abuse.
>
> So with respect to that, I know the jury did find the defendant guilty, but I'm entering – I'm granting the Rule 29 acquittals. So the defendant is acquitted of Counts 5 and 6.

(Transcript Excerpt, at 101-103) The number of jurors actually participating in this post-verdict discussion is unknown, and of course the court expressly acknowledged that it could not consider such comments for any purpose. *See* Evid.R. 606(B). Yet the court chose to "spread . . . on the record" such inadmissible matters while, at the same time, failing to "spread . . . on the record" its underlying reasoning for granting the acquittal. Notably, even if such comments by juror(s) could make a difference, the relief to be granted would be a new trial, not an "acquittal" from the misuse of Crim.R. 29.

As with any appeal mechanism, a State's appeal would be intended to provide an important check on the trial court's actions. Testing the legitimacy of the court's ruling can reassure the public that justice was done or can expose an injustice that occurred. The availability of such an appeal would also provide a degree of deterrence, thereby

incentivizing the court to adhere to the dictates of Crim.R. 29 and, at the same time, deterring the court from granting an "acquittal" based on improper considerations.

B. Labels not Controlling

In determining whether the State can pursue an appeal, 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. "[A]n appellate court must look behind the trial court's announced findings to determine if in reality its judgment acquitting the defendant was on grounds of insufficiency . . .." *State v. Damico*, 1990 Ohio App. LEXIS 1951, at *7 (1st Dist. 1990); *State v. Lee*, 2009-Ohio-4617, ¶ 17 (9th Dist.) ("trial court did not, in fact, rule on a Crim.R. 29 motion" even though so labeled).

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.*, 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.

For purposes of this brief, OPAA will focus on the leave-to-appeal part of R.C. 2945.67(A). OPAA defers to the State's contention that it possessed an appeal of right because the trial court's order should be treated as the functional equivalent of a

dismissal from which the State can appeal as of right.

C. 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." *State v. Kyles*, 2024-Ohio-5038, ¶ 12; *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*, 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."

Given the broad use of the phrase "any other decision," a 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*, 2008-Ohio-762, ¶ 29 (10th Dist); *see also State ex rel. Shkurti v. Withrow*, 32 Ohio St.3d 424, 426 (1987);

Slack Technologies, LLC v. Pirani, 598 U.S. 759, 767 (2023); *Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004) ("the definite article . . . indicates that there is generally only one").

Given the broad reach of the "any other decision" phrase, and given the limited reach of "the final verdict" exception, it must be kept in mind that "'any' means 'all,' . . . unless it is followed by a *clear* limiting condition." *Kyles*, ¶ 12 (emphasis added). 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). "Provisos and exceptions in statutes must be strictly construed and limited to objects fairly within their terms, since they are intended to restrain or except that which would otherwise be within the scope of the general language." *Detroit Edison Co. v. SEC*, 119 F.2d 730, 739 (6th Cir.1941); *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (cautioning against extending exemptions "to other than those plainly and unmistakably within its terms").

As this Court has recognized, "[e]xceptions 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).

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

When *Keeton* and *Yates* were decided, there were repeated 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." Criminal Rule 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." 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, and, even then, the "verdict" is *still* the action of the jury. 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 the rule recognizes the difference.

Given these understandings of "verdict," *Keeton* and *Yates* erred in concluding 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*, 2020-Ohio-6670, ¶ 15; *Thompkins*, 78 Ohio St.3d at 386.

In *Hampton*, the majority contended that "[t]his common-law concept of a directed verdict has now been memorialized through Crim.R. 29." *Hampton*, 2012-Ohio-5688, at ¶ 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 adopted Crim.R. 29 in 1973. The rule abolished the "verdict" approach and adopted 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), paragraph two of the syllabus.

Some subsequent cases also have recognized that, in a jury trial, the "verdict" springs from the jury's decision. In *State v. Lomax*, 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*, 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).

E. 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 "*any* other decision" allowing appeal 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, the phrase "the final verdict" would be read narrowly to apply only when it clearly and unmistakably calls for such application, 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. Such strict construction would interpret "the final verdict" exception narrowly, rather than extending it to rulings other than "verdicts."

It bears emphasis that, 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*, 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*, 2015-Ohio-3930, ¶ 8.

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

F. 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,* 2020-Ohio-602, at ¶ 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)." *Yates*, 32 Ohio St.3d at 32. But even if double jeopardy provided no relevant reference point for determining whether a post-verdict 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, since the case did not involve a post-verdict judgment. Nothing in law makes a post-verdict "judgment of

acquittal" "the *final* verdict" other than the ipse dixit in *Yates* contending that the post-verdict judgment is "final."

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*, 2020-Ohio-602, at ¶ 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" as "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 not-guilty 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.

Given the foregoing indications in statutes and rules, it was counter-textual for *Yates* to conclude that a post-verdict "judgment of acquittal" qualifies as "the final verdict" too. These are substantial reasons to revisit *Yates* and to overrule it. The new parity requirement imposed by Marsy's Law provides further reason to overrule *Yates* in order to bring the statute into constitutional compliance with Marsy's Law.

CONCLUSION

For the foregoing reasons, amicus curiae OPAA respectfully urges that this Court reverse the Eighth District's judgments and remand to that court for further proceedings consistent with this Court's opinion.

Respectfully submitted,

/s/ Steven L. Taylor
Counsel for Amicus Curiae OPAA

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was e-mailed on March 24, 2025, to the following counsel of record: Francis Cavallo, Assistant Public Defender, 310 Lakeside Avenue, Suite 200, Cleveland, Ohio 44113, fcavallo@cuyahogacounty.us, counsel for defendant; Nathan L. Yohey, Logan County Prosecutor's Office, 117 East Columbus Avenue, Suite 200, Bellefontaine, Ohio 43311, nathan.yohey @logancountyohio.gov, counsel for amicus curiae Logan County Prosecuting Attorney's Office; T. Elliot Gaiser, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, thomas.gaiser@OhioAGO.gov, counsel for amicus curiae Ohio Attorney General Dave Yost; Daniel Van, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, dvan@prosecutor.cuyahogacounty.us, counsel for State of Ohio.

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