ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
		Case Number 2009-1619
Plaintiff-Appellant,	:	
		On appeal from Summit County
v.	:	Court of Appeals Case CA-21906
DENNY ROSS,	:	
Defendant-Appellee.	:	

MERIT BRIEF OF DEFENDANT-APPELLEE DENNY ROSS

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A. Introduction.

This is a case in which the death penalty is being sought, and its history is lengthy and complex. As a result, a complete understanding of the current posture of the case requires a detailed explanation of the evidence presented at trial and various legal proceedings which have followed it.

B. The allegations against Defendant Ross.

Defendant Ross was arrested on May 27, 1999 and charged with aggravated murder, rape, kidnapping, tampering with evidence and abuse of a corpse; the indictment was amended in October of the same year to include a death penalty specification. (Indictment, Trial Docket at 6/10/1999; Supplemental Indictment, Trial Docket at 12/20/1999). Defendant Ross' trial commenced in September of the following year in the Summit County Court of Common Pleas, Judge Jane Bond[1] presiding.

The prosecution alleged at trial that Defendant Ross had raped and murdered Hannah Hill, an eighteen year-old Akron resident with whom he was acquainted. (TR[2] 3). Hill left her parents' home at approximately 10:30 PM on May 19, 1999. (TR 33). She spoke with her mother ("Mrs. Hill") at the time she left, but did not indicate where she was going or what her plans were. (TR 39). The following morning, Hannah's employer called her residence to inquire as to why she had not reported for work, at which point Mrs. Hill realized that she had not returned the previous night. (TR 39). Mrs. Hill called the Akron Police that evening (Thursday, May 20) to report that Hannah was missing. (TR 40).

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1 As with the State's brief, Defendant Ross will refer to the various judicial officers who have presided over proceedings in the Court of Common Pleas by their individual names.

2 There are multiple transcripts in this case. The abbreviation "TR" refers to the trial transcript.

Police investigated the disappearance for several days; on May 26, law enforcement received a report that Hill's car had been abandoned in a residential neighborhood. (TR 53-54). After confirming that the vehicle was Hill's, additional law enforcement agents were dispatched to the scene. (TR 54-55). Hill's body was discovered in the trunk, partially clothed and nude from the waist down. (TR 55). The body had been positioned in a degrading manner, indicating that the killer intended to cause shock when the body was located. (TR 720).

Police focused on several subjects in their investigation of Hill's disappearance and murder, including a physically abusive boyfriend and another male acquaintance. (TR 95-97, 106-07; 714-15). The evidence also indicated a possibility that Hill had been murdered by a serial killer. (TR 706-07).

Following the discovery of the body on May 26, police accessed Hill's phone records and found that an eighteen minute call had been placed to Defendant Ross' residence before she left her home on the evening of May 19. (TR 65). Police interviewed Defendant Ross that evening at his apartment at approximately 7:30 PM. (TR 64). Defendant Ross informed the police that he and Hill had engaged in a limited degree of physical intimacy, and that she subsequently left his apartment. (Grant of Acquittal at 12 and FN 41, Trial Docket at 12/22/2003). Defendant Ross also advised the police that Hill's boyfriend had paged her several times while she was at his apartment. (TR 102).

Later that night, the police obtained a warrant to search Defendant Ross' apartment and returned at approximately 3:00 AM. (TR 147, 153). As officers were preparing to make a forcible entry into the apartment, Defendant Ross met them at the door. (TR 150-51). Police then entered the residence, noted the presence of a female guest, and conducted a routine sweep.

(TR 151). As the initial entry was made into Defendant Ross' apartment, a detective checked the rear of the building, where he discovered a trash bag beneath Defendant Ross' apartment window. (TR 190-91). The bag in question contained Hannah Hill's panties, corduroy pants, shoes and socks. (TR 208). The bag also contained Hill's purse, which in turn contained makeup items, cigarettes and Hill's driver's license and credit cards. (TR 208-09). No identifiable fingerprints were recovered from the bag. (TR 218-29). Defendant Ross' semen was found on the exterior of Hill's underwear. (TR 501). However, this was consistent with the information that Defendant Ross had given to police in his earlier interview. (Grant of Acquittal at 12 and FN 41, Trial Docket at 12/22/2003).

The government claimed at trial that Defendant Ross had raped Hill in his apartment and then murdered her there, contending that Defendant Ross had thrown the bag containing Hill's clothes and belongings out his window as the police were coming up the stairs. (TR 148). This theory clearly fails to withstand scrutiny. The evidence at trial established that Hill was wearing her pants and her underwear at the time she was murdered. (TR 205-06; Grant of Acquittal at 7, 9, Trial Docket at 12/22/2003). Accordingly, for the State's theory of the case to be correct, one of two scenarios would have to be true: Defendant Ross raped Hill, Hill put her clothes back on, Defendant Ross then murdered her, took her clothes back off again, and then carried her nude body to her car, or; Defendant Ross raped Hill, Hill put her clothes back on, Defendant Ross then murdered her, carried her body to her car, took her clothes back off again, and then brought them back to his apartment.

