IN THE
SUPREME COURT OF OHIO

STATE OF OHIO, Plaintiff-Appellee, vs. MICHAEL SMITH, Defendant-Appellant.	Case No.: 2018-1831 Appellate Case No.: C-1700335

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEALS
HAMILTON COUNTY, OHIO

MERIT BRIEF OF APPELLANT MICHAEL SMITH

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STATEMENT OF FACTS

As 2015 waned into 2016, a family sleepover would revive the spectre of a former prosecution and force a man to mount a second defense against a decades-old acquittal.

The Undisputed Facts: A broken family begins to mend.

Sixty-one year old Michael Smith had not always been a part of daughter Mychal's life. (Second Trial T.p. 450).[1] After he and her mother Portia split up, Mr. Smith did not see Mychal for years because he did not know where Portia had taken her. (T.p. 830-33, 845). When Mychal was 15 and pregnant, she sought to renew her relationship with Mr. Smith. (T.p. 452). Their initial attempts fizzled. (*Id.*). Father and daughter finally became close when Mychal was around 23 years old and a mother herself. (T.p. 447, 452-53). Mychal visited Mr. Smith nearly every weekend, and the two communicated frequently by phone. (T.p. 453).

Mr. Smith began cultivating relationships with Mychal's three daughters as well. (T.p. 459, 504, 585). The eldest, R.E., was 10 years old when she first spent the night at the house Mr. Smith shared with his sister in the Bond Hill suburb of Cincinnati. (T.p. 456-57, 589). R.E. had a lot of fun with her grandfather, and frequently asked to sleep over at his house. (T.p. 457, 586). The girl slept over three or four times without her sisters prior to 2016. (T.p. 458).

On January 1, 2016, Mr. Smith phoned Mychal and offered to take the children to a movie matinee. (T.p. 459, 841-42). Mychal agreed, and dropped the girls off at Mr. Smith's house on Regent Avenue. (T.p. 459, 842). The girls immediately began playing and, after a time, the youngest grandchild fell asleep. (T.p. 843). It became apparent they would not make the movie in time. (*Id.*). Mr. Smith called Mychal, and it was decided the girls would spend the night at his house so they could see the movie the following day. (*Id.*).

1. Unless otherwise noted, citations refer to the *amended* transcript for the *second* jury trial, which took place from March 28, 2017 to April 6, 2017.

The Disputed Facts: Grandfather and granddaughter present sharply divergent renditions of the sleepover at the house on Regent Avenue.

That evening, R.E. and her younger sisters bathed and settled into Mr. Smith's king-sized bed to watch TV. (T.p. 593, 595, 846-48, 849). R.E.'s skin began feeling itchy from dog hair in the bed. (T.p. 850-51). R.E testified that she asked Mr. Smith to apply baby oil to her skin as he had done in the past. (T.p. 596-97, 851). Mr. Smith applied the oil to the areas R.E. complained were itchy, specifically, her back, chest, and legs. (T.p. 852). Mr. Smith maintained he had no sexual intent in doing so; rather, he simply complied with R.E.'s request. (*Id.*). R.E. offered a different version of events, saying Mr. Smith put the baby oil on her breasts, buttocks, and near her vagina. (T.p. 596-99). She alleged he then licked her vagina and kissed her breasts. (T.p. 600). Mr. Smith denied the allegations. (T.p. 871-72).

R.E. also contended that Mr. Smith turned on a pornographic movie at some point. (T.p. 601). According to Mr. Smith, he provided the remote to the DVD/VHS combo player to R.E. so she could watch *The SpongeBob SquarePants Movie* on DVD. (T.p. 847). Instead of starting the DVD player, however, the VHS engaged and began playing an R-rated Pam Grier movie called *Coffy*. (T.p. 847-48). While the movie contained nudity, it did not depict sexual acts. (T.p. 848). Mr. Smith grabbed the remote and switched the unit to the DVD player, but not before R.E. saw bare breasts on the television screen. (*Id.*).

While watching the SpongeBob movie, the girls and Mr. Smith fell asleep. (T.p. 849). R.E. testified she awoke the next morning to Mr. Smith attempting to place her hand on his bare penis. (T.p. 604-05). She maintained she felt his penis on her back side as Mr. Smith tried to pull her underwear down. (T.p. 603, 605-06). She moved away, at which time Mr. Smith got up to let the dogs out. (T.p. 603, 606). Mr. Smith denied the allegations. (T.p. 871-72). When Mychal picked the girls up later that day, R.E. disclosed the alleged abuse. (T.p. 466, 609). A medical examination

yielded no corroborating evidence. (T.p. 567; State's Exhibit 2).

These events culminated in the return of a six-count indictment in April 2016. (B1600893 T.d. 1). Mr. Smith was charged with two counts of rape, a felony of the first degree in violation of R.C. 2907.02(A)(1)(b); three counts of gross sexual imposition, a felony of the third degree in violation of R.C. 2907.05(A)(4) ("GSI"); and one count of disseminating matter harmful to juveniles, a felony of the fifth degree in violation of R.C. 2907.31(A)(1).

A vague Evid.R. 404(B) ruling paves the way for the introduction of allegations tried when Ronald Regan was President and *Top Gun* dominated movie box offices three decades ago.

Prior to the start of trial, the state filed a notice of intention to use evidence it deemed "other similar acts committed by the Defendant." (B1600893 T.d. 29). Specifically, the state sought to reference allegations from a 30-year-old case against Mr. Smith. (*Id.*). In 1986, a jury acquitted Michael Smith on sexual battery charges involving Verna, his eldest daughter by his first wife, Ava. (T.p. 343-44, 869). The indictment in that case alleged that Mr. Smith engaged in cunnilingus on two occasions with a then-adolescent Verna. (B8603032 Indictment). Though the record from the 1986 case was virtually non-existent, the trial court issued an entry permitting the state to reference the decades-old acquittal based on Evid.R. 404(B). (B1600893 T.d. 56); (*See also* T.p. 880). The entry did not enunciate the particular purpose or purposes for which the evidence was admissible under the evidentiary rule. (*See* B1600893 T.d. 56).

Mr. Smith was initially tried on the charges involving R.E. in January 2017. The jury deadlocked, resulting in a mistrial. (B1600893 T.d. 58). Three months later, a second jury was impaneled. Defense counsel filed a motion in limine prior to the start of the second trial in an attempt to exclude the 1986 acquittal evidence. (B1600893 T.d. 84). Again, resting upon unspecified Evid.R. 404(B) grounds, the trial court declined to bar the evidence. (B1600893 T.d. 85).

Unfettered by the 1986 indictment, acquitted allegations and more become the lynchpin in the state's 2016 case.

If the pretrial ruling allowing the acquittal evidence cracked the door ajar, trial itself flung the door wide open and rent it from its hinges, thrusting the acquittal evidence into the spotlight. Once again, the state's star witness was the alleged victim in the 1986 case, Mr. Smith's now-44-year-old daughter and R.E.'s aunt, Verna. (T.p. 341-409). Defense counsel objected prior to Verna taking the witness stand to preserve its 404(B) challenge. (T.p. 338-39). In response, the trial court issued a basic, untailored limiting instruction concerning the other acts testimony. (T.p. 339-40).

As stated, the 1986 indictment was confined to allegations of cunnilingus. (B8603032 Indictment). Although the pre-trial ruling only sanctioned evidence concerning the exonerated allegations from 1986, Verna's 404(B) testimony in the 2017 trial far exceeded them. Presented first in the state's lineup, Verna told jurors that Mr. Smith anally raped her at age three and periodically abused her until age 15 or 16. (T.p. 345-47). She further alleged that Mr. Smith licked her vagina and breasts, put his penis in her mouth, showed her pornography, and showed her a picture of her unclothed mother. (T.p. 347-48). While Verna stated there was no pattern or routine, she alleged someone was always home when the abuse occurred. (T.p. 347, 361-62, 378).

Verna's younger sister, 40-year-old LaTanya, also took the witness stand in the 2017 trial. (T.p. 411-445). Once again, defense counsel objected to the impending other acts testimony. (T.p. 410-11). The trial court read the same basic, untailored limiting instruction it had read prior to Verna's testimony. (T.p. 410-11). LaTanya testified that Mr. Smith never touched her inappropriately. (T.p. 423). Nonetheless, she relayed a story wherein she ostensibly witnessed Mr. Smith put his hand up Verna's shirt on one occasion when they were children. (T.p. 417-19, 423, 438-39). LaTanya further asserted that Mr. Smith showed her and Verna pornography on two or three occasions. (T.p. 423-24).

After another near-mistrial, Mr. Smith is exonerated on some charges and convicted on others.

After hearing the evidence, the second jury reached an impasse in their deliberations, prompting the trial court to issue a *Howard* charge. (T.p. 1099-1101). Ultimately, Mr. Smith was acquitted on the rape counts and convicted on the GSI and dissemination counts. (B1600893 T.d. 112, 126). The court imposed a nine-year aggregate prison sentence. (B1600893 T.d. 126).

Appellate proceedings follow.

Mr. Smith filed a direct appeal challenging several aspects of his conviction. Relevant to the instant appeal, he argued that the admission of the 1986 acquittal evidence in the 2016 case defied his constitutional rights. (C-1700335 T.d. 20 at 15-16). He decried the evidence as remote and irrelevant, and emphasized the trial court's failure to conduct the requisite balancing test under Evid.R. 403. (*Id.* at 12-15).

In a decision rendered on November 16, 2018, the First District upheld Mr. Smith's convictions and sentence in full. (C-1700335 T.d. 29); *State v. Smith*, 1st Dist. Hamilton No. C-1700335, 2018-Ohio-4615. Citing the lower standard of proof for other acts evidence, the appellate court declined to find that the state was collaterally estopped from utilizing the 1986 acquittal. *Id.* at ¶ 14. The appellate court found the evidence to be relevant because it ostensibly informed Mr. Smith's motive, preparation, plan, and purposeful conduct. *Smith*, 1st Dist. Hamilton No. C-1700335, 2018-Ohio-4615 at ¶ 11-12. For the same reasons, the court deemed the evidence admissible under Evid.R. 404(B). *Id.* at ¶ 12. Finally, the First District declared that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, and opined that the limiting instructions provided adequate protection. *Id.* at ¶ 13. Thereafter, this Court accepted jurisdiction over Mr. Smith's appeal. *State v. Smith*, 155 Ohio St.3d 1404, 2019-Ohio-943, 119 N.E.3d 432.

ARGUMENT

Proposition of Law No. I: Evidence of prior acts pertaining to criminal charges which resulted in acquittal should be barred from admission in a subsequent criminal case. Accordingly, this Court should reject *Dowling* and its progeny and impose a per se bar upon the admission of acquittal evidence in any subsequent criminal case. *Dowling v. United States*, 493 U.S. 342, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990).

> *Every time I think I am out of the woods,*
> *I am back in the fire.*
>
> – ROBERT BLACK
> Author, poet, and former criminal lawyer

The time is ripe for this Court to foreclose the use of acquittal evidence in subsequent criminal prosecutions and reject the United States Supreme Court decision allowing the admission of such evidence under the federal constitution in *Dowling v. United States*, 493 U.S. 342, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990). Notably, the individual states do not accord on the issue. Those that bar acquittal evidence heed the numerous ills that accompany it. These include constitutional ramifications such as double jeopardy and due process violations. As will be discussed, a host of additional dangers plague jurors who hear acquittal evidence. Realistically speaking, these dangers are not effectively curbed by limiting instructions. Finally, various policy reasons counsel against permitting the state to revisit acquittal evidence in later cases. For these reasons, Mr. Smith urges this Court to reject *Dowling* and hold that the Ohio Constitution bars the use of acquittal evidence in subsequent prosecutions.

A. *Dowling*: SCOTUS Sanctions Acquittal Evidence in the Federal Realm.

In 1985, Reuben Dowling was charged with robbing a bank in the Virgin Island of St. Croix. *Id.* at 344. Under the auspices of Fed.R.Evid. 404(b), the federal government elicited testimony concerning an unrelated home invasion. *Id.* at 344-45. Vena Henry testified she had been robbed in her home by a man wearing a knitted mask similar to the one worn by the bank

robber, whom she identified as Rueben Dowling after unmasking him. *Id.* Because Dowling had already been tried and acquitted for the Henry robbery, he challenged the admissibility of Ms. Henry's testimony in his bank robbery trial on federal constitutional grounds. *Id.* at 344-47.

1. Justice Byron White pens the *Dowling* majority.

The *Dowling* Court held that the collateral-estoppel component of the federal Double Jeopardy Clause did not bar the subsequent use of evidence simply because it related to an acquittal. *See id.* at paragraph one of the syllabus. Justice White's opinion acknowledged that collateral estoppel prohibited the relitigation of an issue of ultimate fact previously determined by a valid and final judgment. *Id.* at 347. Even so, the majority reasoned that a general verdict of acquittal did not specify which element of the offense the state failed to prove beyond a reasonable doubt. *Id.* at 350. Accordingly, a defendant could not meet his burden to show that the issue he sought to foreclose from later consideration was dispositive of the prior acquittal. *See id.*

The *Dowling* majority further declared that collateral estoppel did not allow a verdict to have a preclusive effect in a subsequent prosecution where the burden of proof for the admission of evidence was lighter. *Id.* at 348-50. Whereas a conviction must be proven beyond a reasonable doubt, similar conduct evidence under Fed.R.Evid. 404(b) must only be proven by a preponderance of the evidence. *Id*. Thus, in order to admit such evidence, the federal government need only prove that the jury could reasonably conclude the act occurred, and the defendant was the actor. *Id.* at 348-49.

Finally, the *Dowling* majority declared that the admission of acquittal evidence did not violate due process notions of fundamental fairness. *Id.* at paragraph two of the syllabus. It opined that the trial court's ability to disallow prejudicial evidence adequately guarded against the prospect of the jury drawing improper inferences from acquittal evidence. *Id.* at 353. The

majority further opined that limiting instructions provided additional protection. *Id.*

2. Justice William Brennan leads the *Dowling* dissentients.

Joined by two of his judicial brethren, Justice Brennan penned a cogent dissent to the *Dowling* majority warning of the dangers attendant to permitting the use of acquittal evidence in subsequent prosecutions. Rooted in double jeopardy principles, Justice Brennan explained that the doctrine of collateral estoppel served an important function in criminal cases:

> In a criminal case, collateral estoppel prohibits the Government from relitigating any ultimate facts resolved in the defendant's favor by the prior acquittal. Thus, in addition to being protected against retrial for the "same offense," the defendant is protected against prosecution for an offense that requires proof of a fact found in his favor in a prior proceeding.

