In the Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2018-1831
	:	
Plaintiff-Appellee,	:	On Appeal from the
	:	Hamilton County
v.	:	Court of Appeals,
	:	First Appellate District
MICHAEL SMITH,	:	
	:	Court of Appeals
Defendant-Appellant.	:	Case No. C-170335

BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL DAVE YOST IN SUPPORT OF APPELLEE STATE OF OHIO

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INTRODUCTION

Michael Smith sexually abused his granddaughter, R.E., while she was spending the night at his house. Among other things, he showed her a pornographic movie, rubbed oil on her buttocks, breasts, and vagina, and, in the morning, put her hand on his penis. When confronted with R.E.'s claims of abuse, Smith asserted that R.E. was confused. The pornographic movie? An R-rated film he turned on by accident. The oil? Intended merely to help her stop itching and applied without any sexual intent. But this was not the first time that a female family member had accused Smith of sexual assault. Nineteen years earlier, Smith had been acquitted of abusing one of his daughters, V.M. At Smith's trial for the more recent abuse of R.E., Smith defended himself by arguing that any improper touching was an accident or mistake. The trial court allowed the prosecution to introduce evidence of Smith's abuse of V.M. to refute his claims of mistake. At the same time, the court gave the jury a limiting instruction to ensure that it would consider that evidence only for the purposes permitted by Evidence Rule 404(B).

Smith has consistently challenged the trial court's decision to admit evidence of his past abuse. But he has never quite settled on any justification for that challenge. In his appeal to the First District, he argued that the Double Jeopardy Clause barred the evidence's introduction, since he had been acquitted of the crimes against V.M. Smith App. Br. 15–16. (Smith did not distinguish between the state and federal clauses.) His argument ran headlong into an insurmountable obstacle: the United States Supreme

Court has made clear that the Double Jeopardy Clause of the Fifth Amendment poses no barrier to the introduction of other-acts evidence, even when a defendant was previously acquitted of those acts. *Dowling v. United States*, 493 U.S. 342 (1990); *United States v. Felix*, 503 U.S. 378 (1992). Smith changed tack in reply. There, he argued that Rule 404 itself barred the evidence of his prior abuse. Smith App. Reply 1–7. But that failed too, and so Smith has now changed tack yet again. He asks the Court to hold that the Ohio Constitution's Double Jeopardy Clause has a different meaning than the Double Jeopardy Clause in the United States Constitution, and that it imposes greater restrictions on the introduction of other-acts evidence.

Because Smith raised this claim for the first time in his Memorandum in Support of Jurisdiction, the Court should decline to address it in the first instance. "[J]ustice is far better served when" this Court "has the benefit of briefing, arguing, and lower court consideration before making a final determination." *State v. Quarterman*, 140 Ohio St. 3d 464, 2014-Ohio-4034 ¶19 (citation omitted). Regardless, Smith's argument fails on the merits. This Court, in decisions interpreting Ohio's constitution, is not bound by United States Supreme Court decisions interpreting analogous provisions of the *United States* Constitution. *See Arnold v. Cleveland*, 67 Ohio St. 3d 35, syl. ¶1 (1993). But that principle makes no difference here, because an original analysis of Ohio's Double Jeopardy Clause, *see* Ohio Const., Art. 1, §10, shows that the clause *permits* the introduction of other-acts evidence under Rule 404, even in cases where the other acts relate to crimes

of which the defendant was acquitted. This Court has already said as much. Only five years after the People ratified the current version of Ohio's Double Jeopardy Clause, the Court held: "There is no guarantee, either by constitution or by statute, that evidence offered upon the trial of the accused for a different offense, of which he was convicted or acquitted, may not be offered to prove a distinct but related offense." *Patterson v. State*, 96 Ohio St. 90, 95 (1917); *see id.* syl. ¶2.

The Court ultimately need not opine about the independent meaning of the Ohio Constitution's Double Jeopardy Clause if it does not wish to, however. It has repeatedly held that the Double Jeopardy Clauses of the Ohio and United States Constitutions are coextensive. *City of Girard v. Giordano*, 155 Ohio St. 470, 2018-Ohio-5024 ¶6; *State v. Gustafson*, 76 Ohio St. 3d 425, 432 (1996) (collecting cases). Those holdings are consistent with the Clauses' shared common-law history and Smith offers no compelling reason to revisit this Court's precedents. Because the appellate court properly applied the Fifth Amendment when it rejected Smith's claim, the Court can affirm the First District's decision on the basis of existing precedent.

Existing precedent similarly disposes of Smith's challenge to the trial court's routine decision admitting the other-acts evidence under Rule 404(B). Challenges like the ones Smith brings are reviewed for an abuse of discretion. *State v. Kirkland*, 140 Ohio St. 3d 73, 2014-Ohio-1966 ¶67. Here, there was none. The trial court and appellate courts properly applied the three-part test for the admission of other-acts evidence that the

Court announced in *State v. Williams*, 134 Ohio St. 3d 521, 2012-Ohio-5695 ¶¶19–24. And although Smith believes that the trial court's evidentiary ruling was wrong, he has failed to show that it was "unreasonable, arbitrary, or unconscionable." *Kirkland*, 140 Ohio St. 3d 73 ¶67. That means that his evidentiary challenge, like his double-jeopardy challenge before it, must fail.

