

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : No. 2007-1640  
Appellant, :  
v. : On Appeal from the  
RITA RODDY, : Cuyahoga County Court of  
Appellee. : Appeals, Eighth Appellate  
District, Case No. 88759

---

MERIT BRIEF OF AMICUS CURIAE OHIO PUBLIC DEFENDER IN SUPPORT OF  
APPELLEE RITA RODDY

---

WILLIAM MASON (0037540)  
Cuyahoga County Prosecutor  
MATTHEW E. MEYER (0075253)  
Assistant Prosecuting Attorney (of record)  
MICHAEL E. GRAHAM (0078000)  
Assistant Prosecuting Attorney  
  
1200 Ontario 9<sup>th</sup> Floor  
Cleveland, Ohio 44113  
216/443-7800  
216/443-7806 (fax)  
Counsel for Appellant State of Ohio

WILLIAM P. MARSHALL (0038077) (of  
record)  
Solicitor General  
KELLY A. BORCHERS (0081254)  
Assistant Solicitor  
30 E. Broad St., 17<sup>th</sup> Floor  
Columbus, Ohio 43215  
614/466-8980  
614/466-5087 (fax)  
[wmarshall@ag.state.oh.us](mailto:wmarshall@ag.state.oh.us)

Counsel for Amicus Curiae  
Ohio Attorney General

ROBERT L. TOBIK (0029286)  
Cuyahoga County Public Defender  
JOHN MARTIN (0020606)  
Assistant Public Defender (of record)  
  
1200 West Third Street  
100 Lakeside Place  
Cleveland, Ohio 44113-1569  
216/443-7583  
216/443-3632 (fax)  
Counsel for Appellee Rita Roddy

JASON A. MACKE (0069870)  
Office of the Ohio Public Defender  
  
8 E. Long St., 6th Floor  
Columbus, Ohio 43215  
614/466-5394  
614/728-8091 (fax)  
[mackej@opd.ohio.gov](mailto:mackej@opd.ohio.gov)

Counsel for Amicus Curiae  
Ohio Public Defender

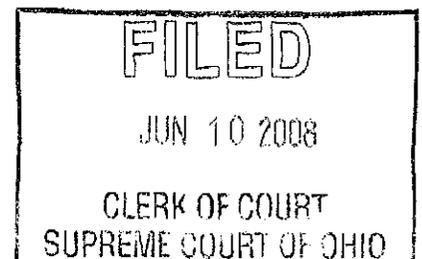


TABLE OF CONTENTS

Page No.

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES ..... iii

STATEMENT OF INTEREST OF AMICUS CURIAE ..... 1

STATEMENT OF THE CASE AND FACTS ..... 1

ARGUMENT OF AMICUS CURIAE OHIO PUBLIC DEFENDER .....2

    First Proposition of Law of Amicus Curiae:

    R.C. 2945.67 does not allow the state to appeal a trial court’s judgment granting a motion under Crim.R. 29(C), which is a “final verdict” that cannot be appealed pursuant to the statute [*State ex rel Yates v. Court of Appeals* (1987), 32 Ohio St.3d 30, and *State v. Keeton* (1985), 18 Ohio St.3d 379, approved and followed].....3

    Second Proposition of Law of Amicus Curiae:

    Ohio Const. Art. IV Sec. 3(A)(2) precludes the state from seeking an advisory opinion as to the validity of a trial court decision, as an advisory opinion does not “review and affirm, modify, or reverse” a judgment or final order [*City of Euclid v. Heaton* (1968), 15 Ohio St.2d 65, paragraph four of the syllabus, and *Eastman v. State* (1936), 131 Ohio St. 1, paragraph twelve of the syllabus, approved and followed] .....7

CONCLUSION..... 13

CERTIFICATE OF SERVICE..... 14

APPENDIX:

    Section 3, Article IV, Ohio Constitution ..... A-1

    Sec. 3, Art. IV, Ohio Const. (1968 version) ..... A-2

    Sec. 6, Art. IV, Ohio Const. (1913 version) ..... A-3

    Sec. 6, Art. IV, Ohio Const. (1945 version) ..... A-3

    Sec. 6, Art. IV, Ohio Const. (1959 version) ..... A-2

    R.C. 2945.67 ..... A-4

## TABLE OF CONTENTS

Page No.

**CASES:**

<i>City of Euclid v. Heaton</i> (1968), 15 Ohio St. 2d 65.....	7,10,11,12,13
<i>Eastman v. State</i> (1936), 131 Ohio St. 1.....	7,10,11,13
<i>State v. Adams</i> (1980), 62 Ohio St.2d 151.....	7
<i>State v. Arnett</i> (1986), 22 Ohio St.3d 186 .....	4
<i>State v. Baughman</i> (1882), 38 Ohio St. 455 .....	9
<i>State v. Bistricky</i> (1990), 51 Ohio St.3d 157 .....	<i>passim</i>
<i>State v. Bistricky</i> (1990), 66 Ohio App.3d 395 (on remand).....	4,6
<i>State v. Dodge</i> (1967), 10 Ohio App.2d 92 .....	10,11,13
<i>State v. Edmonson</i> (2001), 92 Ohio St.3d 393.....	12
<i>State ex rel Leis v. Kraft</i> (1984), 10 Ohio St.3d 34.....	3,8,9
<i>State ex rel. Yates v. Court of Appeals</i> (1987), 32 Ohio St.3d 30 .....	3,5,6,7
<i>State v. Fisher</i> (1988), 35 Ohio St.3d 22.....	6
<i>State v. Keeton</i> (1985), 18 Ohio St.3d 379 .....	3,5,6,11,12
<i>State v. Matthews</i> (1998), 81 Ohio St.3d 375 .....	9
<i>State v. Roddy</i> , Cuyahoga App. No. 88759, 2007-Ohio-4015.....	6
<i>State v. Simmons</i> (1892), 49 Ohio St. 305.....	3
<i>Travis v. Public Utilities Comm’n</i> (1931), 123 Ohio St. 355.....	9