(Internal citation omitted.) *Id.* at 356. Justice Brennan thus opined that the Government should have been estopped from introducing Vena's testimony pertaining to Rueben's burglary acquittal. *Dowling* at 354. This protection endures regardless of whether the acquittal rested upon an "egregiously erroneous foundation." *Id.* at 355, quoting *Fong Foo v. United States*, 369 U.S. 141, 143, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962). Such a rule serves to temper the potential for the Government, with its vastly superior resources, to wear down a defendant and eventually attain a conviction against an innocent man. *Dowling* at 355, quoting *United States v. Scott*, 437 U.S. 82, 91, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978). It further insulates an individual from having to live in a state of perpetual anxiety from the threat of effective retrial. *Dowling* at 355, quoting *Green v. United States*, 355 U.S. 184, 187, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).

Justice Brennan further denounced the majority's allocation of the burden to the defendant to show that the issue sought to be foreclosed was actually decided in the prior acquittal. *Dowling* at 357. Criminal verdicts are general verdicts, rendering it exceedingly difficult to decipher precisely which issues prompted the jury's verdict. *Id.* at 358. Moreover, the

collateral estoppel doctrine and the Double Jeopardy Clause were meant to operate as a shield to protect defendants from government overreaching. *Id.* at 357. Accordingly, the dissent reasoned, "the Government should bear the burden of proving that the issue it seeks to relitigate was *not* decided in the defendant's favor by the prior acquittal." (Emphasis sic.) *Id.* Placing the burden on the defendant in the criminal realm reflects a hypertechnical application of the collateral estoppel doctrine which eviscerates its very protections. *Id.* at 358; *Ashe v. Swenson*, 397 U.S. 436, 444, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970) ("The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality").[2]

Justice Brennan's dissenting opinion advocated for a less technical application of the collateral estoppel doctrine in criminal cases, noting, "when the Government seeks to punish a defendant, the concern for fairness is much more acute." *Id.* at 360-61. He opined that the risk for an erroneous guilty verdict in the accused's current case was heightened *because* the jury need only conclude that the acquitted conduct occurred by a preponderance of the evidence. *Id.* at 361. The majority countered that the accused could introduce evidence to rebut that he committed the prior offense. *Id.* at 362. This suggestion did not appease the dissentients. *Id.* In fact, it underscored a chief flaw in the majority's reasoning: the defendant was forced to mount a second defense to an offense of which he had already been acquitted. *Id.*

The dissent closed with an ominous observation that calls to mind Michael Smith's case in particular:

2. Because Mr. Smith grounds his prayer for relief in Ohio Constitutional principles, federal cases are cited herein only for guidance. *See Michigan v. Long*, 463 U.S. 1032, 1041, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) ("If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.").

> The Court today adds a powerful new weapon to the Government's arsenal. The ability to relitigate the facts relating to an offense for which the defendant has been acquitted benefits the Government because *there are many situations in which the defendant will not be able to present a second defense because of the passage of time, the expense, or some other factor*. Indeed there is no discernible limit to the Court's rule; the defendant could be forced to relitigate these facts in trial after trial. Only by ignoring the principles upon which the collateral-estoppel doctrine is based is it possible for the Court to tip the scales this far in the prosecution's favor.

(Emphasis added.) *Id.* at 363. The First District Court of Appeals' decision flouted this caveat.

3. The First Appellate District's decision embraces the spirit of the *Dowling* majority in derogation of Ohio Constitutional rights.

As stated, the rationale employed by the First District Court of Appeals in upholding the admission of the 30-year-old acquittal evidence in this case mirrored that of the *Dowling* Court. The First District succinctly ruled that the evidence was not barred by the collateral estoppel doctrine, and deemed it admissible under Evid.R. 404(B). *Smith*, 1st Dist. Hamilton No. C-1700335, 2018-Ohio-4615 at ¶ 14, quoting *In re Burton*, 160 Ohio App.3d 750, 2005-Ohio-2210, ¶ 14 (1st Dist.). In eschewing Mr. Smith's cry for a blanket prohibition against the use of acquittal evidence, the appellate court cited one of the scions of *Dowling*, *United States v. Felix*, 503 U.S. 378, 112 S.Ct. 1377, 118 L.Ed.2d 25 (1992). *Smith* at ¶¶ 14-15. The *Felix* Court revisited *Dowling* and reiterated "the basic, yet important, principle that the introduction of relevant evidence of particular misconduct in a case is not the same thing as prosecution for that conduct." *Felix* at 386-87.

B. Treatment of Acquittal Evidence Outside the Federal Realm.

Though *Dowling* represents the majority position among the states, its premise does not enjoy universal acceptance. Some states have rejected acquittal evidence entirely by affording greater rights under their respective state constitutions. Like Ohio, an appreciable number of

state high courts have not yet directly addressed the admissibility of acquittal evidence as other acts in subsequent criminal prosecutions.[3] To be sure, the issue is far from settled.

1. Seventeen states have allowed acquittal evidence after analysis – CA, CT, ID, KS, KY, LA, ME, MD, MI, NJ, NY, ND, OR, PA, RI, VA, WY.

Some of the states that permit acquittal evidence in subsequent prosecutions rely upon the lower standard of proof for 404(B) evidence. *See People v. Avila*, 327 P.3d 821, 836 (Ca.2014); *Hampton v. Commonwealth*, 133 S.W.3d 438, 442 (Ky.2004); *State v. Cotton*, 778 So.2d 569, 577-78 (La.2001); *State v. J.M.*, 137 A.3d 490, 497 (N.J.2016); *State v. Heaton*, 217 N.W. 531, 536 (N.D.1927); *State v. Smith*, 532 P.2d 9, 10 (Ore.1975); *Commonwealth v. McCall*, 786 A.2d 191, 195-96 (Pa.2001); *State v. Bernier*, 491 A.2d 1000, 1005 (R.I.1985); *Eatherton v. State*, 810 P.2d 93, 99-100 (Wyo.1991).

Other states allowing acquittal evidence employ a fact-sensitive collateral estoppel approach. Focusing upon *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed2d 469 (1970), these states require reviewing courts to examine the record from the prior proceeding and determine whether a rational jury could have based its verdict on an issue aside from that which the defendant seeks to bar from consideration. *See State v. Aparo*, 614 A.2d 401, 408-10 (Conn.1992); *State v. Paradis*, 676 P.2d 31, 36-38 (Idaho 1983); *State v. Searles*, 793 P.2d 724, 733 (Kans.1990); *State v. Dean*, 589 A.2d 929, 932-33 (Maine 1991); *Odum v. State*, 989 A.2d 232, 239-40 (Md.2010); *People v. Oliphant*, 250 N.W.2d 443, 454 (Mich.1976); *People v. Acevedo*, 508 N.E.2d 665, 671 (N.Y.1987); *Rhodes v. Commonwealth*, 223 Va. 743, 747-51 (Va.1982).

3. These include Alaska, Alabama, Arkansas, Illinois, Indiana, Iowa, Mississippi, Missouri, New Hampshire, New Mexico, Oklahoma, South Dakota, Texas, Utah, Vermont, and Wisconsin.

2. Five states have allowed acquittal evidence without direct analysis – AZ, CO, GA, WA, WV.

A handful of states permitting acquittal evidence did not directly pass on the issue. Instead, they presumed acquittal evidence was admissible, or merely cited *Dowling* or one of its progeny for the proposition. *See State v. Lehr*, 254 P.3d 379, 387 (Ariz.2011); *Kinney v. People*, 187 P.3d 548, 554 (Colo.2008); *State v. Atkins*, 819 S.E.2d 28, 34 (Ga.2018); *State v. Russell*, 384 P.2d 334, 335 (Wash.1963); *State v. Mongold*, 647 S.E.2d 539, 549 (W.Va.2007). The First District's decision in the present matter appears to have most closely accorded with this approach. *Smith*, 1st Dist. Hamilton No. C-1700335, 2018-Ohio-4615 at ¶ 14.

3. Nine states have barred acquittal evidence outright – DE, FL, HI, MA, MN, MT, NV, NC, TN.

Nine states have completely barred acquittal evidence from admission in subsequent criminal prosecutions. *See Banther v. State*, 884 A.2d 487, 495 (Del.2005); *State v. Perkins*, 349 So.2d 161, 163-64 (Fla.1977); *State v. Mundon*, 92 P.3d 205, 208 (Hawaii 2012); *Commonwealth v. Dorazio*, 37 N.E.3d 566, 576 (Mass.2015); *State v. Wakefield*, 278 N.W.2d 307, 308-09 (Minn.1979); *State v. Hopkins*, 219 P. 1106, 1109 (Mont.1923); *McMichael v. State*, 638 P.2d 402, 403 (Nev.1982); *State v. Scott*, 13 S.E.2d 787, 788-90 (N.C.1992); *State v. Holman*, 611 S.W.2d 411, 413 (Tenn.1981). *See also Kerbyson v. State*, 711 S.W.2d 289 (Tx.Ct.App.1986).

The states that reject acquittal evidence employ various rationales, but a few themes can be discerned. Though acknowledging its minority view, the Minnesota Supreme Court categorically declared that the admission of acquittal evidence in a later case unduly prejudiced the defendant and was fundamentally unfair. *Wakefield* at 308-09. *Accord Holman* at 413. Similarly, the North Carolina Supreme Court held that the admission of evidence of a prior

acquittal on rape charges in a subsequent rape case defied North Carolina's synonymous version of Evid.R. 403 as a matter of law. *Scott* at 42. *Accord Perkins* at 163, *McMichael* at 403.

The Delaware Supreme Court ruled that a prior acquittal on a conspiracy charge collaterally estopped the state from advancing an accomplice theory of liability on the underlying murder charge against the same defendant in a subsequent prosecution. *Banther* at 494-95. Slightly different, the Hawaii Supreme Court held that a jury acquittal on sexual assault charges estopped the state from introducing evidence in a subsequent prosecution that the accused did in fact commit the acts underscoring the prior indictment. *Mundon* at 22-23.

Finally, the Massachusetts Supreme Judicial Court embraced the numerous concerns posited by Justice Brennan in his *Dowling* dissent when it concluded that acquittal evidence involving allegations of sexual conduct with a young girl warranted exclusion in a subsequent case involving similar allegations of sexual conduct with a similar victim. *Dorazio*, 37 N.E.3d at 545-48.

4. Two states have imposed a clear and convincing standard – NE, SC.

Rather than rejecting *Dowling* outright, at least two states have employed a clear and convincing standard. These states require the trial court to determine whether a reasonable jury could find by clear and convincing evidence that the acquitted acts occurred and that the accused was the perpetrator before deeming the evidence admissible. *See, e.g., State v. Wilson*, 556 N.W.2d 643, 652 (Neb.1996); *State v. Smith*, 387 S.E.2d 245, 246-47 (S.C.1989). The rationale behind requiring a higher standard of proof is that it provides for a more individualized and rigorous assessment of acquittal evidence, which is hoped to temper the potential for prejudice.

5. What about Ohio?

To date, this Court has neither definitively adopted nor rejected the *Dowling* Court's

holding in the context of acquitted conduct. *Compare State v. Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153, ¶¶ 46-50 (O'Donnell, J., dissenting) (discussing *Dowling* only as it pertains to standards of review for constitutional versus nonconstitutional errors); *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, 853 N.E.2d 621, ¶ 52 (citing *Dowling* to uphold the admission of prior *no-billed* acts); *State v. Gowdy*, 88 Ohio St.3d 387, 395, 727 N.E.2d 579 (2000) (not citing *Dowling*, but finding no error where prior acquitted conduct was introduced *by the defendant*). Mr. Smith submits that the following harms caused by *Dowling* warrant joining the states that reject it. (*See infra* Sections C, D, E, F, G).

C. *Dowling* Violates Ohio's Double Jeopardy Clause.

1. Civil collateral estoppel considerations are inapposite here.

The Double Jeopardy Clause in Article I, Section 10 of the Ohio Constitution "protects a person who has been acquitted from having to run the gauntlet a second time." *State v. Lovejoy*, 79 Ohio St.3d 440, 443, 683 N.E.2d 1112 (1997). This Court acknowledged that the collateral estoppel component of the Double Jeopardy Clause generally applies to cases of previous acquittal:

> Collateral estoppel is the doctrine that recognizes that a determination of facts litigated between two parties in a proceeding is binding on those parties *in all future proceedings*. Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."

(Emphasis added.) *Id.* at 443-44, quoting *Ashe*, 397 U.S. at 443. *See also State v. Malinovsky*, 60 Ohio St.3d 20, 23, 573 N.E.2d 22 (1991) ("double jeopardy protection is not *absolute* until there is a dismissal *or acquittal* based upon a factual finding of innocence"). (Emphasis added.)

As stated, the *Dowling* Court ruled that the collateral estoppel doctrine did not prohibit the government from introducing acquittal evidence in a subsequent prosecution. Importantly, however, the *Dowling* decision contains a fatal flaw. To conclude that acquittal evidence was

admissible under Fed.R.Evid. 404(b) because it was governed by a lower standard of proof, the *Dowling* majority cited three *civil* cases, to wit: *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 104 S.Ct. 1099, 79 L.Ed.2d 361 (1984); *One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232, 93 S.Ct. 489, 34 L.Ed.2d 438 (1972); and *Helvering v. Mitchell*, 303 U.S. 391, 58 S.Ct. 630, 82 L.Ed. 917 (1938). Borrowing from civil jurisprudence is exceedingly problematic in this context because

> the higher reasonable-doubt standard is employed in the criminal context to ensure the accuracy of convictions and thereby *protect* defendants, not to permit introduction of evidence of crimes for which the defendant has been acquitted. By definition, when the Government fails to prove a defendant guilty beyond a reasonable doubt, the defendant is considered legally innocent. * * * [A]t least with respect to subsequent criminal prosecutions, "the acquitted defendant is to be treated as innocent and in the interests of fairness and finality made no more to answer for his alleged crime."

(Emphasis sic.) (Citation omitted.) *Dowling*, 342 U.S. at 360-61, fn. 4 (Brennan, J., dissenting), quoting *Wakefield*, 278 N.W.2d at 308.

Of note, jeopardy does not attach in civil cases. Cynthia L. Randall, *Acquittals in Jeopardy: Criminal Collateral Estoppel and the Use of Acquitted Act Evidence*, 141 U.Pa.L.Rev. 283, 284 (1992), citing Restatement of the Law 2d, Judgments, Section 17 (1980). Nor is there the potential for loss of one's liberty in civil matters. Indeed, the altogether different climate of criminal cases mandates a different approach to collateral estoppel in the criminal context, at least where acquittal evidence is involved. *See State v. Farmer*, 2d Dist. Montgomery No. 4789, 1976 WL 189250, *5-6 (Jan. 12, 1976) (discussing the difficulty of applying the doctrine of collateral estoppel in criminal versus civil cases). *See also* Anne Bowen Poulin, *Double Jeopardy Protection from Successive Prosecution: A Proposed Approach*, 92 Geo. L.J. 1183,

1199-1202 (2004) (discussing how substantive changes within criminal law have rendered double jeopardy protections more difficult to apply in modern times).

