

ORIGINAL

IN THE SUPREME COURT OF OHIO
2012

STATE OF OHIO,

Case No. 11-1473

Plaintiff-Appellant

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

-vs-

EMMANUEL HAMPTON,

Court of Appeals
Case No. 10AP-1109

Defendant-Appellee

REPLY BRIEF OF PLAINTIFF-APPELLANT STATE OF OHIO

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ARGUMENT

Proposition of Law No. 1. In determining whether a trial court ruling is a “final verdict” because it is based on Crim.R. 29, an appellate court must review the actual nature of the ruling, not just the label the trial court attached to the ruling. If the record shows that the trial court’s ruling went beyond the sufficiency-of-evidence review allowed by Crim.R. 29, the State can appeal pursuant to R.C. 2945.67(A).

Proposition of Law No. 2. Lack of venue cannot result in an “acquittal” under Crim.R. 29 because motions under that rule are limited to claims of lack of proof of one or more material elements of the offense. Venue is not a material element of the offense.

The State stands by its original brief and its propositions of law. It offers the following discussion in response to the arguments of defendant and his amici.

One thing plainly emerges from their briefing. They have no response to the basic problem of how a court could purport to “acquit” the defendant when the court is sustaining the defendant’s objection to improper venue. An “acquittal” purports to reach the merits of the prosecution, but no court lacking venue could purport to reach the merits, as the very point of the venue objection is to have the court recognize that it is not the proper tribunal to entertain the lawsuit.

Overall, the arguments of defendant and his amici seek to whipsaw the justice system with the contradictory assertions that a court can find that venue is improper but can still enter an “acquittal” that bars further prosecution and constitutes a “final verdict” that precludes a State’s appeal.

A.

The briefs expend much effort on the question of whether venue is properly addressed in a motion for judgment of acquittal under Crim.R. 29. The State stands by its

contention that venue is not properly addressed under a Crim.R. 29 motion.

But, even assuming venue is properly addressed in such a motion, the issue remains whether the granting of such an “acquittal” would qualify as a “final verdict” that would preclude a State’s appeal under R.C. 2945.67(A). This is a critical point where the arguments of defendant and his amici fall short. Such an “acquittal” simply would not be a “final verdict” because the court’s finding of improper venue means that the court would have no business reaching a “verdict.” A finding of improper venue *precludes* the court from reaching the merits and therefore *precludes* reaching a “verdict.”

This Court has treated Crim.R. 29 “acquittals” as “final verdicts” when they have been addressed to the sufficiency of the evidence on the material elements of the offense. *State ex rel. Yates vs. Court of Appeals for Montgomery Cty.*, 32 Ohio St.3d 30, 512 N.E.2d 343 (1987); *State v. Keeton*, 18 Ohio St.3d 379, 481 N.E.2d 629 (1985). In those instances, the order granting the judgment of acquittal at least approximates a “verdict” because it reaches the merits of whether the defendant committed the offense. But this Court has never said or held that a non-merits improper-venue “acquittal” would be a “final verdict” too. Extending *Keeton* and *Yates* to the context of a non-merits improper-venue “acquittal” would distort the *Keeton-Yates* case law and would be inconsistent with the non-merits nature of the improper-venue ruling. An order granting an “acquittal” based on lack of venue is simply not equivalent to a “final verdict.”

B.

The arguments of defendant and his amici also depend on the flawed theory that an appellate court applying the “final verdict” exclusion in R.C. 2945.67(A) is bound by the

label used by the trial court. They wish to treat the trial court's use of the word "acquittal" as the final word, regardless of what prompted the "acquittal." They are applying the same logic to the issue of double jeopardy.

Statutorily, this bound-by-label argument has already been rejected by this Court, with this Court emphasizing that the formalism of the label is not controlling. *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629, syllabus (denial of bindover was "functional equivalent" of dismissal); *State v. Davidson*, 17 Ohio St.3d 132, 477 N.E.2d 1141 (1985) (pretrial motion, "however labeled," was "in effect, a motion to suppress"). "Any other result would improperly elevate form over substance, and would be unfaithful to the spirit and intent of * * * R.C. 2945.67 * * *." *Id.* at 135.

Constitutionally, the bound-by-label argument has also been rejected as a matter of double-jeopardy law. "[W]hat constitutes an 'acquittal' is not to be controlled by the form of the judge's action. Rather, we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977). A judge's characterization of his own action cannot control the classification of the action. *United States v. Scott*, 437 U.S. 82, 96, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978).

