

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : No. 2012-0250  
Appellant, :  
v. : On Appeal from the  
M.M., A minor child : Cuyahoga County Court of Appeals,  
Appellee. : Eighth Appellate  
District, Case No. 96776

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MERIT BRIEF OF APPELLEE M.M.

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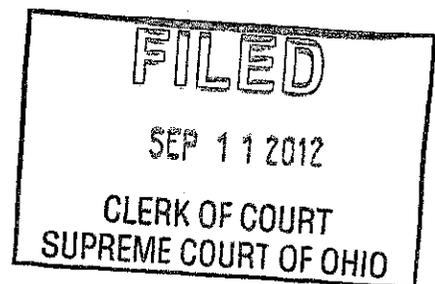


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**THE RIGHT TO FILE AN APPEAL PURSUANT TO STATE V. BISTRICKY, 51 OHIO ST.3D 157, 555 N.E.2D 644 (1990) IS NOT WAIVED IF THE STATE DOES NOT PURSUE AN INTERLOCUTORY REMEDY UNDER CRIM. R. 12(K) AND JUV. R. 22(F). THE EXISTENCE OF INTERLOCUTORY REMEDIES DOES NOT PRECLUDE THE STATE FROM APPEALING SUBSTANTIVE LEGAL ISSUES INVOLVING THE SUPPRESSION OR EXCLUSION OF EVIDENCE PURSUANT TO BISTRICKY.**

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## SUMMARY OF ARGUMENT

The Cuyahoga County Prosecutor's Office tried M.M., and lost. M.M. was found not to be delinquent. The Prosecutor's Office believes that it should have been allowed to introduce evidence at trial that the judge excluded. The Prosecutor's Office acknowledges that principles of double jeopardy dictate that M.M.'s case is over – M.M. cannot be retried. The question thus arises, “why is M.M. now a party in this, or any, court with respect to this matter?” The answer to that question lies in examining what the prosecutor believes he has the power to do.

Relying on R.C. 2945.67, the State of Ohio asks this Court to hold that the State has the right, with leave of the appellate court and after a criminal trial is complete, to appeal the trial court's decision not to admit evidence. The State's after-the-fact appeal will not affect the outcome of M.M.'s case one bit – the acquittal is secure and the case is over. But the State ultimately wants the Eighth District Court of Appeals to determine whether the trial court got it right at trial.

In declining to hear the State's appeal, the Eighth District noted that, had the State been willing to certify that the evidence was integral to its case, the State could have taken a mid-trial appeal of the exclusion of the evidence – at a time when the Eighth District's decision on the merits of the evidentiary issue could have affected the outcome of the trial. Of course, had the State taken such an appeal and lost, the trial would be over – the State's certification under Juv. R. 22(F) (the equivalent of Crim. R. 12(K)) requires the State, before interrupting a trial's progress, to “put up or shut up” and acknowledge that it cannot go forward without the evidence should it lose the appeal. The State did not utilize this procedure.

Instead, the State now wants an opinion that is advisory in nature. If the State is correct that a court of appeals can render such an advisory opinion, the State gains the advantage of

being able to pursue an issue on appeal in a case where no one with a stake in the outcome has the opportunity to participate in the case. In effect, the State, the executive branch, wants the court of appeals, the judicial branch, to act as a legal advisor that can be called upon and requested to promulgate a legal opinion without a pending case and, thus, without benefit of a true adversary process. Then, if the opinion is favorable to its position, the State of Ohio will use the non-adversarial advisory opinion against future criminal defendants in real cases, *i.e.*, where someone's liberty is at stake.

Not only does the State's argument run afoul of R.C. 2945.67, it violates the Ohio Constitution. R.C. 2945.67 only permits decisions excluding evidence to be appealed by the State before the trial is ended, not after the case is over. And, even if R.C. 2945.67 would countenance a State's seeking an advisory opinion, the Ohio Constitution only permits courts of appeals to review decisions of the lower court when the courts of appeals can still "affirm, modify or reverse" the decision below – an advisory opinion does none of these things.

