IN THE SUPREME COURT OF OHIO
2024

STATE OF OHIO, Plaintiff-Appellant, -vs- JEREMY REED, Defendant-Appellee.	Case No. 24-522 On Appeal from the Fairfield County Court of Appeals, Fifth Appellate District Court of Appeals No. 2023 CA 00012

MERIT BRIEF OF AMICUS CURIAE OHIO PROSECUTING ATTORNEYS ASSOCIATION IN SUPPORT OF APPELLANT STATE OF OHIO

Steven L. Taylor 0043876
Legal Research and Staff Counsel
Ohio Prosecuting Attorneys Association
196 East State Street, Ste. 200
Columbus, Ohio 43215
Phone: 614-221-1266
Fax: 614-221-0753
E-mail: taylor@ohiopa.org
Counsel for Amicus Curiae Ohio Prosecuting Attorneys Assn.

Stephen E. Palmer 0065265
Palmer Legal Defense
511 South High Street
Columbus, Ohio 43215
Phone: 614-224-6142
E-mail:
spalmer@palmerlegaldefense.com
Counsel for Defendant-Appellee

R. Kyle Witt 0079890
Fairfield County Prosecuting Attorney
Sarah A. Hill 0092225
(Counsel of Record)
Assistant Prosecuting Attorney
349 W. Main Street, Suite 101
Lancaster, Ohio 43130
Phone: 740-652-7560
Email:
sarah.hill@fairfieldcountyohio.gov
Counsel for State of Ohio

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

CONSTITUTIONAL PROVISIONS

STATEMENT OF AMICUS INTEREST

The Ohio Prosecuting Attorneys Association (OPAA) is a private, non-profit trade organization that supports the state's 88 elected county prosecutors. Its mission includes assisting prosecuting attorneys in the pursuit of truth and justice and advocating for public policies that promote public safety and help secure justice for victims.

OPAA respectfully submits that the Fifth District's decision implicates an important principle in child sex-abuse cases. While the Fifth District nominally stated that it was only reviewing for an abuse of discretion, its ruling amounts to a de facto ruling as a matter of law that juries are incapable of following limiting instructions in such cases because of the inflammatory nature of the charges. But the standard of review is for abuse of discretion, and appellate courts have found that child sex-abuse charges involving different victims can be tried together without being severed under Crim.R. 14 because the charges can be simple and direct. Courts also have repeatedly reaffirmed the efficacy of limiting instructions, presuming that juries can follow such instructions. Given these considerations, the Fifth District could not truly find an abuse of discretion on the trial court's part, and so it imposed its will as a matter of law on the issue.

Adding to the reasonableness of the trial court's exercise of discretion here is the fact that requiring four separate trials necessarily would have delayed the ability of three of the victims to receive trials on their charges. Victims have a constitutional right under Marsy's Law to a prompt conclusion of their case without unreasonable delay. Article I, Section 10a(A)(8), Ohio Constitution. Delays are common, and many are reasonable, but a reversal on "abuse of discretion" grounds should be rare when a trial court exercises its discretion to avoid such delays and allow a victim's charges to be tried alongside those of

other victims, thereby avoiding the seriatim delays that otherwise would ensue from an order of severance that would require multiple trials. But under the Fifth District's logic, severance will be necessary as a matter of law, without regard to the trial court's discretion and without regard to any consideration of the victims' rights.

The Fifth District also went beyond the record in making an assumption that the defendant would be pursuing a complete-denial defense at trial. In fact, the defense motion to sever stated nothing about what defense theories would be pursued at trial. The defendant-movant has the obligation of provide sufficient information at the time of the motion so that the court can weigh the considerations favoring joinder against the defendant's right to a fair trial, and the conclusory motion here was simply silent in this important respect. The trial court hardly can be faulted for denying a motion that was insufficient, and, likewise, the Fifth District could not legitimately find an "abuse of discretion" based on an assumption not supported by the defense motion.

In the interest of aiding this Court's review herein, amicus curiae OPAA offers the present amicus brief in support of the State's appeal.

STATEMENT OF FACTS

Amicus OPAA adopts by reference the procedural and factual history as set forth in the State's merit brief.

ARGUMENT

> **Amicus OPAA's First Proposition of Law**: Upon an appeal after a defendant's no contest plea, a trial court's denial of a pretrial motion to sever counts is reviewed under an abuse-of-discretion standard based solely on the record developed at the time of the pretrial ruling, but also taking into account the court's ability at that time to deny a conclusory pretrial defense motion with the knowledge that the defense will be able to renew the motion later based on new information.

While the Fifth District was correct in concluding that the defendant's no contest plea preserved the ability to appeal the trial court's denial of the pretrial motion for severance, there are nevertheless limits to such review. Criminal Rule 12(I) provides that "[t]he plea of no contest does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a pretrial motion, including a pretrial motion to suppress evidence." The focus of such an appeal would be on the legitimacy of the pretrial ruling at the time it was made, and the court's ruling must be assessed within the context of the record that was developed at the time.

Also, under the plain terms of Crim.R. 12(I), the defendant must demonstrate that the trial court *prejudicially* erred in the pretrial ruling. "Inherent in that rule's language is the notion that when a judgment stemming from a no-contest plea is appealed, it is permissible for the appellate court to review the claimed error for prejudice, just like any other error." *State v. LaRosa*, 165 Ohio St.3d 346, 2021-Ohio-4060, ¶ 41. In regard to the pretrial denial of motions to sever counts, an assessment of prejudice would include taking into account the defense's failure to sufficiently develop the record to support severance at the pretrial stage. It would also take into account the narrow procedural posture in which the motion arises: the trial court does not act with finality when it

denies a pretrial motion to sever, and the court acts with the knowledge that the defendant can renew the motion to sever based on new information developed later.

A. Appellate Court Went Beyond the Developed Record

The State is rightly criticizing the conclusory nature of the defense motion to sever. The Fifth District's decision is subject to similar criticism because it went beyond the record that was developed at the time of the trial court's ruling.

This focus on the developed record arises from the defendant's burden to provide sufficient information to allow the court to rule on the pretrial motion.