Both scenarios are obviously implausible. The far more reasonable explanation is that someone murdered Hill after she left the apartment, and subsequently placed the bag of clothes

outside of the apartment after the body was discovered. Furthermore, the bag containing Hill's clothes and belongings did not match any of the trash bags found in Defendant Ross' apartment. (TR 1070). In addition, there is no physical evidence indicating that Hill was murdered in Defendant Ross' apartment. (TR 802-03). Indeed, the only evidence that Hill was even at Defendant Ross' apartment on the night in question is his previously-discussed statement to the police. There is also no evidence linking Defendant Ross to Hill's car, and a palm print recovered from the trunk (where Hill's body was discovered) has not been identified. (TR 357).

C. The mistrial.[3]

Following the State's presentation of evidence, Judge Bond granted Defendant Ross' motion for an acquittal on the charge of kidnapping. (Order, Trial Docket at 11/02/2000). The defense then elected to rest without calling any witnesses. (TR 1071). The case was then submitted to the jury for deliberations on Friday, October 27, 2000. (Order Barring Retrial at 1, Trial Docket at 2/15/2002). The following afternoon, Judge Bond received a note from the jury foreman which indicated that one juror was aware of inadmissible evidence; the note further indicated that the foreman suspected the juror in question was agreeing with the rest of the group to expedite deliberations. (Order Barring Retrial at 2, Trial Docket at 2/15/2002).

After meeting with counsel in chambers, Judge Bond, Defendant Ross and counsel for both parties met on the record in the courtroom to discuss how to handle the situation presented by the note from the jury foreman. (Order Barring Retrial at 2, Trial Docket at 2/15/2002). Judge Bond asked the parties if they would consent to a mistrial. (Order Barring Retrial at 3,

3 Although the legal issues relating to the mistrial and subsequent litigation are not presently before the Court on the merits, these matters constitute a very substantial and significant portion of the procedural and factual history of this case. *See Ross IV, infra,* 2009-Ohio-3561 at ¶2-10. In light of the fact that this case has the potential to become a capital proceeding, Defendant Ross respectfully submits that a full recounting of its history case is warranted.

Trial Docket at 2/15/2002).

Counsel for Defendant Ross offered several alternatives to a mistrial, all of which Judge Bond rejected. (Order Barring Retrial at 3-4, Trial Docket at 2/15/2002). Defendant Ross personally stated on the record that he did not want a mistrial. (TR 1270-72). Judge Bond indicated that she would not permit the case to proceed, and declared a mistrial over the objection of the defense, stating that she would summon the jury and discharge them from service; Judge Bond further stated that she would permit counsel to question the jurors. (TR 1275-78).

However, rather than call the jury into the courtroom to formally discharge them, Judge Bond abruptly declared that the proceedings were adjourned until the following day. (TR 1278-79). Judge Bond then left the bench, exited the courtroom, briefly entered her chambers, and personally entered the jury room, unaccompanied by a court reporter, and without any explanation to counsel as to why she was making *ex parte* contact with the jury outside the presence of counsel. (Order Barring Retrial at 6, Trial Docket at 2/15/2002). Judge Bond informed the jury that she had declared a mistrial and offered to speak with the jurors about the situation in her chambers. (Order Barring Retrial at 6, Trial Docket at 2/15/2002).

While meeting with one of the jurors, Judge Bond learned that the jury had already acquitted Defendant Ross of aggravated murder, murder and rape. (Order Barring Retrial at 6, Trial Docket at 2/15/2002). Rather than disclosing this fact to counsel, Judge Bond directed her bailiff to retrieve the verdict forms from the jury room and bring them back to her chambers. (HTR [4] 166-67). When one of the jurors expressed concern as to what would happen to

4 "HTR" refers to the transcript of the evidentiary hearing in support of Defendant Ross' motions to bar retrial.

Defendant Ross, Judge Bond told her not to worry about him because she had excluded evidence implicating him in the crime, but that she was going to allow the government to introduce the evidence at the next trial.[5] (HTR 65).

One of Defendant Ross' lawyers attempted to meet with Judge Bond to determine what was going on, but her bailiff refused to allow him to enter her chambers because she was meeting with a juror. (HTR 168; Order Barring Retrial at 7, Trial Docket at 2/15/2002). After Judge Bond had finished meeting with the jurors individually, all twelve jurors waited in the jury room while arrangements were made for them to leave. (Order Barring Retrial at 7, Trial Docket at 2/15/2002). Judge Bond made no attempt to inform counsel for the parties of the unanimous verdicts of acquittal, or to allow counsel to consult with the jurors in accordance with her previous statements. (Order Barring Retrial at 7, Trial Docket at 2/15/2002).

