NO. 10-1476

ORIGINAL

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 95124

STATE OF OHIO,

Plaintiff-Appellant

-vs-

JOSEPH L. MOORE,

Defendant-Appellee

MEMORANDUM IN SUPPORT OF JURISDICTION

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TABLE OF CONTENTS

EXPLANATION OF WHY THIS FELONY CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC INTEREST 1

STATEMENT OF THE CASE AND RELEVANT FACTS 4

LAW AND ARGUMENT 7

Proposition of Law I: Under R.C. 2945.67(A) and *State v. Bistricky* (1990), 51 Ohio St.3d 157, the State may seek leave to appeal any evidentiary or legal ruling that results in an erroneous judgment of acquittal, so long as the verdict itself is undisturbed. 7

1. Deterring legal error that is capable of repetition while evading review promotes the effective prosecution of crime 8

2. The Eighth District has improperly distinguished between acquittal decisions and legal decisions resulting in acquittal 10

Proposition of Law II: When A criminal defendant colludes with his codefendant to perpetrate a killing, leaves his DNA on the murder weapon, and threatens to kill shortly before the actual killing takes place, the evidence establishes complicity to commit aggravated murder rather than "mere presence" at a killing. 12

1. The trial court made a substantive legal error by failing to account for evidence that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime 12

CONCLUSION 15

CERTIFICATE OF SERVICE 16

Appendix

State of Ohio v. Joseph L. Moore, Case No. 532486, Journal Entry No. 434084 1

EXPLANATION OF WHY THIS FELONY CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC INTEREST

It is a regrettable but necessary byproduct of our constitutional system that a man who participated in a killing should go free after a wrongful judgment of acquittal. Appellate review of the wrongful acquittal's erroneous legal foundation can, at the very least, give the public confidence that future killers won't receive the same unjust windfall.

This Honorable Court should hear this case to clarify that when the State seeks leave to appeal pursuant to R.C. 2945.67(A) and *State v. Bistricky* (1990), 51 Ohio St.3d 157, 159, 555 N.E.2d 644, it makes no difference whether the State is appealing the evidentiary rationale for acquittal or an erroneous legal ruling that produced the acquittal. In addition to this case, the Eighth District Court of Appeals has repeatedly dismissed prosecutors' *Bistricky* appeals in *State v. Roddy,* Cuyahoga App. No. 88759, 2007-Ohio-4015,[1] as well as in *State v. Empe,* Cuyahoga App. No. 90333, 2008-Ohio-3803.

Although the Eighth District *sua sponte* dismissed the State's appeal in this case without opinion or comment, in *Roddy,* the Eighth District interpreted *Bistricky* to mean that "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, supra,* at ¶13. In *Empe,* the Eighth District rejected the State's appeal because it would be a purely "advisory opinion." *Empe, supra,* at ¶3. Both views, however, are erroneous under *Bistricky,* as Judge Shaw pointed out in his authoritative article on *Bistricky* and its predecessors:

> [I]t seems evident that both trial courts and appellate courts have been uncomfortable with the review of those appeals both because it looks like a review of acquittals (barred by double jeopardy) and because it looks like purely

[1]This Honorable Court accepted jurisdiction of the State's appeal in *Roddy.* However, it subsequently dismissed the State's appeal as having been improvidently granted. *State v. Roddy,* 120 OhioSt.3d 1208, 898 N.E.2d 49, 2008-Ohio-6101.

> advisory opinions. However, both objections are mistaken. Since acquittals are not being overturned there is no double jeopardy problem. And since the only issues being decided are ones that are "capable of repetition yet evading review," the appeals are genuine controversies and not mere abstract questions of law.

Hon. Stephen R. Shaw, *Prosecution Appeals Taken Midtrial and Following Acquittal: Changing the Trial and Review of Criminal Cases in Ohio*, 22 Ohio N.U. L. Rev. 729, 751 (1996).

Thus, Supreme Court review in this case will serve to clarify that *Bistricky* is a viable tool for prosecutors to challenge erroneous judgments of acquittal, regardless of whether the legal ruling is an "evidentiary ruling, such as the admissibility of evidence" or is an appeal "from the final resolution of this matter." *Roddy, supra,* at ¶13. From a practical standpoint, the State submits that there is no real difference between the two issues under *Bistricky,* and any erroneous ruling that results in an acquittal should be subject to the State's right to appeal.