> {¶104} "Notwithstanding the policy in favor of joinder," Crim.R. 14 permits a defendant to request severance of the counts in an indictment "on the grounds that he or she is prejudiced by the joinder of multiple offenses." *State v. LaMar*, 95 Ohio St. 3d 181, 2002-Ohio-2128, 767 N.E.2d 166, ¶ 49. The defendant "has the burden of furnishing the trial court with sufficient information so that it can weigh the considerations favoring joinder against the defendant's right to a fair trial." *State v. Torres*, 66 Ohio St.2d 340, 343, 421 N.E.2d 1288 (1981). But even if the equities appear to support severance, the state can overcome a defendant's claim of prejudicial joinder by showing either that (1) it could have introduced evidence of the joined offenses as other acts under Evid.R. 404(B) or (2) the "evidence of each crime joined at trial is simple and direct," *State v. Lott*, 51 Ohio St.3d 160, 163, 555 N.E.2d 293 (1990).
>
> * * *
>
> {¶106} We review a trial court's ruling on a Crim.R. 14 motion for an abuse of discretion. *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, 840 N.E.2d 151, ¶ 166. A defendant who appeals the denial of relief bears a heavy burden:
>
> > He must affirmatively demonstrate (1) that his rights were prejudiced, (2) that at the time of the motion to sever he provided the trial court with sufficient information so that it could weigh the

> considerations favoring joinder against the defendant's right to a fair trial, and (3) that given the information provided to the court, it abused its discretion in refusing to separate the charges for trial.
>
> *State v. Schaim*, 65 Ohio St. 3d 51, 59, 1992-Ohio-31, 600 N.E.2d 661 (1992). "Abuse of discretion" has been defined as an attitude that is unreasonable, arbitrary, or unconscionable. *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St.3d 83, 87, 19 Ohio B. 123, 482 N.E.2d 1248 (1985), citing *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). "A decision is unreasonable if there is no sound reasoning process that would support that decision." *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990).

State v. Ford, 158 Ohio St.3d 139, 2019-Ohio-4539, ¶¶ 104, 106.

A centerpiece for the Fifth District's decision was its claim that the defendant "does not claim accident. Rather, Appellant denies perpetrating the offenses altogether. The other acts evidence, thus, would not be necessary to negate any claim of identity, absence of mistake, or lack of accident." Opinion, ¶ 22. But this statement went beyond what the defendant had set forth in his motion to sever, and nothing else in the record at the time of the trial court's ruling supported this claim by the appellate court. In fact, the defense motion to sever made *no claim whatsoever* as to what kind of defense strategy would be pursued at trial. One can imagine a range of possible defense strategems, and the defense did nothing to narrow what defense theories might be pursued at trial. The defense did not claim that it would be pursuing a complete-denial defense as to all charges. Nor did the defense rule out claiming lack of sexual purpose as to some or all of the GSI, kidnapping, and sexual-imposition charges. Nor did the defense rule out the possibility that the defendant might admit guilt as to some counts while denying others.

In regard to sisters G.K. and L.K. who were named as victims in fifteen of the counts, the defense likewise did not rule out claiming that G.K. and L.K. had conspired between themselves or with their mother to concoct the sex-offense charges, a claim which potentially would have provided additional ground for trying those counts together.

At bottom, no one knows what approach the defense was going to take to the various charges at trial, and a trial court (or later appellate court) should not be allowed or required to guess. Indeed, it is likely that the defense itself did not know what theories it would pursue at trial. Just three days before filing the motion to sever, the defense had moved for a continuance by citing the need for further trial preparation. (See 4-8-22 Motion for Continuance)

The defense's cagey silence also comes to the forefront in light of factual information provided in the State's memorandum opposing severance. The facts showed that the defendant had insinuated himself into three homes through romantic relationships with the female heads of household which simultaneously gave him the opportunity as a purported father (or grandfather) figure to gain access to the minor female victims.

Two incidents stand out in which he was "caught" in the act. In the second household, the mother came home early from work and discovered that the defendant was under a blanket with the minor victim G.K., at which point the defendant jumped up in surprise and the mother could see that his pants were down. In the third household, the grandmother actually witnessed the defendant touching the thigh of the minor victim while the victim slept. These incidents supported by adult witnesses were most likely to lead to lack-of-intent or "accident" claims by the defense, rather than a "complete denial"

defense. In any event, the defendant's motion provided no clue as to the defense strategy as to any of the charged counts.

In terms of appellate review, the Fifth District simply got it wrong in concluding that the defense strategy would be a complete-denial defense. The defense was required to provide sufficient information to allow the trial court to rule *at that time*, and an abuse of discretion can only be found on appeal "given the information provided to the court." *State v. Clinton*, 153 Ohio St.3d 422, 2017-Ohio-9423, ¶ 46, quoting *State v. Schaim*, 65 Ohio St.3d 51, 59 (1992). The Fifth District could not create a post hoc rationale that supposedly demonstrated prejudice or an abuse of discretion.

The defense's cagey silence in failing to specify the defense(s) crippled the defense's ability to make any showing of "prejudice." If the defense were to concede guilt in some respects, such concession(s) would naturally impact any assessment of prejudice. And if the defense were pursuing lack-of-sexual-purpose or "accident" defenses, such a strategy would impact the admissibility of other-acts evidence and likely would allow the admission of such evidence. *State v. Smith*, 162 Ohio St.3d 353, 2020-Ohio-4441, ¶ 49. Without knowing the would-be defense theories to be pursued at trial, it becomes guesswork for the defense to actually show prejudice.

Given the bare bones nature of the defense motion to sever and the failure of the defense to specify would-be defense(s), it is also necessarily true that the analysis of admissibility under Evid.R. 404(B) could not be fully undertaken. While the State could propose potential theories of admissibility in its opposing memorandum, it could not presume to dictate or identify what defense(s) would actually be pursued by the defense. The defense was the sole party who could identify the would-be defense trial theories.

Indeed, even when a defendant has made pretrial statements asserting a particular theory, it is well known that the defense can abandon that theory and pursue another theory at trial. See, e.g., *State v. Hartman*, 161 Ohio St.3d 214, 2020-Ohio-4440, ¶¶ 7-8 (complete denial in pretrial statement, but consent theory at trial). Given that the issue of admissibility considers what is "actually in dispute," see *id*. ¶ 27, the end result is that admissibility determinations could not be fully made on such an incomplete record.

Any effort to blame the State or the trial court for the inadequate record must be rejected. As already indicated, it is the defense's job to provide sufficient information, not the State's. Moreover, on the particular question of what defense(s) will be pursued at trial, *only* the defense could make that disclosure. The State cannot be expected to tell the court what would-be defense(s) will be pursued, and, even to the extent that the defendant has made pretrial statements, those statements would not bind the defense at trial since the defense could abandon any pretrial statement and pursue other theories.

In its briefing in the court of appeals, the defense complained that the trial court did not hold a hearing on the motion. (6-21-23 Defense Brief, at 12) But the defense motion to sever did not request an evidentiary or oral hearing, thereby forfeiting the issue. *State v. Miller*, 105 Ohio App.3d 679, 692 (4th Dist.1995) (no error in failing to hold hearing, since defendant "never requested a hearing on his motion to sever"); see, also, *City of Bedford Hts. v. Menefee*, 8th Dist. No. 76184, 1999 Ohio App. LEXIS 5299, at *7 (Nov. 10, 1999) ("failure to request an oral hearing on a pretrial motion to suppress waives any claim of error concerning the failure to conduct a hearing."). Moreover, when the court set the motion for a non-oral hearing, the defense had several days to

object and/or to request an oral hearing or evidentiary hearing, and the defense did not do so.

