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

REPLY BRIEF OF APPELLANT MICHAEL SMITH

JOSEPH T. DETERS (0012084P)
Hamilton County Prosecutor

SCOTT M. HEENAN (0075734P)
Assistant Prosecuting Attorney
(*Counsel of Record*)

Office of the Hamilton County Prosecutor
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
Phone: (513) 946-3227
Facsimile: (513) 946-3021
Scott.Heenan@hcpros.org

COUNSEL FOR THE STATE OF OHIO

RAYMOND T. FALLER (0013328)
Hamilton County Public Defender

KRISTA M. GIESKE (0080141)
Assistant Public Defender
(*Counsel of Record*)

Office of the Hamilton County Public Defender
230 East Ninth Street, Second Floor
Cincinnati, Ohio 45202
Phone: (513) 946-3713
Facsimile: (513) 946-3840
KGieske@cms.hamilton-co.org

COUNSEL FOR MICHAEL SMITH

DAVE YOST (0056290)
Ohio Attorney General

BENJAMIN M. FLOWERS (0095284)
Solicitor General
(*Counsel of Record*)

SAMUEL C. PETERSON (0081432)
Deputy Solicitor General

30 East Broad Street, 17th Floor
Columbus, Ohio 43215
Phone: (614) 466-8980
Facsimile: (614) 466-5087
bflowers@ohioattorneygeneral.gov

COUNSEL FOR AMICUS CURIAE,
OHIO ATTORNEY GENERAL DAVE YOST

ALLEN M. VENDER (0087040)
Assistant State Public Defender
(*Counsel of Record*)

Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
Phone: (614) 466-5394
Facsimile: (614) 752-5167
allen.vender@opd.ohio.gov

COUNSEL FOR AMICUS CURIAE,
OFFICE OF THE OHIO PUBLIC DEFENDER

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REPLY ARGUMENT

<u>Proposition of Law No. I</u>: 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).

State high courts are not relegated to constitutional lockstepping.

Modes of constitutional interpretation have been the source of furious debate by judges, attorneys, and legal scholars for many years. Where state matters are concerned, however, this Court is free to depart from the rulings of the federal high court and afford greater rights to its people. *Arnold v. Cleveland*, 67 Ohio St.3d 35, 616 N.E.2d 163 (1993), paragraph one of the syllabus. *See also* Ohio Constitution, Article IV, Section 1. Contrary to the warning sirens sounded by the state and its amicus, this Court does not have to annihilate the very foundations of Ohio evidentiary and constitutional law in order to decide this appeal in Mr. Smith's favor.

***State v. Craig* does not control this case.**

To the best of counsel's knowledge, the applicability of *Dowling* in the context of acquitted conduct in Ohio is an issue of first impression. Cases proffered by the state as controlling are not directly on point and need not be overruled to justify reversal of the instant appeal. Take, for instance, *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, 853 N.E.2d 621. The *Craig* Court sanctioned the admission of prior acts that were submitted to a grand jury for indictment and ignored. *Id*. (*See* Appellee brief at 11-12). But the procedural posture and ruling in that case consigned these ignored acts to the same realm as any other Evid.R. 404(B) evidence – those never tested by way of prosecution. By contrast, evidence pertaining to a case disposed of by acquittal was actually scrutinized and found to be lacking by a jury.

It is true that a grand jury may decline to indict an individual for a multitude of reasons,

from unavailable witnesses to the failure of evidence. Similarly, as the state touches upon, a petit jury may acquit an individual for a multitude of reasons, from improper venue to actual innocence. (Appellee brief at 13). Nonetheless, a strict collateral estoppel approach to acquittal evidence would allow courts to discern from the prior case whether the accused was acquitted on an ultimate issue by a valid prior judgment, thus barring reconsideration of the issue. This operates like the polar opposite of a no bill. Thus, *Craig* is not on point with the issue central to the case at bar.

***Patterson v. State* need not control this case.**

The state also proffers as dispositive a case decided around the turn of the twentieth century, *Patterson v. State*, 96 Ohio St. 90, 117 N.E. 169 (1917). (Appellee brief at 14-15). In *Patterson*, the state sought to prove that two men conspired to steal cars. Mr. Patterson had previously been acquitted of stealing the car whose theft was attributed to him in the subsequent conspiracy prosecution. This Court ruled that the acquitted conduct could be "offered to prove a distinct but related offense." *Id.* at 95. While seemingly on point at first blush, this case is readily distinguishable.

