IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	Case No. _____
Plaintiff-Appellee	:	
vs.	:	On Appeal from Fairfield County Court of Common Pleas
STEVEN DOUGLAS FARTHING	:	Case No. 18 CR 00463
Defendant-Appellant	:	
	:	And
	:	
	:	The Fairfield County Court of Appeals Fifth Appellate District
	:	C.A. Case No. 19 CA 00049

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT STEVEN DOUGLAS FARTHING

Kathryn L. Cornelius-Blume (0096041)
DAGGER, JOHNSTON, MILLER,
OGILVIE, & HAMPSON, LLP
144 East Main Street
P.O. Box 667
Lancaster, Ohio 43130
Telephone: (740) 653-6464
Email: KCB@DaggerLaw.com
Attorney for Defendant-Appellant,
Steven Douglas Farthing

Steven Douglas Farthing
C/O Southeastern Correctional Institution
5900 B.I.S. Road, Southwest
Lancaster, Ohio 43130

R. Kyle Witt (0079890)
Fairfield County Prosecuting Attorney
239 West Main Street
Suite 101
Lancaster, Ohio 43130
Telephone: (740)
Email: Kyle.Witt@FairfieldCountyOhio.Gov
Attorney for Plaintiff-Appellee,
State of Ohio

TABLE OF CONTENTS

PAGE

ARGUMENT FOR DISCRETIONARY REVIEW

This Court should accept jurisdiction of the present felony case due to the great general interest and substantial constitutional concern present for review. First, Appellant submits that Ohio's appellate districts utilize differing standards when examining admission of third-party guilt in criminal proceedings and thus inherently violate Defendants' constitutional rights afforded by the Due Process Clauses of the Fifth and Fourteenth Amendment and the right to Confrontation outlined in the Sixth Amendment. Furthermore, this matter presents an additional issue of law as a jury cannot simply infer lack of marriage solely from the ages and relationships of the parties when a defendant is charged with Rape, pursuant to R.C. § 2907.02(A)(1)(b) as alleged in the intermediary court's decision.

I. Evidence of Third-Party Guilt Need Not Directly Connect that Third Party With the charged Crime in Order to be Admissible

Upon review of Ohio state and federal appellate case law, there are three (3) possible evidentiary methodologies employed when examining admission of third-party guilt. For ease of reference Appellant employs the following throughout his *Memorandum in Support of Jurisdiction* for the three methodologies: (1) the "Evid.R. 403 plus Direct Connection" approach; (2) the "Evid.R. 403 Balancing Test" approach; and (3) the "Reverse 404(B)" approach.

This Court previously examined the impact of *Holmes v. South Carolina* in *State v. Swann*:

> Holmes did not hold that every rule that exclude evidence of third-party guilt is necessarily unconstitutional or that a criminal defendant has a right to present *all* evidence of third-party guilt. Rather, in *Holmes* the court adhered to its earlier decisions in *Chambers, Crane, Rock*, and *Scheffer* and reiterated that the right to present a complete defense "is abridged by evidence rules that 'infring[e] upon a weighty interest of the accused' and are 'arbitrary or 'disproportionate to the purposes they are designed to serve'"

119 Ohio St.3d 552, 557 (2008) quoting *Holmes*, 547 U.S. at 324-325, 126 S.Ct. 1727, 164 L.Ed2d 503, quoting *Scheffer*, 523 U.S. at 108, 118 S.Ct.1261, 140 L.E.2d 413, quoting *Rock*, 483, U.S. at 56, 107 S.Ct. 2704, 97 L.Ed2d 37 (emphasis in original). However, the *Swann* decision involved

admissibility of third-party guilt pursuant to Evid.R. 804(B)(3). The present matter requests that this Court accept jurisdiction to create a clear and consistent standard and advise which of the three evidentiary approaches trial courts should utilize when assessing admissibility of third-party guilt in criminal proceedings. Due to these three differing methodologies employed by Ohio and federal appellate courts, which are examined more fully below, the varying evidentiary approaches create "arbitrary" and "disproportionate" evidentiary rules based upon the jurisdiction in which a defendant is charged and tried. Therefore, this arbitrary enforcement is in contravention of both the *Holmes* decision and prior Ohio *Holmes*-ian analysis in this Court's *Swann* decision. This district split impedes and violates defendants' Constitutional rights afforded under the Due Process Clauses of the Fifth and Fourteenth Amendments, and the Confrontation and Compulsory Process Clauses of the Sixth Amendment.

II. A Jury Cannot Infer Lack of Marriage Solely From the Ages and the Relationships of the Parties When a Defendant is Charged with Rape Pursuant to R.C. § 2907.02(A)(1)(b)

The Fifth, Sixth, and Fourteenth Amendments to the United States Constitution effectively require that the State prove *every* disputed fact beyond a reasonable doubt. For example, in *Jones v. United States* (1999), in relation to an issue of fact in a sentencing hearing, the United States Supreme Court stated, "[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." 526 U.S. 227, fn. 6, 119 S.Ct. 1215, 143 L.Ed.2d 311. Ohio's Rules of Evidence on judicial notice reflect this constitutional rule: "In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed." Evid.R. 201(G).

As it relates to the present case, the rape statute states, "No person shall engage in sexual conduct with another *who is not the spouse of the offender* or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies: The other person is less than thirteen years of age, whether or not the offender knows the age of the other person." R.C. § 2907.02. In every case in that the prosecution charges a defendant with rape, the prosecution must affirmatively prove, beyond a reasonable doubt, that the alleged victim is not the spouse of the offender. This includes cases such as the present case, where the defendant is an adult, and the alleged victim is five years old. The prosecution failed to do so in this case. Similarly, the Fifth District's analysis and examination of this concern in their recent opinion, creates concerning case precedent which would allow jurors to simply infer elements of the charged crime thus violating defendants' constitutional rights.