The jurors were subsequently escorted from the courthouse as a group in the company of bailiffs and deputy sheriffs due to the large number of reporters outside. (Order Barring Retrial at 7, Trial Docket at 2/15/2002). When defense counsel made another attempt to meet with Judge Bond in order to determine exactly what was happening, her bailiff advised counsel that he would still need to wait because Judge Bond was now giving an interview to a reporter from the Akron Beacon Journal. (Order Barring Retrial at 7, Trial Docket at 2/15/2002). After Judge Bond finished speaking with the reporter, she met with defense counsel and counsel for the prosecution and advised them for the first time that the jury had reached verdicts. (Order Barring Retrial at 7, Trial Docket at 2/15/2002). On November 2, 2000, Judge Bond finalized her oral

5 The evidence in question consisted of DNA testing which allegedly demonstrated that traces of Defendant Ross' blood were present on Hill's pants. (ETR 3-12). The abbreviation "ETR" refers to a separately paginated transcript of pre-trial proceedings relating to evidentiary issues.

declaration of a mistrial by entering judgment in the journal. (Journal Entry, Trial Docket at 11/2/2000).

D. Post-mistrial proceedings in state court.

On November 9, 2000, defense counsel filed a motion to disqualify Judge Bond, a motion to bar retrial on double jeopardy grounds, a renewed motion for a judgment of acquittal, and a motion to perfect the three unanimous verdicts of acquittal rendered by the jury. (Motion to Disqualify, Trial Docket at 11/9/2000; Motion to Bar Retrial, Trial Docket at 11/9/2000; Motion for Acquittal, Trial Docket at 11/9/2000; Motion to Perfect the Verdicts, Trial Docket at 11/9/2000).

An affidavit of disqualification was subsequently filed in the Ohio Supreme Court. *In re Disqualification of Bond* (2001), 94 Ohio St.3d 1221 (Moyer, C.J., in chambers). On January 17, 2001, Chief Justice Moyer disqualified Judge Bond from further proceedings in the case, concluding that she would likely be called as a witness in the hearing on Defendant Ross' post-trial motions. *See generally Id.* Judge Cirigliano was subsequently assigned to handle the case.

Judge Cirigliano conducted an evidentiary hearing on May 22, 2001, at which the previously described facts were established through the testimony of Judge Bond, her bailiff, the jury foreman, another juror, and defense counsel. (HTR; Order Barring Retrial, Trial Docket at 12/15/2002). Following the hearing, Judge Cirigliano granted Defendant Ross' motion to bar retrial, concluding that a second prosecution would clearly violate the Double Jeopardy Clauses of the Ohio and Federal Constitutions. (Order Barring Retrial at 14-16, Trial Docket at 12/15/2002). In light of this disposition of the case, Judge Cirigliano declined to rule on the remaining motions pending before the Court. (Order Barring Retrial at 16, Trial Docket at

12/15/2002).

The prosecution subsequently appealed to the Ninth Appellate District, which determined that Judge Cirigliano had erred in granting relief. *See generally State v. Ross,* Summit App. No. 20980, 2002-Ohio-7317 ("*Ross I*"). The Court of Appeals held that Defendant Ross had no right to submit extraneous evidence in support of his double jeopardy claim, and accordingly refused to consider the fact that Defendant Ross had been acquitted of aggravated murder, murder and rape in making its decision. *Id.* at ¶11-13, 19-20, and at FN 3. Judge Baird submitted a vigorous dissent, concluding that any reprosecution of Defendant Ross would constitute a clear double jeopardy violation. *See Id* at ¶53-59 (Baird, J., dissenting). The merits of the Ninth Appellate District's previous ruling on Defendant Ross' double jeopardy claim are not before the Court at this time.[6]

E. The second acquittal on the charge of rape.

After this Court declined to hear Defendant Ross' double jeopardy claim on the merits, *05/07/2003 Case Announcements*, 2003-Ohio-2242 at page 16, the matter returned to the Court of Common Pleas for the disposition of his remaining motions. On September 23, 2003, Judge Cirigliano issued a journal entry denying Defendant Ross' motion for acquittal and his motion to perfect the jury verdicts which had acquitted him. (Journal Entry, Trial Docket at 9/10/2003).

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6 However, in the event that Defendant Ross is retried, convicted and sentenced to death, his initial double jeopardy claim relating to the mistrial will be before this Court for full review on the merits. *See* R.C. § 2953.02; *c.f. State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160. Although this Court previously declined to review Defendant Ross' claim following the decision of the Ninth District in *Ross I, supra,* a denial of jurisdiction is not a decision on the merits of a case, and as a result it does not operate as *res judicata. State v. Davis,* 119 Ohio St.3d 422, 2008-Ohio-4608 at ¶25-27; *accord Hancock, supra* at ¶30-32. Moreover, the fact that Defendant Ross was unable to obtain relief in federal court would pose no bar to this Court's independent review. *See Ex Parte Roy Gene Smith* (Tex.Crim.App. Apr. 28, 2010), ___ S.W.2d ___, 2010 Tex. Crim. App. LEXIS 534 at *16-*26 and at FN 32.