## TABLE OF CONTENTS

Page No.

### CONSTITUTIONAL PROVISIONS, STATUTES AND RULES:

Section 3, Article IV, Ohio Constitution .....	2,7,8,13
Sec. 3, Art. IV, Ohio Const. (1968 version) .....	8
Sec. 6, Art. IV, Ohio Const. (1913 version) .....	8
Sec. 6, Art. IV, Ohio Const. (1945 version) .....	8
Sec. 6, Art. IV, Ohio Const. (1959 version) .....	8
Amendment V, United States Constitution .....	2
R.C. 2945.67 .....	<i>passim</i>
R.C. 2505.02 .....	8,9
Crim.R. 29 .....	3,5,7,12

### SECONDARY SOURCES:

Alan M. Kappers and Daniels L. Frizzi, Jr., Note, Prosecutor Appeals: A Proposal to Revamp the Law in Ohio (1977), 4 Ohio N.U. L. Rev. 353 .....	3
Honorable Stephen R. Shaw, Prosecution Appeals Taken Midtrial and Following Acquittal: Changing the Trial and Review of Criminal Cases in Ohio (1996), 22 Ohio N.U. L. Rev. 729 .....	4
Thomas R. Swisher, Ed., Ohio Constitution Handbook (1990 ed). .....	8
William H. Wolff, Jr., James A. Brogan and Shauna K. McSherry, Appellate Practice and Procedure in Ohio (2007) .....	8

## STATEMENT OF INTEREST OF AMICUS CURIAE

The Office of the Ohio Public Defender is a state agency charged with the duty to represent criminal defendants and to coordinate criminal defense efforts throughout Ohio. The Ohio Public Defender has an enduring interest in protecting the integrity of the justice system, and a special role in ensuring that the development and application of the criminal law is in accordance with the rights of Ohio's citizens. This Court has recognized this special role of the Ohio Public Defender as it relates to criminal appeals by the state, and has required that "[i]n a case involving a felony, when a county prosecutor files a notice of appeal under S. Ct. Prac. R. II or an order certifying a conflict under S. Ct. Prac. R. IV, the county prosecutor shall also serve a copy of the notice or order on the Ohio Public Defender." S. Ct. Prac. R. XIV, Sec. 2(A).

This case presents important questions regarding the permissible range of appeals by the state in criminal cases; as such, the Office of the Ohio Public Defender and the clients it serves will be directly affected by any action taken by the Court in this case. Moreover, the Office of the Ohio Public Defender is able to provide an important perspective on the issues that will not otherwise be presented to this Court. Accordingly, the Office of the Ohio Public Defender offers this amicus curiae brief in support of the appellee in this case.

## STATEMENT OF THE CASE AND FACTS

Amicus Curiae hereby adopts and incorporates the Statement of the Case and Facts contained in the Merit Brief of Appellee Rita Roddy.

ARGUMENT OF AMICUS CURIAE  
OHIO PUBLIC DEFENDER

In this case, the state and the Ohio Attorney General both advocate for a broader right of appeal for the prosecution following the acquittal of a criminal defendant. The state argues that it may appeal and obtain an advisory opinion regarding one of the trial court's decisions, and the Ohio Attorney General argues that the appeals court has the authority to reinstate the jury's verdict. While the arguments and conclusions of the state and the Attorney General are inconsistent and irreconcilable, they have in common a complete misconception about the law governing prosecution appeals in Ohio. Specifically, both the state and the Attorney General focus their attention on the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, and fail to recognize that the state's appeal is precluded by R.C. 2945.67 and by Ohio Const. IV Sec. 3(B)(2).

The Attorney General's suggestion that the jury's verdict could be reinstated in this case contravenes both the text of R.C. 2945.67 and this Court's longstanding precedent interpreting that text. Similarly, the state's suggestion that it is entitled to an advisory opinion as to the validity of the judgment acquitting Ms. Roddy is based on its complete misunderstanding of the language of the Ohio Constitutional provision creating the District Courts of Appeal as well as this Court's precedent regarding that provision.

Double Jeopardy notwithstanding, to allow the state's appeal in this case, this Court must revisit at least four of its earlier judgments and overrule at least two of them. Moreover, it must disregard the plain text of a statute and a state constitutional provision and expand the jurisdiction and caseload of both the District Courts of Appeal and of the

Court itself. For these reasons, this Court should adopt the propositions of law offered by the Ohio Public Defender and reject both the appeal and the propositions of law presented by the state and the Ohio Attorney General.