Due to the fact that this felony criminal matter involves substantial constitutional rights, Appellant respectfully requests that this Court accept discretionary review to address Appellant's two propositions of law which Appellant believes are of great public and general interest.

STATEMENT OF THE CASE AND OF THE FACTS

Shangri-La Hope Brown has two daughters—R.W., born August 22, 2012, and A.W., born July 24, 2014. Transcript, P. 60, L. 6-8; Indictment. Appellant, Steven Farthing, is Shangri-La Hope Brown's older brother. Transcript, P. 60, L. 18-19. Mr. Farthing was married to Shauna Farthing. Transcript, P. 61, L. 3-8.

Between November 2016 and April 2017, Ms. Brown along with her minor children, R.W. and A.W., experienced significant housing instability; eventually the three met and moved in with Mr. Hassan Jabar. Transcript, P. 62, L. 3-18; P. 63, L. 2-3; P. 64, L. 1; P. 65, L. 8-13; P. 96-97. Mr. Jabar was physically abusive towards Ms. Brown and the girls; on one occasion he poured hot water on Ms. Brown and the girls. Transcript, P. 172, L. 17-18; P. 172, L. 172, 19-24; P. 173, L. 1. When Mr. Jabar would also physically discipline the girls, he would make them bleed with his strikes. Transcript, P. 276, L. 16-18. Though he "wasn't doing anything," Mr. Jabar was uncomfortable watching the children since they were not his (or perhaps because of the abuse).

Ms. Brown then attempted to acquire housing for R.W. and A.W. with other family members in Ohio while she remained in Pennsylvania. Transcript P. 66-67; P. 68, L. 2-14; P. 69, L. 12-24; P. 70, L. 1-11. Ultimately, the Farthings offered to care for the girls and obtained custody of the children on September 1, 2017. Transcript, P. 70, L. 5-9.; P. 72, L. 16-17. There was some contact between Ms. Brown and the girls and eventually the court granted Ms. Brown companionship once weekly, to be continuously supervised by the Farthings. Transcript, P. 81, L. 20-24. But the Farthings were willing to allow Ms. Brown more significant companionship, so they allowed her to have the children for an entire weekend on April 19, 2018. Transcript, P. 83, L. 8-14. During this weekend—the first time at which Ms. Brown has seen her daughters

unsupervised in approximately ten months—both daughters purportedly disclosed sexual abuse by Mr. Farthing. Transcript, P. 85-87.

In an effort to avoid returning her daughters to the Farthings, Ms. Brown contacted four different police departments to attempt to report the alleged abuse. Transcript, P. 87. Eventually the daughters were transported to Nationwide Children's Hospital in Columbus where they were interviewed by Jennifer Sherfield. Transcript, P. 88-89; P. 222 et seq. R.W. proceeded to allege sexual abuse by Mr. Farthing. Transcript, P. 234 et seq. A.W. alleged sexual abuse against both Mr. Farthing **and Mr. Jabar**. Transcript, Motion Hearing, P. 49, L. 20-24; P. 50, L. 1.

Franklin County Children Services conducted an investigation, but never spoke to Mr. Jabar. Transcript, Motion Hearing, P. 28, L. 15-16. Though there were similar allegations against A.F. as a potential perpetrator, Franklin County Children Services similarly failed to speak to him. Transcript, P. 58, L. 7-20. Franklin County Children Services unsubstantiated sexual abuse allegations as to Mr. Farthing. Transcript, P. 42, L. 19-20.

This case nevertheless proceeded, and the Fairfield County Prosecutor's Office charged Steven Douglas Farthing with one count of rape, with alleged victim A.W., born July 24, 2014, on July 13, 2018. Mr. Farthing was arrested on September 9, 2018 and subsequently indicted on September 20, 2018.

The indictment alleged one count of Rape, a first-degree felony violation of R.C. § 2907.02(A)(1)(b); and two counts of Gross Sexual Imposition, third-degree felony violations of R.C. § 2907.05(C)(2), as to alleged victim A.W. The indictment also alleged two counts of Gross Sexual Imposition, third-degree felony violations of R.C. § 2907.05(C)(2), and one count of Corrupting Another with Drugs, a fourth-degree felony violation of R.C. § 2925.02(A)(4)(a), as to alleged victim R.M.W., born August 22, 2012.

Mr. Farthing filed several *Motions in Limine* however, the two *Motions* of interest for this *Memorandum* were filed on March 22, 2019 and September 13, 2019, seeking an order permitting admission of prior sexual abuse perpetrated against the minor children, A.W. and R.W. Specifically, trial counsel sought to introduce evidence that Hassan Jabar and A.F. sexually assaulted the minor children and any subsequent follow-up and investigation in to Hassan Jabar and/or A.F.. Trial counsel quoted a Child Advocacy Center interview conducted on October 24, 2018, A.W. alleged that **Hassan Jabar** had sexually assaulted her:

> Forensic Interviewer: Has a winkie ever touched your mouth?
> A.W.: *pause* Yes.
> Forensic Interviewer: Whose winkie?
> A.W.: Daddy's. Yes, because his name is Hassan.

Motion in Limine, Mar. 22, 2019.

On April 18, 2019, the prosecution sought a superseding indictment, which removed all allegations as to A.L.W. The indictment charged Mr. Farthing with four offenses as to **R.W. only**—Rape, a first-degree felony violation of R.C. § 2907.02(A)(1)(b); two counts of Gross Sexual Imposition, third-degree felony violations of R.C. § 2907.05(C)(2); and one count of Corrupting Another with Drugs, a fourth-degree felony violation of R.C. § 2925.02(A)(4)(a).