STATEMENT OF AMICUS INTEREST

The Attorney General is Ohio's chief law enforcement officer and "shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested." R.C. 109.02. The Attorney General is interested in ensuring that Rule 404(B) is properly applied and that the Ohio Constitution is interpreted in a manner consistent with its text and original meaning.

STATEMENT OF THE CASE AND FACTS

A. R.E. is Michael Smith's granddaughter. R. 16, Tr. 584. R.E.'s mother, M.S., had been estranged from Smith but the two reconnected after R.E.'s birth. R. 16, Tr. 450–53. R.E. developed a good relationship with Smith and, when she was around eight or nine years old, began regularly spending time at his house. R. 16, Tr. 456–57, 585–86. On three or four occasions, she spent the night at Smith's house alone. R. 16, Tr. 458.

On New Year's Day 2016, Smith called M.S. and asked if he could take R.E. and her two sisters to a movie. R. 16, Tr. 459. One of R.E.'s sisters fell asleep before the

movie, however, and the four were therefore unable to go as planned. R. 16, Tr. 459, 589. Smith called M.S. and asked if R.E. and her sisters could spend the night at his house and then go to see the movie the next day instead. R. 16, Tr. 459, 618–19.

According to R.E., this is what happened that night: She and her sisters slept with Smith in his bed. R. 16, Tr. 591. Before falling asleep, Smith and the girls spent time watching a cartoon on television in the bedroom. R. 16, Tr. 593–96, 623–25. While watching television, R.E. began to feel itchy from dog hair that had accumulated on the bed. R. 16, Tr. 596. In the past, Smith had applied baby oil to R.E. to help reduce the itching. R. 16, Tr. 596–97. He did so again that night. On prior occasions, Smith had applied oil just to R.E.'s back. R. 16, Tr. 597. This time, Smith did more; he applied the oil from head to toe, both on R.E's back and on her front. *Id.* Smith rubbed the oil on R.E.'s breasts, buttocks, and vagina. R. 16, Tr. 597–99. And, although R.E. was still clothed at the time Smith applied the oil, he rubbed it underneath her shirt and inside of her underwear. R. 16, Tr. 598.

While applying the oil, Smith told R.E. that her mother should not have had her at such a young age, and he described the circumstances surrounding the night on which R.E. was conceived. R. 16, Tr. 599–600. According to Smith, R.E. was conceived at a party. *Id.* Smith then described the types of things that he said occurred at the party, which he demonstrated in part by licking R.E.'s vagina and kissing her breasts. R. 16, Tr. 600. Smith then got up and put on a pornographic movie, which depicted a man

and woman having oral and penetrative sex. R. 16, Tr. 601, 626, 646–47. Smith began skipping through portions of the movie, although he eventually turned it off when R.E. told him to. R. 16, Tr. 602. Smith cautioned R.E. not to tell her mother about what had occurred. *Id*.

The next morning, R.E. awoke to Smith grabbing her hand and placing it on his penis. R. 16, Tr. 604–05. She could also feel Smith's penis poking against her backside, and felt him try to pull down her underwear. R. 16, Tr. 603–06. R.E. moved closer to her sisters in an attempt to get away from Smith. *Id*. Smith, in turn, got out of bed and took his dogs outside. R. 16, Tr. 606–07.

M.S. picked up R.E. from Smith's house later that day, after Smith and the girls had gone to see the movie that they were unable to see the day before. R. 16, Tr. 607, 635–36. M.S. noticed when she arrived that R.E. was quiet and withdrawn. R. 16, Tr. 463. Smith was acting differently as well, behaving in a way that M.S. described as "standoffish." R. 16, Tr. 463–64. When R.E. and M.S. arrived at home, R.E. told M.S. that they needed to talk, R. 16. Tr. 464–66, and informed her about what happened overnight at Smith's house, R. 16, Tr. 609.

M.S. called the police. R. 16, Tr. 468. As part of the police investigation of R.E.'s claims, M.S. called Smith from a police station and confronted him about those claims. R. 16, Tr. 470–76, 529–35; State Ex. 1. On that call, Smith stated that if anything had happened between him and R.E., it had been accidental. *See* App. Op. ¶5.

B. The State indicted Smith for two counts of rape, three counts of gross sexual imposition, and one count of disseminating matter harmful to juveniles. App. Op. ¶1. After the first jury deadlocked, the trial court declared a mistrial. *Id.* The State tried Smith again, and the second jury convicted him of gross sexual imposition and disseminating matter harmful to juveniles, but acquitted him of rape. *See id.*

At both trials, Smith defended himself by arguing that any conduct between him and R.E. had been accidental. And in both trials, the prosecution countered by introducing evidence that Smith had previously abused a young female family member. *See* R. 4, Mar. 22, 2017 Tr.; *see also* R. 4, Jan. 23, 2017 Tr. (Rule 404 hearing for Smith's first trial). The other evidence involved allegations from Smith's daughter V.M., who had accused Smith of sexually abusing her as a child. R. 16, Tr. 343–48. The State had previously charged Smith with two counts of sexual battery in connection with the abuse of V.M., but he was ultimately acquitted. App. Op. ¶3. The acquittal notwithstanding, the State believed V.M.'s testimony about Smith's past conduct would help counter Smith's defense that anything improper was a mere mistake.