A hypertechnical application of the collateral estoppel doctrine in criminal cases runs afoul of the spirit of double jeopardy. *See Ashe*, 397 U.S. at 444. When acquittal evidence is proffered in a subsequent criminal prosecution, the accused is effectively forced "to defend against charges for which he has already been acquitted." Randall, *Acquittals in Jeopardy*, 141 U.Pa.L.Rev. at 285, quoting *Dowling*, 493 at 354 (Brennan, J., dissenting). This can be as burdensome as defending against the offense for which the accused is presently on trial. *See Dowling* at 362 (Brennan, J., dissenting) ("That the facts relating to the prior offense are used only as evidence of another crime does not reduce the burden on the defendant * * *.").

To the assured dismay of many an acquitted individual, this threat of effective reprosecution appears to be unbound by the constraints of Father Time. The accused is forced to ready a second defense – as illustrated here, as much as 30 years later – when transcripts are gone, case files and exhibits destroyed, police reports lost, witnesses deceased, and memories clouded. This is unacceptable.

2. An absolute bar upon acquittal evidence is the most workable solution.

For the many legal and policy reasons discussed herein, acquittal evidence should be completely barred from admission in subsequent criminal prosecutions. As Justice Brennan observed, the general nature of criminal verdicts makes it difficult to discern upon which issue or issues the prior jury based its verdict. *Dowling*, 493 U.S. at 358 (Brennan, J., dissenting). By contrast, a bright-line rule prohibiting the admission of acquittal evidence could not be more straight-forward. Such a rule could be applied efficiently and consistently by courts across the state of Ohio. Moreover, an absolute bar would eliminate the possibility that a jury could

improperly utilize acquittal evidence to ground its verdict in propensity. Finally, an absolute bar would uphold the accused's constitutional rights to be free from double jeopardy and to be afforded a fair trial most effectively.

3. Even a strict collateral estoppel analysis works in Mr. Smith's favor.

An earlier incarnation of this Court explained the operation of collateral estoppel in a criminal case as follows:

> The doctrine of collateral estoppel, or, more correctly, issue preclusion, precludes further action on an identical issue that has been actually litigated and determined by a valid and final judgment as part of a prior action among the same parties or those in privity with those parties.

State v. Williams, 76 Ohio St.3d 290, 294, 667 N.E.2d 932 (1996). This analysis necessarily entails three inquiries: (1) what ultimate facts or issues were decided against the state in a valid and final judgment in the first trial?; (2) is the state attempting to relitigate those issues or facts in the subsequent trial?; and (3) is there mutuality of parties between the two trials? *Id.* at 294-95.

A court conducting a collateral estoppel analysis must scrutinize the record of the prior proceeding – charging instruments, record filings, transcripts, exhibits, etc. – to determine the issues that were actually decided therein. *Burton*, 1st Dist. Hamilton No. C-040244, 2005-Ohio-2210 at ¶ 12. "A court cannot perform that function unless one of the parties brings the previous trial's record before it." *State v. Phillips*, 74 Ohio St.3d 72, 80, 656 N.E.2d 643 (1995). Here, due to the 30-year passage of time, the record for the 1986 case was scant to nil. (*See* B1600893 T.d. 117; C-1700335 T.d. 20 at 20, Appendix A-1). This was in no way attributable to Mr. Smith. Various arms of the state serve as custodians of public records, not the defendant. *Compare Williams*, 76 Ohio St.3d at 295 ("The state acts through its various agencies and entities * * *.")

One way to guard against governmental overreaching under such circumstances would be to place the burden on the state to show that a prior acquittal *did not* dispose of particular issues.

Dowling, 493 U.S. at 357 (Brennan, J., dissenting). Even if the burden is placed on Mr. Smith, however, it is still possible to determine that he was acquitted of sexual battery in the 1986 case on the substantive issue of actual innocence.

In pertinent part, the version of the sexual battery statute in effect in 1986 provided: "No person shall engage in sexual conduct with another, not the spouse of the offender, when * * * [t]he offender is the other person's natural or adoptive parent * * *." R.C. 2907.03(A)(5) (1972 HB 511, eff. 1-1-74). Because the alleged victim in the case was Verna, Mr. Smith's known daughter, identity was clearly not at issue. There being no mens rea explicitly denoted in the statute, one's status as a parent of the victim rendered them strictly liable for engaging in sexual conduct with their child. *See id. See also State v. Singleton*, 11th Dist. Lake No. 2002-L-77, 2004-Ohio-1517, ¶¶ 55-57.

In view of the above, only one ultimate issue remained in the 1986 case – the absence or existence of the actus reus. Because the jury acquitted Mr. Smith, they necessarily concluded that he *did not* engage sexual conduct with Verna. Therefore, Mr. Smith was acquitted on the ultimate issue in a valid and final judgment in the 1986 case. This satisfied the first prong of the collateral estoppel analysis. *Williams*, 76 Ohio St.3d at 294. Second, despite the fact that the ultimate issues were decided against the state in the 1986 case, the state expressly revisited the 1986 allegations in the 2016 case. This satisfied the second prong of the collateral estoppel analysis. *Id.* at 294. Finally, the third prong of mutuality of parties was easily met, as both the 1986 case and the 2016 case involved the State of Ohio as one party and Mr. Smith as the other. *Id.* at 295.

For the reasons aforesaid, refusing to apply the doctrine of collateral estoppel to prohibit the state from referencing the 1986 case in the 2016 case contravened Mr. Smith's right to be free from double jeopardy.

D. *Dowling* Violates Ohio Constitutional Due Process.

1. Protecting notions of fundamental fairness.

If this Court declines to anchor its decision in double jeopardy, Mr. Smith alternatively argues that the admission of acquittal evidence in a subsequent prosecution violates the fundamental fairness component of Ohio's Due Course of Law Clause. Ohio Constitution, Article I, Section 16. *Compare State v. Lewingdon*, 1st Dist. Hamilton No. C-790488, 1980 WL 352986, *5 (Dec. 24, 1980) (declaring, "the principle of collateral estoppel has also been held to apply where double jeopardy is not at issue"). As this Court well knows, "due process" can be a rather amorphous concept:

> For all its consequence, "due process" has never been, and perhaps can never be, precisely defined. * * * [D]ue process "is not a technical conception with a fixed content unrelated to time, place and circumstances." Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

(Internal citations omitted.) *State v. Lynn*, 129 Ohio St.3d 146, 2011-Ohio-2722, 950 N.E.2d 931, ¶ 11, quoting *Lassiter v. Dept. of Social Servs. of Durham Cty., North Carolina*, 452 U.S. 18, 24-25, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981).

It is beyond cavil that there must be adequate procedures in place before one can be deprived of his personal liberty. *See State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, ¶¶ 43-49 (DeWine, J., concurring) ("Heretofore, the fundamental-fairness standard had always been a procedural standard[.] * * * As courts, we are equipped by training and experience to make individualized determinations as to whether particular procedures that result in a loss of liberty are fundamentally fair."). Mr. Smith submits that the admission of evidence

from a prior acquittal defies the bounds of procedural due process.

As the Minnesota Supreme Court frankly observed, "once the state has mustered its evidence against a defendant and failed, *the matter is done*. * * * [U]nder no circumstances is evidence of a crime other than that for which a defendant is on trial admissible when the defendant has been acquitted of that other offense." (Emphasis added.) *Wakefield*, 278 N.W.2d at 308-09. Similarly, Mr. Smith urges this Court to hold that the right to due process under the Ohio Constitution requires an absolute bar upon acquittal evidence masquerading as other acts evidence in subsequent prosecutions to best ensure the fairness of said proceedings. This absolute bar would operate as a firm and uncomplicated procedural safeguard against the unlawful deprivation of personal liberty under such circumstances.

The sole concession the *Dowling* majority proffered regarding fairness was that a defendant may incur additional temporal and monetary expenses in having to relitigate issues already considered at the trial for the acquitted offense. *Dowling*, 493 U.S. at 352. Relatively speaking, additional time and expense are the least of Mr. Smith's worries. The anxiety and embarrassment associated with having to relive and relitigate a decades-old acquittal on child sexual abuse charges far eclipse time and money. As the *Dowling* majority observed, the question becomes "whether it is acceptable to deal with the potential for abuse through nonconstitutional sources like the Federal Rules of Evidence, or whether *the introduction of this type of evidence is so extremely unfair that its admission violates 'fundamental conceptions of justice.'*" (Emphasis added.) *Id.*, quoting *United States v. Lovasco*, 431 U.S. 783, 787, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977). Indubitably, the latter is correct.

2. Sometimes, juries do acquit on belief of *actual innocence*.

Throughout the proceedings thus far, the state argued that a prior acquittal means only

that the jury found the state did not prove all of the elements of the prior offense beyond a reasonable doubt. But, as a sister state high court echoed, the resort to said justification for acquittal evidence "offends the principles of the presumption of innocence, the significance of being treated *'legally innocent'* that results when the prosecution fails to prove a defendant guilty beyond a reasonable doubt, and notions of fairness and finality." (Emphasis added.) *Dorazio*, 37 N.E.3d at 547-48.

Moreover, this justification ignores the fact that an acquittal may represent an affirmative belief among the jurors that the defendant was entirely innocent. *See* Randall, *Acquittals in Jeopardy*, 141 U.Pa.L.Rev. at 303. Where acquittal evidence is concerned, Mr. Smith submits that fairness dictates erring on the side of such a presumption:

> Where the occurrence of another act is in doubt, the chances greatly increase that truly innocent defendants will be deprived of a much-needed presumption that they are law abiding citizens, and that juries will make prejudicial determinations based not only on an inaccurate understanding of criminal propensity but on inaccurate facts.

Id. Thus, we should allow the presumption of innocence to both start and endure beyond a trial where an acquittal is achieved. *Scott*, 331 N.C. at 43-44.

3. Insulating prior convictions more than prior acquittals defies fairness and reason.

Confoundingly, the state must jump through more hoops to use a stale prior conviction as evidence at trial than it must for a stale acquittal. Under Evid.R. 609, prior felony convictions may be used to impeach the accused, but only if they are not over ten years old and exclusion is not required by Evid.R. 403. Evid.R. 609(A)(2), (B). In fact, where the conviction is over ten years old, the rule flips the burden of proof on its head. That is, Evid.R. 609(B) requires *the prosecution* to establish that the probative value of an aged conviction substantially outweighs its

prejudicial effect. *State v. Fluellen*, 88 Ohio App.3d 18, 25, 623 N.E.2d 98 (4th Dist.1993). Yet, if the *Dowling* rationale is adopted by this Court, a prior acquittal can be used in a subsequent prosecution if it satisfies a mere preponderance standard.

Finally, it also bears noting that expunged prior convictions cannot be used if the person has not been convicted of a subsequent offense punishable by death or imprisonment for more than one year. Evid.R. 609(C). No such bar shields prior acquittals at present. Some convictions cannot be expunged at all, R.C. 2953.36, and those that can be expunged are subject to mandatory waiting periods before an individual can apply. R.C. 2953.32(A). A prior acquittal can be expunged with no waiting period. R.C. 2953.52(A)(1). Yet, under *Dowling*, an expunged acquittal and its surrounding allegations can be invoked freely and indefinitely.

In sum, when compared to the evidentiary safeguards placed upon prior convictions, it is nonsensical that prior acquittals can be used in this manner regardless of age and the fact that no conviction was ever actually attained. *See State v. Rabe*, 12th Dist. Clermont No. CA90-09-092, 1991 WL 96371, *3 (June 3, 1991).

E. Other Dangers Attendant to *Dowling* and its Progeny.

1. The danger of propensity convictions.

Propensity evidence can swiftly change the outcome of trial, especially where a case is stranded at a "he said/she said" impasse. This is because such evidence feeds the jurors' "overstrong tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts[.]" *State v. Curry*, 43 Ohio St.2d 66, 68, 330 N.E.2d 270 (1975), quoting *Whitty v. State*, 34 Wis.2d 278, 292 (1967). This propensity pitfall is particularly compelling where the other acts are similar in nature to the charged offense, or inflammatory. *State v. Schaim*, 65 Ohio St.3d 51, 59, 600 N.E.2d 661 (1992). This peril is undoubtedly magnified where

child sexual abuse is at issue, a subject eclipsed by few others in loathing and repugnance. Such allegations

> tend[ ] to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law * * *. However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged.

Boyd v. United States, 142 U.S. 450, 458, 12 S.Ct. 292, 35 L.Ed. 1077 (1892).

As Justice Brennan pointed out in his *Dowling* dissent, the allowance of prior acquittals as other acts evidence greatly increases the risk that a jury will conclude the accused is "the kind of person" who commits such acts, and likely repeated his or her behavior in the present case. *Dowling*, 493 U.S. at 362 (Brennan, J., dissenting), quoting *United States v. Beechum*, 582 F.2d 898, 914 (5th Cir.1978). Thus, the justice continued, "the fact that the defendant is forced to relitigate his participation in a prior criminal offense under a low standard of proof combined with the inherently prejudicial nature of such evidence increases the risk that the jury erroneously will convict the defendant of the presently charged offense." *Dowling* at 362.

Indeed, empirical evidence indicated an increase in propensity convictions in the wake of *Dowling*. Craig L. Crawford, *Dowling v. United States: A Failure of the Criminal Justice System*, 52 Ohio St.L.J. 991, 993 (1991). As one commentator observed:

> [E]mpirical evidence shows a positive correlation between the admission into evidence of prior criminal acts and the likelihood of conviction. Indeed, "in one study, it was found that jurors in criminal cases involving similar charges and similar evidence convicted 27 percent more often when informed of a prior conviction * * * than where there was no criminal record."

> [S]ome of the statistics indicate that prospective jurors do not care whether the criminal record consists of a conviction or an acquittal, "for it is still a criminal record and thus its owner is an undesirable." As a consequence, the damaging prejudicial effect cannot be wiped out effectively by a limiting jury instruction.

Id. at 993-94 (1991), quoting Comment, *Exclusion of Prior Acquittals: An Attack on the Prosecutor's Delight*, 21 UCLA L.Rev. 892, 910 (1974). The ends of justice warrant curtailing this troubling effect.

2. The danger of the jury convicting a defendant on extrinsic evidence alone.

Another concern is that the jury may attempt to revisit the acquittal case and mete out its own notion of justice. Convinced the defendant committed the prior offense, "the jury may convict the defendant not for the offense charged but for the extrinsic offense. * * * [T]he jury may feel the defendant should be punished for that activity even if he is not guilty of the offense charged." *Dowling* at 361-62 (Brennan, J., dissenting), quoting *Beechum* at 914. Where jury members are so inclined to engage in revisionist justice, limiting instructions are futile.

3. The danger of decreased feelings of responsibility for an incorrect verdict.

When faced with a defendant accused of committing multiple heinous offenses, jury members may not feel quite so tethered by their own consciences. Relevant to the present matter,

> evidence of prior crimes may cause the jury to regard the defendant as a habitual criminal and to care less whether she is actually guilty or innocent of the current crime alleged. * * * [K]nowledge that an individual has been guilty of past crimes may change the regret which the fact finder associates with mistakenly finding that the person is guilty.

Randall, *Acquittals in Jeopardy*, 141 U.Pa.L.Rev. at 302, citing Lempert & Saltzburg, A Modern Approach to Evidence 164-65 (2d Ed.1982). Again, limiting instructions in the face of such moral abandon are useless.