The trial court ruled on Defendant's *Motions* by *Sealed Entry* dated September 10, 2019, excluding allegations against Mr. Jabar, and Franklin County Children's Services to contact Mr. Jabar. The trial court relied upon the fact that allegations against Mr. Jabar were raised by A.W., who was dismissed as a victim. The case was subsequently scheduled for Jury Trial on September 17 through 19, 2019.

At trial, the Court repeatedly excluded defense attempts to introduce evidence relating to sexual abuse perpetrated by Hassan Jabar and A.F. On September 20, 2019, the jury returned a verdict of guilty on all four counts—Rape, two counts of Gross Sexual Imposition, and Corrupting

Another with Drugs. The trial court sentenced Mr. Farthing to a term of fifteen years to life imprisonment and also sentenced Mr. Farthing as a Tier III sex offender.

Mr. Farthing filed his timely notice of appeal to the Court of Appeals of Fairfield County Fifth Appellate District on November 14, 2019. On October 14, 2020 the Fifth Appellate District affirmed the trial court's judgment. The present *Memorandum in Support of Jurisdiction*, with timely *Notice of Appeal* filed on November 30, 2020.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

I. Evidence of Third-Party Guilt Need Not Directly Connect that Third Party With the Charged Crime in Order to be Admissible

This Court should accept jurisdiction of this matter to create a consistent evidentiary approach when examining admissibility of third-party guilt in a criminal proceeding. Ohio's appellate districts utilize differing standards when examining admission of third-party guilt in criminal proceedings. Additionally, the Sixth Circuit Court of Appeals employs a wholly different approach when examining this issue. Therefore, based upon where a defendant is charged, he may face more stringent requirements for admitting third-party guilt and thus inherently violate Defendants' constitutional rights afforded by the Due Process Clauses of the Fifth and Fourteenth Amendments, and the Confrontation and Compulsory Process Clauses of the Sixth Amendment.

A. The Fifth District's "Evid.R. 403 plus Direct Connection"

In *Holmes v. South Carolina*, the United States Supreme Court affirmed a defendant's constitutional right to introduce evidence of third-party guilty. The United States Supreme Court went on to examine well-established rules regarding admissibility of third-party guilt in criminal proceedings: "evidence tending to show the commission by another person of the crime charged may be introduced by accused when it is inconsistent with, and raises a reasonable doubt of, his own guilt; but frequently matters offered in evidence for this purpose are so remote and lack such connection with the crime that they are excluded." *Id.* at 327. Additionally, in Holmes, the Court stated:

> The accused may introduce any legal evidence tending to prove that another person may have committed the crime with which the defendant is charged... such evidence may be excluded where it does not sufficiently connect the other person to the crime, as for example, where the evidence is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial.

In Appellant's intermediary appeal, the Fifth District affirmed the trial court's judgment and rejected Appellant's argument that the trial court erred when it excluded admission of third-party guilt and went on to state that evidence of a direct connection to the crime is necessary. The Fifth District relied upon prior Fifth District case precedent, *State v. Walker*, 5th Dist. Stark No. 2005-CA-00286, 2006 Ohio-6240, ¶ 46-48. Specifically, the Fifth District quoted the above-referenced language in *Holmes* and then further cited *State v. Walker* as follows:

> However, "when a defendant wishes to implicate a specific individual, evidence of the third party's guilt is admissible only if the defense can produce evidence that '**tend[s] to directly connect such other person with the actual commission of the crime charged.**'" Id. at ¶ 49. (citing Smithart v. Alaska (1999), 988 P.2d 583, 586). ***
>
> In the case at bar, for evidence that [third parties] sexually abused R.M.W. to be relevant, there must be a connection between those allegations and the crime charged, thereby casting a reasonable doubt that appellant was the perpetrator. (emphasis added).

State v. Farthing, 5th Dist. No. 2019-CA-0049, 2020-Ohio-4936, ¶ 19–20. In *State v. Benson*, the Court quoted *State v. Walker* and then went on to say that it would employ the same balancing test outlined under Evid.R. 403 as follows:

> Exclusion Mandatory. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of issues, or of misleading the jury.
> Exclusion Discretionary. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless representation of cumulative evidence.

5th Dist. No.19CA00009, 2020-Ohio-1258, ¶ 21. It then stated that while the trial court relied upon both Evid.R. 404(B) and Evid.R. 403, admission of the third-party was appropriately precluded as the probative value was not outweighed by risk of prejudice as there was no **direct connection** between the proposed third-party and the crime. *Id.* Therefore, these two recent Fifth District opinions outline a "Evid.R. 403 plus Direct Connection" analysis for admission of third-party guilt.

This approach is concerning as this analysis violates a fundament principal of the American judicial system: the presumption of an accused's innocence. The "Evid.R. 403 plus Direct Connection" analysis presumes that the person charged with the offense is the true perpetrator of the crime and therefore creates a presumption of guilt prior to the prosecution proving the defendant's guilt beyond a reasonable doubt at trial. Therefore, while it is the prosecution's burden to prove a defendant's guilt beyond a reasonable doubt, it is now the defendant's burden to prove that it was not he who committed the crime **and** provide evidence of a "direct connection" of the third party to the charged crime. This presumption of guilt was similarly rejected in the original *Holmes v. South Carolina* opinion. In *Holmes*, the appellant filed a *writ of certiorari* contesting the constitutionality of the common law principles developed in South Carolina which precluded admission of third-party guilt evidence when there was clear forensic evidence implicating the accused in the crime. The United States Supreme Court went on to state that:

> Under this rule, the trial judge does not focus on the probative value or the potential adverse effects of admitting the defense evidence of third-party guilt. Instead, the critical inquiry concerns the strength of the prosecution's case: if the prosecution's case is strong enough, the evidence of third-party guilt is excluded even if that evidence, if viewed independently, would have great probative value and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues.