While a second trial can never occur after a true acquittal, appellate review of a trial court's erroneous legal rulings is warranted to deter future repetition. "[W]hile defendants are entitled to every benefit of the doubt, and may even be entitled to jury nullification or acquittals against the evidence, surely they are not entitled to straight forward legal error. In other words, 'society has an 'interest' in the government's being able 'to appeal from an erroneous conclusion of law[.]'" Hon. Stephen R. Shaw, *Prosecution Appeals Taken Midtrial and Following Acquittal: Changing the Trial and Review of Criminal Cases in Ohio*, 22 Ohio N.U. L. Rev. 729 (1996) (footnotes and citations omitted). "Indeed, the reason for allowing such appeals is precisely their practical importance; it is the only way the government can correct some kinds of ongoing, systematic legal errors by trial courts." *Id.*

The underlying legal error in this case involves the legal standard necessary to establish complicity. Specifically, the State submits that the trial court in this case refused to consider compelling evidence of complicity to commit murder when the defendant's collusion and

participation in the underlying crime as "mere presence." The State's Evidence demonstrated that:

- Derek Hill testified that defendant Moore got into a fight with Derek Hill outside of defendant's girlfriend's apartment. After the fight, defendant told Hill he was "coming back and killing shit."
- Gregory Thomas testified that defendant then went to codefendant Junious Benford's house, where he found Benford, Gregory Thomas, and Michael Barksdale. Thomas said that defendant talked about the beating and asked Benford, Thomas, and Barksdale go back to his girlfriend's apartment with him.
- Defendant then drove his car with the other three men to the apartment, signed in as a visitor, and is *seen on video with the three others* entering and going up to 8th Floor, where the shooting occurred.
- Melvin Grayer testified that on the 8th floor defendant told him: "tell Derrick and D I'm looking for them." D, aka Darren Minor, had been involved in the earlier fight. Minor testified that he then came up to the 8th Floor with Shane Williams, the victim.
- Thomas testified that before shots were fired, defendant had said "there's going to be a fight."
- After five shots were pumped into Williams' body, defendant, Benford, Thomas, and Barksdale fled in defendant's car. Responding officer spoke with witnesses at the scene and had dispatch radio a description of defendant and his vehicle. A short time later, other officers arrested defendant and the other three men in defendant's car. When they removed Benford from the car, he dropped a .38 Rossi revolver on the pavement, later

determined to be the murder weapon. Benford later pled guilty to murder for his involvement.

- The gun had a mixture of the defendant's and Benford's DNA profiles. In a statement to police, however, defendant insisted that he had no knowledge of the gun whatsoever.

The trial court granted judgment of acquittal, concluding that this evidence only established defendant's "mere presence" at this killing. DNA from the defendant on the murder weapon (that the defendant denies knowing anything about), along with very clear evidence that defendant instigated and participated in a killing, establishes much more than "mere presence." The State therefore submits that the trial court made a substantive legal error when it failed to properly analyze the State's evidence for complicity, in a light most favorable to the State. At the very least, this case warranted an explanation from the Eighth District why it was dismissing the State's appeal from the trial court's ruling

The State strongly believes that this case is worthy of Supreme Court review, and therefore respectfully requests that this Honorable Court accept jurisdiction to hear this case on its merits.

STATEMENT OF THE CASE AND RELEVANT FACTS

The indictment in this case, filed on January 13, 2010, charged defendant Joseph Moore and codefendant Junious Benford with a single count of Aggravated Murder in violation of R.C. 2903.01(A) with a three-year firearm specification pursuant to R.C. 2941.145. Trial commenced on May 3, 2010, and on May 11, 2010 the trial court granted judgment of acquittal and ordered defendant released. On May 3, 2010, codefendant Junious Benford pled guilty to murder in CR 532486 A and received a prison term of fifteen years to life imprisonment.

During the May 11, 2010 hearing, the State summarized its evidence:

Clearly the forensic evidence shows that Junious Benford is likely the person who shot and killed Shane Williams. He's got gunshot residue on his hand. His DNA is on the gun and the gun was emptied, four bullets going into Shane Williams and one bullet skipping down the hallway.