4. The danger a jury will disregard the testimony of the accused in the present matter due to the societal belief that criminals are dishonest.

It is human nature to compartmentalize that which we observe in order to process and adapt. One way in which this may manifest is the subconscious judging and labeling of others, especially individuals on trial. People who are repeatedly accused of breaking the law may be perceived as "bad" people who cannot be believed. Under such circumstances, the credibility of a defendant's version of events is more likely to be discounted by the jury, whether he takes the witness stand or not. Randall, *Acquittals in Jeopardy*, 141 U.Pa.L.Rev. at 303-05.

5. The danger that judicial economy will be impeded when there is a trial within a trial.

As Justice Brennan warned, the admission of acquittal evidence will force the accused to mount a second defense to counter the acquitted charges. *Dowling*, 493 U.S. at 362 (Brennan, J., dissenting). This unnecessarily shifts the focus from the case at hand and elongates the trial. Judicial economy would be better served by imposing a blanket prohibition against acquittal evidence in subsequent prosecutions to "save considerable judicial resources, since issues or points of law, once conclusively determined, need not be again determined." *Kelly v. Georgia-Pac. Corp.*, 46 Ohio St.3d 134, 143, 545 N.E.2d 1244 (1989).

F. The Ohio Supreme Court is Free to Reject *Dowling*.

1. State constitutional rights can be greater than federal constitutional rights.

This Court is free to afford greater rights under the Ohio Constitution than the United States Supreme Court sees fit to extend under the federal constitution. After all,

> the Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of

> Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.

Arnold v. Cleveland, 67 Ohio St.3d 35, 616 N.E.2d 163 (1993), paragraph one of the syllabus. *Accord Michigan v. Long*, 463 U.S. 1032, 1041, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) (state court decisions clearly resting upon adequate and independent state grounds are not reviewable in federal court). *See also Patterson v. New York,* 432 U.S. 197, 201, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977) ("It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government * * *, and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States.").

This Court enjoys the ultimate authority to interpret and enforce the Ohio Constitution. *State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶¶ 14-20. Accordingly, it is free to reject *Dowling* and independently hold that the protections afforded by the Ohio Constitution preclude the admission of acquittal evidence in any subsequent criminal prosecution. *See id.* at ¶ 21. *See also Mundon*, 292 P.3d at 221, fn. 24. Verily, principles of federalism countenance such a conclusion:

> It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. [High courts have] the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious, or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But, in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311, 52 S.Ct. 371, 76 L.Ed. 747 (1932) (Brandeis, J., dissenting). Mr. Smith likewise appeals to the members of this Court to address the issue and

determine that the Ohio Constitution affords greater protection to individuals regarding the resurrection of acquittal evidence in later cases where the federal constitution does not.

2. Federal rule 403 versus Ohio rule 403.

Regarding prejudice considerations, it also bears noting that Ohio Evid.R. 403(A) affords more protection than Fed.R.Evid. 403. Under Ohio's rule, evidence whose probative value is substantially outweighed by the danger of unfair prejudice is subject to *mandatory* exclusion. *State v. Creech*, 150 Ohio St.3d 540, 2016-Ohio-8440, 84 N.E.3d 981, ¶ 32. By contrast, the federal rule renders exclusion under such circumstances discretionary. *Id.* This serves as further grounds upon which this Court could choose to depart from *Dowling*.

3. Policies in favor of rejecting *Dowling* entirely.

a. Ascribing particular significance to an acquittal.

An acquittal should mean something more than the sterile definition regarding failure of proof beyond a reasonable doubt. For "[t]he presumption of innocence enters the courtroom with the accused, and it leaves with the acquitted[.]" *Scott*, 331 N.C. at 43-44. If Ohio accepts *Dowling*, this presumption endures through the life of the trial, then perishes.

Moreover, where a defendant has already been tried and acquitted on a charge, evidentiary and procedural safeguards do nothing to insulate him from having to defend against acquittal evidence proffered in a subsequent prosecution. *Wakefield*, 278 N.W.2d at 308. This serves as an affront to the significance of an acquittal:

> [I]t is a basic tenet of our jurisprudence that once the state has mustered its evidence against a defendant and failed, the matter is done. *In the eyes of the law the acquitted defendant is to be treated as innocent and in the interests of fairness and finality made no more to answer for his alleged crime*. * * * [T]he admission into a trial of evidence of crimes of which the defendant has been acquitted prejudices and burdens the defendant in contravention of this basic principle and is fundamentally unfair.

(Emphasis added.) *Wakefield*, 278 N.W.2d at 308-09. Justice requires that an acquittal have enduring value for an exonerated individual.

b. Maintaining the finality of verdicts.

While a reviewing court may not be cognizant of the basis for the jury's verdict, "[a]n acquittal is the 'legal and formal certification of the innocence of a person who has been charged with a crime.'" *Scott*, 331 N.C. at 43, quoting Black's Law Dictionary 23 (5th ed.1979). In the interests of fairness and finality, one declared legally innocent should not thereafter be recast in the suspicion of guilt for the same charges. *See id.* Allowing an acquittal to lie undisturbed furthers the institutional interest in preserving this finality of judgments. *See Dowling* at 355 (Brennan, J., dissenting).

c. Foreclosing the threat of societal scrutiny in perpetuity.

An exonerated individual already has to live with the residual societal scrutiny plaguing those accused of child sexual abuse. Such individuals should not be made to bear the yoke of effective re-prosecution in perpetuity. As one pre-*Dowling* federal appellate court declared:

> It is fundamentally unfair and totally incongruous with our basic concepts of justice to permit the sovereign to offer proof that a defendant committed a specific crime which a jury of that sovereign has concluded he did not commit. Otherwise a person could never remove himself from the blight and suspicious aura which surround an accusation that he is guilty of a specific crime.

Wingate v. Wainwright, 464 F.2d 209, 215 (5th Cir.1972). This is precisely the effect of allowing acquitted conduct to serve as evidence in subsequent cases.

d. Stepping on jurors' toes.

Criminal jury verdicts are general verdicts. *See Schad v. Arizona*, 501 U.S. 624, 631-32, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991). *See also Farmer*, 2d Dist. Montgomery No. 4789, 1976 WL 189250 at *6 (describing the arduous process of dissecting a criminal jury verdict as "an

exercise in futility buried in the conflict of testimony"). But it is not for a reviewing court to invade the province of the jury and attempt to divine the basis for its acquittal. *Scott*, 331 N.C. at 43. "[J]ury verdicts must be accepted as they stand. * * * 'Courts have always resisted inquiring into a jury's thought processes * * *.'" *State v. Lovejoy*, 79 Ohio St.3d at 445, quoting *United States v. Powell*, 469 U.S. 57, 67, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984). To attempt to dissect the jury's verdict is to engage in speculation, an act the law universally reviles. The better practice would be to accept an acquittal as "legal innocence" for purposes of Evid.R. 404(B) and R.C. 2945.59.

e. Protecting against government overreaching.

With its vastly superior resources, the government must not be permitted to retry individuals ad nauseam on issues already settled. As the United States Supreme Court observed:

> [T]he law attaches particular significance to an acquittal. To permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that "even though innocent, he may be found guilty."

Scott, 437 U.S. at 91, quoting *Green*, 355 U.S. at 188. Thus, affording the requested weight to an acquittal reflects the significant public interest in shielding individuals from governmental overreaching. *Dowling*, 493 U.S. at 355 (Brennan, J., dissenting).

G. Beware the "Unmitigated Fiction:" Why Limiting Instructions Are Not Enough.

1. Limiting instructions in child sexual abuse cases are particularly futile.

Realistically, a limiting instruction regarding the use of acquittal evidence in child sex abuse cases is neither sufficient nor effective in protecting a defendant from propensity reasoning and unfair prejudice. Generally speaking, "[t]he effective use of the limiting jury instruction to diminish the prejudicial effect of the evidence is questionable to doubtful." Crawford, *Dowling:*

A Failure, 52 Ohio St.L.J. at 993. "[O]nce such evidence is before a jury the damaging prejudicial effect cannot be wiped out by a subsequent limitation." *Id*., quoting Comment, *Exclusion of Prior Acquittals*, 21 UCLA L.Rev. 892 at 913. *See also Dowling*, 493 U.S. at 362, fn. 5 (Brennan, J., dissenting) ("The fact that the trial judge may instruct the jury that the defendant was acquitted does not sufficiently protect the defendant * * *. There is no guarantee that the jury will give any weight to the acquittal; the jury may disregard it or even conclude that the first jury made a mistake.").

It is difficult to dispute that the trend is for trial courts to freely admit other acts evidence for a variety of reasons, oftentimes unspecified. Randall, *Acquittals in Jeopardy*, 141 U.Pa.L.Rev. at 314. To err is human, and none is more likely to be swayed by emotions than the average juror:

> It is difficult, if not impossible, for juries to ignore the prejudicial implications of other act evidence. Juries respond irrationally to such evidence and reach unjustified conclusions about the defendant's guilt – which is why it has traditionally been considered a highly prejudicial and dangerous type of evidence in the first place. It is unlikely that simply because such evidence is introduced for some other limited purpose, juries will respond to it with any more reason and judgment than they otherwise would, or that they will ignore its obvious character implications. Courts have long recognized the futility of instructing jurors not to consider these implications, referring to the use of limiting instructions with other act evidence as "mental gymnastics" requiring "human beings to act with a measure of dispassion and exactitude well beyond mortal capacities." One past Supreme Court Justice has even called the suggestion that juries follow such instructions an "*unmitigated fiction.*"

(Emphasis added.) (Internal citations omitted.) *Randall* at 313-14, quoting *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir.1932); *United States v. Daniels*, 770 F.2d 1111, 1118 (D.C. Cir.1985); and *Krulewitch v. United States*, 336 U.S. 440, 443, 69 S.Ct. 716, 93 L.Ed. 790 (1949) (Jackson, J., concurring) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction.").

Mr. Smith submits that the presumption that jurors follow jury instructions is even less likely in child sexual abuse cases. Such cases entail a high risk of conviction based on propensity due to the inherently abhorrent nature of the charges. *See Dowling* at 354, 361 (Brennan, J., dissenting). *See also Creech*, 150 Ohio St.3d 540, 2016-Ohio-8440 at ¶ 39, quoting 1980 Staff Note, Evid.R. 105 (if there exists the danger of unfair prejudice, the offending evidence should not be admitted even with a limiting instruction); *Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052 at ¶ 30 (even where the prosecution's case is strong, where the prejudice is blatant, a new trial is warranted). Accordingly, acquittal evidence requires an alternate form of protection. Randall, *Acquittals in Jeopardy*, 141 U.Pa.L.Rev. at 314.

2. Vague instructions are no more helpful than the blank pages they are written on.

This problem is compounded where, as here, the trial court fails to tailor its admission or limitation of the evidence. In its pre-trial entry, the trial court denied Mr. Smith's motion in limine seeking to bar the acquittal evidence. (B1600893 T.d. 56, 85). The trial court's ruling concluded only that "the testimony is admissible pursuant to Evid.R. 404(B)." (*See id.*). At trial, the cautionary jury instruction was equally nondescript:

> [I]f you find that the evidence of other crimes, wrongs, and/or acts is true and the Defendant committed them, you may consider that evidence only for the purpose of deciding whether it proves the Defendant's motive, opportunity, intent or purpose, preparation, and/or plan to commit the offense charged in this trial.

(T.p. 1047-48).

This overly broad instruction failed to enunciate the specific purposes for which the jury could consider the acquittal evidence in the case at bar. *State v. Hartman*, 8th Dist. Cuyahoga No. 105159, 2018-Ohio-2641, ¶ 44 (Stewart, J., concurring in part and dissenting in part). *See also United States v. Davis*, 726 F.3d 434, 442 (3d Cir.2013) (the trial court "in the first instance,

rather than the appellate court in retrospect," must articulate reasons supporting 404(B) evidence). Troublingly, then, the 12 lay men and women of the jury were left to decipher precisely which 404(B) exceptions applied to the acquittal evidence. *Hartman* at ¶ 44. Such a feat is sometimes difficult for lawyers and judges alike, much less laypeople. This omission "created the risk that the jury considered the other acts evidence for a purpose that had no basis in evidence" in Mr. Smith's case. *Id.* Moreover, it ignored the possibility that the facts of the case may not have carved out a proper role for the evidence under Evid.R. 404(B).

H. In Sum: A Call to Embolden Minds.

This Court, and only this Court, is empowered to elevate Ohio Constitutional rights above *Dowling* if it so chooses. Its members can "let [their] minds be bold." *Liebmann*, 285 U.S. 262 at 311 (Brandeis, J., dissenting). Mr. Smith respectfully implores the Court to do just that by joining the states that impose a blanket prohibition against acquittal evidence in subsequent criminal prosecutions. Specifically, Mr. Smith asks the Court to hold that Ohio Constitutional principles operate to bar all evidence pertaining to an issue on which a defendant previously won an acquittal, regardless of the role ascribed to that evidence in a subsequent criminal proceeding.

<u>Proposition of Law No. II</u>: The admission of irrelevant, highly prejudicial evidence of a 30-year-old acquittal for which the transcripts and complete record are unattainable contravenes the test articulated by this Court in *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, requiring retrial.

In order to uphold a defendant's right to a fair trial, it is crucial that the jury not be tainted by outside influences or biases. Ohio Constitution, Article I, Section 10; Sixth and Fourteenth Amendments to the U.S. Constitution. *See also Sheppard v. Maxwell*, 384 U.S. 333, 362, 86 S.Ct. 1507, 16 L.E.2d 600 (1966). These concerns ring particularly true where allegations of child sexual abuse are involved. *See, e.g., Schaim*, 65 Ohio St.3d 51.

In furtherance of this caveat, black letter law prohibits the use of propensity evidence in criminal prosecutions. Troublingly, the exceptions contained in Evid.R. 404(B) for the admission of other acts evidence are invoked with such increasing frequency that the insulation provided by the rule has been all but obliterated. Hence the rule's unofficial moniker, "the prosecutor's delight." Comment, *Exclusion of Prior Acquittals*, 21 UCLA L.Rev. 892 at 896.

Because Evid.R. 404(B) codifies an exception to the general rule barring other acts evidence, it is supposed to be strictly construed. *State v. Broom*, 40 Ohio St.3d 277, 533 N.E.2d 682 (1988), paragraph one of the syllabus. Oftentimes, it is not. Crawford, *Dowling: A Failure*, 52 Ohio St.L.J. at 993 ("[T]ime has shown that trial judges infrequently exclude the prior criminal conduct * * *. Because the question of admissibility is a discretionary decision for the trial judge, appellate reversal is practically nonexistent."). Mr. Smith urges that his case be utilized as an opportunity to rein in lower courts' burgeoning misapplication of the test enunciated by this Court for the assessment of other acts evidence in *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278.