Although defendant and his amici continue to insist that a second trial after an improper-venue "acquittal" would violate double jeopardy, they fail to cite a single case holding that an improper-venue ruling bars a second trial on double-jeopardy grounds. The State has cited several cases holding that an improper-venue determination, even after a

first trial has begun, does not preclude a second trial for double-jeopardy purposes. This is because venue is not an element of the offense and a lack-of-venue ruling merely means that the prosecution was brought in the wrong county, not that the defendant was truly acquitted of the crime.

Amicus CCPD conjures up a worst-case scenario of a prosecutor repeatedly getting venue wrong so that a trial is held in all 88 counties. Of course, such an absurd scenario would not control in this case, in which everyone is agreed that venue lies in Fairfield County. At most, a second county would become involved here, not 88 counties.

Defendant and his amici also fail to recognize that there is no double-jeopardy bar when the first trial terminates prematurely on the basis of a non-merits defense motion. When a defendant decides “to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, [he] suffers no injury cognizable under the Double Jeopardy Clause” by his retrial. *Scott*, 437 U.S. at 98-99; *State v. Broughton*, 62 Ohio St.3d 253, 262-66, 581 N.E.2d 541 (1991) (following *Scott*). Venue is unrelated to factual guilt or innocence of the offense charged, and so the defense decision to seek a premature non-merits termination of the trial creates no double-jeopardy bar. Defendant cannot both complain about lack of venue and then complain that the first trial was ended prematurely because he complained about lack of venue.

C.

Amicus CCPD attempts to construct a pseudo-double-jeopardy bar out of R.C. 2943.09, which provides that a second indictment cannot be brought if there has been a prior conviction or acquittal or the defendant has been “once in jeopardy * * *” for the same

offense. There are several answers to this argument.

First, R.C. 2943.09 is part of a series of sections governing the litigation of claims of double jeopardy. Under such sections, the claim of double jeopardy was made by a formal plea. But such a plea has been abolished via Crim.R. 12(A), which provides that only the pleas of guilty, not guilty, not guilty by reason of insanity, and no contest are preserved under the Criminal Rules. “All other pleas, demurrers, and motions to quash, are abolished.” Crim.R. 12(A). “Defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.” *Id.* “While criminal procedure was once governed by Chapter 2943 of the Revised Code, the procedure for the taking of pleas and disposition of criminal pretrial matters is now controlled by Crim.R. 11 and 12.” *State v. McGrath*, 8th Dist. No. 77896 (2001). The current applicability of R.C. 2943.05 et seq. is in substantial doubt.

Second, a “former acquittal” is not preclusive under these statutes unless the acquittal was “on the merits.” R.C. 2943.08. Moreover, an acquittal “on the ground of variance between the indictment * * * and the proof” “is not an acquittal of the same offense.” R.C. 2943.07. Under these provisions, the trial court’s use of “acquittal” language does not bar a later prosecution, because the lack-of-venue ruling did not acquit defendant “on the merits” and the purported “acquittal” due to lack of venue can be treated as an error of variance between the indictment and the proof.

Third, defendant was not “once in jeopardy” for purposes of R.C. 2943.09. There is no attachment of jeopardy when the tribunal is “without power to make any determination

regarding [the defendant's] guilt or innocence.” *Serfass v. United States*, 420 U.S. 377, 389, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975). “Without risk of a determination of guilt, jeopardy does not attach * * *.” *Id.* at 391-92. Even a purported acquittal “has no significance in this context unless jeopardy has once attached and an accused has been subjected to the risk of conviction.” *Id.* at 392. A defendant’s double-jeopardy protection bestows a “valued right to have his guilt or innocence determined before the first trier of fact.” *Scott*, 437 U.S. at 93. But given defendant’s insistence on his objection to improper venue, which, according to the trial court, had not been waived, defendant was never in “jeopardy” of having his “guilt or innocence” determined in the first trial. The import of defendant’s venue objection and the court’s ruling was that the court could not proceed to determine guilt or innocence.

This understanding that trial in an improper venue does not create “jeopardy” under R.C. 2943.09 is buttressed by R.C. 2945.08, which provides that, even when a court learns during trial that the prosecution was brought in the wrong county, the court shall commit the defendant or release the defendant on bail pending the issuance of an arrest warrant by the proper county. The statute also provides that the clerk shall notify the prosecutor of the proper county “in order that proper proceedings may be had in the case.” These provisions plainly contemplate further proceedings, including potential indictment, in the county having proper venue.