The question is how did he get to this apartment building where he didn't live and why did he shoot Shane Williams? The evidence, Your Honor, which this Court must look at in a light most favorable to the State of Ohio under State versus Bridgeman, the evidence shows that he got there in Joseph Moore's car after Joseph Moore went to Junious Benford's house, told Junious and Gregory Thomas about how he got beat up and then asked them to go with him to his girlfriend's apartment, a girlfriend that Gregory Thomas had never met before and they all go. He drives them in his car to the scene of the crime.

Why did Shane Williams get shot? He was part of an assault earlier that day on Joseph Moore. That's the assault Joseph Moore talked about with Junious Benford in Junious Benford's house.

THE COURT: Where was the evidence of that?

MR. FILIATRAUT: Gregory Thomas.

THE COURT: He testified that he was half-ass listening to the defendant talking about getting beat up at some point.

MR FILIATRAUT: Right, getting beat up.

THE COURT: But not by Shane Williams.

MR. FILIATRAUT: We know that it happened, because Derrick Hill testified that he was there. He's the one who beat up Joseph Moore with Shane Williams right there. Darren Minor testified –

THE COURT: Yes, but Gregory Thomas didn't know anything about that.

That's what my interjection is.

MR. FILIATRAUT: Okay. Derrick Hill testified that he beat up the defendant earlier that day. Shane Williams was right there. Shane Williams joined in after the defendant pushed him during this fight. When all of them return, what happens?

Testimony shows Joseph Moore went up to Melvin Grayer in the hallway and said I'm looking for D and Derrick. There was some dispute of whether he said I'm looking for D or I'm looking for Derrick. He testified I'm looking for D and Derrick. That was the defendant's words to him. Not, hey, happy to see you, I'm here to see my girlfriend with my buddies.

No. When he gets there, he says I'm looking for D and Derrick. Clearly they have a gun on them and they are willing to use it, okay? That's the evidence, so Junious Benford is brought there in the defendant's car and Junious Benford shoots Shane Williams and then they all leave together.

Interestingly enough, in the forensic evidence you have got Junious Benford with gunshot residue on his hand, but you don't have the defendant with gunshot reside on his hand. Curt Jones testified that after that gun was fired, if somebody held it in the positions where he swabbed after it was fired, that person would likely have gunshot residue on their hands, unless the gun was wiped down or something like that.

> The defendant's DNA is on this gun. In his own statement to police, he denied even knowing about this gun, yet his DNA is on it. Judge, clearly this evidence shows that while Junious Benford is the shooter, this defendant was complicit in that shooting. They brought that gun to that apartment.
>
> They had prior calculation and design to get revenge on the guys who beat up Joseph Moore earlier that day. They got that revenge. Junious Benford shot Shane Williams with a gun that the defendant gave to him or handled earlier after having arrived there in the defendant's car. Then they left in the defendant's car.
>
> Judge, while [defense counsel] paints a nice picture about how all of the evidence shows Benford is the shooter, it shows the defendant is equally guilty, because Benford gets there in the defendant's car. The only reason Benford goes there is because of the defendant, and he shoots Shane Willliams, who had assaulted the defendant earlier.
>
> Looking at this evidence in a light most favorable to the State, Judge, their [Rule 29] motion should be denied.

(Tr. pp. 1029-1033). A participant in the beating, Derrick Hill, testified that after the beating, defendant threatened that "I'm coming back and killing shit." (Tr. p. 247). Gregory Thomas testified that defendant went to Junious Benford's house to ask Benford and anyone else who was there to come back to his girlfriend's apartment downtown. (Tr. pp. 812-16). According to Thomas, defendant did the driving, and when they got to the apartment, signed in. (Tr. p. 817).

A short time after the shooting at the apartment, officers on scene broadcast a description of the shooting suspects and a description of the vehicle they were driving. (Tr. pp. 722-23, 733). Approximately a half hour after the shooting, Fourth District police officers pulled over a vehicle containing the defendant, along with Junious Benford, Gregory Thomas, and Michael Barksdale. The arresting officers discovered that Benford had possessed a black .38 Rossi revolver, which Benford dropped on the pavement after being removed from the car. (Tr. p. 749-51), Investigators later found a mixture of defendant and Benford's DNA profiles on the gun. (Tr. p. 661). Defendant made a statement to police, during which he denied any knowledge of the gun that had been in his car. (Tr. p. 1008). Police recovered a surveillance video from the

apartment, on which defendant is seen with Benford, Thomas and Barksdale entering the apartment and going up to floor of the shooting. (State's Exhibit 63).