The tactic of cagey silence provides the likely explanation for the defense decision not to request a hearing. Had there been an evidentiary or oral hearing, the trial court very well could have asked the defense what defense(s) it would be pursuing. The defense for various reasons could have wanted *not* to commit to any defense. If the court asked what defense would be pursued, an answer of "I don't know" from the defense counsel would have exposed the premature nature of the motion for sever. If defense counsel conceded that the defense would be pursuing lack-of-sexual-purpose or accident defenses as to some counts, then such a concession would have readily led to the conclusion that all of the acts of sexual abuse would be admissible under Evid.R. 404(B) anyway, thereby negating any need for severance. And if the defense counsel asserted a conspiracy of the sister-victims, that assertion readily would have led to the conclusion that a joint trial was necessary as to those fifteen counts at a minimum. The defense tactic of cagey silence represented an apparent bluff, and having any form of hearing could have exposed the bluff and provided additional reasons for having a joint trial.

In the final analysis, the conclusory nature of the motion rendered it insufficient to support severance, and the Fifth District erred in going beyond the conclusory motion to create a post hoc rationale to reverse the trial court's denial of the motion. "The defendant * * * bears the burden of proving prejudice and of proving that the trial court abused its discretion in denying severance." *State v. Dean*, 146 Ohio St.3d 106, 2015-Ohio-4347, ¶ 61, quoting *State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, ¶ 29. "It is the defendant's burden to demonstrate that joinder is prejudicial." *State v. Gordon*,

152 Ohio St.3d 528, 2018-Ohio-259, ¶ 21. "A defendant who appeals the denial of relief bears a heavy burden." *Clinton*, ¶ 46.

B. Discretion to Deny When There is Insufficient Information and When the Motion can be Renewed Later

The trial court's denial of the pretrial motion also must be understood to take place within the context of the defense still having available to it the ability to renew the motion at a later time, including at trial. Under Crim.R. 12(C)(5) and (D), a motion to sever counts must be brought within 35 days after arraignment or seven days before trial, whichever is earlier. But the rule also allows the court in the interest of justice to extend the time for making the pretrial motion. Crim.R. 12(D). If the defense was unable to provide sufficient information regarding its would-be trial theories within the original deadline, it could seek to extend its deadline until a later date. And if new information developed later, the defense could seek to renew the earlier motion based on the new information because the interests of justice warranted its consideration. The defense also must renew its motion to sever at trial to preserve the issue. *State v. Sapp*, 105 Ohio St.3d 104, 2004-Ohio-7008, ¶ 68; *State v. Cunningham*, 10th Dist. No. 21AP-470, 2024-Ohio-2032, ¶ 40.

In this context, the court's denial of an original motion looks even more reasonable. By operation of law, the denial of the insufficient motion was merely interlocutory and was subject to additional motion practice to be pursued by the defense if the defense developed additional reason(s) for granting severance. The pretrial denial of the motion does not completely cut off the defendant's ability to obtain severance.

The defendant's no contest plea obviated any trial that would have occurred here,

and so there was not going to be a motion to renew at trial. Even so, before the defendant pleaded no contest, over nine months had elapsed from the denial of the pretrial motion to sever on May 2, 2022, and the defense did not renew the motion during that time. This leaves the present case in a posture in which the only ruling on a pretrial motion to be reviewed on appeal is the denial of the original motion. The insufficiency of the pretrial motion leads to the conclusion that the court's pretrial order must be affirmed.

C. Denying Severance When "Other Acts" Admissible and When Charges are "Simple and Direct"

Even if a defendant makes a prima facie showing of prejudice, such a showing is not conclusive. The State can negate the claim of prejudice by demonstrating "either (1) that evidence relative to the count subject to joinder would have been admissible in the trial of the remaining counts under the 'other acts' portion of Evid. R. 404(B), or (2) that, irrespective of the admissibility of such evidence under Evid. R. 404(B), the evidence as to each count is 'simple and direct.' The latter test focuses on whether the trier of fact is likely to consider 'evidence of one [offense] as corroborative of the other * * *.'" *State v. Wiles*, 59 Ohio St.3d 71, 77 (1991) (citations omitted).

"Under the second method, the 'joinder' test, the state is not required to meet the stricter 'other acts' admissibility test, but is merely required to show that evidence of each crime joined at trial is simple and direct. Thus, when simple and direct evidence exists, an accused is not prejudiced by joinder regardless of the nonadmissibility of evidence of these crimes as 'other acts' under Evid. R. 404(B)." *State v. Lott*, 51 Ohio St.3d 160, 163-64 (1990) (citations omitted). "Because the two tests are disjunctive, the satisfaction of one negates an accused's claim of prejudice without consideration of the

other." *State v. Truss*, 10th Dist. No. 18AP-147, 2019-Ohio-3579, ¶ 17.

> {¶22} The Supreme Court of Ohio has said that evidence is "simple and direct," where (1) proof of each offense is "separate and distinct" or could be "readily separated"; (2) the jury is unlikely to be confused; and (3) "the evidence of each crime is uncomplicated." *State v. Coley*, 93 Ohio St.3d 253, 260, 2001-Ohio-1340, 754 N.E.2d 1129 (2001); *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, ¶ 52; and *State v. Clinton*, 153 Ohio St.3d 422, 2017-Ohio-9423, 108 N.E.3d 1, ¶ 52.
>
> {¶23} An additional point to consider is the trial court's cautionary jury instructions. *E.g., Clinton* at ¶ 52. Furthermore, the simple and direct test "focuses on whether the trier of fact is likely to consider 'evidence of one [offense] as corroborative of the other * * *.'" *State v. Wiles*, 59 Ohio St.3d 71, 77, 571 N.E.2d 97 (1991), quoting *Dunaway v. United States*, 205 F.2d 23, 27, 92 U.S. App. D.C. 299 (D.C. Cir.1953). Joinder may be prejudicial when the offenses are unrelated and the evidence as to each is very weak, * * * but it is otherwise when the evidence is direct and uncomplicated and can reasonably be separated as to each offense." (Citations omitted.) *Torres*, 66 Ohio St.2d at 343-344, 421 N.E.2d 1288.

State v. Kocevar, 2023-Ohio-1513, 213 N.E.3d 1240, ¶¶ 22-23 (2d Dist.).

As already indicated, the original defense motion to sever was insufficient and therefore provided no basis to sever. The Fifth District guessed that the defense would have pursued a complete-denial strategy, but the trial court cannot be found to have abused its discretion in failing to consider a complete-denial defense theory that was not even proffered by the defense in the motion.

The State should not be penalized for the defense's cagey silence. In response to an insufficient defense motion, the State should be able to posit theories of admissibility based on possibilities of what the defense might argue at trial. A defense motion asserting no defense trial theory effectively leaves open *every* possible defense theory

that might be pursued, and questions of admissibility under Evid.R. 404(B) would consider all of those possible theories.