Smith sought to bar the introduction of evidence of his past abuse on the ground that he had been acquitted. *See* R. 84, Motion; R. 4, Jan. 23, 2017 Tr.; R. 4 Mar. 22, 2017 Tr. The trial court allowed the prosecution to introduce evidence of Smith's past abuse. But it instructed the jury that it could consider this evidence *only* for purposes permitted by Rule 404(B), R. 16, Tr. 1047–48, and that it could not consider the testimony as evi-

dence of Smith's character or as evidence that Smith acted in accordance with that character. *Id.*; *see also* R. 16, Tr. 340, 410–11.

V.M. testified about the abuse she suffered at Smith's hands. She explained that Smith's abuse began around the time that V.M. was three-years old and continued until she was fifteen or sixteen. R. 16, Tr. 346–47. She testified that Smith would put his penis in her rectum, R. 16, Tr. 346, that he would lick her vagina and breasts, and that he would put his penis in her mouth, R. 16, Tr. 347–48. V.M. also testified that Smith had showed her pornography, including pornographic movies and a naked photograph of her mother. R. 16, Tr. 348.

V.M. testified that Smith sought to engage in further sexual activities even after he had been acquitted of abusing her. When V.M. was fifteen or sixteen, Smith took her to a hotel and indicated that he wanted to have sex with her. R. 16, Tr. 352–53. V.M. refused Smith's advances. R. 16, Tr. 353. Smith finally stopped abusing her only after that refusal. *Id.*

V.M.'s sister, L.S., corroborated much of V.M.'s testimony. L.S. testified that Smith showed her pornography as well, R. 16, Tr. 417, 422–27, and that she witnessed Smith abuse her sister. She saw Smith put his hands up V.M.'s shirt while they were all watching a movie together on the couch. R. 16, Tr. 417. The next day, L.S. told their mother about what she had seen, which ultimately led to the earlier abuse charges against Smith. R. 16, Tr. 419.

C. After the jury convicted Smith of sexually abusing R.E., Smith appealed his conviction. He challenged, among other things, the trial court's decision to admit the evidence of his past abuse under Rule 404(B). App. Op. ¶8. The First District Court of Appeals rejected Smith's claim and affirmed his convictions. App. Op. ¶2. The appellate court held that the evidence at issue was properly admitted to show "motive, intent, and absence of a mistake." App. Op. ¶12.

Smith sought discretionary review in this Court, raising two Propositions of Law. The Court accepted his appeal on both propositions. *State v. Smith*, 155 Ohio St. 3d 1404, 2019-Ohio-943.

ARGUMENT

In every brief that Smith has filed, from his opening brief in the appellate court to his merits brief in this one, he has changed his theory about why evidence that he had abused V.M. should have been excluded at trial. In his first appellate brief, he cited *Dowling v. United States*, 493 U.S. 342 (1990), for the proposition that the evidence in question was barred by the Double Jeopardy Clause, Smith App. Br. 15–16. When he filed his reply, Smith reversed course and argued that the appellate court should "reject *Dowling*" and that it should hold that the evidence is barred by Rule 404(B). Smith App. Reply 4. Nowhere in that reply did he cite the Ohio Constitution. *See generally id.* Smith mentioned the Ohio Constitution for the first time in his Memorandum in Support of Jurisdiction. Smith Jur. Mem. 9. Now, in his merits brief in this Court, Smith

has changed his argument for a fourth time—while still arguing his Ohio constitutional claim, he has added a stand-alone due-process claim. Smith Br. 19–22.

The Court should hold that Smith forfeited any claims that were not raised in his initial merits brief below. *See State v. Quarterman*, 140 Ohio St. 3d 464, 2014-Ohio-4034 ¶¶20-22. That includes his argument that Article I, Section 10 of the Ohio Constitution provides greater double-jeopardy protection than the Fifth Amendment to the United States Constitution. And it includes his argument that the due-process principles reflected in Article I, Section 16 should have barred the introduction of evidence that he abused V.M., even if double-jeopardy principles did not. Failing that, the Court should reject Smith's constitutional arguments on the merits. It should likewise reject his attempt to second-guess the trial court's Rule 404(B) ruling.