In response to the State's evidence, the trial court ruled that "mere presence alone is insufficient to convict. Rule 29 motion for acquittal is granted. The defendant is ordered released." (Tr. p. 1042). The trial court omitted any analysis or of evidence demonstrating that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime.

The State filed a Notice of Appeal and Motion for Leave to Appeal pursuant to App. R. 5(C) and R.C. 2945.67(A) on May 18, 2010, requesting that the Eighth District Court of Appeals review the legal issue that resulted in acquittal on appeal pursuant to this Honorable Court's judgment in *State v. Bistricky* (1990), 51 Ohio St.3d 157, 159, 555 N.E.2d 644. The Eighth District Court of Appeals dismissed the State's appeal *sua sponte* without comment or opinion on July 20, 2010.

LAW AND ARGUMENT

PROPOSITION OF LAW I: UNDER R.C. 2945.67(A) AND *STATE V. BISTRICKY* (1990), 51 OHIO ST.3D 157, THE STATE MAY SEEK LEAVE TO APPEAL ANY EVIDENTIARY OR LEGAL RULING THAT RESULTS IN AN ERRONEOUS JUDGMENT OF ACQUITTAL, SO LONG AS THE VERDICT ITSELF IS UNDISTURBED.

Prosecution appeals following acquittal serve an important function because they give prosecutors tools with which to challenge trial-level errors that are capable of repetition while evading normal review. The Eighth District's repeated refusal to hear such appeals, founded upon an incorrect interpretation of this Honorable Court's judgment in *Bistricky,* deprives prosecutors of an essential tool to promote the effective prosecution of crime. This case therefore warrants Supreme Court Review in order to clarify that under *Bistricky,* it makes no

difference whether the State is appealing the evidentiary rationale for acquittal or an erroneous legal ruling that produced the acquittal.

1. Deterring legal error that is capable of repetition while evading review promotes the effective prosecution of crime.

It is from R.C 2945.67(A) that appellate courts have discretionary jurisdiction to consider State appeals following acquittal. R.C. 2945.67(A) provides in relevant part 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" (Emphasis added). In this case, the State filed its notice of appeal containing an explicit proviso that the matter under appeal was "seeks leave to appeal to the substantive issues of law surrounding the trial court's May 11, 2010 decision to grant judgment of acquittal pursuant to Crim. R. 29." (May 18, 2010 Notice of Appeal). The State did not appeal the verdict itself, in compliance with *Bistricky, supra,* and R.C. 2945.67(A). Despite the State's compliance with R.C. 2945.67(A) and *Bistricky,* the Court of Appeals *sua sponte* dismissed the State's appeal without any explanation whatsoever.

While the constitutional prohibition against double jeopardy gives a criminal defendant an ironclad guarantee against future prosecution following an erroneous acquittal, the public is forced to absorb a wrongful acquittal based upon straightforward legal error. Here, the legal error sent a man who participated in a killing back into the community. In all likelihood, future killers will likely reap an unjust windfall from the same legal error because the trial court's erroneous legal ruling will repeat itself free from any meaningful appellate review. Without some means to challenge the erroneous legal ruling that served as foundation for an erroneous acquittal, the straightforward legal error is bound to repeat itself again and again.

In *State v. Fraternal Order of Eagles, Aerie 0337 Buckeye,* (1991), 58 Ohio St.3d 166, 168, 569 N.E.2d 478, this Honorable Court explained that even where a trial court enters a final judgment of acquittal that cannot be disturbed on appeal, it is proper to review the underling legal issue where the issue was one "of extreme importance and capable of repetition * * *." The *Fraternal Order of Eagles* Court continued: "we reach the issue concerning the state's right to appeal because "these provisions [R.C. 2945.67 and Crim. R. 12(J)] were enacted to facilitate the effective prosecution of crime and to promote fairness between the accuser and the accused." *Id.,* quoting *State v. Davidson* (1985), 17 Ohio St.3d 132, 135, 477 N.E.2d 1141, 1144.