First Proposition of Law of Amicus Curiae:

R.C. 2945.67 does not allow the state to appeal a trial court's judgment granting a motion under Crim.R. 29(C), which is a "final verdict" that cannot be appealed pursuant to the statute [*State ex rel Yates v. Court of Appeals* (1987), 32 Ohio St.3d 30, and *State v. Keeton* (1985), 18 Ohio St.3d 379, approved and followed]

Ohio abides by the rule that the state cannot appeal any judgment, ruling or decision of a trial court in a criminal case unless the power to appeal is specifically conferred by statute. See Alan M. Kappers and Daniels L. Frizzi, Jr., Note, Prosecutor Appeals: A Proposal to Revamp the Law in Ohio (1977), 4 Ohio N.U. L. Rev. 353, 373, discussing *State v. Simmons* (1892), 49 Ohio St. 305, 307. See also *State ex rel Leis v. Kraft* (1984), 10 Ohio St.3d 34, 35 (holding that state may not "prosecute error in a criminal matter" unless appeal is provided by statute).

The modern statutory basis for state appeals is contained in R.C. 2945.67, which grants the state a right to appeal a court's judgment granting a motion to dismiss a charging instrument, a motion to suppress evidence, a motion for the return of seized property, or a motion for postconviction relief. R.C. 2945.67(A). The statute also 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 . . ." *Id.* In *State v. Bistricky* (1990), 51 Ohio St.3d 157, this Court concluded that this language vested courts of appeals with "discretionary authority . . . to decide whether to review

substantive law rulings made in a criminal case which results [sic] in a judgment of acquittal so long as the verdict itself is not appealed.” *Id.* at 160. In *Bistricky*, the court of appeals had held that it “lacked authority” under R.C. 2945.67 to hear the state’s appeal of a bench trial acquittal that was based on the argument that the defendants were statutorily immune from prosecution. *Id.* at 157. This Court indicated that the state’s motion for leave was permissible under the statute, and remanded the case to the court of appeals to exercise its discretion to determine whether to hear the case. *Id.* at 160. The court of appeals declined review, noting that it was “not required to give mere advisory opinions or to rule on questions of law which cannot affect the matters in issue in the case before us.” *State v. Bistricky* (1990), 66 Ohio App.3d 395, 396 (judgment on remand).

*Bistricky* has been interpreted as broadening post-trial state appeals in Ohio. See, e.g., The Honorable Stephen R. Shaw, Prosecution Appeals Taken Midtrial and Following Acquittal: Changing the Trial and Review of Criminal Cases in Ohio (1996), 22 Ohio N.U. L. Rev. 729, 743 (arguing that after *Bistricky* “the door is now wide open with regard to the scope of subject matter” for post-acquittal appeals). But while *Bistricky* may have expanded the rulings the state is permitted to appeal, it did not overrule this Court’s prior decisions restricting the state from appealing judgments of acquittal themselves. *Bistricky*, 51 Ohio St.3d at 159 – 159 fn. 1. Cf. *State v. Arnett* (1986), 22 Ohio St.3d 186, 187-88 (allowing appeal of evidentiary ruling acquittal but forbidding appeal of acquittal).

Moreover, *Bistricky* had no effect whatsoever on the issue of what judgments constitute a “final verdict” and are thus not appealable under R.C. 2945.67. For

example, in *State v. Keeton* (1985), 18 Ohio St.3d 379, this Court concluded that a trial court's decision to enter a directed verdict of acquittal pursuant to Crim.R. 29 was a "final verdict" within the meaning of R.C. 2945.67(A), and was therefore not appealable by the state pursuant to the statute. *Id.* at paragraph two of the syllabus. More to the point, in *State ex rel. Yates v. Court of Appeals* (1987), 32 Ohio St.3d 30, this Court held that a Crim.R. 29(C) judgment of acquittal granted following a jury's finding of guilty is a "final verdict" that the state may not appeal. *Id.* at syllabus. Insofar as it rests on an interpretation of R.C. 2945.67, this case is controlled by *Keeton*, and even more squarely controlled by *Yates*.<sup>1</sup> Cf. *Bistricky*, 51 Ohio St.3d at 158 (quoting *Keeton* and *Yates*). Indeed, there is virtually no distinction between the procedural situation presented in this case and that described in *Yates*.

The state's assertion that it is appealing a substantive law ruling rather than the final verdict itself is simply false. There is no "substantive law ruling" in place in this case; rather, the state simply submits that the trial court's Crim.R. 29(C) analysis was *wrong*. See Merit Brief of Appellant at 6-7. The state's entire argument on this point is merely a series of reasons how the trial court abused its discretion. *Id.* This is to be contrasted against the specific legal rulings it sought review of in *Bistricky* – namely, that a specific statute provided a blanket immunity rather than an affirmative defense, and that the statute's plain language provided an absolute defense to the crime

---

<sup>1</sup> Moreover, the *Yates* majority (including Chief Justice Moyer) specifically rejected the argument advanced in this case by the Attorney General, noting that "R.C. 2945.67 has no analogous federal counterpart . . . . The 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. The Attorney General's brief cites a number of this Court's authorities, but tellingly fails to mention *Yates*, the case that forecloses the argument it presents.

charged. These issues of statutory construction are quintessentially legal ones, and can be plainly distinguished from the claims presented by the state here—that the trial court’s acquittal was improperly based on the victim’s lack of credibility. See *State v. Roddy*, Cuyahoga App. No. 88759, 2007-Ohio-4015 at ¶13 (quoting the state’s argument that the trial court “misapplied the legal standard for a judgment of acquittal because it considered the victim’s credibility”).