Under R.C. 1.51, “[i]f a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both.” “When two statutory provisions are alleged to be in conflict, R.C. 1.51 requires us to construe them, where possible, to *give effect to both.*” *Gahanna–Jefferson Local School Dist. Bd. of Edn. v.*

Zaino, 93 Ohio St.3d 231, 234, 754 N.E.2d 789 (2001) (emphasis sic). Here, the “once in jeopardy” language in R.C. 2943.09 is best understood as not applying to a trial begun in an improper venue. This view is consistent with constitutional concepts of “jeopardy” discussed above and consistent with R.C. 2945.08, which plainly contemplates further proceedings in the proper county after an initial trial was begun and terminated in the wrong county.

Even if R.C. 2943.09 would otherwise bar a second indictment in Fairfield County, R.C. 2945.08 would represent a specific exception to that general rule. Under R.C. 1.51, if there is an irreconcilable conflict, the specific provision controls over the general. The specific provisions in R.C. 2945.08 regarding wrong-county prosecutions show that there is no legislative intent to create a bar to further prosecution. Rather, the General Assembly expects further prosecution by “proper proceedings” in the correct county. The specific provisions regarding lack of venue in R.C. 2945.08 would control over the general provisions of R.C. 2943.09, even if those general provisions would otherwise bar a further prosecution.

D.

Defendant and his amici also err in attempting to create a false dilemma. In their efforts to shoehorn the issue of venue into a motion for acquittal under Crim.R. 29, their arguments assume that a Crim.R. 29 motion would be the sole vehicle available in which to object to a failure to prove venue. But such an assumption is clearly incorrect.

If this Court is going to retain the current system of requiring proof of venue at trial, there is no imperative that venue be shoehorned into motion practice under Crim.R. 29. The

Criminal Rules generally provide for oral motions during trial under Crim.R. 47, and so a defendant could raise a venue-based objection at the end of the State's case-in-chief or at the conclusion of the trial as a matter of general motion practice. This Court need not require that venue objections be raised in a motion under Crim.R. 29.

E.

Citing *State v. Nevius*, 147 Ohio St. 263, 71 N.E.2d 258 (1947), defendant contends that the pre-Rules practice was to allow the objection to lack of venue to be raised in a "motion for directed verdict." He then analogizes the former "directed verdict" practice to the current motion for acquittal under Crim.R. 29. After equating venue with "directed verdict," and then equating "directed verdict" with "judgment of acquittal" under Crim.R. 29, defendant argues that a venue objection is properly brought under Crim.R. 29 and that such an "acquittal" amounts to a "verdict."

Upon close inspection, several flaws quickly emerge in defendant's logic. First, the rule makers did not carry over "directed verdict" language into Crim.R. 29 when it was adopted in 1973. Indeed, the language of Crim.R. 29 expressly distinguishes between "verdict" and "judgment of acquittal." Crim.R. 29(B) & (C). R.C. 2945.67(A) adopted its "final verdict" language well after the nomenclature in Crim.R. 29 was adopted. Accordingly, the pre-Rules practice surrounding "directed verdict" motions is not informative as to what the General Assembly meant by the adoption of "final verdict" in R.C. 2945.67(A).

Second, this Court emphasized in *State v. Bridgeman*, 55 Ohio St.2d 261, 381 N.E.2d 184 (1978), that the Crim.R. 29 standard had not changed from the pre-Rules

standard, which already had a “material elements” component. As stated in *Bridgeman*, “[i]t has long been established law in Ohio that a question is one for determination by the jury when ‘reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt * * *.’” *Bridgeman*, 55 Ohio St.2d at 263, quoting *State v. Swiger*, 5 Ohio St.2d 151, 214 N.E.2d 417 (1966), paragraph two of the syllabus.

The statements in *Nevius* regarding raising venue in a directed-verdict motion predate by several years the *Bridgeman* and *Swiger* decisions focusing on the material elements of the offense. It is now well settled under *Bridgeman* and later cases that the standard for acquittal under Crim.R. 29 is the same as the standard for due-process sufficiency review and that both standards are focused on the “material element[s] of a crime,” the “essential elements of the crime,” and “the substantive elements of the criminal offense as defined by state law.” *Bridgeman*, syllabus; *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, ¶ 34.