The ruling was summary in nature and contained no analysis. (Journal Entry, Trial Docket at 9/10/2003).

Defendant Ross subsequently submitted supplemental memorandums in support of the motions. (Supplemental Memorandum, Trial Docket at 9/12/2003; Supplemental Memorandum, Trial Docket at 11/6/2003). A hearing was held on November 12, 2003, and an additional supplemental memorandum in support of acquittal was filed after the hearing which responded to some of the statements the prosecution on the record. (*See generally* MTR;[7] Supplemental Memorandum, Trial Docket at 11/26/2003).

Following the hearing, Judge Cirigliano granted Defendant Ross' motion for acquittal with respect to the charge of rape and accompanying capital specification; Judge Cirigliano declined to grant an acquittal on the remaining counts, and also denied Defendant Ross' motion to perfect the verdicts. (Grant of Acquittal, Trial Docket at 12/22/2003). As the record makes clear, this was the second time that Defendant Ross had been acquitted of the charged rape. (Order Barring Retrial at 6, Trial Docket at 2/15/2002); *see also Green v. United States* (1957), 355 U.S. 184, 188 ("a verdict of acquittal is final...even when not followed by any judgment" (citation and internal quotation marks omitted)); *Bair v. State* (Ga. App. 2001), 551 S.E.2d 84; *Stone v. Superior Court* (Cal. 1982), 646 P.2d 809; *Stow v. Murashige* (C.A.9 2004), 389 F.3d 880.

The State subsequently filed a notice of appeal and a motion for leave to appeal from the judgment of acquittal. (Notice of Appeal, Trial Docket at 1/20/2004; Motion for Leave to Appeal, Appeals Docket at 1/20/2004). Defendant Ross responded by filing a motion to dismiss the appeal. (Motion to Dismiss, Appeals Docket at 2/2/2004). The Ninth Appellate District

7 The abbreviation "MTR" refers to the motions hearing conducted on November 12, 2003.

subsequently granted the prosecution's motion for leave to appeal on March 29, 2004. (Grant of Leave to Appeal, Appeals Docket at 3/29/2004).

F. Federal habeas corpus proceedings.

While the government's appeal challenging the acquittal on the charge of rape was pending in the Ninth Appellate District, Defendant Ross filed a petition for habeas corpus relief in the Northern District of Ohio. *See generally Ross v. Petro* (N.D.Oh. 2005), 382 F.Supp.2d 957 ("*Ross II*"). After the petition was filed, the District Court ordered a stay of all state criminal proceedings to ensure that Defendant Ross' double jeopardy rights would not be violated. (Notice of Stay, Appeals Docket at 5/17/2004). The Ninth Appellate District accordingly canceled the previously scheduled oral argument and stayed the proceedings pending the outcome of the federal proceedings. (Journal Entry, Appeals Docket at 6/23/2004; Stay of Proceedings, Appeals Docket at 7/7/2004).

The District Court subsequently granted Defendant Ross' petition, concluding that the decision of the Ninth Appellate District rejecting his double jeopardy claim was both contrary to, and an objectively unreasonable application of, the clearly established precedent of the United States Supreme Court. *See generally Ross II, supra.* The prosecution filed an appeal to the Sixth Circuit, and Defendant Ross cross-appealed on various alternative grounds for relief with which the District Court did not agree. *See generally Ross v. Petro* (C.A.6 2008), 515 F.3d 653 ("*Ross III*"). The Sixth Circuit reversed the District Court's decision in a 2-1 ruling, concluding that Defendant Ross did not satisfy the requirements for habeas corpus relief. *See generally Id.* Judge Guy dissented, concluding that the Ninth Appellate District's denial of Defendant Ross' double jeopardy claim was objectively unreasonable. *Id.* at 671-73 (Guy, J., dissenting).

G. Return to state court.

After the United States Supreme Court declined to hear the case on the merits,[8] *Ross v. Rogers* (2009), 129 S.Ct. 906, the stay of state criminal proceedings was dissolved, and the case returned to the Ninth Appellate District. (Journal Entry, Appeals Docket at 1/23/2009). The Court of Appeals subsequently affirmed Judge Cirigliano's ruling acquitting Defendant Ross of rape and the accompanying capital specification. *See generally State v. Ross*, 184 Ohio App.3d 174, 2009-Ohio-3561 ("*Ross IV*"). The prosecution moved for reconsideration, but the Ninth Appellate District found the State's arguments to be without merit. (Journal Entry, Appeals Docket at 8/6/2009). The case is now before this Court on the merits pursuant to a discretionary grant of jurisdiction. *02/10/2010 Case Announcements*, 2010-Ohio-354 at page 4.