Moreover, the state fails to analyze a critical question before this Court – whether the appellate court’s decision to deny leave for the state’s appeal constitutes an abuse of that court’s discretion. See *Id.* at 8-11 (arguing that the appellate court’s decision was “erroneous”). Cf. *Bistricky*, 66 Ohio App.3d at 396 (declining review upon remand). Contrary to the arguments of the state, the appellate court’s denial of review was not solely based on the Double Jeopardy Clause. Rather, the appellate court analyzed *Keeton* and *Yates*, looked at the state’s claimed error, and concluded that “this matter does not present an evidentiary ruling, such as admissibility of evidence, or other decision and instead is an appeal from the final resolution of this matter.” *Roddy* at ¶¶12-13.

Even assuming that the state is not appealing a “final verdict” in this case, there is no basis whatsoever to conclude that the court of appeals abused its discretion by denying leave to appeal such issues. The appellate court’s review of this case hardly presents an error of fact or law sufficient to demonstrate an abuse of that court’s discretion. Cf. *State v. Fisher* (1988), 35 Ohio St.3d 22, 26 (holding that denial of leave to appeal trial court’s decision to grant shock probation was not abuse of discretion). As the state so often reminds criminal defendants, an abuse of discretion “connotes more

than an error of law or of judgment; it implies that the trial court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157. That attitude is wholly lacking here. The state here pays lip service to the idea that the trial court's alleged error is capable of repetition in other cases, but even the most cursory examination of the issue demonstrates that the "substantive legal issue" is neither novel nor purely legal—rather, it is fact-intensive and purely mundane. Cf. *Bistricky*, 51 Ohio St.3d at 157. In fact, as the appellate court of appeals recognized, it is the very nature of those issues that demonstrates the real judgment being appealed by the state is the trial court's Crim.R. 29(C) judgment of acquittal. The apparent confusion of the Attorney General as to the nature of the issues should further demonstrate that the state truly seeks nothing but a review of a "final verdict." Cf. *Yates*, 32 Ohio St.3d 30 at the syllabus. Accordingly, this Court should follow its prior precedent and conclude that the state's appeal from a final verdict is not authorized by R.C. 2945.67.

#### Second Proposition of Law of Amicus Curiae:

Ohio Const. Art. IV Sec. 3(A)(2) precludes the state from seeking an advisory opinion as to the validity of a trial court decision, as an advisory opinion does not "review and affirm, modify, or reverse" a judgment or final order [*City of Euclid v. Heaton* (1968), 15 Ohio St.2d 65, paragraph four of the syllabus, and *Eastman v. State* (1936), 131 Ohio St. 1, paragraph twelve of the syllabus, approved and followed]

Ohio Const. Art. IV Sec. 3 establishes Ohio's District Courts of Appeals and provides for their original and appellate jurisdiction. Relevant to this case, Article IV Section 3(B)(2) states that "Courts of Appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district . . . ." This same

language has survived substantively unchanged since 1913, when amendments establishing the limits of the jurisdiction of the Courts of Appeals and the Ohio Supreme Court were incorporated into the Ohio Constitution. See Ohio Const. Art. IV Sec. 6 (1913 version), Ohio Const. Art. IV Sec. 6 (1945 version), Ohio Const. Art. IV Sec. 6 (1959 version), Ohio Const. Art. IV Sec. 3 (1968 version). See also Thomas R. Swisher, Ed., Ohio Constitution Handbook (1990 ed). As the compilers of one of Ohio's annotated revised codes observed:

Until 1912, the practice was to leave to the legislature the task of providing the details of jurisdiction of the appellate courts. The Constitution gave the district courts created in 1851 the same original jurisdiction as the Supreme Court, plus appellate jurisdiction as provided by law, and this formula was continued when the district courts were replaced by the circuit courts in 1883. The 1912 amendments discarded this practice, so that the jurisdiction of the courts of appeals was spelled out in some detail—in substance, much the same as present §3, Article IV.

Ohio Const. Art. IV Sec. 3 (2008 Baldwin's O.R.C. Ann.), 1990 Editor's Comment.

As a result of the 1912 amendments, most of the legislative attention regarding appellate jurisdiction revolves around the question of whether the order to be reviewed is a "final order" that is reviewable under the relevant statutes. See R.C. 2505.02. and William H. Wolff, Jr., James A. Brogan and Shauna K. McSherry, Appellate Practice and Procedure in Ohio (2007) at 16-42 (discussing appealability and focusing on final orders). Moreover, Ohio's most recent revisions to the final orders statute restrict the jurisdiction of courts of appeals to seven specified types of final orders. R.C. 2505.02(B)(1 – 7) ("An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, *when it is one of the following . . .*") (emphasis added). Other decisions of this Court indicate that the state must have in place a "final order" under R.C. 2505.02 in addition to complying with R.C. 2945.67. See *State ex rel Leis v.*

*Kraft* (1984), 10 Ohio St.3d 34, 37 (holding that an order granting defendant a polygraph at state expense was a final order under R.C. 2505.02 and is appealable by leave under R.C. 2945.67) and *State v. Matthews* (1998), 82 Ohio St.3d 375, 379 (holding that the granting of a motion for new trial is a final order under R.C. 2505.02 and is appealable by leave under R.C. 2945.67).