***Amicus Curiae* Ohio Attorney General's Proposition of Law 1:**

> *Neither the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution nor Article 1, Section 10 of the Ohio Constitution prohibits the introduction of other-acts evidence relating to charges of which a defendant was earlier acquitted.*

The United States Supreme Court has, on several occasions, held that the Double Jeopardy Clause of the Fifth Amendment permits the introduction of other-acts evidence that involves conduct of which a defendant was acquitted in an earlier case. *Dowling*, 493 U.S. at 350; *see also Currier v. Virginia*, 138 S. Ct. 2144, 2150–51 (2018); *United States v. Felix*, 503 U.S. 378, 386 (1992). Smith concedes that the First District simply applied those decisions. *See* Smith Br. 10. If the Court adheres to its existing precedent,

and if it reaffirms that the double-jeopardy protections found in the Ohio and United States Constitutions are coextensive, *see City of Girard v. Giordano*, 155 Ohio St. 470, 2018-Ohio-5024 ¶7, then there is nothing left to say. This case is over.

That is perhaps why Smith invites the Court to reject the United States Supreme Court's double-jeopardy analysis and to hold that the Ohio Constitution prohibits that which the United States Constitution allows. *See* Smith Br. 25–27. The Court should decline his invitation. Properly interpreted in light of "the common understanding of the people who framed and adopted it," *see Pfeifer v. Graves*, 88 Ohio St. 473, 487 (1913), the Ohio Constitution in fact imposes *fewer* restrictions than the Fifth Amendment—not more—on the introduction of other-acts evidence.

A. The Ohio Constitution's Double Jeopardy Clause does not independently prohibit the introduction of other acts evidence involving acquitted conduct.

1. Ohio's version of the Double Jeopardy Clause appeared in the State's very first constitution, adopted in 1803. The language of the Clause has not changed in any meaningful way between then and now. As originally drafted, the 1803 version of the Clause stated that an accused shall not "twice be put in jeopardy for the same offense." Ohio Const., Art. 8, §11 (1803). The current version of the Clause says the same thing: "No person shall be twice put in jeopardy for the same offense." Ohio Const., Art. 1, §10.

That text by itself provides reason enough to reject Smith's argument that the Double Jeopardy Clause prohibits the introduction of other-acts evidence relating to ac-

quitted conduct. That is because the Constitution's text speaks of "*offense[s],*" not *evidence*. *Id.* (emphasis added); *cf. Gamble v. United States*, 139 S. Ct. 1960, 1965 (2019) (the Fifth Amendment's language "protects individuals from being twice put in jeopardy 'for the same *offense*,' not for the same *conduct* or *actions*" (citation omitted)). As long as an offense with which a person has been charged is different from a previously tried offense, the text of Ohio's Double Jeopardy Clause cannot be read as restricting the evidence that may be introduced to prove that subsequent offense.

The history of Ohio's Double Jeopardy Clause confirms that, as long as a defendant is not being prosecuted a second time for the same crime, it does not restrict the evidence that may be introduced at trial. The Court has made clear that it will "interpret the language of the constitution according to its fair and reasonable import and the common understanding of the people who framed and adopted it." *Pfeifer*, 88 Ohio St. at 487. It reads the Ohio Constitution "with reference to its popular and received signification; and applie[s] it as it had been practically applied." *Hill v. Higdon*, 5 Ohio St. 243, 247-48 (1855). That interpretive approach is particularly relevant here because the Court has held that the Ohio Constitution's Double Jeopardy Clause "is nothing more than the recognition of the common law principle on that subject." *Hurley v. State*, 6 Ohio 399, 402 (1834), *superseded by statute on other grounds*; *see City of Girard*, 155 Ohio St. 470 ¶7.

At common law, the only time that double-jeopardy principles would have barred the introduction of evidence at a second trial was when "the evidence necessary to support the second indictment would have been sufficient to prove a legal conviction in the first." *Price v. State*, 19 Ohio 423, 424 (1850) (citation omitted); *see also Mitchell v. State*, 42 Ohio St. 383, 391–92 (1884) (collecting cases). That is, common law double-jeopardy principles did little more than prevent a second "'prosecution for the same identical act and crime.'" *Bainbridge v. State*, 30 Ohio St. 264, 272 (1876) (*quoting* 4 William Blackstone, Commentaries *336); *accord* 2 Joseph Story, *Commentaries on the Constitution of the United States* 546 (Thomas Cooley, ed., 4th ed. 1873) (the meaning of the Double Jeopardy Clause is "that a party shall not be tried a second time *for the same offence* after he has once been convicted or acquitted of the offence charged" (emphasis added)).

When the crimes involved were *not* the same, common-law double-jeopardy principles allowed the introduction of evidence involving a crime for which a defendant had previously been acquitted. That remained true even when the crimes in question occurred as part of the same transaction. For example, "a man acquitted for stealing the horse" could be later tried and convicted for stealing the saddle, "tho both were done at the same time." 2 Matthew Hale, History of the Pleas of the Crown 245–46 (1736). One of the earliest reported cases on the subject, *King v. Vandercomb and Abbott*, 2 Leach 708, 168 Eng. Rep. 455 (K.B. 1796), provides another example. The court in that case held

that even though the defendants had already been acquitted of burglary once, they could still be prosecuted for burglary a second time because the second prosecution rested on a different theory of the crime. *Id.* at 720–21. The second prosecution was allowed to go forward despite the fact it would necessarily involve much of the same evidence that had been introduced the first time around.