Holmes supra at 328. The Fifth District's "Evid.R. 403 Plus Direct Connection" requirement similarly impinges upon defendants' rights as it establishes a more stringent and heightened standard for admission of third-party guilt, specifically proof and evidence of a third party's direct connection to the charged crime. This is additionally concerning because this standard is a more difficult standard than the "Evid.R. 403 Balancing Test" approach which Appellant will examine in the following subsection "B" which was adopted by Ohio's Second District Court of Appeals.

B. The Second District's "Evid.R. 403 Balancing Test"

The Second District Court of Appeals examined the issue of admissibility of third-party guilt and whether "Evid.R. 403 Balancing Test" or the "Reverse Evid.R. 404(B)" is the appropriate evidentiary approach. *See State v. Gillespie*, 985 N.E.2d 145 (2012). The Second District went on to examine federal circuits' analyses and advised additionally of a federal circuit split regarding the appropriate evidentiary standard regarding admissibility of third-party guilt. Some federal appellate courts utilize the "Evid.R. 403 Balancing Test" while others use the "Reverse 404(B)" analysis. For example the Second District examined a New Jersey Supreme Court opinion which advised that other-crimes evidence was admissible and can only be excluded "if its probative value is substantially outweighed by the risk that its admission will either (a) necessitate undue consumption of time or (b) create substantial danger of consuming the issues or of misleading the jury." *Id.* at ¶18. The Second District went on to hold:

> We agree with the approach taken by most federal circuits, which distinguishes other-crimes evidence offered against a defendant, from other-crimes evidence offered against a defendant, from other-crimes evidence offered by a defendant to support the proposition that a third party, not the defendant, committed the crime, in this situation, courts evaluate the evidence using a **balancing approach under Evid.R. 403.**

Id. at ¶ 20 (emphasis added). There is no mention of any mandatory "direct connection" for this Evid.R. 403 balancing approach as alleged by the Fifth District. Therefore, the Second District and the majority of federal circuit courts utilize a "strict" balancing approach outlined in Evid.R.403, thus the "Evid.R. 403 Balancing Test" as referenced by Appellant. This creates two different standards and thus an arbitrary analysis of admissibility of third-party guilt depending on the county in which a defendant is charged with a crime in Ohio.

C. The Sixth Circuit Court of Appeal's "Reverse Evid.R. 404(B)" Analysis

Complicating the analysis further, there is also a third approach which a minority of federal courts employ to determine admissibility of third-party guilt which is often referenced as the "Reverse 404(B) approach." Examining Ohio's sister federal jurisdiction, the Sixth Circuit Court of Appeals utilizes this minority approach in determining admissibility of third-party guilt and has previously held that Fed.R. 404(b) "protects every person, not just the criminal defendant or a victim" *Gillespie,* supra at ¶ 19 quoting *Wynne v. Renico*, 606 F.3d 867, 873 (6th Cir. 2010). The "Reverse 404(b)" is examined more thoroughly in Wigmore's treatise:

> It should be noted that ['other crimes'] evidence may be also available to negative the accused's guilt. E.G., if A is charged with forgery and denies it, and if B can be shown to have done a series of similar forgeries connected by a plan, this plan of B is oms evidence that B and not A committed the forgery charged. This mode of reasoning may become the most important when A alleges that he is a victim of mistaken identification." *Wigmore on Evidence*, Section 304 at 253 (J. Chadbourn Rev. Ed. 1979)

Therefore, an accused will face different evidentiary standards regarding admissibility of third-party guilt based solely on whether he is charged in federal as opposed to state court.

II. A Jury Cannot Infer Lack of Marriage Solely From the Ages and the Relationships of the Parties When a Defendant is Charged with Rape Pursuant to R.C. § 2907.02(A)(1)(b)

The Fifth, Sixth, and Fourteenth Amendments to the United States Constitution effectively require that the State prove *every* disputed fact beyond a reasonable doubt. As previously outlined above, the Prosecution failed to prove each element of the charged offense as it relates to Appellant's Rape charge, pursuant to R.C. § 2907.02. The pertinent section of the Revised Code states: "No person shall engage in sexual conduct with another *who is not the spouse of the offender* or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies: The other person is less than thirteen years of age, whether or not the offender knows the age of the other person." The proven facts here are likewise insufficient to

support an inference that they were unmarried. Ohio law provides that only males of eighteen years may marry females of eighteen years, with a limited exception for marriage with court approval of individuals that are seventeen years old. R.C. § 3101.01(A); R.C. § 3101.02. Though this is Ohio's law, Ohio recognizes marriages entered into in other states. The sole statutory exception, which has been declared unconstitutional, provides that Ohio will not give full faith and credit to marriages between individuals of different sexes. R.C. § 3101.01(B). There is no similar exception to full faith and credit for marriages based upon age differential, or for any other type of marriage. *See generally* R.C. § 3101.01; *see also, Peefer v. State*, 42 Ohio App. 276, 192 N.E. 117 (citing Kentucky law to determine the validity of a marriage between a forty-one-year-old male and fourteen-year-old female). Had the legislature intended to prohibit recognition of marriages based upon age differential, it could have done so, but the only exception to recognition is for same-sex marriage.

There are currently eleven states without an age limit for marriage. *See, e.g.,* 23 Pa. C.S. 1304(b) (permitting issuance of marriage licenses for minors under the age of sixteen with court approval); W. Va. Code 48-2-301(c) (permitting issuance of marriage licenses for minors under the age of sixteen with parental consent and court approval). Miss. Code Ann. 93-1-5 (permitting marriage of males under seventeen, or females under fifteen, with parental consent and judicial approval). Based upon R.C. § 3101.01, these marriages would be given full faith and credit in Ohio.