One of the essential elements of the offense of criminal conspiracy is a common scheme or plan. *See* R.C. 2923.01. In *Patterson*, the plan to steal both cars gave rise to the conspiracy. Thus, the acquitted theft allegations actually formed part of the allegations underscoring the conspiracy charges. It also bears noting that not only were the charges inexplicably intertwined, they were situated close in time. In the present matter, by contrast, the 1986 charges did not form part of the allegations for the 2016 charges. Moreover, the 1986 evidence was 30 years removed from the 2016 case. Mr. Smith submits that these distinctions allow this Court to confine rather than overrule *Patterson*.

As the state points out, the *Dowling* Court ruled that Rueben Dowling failed to show the issue he sought to foreclose from relitigation had actually been decided in the prior proceeding. The state similarly argues that Mr. Smith failed to show the 1986 general verdict of acquittal actually determined he did not engage in any of the other acts evidence that was introduced in the 2016 prosecution. (Appellee brief at 13). In order to make this estoppel determination, however, a searching review of the record of the prior proceeding is mandated:

> [W]here a previous judgment of acquittal was based on a general verdict, courts must "'examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict on an issue other than that which the defendant seeks to foreclose from consideration.'"

Dowling v. United States, 493 U.S. 342, 350, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990), quoting *Ashe v. Swenson*, 397 U.S. 436, 444, 90 S. Ct. 1189, 1194, 25 L.Ed.2d 469 (1970). (*See id.*). Furthermore, as both parties have pointed out, the estoppel proponent must bring forth the prior record to allow this determination to take place. *State v. Phillips*, 74 Ohio St.3d 72, 80, 656 N.E.2d 643 (1995). (Appellant brief at 17); (Appellee brief at 13).

Here, other than the 1986 indictment and a couple of subpoenas, *there is no record to review*. The absence thereof is in no way attributable to Mr. Smith. Yet it severely hampered, if not effectively foreclosed, Mr. Smith's ability to fulfill his burden for purposes of estoppel.

For this and the multitude of other reasons stated in his merit brief, Mr. Smith urges this Court to reject *Dowling* and impose a blanket prohibition against the use of acquittal evidence in subsequent prosecutions. Alternatively, should this Court be unwilling to impose such a bar, it could confine relief to cases like Mr. Smith's. That is, where the absence of a record from a prior proceeding obstructs the accused's ability to carry his burden for purposes of collateral estoppel, the trial court should bar the evidence in question from the proceeding.

***Gamble v. United States* does not affect this case.**

The state cites a recent case out of the United States Supreme Court to support its argument that double jeopardy does not apply in this case, to wit: *Gamble v. United States*, __ U.S. __, 139 S.Ct. 1960 (2019). (Appellee brief at 14). Should the panel decide the issue at hand on Ohio Constitutional principles, *Gamble* need not apply. Even if analyzed on its merits, however, *Gamble* does not apply.

Due to a previous conviction for a crime of violence, Terance Martez Gamble was encumbered by a weapons disability when a traffic stop unearthed a loaded 9-mm pistol in his car. *Gamble* at 1964. Following his conviction in Alabama state court for unlawfully possessing the firearm, Gamble was indicted on a federal offense prohibiting felons from transporting or possessing firearms. *Id.* Gamble moved to dismiss the federal charges on Fifth Amendment Double Jeopardy grounds, arguing that the federal indictment concerned the "same offense" at issue in state court. *Id.* The district court denied the motion. *Id.*

Ultimately, the United States Supreme Court granted certiorari and utilized its decision to reaffirm the dual-sovereignty doctrine of the federal Double Jeopardy Clause. *Id.* at 1964-80. The dual-sovereignty doctrine treats the states and the federal government as separate sovereigns for the purposes of double jeopardy. *Id.* at 1965. Thus, a person who engages in conduct which simultaneously violates state and federal laws commits two separate offenses and can be prosecuted for each by the separate sovereigns. *See id*.