Judge Shaw also explained that the *Bistricky* appeal is an important tool to correct a trial court's ongoing misapplication of the law:

> Insofar as most substantive law rulings and many evidentiary rulings rendered in a criminal trial usually reflect the ongoing view of the particular trial judge as to the law governing a given issue, the prosecution will likely be in a strong position in most cases to argue that the issue is capable of repetition in the next trial. Moreover, if a given ruling appears to have facilitated a verdict of acquittal in one case, the issue will likely evade meaningful review for the state until the trial judge can be compelled to correct an erroneous interpretation in future cases.

Hon. Stephen R. Shaw, *Prosecution Appeals Taken Midtrial and Following Acquittal: Changing the Trial and Review of Criminal Cases in Ohio,* 22 Ohio N.U. L. Rev. 729, 751 (1996) (footnotes and citations omitted).

The Eighth District, however, has repeatedly refused to hear the merits of the State's *Bistricky* appeals. In addition to this case, the Eighth District has recently dismissed the State's *Bistricky* appeal in *State v. Roddy,* Cuyahoga App. No. 88759, 2007-Ohio-4015,[2] as well as in *State v. Empe,* Cuyahoga App. No. 90333, 2008-Ohio-3803. The Eighth District's repeated

[2]This Honorable Court accepted jurisdiction of the State's appeal in *Roddy.* However, it subsequently dismissed the State's appeal as having been improvidently granted. *State v. Roddy,* 120 Ohio St.3d 1208, 898 N.E.2d 49, 2008-Ohio-6101.

refusal to hear prosecutors' *Bistricky* appeals stands in marked contrast to Judge Shaw's critique that "it is clear from the tenor of those Supreme Court of Ohio decisions[3] that intermediate appellate courts can no longer simply reject those appeals automatically and must evaluate seriously properly filed prosecution motions for leave to appeal following a verdict of acquittal." *Shaw, supra,* at 755.

2. The Eighth District has improperly distinguished between acquittal decisions and legal decisions resulting in acquittal.

Although the Eighth District *sua sponte* dismissed the State's appeal in this case without opinion or comment, in *Roddy,* the Eighth District interpreted *Bistricky* to mean that "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, supra,* at ¶13. In *Empe,* the Eighth District rejected the State's appeal because it would be a purely "advisory opinion." *Empe, supra,* at ¶3. Both views, however, are erroneous under *Bistricky,* as Judge Shaw pointed out in his authoritative article on *Bistricky* and its predecessors:

> [I]t seems evident that both trial courts and appellate courts have been uncomfortable with the review of those appeals both because it looks like a review of acquittals (barred by double jeopardy) and because it looks like purely advisory opinions. However, both objections are mistaken. Since acquittals are not being overturned there is no double jeopardy problem. And since the only issues being decided are ones that are "capable of repetition yet evading review," the appeals are genuine controversies and not mere abstract questions of law.

Hon. Stephen R. Shaw, *Prosecution Appeals Taken Midtrial and Following Acquittal: Changing the Trial and Review of Criminal Cases in Ohio*, 22 Ohio N.U. L. Rev. 729, 751 (1996).

In another situation, however, the Eighth District did apply *Bistricky* to review a trial court's judgment acquitting a criminal defendant of driving with expired plates that was issued

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[3]Discussing *State v. Keeton* (1985), 18 Ohio St.3d 379, 481 N.E.2d 629, *State v. Arnett* (1986), 22 Ohio St.3d 186, 489 N.E.2d 284, *and State v. Bistricky, supra.*

under an erroneous interpretation of R.C. 4503.21. In *State v. Boumann,* Cuyahoga App. No. 88021, 2007-Ohio-824, at ¶12, the Eighth District held that "[a]lthough we find that the trial court did err on this issue of law, we believe this error was based on the trial judge's misunderstanding of a legal principle, but rather on the poor choice of wording in the statute that foster's misapplication." *Id.*

The State submits that there is no practical difference between an erroneous application of the expired license plate statute in *Baumann* and the erroneous application of the complicity statute in this aggravated murder case. Both issues, if not heard on appeal, are capable of repetition. Because the State cannot appeal the final verdict itself, an appeal under either circumstance cannot result in double jeopardy. Judge Shaw explained that such appeals should not be limited to abstract legal concepts, but practical ones:

> And since the only issues being decided are ones that are "capable of repetition yet evading review," the appeals are genuine controversies and not mere abstract questions of law. Indeed, the reason for allowing such appeals is precisely their practical importance; it is the only way the government can correct some kinds of ongoing, systematic legal errors by trial courts. As such, those cases should not be regarded as "second class citizens" on the appellate docket but as important as any other case on the docket.