A. The *Williams* Test and the Distention of Evid.R. 404(B).

Evid.R. 404(B) permits the introduction of other acts evidence for certain purposes,

including proof of motive, opportunity, intent, preparation, plan, knowledge, identity, and absence of mistake or accident. *See also* R.C. 2945.59 (other acts permissible to show motive, intent, absence of mistake or accident, scheme, plan, or system). Significantly, on direct appeal in the present matter, the state argued that the acquittal evidence "showed that Smith was acting today in conformity with how he had in the past * * *." (C170355 T.d. 24 at 8).

On the contrary, as stated, other acts evidence is *never* admissible to show action in conformity. *See* Evid.R. 404(B). *See also State v. Mann*, 19 Ohio St.3d 34, 37, 482 N.E.2d 592 (1985); *Curry*, 43 Ohio St.2d at 68. As this Court observed, other acts evidence "is admissible, not because it shows that the defendant is crime prone, or even that he has committed an offense similar to the one in question, *but in spite of such facts*." (Emphasis added.) *State v. Burson*, 38 Ohio St.2d 157, 158, 311 N.E.2d 526 (1974).

In *Williams*, this Court instructed lower courts to consider the following three elements to determine whether other acts evidence should be admitted in any given case: (1) whether the other acts are relevant under Evid.R. 401; (2) whether the other acts are proffered merely to suggest action in conformity therewith or for one of the permissible purposes under Evid.R. 404(B); and (3) whether the probative value of the evidence is outweighed by the danger of unfair prejudice, requiring exclusion under Evid.R. 403. *Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695 at ¶ 20. Such was not properly done here.

B. Application of the *Williams* Test in the Case Sub Judice.

At the 2016 jury trial of the present matter, Verna testified about multiple instances of sexual abuse allegedly perpetrated by Mr. Smith three decades earlier. She stated that Mr. Smith anally raped her, licked her vagina and breasts, put his penis in her mouth, and showed her pornography. Sister LaTanya echoed the pornography allegation and testified that she once witnessed

Mr. Smith put his hand up Verna's shirt. Mychal testified that Verna twice warned her that their father had molested her – once when Mychal was a child, and again when Mychal was an adult with children of her own.

As stated, Mr. Smith had been acquitted of sexually abusing Verna in the 1986 case. Moreover, the testimony offered by Verna and LaTanya in the 2017 trial far exceeded the allegations underscoring the 1986 case. Nonetheless, the First District Court of Appeals misapplied the *Williams* elements to uphold the admission of this irrelevant, highly prejudicial testimony. *Smith*, 1st Dist. Hamilton No. C-1700335, 2018-Ohio-4615 at ¶ 8-15.

1. The decades-old acquittal evidence was not relevant under Evid.R. 401.

In upholding Mr. Smith's convictions, the First District deemed the acquittal evidence relevant. *Smith*, 1st Dist. Hamilton No. C-1700335, 2018-Ohio-4615 at ¶ 11. To begin, the temporal remoteness of the acquittal evidence counseled strongly against a finding of relevance. As this Court noted:

> One recognized method of establishing that the accused committed the offense set forth in the indictment is to show that he has committed similar crimes *within a period of time reasonably near to the offense on trial*, and that a similar scheme, plan or system was utilized to commit both the offense at issue and the other crimes.

(Emphasis added.) *Curry*, 43 Ohio St.2d at 73.

One cannot viably argue that 30-year-old accusations were posited "within a period of time reasonably near to the instant offense." *Id.* This 30-year passage of time inhibited access to the original records, including court filings and transcripts. *Compare State v. Luck*, 15 Ohio St.3d 150, 158-59, 472 N.E.2d 1097 (1984) (decrying a 15-year pre-indictment delay). Indeed, the only documents available were the 1986 indictment and a handful of subpoenas. (*See* B1600893 T.d. 117 at 2-3, Exhibit A; C-1700335 T.d. 20 at 20, Appendix A-1). These omissions were not

attributable to Mr. Smith, and should not have inured to his detriment when the state dredged up acquitted charges three decades later. *See Dowling*, 493 U.S. at 363 (Brennan, J., dissenting) (noting, "[t]he ability to relitigate the facts relating to an offense for which the defendant has been acquitted benefits the Government because there are many situations in which the defendant will not be able to present a second defense because of the passage of time, the expense, or some other factor"). Accordingly, the 30-year lapse weighed heavily against the relevance of Verna's and LaTanya's testimony.

The appellate court cited Evid.R. 404(B) justifications to conclude that the offending testimony was relevant. *Id.* It opined that the testimony showed Mr. Smith's motive, preparation, and plan to target young, female family members in his care. The court indicated Mr. Smith isolated his victims,[4] showed them pornographic images, rubbed their bodies with his hand, and then progressed to genital contact. According to the court, the testimony also countered Mr. Smith's assertion that any inappropriate contact was accidental.

Contrary to *Williams*, however, the alleged "grooming" by Mr. Smith can hardly be deemed a "unique behavioral footprint" sufficient to render the evidence relevant. *In re C.T.*, 8th Dist. Cuyahoga No. 97278, 2013-Ohio-2458, 991 N.E.2d 1171, ¶ 33. The Eighth Appellate District aptly explained why:

> Finding an opportunity to be alone with another is a necessary part of engaging in sexual conduct, whether lawfully or not. As to the allegation of engaging in unconsented oral sex and digital penetration, this is conduct that goes to an element of the rape offense itself, not a "scheme," "plan," or "method." * * * Unlike *Williams*, [134 Ohio St.3d 521,] there is no evidence here demonstrating a unique behavioral footprint, and therefore, the previous adjudication of delinquency is not relevant to making any

4. The origin of this "isolation" finding is unclear from the record. The 2017 trial testimony established that R.E.'s sisters were in the bed alongside her when the abuse was allegedly perpetrated. (T.p. 602).

> fact that is of consequence to the determination of whether C.T. engaged in sexual conduct with K.W. without consent.

In re C.T. at ¶ 33.

The same rationale casts doubt upon the relevance of the offending testimony in the present matter. The existence of "some commonalities" between victims "does not rise to the level of showing a specific modus operandi, scheme, design, or plan, such that each victim's testimony would have been admissible under Evid.R. 404(B) * * *." *State v. Garrett*, 12th Dist. Clermont No. CA2008-08-075, 2009-Ohio-5442, ¶¶ 46-47. Here, the parallels between Verna's allegations and R.E.'s allegations were little more than "some commonalities" which failed to rise to the level of a unique behavioral footprint necessary for admissibility. *In re C.T.* at ¶ 33. Mr. Smith thus maintains that the acquittal evidence in this case did not satisfy the threshold hurdle of relevance.

2. The acquittal evidence was not properly admitted under Evid.R. 404(B).

a. Like a cart with no horse, the jury was never instructed regarding the particular Evid.R. 404(B) purposes for which the evidence could ostensibly be considered.

Next, without analysis, the appellate court stated that the testimony offered by Verna and LaTanya was properly admitted under Evid.R. 404(B) to show motive, intent, and absence of mistake. *Smith*, 1st Dist. Hamilton No. C-1700335, 2018-Ohio-4615 at ¶ 12. But, as previously discussed, the trial court's instructions to the jury neglected to specify for which 404(B) purposes the jury could consider the evidence. (T.p. 340, 410-11). *See* 2 OJI-CR 401.25. Such a practice is not novel:

> All too often the state presents Evid.R. 404(B) as if the jury must determine the state's intended reason for introducing the other acts evidence. * * * Evid.R. 404(B) provides a nonexhaustive list of alternatives for admitting other acts evidence. Not all factors are relevant in every case such that [a general] instruction is always

> appropriate. The proponent of the evidence must demonstrate the applicability of one or more of the exceptions. *It is not enough to simply cite them all and let the jury figure out which one applies*.

(Emphasis added.) *State v. Hart*, 8th Dist. Cuyahoga No. 105673, 2018-Ohio-3272, ¶¶ 55-56 (S. Gallagher, J., concurring in part and dissenting in part). Such a practice should not be sanctioned by this Court. This crucial omission in Mr. Smith's case was error. *Hartman*, 8th Dist. Cuyahoga No. 105159, 2018-Ohio-2641 at ¶ 44 (Stewart, J., concurring in part and dissenting in part).

Under the facts of Mr. Smith's case, it is a legal fiction to trust that the jury was able to parse out the permissible purposes for the aged acquittal evidence and evade the propensity trap. 71 Tex. Jur.3d Trial and ADR, Section 246 ("If evidence has a clear prejudicial effect on one issue, a limiting instruction to focus the jury's attention only on another issue may not be effective; under such circumstances, a jury cannot be expected to parse out the ways in which the evidence can be considered and the ways it cannot.").

The trial court in the first instance, and not the appellate court in retrospect, must enunciate the permissible bases upon which other acts evidence can come in. *Davis*, 726 F.3d at 442. An overly broad finding should diminish the deference reviewing courts afford the trial court's ruling on the admissibility of such evidence. Mr. Smith requests that this Court issue a proclamation requiring trial courts to instruct the jury as to the specific bases upon which the jury can consider other acts evidence, rather than issuing an all-inclusive "laundry list" of Evid.R. 404(B) or R.C. 2945.59 exceptions.

b. Horse, thy name be Propensity.

The prosecution's arguments during trial and on appeal belied the true purpose behind the acquittal evidence in this case: propensity. In her opening statement, the prosecutor acknowledged that, with no physical evidence, the case seemingly came down to two stories: "it may seem like you

have my little girl's word against the Defendant's word." (T.p. 314). However, she continued, "there is actually more than that. When we talked a little bit yesterday, I mentioned that there were previous allegations against the Defendant, and those involved his own daughter." (T.p. 315-16). The prosecutor then implored the jury to focus on the similarities between the allegations surrounding the 1986 case and those surrounding the 2016 case. (T.p. 315-16).

Similarly, during closing arguments, the prosecutor invited the jury to "focus on the similarities between what [Verna and LaTanya] said and what [R.E.] said." (T.p. 984). On rebuttal closing, the prosecutor assiduously rebuked the "acquittal" part of the acquittal evidence:

> Defendant was found not guilty back in 1986. I've been doing this for a very long time. I can't tell you if [sic] number of trials where a jury, much like yourselves[,] have come back and said not guilty. Just because a jury says not guilty doesn't mean it didn't happen. I can tell you from my own experience, juries say not guilty for a variety of reasons. Some of them are logical. Some of them, in my opinion, are not so logical, and it's frustrating. Just because a group of people said not guilty doesn't mean it didn't happen.

(T.p. 1024). Rebuttal closing drew to a close with the prosecutor again imploring the jury to focus on the similarities between Verna's and R.E.'s testimony, and asking the jury to find Mr. Smith guilty. (T.p. 1038-39).

As indicated, the state was even more explicit on direct appeal. In its brief, the state maintained that the acquittal evidence "showed that Smith was acting today in conformity with how he had in the past * * *." (C170355 T.d. 24 at 8). Mr. Smith avers that this assertion sheds light upon the state's true motive in citing the acquittal evidence.

c. The acquittal evidence was not admissible to prove motive, intent, preparation, plan, absence of mistake, etc.

In actuality, the evidence was not admissible under Evid.R. 404(B) because it could not be pigeonholed into any of the permissible purposes under the rule. As discussed, identity was

not at issue. Nor did the existence of a few minor parallels between the Verna allegations and the R.E. allegations rise to the level of a unique behavioral footprint. *In re C.T.*, 8th Dist. Cuyahoga No. 97278, 2013-Ohio-2458 at ¶ 33. Indeed, most creative attorneys could fashion a list of purported similarities in an attempt to usher evidence into a record.

Where no more than "some commonalities" are proffered, the default rule strictly limiting propensity evidence should be rigorously applied. *State v. DeMarco*, 31 Ohio St.3d 191, 194, 509 N.E.2d 1256 (1987); *Garrett*, 12th Dist. Clermont No. CA2008-08-075, 2009-Ohio-5442 at ¶¶ 46-47. Courts have gotten away from this. In Mr. Smith's case in particular, the parallels between Verna's allegations and R.E.'s allegations were little more than "some commonalities." Because the purported parallels failed to rise to the level necessary for admissibility, the trial court erred in sanctioning the admission of the acquittal evidence under Evid.R. 404(B).

3. Any alleged probative value of the acquittal evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or considerations of undue delay under Evid.R. 403.

a. The overlooked *Williams* prong.

Finally, without analysis, the appellate court declared that the probative value of the testimony was not substantially outweighed by unfair prejudice. *Smith*, 1st Dist. Hamilton No. C-1700335, 2018-Ohio-4615 at ¶ 13. Evidence deemed admissible under Evid.R. 404(B) is still subject to the limitations of Evid.R. 403. *State v. Broom*, 40 Ohio St.3d at 283, fn. 1. *See also United States v. Huddleston*, 485 U.S. 681, 688, 691, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988). Yet the trial court never performed the requisite balancing of the 403 factors on the record.

The admissibility of the evidence in question was initially addressed at a January 23, 2017 pretrial hearing. After entertaining arguments from both sides, the trial court ruled that the

evidence was probative of lack of mistake, preparation, and plan. (01/23/2017 T.p. 52). The court opined that the acquittal aspect of the evidence was "irrelevant." (*Id.*). It concluded that the evidence was sufficiently similar to the current allegations to be admitted, and asserted the defense could cross on it. (01/23/2017 T.p. 52-53). No Evid.R. 403 analysis can be discerned from the record.

The admissibility of the acquittal evidence was revisited at a March 22, 2017 motion hearing before the start of the second trial. The attorneys presented arguments substantially similar to those offered at the January 23 hearing, after which the trial court again deemed the acquittal evidence admissible and asserted that the weight to be attributed thereto was for the jury. (03/22/2017 T.p. 15). Again, no Evid.R. 403 analysis can be garnered from the record. The omission of this prong from the trial court's assessment of the evidence during both motion hearings rendered the court's decisions arbitrary and an abuse of discretion.

b. Properly scrutinized, the 403 scale tips in Mr. Smith's favor.

Mr. Smith submits that a proper analysis under the third prong of *Williams* mandates exclusion of the acquittal evidence. Unfair prejudice results when a jury verdict is grounded in evidence that "arouses the jury's emotional sympathies, evokes a sense of horror, or appeals to an instinct to punish * * *." (Citations omitted.) *Creech*, 150 Ohio St.3d 540, 2016-Ohio-8440 at ¶ 36. The testimony surrounding the 1986 case was designed to appeal to just such objectives. Both the 1986 case and the present matter involved accusations of sexual abuse against adolescent female relatives. Due to the absence of physical evidence, the resolution of this "he said/she said" case hinged entirely upon credibility. As stated, there was a high risk of a conviction based upon propensity in this context due to the inherently abhorrent nature of child sexual abuse allegations.

See Dowling at 354, 361 (Brennan, J., dissenting). This was particularly so where the prosecuting witness was the accused's biological relative.