But there is another aspect to the constitutional text. Even if the trial court order in question is a "judgment or final order", the Constitution specifically enumerates what actions the appellate court may take when reviewing that order. The appellate jurisdiction of Ohio's district courts cannot be expanded beyond the authority to "review and affirm, modify, or reverse judgments or final orders" of trial courts.

The state in this case claims to seek an advisory opinion regarding the trial court's judgment of law. Since as far back as 1882, this Court has recognized the inherent problems with the issuance of advisory opinions. In *State v. Baughman* (1882), 38 Ohio St. 455, this Court refused to issue an advisory opinion to the Ohio Attorney General regarding the constitutionality of a specific question presented in a joint resolution of the general assembly. The Court held that it could not "decide hypothetical questions of law not involved in a judicial proceeding in a cause before it" and that such a decision would be "unauthorized, and dangerous in its tendency." *Id.* at 459. Similarly, in *Travis v. Public Utilities Comm'n* (1931), 123 Ohio St. 355, the Court noted that its duty was to "decide actual controversies where the judgment can be carried into effect, and not to give opinions upon moot questions, or abstract propositions, or to declare principles or rules of law which cannot affect the matter at issue in the case before it." *Id.* at paragraph 2 of the syllabus.

More directly to the issue before this Court, in *Eastman v. State* (1936), 131 Ohio St. 1, the Court determined that a set of statutes granting the power to a state prosecutor to seek an advisory opinion from the Ohio Supreme Court under the general code was unconstitutional under the Ohio Constitution. *Id.* at 11-12. The Court observed:

These statutes provide that the decree of this court shall *not* affect the judgment of the court of common pleas in *said* cause, but they also contain the further provision that the decree of this court *shall* determine the law to govern in a *similar* case. Just what sort of process is this? It has been said that this is not an exercise of judicial power. Of course it could not well be argued otherwise, inasmuch as this power is concededly controlled by the Constitution alone, except in the case of revisory jurisdiction of the proceedings of administrative officers. But if the power involved in these statutes is not judicial, what is it? Legislative? Certainly not the latter, because all courts insistently deny any indulgence in judicial legislation. Then what becomes of the axiom that the exclusive sources of law are the legislative and judicial processes? . . . Although the purpose of these statutes is a laudable one, it is apparent that they are in conflict with sections 2 and 6 of article IV of the Constitution of Ohio, and therefore void.

*Id.* Thirty years later, this Court squarely faced the issue of whether the state could seek review of a criminal case following an acquittal. In *City of Euclid v. Heaton* (1968), 15 Ohio St.2d 65, 72, five members of the Court affirmed and adopted the rationale of *State v. Dodge* (1967), 10 Ohio App.2d 92, and held that insofar as the statutes governing such appeals allowed the state to seek an advisory opinion, they were unconstitutional. The *Dodge* court specifically and thoroughly considered how the language of the Ohio Constitution affected its ability to issue post-verdict advisory opinions in criminal cases:

We conclude from the various authorities and from its ordinary use and meaning that, as used in Section 6, Article IV of the Ohio Constitution, the word 'review' has reference to the general appellate process, which may be more specifically defined and prescribed by the General

Assembly, and which produces, or results in, the affirmance, modification, setting aside, or reversal of a judgment or final order. . . . We therefore further conclude that under present constitutional provisions the exercise by Courts of Appeals of their appellate jurisdiction to 'review' a judgment or final order of a trial court must always produce, or result in, the affirmance, modification, setting aside, or reversal of that judgment or final order, and thereby must necessarily 'affect the judgment of the trial court in said cause.' . . . [A]ny attempt by the General Assembly to bestow upon the Courts of Appeals jurisdiction to entertain a proceeding which results in a decision which 'shall not affect the judgment of the trial court in said cause' but merely 'shall determine the law to govern in a similar case' is an attempt to enlarge the jurisdiction, as well as the judicial power, of such courts beyond that prescribed by Section 6, Article IV of the Constitution, as amended effective January 1, 1945, and is, therefore, unconstitutional and void.