1. GSI Charge as to Victim A.M.

The singular charge of gross sexual imposition committed against victim A.M. stands out as avoiding severance. Under a simple-and-direct approach, the crime against A.M. was an isolated event in that household and was the last-occurring incident. Even if that incident was not admissible as to the crimes against the other victims, the jury would be able to segregate it and compartmentalize its consideration of that count in a trial that also addressed the crimes committed against the other victims. "Ohio appellate courts have upheld joinder in sex abuse cases involving multiple child victims where the evidence as to each offense is separate, uncomplicated and sufficient to support a conviction without necessitating the use of evidence relating to other offenses." *State v. Ashcraft*, 12th Dist. No. CA2008-12-305, 2009-Ohio-5281, ¶ 19. A case can meet the "simple and direct" test even with evidence involving five child sex-abuse victims spanning several years. Id. ¶ 2 ("This case arises out of appellant's alleged sexual abuse of five female minors over the course of 15 years, from 1989 to 2004."). "Ohio Appellate Courts have repeatedly found no abuse of discretion where sexual assault charges against different victims were joined for trial after determining that the evidence of each case was separate and distinct." *State v. Carter*, 3d Dist. No. 1-21-19, 2022-Ohio-1444, ¶ 26 (two victims); *State v. Addison*, 12th Dist. No. CA2019-07-058, 2020-Ohio-3500, ¶ 53 (three victims); *State v. Valentine*, 5th Dist. No. 18 CA 27, 2019-Ohio-2243, ¶ 56 (two victims).

The trial court can reach the simple-and-direct conclusion even when there will

be some evidentiary overlap. See *State v. Bradshaw*, 2023-Ohio-1244, 213 N.E.3d 117, ¶ 14 (3d Dist.) (three victims sexually abused in same residence: even with some evidentiary overlap, "evidence was sufficiently straightforward and uncomplicated that the jury could readily segregate the proof required for each offense."); *State v. A.M.*, 8th Dist. No. 106400, 2018-Ohio-4209, ¶ 37 (denial of severance affirmed: "three named victims were all biological daughters of" defendant; "alleged abuse was facilitated by his access to the children due to the nature of that relationship" and "cases were interrelated" because victims disclosed to each other).

The value of appropriately-worded jury instructions must be considered in assessing whether the jury would be likely to use the evidence of the crime against A.M. as corroborative of the crimes committed against the other victims. The standard is whether it is *likely* that the jury would disregard such instructions. The defense would have the heavy burden to show that the trial court abused its discretion in crediting the jury's ability to follow such instructions.

The law favors and presumes the efficacy of limiting instructions. This Court presumes the efficacy of jury instructions prohibiting the misuse of other-acts evidence. *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, ¶ 23 ("We presume the jury followed those instructions."); *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, ¶ 69 (same); *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, ¶ 103 (same); *State v. Williams*, 73 Ohio St.3d 153, 159 (1995) (same). More generally, this Court has repeatedly endorsed the use of limiting instructions and presumed that the jury can follow such instructions. See, e.g., *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, ¶ 190; *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶ 54; *State v. Ahmed*, 103

Ohio St.3d 27, 2004-Ohio-4190, ¶ 147; *State v. Murphy*, 65 Ohio St.3d 554, 584 (1992); *Browning v. State*, 120 Ohio St. 62, 72 (1929). Given this Court's vouching for the value of such instructions, it cannot be said that the trial court abused its discretion in believing that such instructions would avoid prejudice here by preventing the jury from using the evidence from the incident as to victim A.M. in regard to the counts involving the other victims.

The United States Supreme Court recently reaffirmed the value of limiting instructions. "Evidence at trial is often admitted for a limited purpose, accompanied by a limiting instruction. And, our legal system presumes that jurors will '"attend closely the particular language of [such] instructions in a criminal case and strive to understand, make sense of, and follow"' them." *Samia v. United States*, 599 U.S. 635, 646-47 (2023). "The presumption credits jurors by refusing to assume that they are either 'too ignorant to comprehend, or were too unmindful of their duty to respect, instructions' of the court." Id. In the context of severance, the same Court has emphasized that limiting instructions "often will suffice to cure any risk of prejudice." *Zafiro v. United States*, 506 U.S. 534, 539 (1993).

In light of the efficacy of limiting instructions, and given the court's ability to control the presentation of evidence in ways that would avoid confusion, it cannot be said that the trial court abused its discretion in refusing to sever the crime committed against A.M. from the trial of the other counts. Under the simple-and-direct test, the defense would be unable to show that it is likely that the jury would disregard the limiting instruction and consider the evidence involving A.M. for corroborative purposes as to the charges involving the other victims.

Citing *State v. Frazier*, 8th Dist. No. 83024, 2004-Ohio-1121, the Fifth District here refused to credit the efficacy of limiting instructions, contending that it was difficult to believe that the jury would not use the other-acts evidence in a corroborative way across counts. But this contention disregards the discretion afforded to the trial court in this regard, and it misconceives the simple-and-direct test. As stated by the First District:

> {¶14} We find the logic of *Frazier* to be flawed, and decline to follow it. As we understand the second part of the joinder test, the focus is not on the emotional impact of the evidence but on the potential for juror confusion. We cannot presume that just because evidence may garner a strong emotional response that jurors are incapable of segregating the evidence in their minds. To accept the logic of *Frazier* would mean that sex counts could rarely be joined, because the evidence will often be inflammatory. Instead we believe the same rules on joinder should apply in sex cases as in any other case.

State v. Woodruff, 1st Dist. No. C-140256, 2015-Ohio-2422, ¶ 14 (DeWine, J., for the unanimous court).

While the simple-and-direct analysis supported the denial of severance of the GSI count committed against A.M., there was a probable theory of other-acts admissibility that would have allowed the trial of that GSI count with the other counts. As indicated above, there was an adult witness to this act of touching for a sexual purpose of A.M.'s thigh, a circumstance which made it unlikely that the defense would rely on a complete denial. Given the possible defense claim that touching A.M.'s thigh lacked a sexual purpose and was an "accident," the incidents involving the other victims would have been relevant to show the defendant's sexual purpose in touching A.M.'s thigh. The defendant's relationship to the victims, the manner in which he touched them, and the location and environment in which the abuse occurred, were so similar as to strongly

suggest that an innocent explanation was implausible. *Smith*, ¶ 49. "Because [the defendant] placed his intent at issue by claiming that his actions were accidental and not done with sexual intent, the evidence was properly admissible to show absence of mistake – or to put it another way, that he committed the acts not accidentally, but with the intent of sexual gratification." *Id*.

2. Rape, GSI, and Kidnapping Charges as to Sisters G.K. and L.K.

The defendant sought two separate trials as to the crimes committed against G.K. and L.K., but it is difficult to see the logic of separating these groups of offenses.