Also, long after *Nevius*, and shortly after *Bridgeman*, this Court recognized that “[v]enue is not a material element of any offense charged.” *State v. Draggo*, 65 Ohio St.2d 88, 90, 418 N.E.2d 1343 (1981). “The elements of the offense charged and the venue of the matter are separate and distinct.” *Id.* Further emphasizing what is an “element,” this Court in *Draggo* stated that “[t]he elements of a crime are the constituent parts of an offense which must be proved by the prosecution to sustain a conviction.” *Id.* at 91.

As can be seen, this Court’s current case law is applying a material-elements test to sufficiency review under Crim.R. 29 and has specifically recognized that venue is not a

material or essential element of the crime. At best, the statements in *Nevius* vis-à-vis venue and motions for “directed verdict” are inapposite in light of current precedents addressing Crim.R. 29 and are inapposite even in light of the “material elements” language of *Swiger*.

Defendant does not state any compelling reason to overrule such precedents adopting the “material elements” standard. Nor does he demonstrate that *Draggo* was wrong in saying that venue is separate from the material elements.

Along the same vein, defendant errs in contending that Crim.R. 29 literally reaches the venue issue because it allows an acquittal if the evidence is insufficient to sustain conviction. The full text shows that Crim.R. 29 is directed at entering a “judgment of acquittal *of one or more offenses* charged in the indictment * * *” and that such a judgment shall be entered if “the evidence is insufficient to sustain a conviction *of such offense or offenses.*” Crim.R. 29(A) (emphasis added). Thus, under Crim.R. 29, the defendant is not awarded a generic “acquittal,” but, rather, an acquittal as to specified offenses. As *Bridgeman* shows, this test is naturally focused on the material elements of those offenses.

Indeed, the very concept of awarding an “acquittal” based on improper venue is an oxymoron. A finding of improper venue means that the court should not be convicting or acquitting the defendant of any offenses. Improper venue means that the court cannot decide guilt or innocence as to the offenses.

The Crim.R. 29 concept of granting a judgment of “acquittal” is entirely consistent with the language of *Bridgeman* limiting such acquittals to a lack of evidence on material elements. Given the *Draggo* conclusion that venue is not a material element, improper venue would not be a proper basis to grant an “acquittal” under Crim.R. 29.

F.

Also citing *Nevius*, defendant asserts that the failure to prove venue can have preclusive effects on further prosecution. In *Nevius*, this Court ruled that the appellate court's remand of the case for a retrial to prove venue was not allowed.

The State does not dispute that a failure to prove venue often can have a preclusive effect. "Collateral estoppel would normally apply in such a situation." *United States v. Kaytso*, 868 F.2d 1020, 1021 (9th Cir. 1988); Restatement (2d) of Judgments, § 20, comment b, illus. 1 (losing on venue can bar further prosecution of same claim in same county). A party having the burden of proving venue generally would get one chance to prove venue in that county, not multiple chances. Accordingly, it is not surprising that the *Nevius* Court prevented the State from getting a second chance to prove venue in the court and county where it already had the opportunity to prove venue.

But collateral estoppel would not bar bringing the charge in another county having proper venue. *Kaytso*, 868 F.2d at 1021 n. 2; Restatement (2d) of Judgments, § 20, comment b, illus. 1. A failure to prove venue in Franklin County would not be preclusive of proving proper venue in a Fairfield County court. The Franklin County court actually concluded that venue would be proper in Fairfield County. See 10-25-10 Judgment, at 1 ("it became clear that the events giving rise to the charges in this case all occurred within Fairfield County * * *"). Prosecution in Fairfield County would be entirely consistent with the lack-of-venue conclusion of the Franklin County court.

Nevius actually *supports* the State's argument here. The defendant in *Nevius* had been prosecuted in Clark County, even though the evidence showed the acceptance of the

bribe in Montgomery County. In that circumstance, the *Nevius* Court expressly acknowledged that it was not precluding prosecution in Montgomery County, where venue was proper. Like the State in the present case, the Court quoted G.C. 13442-6 (now R.C. 2945.08) for the proposition that “the trial court would have been warranted in committing Nevius to await a warrant for his arrest from Montgomery county upon the charge contained in the fourth count of the indictment.” *Nevius*, 147 Ohio St. at 268. When the Court indicated that further trial was precluded in Clark County, the Court indicated that the defendant was only being “discharged on such fourth count *from prosecution in Clark county, Ohio.*” *Id.* at 286 (emphasis added). Thus, the Court was precluding only another trial in the improper venue of Clark County. It was not precluding prosecution in the proper venue of Montgomery County. Nor was the Court purporting to enter an unqualified “acquittal.”