II. LAW AND ARGUMENT

A. Appellant's Proposition of Law: The Court of Common Pleas lacks jurisdiction to grant an untimely Crim.R. 29(C) motion for acquittal because Crim.R. 45(B) bars "any action" not expressly provided for by Crim.R. 29(C), and any order purporting to grant acquittal outside the confines of Crim.R. 29(C) is void and unenforceable.

B. Appellee's Response.

1. Introduction.

The arguments raised by the State are devoid of merit, and as a result the decision of the Ninth Appellate District must be affirmed. Judge Cirigiano did not act outside his jurisdiction in granting an acquittal as to the charge of rape and accompanying capital specification, and even if he did, it would not matter because the jurisdictional exception to the Double Jeopardy Clause[9] is

8 As with this Court, a denial of certiorari in the Supreme Court of the United States does not constitute an opinion on the merits of a case. *See, e.g., Teague v. Lane* (1989), 489 U.S. 288, 296 (citations omitted).

9 Unless otherwise specified, Defendant Ross will use the term "Double Jeopardy Clause" to refer to both the Double Jeopardy Clause of the Federal Constitution and the Double Jeopardy Clause of the Ohio Constitution.

not applicable to this case. Furthermore, Judge Cirigliano did not consider evidence outside the trial record in granting the acquittal, and even if he did, it would not matter because the Double Jeopardy Clause prohibits any review whatsoever of a judicial acquittal granted after a mistrial. Finally, the fact that Judge Cirigliano was not the same judge who presided over the trial has no bearing upon the validity of the acquittal. Accordingly, the decision of the Ninth Appellate District must be affirmed.

2. *Carlise v. United States* (1996), 517 U.S. 416, has no bearing upon this case.

The prosecution relies heavily upon *Carlise v. United States* (1996), 517 U.S. 416. (State's Brief at 9-11).[10] *Carlise* has no applicability to this case. In *Carlise,* the defendant was charged with a federal narcotics offense and subsequently convicted by a jury. *Carlise,* 517 U.S. at 418. The defendant subsequently filed a motion for acquittal; the motion was untimely, having been filed outside the seven-day limitations period which was applicable at that time. *Id.* The District Court initially denied the motion on the merits, but subsequently reconsidered its decision and granted an acquittal at the time of sentencing. *Id.* at 418-19. The United States Supreme Court subsequently concluded that the District Court lacked jurisdiction to grant the acquittal because it had not been timely filed. *Id.* at 433.

Carlise does not control this case in any respect. First, unlike the defendant in *Carlise*, Defendant Ross filed a **timely** motion for acquittal following the declaration of the mistrial. *Ross IV, supra,* 2009-Ohio-3561 at ¶25. The entire basis of *Carlise's* holding is predicated upon the fact that the defendant in that case failed to file a timely motion for acquittal in the first instance. *See generally Carlise, supra.* Unlike this case, it did not involve reconsideration of a

10 As noted by the Ninth Appellate District, the State did not even raise any issues relating to *Carlise* until it filed its reply brief. *Ross IV, supra*, 2009-Ohio-3561 at ¶19.

motion for acquittal which was timely filed in accordance with Rule 29. *Compare Id. with Ross IV, supra.* The government's reliance of *Carlise* is obviously misplaced, *Ross IV, supra,* at ¶22-23, and its arguments must be rejected.

Second, and far more importantly, the acquittal at issue in *Carlise* was not protected by the Double Jeopardy Clause; as previously noted, *Carlise* involved an acquittal *following a conviction. Carlise,* 517 U.S. at 418. The Double Jeopardy Clause permits review of a post-conviction judicial acquittal. *See, e.g., United States v. Wilson* (1975), 420 U.S. 332, 344-45.[11] In such circumstances, a reversal does not place the defendant back in jeopardy by subjecting him or her to further fact-finding on the charged offense; instead, the reversal merely reinstates the conviction that was previously returned by the jury. *See generally Id.* In contrast, a judicial acquittal following a mistrial (as in this case) enjoys the full protection of the Double Jeopardy Clause. *See generally United States v. Martin Linen Supply* (1977), 430 U.S. 564. Unlike the acquittal in *Carlise*, the acquittal in Defendant Ross' case cannot be reviewed. *See Id.*[12] Accordingly, the government's reliance on *Carlise* is clearly misplaced.[13]

3. There was no violation of Criminal Rule 45(B).

The State nevertheless insists that under Crim.R. 45(B), Judge Cirigliano was prohibited

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11 Although R.C. § 2945.67(A) disallows challenges to post-conviction acquittals, the prohibition is purely statutory in nature in that context. The statute, in addition to the Double Jeopardy Clause, also bars any further proceedings on the charge of rape and accompanying capital specification in the instant case.