The record contains no evidence that Mr. Farthing was not married to R.W., and similarly contains no evidence that Mr. Farthing and R.W. did not travel to another state to marry. Though this argument may seem strange, it could have been resolved with a single question to R.W.'s mother, or any other witness—"Were Mr. Farthing and R.W. married to one another?"

Though the record also refers to Mr. Farthing's marriage to Shauna Farthing, the record contains no evidence as to the date or length of their marriage. Specifically, the prosecution presented no evidence suggesting that Mr. Farthing was married to Shauna (or not married to R.W.) at the time of the alleged offenses. Mr. Farthing and R.W. could have been married at the time of the alleged offenses, then subsequently divorced, with his marriage to Shauna coming later. Again, though this may seem unlikely, the prosecution could have introduced sufficient evidence with a single question—"Were Mr. Farthing and R.W. married to one another?"

Even though trial counsel did not explicitly raise this omission in support of his Crim.R. 29 motions for judgments of acquittal during trial and prior to sentencing, this argument does not require a timely motion or objection at trial. *State v. Jones,* 91 Ohio St.3d 335, 744 N.E.2d 1163, 2001-Ohio-57 ("The state argues that appellant waived this claim by failing to raise the issue at trial. We disagree. Appellant's 'not guilty' plea preserved his right to object to the alleged insufficiency of the evidence proving the prior offense.").

CONCLUSION

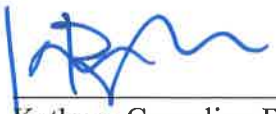
Based upon the great public interest and substantial constitutional implications associated with the above-referenced felony matter, Appellant, Steven Douglas Farthing respectfully requests that the Court accept jurisdiction of this appeal.

Respectfully submitted,

Kathryn Cornelius-Blume (0096041)
DAGGER, JOHNSTON, MILLER,
OGILVIE & HAMPSON, LLP
144 E. Main Street
P.O. Box 667
Lancaster, Ohio 43130-0667
(740) 653-6464
Email: kcb@daggerlaw.com
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was provided by Electronic Mail on R. Kyle Witt, Kyle.Witt@FairfieldCountyOhio.gov, Fairfield County Prosecuting Attorney, 239 West Main Street, Suite 101, Lancaster, Ohio 43130, on this 30 day of November, 2020.



Kathryn Cornelius-Blume (0096041)
DAGGER, JOHNSTON, MILLER,
OGILVIE & HAMPSON
144 E. Main Street
P.O. Box 667
Lancaster, Ohio 43130-0667
(740) 653-6464
Email: kcb@daggerlaw.com
Attorney for Appellant

ORIGINAL

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Earle E. Wise, Jr., J.
-vs-	:	
	:	
STEVEN FARTHING	:	Case No. 2019 CA 00049
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas, Case No. 18 CR 00463

JUDGMENT: Affirmed

DATE OF JUDGMENT:

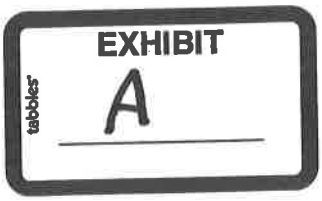
APPEARANCES:

For Plaintiff-Appellee

THOMAS S. LININGER
239 West Main Street
Suite 101
Lancaster, OH 43130

For Defendant-Appellant

RYAN SHEPLER
158 East Main Street
P.O. Box 388
Logan, OH 43138



Wise, Earle, J.

{¶ 1} Defendant-Appellant, Steven Farthing, appeals his October 28, 2019 convictions in the Court of Common Pleas of Fairfield County, Ohio. Plaintiff-Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶ 2} On September 20, 2018, the Fairfield County Grand Jury indicted appellant on one count of rape in violation of R.C. 2907.02 and two counts of gross sexual imposition in violation of R.C. 2907.05. Said charges arose from an incident involving a minor, A.L.W. Appellant was also indicted on two additional counts of gross sexual imposition and one count of corrupting another with drugs in violation of R.C. 2925.02 in relation to A.L.W.'s older sister, also a minor, R.M.W. Mother of the children is S.B. Appellant is the brother of S.B., and he and his wife, S.F., cared for the children because his sister was unable to do so.

{¶ 3} On April 18, 2019, a superseding indictment was filed removing all allegation as to A.L.W., and charging appellant with one count of rape, two counts of gross sexual imposition, and one count of corrupting another with drugs as to R.M.W.

{¶ 4} A jury trial commenced on September 17, 2019. The jury found appellant guilty as charged. By judgment entry filed October 28, 2019, the trial court sentenced appellant to an aggregate term of fifteen years to life in prison.

{¶ 5} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶ 6} "THE TRIAL COURT ERRED BY EXCLUDING EVIDENCE OF AN ALTERNATE PERPETRATOR OF RAPE."

II

{¶ 7} "THE JURY'S VERDICT WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE."

III

{¶ 8} "THE JURY'S VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

I

{¶ 9} In his first assignment of error, appellant claims the trial court erred by excluding evidence of an alternate perpetrator of the rape. We disagree.

{¶ 10} On March 22, 2019, appellant filed a motion in limine to permit admission of sexual abuse allegations involving the mother's boyfriend, H.J., and appellant's minor son, A.F. In support, appellant cited the rape shield law, R.C. 2907.02(D), which states in pertinent part:

> Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

{¶ 11} Appellant acknowledged the statute is intended to prohibit the admission of prior sexual conduct of victims, but argued the aforementioned evidence was "highly relevant and appropriate to establish other possible alleged perpetrators and establish a cohesive narrative surrounding the alleged events in the present case." The evidence would be introduced "to demonstrate the inconsistencies and incoherence of the alleged victims' respective stories."