G.

Amicus CCPD argues that the State is only seeking an advisory opinion because the State could have merely sought to have defendant prosecuted in the proper venue of Fairfield County and because further prosecution is barred by double jeopardy, thereby precluding prosecution in Fairfield County anyway. There are several problems with this argument.

The State was not seeking an advisory opinion in appealing to the Court of Appeals. The State’s first assignment of error contended that defendant had already waived the venue issue by failing to challenge venue before trial when the address in question was alleged in the indictment and by failing to challenge venue during the juvenile-bindover proceedings.

The State's second assignment of error contended that, even if the trial court was correct to sustain the venue objection, the court should have ordered a mistrial and should not have characterized it as a Crim.R. 29 "acquittal."

These contentions are ripe for resolution. If the State's first assignment of error would be sustained, the result would be to reverse the "acquittal" and to remand for further proceedings to allow the conclusion of the bench trial in Franklin County. Thus, the State's appeal was not merely a matter of the State being able to seek prosecution in Fairfield County. The State was contending that the trial should remain in Franklin County and that a prosecution in Fairfield County was not necessary.

The State's contention about the impropriety of the purported "acquittal" is also ripe. The State could rightly fear that defendant would claim that the trial court's "acquittal" language has preclusive double-jeopardy effects barring any further prosecution. In fact, defendant made that contention in the Court of Appeals, see 3-9-11 Brief, at 9, and is continuing to make that contention in his current merit brief. Defendant's Merit Brief, at 4-5, 10.

Had the State not appealed, defendant would have contended that the failure to appeal the "acquittal" characterization created a res judicata or collateral estoppel bar as to the propriety of the "acquittal." Even if only to avoid a claim of preclusion in the Fairfield County court, the State had a valid reason to appeal now to seek correction of the flawed "acquittal" approach used by the trial court. The trial court made its "acquittal" characterization in its judgment, and there is a live controversy here and now about the propriety of that characterization, as shown by the various briefs here. The effort by the

defense to give that “acquittal” characterization a preclusive effect shows that the propriety of that characterization is ripe for resolution here and now.

Vacating the “acquittal” characterization would substantially undercut defendant’s claim that the Franklin County court’s action would be preclusive of further prosecution. This shows that the State is not merely seeking an advisory opinion but, rather, is seeking an order of reversal that would vacate a part of the trial court’s order, a part which defendant claims significantly benefits him.

CCPD essentially contends that the State’s appeal would not accomplish anything *if* the defense would win certain legal arguments about the binding nature of the “acquittal” and about double jeopardy. But such legal arguments are themselves hotly contested. Since the State’s appeal could not be found pointless until the appellate court actually rules on those contested arguments, the legal issues are ripe for review now.

Moreover, the State’s appeal has led to the litigation of related issues. The question of whether the trial court’s ruling was a “final verdict” caused the Tenth District to deny leave to appeal. Double-jeopardy concerns are also in play, here and now, because a State cannot appeal if double jeopardy would bar further prosecution if the appeal succeeds. Again, these are live controversies, here and now, and need not await the bringing of an indictment in Fairfield County, especially given the State’s first assignment of error that the case should remain in Franklin County because the defense waived the venue issue by failing to raise it before trial.

H.

Finally, the State disagrees with amicus CCPD’s argument that the Tenth District’s

order denying leave to appeal must be affirmed under an abuse-of-discretion standard.

Although an appellate court has discretion in deciding whether to grant leave to appeal, the Tenth District here did not purport to be exercising any discretion. Instead, it rejected the State's appeal as a matter of law based on the "final verdict" exclusion in R.C. 2945.67(A) "[b]ecause the state cannot appeal the trial court's judgment * * *." Tenth Dist. Op. ¶¶ 1, 20. "When a court's judgment is based on an erroneous interpretation of the law, an abuse-of-discretion standard is not appropriate." *State v. Futrall*, 123 Ohio St.3d 498, 2009-Ohio-5590, 918 N.E.2d 497, ¶ 6, quoting *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, 909 N.E.2d 1237, ¶ 13.

In addition, even under an abuse-of-discretion standard, an abuse of discretion occurs when the court fails to exercise sound, reasonable, and legal decision-making. *State v. Beechler*, 2nd Dist. No. 09-CA-54, 2010-Ohio-1900, ¶ 62. "When a pure issue of law is involved in appellate review, the mere fact that the reviewing court would decide the issue differently is enough to find error." *Id.* ¶ 67. "[W]e are not aware of any Ohio appellate decisions in which it is declared, as part of the *holding*, that a trial court may, in the exercise of its discretion, commit an error of law." *Id.* ¶ 68. "No court – not a trial court, not an appellate court, nor even a supreme court – has the authority, within its discretion, to commit an error of law." *Id.* ¶ 70.

