

NO. 07-1640

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IN THE SUPREME COURT OF OHIO

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APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 88759

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STATE OF OHIO,

Plaintiff-Appellant

-vs-

RITA RODDY,

Defendant-Appellee

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REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

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Now comes Cuyahoga County Prosecuting Attorney William D. Mason on behalf of the State of Ohio, by and through his undersigned assistants, and respectfully submits the following Reply Brief of Appellant pursuant to Sup. Ct. R. P. VI, § 4.

**1. Subjecting erroneous judicial acquittals to appellate review in order to deter future repetition is sound public policy.**

By urging abolishment, the legal arguments put forward by defendant-appellee (“defendant”) and her *amicus* against post-acquittal “rule of law” appeals inadvertently emphasize the need for appellate review of erroneous judicial acquittals. It is largely self evident that most criminal appeals focus on various legal challenges to criminal defendants’ convictions or sentences. The problem of acquittals based upon straightforward legal error, however, goes largely unnoticed because most acquitted criminal cases never get appealed.

Without overstating the problem, legally erroneous judicial acquittals do exist,<sup>1</sup> and have the potential to be repeated again and again without some form of appellate

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<sup>1</sup> See James F. McCarty, *More defendants opt to skip jury Prosecutor calls judges soft; other cite no-deal policy*, Cleveland Plain Dealer (July 12, 2005) A1, 2005 WLNR

review. Indeed, the problem has surfaced recently before this Honorable Court. See *State v. Mayfield*, 102 Ohio St.3d 1240, 2004-Ohio-3440, at ¶¶ 10-20 (O'Donnell, J, dissenting, describing the prosecutor's appeal of the trial court's decision to acquit a criminal defendant following a no contest plea, based upon unsworn statements made by the defendant and his wife following the plea).

While jury nullification has persisted within the legal system as a form of persistent civil disobedience that courts have no authority to prevent, there should be no legal tolerance for judicial nullification. *United States v. Lynch* (C.A. 2, 1998), 162 F.3d 732, 747 (Feinberg, J., dissenting). “[T]he exercise of nullification by a federal judge—even when termed a ‘prerogative of leniency’—may create an appearance of injustice that cannot be tolerated by a legal system that strives to resolve cases in a reliable, consistent and objective manner.” *Id.* “The arbitrariness of a power that would allow an Article III judge to acquit otherwise guilty defendants if and when the judge sees fit to do so simply cannot be reconciled with the Supreme Court’s admonition that to perform its high function in the best way justice must satisfy the appearance of justice.” *Id.*, quoting *In re Murchison* (1955), 349 U.S. 133, 136, 75 S.Ct. 623 (internal quotations omitted). It has also been observed that “[j]udicial nullification’ is not a permissible way to ameliorate the consequences of a criminal prosecution.” *United States v. Nofziger*, (C.A.D.C., 1989), 878 F.2d 442, 456 (Edwards, J., dissenting).

As the foregoing authority makes clear, sound public policy supports making acquittals based upon straightforward legal error subject to appellate review, at least as far as the propriety of the “rule of law” upon which they are based. The defendant and

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24026679 (describing statistical evidence that less than a half dozen of Cuyahoga County’s 34 Court of Common Pleas judges heard a disproportionately large number of bench trials ending in acquittal).

her *amicus's* attempt to restrict the *Bistricky* "rule of law" appeal seems to tacitly support a legal system that either ignores, or allows for, improper judicial nullification. In response, the State submits that no criminal defendant should have the right to petition a court for improper judicial nullification. No judge should ever convict a criminal defendant based upon any other standard than the controlling law and manifest weight of the evidence. Likewise, no judge should ever acquit any criminal defendant based upon any other standard than the controlling law and the manifest weight of the evidence.

## **2. The *Bistricky* "rule of law" appeal is constitutional.**

Defendant and her *amicus* contend that a *Bistricky* "rule of law" appeal violates the constitutional provision giving courts of appeals appellate jurisdiction to "review and affirm, modify or reverse judgments or final orders." (Ape Br. at pp. 1-6, *amicus* ape. Br. at 7-13). In essence, defendant argues, the *Bistricky* rule of law appeal amounts to an appellate form of declaratory judgment that will not alter the actual final verdict criminal case, and therefore will not "review and affirm, modify or reverse judgments or final orders" in violation of Ohio Constitution Article IV, § 3(B). This Honorable Court did hold in *Bistricky*, however, that "[o]rdinarily when there is no case in controversy or any ruling by an appellate court that would result in an advisory opinion, there will be no appellate review unless the underlying legal question is capable of repetition yet evading review." *State v. Bistricky* (1990), 51 Ohio St.3d 157, 158, 555 N.E.2d 644.

In response to defendant and her *amicus's* novel constitutionality argument, Article IV, § 3(B) of the Ohio Constitution confers the court of appeals with jurisdiction as provided "by law" to *review and affirm*. The *Bistricky* Court clearly held that a post-verdict rule of law appeal is allowable by statute. "A court of appeals has discretionary

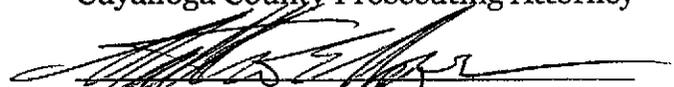
authority pursuant to R.C. 2945.67(A) to review substantive law rulings made in a criminal case which result in a judgment of acquittal.” *Id.*, at syllabus.

From your writer’s research, the phrase “review and affirm” contained in Article IV, § 3(B) has not been interpreted in the context of a *Bistricky* “rule of law” appeal. Applying reason and common sense to this provision’s plain language, however, the phrase “review and affirm” fits exactly with the role of the appellate court in a *Bistricky* “rule of law” appeal. See *State v. Jackson*, 102 Ohio St.3d 380, 2004-Ohio-3206, at ¶ 14 (explaining that when determining the intent of the framers, courts first look to the plain language of a constitutional provision). Under *Bistricky*, what else would an appellate court do but “review and affirm?” Because the prosecutor cannot appeal the final verdict, the reviewing court should “affirm.” But because R.C. 2945.67(A) allows the prosecutor to ask for leave to appeal any other decision, i.e., the “rule of law” producing an erroneous acquittal, the court of appeals will nevertheless conduct “review.” Defendant and her *amicus* myopically focus on the portion of Article IV, Section 3(B) that allows courts of appeal to “modify or reverse judgments or final orders,” while overlooking the “review and affirm” prong. Under this plain reading of the constitution, the *Bistricky* “rule of law” appeal passes muster.

For the foregoing reasons, the State respectfully urges this Honorable Court to reject the arguments of defendant and her *amicus*.

Respectfully submitted,

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### CERTIFICATE OF SERVICE

A copy of the foregoing Reply Brief of Appellant was sent by regular U.S. mail and electronically this 24<sup>th</sup> day of June, 2008 to counsel for defendant-appellee, John Martin, Esq., 1200 West Third Street, 100 Lakeside Place, Cleveland, Ohio 44113, counsel for *amicus curiae* in support of defendant-appellee, Jason A. Macke, Esq., 8 E. Long Street, 6<sup>th</sup> Floor, Columbus, Ohio 43215, and counsel for *amicus curiae* in support of plaintiff-appellant, Kelly A. Borchers, Esq., 30 E. Broad Street, 17<sup>th</sup> Floor, Columbus, Ohio 43215.

  
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