{¶ 12} Also in support, appellant cited to specific portions of an October 2018 interview by Nationwide Children's Hospital, Child Advocacy Center, of R.M.W.'s sister, A.L.W., wherein she alleged that H.J. had sexually assaulted her. The two children also related incidents of physical abuse between their mother and H.J. Appellant also cited to statements made by appellant and/or his wife that A.F. sexually assaulted R.M.W.

{¶ 13} Appellant argued if the evidence was inadmissible under the rape shield statute, it should be admitted with regard to the gross sexual imposition counts, and the trial court must admit the evidence of prior sexual conduct under Evid.R. 404(B) which states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In criminal cases, the proponent of evidence to be offered under this rule shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good

cause shown, of the general nature of any such evidence it intends to introduce at trial.

{¶ 14} A hearing on all pretrial motions was held on August 26, 2019. The hearing consisted of an in camera interview of R.M.W. to determine her competency given her young age, the voir dire examination of Sarah McGee, a child welfare intake caseworker with Franklin County Children Services seeking to quash a subpoena, and argument on the motion in limine. The trial court found R.M.W. competent to testify at trial. August 26, 2019 T. at 22. Ms. McGee testified to conducting an investigation in October 2018 on three separate intakes for sexual abuse, physical abuse, and emotional maltreatment regarding R.M.W. and her sister. *Id.* at 25, 28. This investigation was for new and different allegations than those substantiated in the Fairfield County investigation. *Id.* at 46-48, 50-52. Ms. McGee stated the Franklin County agency spoke with appellant and his wife, the children, and the children's mother, but did not speak with mother's boyfriend, H.J. as he could not be located or contacted. *Id.* at 28, 42. At the conclusion of her investigation, Ms. McGee determined any Franklin County allegations related to sexual abuse of the children by anyone were unsubstantiated. *Id.* at 42. Although an allegation of sexual abuse had been made by A.L.W. involving H.J., she recanted her disclosure. *Id.* at 49-50, 57. Therefore, the sexual abuse by H.J. was unsubstantiated. *Id.* at 50. Ms. McGee's intake regarding oral sex and appellant involved A.L.W., not R.M.W. *Id.* at 54, 59-60. Defense counsel agreed anything involving A.L.W. was not admissible, including her interviews with the Child Advocacy Center. *Id.* at 69-70, 78. It was A.L.W. who mentioned H.J. and then recanted. As for any evidence of sexual abuse by A.F., the trial court concluded the

issue would be one of foundation as a lay witness could not offer opinion testimony without some significant foundation so as not to confuse the issue and mislead the jury. *Id.* at 85. The trial court ordered any issues relating to any allegations involving A.F. could not be inquired into without first conducting a voir dire of the witness to make sure the "witness would have sufficient foundation to answer the question and whether there at that time is any relevancy to it." *Id.* at 85-86. The trial court directed counsel to approach the bench during the trial for discussion and possible voir dire examination of the witness "[o]therwise the Court is not going to permit any testimony or allegations or argument concerning other sexual acts by other individuals." T. at 86. The trial court journalized its decision in an entry filed September 10, 2019, wherein it issued an in limine order directing defense counsel "is not permitted to inquire about any" allegations by A.L.W. against H.J. as they are not relevant to the claims by R.M.W. against appellant.

{¶ 15} On September 13, 2019, appellant filed another motion in limine to permit defense counsel to question the state's witnesses as to alleged conduct of other alleged perpetrators, to wit: H.J. and AF. Appellant argued he had a constitutional right to introduce evidence of third-party guilt.

{¶ 16} In his appellate brief at 16, appellant argues the trial court "repeatedly excluded defense attempts to introduce evidence relating to sexual abuse" by H.J. and A.F., but did not cite to specific portions of the transcript in support. Appellant argues he was denied the right to present evidence of third-party guilt, and the rape shield statute does not explicitly prohibit introduction of prior nonconsensual sexual conduct or evidence of third-party guilt.

{¶ 17} On April 22, 2020, the Supreme Court of Ohio filed its decision in *State v. Jeffries*, --- N.E.3d ---, 2020-Ohio-1539, holding the following at ¶ 30: "We hold that the plain meaning of the term 'sexual activity' as used in the rape-shield law includes both consensual and nonconsensual sexual activity and that both are barred from admission into evidence by the rape-shield law, absent one of the specific exceptions listed in the law." Appellant's arguments do not fall under any of the specific exceptions. Given the holding in *Jeffries*, appellant's arguments as to the rape shield statute lack merit.

{¶ 18} In support of his argument to introduce evidence of third-party guilt, appellant cites the case of *Holmes v. South Carolina*, 547 U.S. 319, 326-327, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006), wherein the United States Supreme Court discussed the use of third-party guilt evidence as follows:

> While the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury. * * * Plainly referring to rules of this type, we have stated that the Constitution permits judges "to exclude evidence that is 'repetitive ..., only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.' " * * *
>
> A specific application of this principle is found in rules regulating the admission of evidence proffered by criminal defendants to show that

someone else committed the crime with which they are charged. See, *e.g.*, 41 C.J.S., Homicide § 216, pp. 56–58 (1991) ("Evidence tending to show the commission by another person of the crime charged may be introduced by accused when it is inconsistent with, and raises a reasonable doubt of, his own guilt; but frequently matters offered in evidence for this purpose are so remote and lack such connection with the crime that they are excluded"); 40A Am.Jur.2d, Homicide § 286, pp. 136-138 (1999) ("[T]he accused may introduce any legal evidence tending to prove that another person may have committed the crime with which the defendant is charged .... [Such evidence] may be excluded where it does not sufficiently connect the other person to the crime, as, for example, where the evidence is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial" (footnotes omitted). (Citations omitted.)