Moreover, the lack of transcripts and record from the 1986 case unfairly prejudiced Mr. Smith in numerous ways. Mr. Smith was unable to effectively challenge and confront Verna and LaTanya because these documents from the 1986 case were not available. (03/22/2017 T.p. 12). Nor could Mr. Smith or the trial court review the prior testimony of both witnesses to determine whether there existed, at minimum, impeachment material. The danger of unfair prejudice under such circumstances was aptly explained by the Southern District of Ohio in *United States v. Henderson*, where the federal government sought to introduce evidence from a 26-year-old homicide:

> This Court finds that, while evidence of the Boyd murder and Thompson attempted murder may be relevant to support further Defendant's motive for killing those who may provide, or have provided, information to law enforcement relating to the Macon robbery, the evidence is substantially outweighed by the danger of unfair prejudice. First, the alleged offenses against Boyd and Thompson *are too remote in time and their introduction would deny Defendant his right to present a meaningful and effective defense against such accusations because relevant evidence is likely to be lost or untraceable*. *See United States v. Tolley*, 1999 WL 137620, 173 F.3d 431 (6th Cir.1999) (stating that in order for past acts evidence to be admissible, "the evidence must deal with conduct substantially similar and *reasonably near in time to the offenses for which the defendant is being tried*") (citing *United States v. Feinman*, 930 F.2d 495, 499 (6th Cir.1991)); *United States v. Green*, 151 F.3d 1111, 1113 (8th Cir.1998) (stating that, under 404(b), evidence is admissible if it is relevant to a material issues and not overly remote in time); *United States v. Norman*, 1993 WL 425964, at *5, 8 F.3d 32 (9th Cir.1993) (same).

(Emphasis added.) *United States v. Henderson*, 485 F.Supp.2d 831, 839-40 (S.D.Ohio 2007).

On direct appeal, the state generally averred that the acquittal evidence was more probative than prejudicial. (C-1700335 T.d. 24 at 8). It argued that the prejudicial effect of the acquittal evidence occasioned by its age was tempered by the trial court's limiting instructions.

(*Id.* at 9-10). On the contrary, as discussed, the prejudice was compounded by the trial court's failure to tailor its jury instruction to any of the Evid.R. 404(B) exceptions. Once the acquittal evidence is excised from the record, the weaknesses plaguing the state's case reveal the outcome-determinative nature of the error. *See Schaim*, 65 Ohio St.3d 61 at syllabus. This brings us to the final point.

C. The Trial Court's Admission of the Evidence Was Not Harmless Error.

A reviewing court must find that the error in admitting improper other acts evidence was harmless beyond a reasonable doubt in order to support reversal. *Id.* at ¶ 28, citing *State v. Crawford*, 32 Ohio St.2d 254, 255, 294 N.E.2d 450 (1972); *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The burden to prove that the error was harmless beyond a reasonable doubt rests with the state. *Chapman* at syllabus.

The admission of the acquittal evidence in the case at bar was not harmless error. This Court has stated that, "in determining whether a new trial is required or the error is harmless beyond a reasonable doubt, the court must excise the improper evidence from the record and then look to the remaining evidence." *Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052 at ¶ 29. Further, "the cases where imposition of harmless error is appropriate must involve either overwhelming evidence of guilt or some other indicia that the error did not contribute to the conviction." (Internal quotations omitted.) *Id.*, citing *State v. Rahman*, 23 Ohio St.3d 146, 151, 492 N.E.2d 401 (1986). "[B]latant prejudice may override even a strong case and require a new trial." *Morris* at ¶ 32.

The instant matter, however, was not a strong case. *See id.* at ¶¶ 29-30. Rather, it was a "he said/she said" case with no physical evidence and no evidence to corroborate the prosecuting witness' accusations except for the improperly-admitted acquittal evidence. The prosecution repeatedly implored the jury to "focus on the similarities" between the 1986 case and the 2016

case. (T.p. 315-16, 984-85, 1038). In the first 2017 trial, the jury hung. Even with the offending evidence in the record, the second jury nearly hung. The certainty of a guilty verdict under these circumstances could not have been more tenuous. In fact, when faced with a similarly weak child sexual abuse case tainted by the admission of inflammatory 404(B) evidence, this Court affirmed the appellate court's grant of a new trial. *See, generally*, *Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052.

Finally, as emphasized, the untailored limiting instructions were insufficient to overcome the substantial prejudice occasioned by the admission of the acquittal evidence. In this respect, this case aligns with this Court's decision in *State v. Creech*:

> The discounted probative value of the state's evidence was substantially outweighed by the danger of unfair prejudice in this case, and thus the trial court abused its discretion in admitting that evidence. The limiting instruction the trial court gave to the jury – to not consider the evidence "to prove the character of the defendant in order to show that he acted in conformity or accordance with that character" – was insufficient to overcome the admission of inadmissible evidence of Creech's prior convictions and indictment. "[I]f there would be danger of unfair prejudice, evidence ordinarily admissible for a limited purpose should not be admitted even with a limiting instruction." 1980 Staff Note, Evid.R. 105. Finally, we agree with the determination of the court of appeals that the trial court's error was not harmless.

Creech, 150 Ohio St.3d 540, 2016-Ohio-8440 at ¶¶ 39-40.

Once the offending evidence is excised from the record in the case sub judice, certainty regarding a guilty verdict quickly dissipates. Given the "scarcely overwhelming" evidence supporting the state's case, it cannot be said that the admission of the offending evidence was harmless. *See State v. Hart*, 94 Ohio App.3d 665, 675, 641 N.E.2d 755 (1st Dist.1994) (remaining evidence was "scarcely overwhelming" where case came down to credibility and little other direct evidence was introduced in the second trial of a case in which the jury failed to reach a verdict in the first trial). Accordingly, even if this Court declines to impose a per se bar against acquittal evidence,

it should afford Mr. Smith a new trial and foreclose the acquittal evidence from consideration by the newly-empaneled jury.

CONCLUSION

This Court must protect the citizens of Ohio by keeping acquittals where they belong – in the past. The effect of an acquittal should not begin and end in the case from whence it came. To afford an acquittal meaning, it should endure to shield the exonerated individual from effective reprosecution under the guise of Evid.R. 404(B). Accordingly, Mr. Smith respectfully asks this Court to reverse the ruling of the First District Court of Appeals and order a new trial on the convicted counts with instructions that all evidence pertaining to the 1986 case be barred.

Respectfully submitted,

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/s Krista M. Gieske

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CERTIFICATE OF SERVICE

I certify that a copy of the Merit Brief of Defendant-Appellant Michael Smith has been served on Scott M. Heenan, Attorney for Plaintiff-Appellee, the State of Ohio, at 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202 on the 7th day of June, 2019.

/s Krista M. Gieske

Krista M. Gieske (0080141)

APPENDIX A:
Notice of Appeal
to the Ohio Supreme Court
(Dec. 27, 2018)

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
Appellee,	:	On Appeal from the Hamilton County Court
vs.	:	of Appeals, First Appellate District
MICHAEL SMITH,	:	
Appellant.	:	Court of Appeals Case No. C1700335

NOTICE OF APPEAL OF APPELLANT MICHAEL SMITH

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Notice of Appeal of Appellant Michael Smith

Appellant, Michael Smith, by and through the office of the Hamilton County Public Defender, Raymond T. Faller, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Hamilton County Court of Appeals, First Appellate District, entered in Court of Appeals Case No. C1700335 on November 16, 2018.

This case raises substantial constitutional questions and is of great general and public interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the Notice of Appeal has been served on Scott M. Heenan, Counsel for Appellee, State of Ohio, at 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202 via hand delivery on the 27th day of December, 2018.

/s Krista M. Gieske

Krista M. Gieske

APPENDIX B:
Opinion of the
First District Court of Appeals
(Nov. 16, 2018)

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-170335 TRIAL NO. B-160893
Plaintiff-Appellee,	:	*OPINION.*
vs.	:	
MICHAEL SMITH,	:	PRESENTED TO THE CLERK OF COURTS FOR FILING
Defendant-Appellant.	:	NOV 16 2018
		COURT OF APPEALS

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: November 16, 2018

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Scott M. Heenan*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Raymond T. Faller, Hamilton County Public Defender, and *Demetra Stamatakos*, Assistant Public Defender, for Defendant-Appellant.

ENTERED
NOV 16 2018

MOCK, Presiding Judge.

{¶1} Defendant-appellant Michael Smith was indicted on two counts of rape, in violation of R.C. 2907.31(A)(2), three counts of gross sexual imposition, in violation of R.C. 2907.02(A)(4), and one count of disseminating matter harmful to a juvenile, in violation of R.C. 2907.21(A)(1). Smith was originally tried on the charges contained in the indictment in late January 2017. The case was presented to a jury, but the jurors were unable to reach a verdict. The trial court declared a mistrial, and the matter proceeded to a second jury trial before a visiting judge. At the conclusion of the second trial, Smith was found guilty of three counts of gross sexual imposition and one count of disseminating matter harmful to a juvenile, and was sentenced accordingly.

{¶2} In five assignments of error, Smith claims that he was improperly convicted. We affirm.

Granddaughter Claims Molestation

{¶3} V.M. was Smith's daughter. She testified that Smith had molested her over the course of several years in the 1980s. She said that he had shown her photographs of her mother naked, as well as pornographic material. One instance was witnessed by V.M.'s sister, L.S. L.S. testified that she had seen Smith fondle V.M.'s breasts and vagina. When V.M. told her mother about the incident, Smith was arrested and charged with two counts of sexual battery. The matter proceeded to trial in 1986, and Smith was acquitted of both charges.

{¶4} Over 19 years later, Smith was involved in another incident involving a minor, female relative. R.E. was the ten-year-old daughter of M.S., V.M.'s niece, and Smith's granddaughter. M.S. allowed R.E. to spend the night at Smith's home with the understanding that Smith would be taking her to see a movie. R.E. testified

that, during the evening of that visit, Smith rubbed oil on her buttocks, breasts, and vagina under the guise of applying it to her skin to help with itching. She testified that Smith also licked her breasts and vagina, and that he showed her a pornographic movie. She further testified that Smith later rubbed her vagina again as she was falling asleep. R.E. testified that the next morning, Smith put her hand on his penis, pushed his penis against her buttocks, and then tried to pull down her underwear. Later that day, R.E. told her mother what had happened.

{¶5} R.E.'s mother testified that she had been estranged from Smith for many years, but had been trying to reconnect with him. She recounted that her sister had told her that Smith had molested her, but she did not believe that it had occurred. She testified that she noticed that R.E. was acting strangely after having been to Smith's home. She said that Smith was also acting strangely. R.E.'s mother then testified that R.E. told her what she claimed Smith had done. R.E.'s mother called Smith and asked him about what R.E. had told her. In the call, which R.E.'s mother recorded, Smith insisted that, if anything had happened, it was accidental.

{¶6} Smith testified that while he had rubbed oil on R.E.'s body, he had not done so with a sexual motivation. He also denied showing R.E. a pornographic movie, claiming that he accidently played a sex scene from an R-rated movie while trying to play a children's program.

{¶7} Cincinnati Police Detective Sharon Johnson testified about her investigation of the incident. She testified that, during the course of her investigation, she made reference to reviewing an "old office file," which was presumably the police file from the 1986 investigation involving V.M. and Smith. At trial, after the parties had rested their cases, but before closing argument, defense counsel raised the issue that the 1986 police file had not been turned over during

discovery, but did not seek a sanction for this omission. Counsel "just wanted to place it on the record."

Testimony About Prior Conduct

{¶8} In his first assignment of error, Smith argues that the trial court erred when it allowed testimony relating to his alleged conduct that had been the subject of his 1986 prosecution for sexual battery—a prosecution that had resulted in his acquittal.

{¶9} Generally, evidence of other crimes, wrongdoing, or acts is not admissible to prove that an individual acted in conformity with that past conduct. Evid.R. 404(B). But the rule provides certain exceptions for when such evidence is admitted to establish proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id.* The admission of other-acts evidence under Evid.R. 404(B) rests within the broad discretion of the trial court. *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, syllabus. We review the trial court's decision under an abuse-of-discretion standard. *Id.*

{¶10} The Ohio Supreme Court has set forth a three-part test to determine when a trial court may allow testimony about the actions of a defendant in a prior incident involving a different victim. *State v. Smith*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278. When making that decision, the court must consider: (1) whether the other-acts evidence is relevant to making a finding that is of consequence more or less probable than it would have been without the evidence; (2) whether the evidence is presented to prove the character of the accused in order to show action in conformity therewith or whether it was presented for a legitimate

purpose; and (3) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *Id.* at ¶ 20.

{¶11} As to the first step, we conclude that the evidence was relevant. The evidence from the witnesses tended to show the motive Smith had, and the preparation and plan he exhibited when targeting young, female family members under his care. In both instances, Smith had waited until the children were isolated, showed them pornographic images, rubbed their bodies with his hand first, and progressed to involving his genitals in the abuse. This evidence was also relevant to counter his assertion that any inappropriate touching had been accidental, and had not been motivated by a desire for sexual gratification.

{¶12} We next conclude that the evidence was properly admitted under the exceptions to Evid.R. 404(B). The evidence was admitted to show motive, intent, and absence of a mistake. The trial court repeatedly warned the jury that it was to consider the evidence only for that limited purpose and that it could not consider the evidence as improper character evidence. A jury is presumed to follow the instructions given it by a trial judge. *State v. Garner*, 74 Ohio St.3d 49, 59, 656 N.E.2d 623 (1995).

{¶13} Finally, we conclude that the probative value of the evidence was not substantially outweighed by unfair prejudice to Smith. The trial court's repeated instructions on the limited use of the evidence guarded against the danger of undue prejudice. *See Smith*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, at ¶ 24. The effect of the testimony presented by V.M. and L.S. was not so unfairly prejudicial that the trial court abused its discretion when admitting it.

{¶14} Smith also argues that the state should have been estopped from presenting this evidence because he had been acquitted of the charges associated

with that conduct. But this court has held that "collateral estoppel does not bar the state's use of other acts evidence pursuant to Evid.R. 404(B), when the evidence relates to alleged criminal conduct of which the accused has previously been acquitted." *In re Burton*, 160 Ohio App.3d 750, 2015-Ohio-2210, 828 N.E.2d 719, ¶ 14 (1st Dist.). This is because "the relevance of evidence offered under Rule 404(B) [is] governed by a lower standard of proof than that required for a conviction." *United States v. Felix*, 503 U.S. 378, 386, 112 S.Ct. 1377, 118 L.Ed.2d 25 (1992).

{¶15} As the Ohio Supreme Court stated, Evid.R. 404(B) precludes the admission of

> evidence of crimes, wrongs, or acts offered to prove the character of an accused in order to demonstrate conforming conduct, and it affords the trial court discretion to admit evidence of other crimes, wrongs, or acts for "other purposes," including, but not limited to, those set forth in the rule. Hence, the rule affords broad discretion to the trial judge regarding the admission of other acts evidence.

State v. Williams, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶ 17. In this case, the trial court did not abuse its discretion when it allowed the testimony of V.M. and L.S. relating to Smith's prior conduct. We overrule Smith's first assignment of error.