In the end, this Court is asked to reject the State's proposition of law and, instead, adopt the following holding:

**The Ohio Constitution does not permit appellate courts to issue advisory opinions. In matters involving the exclusion of evidence at trial, the State of Ohio has no right to seek discretionary review of a decision of the trial court that excludes or suppresses evidence at trial.**

#### STATEMENT OF THE CASE AND FACTS

For purposes of this appeal only, and without conceding any factual circumstances should this case be remanded for further consideration by the court of appeals, the salient facts and circumstances can be gleaned from the State's Brief of Appellant.

## ARGUMENT

*In Opposition to the State of Ohio's Proposition of Law (as posited by the State, verbatim):*

**THE RIGHT TO FILE AN APPEAL PURSUANT TO STATE V. BISTRICKY, 51 OHIO ST.3D 157, 555 N.E.2D 644 (1990) IS NOT WAIVED IF THE STATE DOES NOT PURSUE AN INTERLOCUTORY REMEDY UNDER CRIM. R. 12(K) AND JUV. R. 22(F). THE EXISTENCE OF INTERLOCUTORY REMEDIES DOES NOT PRECLUDE THE STATE FROM APPEALING SUBSTANTIVE LEGAL ISSUES INVOLVING THE SUPPRESSION OR EXCLUSION OF EVIDENCE PURSUANT TO BISTRICKY.**

At the outset, it is important to understand what the State is seeking in this case. Should the State prevail, this Court will reverse the decision of the court of appeals dismissing the appeal and remand the case to the court of appeals for further consideration of the State's discretionary appeal.

Thus, the determination of the issues presented in this case have no effect on the life of M.M. The acquittal is secure. The charges cannot be brought again. *State v. Edmonson*, 92 Ohio St.3d 393, 395 (2001) (State's post-verdict appeal with leave of court pursuant to R.C. 2945.67(A) "has no practical effect on this appellant.").

Ironically, it is this legal impotency that causes this case to present an important issue for this Court – when in a juvenile (or, for that matter, a criminal) case can the State appeal decisions of a trial court with which it disagrees? As discussed below, the answer to this question requires both a constitutional and statutory analysis.

### **Ohio Constitution Article IV, Section 3(B): Conferring Appellate Jurisdiction**

The jurisdiction of the courts of appeals is, first and foremost, a creature of the Ohio Constitution. Without a constitutional grant of authority, there is no jurisdiction. See, *Eastman v. State*, 131 Ohio St. 1 (1936), par. 12 of syllabus; see also, *Eisler v. United States*, 338 U.S. 189, 194 (1949) (jurisdiction of the United States Supreme Court set forth in Article III of the United

States Constitution and limited to cases and controversies; Court noted that, because constitutional provision did not allow for issuing advisory opinions, first Court declined to provide advisory opinion to President Washington). Article IV, Section 3(B)(2) addresses the appellate jurisdiction of the courts of appeals with respect to lower courts:

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 courts of appeals within the district . . .

By its plain language, the constitutional provision thus hinges appellate jurisdiction on three criteria:

- (1) There must be a further statutory grant of jurisdiction (“shall have jurisdiction as may be provided by law”)
- (2) The statutory grant must enable the court of appeals “to review and *affirm, modify or reverse*” a lower court’s ruling, and
- (3) The ruling subject to affirmance, modification or reversal must be a “judgment or final order.”

The State’s argument improperly expands the jurisdiction of courts of appeals beyond both the first and second criterion, above.

### **There Is No Statutory Authority for the State’s Appeal in This Case**

R.C. 2945.67, on its face, precludes the State’s appeal. The statute provides:

(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.

The statute thus gives the State an appeal of right “of any decision . . . which decision grants . . . a motion to suppress evidence.” By “suppress” the statute also includes decisions which grant motions to exclude evidence on evidentiary grounds. *State v. Davidson*, 17 Ohio St.3d 132 (1985). The process for taking such appeals of right is set forth in Juv. R. 22(F) and Crim. R. 12(K), which each establish the procedure for taking an appeal of right. Both rules require the appeal to be noted within seven days of the ruling and both rules only allow the appeal to be taken if the prosecutor also represents that the evidence is sufficiently integral to the State’s case that the State cannot reasonably prevail at trial without it.