12 Furthermore, as explained in detail in section II(B)(5) *infra*, the jurisdictional exception to the Double Jeopardy Clause may not be invoked under the facts of this case. As a result, the government's attempt to frame its argument in jurisdictional terms has no bearing upon the unreviewable nature of the acquittal at issue in this appeal.

13 The decision in *United States v. Gupta* (C.A.11 2004), 363 F.3d 1169, upon which *amicus curiae* The Ohio Prosecuting Attorney's Association relies, also involved a post-conviction acquittal, and as a result the Double Jeopardy Clause was not implicated. *See Gupta*, 363 F.3d at 1170. Accordingly, *Gupta* has no applicability to this case.

from taking "any action" under Crim.R. 29 once the time for filing had expired. (State's Brief at 13). As correctly noted by the Court of Appeals, there was no was violation of Crim.R. 45(B) because the rule relates only to the timeliness of filing a Rule 29 motion, not its disposition. (Journal Entry, Appeals Docket at 8/6/2009).

Furthermore, the unreasonableness of the prosecution's interpretation of Crim.R. 45(B) is evident from the patently nonsensical results to which it would lead. The State apparently reads Crim.R. 45(B)'s reference to "any action" to mean that any action whatsoever relating to the motion must be completed before the limitations period has expired. (State's Brief at 13-15). Under the government's interpretation of the rule, if a defendant files a motion for acquittal at 11:50PM on the last timely day, Crim.R. 45(B) would give the Court exactly ten minutes to rule on it. Even worse, if a defendant files a motion for a new trial at 11:59PM, the Court would need to conduct an evidentiary hearing and dispose of the matter within a span of sixty seconds. While the judicial officers of this State are undoubtedly efficient, they are not superhuman, and the authors of Rule 45 were surely aware of that fact at the time the rule was drafted. Accordingly, the prosecution's arguments in this regard must be rejected.

4. The denial of a timely-filed motion for acquittal following a mistrial is an interlocutory order, and is accordingly subject to reconsideration.

The prosecution contends that "There is absolutely no reasonable interpretation of Crim.R. 45(B) that would make the denial of acquittal as 'interlocutory' and subject to reconsideration outside of the rule, particularly three months after denying the motion." (State's Brief at 15). A ruling is either interlocutory or it is final and appealable. *Pitts v. Ohio Dept. of Transp.* (1981), 67 Ohio St.2d 378, FN 1. There is no in-between. *Id.; see also State v. Harris* (Utah 2004), 104 P.3d 1250 at ¶15. If an order is interlocutory, it is subject to reconsideration.

Pitts, supra, 67 Ohio St.2d 378, FN 1; *State v. Abood,* Cuyahoga App. Nos. 80318, 80325, 2002-Ohio-4437 at ¶8; *State v. Ward,* Gallia App. No. 03CA2, 2003-Ohio-5650 at ¶11. Any other rule would leave trial courts without any mechanism to correct erroneous non-final rulings, and such a state of affairs would hardly be conducive to the orderly administration of the criminal justice system.

The denial of a motion for acquittal following a mistrial is not a final appealable order. *State v. Alderman* (Dec. 11, 1990), Athens App. No. CA 1433, 1990 WL 253034 at *4; *see also Richardson v. United States* (1984), 468 U.S. 317. Accordingly, the denial of Defendant Ross' motion for acquittal was an interlocutory order, and it was therefore subject to reconsideration. *See Abboud, supra,* 2002-Ohio-4437 at ¶8; *Ward, supra,* 2003-Ohio-5650 at ¶11. As a result, Judge Cirigliano did not exceed his jurisdiction in acquitting Defendant Ross on the charge of rape and accompanying capital specification. The arguments of the government to the contrary lack merit and must be rejected.

5. Even assuming that Judge Cirigliano exceeded his jurisdiction in acquitting Defendant Ross, the jurisdictional exception to the Double Jeopardy Clause has no applicability to this case, and as a result the acquittal may not be challenged.

As the foregoing makes clear, Judge Cirigliano did not commit any jurisdictional error in acquitting Defendant Ross. However, even if he did, it would not have any impact on the unreviewable nature of the acquittal. While the Double Jeopardy Clause does provide for a jurisdictional exception to the preclusivity of an acquittal, *United States v. Ball* (1896), 163 U.S. 662, 669, the exception is extremely narrow, and it contemplates "jurisdiction" only in the most fundamental sense. *See generally State v. Corrado* (Wash. App. 1996), 915 P.2d 1121, and the decisions cited therein.[14]

14 *Corrado* provides a detailed survey of various state and federal decisions which have

"Clearly, the exception does not apply every time a court chooses to intone 'lack of jurisdiction' for state procedural law purposes." *Id.* at 1127. So long as the court has jurisdiction over the defendant and jurisdiction to preside over the trial, the Double Jeopardy Clause bars any challenge to an acquittal, even if the rendering of the acquittal was accompanied by some other type of "jurisdictional" error. *Id.* at 1127-31. Stated differently, the jurisdictional exception may only be invoked in cases where the defect was so profound that the accused was never actually "in jeopardy" of being convicted and sentenced. *Id.* at 1129-30.