As noted in the State's memorandum opposing the motion, these victims were sisters and were living in the same household with their mother and with the defendant. The trial court noted that their testimonies were bound to overlap at least to some degree because, "[f]or example, they would be able to testify about how the other was likely alone with the Defendant giving the Defendant the opportunity to commit the alleged crimes." (5-2-22 Entry, at 5) Even if split into two separate trials, the girls would be able to testify on issues related to how the defendant would have been in a position to have time alone with them. The same household was likely to have the same set of practices and schedules in place that would allow the defendant to be alone with them, and each child and their mother would be expected to testify on such matters. This was a factor against severance because severance would require that the girls and their mother testify twice. Joint trials "'conserve state funds, *diminish inconvenience to witnesses* and public authorities, and avoid delays in bringing those accused of crime to trial.'" *Gordon*, ¶ 18 (emphasis added). Indeed, given that the acts of sexual abuse were committed through isolation of each victim, those acts would be admissible for the non-

character/non-propensity purpose of showing the defendant's opportunity to commit the offenses in the same household.

The question of the defendant's sexual purpose would have played a role in both trials too. As to victim G.K., the defendant faced five counts of rape, two counts of kidnapping, and four counts of GSI. As to victim L.K., he faced two counts of rape and two counts of kidnapping. All of the kidnapping counts included the allegation that the defendant removed or restrained the victim with the purpose to engage in sexual activity against the victim's will, and all such counts included a sexual-motivation specification that would be heard by the jury as well, requiring proof of a purpose to gratify the sexual needs or desires of the offender. R.C. 2971.01(J); R.C. 2971.03. The counts of GSI as to victim G.K. likewise required proof of "sexual contact," i.e., that the touching was committed with the purpose of sexual arousal or gratification. R.C. 2907.01(B).

As already indicated, the cagey silence of the conclusory defense motion left open the possibility that the defense might claim lack of sexual purpose or accident as to one or more of these counts. One can easily envision a scenario in which the defendant would claim that some acts of touching did not occur, but that some acts of touching were "misinterpreted" by the victims, and that there was simply no sexual motivation when he removed/restrained these young female victims. Such a defense stance at trial, again, would have made it relevant to prove all sexual activity that the defendant had committed against young girls, such as in *Smith*, to show that he committed the acts not accidentally but with the intent of sexual gratification.

The conclusory nature of the defense motion likewise left open the possibility that the defense would pursue a "conspiracy" or "copycat" theory, in which the defense

would claim that: (1) the victims in that household were "put up" to making the allegations by their mother; (2) the older sister G.K. made the false allegations and convinced the younger sister L.K. to go along; or (3) the younger sister L.K. was merely copying the false allegations that the older sister had already made. These kinds of defenses would easily justify having a joint trial as to both victims because the defense theories would implicate the allegations of both victims, and it would be most efficient to determine such charges and purported defenses in a single trial.

Even assuming that there would be no theory of other-acts admissibility as between the counts involving G.K. and the counts involving L.K., the simple-and-direct approach would have allowed the trial of the counts involving L.K. in the same trial as the counts involving G.K. "While there were several instances of alleged sexual abuse involved, and a number of years over which said abuse occurred, the record demonstrates that the evidence pertaining to each victim and each offense could easily be segregated." *Ashcraft*, ¶¶ 20-21. The evidence underlying the various counts can be presented with "vigilant precision" and in an "organized, chronological" and "victim-specific" way that would reduce the danger of mingling the evidence between counts. *Id*. ¶¶ 18, 20-21, 23. "Ohio appellate courts routinely find no prejudicial joinder where the evidence is presented in an orderly fashion as to the separate offenses or victims without significant overlap or conflation of proof." *State v. Lewis*, 6th Dist. No. L-09-1224, 2010-Ohio-4202, ¶ 33.

The trial court here noted that the State would be able to introduce "evidence of each distinct crime involving each of the four alleged victims about specific detail on how the alleged abuse occurred, when it began, and how long it continued." (5-2-22

Entry, at 2). The trial court also emphasized that it would be able to give specific instructions limiting the jury to the evidence underlying each count and further instructing the jury that a verdict on one count must not influence other counts. (*Id.* at 2) Given the long-standing approval of limiting instructions, it cannot be said that the trial court abused its discretion in crediting the jury's ability to segregate the evidence and to obey the court's limiting instruction preventing the jury from considering such evidence across these different groups of counts.

The defense brief on appeal contended that the State's arguments about the defendant's pattern of sexual abuse at the sentencing hearing "showcase[d] the irresistible temptation to draw broad conclusions about all the allegations rather consider the evidence individually." (6-21-23 Defense Brief, at 11) According to the defense, "[t]he State could not resist the temptation that the evidentiary rules prohibit." (*Id.* at 12) In the defense reply brief, the defense argued that "the State revealed the true purpose of the evidence during the sentencing hearing, arguing that Reed engaged in a 'pattern of sexual depravity' over '20 years.' Sentencing Tr. 7-8. This is precisely what Evid.R. 404(A) prohibits." (8-22-23 Defense Reply Brief, at 6)

These contentions could not be more wrong. Neither the prosecutor nor the court are bound by Evid.R. 404 at sentencing, since the Evidence Rules do not apply. Evid.R. 101(D)(3). In addition, sentencing courts readily consider bad-character and "pattern" arguments at sentencing, since "the function of the sentencing court is to acquire a thorough grasp of the character and history of the defendant before it. * * * Few things can be so relevant as other criminal activity of the defendant * * *." *State v. Burton*, 52 Ohio St.2d 21, 23 (1977). A prosecutor's arguments at sentencing simply do not reflect

the arguments that the prosecutor would have been making to the jury under appropriate limiting instructions during trial. And sentencing arguments certainly do not support any showing of an abuse of discretion on the trial court's part in denying severance in relation to the conclusory defense motion several months earlier.

3. GSI and Sexual-Imposition Charges as to T.S.

The four counts of GSI and two counts of sexual imposition involving victim T.S. could have been readily segregated. They arose in another household and occurred a number of years before the incidents occurring in the second household involving G.K. and L.K. and the third household involving A.M. Again, if the incidents involving T.S. were not admissible as other acts in relation to the crimes involving the other victims, the trial court could take steps to segregate the presentation of the evidence as to this earlier group of offenses and could credit the jury's ability to follow the court's instructions to determine guilt as to these groups of offenses separately.

Nevertheless, given the possibility that the defense would pursue lack-of-sexual-purpose or "accident" theories as to other victims, the evidence admitted under the counts as to T.S. would be admissible as to the counts as to the other victims to negate such theories. Likewise, the evidence as to the other victims would be admissible to negate "accident" and lack-of-sexual-purpose theories that the defense possibly would pursue as to the crimes committed against T.S.

4. Admissibility under *State v. Williams*

In its memo opposing severance, the State relied heavily on this Court's decision in *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, which supports admissibility.