In the case at bar, the state cited *Gamble* for the proposition that "double jeopardy protects a person from being put twice in jeopardy for the same offense, not for the same conduct or actions." (Appellee brief at 14). While this is a tempting proposition to transpose to Mr. Smith's case, this Court cannot rightly invoke *Gamble* for such a proposition herein because the

instant case does not concern double jeopardy in the context of dual sovereignty. Indeed, the sole attribute the two cases share is the general notion of double jeopardy, nothing more.

<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.

Two misapprehensions beg correction to enable this Court to properly analyze Mr. Smith's second proposition of law.

The state mischaracterizes Mr. Smith's second proposition of law as a call for this Court to require collateral evidence to support the admission of other acts evidence under Evid.R. 404(B). (Appellee brief at 21-22); (AG Amicus at 27). The state further alleges that Mr. Smith's second proposition of law asks for nothing new and contemplates only error correction. These assertions miss the mark.

First, Mr. Smith's arguments referencing the absence of a record in this case were not designed to impose a collateral evidence prerequisite upon all 404(B) evidence. Rather, they served to explain why Mr. Smith was robbed of the ability to meaningfully counter the acquittal evidence in the 2016 case.

Second, Mr. Smith's latter proposition of law is not confined to mere error correction. Rather, the heart of Proposition of Law No. II is Mr. Smith's plea for this Court to rein in lower courts' misapplication of *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278. (*See* Appellant brief at 33, 37-38). Most importantly, Mr. Smith beseeches the Court to issue a ruling requiring lower courts to specifically instruct juries on which Evid.R. 404(B) or R.C. 2945.59 exceptions apply to other acts evidence submitted to the jury rather than issuing the standard "laundry list" regurgitating all of the exceptions. To the best of counsel's knowledge, this is an issue of first impression before this bench.

This case can serve as a vehicle for curtailing the rampant misapplication of this Court's precedents governing the admission of other acts evidence.

Regarding the first prong of the *Williams* test, the state concedes that the age of the acquittal evidence in this case may be disconcerting to some. (Appellee brief at 25). Indeed, the focus of Mr. Smith's relevance analysis was the advanced age of the 1986 allegations. (Appellant brief at 35). In an attempt to allay this concern, the state offers that the age of the evidence should be discounted because it simply took Mr. Smith 30 years to have a chance to molest another relative. (Appellee brief at 25). This purely speculative justification cannot properly be declared as fact on this record. Mr. Smith submits that the Court could use this case as an opportunity to revisit *State v. Curry* and require courts to more stringently scrutinize other acts evidence that is temporally remote from the case at hand. *See State v. Curry*, 43 Ohio St.2d 66, 330 N.E.2d 270 (1975) (other acts evidence should involve conduct that occurred "within a period of time reasonably near to the offense on trial").

Regarding the second prong of the *Williams* test, the state argues that the acquittal evidence was admissible under Evid.R.404(B) to show Mr. Smith's molestation plan and to counter his assertion that any inappropriate touching occurred by accident. (Appellee brief at 23-24). Yet all of the jury instructions entirely failed to target these permissible purposes. The twelve lay men and women of the jury were thus left to engage in the "unmitigated fiction" of ignoring the evidence for propensity purposes and personally parsing out the permissible purposes for which it could be considered. (*See id.* at 29-32).

As stated, Mr. Smith urges this Court to seize upon the opportunity to rein in the sloppy application of the second *Williams* prong by requiring more precision. This could be accomplished by (1) requiring the proponent of other acts evidence to elect the specific exceptions for which the evidence is sought to be admitted under Evid.R. 404(B) or R.C.

2945.59, and (2) requiring the trial court to issue jury instructions enunciating *only* those Evid.R. 404(B) or R.C. 2945.59 purposes specified by the proponent of the evidence.