{¶ 19} In *State v. Walker,* 5th Dist. Stark No. 2005-CA-00286, 2006-Ohio-6240, ¶ 46-48, this court quoted this same language from the *Holmes* case, and further stated at ¶ 49:

However, "when a defendant wishes to implicate a specific individual, evidence of the third party's guilt is admissible only if the defense can produce evidence that 'tend[s] to directly connect such other person with the actual commission of the crime charged' ". *Smithart v. Alaska* (1999), 988 P.2d 583, 586. [Footnotes and citations omitted].

Accord State v. Benson, 5th Dist. Guernsey No. 19CA00009, 2020-Ohio-1258.

{¶ 20} In the case at bar, for the evidence that H.J. or A.F. sexually abused R.M.W. to be relevant, there must be a connection between those allegations and the crime charged, thereby casting a reasonable doubt that appellant was the perpetrator.

{¶ 21} Allegations of sexual abuse were first reported in April 2018. R.M.W. never implicated H.J. or A.F. in sexually abusing her. Any allegations against H.J. were made by A.L.W. and then recanted. H.J. was not living with the children at the time of the sexual abuse allegations as the children were living with appellant and his family from July 2017 through the time of the allegations. Any allegations of sexual abuse by A.F. were told secondhand by appellant and/or his wife. August 26, 2019 T. at 79-85.

{¶ 22} Given the fact that the record is devoid of any evidence linking R.M.W.'s sexual abuse allegations to H.J. and/or A.F., we do not find a misapplication of the rules of evidence or a violation of appellant's constitutional rights.

{¶ 23} Assignment of Error I is denied.

II, III

{¶ 24} In his second and third assignments of error, appellant claims the jury's verdict was against the sufficiency and manifest weight of the evidence. We disagree.

{¶ 25} On review for sufficiency, a reviewing court is to examine the evidence at trial to determine whether such evidence, if believed, would support a conviction. *State v. Jenks,* 61 Ohio St.3d 259, 574 N.E.2d 492 (1991). "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a

reasonable doubt." *Jenks* at paragraph two of the syllabus, following *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

{¶ 26} On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine "whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Martin,* 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). *See also, State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997). The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶ 27} Appellant was convicted of rape in violation of R.C. 2907.02(A)(1)(b) which states:

> (A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:
>
> (b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person.

{¶ 28} Appellant was also convicted of gross sexual imposition in violation of R.C. 2907.05(A)(4) which states:

(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

(4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person.

{¶ 29} "Sexual conduct" and "sexual contact" are defined in R.C. 2907.01(A) and (B), respectively:

(A) "Sexual conduct" means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

(B) "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

{¶ 30} Lastly, appellant was convicted of corrupting another with drugs in violation of R.C. 2925.02(A)(4)(a) which states:

(A) No person shall knowingly do any of the following:

(4) By any means, do any of the following:

(a) Furnish or administer a controlled substance to a juvenile who is at least two years the offender's junior, when the offender knows the age of the juvenile or is reckless in that regard.

{¶ 31} Appellant challenges his convictions on the following two issues: 1) the state failed to appropriately identify appellant as the perpetrator, and 2) the state failed to prove that the victim was not the spouse of appellant. Appellant also argues the lack of physical or corroborating evidence.

{¶ 32} R.M.W. was seven years old at the time of trial. T. at 135. She was asked about knowing someone called "Uncle Steven" and she testified she knew him as being her uncle. T. at 137. She was asked to identify Uncle Steven in court. *Id.* She said his jacket was gray and pointed. T. at 137. The prosecutor clarified the finger-point (T. at 137-138):

Q. Can you tell me - - Do you see people - - Where are you pointing at?

A. In that - -

Q. So that's the defendant's table? Like right here at this table?

A. Uh-uh.

Q. Do you see - - how many people are seated at that table?

A. Three.

Q. Okay. And which one is Uncle Steven? Is he at the last seat, the middle seat or the seat closest to the door?

A. Um, he is right there.

Q. Is he wearing glasses?

A. Um, no.

MS. ELLISON: Can you have the Defendant please look at the witness, Your Honor?

UNIDENTIFIED SPEAKER: I'm sorry.

A. He is wearing glasses.

Q. He's wearing glasses? Okay.

MS. ELLISON: Your Honor, may the record reflect that the witness has identified the Defendant as Steven Farthing?

THE COURT: Yes.

{¶ 33} Defense counsel objected, arguing R.M.W. "clearly pointed to the back of the courtroom twice and then she asks if we can have the Defendant look at her directing her to identify my client." T. at 138. The prosecutor argued appellant "was looking down hiding his face the entire time I was asking about identification." *Id.* The trial court determined the identification was subject to cross-examination and was a weight of the evidence issue. T. at 139.

{¶ 34} Defense counsel did not cross-exam R.M.W. on the issue of identification.

{¶ 35} Based upon the transcript, we find sufficient evidence of identification of appellant as the perpetrator.

{¶ 36} Regarding appellant's argument that the state failed to prove that R.M.W. was not his spouse, again, R.M.W. was seven years old when she testified. T. at 135. She stated appellant was her uncle. T. at 137, 168. R.M.W.'s mother testified appellant was one of her older brothers. T. at 60. S.F. testified she was planning on starting divorce proceedings from appellant which would imply that she and appellant were married. T. at 445.

{¶ 37} Based upon the testimony, we find sufficient evidence was presented to establish that R.M.W. was not the spouse of appellant.