The defendant in *Williams* was facing dozens of counts for sexually abusing a boy

beginning in 2008 when the boy was 14 years old. The allegations arose from a scenario in which the boy had no father figure and the defendant exploited a church-related mentor relationship with the boy. The defense was pursuing attacks on the State's case by contending, inter alia, that: (1) the boy had credibility issues and was suicidal; (2) the boy made up the allegations "to get out of trouble" at school; and (3) the defendant had no sexual attraction to boys. *Williams*, ¶ 6.

The State was allowed to introduce the testimony of another boy who was sexually abused by the defendant 11 years before when the defendant was one of that boy's swim coaches. The evidence showed that the defendant's relationship and course of offending as to the other boy paralleled the offending charged in the current case being tried, with the defendant also exploiting a mentor relationship as a coach to the boy.

This Court affirmed the admissibility of the other-acts evidence, even though it related to acts occurring several years before.

> {¶21} The state offered the testimony of A.B. to demonstrate the motive, preparation, and plan of the accused to target teenage males who had no father figure and to gain their trust and confidence for the purpose of grooming them for sexual activity with the intent to be sexually gratified. *See United States v. Chambers*, 642 F.3d 588, 593 (7th Cir.2011) ("Grooming refers to deliberate actions taken by a defendant to expose a child to sexual material; the ultimate goal of grooming is the formation of an emotional connection with the child and a reduction of the child's inhibitions in order to prepare the child for sexual activity"); *United States v. Johnson*, 132 F.3d 1279, 1283 (9th Cir.1997), fn. 2 ("'Shaping and grooming' describes the process of cultivating trust with a victim and gradually introducing sexual behaviors until reaching the point of intercourse").
>
> {¶22} As to the first step of our three-part test for the admission of other acts evidence, A.B.'s testimony was

> relevant because it tended to show the motive Williams had and the preparation and plan he exhibited of targeting, mentoring, grooming, and abusing teenage boys; if believed by the jury, such testimony could corroborate the testimony of J.H. Notably, A.B.'s testimony also rebutted the suggestion offered by the defense during opening statements that J.H. had falsely accused Williams of abuse with the hope of getting out of trouble at school and the suggestion that Williams was sexually attracted to women. A.B.'s testimony that Williams received "some type of sexual gratification" also is relevant to show that Williams's intent was sexual gratification. *See* R.C. 2907.01; 2907.05(A)(1).

Williams, ¶¶ 21-22.

Williams recognized the change in law that was wrought by the adoption of Evid.R. 404(B). The Eighth District in *Williams* had relied heavily on the pre-rule decision in *State v. Curry*, 43 Ohio St.2d 66 (1975), as requiring the exclusion of the evidence because the other acts were not part of the immediate background to the charged offenses and because identity was not at issue. *Williams*, ¶ 1. But *Williams* rejected such reliance on *Curry* given that the rule was different than the statute that had controlled admissibility before the rule.

> {¶2} Pursuant to Evid.R. 404(B), * * * evidence of other crimes, wrongs, or acts of an accused may be admissible to prove intent or plan, *even if the identity of an accused or the immediate background of a crime is not at issue.* Consequently, evidence that Williams had engaged in sexual relations with a teenage boy on previous occasions may be admissible to prove that Williams had a plan to target vulnerable teenage boys, to mentor them, and to groom them for sexual activity with the intent of sexual gratification. The rule precludes admission of evidence of crimes, wrongs, or acts offered to prove the character of an accused to demonstrate conforming conduct, but it affords the trial court discretion to admit other acts evidence for any other purpose, and therefore, we reverse the judgment of the appellate court and reinstate the judgment of the trial

court.

* * *

{¶17} While both the statute and the rule adopted the common law rule, they also carve out exceptions to that common law, and some differences exist between the statute and the rule. The statute affords the trial court discretion to admit evidence of any other acts of a defendant in cases where motive or intent, absence of mistake or accident, or scheme, plan, or system in doing an act is *material*. *See generally Black's Law Dictionary* 1066 (9th Ed.2009) ("material" means "[h]aving some logical connection with the consequential facts"). Evid.R. 404(B) contains no reference to materiality. Rather, it precludes the admission of evidence of crimes, wrongs, or acts offered to prove the character of an accused in order to demonstrate conforming conduct, and it affords the trial court discretion to admit evidence of other crimes, wrongs, or acts for "other purposes," including, but not limited to, those set forth in the rule. Hence, *the rule affords broad discretion to the trial judge regarding the admission of other acts evidence*.

{¶18} In *Curry*, we interpreted R.C. 2945.59 and stated that "scheme, plan, or system" evidence is relevant in two general factual situations: those in which the other acts form part of the immediate background of the alleged act that forms the foundation of the crime charged in the indictment and those involving the identity of the perpetrator. *Curry*, 43 Ohio St.2d at 72, 330 N.E.2d 720. But we did not limit admissibility to those two situations. Moreover, *Curry* predated Evid.R. 404(B), so it did not consider or apply that rule.

{¶19} Evidence of other crimes, wrongs, or acts of an accused tending to show the plan with which an act is done may be admissible for other purposes, such as those listed in Evid.R. 404(B) – to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident * * *.

Williams, ¶¶ 2, 17-19 (emphasis added).

Williams plainly rejected the pre-rule limits on "plan" evidence imposed by

Curry. The other-acts evidence in *Williams* involving the first teenage victim had predated the acts on trial by over a decade and presumably did not meet an "immediate background" or "inextricably related" or "overarching grand design" test. And the charges now on trial in *Williams* involved a victim to whom the defendant was well known, thereby supposedly removing "identity" from being in "dispute." Even in these circumstances, however, *Williams* fully endorsed admissibility under "preparation" and "plan" approaches, specifically citing both of those approaches as a basis for admissibility, and further emphasizing the trial court's broad discretion to admit other-acts evidence under the rule.

OPAA incorporates by reference here the briefing submitted by the State and the amicus Ohio Attorney General in the *Williams* case. (See *State v. Williams*, No. 11-2094) As discussed therein, pre-rule case law would not be controlling after the adoption of Evid.R. 404(B) in 1980 because the rule supersedes the statute, because the rule affords broad discretion to admit other-acts evidence for one of the purposes listed in the rule and even for purposes not expressly listed in the rule, and because the rule does not make the admissibility of "plan" evidence contingent on the same evidence also proving "immediate background" or "identity." As stated by the Attorney General:

> The court below therefore erred by relying on *State v. Curry*, 43 Ohio St. 2d 66 (1975), a case that pre-dated the Rules of Evidence. *Curry* interpreted "plan" evidence narrowly, consistent with the statute in force at the time. In particular, *Curry* limited "plan" evidence to two circumstances: (1) where the "[i]dentity of the perpetrator of the crime" was at issue; and (2) where the evidence "concern[ed] events which [we]re inextricably related to the alleged criminal act." *Id.* at 73. The Eighth District reversed the conviction in this case because the trial court admitted evidence that did not fit one of *Curry's* narrow

> categories. *Curry*, however, interpreted a statute that no longer governs, and the differences between Rule 404(B) and R.C. 2945.59 reveal that *Curry's* precepts did not survive Rule 404(B)'s enactment.