This Court's own cases, just like the ancient common-law authorities, interpret double-jeopardy principles as permitting the introduction of acquitted-conduct evidence to help prove a different offense. In *Patterson v. State*, 96 Ohio St. 90, syl. ¶2 (1917), the Court considered the question whether a defendant on trial for a conspiracy to steal cars could rely on *res judicata* to prevent the introduction of evidence related to a past car theft of which he had been acquitted. Consistent with the common-law history of the Ohio Constitution's Double Jeopardy Clause, the Court deemed the evidence admissible. It explained that "[t]here is no guarantee, either by constitution or by statute, that evidence offered upon the trial of the accused for a different offense, of which he was convicted or acquitted, may not be offered to prove a distinct but related offense." *Id.* at 95. In fact, the limited scope of the Ohio Constitution's Double Jeopardy Clause was at the time so well-settled that the defendant in that case *conceded* that the Ohio Constitution's double-jeopardy clause did not apply. *Id.* at 94 ("[C]ounsel for the accused concede that their client cannot avail himself in this case of the constitutional guarantee of not being twice placed in jeopardy for the same offense.").

Finally, although many early double-jeopardy decisions involved prosecutions for related offenses, others established that evidence of acquitted conduct could be introduced for other reasons as well, such as for demonstrating the absence of mistake. *See* Austin Abbott, *A Brief for the Trial of Criminal Cases* 527–28 (2d ed. 1902) (collecting cases).

2. This history establishes that Article I, Section 10 of the Ohio Constitution permits introduction of other-acts evidence *even when* that evidence pertains to crimes of which the defendant was acquitted. The only exception arises when "the evidence necessary to support the second indictment would have been sufficient to prove a legal conviction in the first." *Price*, 19 Ohio at 424 (citation omitted).

These principles defeat any argument that the trial court in Smith's case violated (or even implicated) Ohio's Double Jeopardy Clause by introducing evidence of Smith's abuse of V.M. After all, Smith does not dispute that the other-acts evidence related to a different crime than the one he was on trial for, since each crime involved an entirely different victim. While the other-acts evidence pertained to the alleged sexual abuse of his *daughter*, the charged offense in this case involved the assault of his *granddaughter*. Moreover, as even Smith acknowledges, the prosecution in this case introduced evidence of Smith's abusing V.M. that "far exceeded" the allegations V.M. made in Smith's earlier case. Smith Br. 35. Thus, the premise of his argument is wrong: he was *not* acquitted of all the crimes to which V.M. testified.

Smith offers no compelling reason why the Court should hold that Ohio's Double Jeopardy Clause bars introduction of acquitted conduct. He has not, for example, offered any analysis of the "language, history, or early understandings" of the Ohio Constitution. *State v. Mole*, 149 Ohio St. 3d 215, 2016-Ohio-5124 ¶117 (French, J., dissenting); *see also Stolz v. J&B Steel Erectors*, 155 Ohio St. 3d 567, 2018-Ohio-5088 ¶28 (Fischer, J., concurring) (arguments about the meaning of the Ohio Constitution should involve a careful analysis of the "unique language and historical background" of the constitutional provision in question). He argues that the Court *can* interpret the Ohio Constitution differently, but provides no compelling legal reasons why it *should*.

The closest Smith comes to providing any substantive legal analysis is when he repeats arguments that Justice Brennan made in his dissent in *Dowling*. But repeating arguments that garnered the votes of only two other justices is hardly persuasive in and of itself. And his argument is made even less compelling by the fact that the *Dowling* dissent reflects an outlier view of the Double Jeopardy Clause more generally. Unlike a majority of justices, Justice Brennan consistently advocated for a transaction-based approach to applying the Double Jeopardy Clause. *See Brown v. Ohio*, 432 U.S. 161, 170 (1977) (Brennan, J., concurring) (arguing that "all charges growing out of conduct constituting a 'single criminal act, occurrence, episode, or transaction' must be tried in a single proceeding"). His views of the Clause were so idiosyncratic that they compelled one of his colleagues to write separately "to make explicit my understanding that the

Court's opinion in no way intimates that the Double Jeopardy Clause embraces to any degree the 'same transaction' concept reflected in the concurring opinion of my Brother Brennan." *Ashe v. Swenson*, 397 U.S. 436, 449 (1970) (Harlan, J., concurring). The only time that Justice Brennan's view of the Double Jeopardy Clause *did* command a majority was in *Grady v. Corbin*, 495 U.S. 508 (1990). The Court reversed *Grady* just three years later. *See United States v. Dixon*, 509 U.S. 688, 704 (1993); *see also Gamble*, 139 S. Ct. at 1965 (describing Justice Scalia's dissent in *Grady* as "soon-vindicated"). Smith's argument in this case therefore rests not just on a dissenting opinion, but on a dissenting opinion that reflects a view of the Double Jeopardy Clause that the United States Supreme Court has rejected as "lack[ing] constitutional roots." *Dixon*, 509 U.S. at 704.