Shaw, supra, at 754. The Eighth District's failure to even explain its reasons for *sua sponte* dismissing the State's appeal, rather than hear this case on its merits, clearly shows that it treats such appeals as "second class citizens" on its docket.

In summary, Supreme Court review demonstrate that Ohio's intermediate appellate courts must seriously consider the issues raised in prosecutors' post-acquittal appeals because they are the only available legal tool to correct systematic issues in the criminal justice system which are capable of repetition yet evading review.

PROPOSITION OF LAW II: WHEN A CRIMINAL DEFENDANT COLLUDES WITH HIS CODEFENDANT TO PERPETRATE A KILLING, LEAVES HIS DNA ON THE MURDER WEAPON, AND THREATENS TO KILL SHORTLY BEFORE THE ACTUAL KILLING TAKES PLACE, THE EVIDENCE ESTABLISHES COMPLICITY TO COMMIT AGGRAVATED MURDER RATHER THAN "MERE PRESENCE" AT A KILLING.

1. The trial court made a substantive legal error by failing to account for evidence that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime.

A criminal defendant may be convicted of the principal offense if it is established that the defendant acted in complicity with another. See *State v. Riley,* Summit App. No. 21852, 2004-Ohio-4880, at ¶ 36, citing *State v. Herring* (2002), 94 Ohio St.3d 246, 251. R.C. 2923.03 defines complicity, providing in relevant part, that "[n]o person, acting with the kind of culpability required for the commission of an offense, shall * * * [a]id or abet another in committing the offense[.]" R.C. 2923.03(A)(2). The Ohio Supreme Court has dictated the requirements for a conviction of complicity by aiding and abetting:

> To support a conviction for complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal. Such intent may be inferred from the circumstances surrounding the crime.

State v. Johnson (2001), 93 Ohio St.3d 240, syllabus. "'Participation in criminal intent may be inferred from presence, companionship and conduct before and after the offense is committed.'" *Id.,* at 245, quoting *State v. Pruett* (1971), 28 Ohio App.2d 29, 34.

Under Ohio law, "[b]oth direct and circumstantial evidence may be introduced to establish the aiding and abetting elements of complicity." *State v. Ranson,* Franklin App. No. 01AP-1049, 2002-Ohio-2398, at ¶ 30. Evidence clearly established that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime. The State's Evidence demonstrated that:

- Derek Hill testified that defendant Moore got into a fight with Derek Hill outside of defendant's girlfriend's apartment. After the fight, defendant told Hill he was "coming back and killing shit."
- Gregory Thomas testified that defendant then went to codefendant Junious Benford's house, where he found Benford, Gregory Thomas, and Michael Barksdale. Thomas said that defendant talked about the beating and asked Benford, Thomas, and Barksdale go back to his girlfriend's apartment with him.
- Defendant then drove his car with the other three men to the apartment, signed in as a visitor, and is *seen on video with the three others* entering and going up to 8th Floor, where the shooting occurred.
- Melvin Grayer testified that on the 8th floor defendant told him: "tell Derrick and D I'm looking for them." D, aka Darren Minor, had been involved in the earlier fight. Minor testified that he then came up to the 8th Floor with Shane Williams, the victim.
- Thomas testified that before shots were fired, defendant had said "there's going to be a fight."
- After five shots were pumped into Williams' body, defendant, Benford, Thomas, and Barksdale fled in defendant's car. Responding officer spoke with witnesses at the scene and had dispatch radio a description of defendant and his vehicle. A short time later, other officers arrested defendant and the other three men in defendant's car. When they removed Benford from the car, he dropped a .38 Rossi revolver on the pavement, later determined to be the murder weapon. Benford later pled guilty to murder for his involvement.

- The gun had a mixture of the defendant's and Benford's DNA profiles. In a statement to police, however, defendant insisted that he had no knowledge of the gun whatsoever.