{¶ 38} S.B., the victim's mother and appellant's sister, testified how R.M.W. and her younger child came to be cared for by appellant and his wife in July 2017. T. at 61-70. In August 2017, appellant's wife surprised S.B. by formally filing for custody of the children so R.M.W. could be enrolled in school. T. at 71-74, 105, 107. In April 2018, R.M.W. told S.B. some things that concerned S.B. enough to call law enforcement and have the child transported to Nationwide Children's Hospital. T. at 83, 86-90. The children were returned to S.B.'s custody. T. at 114-115.

{¶ 39} R.M.W. testified to living with appellant when she was four and five. T. at 139. She stated appellant made her touch his private places with her hands, specifically his "winkie." T. at 144-145. She then described what happened while she was touching it. T. at 147-148. She stated he made her touch his winkie again with her hands and also with her mouth. T. at 149-150. Again, she described what happened. T. at 151-157. Once, appellant made her smoke from "a little long thing and there is a little hole in the end and there is a big hole, and, um, you put some stuff in it and you light it up with a lighter." T. at 158. She did not know what was in the big hole, but her

throat felt like fire. T. at 159-160. R.M.W. testified she spoke to two people at the hospital. T. at 184, 190.

{¶ 40} Carolyn Apple, a pediatric sexual assault nurse examiner at Nationwide Children's Hospital, observed R.M.W.'s interview and physically examined her. T. at 196-197, 212. R.M.W. "disclosed that her uncle had her touch his genitals." T. at 213.

{¶ 41} Jennifer Sherfield, a forensic interviewer at Nationwide Children's Hospital, interviewed R.M.W. T. at 222, 224. Portions of the videotaped interview were played to the jury. T. at 227; State's Exhibits 2 and 3. R.M.W. related her Uncle Steven wanted help to go potty, so she held his winkie for him in the bathroom. T. at 234. It happened one time. *Id.* Her description of what happened was nearly identical to her testimony. T. at 235-236, 241, 243-244. She also explained the smoking incident. T. at 236-238. She stated it happened twice. T. at 239. She then related how appellant made her put his hand on his winkie "a long time ago" and that happened in the living room. T. at 243-244. Appellant told her not to tell her mommy or anything that goes on in this house or "I would get a whooping and I would lose my bag of gum." T. at 243. In a second interview conducted six months later, R.M.W. stated Uncle Steven "put his winkie in my mouth" and that happened "two - - three times." T. at 283, 287. Her description of what happened was very similar to her testimony. T. at 291-293. She also stated she had to help him go to the bathroom and she had to touch his winkie. T. at 293-296. When asked if somebody else ever made her touch their private places, R.M.W. said "[n]o, only Uncle Steven." T. at 299.

{¶ 42} Kerry Schnirring, a psychology assistant with Lighthouse Family Center, reviewed R.M.W.'s forensic interviews. T. at 324-325, 338. She explained very rarely does a child disclose everything at their first interview. T. at 326. It can take "weeks,

months or even years for a child to feel comfortable enough to tell the whole story." *Id.* Ms. Schnirring opined "I was very concerned that this was, in fact, a trauma of sexual abuse that she experienced." T. at 338-339. R.M.W. was "very detailed and specific." T. at 339. Ms. Schnirring concluded (T. at 349):

> In my opinion after paying attention to her childlike language, the idiosyncratic details that she provided, the number of details that she provided, all the context she provided for why she was in certain rooms at certain times, that suggested to me that she has, in fact, experienced the trauma of sexual abuse and that she would probably benefit from specific counseling to address that.

{¶ 43} Ms. Schnirring watched very closely for coaching given "there was a bit of a custody issue going on," but did not see anything that she would typically see with a child who had been coached. T. at 351. On cross-examination, Ms. Schnirring agreed some of R.M.W.'s statements were inconsistent, but "you have to understand how five-year olds talk and how they jump around." T. at 366.

{¶ 44} S.F., appellant's wife, testified for the defense. The children were dropped off at their home in July 2017. T. at 423. She agreed to care for the children for a week. T. at 425. After that, she contacted S.B. to come get the children, but S.B. always had an excuse. T. at 426. They agreed on a date in August for S.B. to pick up the children, but S.B. was a no-show. T. at 427. S.F. then decided to make the situation more permanent so she could enroll R.M.W. in school, take care of the children medically, and receive financial assistance. T. at 430. That is when she

received emergency custody of the children in August 2017. T. at 431. After S.B. agreed in April 2018 to supervised visitation with her children, the allegations against appellant were made. T. at 440-441. At no time did R.M.W. report any incidents involving appellant to S.F. or exhibit any odd or alarming behaviors around appellant. T. at 444.

{¶ 45} The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison,* 49 Ohio St.3d 182, 552 N.E.2d 180 (1990). The trier of fact "has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger,* 77 Ohio St.3d 415, 418, 674 N.E.2d 1159 (1997).

{¶ 46} Upon review, given the testimony of R.M.W., Ms. Sherfield, and Ms. Schnirring, we find sufficient evidence, if believed, to support the guilty finding, and we do not find any manifest miscarriage of justice.

{¶ 47} Assignments of Error II and III are denied.

{¶ 48} The judgment of the Court of Common Pleas of Fairfield County, Ohio is hereby affirmed.

By Wise, Earle, J.

Gwin, P.J. and

Wise, John, J. concur.

Hon. Earle E. Wise, Jr.

Hon. W. Scott Gwin

Hon. John W. Wise

EEW/db

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
STEVEN FARTHING	:	
Defendant-Appellant	:	CASE NO. 2019 CA 00049

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Fairfield County, Ohio is affirmed. Costs to appellant.

Hon. Earle E. Wise, Jr.

Hon. W. Scott Gwin

Hon. John W. Wise

EXHIBIT
tabbies
B