*Dodge*, 10 Ohio App.3d at 102-03 (affirmed and reasoning adopted by *Heaton*, 15 Ohio St.2d at 72).<sup>2</sup> *Heaton's* subsequent affirmance and adoption of *Dodge* renders its opinion the controlling Ohio law on the subject, since *Eastman*, *Heaton* and *Dodge* have never been overruled. And to this date, the constitutional problems with post-verdict advisory appeals have not been resolved. See, e.g., *Kappers and Frizzi*, *supra* at 390-91 (arguing that while a prosecutorial advisory opinion is desirable, "the constitutional impediment to lack of jurisdiction can only be removed by an amendment to the Ohio Constitution enlarging the scope of review . . . .") The cases following *Keeton* and *Bistricky* appear to allow the state to seek such advisory opinions under R.C. 2945.67,

---

<sup>2</sup> Although the Court unanimously affirmed the judgment in *Dodge*, the *Heaton* opinion merely reports that "five members of the court, affirming and adopting the rationale of the Court of Appeals in its opinion in *Dodge*, concurred in the proposition that the statutes referred to are constitutionally inoperative to permit an 'appeal' in a criminal case on behalf of the prosecutor from any judgment of a trial court not included within the exceptions enumerated in [former] Section 2945.70." *Heaton*, 15 Ohio St.2d at 76. The opinion contains no further analysis of this proposition, largely because of the procedural morass surrounding the case, which related to the adoption of the Modern Courts Amendment after the case was argued but prior to the issuance of the opinion. See *id.* at 72-76. But the ultimate result is that the controlling law on this issue is contained in *Dodge*, and it is that opinion that has been quoted and analyzed herein.

but none of those cases (including *Keeton* and *Bistricky* themselves) have addressed the foregoing constitutional language. And while R.C. 2945.67 is a slightly different statute than the one addressed in *Heaton* and *Dodge*, the general problem of advisory appeals is the same, and it is axiomatic that an amendment to a statute cannot affect the constitution.

Moreover, the analysis offered in *Dodge* and adopted in *Heaton* seems intuitively correct—the language “review and affirm, modify, or reverse” seems to be a very specific grant of judicial power under the Ohio Constitution, and the legislative lacks the power to change it. Were courts allowed to take actions that did not “review and affirm, modify or reverse” the judgment of a trial court, they would be engaging in an exercise that seems odd and nonjudicial. This Court recognized the strangeness of this scenario in *State v. Edmonson* (2001), 92 Ohio St.3d 393, 395:

Because it rejected the legal conclusion reached by the trial court, the court of appeals originally reversed the trial court's judgment and remanded for further proceedings. The court of appeals later issued an amended entry in which it affirmed the trial court's judgment finding Edmondson guilty only of the lesser-included offenses . . . . The court of appeals' correction of its judgment was necessary insofar as reversal and remand would have been a futile exercise; double-jeopardy principles barred the state from pursuing the grand theft charges because the trial court's finding of guilt on the lesser-included offenses operated as an acquittal of the greater offenses . . . . Although the state's appeal had no effect on Edmonson's case, the court of appeals had statutory authority to exercise jurisdiction over it [under R.C. 2945.67].

The language in *Edmonson* is careful to note that Ohio Supreme Court's jurisdiction is constitutional and properly based on the appellate court's certification of a conflict, *id.* at 396, but it specifically avoids addressing whether the appellate court's exercise of jurisdiction was constitutionally proper. Instead, it merely notes that “the court of appeals had statutory authority” to decide the case, in accordance with *Keeton* and

*Bistricky. Id.*

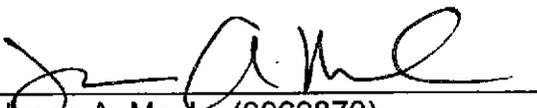
While it does not appear that the advisory opinion procedure under R.C. 2945.67 has created problems to date, amicus curiae respectfully assert that this case, in which the state simply challenges the factual and analytical basis of trial court's Crim.R. 29 judgment, demonstrates that there are serious problems ahead. Moreover, if this Court rejects the rationale of *Eastman*, *Heaton*, and *Dodge*, there appears to be no other constitutional impediment to advisory appellate review of civil judgments. This is unwise and unnecessary, and would greatly reduce the efficacy of Ohio's Declaratory Judgments Act. Cf. R.C. Chapter 2721. For all these reasons, this Court should adhere to its established precedent and conclude Ohio Const. Art. IV Sec.3(B)(2) precludes the state from seeking an advisory opinion under R.C. 2945.67(A).

#### CONCLUSION

The Ohio Public Defender respectfully requests this Court to reject the state's proposition of law, to reject the Ohio Attorney General's proposition of law and to affirm the judgment of the Court of Appeals for the Eighth Appellate District dismissing the state's appeal. The Ohio Public Defender further respectfully requests this Court to adhere to its prior caselaw and adopt the two propositions of law offered in response to the state's appeal.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



Jason A. Macke (0069870)  
Assistant State Public Defender

8 E. Long St., 6th Floor  
Columbus, Ohio 43215  
614/466-5394  
614/728-8091 (fax)  
[mackeja@opd.ohio.gov](mailto:mackeja@opd.ohio.gov)

Counsel for Amicus Curiae  
Ohio Public Defender

### CERTIFICATE OF SERVICE

I certify a copy of the foregoing document has been served upon the following persons, by regular mail on this 10<sup>th</sup> day of June, 2008:

MATTHEW E. MEYER (0075253)  
Assistant County Prosecutor  
Cuyahoga County Prosecutor's Office  
1200 Ontario 9<sup>th</sup> Floor  
Cleveland, Ohio 44113

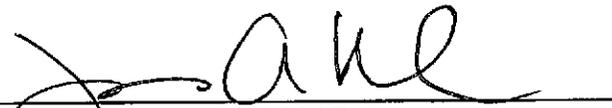
Counsel for Appellant State of Ohio

JOHN MARTIN (0020606)  
Assistant Public Defender  
Cuyahoga County Public Defender's Office  
1200 West Third Street  
100 Lakeside Place  
Cleveland, Ohio 44113-1569