The trial court granted judgment of acquittal, concluding that this evidence only established defendant's "mere presence" at this killing. The State, however, submits that DNA from the defendant on the murder weapon (that the defendant denies knowing anything about), along with very clear evidence that defendant instigated and participated in a killing, establishes much more than "mere presence."

Similarly, in *Ranson, supra,* the Franklin County Court of Appeals held that a criminal defendant's intent to aid and abet in attempting to cause physical harm to another, to possess a deadly weapon, or to inflict or attempt to inflict physical harm on another, "began at the moment appellant chose to run away from the crime scene with his accomplices." *Ranson,* supra, at ¶ 32. The *Ranson* court further held that the appellant's complicity "continued when he chose to enter the getaway vehicle and ride in the passenger's seat of the van with his accomplices in an attempt to elude the police." *Id.* In this case, defendant had the motive to kill the victim due to the earlier beating the victim inflicted upon him. Before the murder, defendant threatened Derek Hill, stating "I'm coming back and killing shit." Defendant drove the shooter to the murder scene, handled the gun the shooter used, told a witness there was going to be a fight shortly before shots rang out, and then was arrested approximately a half hour after the murder, in a car containing the murder weapon. Despite bearing DNA from both Benford and defendant, defendant demonstrated his guilty mind when he insisted to police that he knew nothing about the gun.

In sum, the evidence in this case clearly demonstrated, in a light most favorable to the State, that the defendant was complicit in aggravated murder. The State submits that the trial

court made a substantive legal error when it failed to analyze the State's evidence for complicity, in a light most favorable to the State.

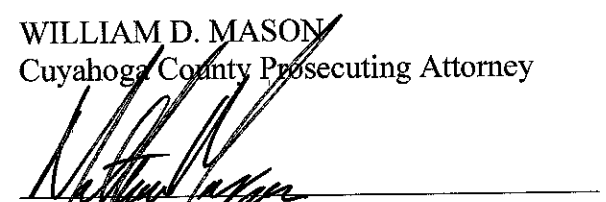
At the very least, this case warranted an explanation from the Eighth District why it was dismissing the State's appeal from the trial court's ruling

CONCLUSION

The State respectfully requests that this Honorable Court grant jurisdiction and hear this case on its merits. This case presents a substantial constitutional question and issue of great general or public interest because it can serve to clarify that prosecutors may seek leave to appeal any evidentiary or legal ruling that results in an erroneous judgment of acquittal. These erroneous legal judgments are effectively unreviewable and chronically repeatable without such an appeal. In Cuyahoga County, however, the Eighth District has deprived the State of this tool through its repeated refusal to hear such appeals and, in this case, failed to even explain its reasons for dismissal. Supreme Court review in this case will therefore serve to clarify that this Court's judgment in *State v. Bistricky* is a viable tool for prosecutors to challenge any erroneous rulings, whether evidentiary or legal, that result in acquittal.

Respectfully submitted,

WILLIAM D. MASON
Cuyahoga County Prosecuting Attorney



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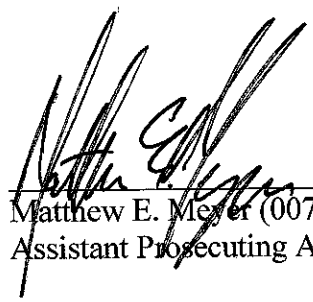
CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction was sent by regular U.S. mail this 19th day of August, 2010, to Thomas A. Rein, Esq., 526 Superior Ave, Suite 940, Cleveland, Ohio 44114.



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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellant

COA NO. 95124 | LOWER COURT NO. CP CR-532486

COMMON PLEAS COURT

-vs-

JOSEPH L. MOORE

Appellee

MOTION NO. 435868

Date 07/20/2010

Journal Entry

SUA SPONTE, THE APPEAL IS DISMISSED PER ENTRY NO. 434084.

COPIES MAILED TO COUNSEL FOR ALL PARTIES.-COSTS TAXED

FILED AND JOURNALIZED
PER APP.R. 22(C)

JUL 20 2010

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

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Judge KENNETH A. ROCCO, Concurs

Presiding Judge
CHRISTINE T. MCMONAGLE

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