Even on its own terms, however, the reasoning of the *Dowling* dissent is flawed and unpersuasive, and Smith's argument based on that dissent repeats those flaws. He, like the *Dowling* dissent, complains that the *Dowling* majority cited several civil cases when discussing the lower burden of proof that applies to the introduction of Rule 404(b) evidence. Smith Br. 14–16; *see also Dowling*, 493 U.S. at 359–61 (Brennan, J., dissenting). The *Dowling* majority, however, primarily cited those cases for the uncontroversial position that the burden of proof in criminal cases is different from the burden of proof in civil ones. *See Dowling*, 493 U.S. at 348–50. Smith's real complaint appears to be that the standard for introducing other-acts evidence under Rule 404(B) is less stringent than the beyond-a-reasonable-doubt standard. But the standard for admitting

such evidence is settled, *see State v. Carter*, 26 Ohio St. 2d 79 (1971), and the Proposition of Law that this Court accepted does not challenge that standard.

Whatever the merits of the *Dowling* dissent, it is not an authoritative interpretation of the *Ohio* Constitution. Even the strongest advocates of giving independent effect to state constitutions reject an approach to state constitutional law that involves nothing more than choosing between competing federal court opinions. "There will never be a healthy 'discourse' between state and federal judges about the meaning of core guarantees in our American constitutions if the state judges merely take sides on the federal debates and federal authorities, as opposed to marshaling the distinct state texts and histories and drawing their own conclusions from them." Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 177 (2018) (footnote omitted). After all, if the problem with current state-constitutional-law jurisprudence is that a "heavy reliance on debates about the meaning of a *federal* guarantee [is] not apt to dignify [] state constitutions as independent sources of law," *see* Jeffrey S. Sutton, *What Does—and Does Not—Ail State Constitutional Law*, 59 U. Kan. L. Rev. 687, 711 (2011), then merely adopting a federal dissent as a state majority is not the solution. Doing so might change a case's outcome, but that outcome is still the product of a flawed approach to constitutional interpretation.

The fact that courts in a minority of *other* States have declined to follow *Dowling* does not help Smith here. To begin with, many of the cases that he cites pre-date

Dowling and so could not have rejected that decision's reasoning. *See* Smith Br. 12; *but see, e.g.*, *Burr v. State*, 576 So. 2d 278, 280 (Fla. 1991) (reaffirming *State v. Perkins*, 349 So. 2d 161 (Fla. 1977), post-*Dowling*). Many were also resolved on evidentiary rather than constitutional grounds. *See State v. Holman*, 611 S.W.2d 411 (Tenn. 1981); *State v. Scott*, 413 S.E.2d 787 (N.C. 1992); *Kerbyson v. State*, 711 S.W.2d 289 (Tx. Ct. App. 1986). One even explicitly stated that the Double Jeopardy Clause *was not* the basis for its decision. *McMichael v. State*, 638 P.2d 402, 403 (Nev. 1982). Another, *Commonwealth v. Dorazio*, 472 Mass. 535 (2015), has no bearing on the question presented because it rested on a constitution—Massachusetts's—that *has no* double jeopardy clause, *id.* at 573–74.

Even the double-jeopardy decisions that post-date *Dowling* say nothing about the meaning of the Ohio Constitution. Among other things, many of those cases suffer from the same flaw as Smith's argument: they never engage in any analysis of the history and meaning of their own, state-specific double-jeopardy clauses. Instead, just as Smith does here, most of the courts simply picked sides, choosing to substitute the *Dowling* dissent's reasoning for that of its majority. *See State v. Mundon*, 292 P.3d 205, 221–23 (Haw. 2012); *see also Burr*, 576 So.2d at 280. And, to the extent those decisions depend upon incorporating collateral-estoppel principles into state double-jeopardy clauses, *see Mundon*, 292 P.3d at 208, they are incompatible with this Court's precedent, *see Patterson*, 96 Ohio St. 90 (rejecting argument that the state was "[estopped] by way of res adjudicata" because of a prior acquittal).

Finally, Smith offers a hodge-podge of other reasons why he believes the Court should follow the *Dowling* dissent rather than its majority. None of them are compelling. For example, he contends that limiting instructions are ineffective, both generally and in this case specifically. Smith Br. 29–32. Smith never objected to the trial court's instructions, however. R. 16, Tr. 340, 410–11, 957. And he at one point specifically asked the trial court to repeat the same limiting instruction that it had given before. R. 16, Tr. 410–411. Smith also barely mentioned the trial court's limiting instruction in his opening brief on direct appeal, Smith App. Br. 18; *but see* Reply 5–6, and did not challenge that instruction in his appeal to this Court. His argument is therefore an inappropriate attempt to smuggle in an unpreserved claim that appeared nowhere in his Memorandum in Support of Jurisdiction.

Smith also focuses on what he describes as the "dangers attendant to *Dowling*" and "policies in favor of rejecting *Dowling* entirely." Smith. Br. 22 & 27 (capitalization omitted). This Court, however, is not a court of policy. It is a court of law. Regardless, Smith makes no persuasive policy argument. Indeed, his arguments go almost entirely to the admissibility of other-acts evidence more generally. For example, he argues that introducing such evidence creates a risk that the jury will convict based on criminal propensity or bad character. *See* Smith Br. 22–25. That is true in *every case* involving other-acts evidence, however, and has nothing to do with whether the defendant was acquitted or not. Indeed, evidence of past conduct relating to a crime of which the de-

fendant was convicted might prove more damning. Regardless, Ohio courts already account for the risk of unfair prejudice: the decision whether to admit such evidence is subject to a three-part test that considers this and other concerns. *See State v. Williams*, 134 Ohio St. 3d 521, 2012-Ohio-5695 ¶¶19–24.