Counsel for Appellee Rita Roddy

WILLIAM P. MARSHALL (0038077)  
Solicitor General  
Office of the Ohio Attorney General  
30 E. Broad St., 17<sup>th</sup> Floor  
Columbus, Ohio 43215  
614/466-8980

Counsel for Amicus Curiae  
Ohio Attorney General

  
Jason A. Macke (0069870)  
Assistant State Public Defender

Counsel for Amicus Curiae  
Ohio Public Defender

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	No. 2007-1640
Appellant,	:	
v.	:	On Appeal from the
RITA RODDY,	:	Cuyahoga County Court of
Appellee.	:	Appeals, Eighth Appellate
	:	District, Case No. 88759

---

APPENDIX TO

MERIT BRIEF OF AMICUS CURIAE OHIO PUBLIC DEFENDER IN SUPPORT OF  
APPELLEE RITA RODDY

---

Oh. Const. Art. IV, § 3 (2008)

§ 3. Court of appeals

(A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case. The court shall hold sessions in each county of the district as the necessity arises. The county commissioners of each county shall provide a proper and convenient place for the court of appeals to hold court.

(B) (1) The courts of appeals shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district, except that courts of appeals shall not have jurisdiction to review on direct appeal a judgment that imposes a sentence of death. Courts of appeals shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2(B) (2) of this article. No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

(C) Laws may be passed providing for the reporting of cases in the courts of appeals.

(Amended November 8, 1994)

**O Const IV § 3 Organization and jurisdiction of courts of appeals**

(A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case. The court shall hold sessions in each county of the district as the necessity arises. The county commissioners of each county shall provide a proper and convenient place for the court of appeals to hold court.

(B) (1) The courts of appeals shall have original jurisdiction in the following:

- (a) Quo warranto;
- (b) Mandamus;
- (c) Habeas corpus;
- (d) Prohibition;
- (e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district and shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2 (B) (2) of this article. No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

(C) Laws may be passed providing for the reporting of cases in the courts of appeals.

**HISTORY:** 132 v HJR 42, adopted eff. 5-7-68

Note: Former Art IV, § 3 repealed by 132 v HJR 42, eff. 5-7-68; 1912 constitutional convention, am. eff. 1-1-13; 1851 constitutional convention, adopted eff. 9-1-1851

Note: Effective date and repeal date for revision of O Const Art IV by 132 v HJR 42 is May 7, 1968. See *Euclid v Heaton*, 15 OS(2d) 65, 238 NE(2d) 790 (1968).

**O Const IV § 6 Former version in effect from 11-3-1959 to 5-7-1968**

The state shall be divided into appellate districts of compact territory bounded by county lines, in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and

disposition of each case. Vacancies caused by the expiration of the terms of office of the judges of the courts of appeals shall be filled by the electors of the respective appellate districts in which such vacancies shall arise. Until otherwise provided by law the term of office of such judges shall be six years. Laws may be passed to prescribe the time and mode of such election and the qualifications of such judges, and to alter the number of districts or the boundaries thereof, but no such change shall abridge the term of any judge then in office. The court of appeals shall hold at least one term annually in each county in the district and such other terms at a county seat in the district as judges may determine upon, and the county commissioners of any county in which the court of appeals shall hold sessions shall make proper and convenient provisions for the holding of such court by its judges and officers. Each judge shall be competent to exercise judicial powers in any appellate district of the state.

The courts of appeals shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and such jurisdiction as may be provided by law to review, affirm, modify, set aside, or reverse judgments or final orders of boards, commissions, officers, or tribunals, and of courts of record inferior to the court of appeals within the district, and judgments of the court of appeals shall be final in all cases, except cases involving questions arising under the constitution of the United States or of this state, cases of felony, cases of which it has original jurisdiction, and cases of public or great general interest in which the supreme court may direct any court of appeals to certify its record to that court. No judgment of any court of record entered on the verdict of the jury shall be set aside or reversed on the weight of the evidence except by the concurrence of all three judges of a court of appeals. Only a majority of such court of appeals shall be necessary to pronounce a decision, make an order or enter judgment, upon all other questions; and whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination. The decisions in all cases in the Supreme Court shall be reported, together with the reasons therefor, and laws may be passed providing for the reporting of cases in the courts of appeals. The chief justice of the supreme court of the state may assign any judge of the court of appeals to any county to hold court. The chief justice of the supreme court shall determine the disability or disqualification of any judge of the court of appeals.

**O Const IV § 6 Former version in effect from 1-1-1945 to 11-3-1959**

The state shall be divided into appellate districts of compact territory bounded by county lines, in each of which there shall be a court of appeals consisting of three judges. Vacancies caused by the expiration of the terms of office of the judges of the courts of appeals shall be filled by the electors of the respective appellate districts in which such vacancies shall arise. Until otherwise provided by law the term of office of such judges shall be six years. Laws may be passed to prescribe the time and mode of such election and the qualifications of such judges, and to alter the number of districts or the boundaries thereof, but no such change shall

abridge the term of any judge then in office. The court of appeals shall hold at least one term annually in each county in the district and such other terms at a county seat in the district as the judges may determine upon, and the county commissioners of any county in which the court of appeals shall hold sessions shall make proper and convenient provisions for the holding of such court by its judges and officers. Each judge shall be competent to exercise judicial powers in any appellate district of the state.