(See *State v. Williams*, No. 11-2094, Amicus Attorney General's 5-18-12 Merit Brief, at 2) Introducing other-acts evidence to prove a "plan" is not limited to proving only single-episode immediate-background plans; the "plan" language easily includes the concept of a "plan" as involving the use of recurring methods in committing certain offenses, whenever those methods were used. (*Id*. at 12-14)

As further contended by the State in *Williams*:

> This Court's use of a disjunctive "or" in Evid.R. 404(B) indicates that each basis is to be treated as an independent alternative distinct from every other enumerated purpose in the rule. None of the listed bases may be treated merely as a prerequisite to another or otherwise given less than its full meaning. The language of Evid.R. 404(B) therefore precludes *Curry's* interpretation that other acts evidence may be admitted to show a defendant's plan only where the evidence also tends to show identity. Such an interpretation would effectively read the word "plan" out of the rule. Nor can identity and plan be inextricably linked together such that the [sic] each functions as a necessary prerequisite for the other. Evid.R. 404(B)'s listing of separate items mandates that each item be independently sufficient for the introduction of other acts evidence.

(See *State v. Williams*, No. 11-2094, State's 5-18-12 Merit Brief, at 22-23)

Drawing on *Williams*, the State in the present case contended that the defendant's actions with each of the victims were admissible vis-à-vis the other victims.

> The anticipated evidence will show that Defendant Reed repeatedly engaged in a common scheme or pattern in choosing his minor female victims who he could isolate while he lived with their mothers or grandmother, with whom he began romantic relationships. Defendant Reed

> would take on the father figure role with the young girls, where he could groom them and manipulate his girlfriends into trusting him with the daughters or granddaughter. Defendant Reed began abusing T.S. when she was nine years old, G.K. when she was eight years old, L.K. when she was six or seven years old * * *, and A.M. when she was seven years old. Defendant Reed took the additional step to initially begin sexually assaulting T.S., G.K., and A.M. in the middle of the night, when everyone was asleep. Instead of sneaking into her bedroom, Defendant Reed snuck into the bathroom when L.K. was using it, likely to normalize being around her during her private time. And both G.K. and L.K. reported that the only time Defendant Reed would take his clothes off was when he took each of them into the bathroom when the rest of the family was out of the house. And Defendant Reed's sexual behavior towards all four victims, T.S., G.K., L.K., and A.M., began with him touching them in their erogenous zones. * * *

(4-27-22 State's Memo Contra Motion to Sever, at 7-8)

Given these contentions, the admissibility of the other-acts evidence in *Williams* provided strong support for admissibility here. The present case involves the same kind of exploitation of a trusted relationship, with the defendant taking on a father-figure role and using that role to groom the victims. As *Williams* expressly states, such evidence is relevant because it tends to show the motive the defendant had and the preparation and plan he exhibited in targeting, mentoring, grooming, and abusing the young victims. *Williams* plainly approves the admission of such evidence for such non-character/non-propensity purposes and, as *Williams* also notes, "if believed by the jury, such testimony could corroborate the testimony of" the victims in this case.

In the present case, the exact nature of the defense trial strategies was unclear because the defense failed to specify them. But one could easily expect an attack on the victims' credibility in each case to some degree, with it being likely that the defense

would assert theories like the "get out of trouble" theory or the "conspiracy with mom" theory. *Williams* expressly allows the use of other-acts evidence to rebut defense theories that individual victims are falsely accusing the defendant to "get out of trouble." Also, in light of *Williams*, and consistent with *Smith*, it is permissible to use the other-acts evidence to show the defendant's sexual motivation and to refute claims that some of the touching might have been "accidental" or as lacking a sexual purpose.

5. Effort to Distinguish *Williams* Fell Short in *Hartman*

While *Williams* and *Smith* support admissibility in these ways, the defense would likely point to *Hartman* and to other aspects of *Smith* as undercutting the *Williams* analysis as to "plan" evidence. *Hartman* devoted attention to *Williams* in an attempt to distinguish *Williams*. But, in the end, both *Hartman* and *Smith* leave *Williams* in place, and, ultimately, the effort to distinguish *Williams* falls short. This Court would be faced with a decisionmaking "fork in the road" of whether it will adhere to *Williams* or will overrule *Williams* based on the aspects of *Hartman* and *Smith* that cut against that decision.

The present case might not be the case to resolve that question. As already indicated, the defense's cagey silence regarding its would-be trial theories left open the possibility that the defense would argue lack of sexual purpose in regard to the touching and kidnapping offenses. Even under *Smith*, it is appropriate to prove other acts of sexual abuse to rebut claims in the present case of "innocent" actions or "accidental" touching. *Williams* provides an *additional* basis for admitting other-acts evidence of sexual abuse, and this Court would not need to reach that additional basis to conclude that the acts of sexual abuse as to each victim would be admissible here as to the charges

involving the other victims, thereby avoiding severance under the other-acts prong of the severance test.

As between *Hartman* and *Smith*, on the one hand, and *Williams*, on the other hand, the *Williams* analysis of "plan" evidence stands up and should be followed. The problem boils down to *Hartman* seeming to revive the limits on "plan" evidence from *Curry* when *Williams* had already rejected those limits because of the adoption of Evid.R. 404(B).

One problem with the *Hartman* discussion is its use of an overly-compartmentalized analysis. Setting a higher bar for "plan" evidence does not resolve the question of admissibility. This is because admissibility is *not* limited to the purposes expressly listed in the rule. The phrase "such as" after the list of permissible purposes shows that the list is non-exhaustive, as *Hartman* concedes. *Hartman*, ¶ 26 ("nonexhaustive list of the permissible nonpropensity purposes"). *Any* proper purpose can provide a basis for admission. *Williams*, ¶ 2 ("any other purpose"); *State v. Smith*, 49 Ohio St.3d 137, 140 (1990). Accordingly, even if particular other-act evidence does not satisfy a heightened standard for being a "plan," it can still qualify for admission as being reflective of a less-demanding category of evidence, e.g., as evidence of a "system" or as evidence of a "set of methods." Of course, a would-be heightened interpretation of "plan" would "move the goalposts" to some degree, but under the broad, non-exhaustive parameters for admissibility under Evid.R. 404(B), the goalposts are merely moved, and a proponent of evidence is not "stuck" with "plan" as the basis for admission. Whether called a "system" or a "set of methods," the other-acts evidence could still be admissible for such non-character/non-propensity purposes.