Even if purely legal issues were "discretionary," the court's erroneous belief that it cannot exercise discretion would itself constitute an abuse of discretion. It is an abuse of discretion when a court fails to exercise its discretion. *Kaur v. Bharmota*, 10th Dist. No. 05AP-1333, 2006-Ohio-5782, ¶ 13.

Accordingly, the Tenth District's "final verdict" holding cannot be upheld as an exercise of discretion. It did not exercise discretion but instead believed that it was prevented as a matter of law from granting leave to appeal. Even if the Tenth District had been purporting exercise discretion, its decision to deny leave to appeal was prejudiced by its erroneous conclusion that the State could not appeal. The Tenth District's legal conclusion that a "final verdict" was involved is reviewed de novo here.

As the State acknowledged in its initial brief, the remand of a case in this posture usually would leave room for the appellate court to exercise its discretion. But, by finding error in the Tenth District's "final verdict" analysis, this Court very likely will have concluded that reversible error occurred in the trial court's proceedings when that court characterized its lack-of-venue ruling as the granting of a Crim.R. 29 "acquittal." With this Court having already concluded that error occurred, there would be no conceivable basis for the Tenth District now to exercise "discretion" by refusing to allow the appeal or by refusing to enter a reversal of that very error.

The State's first and second propositions of law warrant relief.

Proposition of Law No. 3. A trial court's granting of a Crim.R. 29 motion for judgment of acquittal is not a "final verdict." The State can appeal such a ruling by leave of court under R.C. 2945.67(A) when such an appeal does not violate double jeopardy. (*State ex rel. Yates v. Court of Appeals for Montgomery Cty.*, 32 Ohio St.3d 30, 512 N.E.2d 343 (1987), overruled)

The State stands by its third proposition of law. Defendant suggests that the State is only arguing for the overruling of *Yates*, thereby leaving *Keeton* intact. But, as the State argued in its merit brief, "This Court should revisit and overrule the *Yates* concept, also

expressed in *Keeton*, that the granting of a Crim.R. 29 motion is a “final verdict.” State’s Merit Brief, at 20. Both *Yates* and *Keeton* should be overruled to the extent they depend on the concept that an order granting a judgment of acquittal under Crim.R. 29 is a “final verdict” for purposes of R.C. 2945.67(A). If *Yates* falls on that point, then so does *Keeton*.

The arguments of defendant and his amici merely confirm that *Yates* and *Keeton* would be distorted beyond recognition if they would be extended to a non-merits lack-of-venue “acquittal” granted under Crim.R. 29. If that rule is used for non-merits determinations like lack of venue, then an “acquittal” simply should not be treated as a “final verdict.” Finding a lack of venue is the antithesis of a “verdict,” which would not be “final” anyway because finding a lack of venue presupposes the ability to prosecute in a proper venue. Treating a “judgment of acquittal” as a “final verdict” is erroneous anyway, given that Crim.R. 29 itself expressly refers to “verdicts” and “judgments of acquittal” separately.

A bill introduced in the current General Assembly might correct the confusion for future cases. House Bill 477 would turn all timely State appeals into appeals of right and would delete the “final verdict” exclusion. The State would only be precluded from appealing if double jeopardy would prohibit further prosecution. This approach is consistent with federal law.

The State’s third proposition of law warrants relief.

CONCLUSION

The State respectfully requests that this Court reverse the Tenth District's judgment and remand the case with instructions for that court to grant the State's motion for leave to appeal, to address the State's two assignments of error, and to, at a minimum, reverse the trial court's language purporting to grant a Crim.R. 29 motion for judgment of acquittal based on lack of venue.¹

Respectfully submitted,

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¹ If this Court sua sponte contemplates a decision upon an issue not briefed, the State respectfully requests notice of that intention and requests an opportunity to brief the issue before this Court makes its decision. *Miller Chevrolet v. Willoughby Hills*, 38 Ohio St.2d 298, 301 & n. 3, 313 N.E.2d 400 (1974); *State v. 1981 Dodge Ram Van*, 36 Ohio St.3d 168, 170, 522 N.E.2d 524 (1988).

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail on this

9th day of Apr., 2012, to the following:

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