Finally, regarding the third prong of the *Williams* test, the state insists that the trial court did in fact perform an Evid.R. 403 analysis in assessing the acquittal evidence. (*Id.* at 24). In support, it cites to the fact that the trial court conducted two pretrial hearings on the admissibility of the evidence and issued repeated limiting instructions. (*Id.* at 23-24). It is well established that most pretrial evidentiary rulings are tentative and preliminary. *State v. Grubb*, 28 Ohio St.3d 199, 202, 503 N.E.2d 142 (1986). Their substance must be revisited at trial in order to preserve scrutiny of the issue on appeal. *See id. See also State v. Maurer*, 15 Ohio St.3d 239, 259, fn. 14, 473 N.E.2d 768 (1984), quoting Palmer, Ohio Rules of Evidence, Rules Manual 446 (1984) ("Although extremely useful as a trial technique, the ruling in a motion in limine does not preserve the record on appeal.").

If the trial court in this case undertook an Evid.R. 403 analysis, it was not done anywhere *on the record*. Evid.R. 403 rulings cannot be implicit. Reviewing courts should not be forced to extrapolate 403 findings from a silent record. Here, absolutely no language invoking the balancing of probative value versus prejudice, confusion, or undue delay appears on the record. Mr. Smith asks this Court to utilize this occasion to tighten the third *Williams* prong by holding that trial courts must make apparent that they have balanced the requisite Evid.R. 403 factors prior to admitting challenged evidence at trial.

Mr. Smith did not forfeit any of his constitutional claims.

Advocating for dismissal, the Ohio Attorney General's amicus brief insists that Mr. Smith raised his Ohio double jeopardy and due process claims for the first time in this Court. (AG Amicus at 9-10, 23). This argument is curious, indeed. On direct appeal of his convictions

to the First Appellate District, these issues were front and center in Mr. Smith's First Assignment of Error:

> The trial court denied Mr. Smith his right to due process and a fair trial when it admitted Verna's and LaTanya's testimony regarding Mr. Smith's 1986 acquittal under Evid.R. 404(B). Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; Article I, Sections 10 and 16 of the Ohio Constitution.

(C170355 T.d. 20 at 11). Thus, the phrasing and citations in Mr. Smith's first assigned error on direct appeal expressly preserved his Ohio constitutional claims. In the body of his argument, Mr. Smith invoked double jeopardy principles to argue for a per se bar against acquittal evidence or, in the alternative, for the exclusion of such evidence where the accused can establish that he was acquitted on an ultimate issue in the former case. (*Id.* at 11). Verily, the analysis of the cited *Dowling* decision was rooted in both double jeopardy and due process principles. (*See id.* at 15-16). While Mr. Smith may have shifted his *focus* as the appellate proceedings evolved, he did not insert new claims. Shifting one's focus during the appellate process is permissible, and does not rightly beget dismissal.

A word on methods of constitutional interpretation.

Both the state and its amicus note that this Court has historically treated the federal double jeopardy clause and the parallel provision in the Ohio Constitution as coextensive. *State v. Gustafson*, 76 Ohio St.3d 425, 432, 1996-Ohio-299, 668 N.E.2d 435. (Appellee brief at 8-9); (AG Amicus at 3, 21-23). Both are grounded in protections afforded by English common law. *City of Girard v. Giordano*, 155 Ohio St.3d 470, 2018-Ohio-5024, 122 N.E.3d 151, ¶ 7. And both have evolved greatly beyond their common law origins. *Id.* Of note, this Court's jurisprudence progressed to integrate the doctrine of collateral estoppel into the framework for

Ohio constitutional analysis. *See, e.g., State v. Liberatore*, 4 Ohio St.3d 13, 445 N.E.2d 1116 (1983).

As stated, this Court is free to afford greater rights under the Ohio Constitution. *Arnold*, 67 Ohio St.3d at paragraph one of the syllabus. "Coextensive" generally refers to things that occupy the same space. Harper, *Online Etymology Dictionary*, https://www.etymonline.com/ word /coextensive (last accessed Aug. 14, 2019). But, what the federal high court decides concerning matters of federal law does not fetter this Court's decisions concerning matters of state law. Any prior rulings deferring to the United States Supreme Court on double jeopardy analysis certainly do not subvert this Court's authority as the ultimate arbiter over issues of Ohio Constitutional law. *See State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶21.

As this Court is well aware, there are a number of modes of constitutional interpretation, from originalism to progressivism and everything in between. *See, generally*, Murrill, *Modes of Constitutional Interpretation*, Congressional Research Service (Mar. 15, 2018). Just as the composition of this Court is continually altered by the passage of time, so have the dominant modes of constitutional interpretation ebbed and flowed. The state's amicus plucks a bundle of these modes – textualism, originalism, and historical analysis – to offer support for its position. (AG Amicus at 16).