B. Under this Court's precedent, Article I, Section 10 of the Ohio Constitution is coextensive with the Double Jeopardy Clause found in the Fifth Amendment to the United States Constitution.

Like its Ohio counterpart, the Fifth Amendment's Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The similarities between the texts of the two clauses reflect their shared common-law roots: both had their "origin in the three common-law pleas of *autrefois acquit*, *autrefois convict*, and pardon." *United States v. Scott*, 437 U.S. 82, 87 (1978). And the underlying principle, that an individual should not be tried twice for the same crime stretches back even further, at least to "the days of Demosthenes." *Whalen v. United States*, 445 U.S. 684, 699 (1980) (Rehnquist, J., dissenting).

Their similar language and shared history explain why this Court has repeatedly held that the Double Jeopardy Clauses of the United States and Ohio Constitutions are coextensive. *See State v. Gustafson*, 76 Ohio St. 3d 425, 432 (1996); *City of Girard*, 155 Ohio St. 3d 470 ¶7. The Court should adhere to its past precedent.

Doing so will in fact afford criminal defendants *greater* double-jeopardy protections than would be warranted under an original interpretation of Article 1, Section 10

of the Ohio Constitution. As discussed above, common-law double-jeopardy principles *would not* have prohibited the introduction of any evidence unless it was being used in an attempt to convict a defendant of a crime of which he or she had previously been acquitted. The rule under the Fifth Amendment's Double Jeopardy Clause is a bit broader, at least as it has been interpreted by the United States Supreme Court. In *Ashe v. Swenson*, that court held that the Fifth Amendment's Double Jeopardy Clause incorporates the principles of collateral estoppel to a limited degree. 397 U.S. at 442–44. Thus, under *Ashe*, the government may not try a defendant if, "to secure a conviction," the "prosecution must prevail on an issue the jury necessarily resolved in the defendant's favor in the first trial." *Currier*, 138 S. Ct. at 2150. The Ohio Double Jeopardy Clause, as originally understood, contained no such rule. And so, to the extent this Court has applied *Ashe* as a matter of state law, it has given criminal defendants more protection than they would otherwise be entitled to under the original meaning of Ohio's Double Jeopardy Clause.

Even though *Ashe* incorporates some collateral-estoppel principles into the Double Jeopardy Clause, it has no bearing on this case. The reason is that *Ashe* does not bar other-acts evidence. By its very nature, other-acts evidence does not relate to an element of the offense being tried—it relates to *another* act. *Dowling*, 493 U.S. at 348–50; *Felix*, 503 U.S. at 387. Other-acts evidence is therefore admissible without regard to *Ashe*'s gloss on the Fifth Amendment.

Indeed, this case provides a clear example of why *Ashe*'s rule does not bar the admission of other-acts evidence. Smith's conviction did not require the prosecution to "prevail on an issue the jury necessarily resolved in [Smith's] favor in [his] first trial," *Currier*, 138 S. Ct. at 2150, because Smith's earlier behavior was not an element of his latter offense. Instead, evidence of that behavior helped only to establish Smith's motive and "counter his assertion that any inappropriate touching had been accidental." App. Op. ¶11. Such a limited use of evidence is a far cry from the second prosecution that the Double Jeopardy Clause prohibits.

C. Article I, Section 16 of the Ohio Constitution provides no greater double-jeopardy protections than Article I, Section 10.

In addition to his double-jeopardy claim, Smith argues for the first time in his merits brief that the due-process principles reflected in Article I, Section 16 of the Ohio Constitution independently bar other-acts evidence when that evidence relates to a prior acquittal. *See* Smith Br. 19–22. But if the double-jeopardy protections provided by Article I, Section 10 do not prohibit the introduction of such evidence then the due-process protections provided by Article I, Section 16 do not either. Both the United States Supreme Court and this Court agree that when there is "an explicit textual source of constitutional protection," that protection and "not the more generalized notion" of due process must be the guide for analyzing a constitutional claim. *Graham v. Connor*, 490 U.S. 386, 395 (1989); *Medina v. California*, 505 U.S. 437, 443 (1992); *State v. Anderson*, 148 Ohio St. 3d 74, 2016-Ohio-5791 ¶¶25–29;

Applying that principle, the United States Supreme Court has already rejected the same argument that Smith now makes. In *Dowling*, it held that the Due Process Clause imposes no greater restriction on the use of acquitted other-acts evidence than does the Double Jeopardy Clause. *See Dowling*, 493 U.S. at 352 ("Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation."). While this Court has yet to formally adopt *Dowling's* double-jeopardy holding as a matter of Ohio constitutional law, it *has* embraced its interpretation of the Due Process Clause. Like the United States Supreme Court, it has held that "[a]pplying the Due Process Clause in a situation that is governed by the Double Jeopardy Clause would require us to apply the wrong constitutional test." *Anderson*, 148 Ohio St. 3d 74 ¶¶25–29. Thus, even if Smith's due-process claim had been properly presented and preserved, it would still fail under *Anderson*.