Discovery of 1986 Police File

{¶16} In his second assignment of error, Smith claims that the trial court erred when it failed to order the state to turn over a copy of the police report from the 1986 incidents that made up the testimony of V.M. and S.L. We disagree.

{¶17} During the course of the trial, Detective Johnson testified that she had found a copy of the 1986 file while investigating the allegations involving R.E. After

the proceedings had concluded that day, counsel for Smith "informally requested" a copy of the file by text message. Nothing more came of the matter until counsel met with the trial court in chambers to discuss closing arguments, after both parties had rested. The following exchange took place:

> **Defense Counsel:** As was discussed preliminarily, and [to] place [it] on the record now, Detective Johnson testified yesterday with regards to her investigation and then in testifying, she made reference to examining [an] "old office file" on the case that [lead] to the charge from 1986 [case].
>
> That material was not provided to defense counsel. I don't know what the matter - - that the evidence - - that that file was actually presented to the Prosecutor on this case as well.
>
> But in any case, it wasn't presented to us. We made efforts to obtain various documents from the case in 1986[:] transcript, police reports, clerk's records, things of that nature[. W]e were very limited in our ability to get those materials, and certainly we did not, [to] reiterate, did not get anything that we believe was in the office file that Detective Johnson referenced. Thank you.
>
> **The Court:** You are not asking for a remedy? I didn't hear a request for a remedy?
>
> **Defense Counsel:** We are not asking for a remedy at this time. Just wanted to place it on the record.

{¶18} In this case, Smith has not established that the state was aware of the 1986 police file, has not established that he was entitled to its contents as part of the normal discovery process, did not involve the trial court in seeking to obtain a copy

of the police report, and sought no remedy from the trial court in light of his failure to obtain the report. While Smith characterizes the above colloquy as a "second request for the police file," nothing in that exchange can be read as a request for the file, and Smith requested no remedy for the state's alleged failure to disclose it. We overrule Smith's second assignment of error.

Prosecutorial Misconduct

{¶19} In his third assignment of error, Smith claims that his convictions should be reversed because of misconduct by the prosecuting attorney. Generally, prosecutorial misconduct will not provide a basis for overturning a conviction unless, on the record as a whole, the misconduct can be said to have deprived the defendant of a fair trial. *See State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 257. The test for whether prosecutorial misconduct mandates reversal is whether the prosecutor's remarks or actions were improper, and, if so, whether they prejudicially affected the substantial rights of the accused. *State v. Smith*, 97 Ohio St.3d 367, 2002-Ohio-6659, 780 N.E.2d 221, ¶ 45.

{¶20} Smith first submits that the prosecutor violated the rules of discovery when the state failed to produce a copy of the 1986 police file referenced by Detective Johnson. But we are unable to determine what information was contained in that file, so we cannot say that the state was obligated to produce it in discovery. While Smith argues that the file could have contained police reports, witness statements, and medical records, there is nothing in the record to support that supposition. The detective was not questioned about the details of the contents, Smith did not ask that the file be presented to the trial court for review, and Smith did not ask that the file be preserved in the record for this court to review. Smith never made a formal discovery request for the file.

{¶21} The appellant has the burden on appeal to establish error in the trial court. *State v. Carter*, 9th Dist. Summit No. 21622, 2003-Ohio-7170, ¶ 6, citing *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980). On this record, Smith has failed to demonstrate that the 1986 police record contained information that the state was required to produce in discovery.

{¶22} Smith also claims that the state engaged in misconduct when it "failed to correct false testimony in the second trial." In a claim of prosecutorial misconduct based on the use of false or perjured testimony, the defendant has the burden to "show that (1) the statement was actually false; (2) the statement was material; and (3) the prosecution knew it was false." *State v. Iacona*, 93 Ohio St.3d 83, 97, 752 N.E.2d 937 (2001), quoting *United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir.1989).

{¶23} In this case, Smith bases his claim on the assertion that, during the first trial, M.S. testified that V.M. had "told me the full, everything, when she told me everything what [sic] happened." During the second trial, on the other hand, V.M. testified that she had told no one about what had happened to her except the jurors during the 1986 trial. Also, during the second trial, M.S. testified that that she had not heard the specifics of what allegedly had happened to V.M. at the hands of Smith. The state relied on this testimony during closing arguments to rebut the defense theory that the details from V.M.'s accounts had been used to enhance or create the account of what had happened to R.E.

{¶24} "Mere inconsistencies in testimony do not establish the knowing use of false testimony by the prosecutor." *State v. Buck*, 2017-Ohio-8242, 100 N.E.3d 118, ¶ 76 (1st Dist.), quoting *State v. Widmer*, 12th Dist. Warren No. CA2012-02-008, 2013-Ohio-62, ¶ 41. Additionally, the fact "that a witness contradicts [herself] or changes [her] story

also does not establish perjury." *Id.* As the state points out, there are reasons that M.S. could have characterized what V.M. had told her in different ways without demonstrating that one of the versions is false. Further, examining the *Iacona* factors, Smith has not established that the second version of M.S.'s testimony was false, just that it could be read as inconsistent with her first statement. That is insufficient to establish that the state engaged in misconduct when presenting and relying upon the testimony.

{¶25} Finally, Smith argues that statements made by the prosecutor during closing arguments were improper. The test regarding prosecutorial misconduct in closing arguments is whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the defendant. *State v. Smith*, 14 Ohio St.3d 13, 14, 470 N.E.2d 885 (1984). "[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 220, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). "A prosecutor is entitled * * * to 'wide latitude in summation as to what the evidence has shown and what reasonable inferences may be drawn therefrom.' " *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 274, quoting *State v. Stephens*, 24 Ohio St.2d 76, 82, 263 N.E.2d 773 (1970).

{¶26} Defense counsel offered no objection to these alleged instances of prosecutorial misconduct. Smith is thus precluded from predicating error on these alleged improprieties, unless they rise to the level of plain error. *See* Crim.R. 52(B); *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 22-23. To constitute plain error, an error must be an obvious defect that would clearly, but for the error, have resulted in a different outcome of the trial. *State v. Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, 12 N.E.3d 1112, ¶ 177, quoting *State v. Long*, 53 Ohio St.2d 91, 97, 372 N.E.2d 804 (1978).

{¶27} During the state's rebuttal closing argument, the prosecutor said that

> I've been doing this for a very long time. I can't tell you of a number of trials where a jury, much like yourselves have come back and said not guilty. Just because a jury says not guilty doesn't mean it didn't happen.
>
> I can tell you from my own experience, juries say not guilty for a variety of reasons. Some of them are logical. Some of them, in my opinion, are not so logical, and it's frustrating. Just because a group of people said not guilty doesn't mean it didn't happen.

{¶28} These comments were made by the state in response to defense counsel's argument, which had attempted to discredit the state's other-acts evidence involving the 1986 investigation and trial. Defense counsel had argued that

> Now what angers me as a defense attorney is that we even have to talk about that case from 1986. We live in a country where you stand accused. You face your accuser, you have your day in Court, you clear your name. The end. It's over.
>
> But the State of Ohio's found [a way] to make that not the case. That Michael Smith essentially has to stand trial not just for these allegations here, but also for that case back in 1986.
>
> And that, folks, not guilty verdicts have to mean something.
>
> And again, from my humbled position as a defense attorney, I think that's fundamentally unfair, but, yet, that's what he does, okay? He stands up back then, he stands up now defending himself. He puts that case from 1986 behind him. End of story.

> I find it fundamentally unfair but I acknowledge the State has used it today. But ask yourself, why did the State use it? Okay.
>
> The State has to use it because they know the case they currently have before you, this current case, January 26th, it feels thin, okay? There's no physical evidence. We have the allegations. We don't have anything concrete in your hand to back it up. So, yeah, let's strengthen our case, let's bring in these old allegations, and that's what they've done.

{¶29} In light of the context of the argument of counsel, we conclude that the statements made by the prosecutor were ill-advised but did not rise to the level of plain error. The prosecutor was making the point that the failure of a jury to convict is not the same as establishing that the underlying events did not occur. The same argument could have—and perhaps should have—been made by reference to the jury instructions on reasonable doubt, the state's burden, and the jury's role without reference to the prosecutor's personal experience. We do not agree with Smith that the argument introduced facts that were not presented during the course of the trial.

{¶30} Smith next cites comments that the prosecutor made relating to a delay between when the incident was first investigated and when the prosecution commenced. Smith's counsel had cited the delay as evidence of sloppy police work during defense's closing argument. In rebuttal, the prosecutor discussed the delay, saying that

> I'll tell you all right now, I'm the one who scheduled the grand jury. The reason the case came over in February and did not get scheduled until April was because it sat on my desk. It had absolutely nothing to do with poor police work, with us not thinking we have a good case, I just had other stuff going on and it sat on my desk. It had

absolutely nothing to do with the strength of my case, and anything [the investigator] did wrong. That is on me.

{¶31} The difference between this example and the previous one is that this statement by the prosecutor injects a specific series of events into the timeline of the case that was not presented to the jury in the form of admissible evidence. The specific facts surrounding any preindictment delay were not testified to. The prosecutor asked the jury to accept as true statements about the course of events that had no direct or inferential support from the evidence that had been submitted. This was improper.

{¶32} But establishing that a remark was improper is insufficient to establish that the convictions must be reversed. Smith must also establish prejudice. "In general terms, the conduct of the prosecuting attorney cannot be the ground for error unless such conduct deprives the defendant of a fair trial." *State v. Evans*, 63 Ohio St.3d 231, 240, 586 N.E.2d 1042 (1992), quoting *State v. Maurer*, 15 Ohio St.3d 239, 266, 473 N.E.2d 768 (1984). This isolated comment, about an auxiliary issue to the core issues in the case, was insufficient to rise to a level where we question the fairness of the trial. So, while the comments were improper, Smith was not prejudiced by them.

{¶33} Since neither statement by the prosecutor clearly deprived Smith of a fair trial, the trial court's failure to sua sponte admonish the state and instruct the jury to disregard the comments did not amount to plain error. We overrule Smith's third assignment of error.

Ineffective Assistance of Counsel

{¶34} In his fourth assignment of error, Smith claims that his trial counsel was ineffective and, as a result, his right to due process was violated. To prove ineffective assistance of counsel, a defendant generally has to demonstrate that counsel's performance was deficient and that the deficient performance was

prejudicial. *Strickland v. Washington*, 446 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 141-142, 538 N.E.2d 373 (1989). Prejudice results when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Bradley* at 142.

{¶35} Smith first argues that trial counsel did not adequately cross-examine the state's witnesses. The scope of cross-examination, however, falls within the ambit of trial strategy. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 101. This is particularly true in sex cases with minor victims where counsel may be wise to tread lightly in questioning. *State v. Johnson*, 2016-Ohio-4934, 69 N.E.3d 143, ¶ 29 (1st Dist.), citing *State v. Diaz*, 9th Dist. Lorain No. 04CA008573, 2005-Ohio-3108, ¶ 26 (failure to cross-examine child victims of sex abuse is a matter of trial strategy and does not constitute ineffective assistance). We find nothing deficient in Smith's attorney's cross-examination.

{¶36} Smith next argues that counsel was ineffective for failing to object to the state's failure to produce the 1986 police file, and for failing to pursue sanctions for the alleged discovery violation. But there is nothing in this record to establish that Smith would have been entitled to the information. Even if we were to assume for the purpose of this argument that the material was subject to discovery, we conclude that Smith cannot show prejudice as a result. The 1986 police file related to the allegations involving Smith and V.M., not the allegations in this case. The material was secondary to the main issues of the case which were the conduct of Smith with R.E. Having more information about the 1986 incidents, in light of the fact that those incidents were testified to, would not have changed the outcome of the proceedings below.

{¶37} Finally, Smith argues that trial counsel was ineffective for failing to object to the statements made by the prosecutor during closing arguments that formed the basis for the third assignment of error. For the reasons that have been set forth above, Smith failed to show that either comment prejudiced him such that he was denied a fair trial. Had counsel objected to the statements, our decision would not have changed. We overrule Smith's fourth assignment of error.

Cumulative Error

{¶38} In his final assignment of error, Smith claims that the cumulative effect of the errors outlined in his first four assignments of error entitles him to a new trial, even if the effect of each individual error would be insufficient on its own. Under the doctrine of cumulative error, a conviction may be reversed if the cumulative effect of errors deemed separately harmless is to deny the defendant a fair trial. *State v. DeMarco*, 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987), paragraph two of the syllabus. But we have not found multiple instances of harmless error in this case, so the doctrine does not apply. We overrule Smith's fifth assignment of error.

Conclusion

{¶39} Having considered and overruled all five assignments of error, we affirm the judgment of the trial court.

Judgment affirmed.

MILLER and **DETERS, JJ.**, concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.

APPENDIX C:
Judgment Entry of the First District Court of Appeals (Nov. 16, 2018)

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-170335 TRIAL NO. B-160893
Plaintiff-Appellee,	:	*JUDGMENT ENTRY.*
vs.	:	
MICHAEL SMITH,	:	
Defendant-Appellant.	:	

This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is affirmed for the reasons set forth in the Opinion filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty, and orders that costs are taxed under App. R. 24.

The court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on November 16, 2018 per Order of the Court.

By: _____
Presiding Judge

APPENDIX D:
Judgment Entry of the Hamilton County Common Pleas Court Case No. B1600893 (June 28, 2017)

ENTERED
JUN 28 2017

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

date: **06/14/2017**
code: **GJEI**
judge: **283**

Judge: **JEROME CATANZARO**

NO: **B 1600893**

STATE OF OHIO
VS.
MICHAEL J SMITH

JUDGMENT ENTRY: SENTENCE: INCARCERATION

Defendant was present in open Court with Counsel **SOUMYAJIT DUTTA** and **CARRIE E. WOOD** on the **14th** day of **June 2017** for sentence.
The court informed the defendant that, as the defendant well knew, after defendant entering a plea of not guilty and after trial by jury, the defendant has been found guilty of the offense(s) of:
count 3: GROSS SEXUAL IMPOSITION, 2907-05A4/ORCN,F3

count 4: GROSS SEXUAL IMPOSITION, 2907-05A4/ORCN,F3

count 5: GROSS SEXUAL IMPOSITION, 2907-05A4/ORCN,F3

count 6: DISSEMINATING MATTER HARMFUL TO JUVENILES, 2907-31A1/ORCN,F5

count 1: RAPE, 2907-02A1B/ORCN,F1, JUDGMENT ENTRY OF ACQUITTAL

count 2: RAPE, 2907-02A1B/ORCN,F1, JUDGMENT ENTRY OF ACQUITTAL

The Court afforded defendant's counsel an opportunity to speak on behalf of the defendant. The Court addressed the defendant personally and asked if the defendant wished to make a statement in the defendant's behalf, or present any information in mitigation of punishment.