Of note, the Attorney General cites the previously-discussed federal *Gamble* decision for the proposition that the language of the Ohio Double Jeopardy Clause prohibits placing one in jeopardy twice for the same offense, not the same conduct. (AG Amicus at 12). Its use of the signal "*Cf.*" before the *Gamble* citation acknowledges that the cited authority is not directly on point. (*Id.*). *See* The Bluebook: A Uniform System of Citation 47 (Columbia Law Review et al. eds., 18th ed.2005) ("Cf." is used when "[c]ited authority supports a proposition different from

the main proposition but sufficiently analogous to lend support"). In actuality, as discussed above, the dual-sovereignty subject matter of the *Gamble* case removes it from the realm of persuasive authority and, arguably, beyond the circle of any tangential relevance to the present matter.

Also of note, the Attorney General cites examples of English common law to argue that interpretation of Ohio's Double Jeopardy Clause bars successive prosecution for the same crime and does not restrict evidence that may be introduced at trial. (AG Amicus at 12-14). Puzzlingly, the common law authorities cited in its brief reflect scenarios that run squarely afoul of double jeopardy protections as they are understood today. (*See* AG Amicus at 13-14, citing 2 Matthew Hale, History of the Pleas of the Crown 245-46 (1736) and *King v. Vandercomb and Abbott*, 2 Leach 708, 168 Eng. Rep. 455 (K.B. 1796)).

The Attorney General cites the fact that Verna's testimony in the 2016 case far exceeded the 1986 allegations to argue that double jeopardy would not have barred her testimony because Mr. Smith was not acquitted of any offenses relative to said allegations. (AG Amicus at 15). But double jeopardy prohibits piecemeal prosecutions for multiple offenses flowing from the same or connected transactions. *See, e.g., Griffith v. State*, 93 Ohio St. 294, 298, 112 N.E. 1017 (1915) (where one is convicted of embezzlement of money, he cannot later be prosecuted for obtaining the same money by false pretenses). The state did not charge Smith for anything other than sexual battery back in 1986. Properly applied, double jeopardy would foreclose the state from going back after the acquittal and prosecuting him for additional charges that were known but uncharged at the time of the 1986 indictment. *See State v. Tolbert*, 60 Ohio St.3d 89, 90-92, 573 N.E.2d 617 (1991).

Finally, the Attorney General argues that adoption of the rationale advanced by a federal dissenting opinion on a constitutional issue (i.e., Justice Brennan's *Dowling* dissent) fails to dignify state constitutions as independent sources of law. (AG Amicus at 18). This cuts both ways. It can be argued with equal force that adoption of the rationale advanced by a federal majority opinion on a constitutional issue fails to dignify state constitutions as independent sources of law. Accordingly, this argument is unpersuasive.

CONCLUSION

In accordance with the arguments presented in his merit brief and herein, Mr. Smith respectfully requests that this Court reverse the decision of the First District Court of Appeals and remand for retrial with instructions that all references to the 1986 case be barred or, alternatively, with instructions pertaining to this evidence as this Court deems fit.

Respectfully submitted,

Raymond T. Faller (0013328)
Hamilton County Public Defender

/s Krista M. Gieske
Krista M. Gieske (0080141)
Counsel for Appellant
230 East Ninth Street, Second Floor
Cincinnati, Ohio 45202
(513) 946-3713 voice
(513) 946-3840 facsimile
KGieske@cms.hamilton-co.org

CERTIFICATE OF SERVICE

I certify that a copy of this Reply Brief of Defendant-Appellant Michael Smith has been served upon the following on the 14th day of August, 2019:

Scott M. Heenan
Counsel for Appellee, State of Ohio
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
(via hand delivery)

Allen M. Vender
Counsel for Amicus Curiae,
Office of the Ohio Public Defender
allen.vender@opd.ohio.gov
(via email)

Benjamin M. Flowers
Counsel for Amicus Curiae,
Ohio Attorney General Dave Yost
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(via USPS)

/s Krista M. Gieske

Krista M. Gieske (0080141)