In this case, there is no dispute that the Summit County Court of Common Pleas had jurisdiction over Defendant Ross and had jurisdiction to preside over trial on the charged offenses. There is no dispute that he was "in jeopardy" of being convicted and sentenced in the jurisdictional sense. So far as the Double Jeopardy Clause is concerned, that is the end of the inquiry with respect to the validity of the acquittal rendered by Judge Cirigliano. *See generally Id.* If Judge Cirigliano violated Crim.R. 45(B) and in granting the acquittal, it simply does not matter, even if the procedural error was "jurisdictional" in nature. *See generally Id.* The jurisdictional exception to the Double Jeopardy Clause is not applicable to this case, the acquittal rendered by Judge Cirigliano is not subject to challenge, and the arguments raised by the State must accordingly be rejected.

6. Judge Cirigliano did not consider evidence outside the record in acquitting Defendant Ross, and even if he did, it would not have any bearing upon the validity of the acquittal.

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considered the jurisdictional exception to the Double Jeopardy Clause. *Corrado,* 915 P.2d at 1126-33 (citations omitted). Defendant Ross has been unable to locate any Ohio decisions addressing the jurisdictional exception as it relates to a double jeopardy-protected acquittal, and the Ninth Appellate District did not reach any of the double jeopardy issues presented by this case, *see generally Ross IV, supra.* Should the Court reach this issue, it would appear to be a matter of first impression in this State.

The prosecution contends that Judge Cirigliano considered evidence outside of the trial record in acquitting Defendant Ross on the charge of rape. (State's Brief at 4-7). As correctly determined by the Court of Appeals, there is absolutely no indication that Judge Cirigliano allowed the falsity of some of testimony presented at trial to factor into his analysis of the sufficiency of the evidence. *Ross IV, supra*, 2009-Ohio-3561 at ¶26-30. Even if he did consider extraneous evidence, however, it would not matter. An acquittal is unreviewable, even if based upon "an egregiously erroneous foundation." *Fong-Foo v. United States* (1962), 369 U.S. 141, 143; *see also Martin Linen Supply, supra,* 430 U.S. at 571-76.; *State ex. rel. Sawyer v. O'Connor* (1978), 54 Ohio St.2d 380, 382-84; *and see generally People v. Anderson* (Mich. 1980), 295 N.W.2d 482. If Judge Cirgliano did allow the extraneous evidence to influence his decision, it has no bearing upon the validity of the acquittal which he rendered. *Fong-Foo, supra.* Accordingly, the arguments raised by the State lack merit, and the decision of the Ninth Appellate District must be affirmed.

7. The fact that Defendant Ross was acquitted by Judge Cirigliano instead of Judge Bond is irrelevant.

The government contends that Judge Cirigliano should not have granted the motion for acquittal because Judge Bond was the one who presided over the trial proceedings. The prosecution maintains:

> An appellate court must bear in mind the trier of fact's superior, first hand perspective in judging the demeanor and credibility of witnesses. *State v. Drayer* 159 Ohio App.3d 189, 2004-Ohio-6120. An appellate court is ill-suited to assess witness credibility, as the demeanor and attitude of witnesses do not translate well into the written record. *See In re Wolfe* (Feb. 16, 2001), Greene App. No. 2000-CA-60, 2001 WL 128884. Just as an appellate court is ill-suited to evaluate a cold-trial record in the same fashion as the fact-finder who hears the evidence, it necessarily follows that a successor judge is also generally ill-suited to the same task based on the same cold record. When, as here, the review of the trial

> evidence occurs years after the actual trial, Judge Cirigliano simply did not have the same firsthand experience with the case as Judge Bond.
>
> (State's Brief at 17).

Completely absent from the State's argument is any acknowledgment that appellate courts do, in fact, have the authority to rule on the sufficiency of the evidence in a criminal proceeding. *See, e.g. Jackson v. Virginia* (1979), 443 U.S. 307. Indeed, while reviewing courts grant a great deal of deference to judicial officers who preside over trial proceedings, appellate courts routinely examine the factual findings made by trial judges.