The State claims that, even if it does not take an appeal of right, it can still take an after-the-verdict appeal of the exclusion of evidence on the basis of R.C. 2945.67’s provision for an appeal with leave of the court. But the State’s argument fails on the plain meaning of the statute. The discretionary appeal provision specifically applies to “other” decisions of the trial court. The word “other,” falling in the same sentence as the list of decisions that can be appealed as a matter of right clearly indicates that discretionary appeals are only available for decisions “other” than those where an appeal of right can be taken. Because exclusion of evidence is appealable as a matter of right, it cannot qualify as a matter that can be appealed as a discretionary matter.

R.C. 2945.67(A) still allows the State to appeal by leave of court a myriad of decisions by trial courts, that the State has no absolute right to appeal. For example, “other decision[s]” would include the granting of a motion for a new trial,<sup>1</sup> an order denying forced medication,<sup>2</sup> or

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<sup>1</sup> *State v. Matthews*, 81 Ohio St.3d 375 (1998).

<sup>2</sup> Cf. *State v. Muncie*, 91 Ohio St.3d 440, 446 (2001).

an order finding the defendant incompetent to stand trial.<sup>3</sup> But each of these cases has something that the instant appeal lacks – the ability of the court of appeals to make any difference in the case then under consideration.

### **There is No Constitutional Authority for the Rendering of an Advisory Opinion**

It is the second criteria that is at issue in this portion of this brief: “to review and affirm, modify or reverse” a lower court’s ruling:

We therefore 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.” . . . any 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” is an attempt to enlarge the jurisdiction, as well as the judicial power, of such courts . . . and is, therefore, unconstitutional and void.

*State v. Dodge*, 10 Ohio App.2d 92, 102-03 (1967), aff’d sub nom. *City of Euclid v. Heaton*, 15 Ohio St.2d 65 (1968) (adopting the reasoning of *Dodge*).

*Dodge* and *Heaton* specifically recognized that the predecessor to R.C. 2945.67 was unconstitutional to the extent that it permitted the State to seek advisory opinions that would have no effect on the trial court’s judgment. Under the same rationale, the State’s reading of R.C. 2945.67 as permitting review of a “decision” of a trial court that would have no effect on the outcome of the case, is unconstitutional.

The Ohio Constitution’s “affirm, modify or reverse” requirement is hardly novel. It has long been recognized that the adversarial process is integral to Anglo-American jurisprudence. When courts of appeals cannot make a wit of difference to one or both of the parties involved, the adversarial process breaks down.

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<sup>3</sup> *State v. Upshaw*, 110 Ohio St.3d 189, 2006-Ohio-4253.

To be sure, this Court has since countenanced State's appeals that did nothing but seek advisory opinions. E.g., *State v. Bistricky*, 51 Ohio St.3d 157 (1999), *Edmonson*. Respectfully, these opinions are wrong. The majority opinions in these cases, by focusing solely on whether there was a statutory grant of appellate jurisdiction set forth in R.C. 2945.67 never looked at the "affirm, modify or reverse" requirement of Article IV, Section 3(B) as interpreted by *Heaton*.

Put a different way, this Court's post-*Heaton* jurisprudence has focused solely on Article IV, Section 3(B)(2)'s first jurisdictional criterion that courts of appeals shall "have jurisdiction as may be provided by law," but has not addressed Article IV, Section 3(B)(2)'s second criterion, that the jurisdiction "provided by law" must still be limited to the ability to "review and affirm, modify or reverse" a lower court's judgment or final order.

In the process, this Court has not disturbed its precedent in *Heaton*. In *Edmonson*, this Court noted that the court of appeals below while disagreeing with the trial court's judgment, was still required to *affirm* the trial court because the R.C. 2945.67(A) appeal "could not effect *Edmonson*'s conviction." Nonetheless, no constitutional analysis under Article IV, Section 3(B) was undertaken.