The courts of appeals shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and such jurisdiction as may be provided by law to review, affirm, modify, set aside, or reverse judgments or final orders of boards, commissions, officers, or tribunals, and of courts of record inferior to the court of appeals within the district, and judgments of the courts of appeals shall be final in all cases, except cases involving questions arising under the constitution of the United States or of this state, cases of felony, cases of which it has original jurisdiction, and cases of public or great general interest in which the supreme court may direct any court of appeals to certify its record to that court. No judgment of any court of record entered on the verdict of the jury shall be set aside or reversed on the weight of the evidence except by the concurrence of all three judges of a court of appeals. Only a majority of such court of appeals shall be necessary to pronounce a decision, make an order or enter judgment, upon all other questions; and whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination. The decisions in all cases in the supreme court shall be reported, together with the reasons therefor, and laws may be passed providing for the reporting of cases in the courts of appeals. The chief justice of the supreme court of the state may assign any judge of the court of appeals to any county to hold court. The chief justice of the supreme court shall determine the disability or disqualification of any judge of the court of appeals. All laws now in force, not inconsistent herewith, shall continue in force until amended or repealed; provided, that all cases, actions, or proceedings pending before or in any board, commission, officer, tribunal, or court on the first day of January, 1945, shall be heard, tried, and reviewed in the same manner and by the same procedure as is now authorized by law.

**O Const IV § 6 Former version in effect from 1-1-1913 to 1-1-1945**

The state shall be divided into appellate districts of compact territory bounded by county lines, in each of which shall be a court of appeals consisting of three judges, and until altered by law the circuits in which the circuit courts are now held shall constitute the appellate districts aforesaid. The judges of the circuit courts now residing in their respective districts shall be the judges of the respective courts of appeals in such districts and perform the duties thereof until the expiration of their respective terms of office. Vacancies caused by the expiration of the terms of office of the judges of the courts of appeals shall be filled by the electors of the respective appellate districts in which such vacancies shall arise. Until otherwise provided by law the term of office of such judges shall be six years. Laws

may be passed to prescribe the time and mode of such election and to alter the number of districts or the boundaries thereof, but no such change shall abridge the term of any judge then in office. The court of appeals shall hold at least one term annually in each county in the district and such other terms at a county seat in the district as the judges may determine upon, and the county commissioners of any county in which the court of appeals shall hold sessions shall make proper and convenient provisions for the holding of such court by its judges and officers. Each judge shall be competent to exercise judicial powers in any appellate district of the state. The courts of appeals shall continue the work of the respective circuit courts and all pending cases and proceedings in the circuit courts shall proceed to judgment and be determined by the respective courts of appeals, and the supreme court, as now provided by law, and cases brought into said courts of appeals, after the taking effect hereof shall be subject to the provisions hereof, and the circuit courts shall be merged into, and their work continued by, the courts of appeals. The courts of appeals shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and appellate jurisdiction in the trial of chancery cases, and, to review, affirm, modify, or reverse the judgments of the court of common pleas, superior courts and other courts of record within the district as may be provided by law, and judgments of the courts of appeals shall be final in all cases, except cases involving questions arising under the constitution of the United States or of this state, cases of felony, cases of which it has original jurisdiction, and cases of public or great general interest in which the supreme court may direct any court of appeals to certify its record to that court. No judgment of a court of common pleas, a superior court or other court of record shall be reversed except by the concurrence of all the judges of the court of appeals on the weight of evidence, and by a majority of such court of appeals upon other questions; and whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination. The decisions in all cases in the supreme court shall be reported, together with the reasons therefor, and laws may be passed providing for the reporting of cases in the courts of appeals. The chief justice of the supreme court of the state shall determine the disability or disqualification of any judge of the courts of appeals and he may assign any judge of the courts of appeals to any county to hold court.

ORC Ann. 2945.67 (2008)

§ 2945.67. Appeal by state

(A) A prosecuting attorney, village solicitor, city director of law, or the attorney general may appeal as a matter of right any decision of a trial court in a criminal case, or any decision of a juvenile court in a delinquency case, which decision grants a motion to dismiss all or any part of an indictment, complaint, or information, a motion to suppress evidence, or a motion for the return of seized property or grants post conviction relief pursuant to sections 2953.21 to 2953.24\* of the Revised Code, and may appeal by leave of 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. In addition to any other right to appeal under this section or any other provision of law, a prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a municipal corporation, or the attorney general may appeal, in accordance with section 2953.08 of the Revised Code, a sentence imposed upon a person who is convicted of or pleads guilty to a felony.

(B) In any proceeding brought pursuant to division (A) of this section, the court, in accordance with Chapter 120. of the Revised Code, shall appoint the county public defender, joint county public defender, or other counsel to represent any person who is indigent, is not represented by counsel, and does not waive the person's right to counsel.

**History:** 137 v H 1168 (Eff 11-1-78); 146 v S 2. Eff 7-1-96.