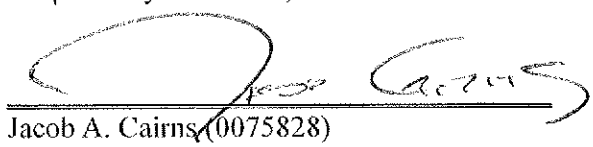
The prosecution has also failed to note that, in stating the relevant standard of review, Judge Cirigliano recognized that "Evidentiary conflicts and the credibility of witnesses are functions reserved for the trier of fact, and the court will not take either into account when determining the sufficiency of the evidence." (Grant of Acquittal at 4, Trial Docket at 12/22/2003). There is absolutely no indication in the ruling that Judge Cirigliano somehow deviated from the correct standard of review, and as the presiding judicial officer appointed by the Chief Justice he obviously had the authority to rule on Defendant Ross' motion for acquittal. Furthermore, even if Judge Cirigliano had applied an erroneous standard of review, it would not have made any difference for double jeopardy purposes. *See, e.g., Fong-Foo, supra.* The prosecution's arguments lack merit, and the decision of the Court of Appeals must be affirmed.

III. CONCLUSION.

For the foregoing reasons, the arguments raised by the State lack merit. Judge Cirigliano did not exceed his jurisdiction or consider extraneous evidence in acquitting Defendant Ross, and even if he did the acquittal may not be disturbed. Any further prosecution on the charge of rape and accompanying capital specification would violate the Double Jeopardy Clause of the Federal

Constitution, the Double Jeopardy Clause of the Ohio Constitution, and Ohio Revised Code § 2945.67(A). Accordingly, the decision of the Ninth Appellate District must be affirmed.

Respectfully submitted,



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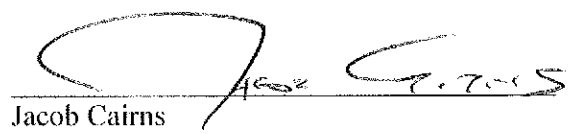
CERTIFICATE OF SERVICE

I certify that on May 28, 2010, the foregoing pleading was served by regular United States Mail upon: Matthew Meyer, Assistant Prosecuting Attorney, Office of the Cuyahoga County Prosecutor, The Justice Center, 1200 Ontario Street, Cleveland, Ohio, 44113; Billie Jo Belcher, Assistant Prosecuting Attorney, Office of the Lorain County Prosecutor, 225 Court Street, Third Floor, Elyria, Ohio, 44035, and; Shelley Pratt, Assistant Prosecuting Attorney, Office of the Ashtabula County Prosecutor, 25 West Jefferson Street, Jefferson, Ohio, 44047.



Jacob Cairns

APPENDIX

Text of Statutes, Rules and Constitutional Provisions:

Ohio Revised Code § 2945.67(A)

(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.

Ohio Revised Code § 2953.02

In a capital case in which a sentence of death is imposed for an offense committed before January 1, 1995, and in any other criminal case, including a conviction for the violation of an ordinance of a municipal corporation, the judgment or final order of a court of record inferior to the court of appeals may be reviewed in the court of appeals. A final order of an administrative officer or agency may be reviewed in the court of common pleas. A judgment or final order of the court of appeals involving a question arising under the Constitution of the United States or of this state may be appealed to the supreme court as a matter of right. This right of appeal from judgments and final orders of the court of appeals shall extend to cases in which a sentence of death is imposed for an offense committed before January 1, 1995, and in which the death penalty has been affirmed, felony cases in which the supreme court has directed the court of appeals to certify its record, and in all other criminal cases of public or general interest wherein the supreme court has granted a motion to certify the record of the court of appeals. In a capital case in which a sentence of death is imposed for an offense committed on or after January 1, 1995, the judgment or final order may be appealed from the trial court directly to the supreme court as a matter of right. The supreme court in criminal cases shall not be required to determine as to the weight of the evidence, except that, in cases in which a sentence of death is imposed for an offense committed on or after January 1, 1995, and in which the question of the weight of the evidence to support the judgment has been raised on appeal, the supreme court shall determine as to the weight of the evidence to support the judgment and shall determine as to the weight of the evidence to support the sentence of death as provided in section 2929.05 of the Revised Code.

Criminal Rule 29(C)

Motion after verdict or discharge of jury. If a jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within fourteen days after the jury is discharged or within such further time as the court may fix during the fourteen day period. If a verdict of guilty is returned, the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned, the court may enter judgment of acquittal. It shall not be a prerequisite to the making of such motion that a similar motion has been made prior to the submission of the case to the jury.

Criminal Rule 45(B)

Time; enlargement. When an act is required or allowed to be performed at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before expiration of the period originally prescribed or as extended by a previous order; or (2) upon motion permit the act to be done after expiration of the specified period, if the failure to act on time was the result of excusable neglect or would result in injustice to the defendant. The court may not extend the time for taking any action under Rule 23, Rule 29, Rule 33, and Rule 34 except to the extent and under the conditions stated in them.

The Double Jeopardy Clause of the Fifth Amendment

[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb[.]

The Double Jeopardy Clause of Article I, § 10 of the Ohio Constitution

No person shall be twice put in jeopardy for the same offense.