This is not to suggest that this Court's omission of an Ohio constitutional analysis in cases such as *Bistricky* and *Edmonson* was a failure on the part of the Court. Rather, common law tradition places it upon the parties to present salient issues, both constitutional and statutory, to the Court. As discussed in the amicus brief of the Ohio Public Defender, the only entities that were involved in the briefing of issues before this Court in *Bistricky* were the Cuyahoga County Prosecutor's Office and various amici – all of whom wanted this Court to address the substantive immunity issue that was presented. The defendants in the *Bistricky* case (who had all been acquitted) did not file briefs. Thus, in *Bistricky*, the Court departed from *Heaton*'s constitutional

analysis without anyone – party, amicus or the Court, itself – even acknowledging (or realizing) that the Court had done so. And, with *Bistricky* as guiding precedent, the apparent authority of the Court to issue advisory opinions has become an unfortunate – and unconstitutional process – that has continued unchecked, and virtually unchallenged. One exception to this somnambulence came in *State v. Roddy*, 120 Ohio St.3d 1208, 2008-Ohio-6101, where defendant Roddy made many of the same jurisdictional arguments set forth herein. However, *Roddy* was ultimately dismissed as improvidently allowed, and courts of appeals have continued to countenance appeals seeking advisory opinions without examining the constitutional jurisdiction of courts of appeals to do so. <sup>4</sup>

**The State’s Argument Offends the Separation of Powers and the Traditional Role of the Judiciary**

The State’s argument is also inconsistent with traditions of separation of powers. The judicial branch is independent of the executive branch. The executive branch should not be able to call upon the judicial branch to undertake legal analysis and promulgate opinions that are independent of any pending controversy. *Cf. Hayburn’s Case*, 2 U.S. 408, 2 Dall. 409, 1 L.Ed. 436 (1792).

As discussed in the amicus brief of the Ohio Public Defender, Chief Justice Jay declined President Washington’s letter request for an advisory opinion as constitutionally inappropriate. The State’s motion for leave to appeal in this case, while cloaked in legal process as opposed to a letter, is no less offensive to those constitutional considerations that prompted Chief Justice Jay’s response.

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<sup>4</sup> As much as the defense would like to seek this Court decide the constitutional jurisdictional issue once and for all an overrule *Bistricky* and its progeny, the defense must acknowledge that overruling *Bistricky* and *Edmonson* is not required in this case. *Bistricky* and *Edmonson* can be distinguished on the basis that neither involved the exclusion of evidence.

## The State's Policy Argument Fails as Well

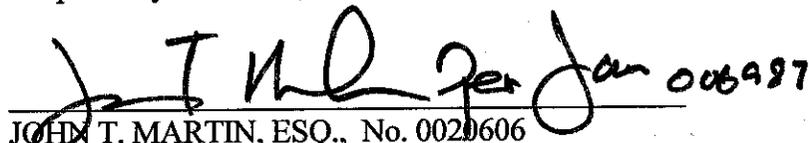
Finally, the State's argument that the evidentiary issue presented in the instant case is so important that it must be decided in an advisory opinion should also be rejected. First and foremost, no issue is so important that it should be decided in a manner that departs from the adversarial process.

Second, if the issue is truly one that recurs, then the State will have its day in court. In the future, if the trial court admits the evidence and the defendant is convicted, the issue may become one raised on appeal by the defendant. On the other hand, if the trial court excludes the evidence, the State can take its mid-trial appeal if the evidence is sufficiently integral to its case. In either case, the State will have its opportunity to litigate the issues – but in a forum where it makes a difference.

## CONCLUSION

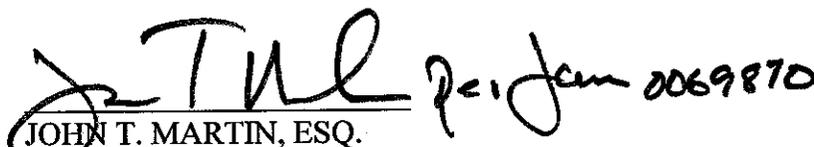
Wherefore, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

  
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## SERVICE

I certify a copy of the foregoing document has been served upon Daniel Van, counsel for the State of Ohio, 1200 Ontario Street 9<sup>th</sup> Floor, Cleveland, Ohio 44113, on this 11<sup>th</sup> day of September, 2012.

  
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