It would also fail on its own merits. A trial court's evidentiary ruling must be *egregiously* wrong, not just wrong, before it qualifies as a constitutional violation. *Cf. Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003); *cf. also Spencer v. Texas*, 385 U.S. 554, 562 (1967) ("To say the United States Constitution is infringed simply because [other-acts] evidence may be prejudicial and limiting instructions inadequate to vitiate prejudicial effects, would make inroads into [the] entire complex code of state criminal evidentiary law, and would threaten other large areas of trial jurisprudence."). That means there will never be a need to reach a due-process claim like the one Smith seeks

to raise here; such claims will always be resolved on the basis of state evidentiary law. *See State ex rel. Blozenius v. Preisse*, 155 Ohio St. 3d 45, 2018-Ohio-3708 ¶14 (the Court will not decide constitutional questions unless it is necessary to do so.). But as discussed below, the evidentiary ruling at issue here was not even erroneous, which makes short work of any possible due-process claim.

***Amicus Curiae* Ohio Attorney General's Proposition of Law 2:**

> *The trial court correctly applied controlling precedent when it admitted evidence that Smith had abused V.M.*

The trial court did not err, and it certainly did not abuse its discretion, by admitting the other-acts evidence under Rule 404(B).

Rule 404(B) provides that evidence of other crimes or wrong acts is admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," but not to prove the character of a person, or "action in conformity therewith." *See also* R.C. 2945.59. The Court has held the admissibility of evidence under Rule 404(B) turns on three questions. *Williams*, 134 Ohio St. 3d 521 ¶20. The evidence must be (1) relevant, *id.* ¶22, (2) presented for a legitimate purpose, *id.* ¶23, and (3) more probative than prejudicial, *id.* ¶24.

Appellate courts, including this Court, review a trial court's decision to admit other-acts evidence under an abuse-of-discretion standard. *State v. Morris*, 132 Ohio St. 3d 337, 2012-Ohio-2407 syl. Thus, courts may not overturn decisions admitting such evidence unless the trial court "clearly abused its discretion" and a defendant was "ma-

terially prejudiced." *State v. Kirkland*, 140 Ohio St. 3d 73, 2014-Ohio-1966 ¶67 (citation omitted). An abuse of discretion requires "unreasonable, arbitrary, or unconscionable use of discretion . . . that no conscientious judge could honestly have taken." *Id.* (citation omitted).

The trial court committed no such error here. As the First District properly recognized, evidence that Smith had previously abused V.M. was admissible "to show motive, intent, and absence of mistake." *See* App. Op. ¶¶10–15. And even if there were room for disagreement on this point, there is no good argument that the trial court's decision was arbitrary or unconscionable. Instead, it was a routine application of *Williams*. Smith had argued that he lacked a sexual motivation when applying oil to R.E. and that he had only accidentally showed R.E. a movie containing nudity. *See* App. Op. ¶6; Smith App. Br. 8. Evidence that Smith had abused V.M. in similar ways was admissible under Rule 404(B) to refute those assertions, *see Williams*, 134 Ohio St. 3d 521 ¶19; *see also* Evid.R. 404(B), and the trial court gave the jury a limiting instruction to ensure that it would consider the evidence only for that limited purpose, App. Op. ¶12; *see also Williams*, 134 Ohio St. 3d 521 ¶24 (other-acts evidence was not "unduly prejudicial" because the trial court gave a limiting instruction).

Smith attacks this conclusion, but never discusses the controlling standard of review. His omission is particularly notable in light of the fact that his second Proposition

of Law represents an attempt to second-guess the trial court's decision admitting that evidence.

In the end, Smith seeks nothing more than error correction. *See* Smith Br. 33 (arguing that the Court should correct what he characterizes as the misapplication of *Williams*). But there is no error to correct. Smith is wrong, for example, when he asserts that evidence of his abuse of V.M. was inadmissible under *Williams* because the transcripts of his earlier trial were unavailable. What does that have to do with Rule 404(B)? The Rule does not require transcripts pertaining to other-acts evidence, and generally there are none. Additionally, as Smith himself acknowledges, the other-acts evidence that was admitted in this case involved acts *in addition to* the precise acts at issue in his earlier trial. *See* Smith Br. 35. So if the transcripts of his first trial had been available, they would have been of minimal use. Finally, even if Smith would have derived some benefit from having the transcripts, the fact that he did not have them was not so prejudicial as to outweigh the probative value that otherwise justified the admission of the other-acts evidence under Rule 404(B).

CONCLUSION

The Court should affirm the judgment of the First District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of *Amicus Curiae* Ohio Attorney General Dave Yost in Support of Appellee State of Ohio was served on July 22nd, 2019, by U.S. mail on the following:

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