Defendant is sentenced to be imprisoned as follows:
count 3: CONFINEMENT: 3 Yrs DEPARTMENT OF CORRECTIONS

count 4: CONFINEMENT: 3 Yrs DEPARTMENT OF CORRECTIONS

count 5: CONFINEMENT: 3 Yrs DEPARTMENT OF CORRECTIONS

count 6: CONFINEMENT: 1 Yr DEPARTMENT OF CORRECTIONS

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

date: **06/14/2017**
code: **GJEI**
judge: **283**

Judge: **JEROME CATANZARO**

NO: **B 1600893**

STATE OF OHIO
VS.
MICHAEL J SMITH

JUDGMENT ENTRY: SENTENCE: INCARCERATION

THE SENTENCES IN COUNTS #3, #4 AND #5 ARE TO BE SERVED CONSECUTIVELY TO EACH OTHER, BUT CONCURRENTLY WITH THE SENTENCE IMPOSED IN COUNT #6.

THE TOTAL AGGREGATE SENTENCE IS NINE (9) YEARS IN THE DEPARTMENT OF CORRECTIONS.

THE DEFENDANT IS TO RECEIVE CREDIT FOR DAYS TIME SERVED.

With respect to the imposition of consecutive sentences, the Court hereby finds that consecutive sentences are necessary to protect public and to punish the Defendant, and are not disproportionate to seriousness of the Defendant's conduct and the danger the Defendant poses to the public.

Further, specifically, the Court finds that at least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the Defendant's conduct.

FURTHER, IN ACCORDANCE WITH RC 2901.07, THE DEFENDANT IS REQUIRED TO SUBMIT A DNA SPECIMEN WHICH WILL BE COLLECTED AT THE PRISON, JAIL, CORRECTIONAL OR DETENTION FACILITY TO WHICH THE DEFENDANT HAS BEEN SENTENCED. IF THE SENTENCE INCLUDES ANY PERIOD OF PROBATION OR COMMUNITY CONTROL, OR IF AT ANY TIME THE DEFENDANT IS ON PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL, THE DEFENDANT WILL BE REQUIRED, AS A CONDITION OF PROBATION, COMMUNITY CONTROL, PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL, TO SUBMIT A DNA SPECIMEN TO THE PROBATION DEPARTMENT, ADULT PAROLE AUTHORITY, OR OTHER AUTHORITY AS DESIGNATED BY LAW. IF THE DEFENDANT FAILS OR REFUSES TO SUBMIT TO THE REQUIRED DNA SPECIMEN COLLECTION PROCEDURE, THE DEFENDANT WILL BE SUBJECT TO ARREST AND PUNISHMENT FOR VIOLATING THIS

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

date: **06/14/2017**
code: **GJEI**
judge: **283**

Judge: **JEROME CATANZARO**

NO: **B 1600893**

STATE OF OHIO
VS.
MICHAEL J SMITH

JUDGMENT ENTRY: SENTENCE: INCARCERATION

CONDITION OF PROBATION, COMMUNITY CONTROL, PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL.

AS TO COUNTS #3, #4 AND #5, AS PART OF THE SENTENCE IN THIS CASE, THE DEFENDANT SHALL BE SUPERVISED BY THE ADULT PAROLE AUTHORITY AFTER DEFENDANT LEAVES PRISON, WHICH IS REFERRED TO AS POST-RELEASE CONTROL, FOR FIVE (5) YEARS.

AS TO COUNT #6, AS PART OF THE SENTENCE IN THIS CASE, THE DEFENDANT MAY BE SUPERVISED BY THE ADULT PAROLE AUTHORITY AFTER DEFENDANT LEAVES PRISON, WHICH IS REFERRED TO AS POST-RELEASE CONTROL, FOR UP TO THREE (3) YEARS AS DETERMINED BY THE ADULT PAROLE AUTHORITY.

IF THE DEFENDANT VIOLATES POST-RELEASE CONTROL SUPERVISION OR ANY CONDITION THEREOF, THE ADULT PAROLE AUTHORITY MAY IMPOSE A PRISON TERM, AS PART OF THE SENTENCE, OF UP TO NINE (9) MONTHS, WITH A MAXIMUM FOR REPEATED VIOLATIONS OF FIFTY PERCENT (50%) OF THE STATED PRISON TERM. IF THE DEFENDANT COMMITS A NEW FELONY WHILE SUBJECT TO POST-RELEASE CONTROL, THE DEFENDANT MAY BE SENT TO PRISON FOR THE REMAINING POST-RELEASE CONTROL PERIOD OR TWELVE (12) MONTHS, WHICHEVER IS GREATER. THIS PRISON TERM SHALL BE SERVED CONSECUTIVELY TO ANY PRISON TERM IMPOSED FOR THE NEW FELONY OF WHICH THE DEFENDANT IS CONVICTED.

APPENDIX E:
Indictment,
Hamilton County
Common Pleas Court
Case No. B8603032

THE STATE OF OHIO, HAMILTON COUNTY

The Court of Common Pleas of Hamilton County:

Term of Nineteen Hundred and EIGHTY-SIX

HAMILTON COUNTY, ss. FIRST COUNT

The Grand Jurors of the County of Hamilton, in the name and by authority of the State of Ohio, upon their oaths present that MICHAEL SMITH

ON AN UNDETERMINED DATE IN JANUARY

~~on the~~ ~~day of~~ ~~in the~~ *in the year nineteen hundred and* EIGHTY-SIX *at the County of Hamilton and State of Ohio, aforesaid,*

ENGAGED IN SEXUAL CONDUCT, TO-WIT; CUNNILINGUS WITH VERNA SMITH, A PERSON WHO WAS NOT HIS SPOUSE AT THE TIME, AND THE SAID MICHAEL SMITH WAS AT THE TIME THE NATURAL PARENT, OR ADOPTIVE PARENT, OR STEPPARENT, OR GUARDIAN, OR CUSTODIAN, OR PERSON STANDING IN THE PLACE OF A PARENT OF THE SAID VERNA SMITH, IN VIOLATION OF SECTION 2907.03 OF THE OHIO REVISED CODE AND AGAINST THE PEACE AND DIGNITY OF THE STATE OF OHIO.

SECOND COUNT

AND THE GRAND JURORS AFORESAID UPON THEIR OATHS AFORESAID DO FURTHER PRESENT THAT MICHAEL SMITH ON AN UNDETERMINED DATE IN FEBRUARY IN THE YEAR NINETEEN HUNDRED AND EIGHTY-SIX AT THE COUNTY OF HAMILTON AND STATE OF OHIO, AFORESAID ENGAGED IN SEXUAL CONDUCT, TO-WIT; CUNNILINGUS WITH VERNA SMITH, A PERSON WHO WAS NOT HIS SPOUSE AT THE TIME, AND THE SAID MICHAEL SMITH WAS AT THE TIME THE NATURAL PARENT, OR ADOPTIVE PARENT, OR STEPPARENT, OR GUARDIAN, OR CUSTODIAN, OR PERSON STANDING IN THE PLACE OF A PARENT OF THE SAID VERNA SMITH, IN VIOLATION OF SECTION 2907.03 OF THE OHIO REVISED CODE AND AGAINST THE PEACE AND DIGNITY OF THE STATE OF OHIO.

Arthur M. Ney, Jr.
Prosecuting Attorney
Hamilton County, Ohio

BY: [signature]
Assistant Prosecuting Attorney

APPENDIX F:
R.C. 2907.03
1972 Am.Sub.H.B. No. 511
(eff. 1-1-74)

(Amended Substitute House Bill No. 511)

AN ACT

To amend sections 1.05, 1.07, 119.061, 155.99, 165.13, 305.99, 317.22, 317.99, 319.60, 319.99, 507.07, 733.671, 901.121, 901.99, 905.59, 925.07, 941.05, 955.99, 959.99, 981.99, 1153.01, 1153.07, 1153.99, 1333.99, 1503.15, 1503.28, 1503.99, 1547.99, 1548.19, 1701.99, 1702.99, 1703.99, 1711.11, 1737.24, 1738.19, 2151.43, 2151.99, 2931.29, 2931.30, 2931.31, 2935.03, 2935.10, 2935.23, 2935.24, 2937.18, 2941.07, 2941.14, 2941.17, 2941.18, 2941.43, 2945.17, 2945.39, 2945.70, 2947.20, 2947.25, 2950.01, 2950.99, 2961.01, 2963.34, 2967.04, 2967.19, 2967.191, 2967.25, 3113.04, 3113.06, 3113.99, 3319.31, 3345.23, 3599.40, 3701.99, 3705.30, 3705.99, 3707.99, 3709.32, 3709.35, 3709.36, 3734.11, 3767.08, 3771.99, 3773.99, 3921.99, 3999.99, 4104.99, 4123.99, 4141.99, 4151.99, 4505.19, 4511.99, 4549.05, 4549.99, 4731.99, 4907.20, 5105.08, 5106.99, 5113.13, 5129.01, 5149.03, 5301.99, 5537.99, 5538.99, 5743.15, and 6115.99; to enact sections 101.81, 901.51, 1333.81, 1547.91, 1547.92, 1547.93, 1708.01, 1708.02, 1708.03, 1708.04, 1708.05, 1708.99, 2901.01, 2901.02, 2901.03, 2901.04, 2903.11, 2903.21, 2903.22, 2913.21, 2913.31, 2913.32, 2913.33, 2913.41,

2913.42, 2913.43, 2913.44, 2913.45, 2913.51, 2913.61, 2913.71, 2921.31, 2921.32, 2921.33, 2921.34, 2921.35, 2921.41, 2921.42, 2921.43, 2921.44, 2921.45, 2927.01, 2927.11, 2929.01, 2929.02, 2929.03, 2929.04, 2929.11, 2929.12, 2929.21, 2929.22, 2929.31, 2929.41, 2929.51, 2933.41, 2947.271, 2967.31, 3701.81, 3701.82, 4731.81, 4731.91, and 5301.61; to enact new sections 2901.05, 2901.11, 2901.12, 2901.13, 2901.21, 2901.22, 2901.23, 2901.24, 2903.01, 2903.02, 2903.03, 2903.04, 2903.05, 2903.06, 2903.07, 2903.12, 2903.13, 2903.14, 2905.01, 2905.02, 2905.03, 2905.04, 2905.11, 2905.12, 2907.01, 2907.02, 2907.03, 2907.04, 2907.05, 2907.06, 2907.07, 2907.08, 2907.09, 2907.21, 2907.22, 2907.23, 2907.24, 2907.25, 2907.26, 2907.27, 2907.31, 2907.32, 2907.33, 2907.34, 2907.35, 2907.36, 2907.37, 2909.01, 2909.02, 2909.03, 2909.04, 2909.05, 2909.06, 2909.07, 2909.11, 2911.01, 2911.02, 2911.11, 2911.12, 2911.13, 2911.21, 2911.31, 2911.32, 2913.01, 2913.02, 2913.03, 2913.04, 2913.11, 2915.01, 2915.02, 2915.03, 2915.04, 2915.05, 2915.06, 2917.01, 2917.02, 2917.03, 2917.04, 2917.05, 2917.11, 2917.12, 2917.13, 2917.21, 2917.31, 2917.32, 2919.01, 2919.11, 2919.12, 2919.21, 2919.22, 2919.23, 2921.01, 2921.02, 2921.03, 2921.11, 2921.12, 2921.13, 2921.21, 2921.22, 2921.23, 2923.01, 2923.02, 2923.03, 2923.04, 2923.11, 2923.12, 2923.13, 2923.14, 2923.15, 2923.16, 2923.17, 2923.18, 2923.19, 2923.20, 2923.21, 2923.22, 2923.23, 2923.24, 2941.25, 2945.44, 2945.71, 2945.72, 2945.73, 2945.75,

FENDER UNDER DIVISION (A) (3) OF THIS SECTION PURPOSELY COMPELS THE VICTIM TO SUBMIT BY FORCE OR THREAT OF FORCE, WHOEVER VIOLATES DIVISION (A) (3) OF THIS SECTION SHALL BE IMPRISONED FOR LIFE.

Sec. 2907.03. (A) NO PERSON SHALL ENGAGE IN SEXUAL CONDUCT WITH ANOTHER, NOT THE SPOUSE OF THE OFFENDER, WHEN ANY OF THE FOLLOWING APPLY:

(1) THE OFFENDER KNOWINGLY COERCES THE OTHER PERSON TO SUBMIT BY ANY MEANS THAT WOULD PREVENT RESISTANCE BY A PERSON OF ORDINARY RESOLUTION.

(2) THE OFFENDER KNOWS THAT THE OTHER PERSON'S ABILITY TO APPRAISE THE NATURE OF OR CONTROL HIS OR HER OWN CONDUCT IS SUBSTANTIALLY IMPAIRED.

(3) THE OFFENDER KNOWS THAT THE OTHER PERSON SUBMITS BECAUSE HE OR SHE IS UNAWARE THAT THE ACT IS BEING COMMITTED.

(4) THE OFFENDER KNOWS THAT THE OTHER PERSON SUBMITS BECAUSE SUCH PERSON MISTAKENLY IDENTIFIES THE OFFENDER AS HIS OR HER SPOUSE.

(5) THE OFFENDER IS THE OTHER PERSON'S NATURAL OR ADOPTIVE PARENT, OR A STEPPARENT, OR GUARDIAN, CUSTODIAN, OR PERSON IN LOCO PARENTIS.

(6) THE OTHER PERSON IS IN CUSTODY OF LAW OR A PATIENT IN A HOSPITAL OR OTHER INSTITUTION, AND THE OFFENDER HAS SUPERVISORY OR DISCIPLINARY AUTHORITY OVER SUCH OTHER PERSON.

(B) WHOEVER VIOLATES THIS SECTION IS GUILTY OF SEXUAL BATTERY, A FELONY OF THE THIRD DEGREE.

Sec. 2907.04. (A) NO PERSON, EIGHTEEN YEARS OF AGE OR OLDER, SHALL ENGAGE IN SEXUAL CONDUCT WITH ANOTHER, NOT THE SPOUSE OF THE OFFENDER, WHEN THE OFFENDER KNOWS SUCH OTHER PERSON IS OVER TWELVE BUT NOT OVER FIFTEEN YEARS OF AGE, OR THE OFFENDER IS RECKLESS IN THAT REGARD.

(B) WHOEVER VIOLATES THIS SECTION IS GUILTY OF CORRUPTION OF A MINOR, A FELONY OF THE THIRD DEGREE. IF THE OFFENDER IS LESS THAN FOUR YEARS OLDER THAN THE OTHER PERSON, CORRUPTION OF A MINOR IS A MISDEMEANOR OF THE FIRST DEGREE.

Sec. 2907.05. (A) NO PERSON SHALL HAVE SEXUAL CONTACT WITH ANOTHER, NOT THE SPOUSE OF THE OFFENDER, WHEN ANY OF THE FOLLOWING APPLY:

(1) THE OFFENDER PURPOSELY COMPELS THE OTHER PERSON TO SUBMIT BY FORCE OR THREAT OF FORCE.

(2) FOR THE PURPOSE OF PREVENTING RESISTANCE, THE OFFENDER SUBSTANTIALLY IMPAIRS THE OTHER