Hartman attempted to distinguish *Williams*. *Hartman* variously described "the common understanding of plan evidence" as encompassing: "the same overall plan"; "a larger criminal scheme of which the crime charged is only a portion"; other acts as "'inextricably related' to the crime charged"; other acts as "'immediate background' of the present crime"; other acts as arising out of either the "same transaction" or the same "sequence of events"; other acts as part of "a larger, continuing plan, scheme, or conspiracy, of which the present crime on trial is a part"; and other acts as "prior preparatory acts." *Hartman*, ¶¶ 40-43. *Hartman* then turned to discussing *Williams*:

> {¶43} Here, the evidence plainly does not fit into the common understanding of plan evidence. Hartman's alleged assault of his stepdaughter was not part of a larger scheme involving the rape of E.W. Nonetheless, the state contends that the evidence was admissible as a result of our decision in *Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278.
>
> {¶44} In *Williams*, we considered whether other-acts evidence tending to show a plan may be admitted when the identity of the assailant is not at issue. Although we had previously indicated that such evidence will most often be relevant to illustrate the immediate background of the offense or identify the perpetrator, *see Curry*, 43 Ohio St.2d at 73, 330 N.E.2d 720, we confirmed in *Williams* that plan evidence is not necessarily limited to those scenarios and may be admitted for other purposes, *Williams* at ¶ 19.
>
> {¶45} While the other-acts evidence in *Williams* tended to show that the defendant, who had been charged with the rape of a 14-year-old boy, had a pattern of grooming teenage boys to take advantage of them sexually, that fact alone is not what overcame the propensity bar. Rather, the result in *Williams* turned on the state's use of the other-acts evidence for the purpose of refuting the defendant's claims that he was not sexually attracted to teenage boys and establishing that the defendant had acted with the specific intent of achieving sexual gratification. *Id.* at ¶ 22, 25.

> {¶46} There may be instances in which seemingly unrelated but highly similar crimes could be evidence of a common scheme to commit the charged crime – perhaps, for instance, a string of robberies occurring close in time and location. We stress, however, that plan evidence should show that the crime being charged and the other acts are part of the same grand design by the defendant. Otherwise, proof that the accused has committed similar crimes is no different than proof that the accused has a propensity for committing that type of crime. The takeaway for the jury becomes, "The accused did it once recently; therefore, the accused did it again." Imwinkelried, *Using a Contextual Construction to Resolve the Dispute over the Meaning of the Term "Plan" in Federal Rule of Evidence 404(b)*, 43 U.Kan.L.Rev. 1005, 1012 (1995).
>
> {¶47} Here, Hartman's molestation of his stepdaughter four years prior was not linked to any overarching plan to commit rape against E.W. The incidents are wholly distinct, and unlike the common-scheme evidence demonstrated in *Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, the other-acts evidence in this case contains few similarities to the crimes charged. Thus, the evidence was not relevant to show a common scheme or plan.

Hartman, ¶¶ 43-47. Consistent with the "larger scheme" and "overarching plan" language in *Hartman*, the Court in *Smith* on the same day reiterated that the other acts must be a part of the "same grand design" as the acts on trial so that the "plan" "embrac[ed] both the prior criminal activity and the charged crimes" in a way that created "a direct connection between the two incidents." *Smith*, ¶¶ 40-41.

While *Hartman* conceded *Williams*' holding that other-acts "plan" evidence need not meet the "immediate background" and "identity" limitations of *Curry*, it is fair to point out that *Hartman* thereafter engaged in a post hoc reinterpretation of what *Williams* had actually decided. In suggesting that the grooming evidence was not sufficient to justify admission as "plan" evidence, *Hartman* disregarded the express language in

Williams stating that the other acts demonstrated "preparation" and "plan," concepts which were plainly referring to the evidence of grooming and targeting. *Williams*, ¶¶ 21-22. *Williams* was approving the grooming-targeting evidence as "plan" evidence, and it was *also* approving the other-acts evidence as evidence of motive and specific intent, as evidence that corroborated the testimony of the victim of the charged offenses, and as evidence that helped negate the defense claim that the victim had made up the allegations to "get out of trouble." The fact that the other-acts evidence was admissible in *Williams* for these other purposes does not detract from the holding in *Williams* that the other-acts evidence was also admissible as "plan" evidence. The introduction of other-acts evidence under Evid.R. 404(B) often involves admission of other acts for *multiple* purposes, and each basis would provide an independent basis for admission, notwithstanding admissibility under other grounds.

Nor can the "plan" holding in *Williams* be disregarded on the ground that it was mere "dicta." When a court states two grounds for reaching its judgment, *both* grounds constitute a holding of the court, and neither is dicta. *Massachusetts v. United States*, 333 U.S. 611, 622-23 (1948); *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924); *Richards v. Mkt. Exchange Bank Co.*, 81 Ohio St. 348, 367-368 (1910). "[A]dditional or alternative holdings are not dicta, but instead are as binding as solitary holdings." *Bravo v. United States*, 532 F.3d 1154, 1162 (11th Cir. 2008). At bottom, *Williams* was a "plan" case, and it cannot be distinguished by contending that there were other multiple bases for admission in that case.

As a "plan" case, *Williams* shows that other acts can be admissible even when those other acts were not part of the "same grand design" or same "overarching plan."

The other acts in *Williams* were found to be probative of "plan" even though they occurred over a decade before the acts that were on trial. There was no claim that there needed to be some "direct connection" between the other acts and the acts on trial or that the defendant had planned to sexually abuse the victims over a decade apart so as to make the other acts a part of the "same grand design." The "plan" holding of *Williams* plainly refutes the limits imposed by *Curry* and brings into question the attempt in *Hartman* and *Smith* to resurrect *Curry*.

6. General Evidentiary Doctrine Leads to the Rejection of *Curry* Too

While the broad text of Evid.R. 404(B) itself contradicts *Curry* and supersedes it, it must be noted that *Curry* would represent an anachronism under modern evidentiary doctrine for other reasons. *Curry* concedes that other acts demonstrating a scheme, system, or plan *can* be probative of identity. But, under the *Curry* analysis, it is somehow thought that such probative value evaporates depending on the posture of the proofs at trial, such as if the defense makes a certain concession or if the defendant is already well known to the victim identifying him. But, even with certain concessions, and even with the victim's prior knowledge of the defendant, the fact remains that the case is going to trial and "identity" *is* being disputed.

Evidence does not stop being probative of identity because the State has other evidence that can prove identity too. An item of evidence does not become irrelevant because the proponent has another way of proving a point. "[N]either the Rules of Evidence nor this court's precedents make 'necessity' a prerequisite for admissibility." *State v. Whitaker*, 169 Ohio St.3d 647, 2022-Ohio-2840, ¶ 89. "[E]videntiary relevance under Rule 401 [is not] affected by the availability of alternative proofs * * *." *Old Chief*

v. United States, 519 U.S. 172, 179 (1997). In addition, "need is irrelevant to an Evid.R. 404(B) objection * * *." *State v. McNeill*, 83 Ohio St.3d 438, 442 (1998). The State bears the burden of persuasion, and it often needs to put on multiple items of evidence to prove its case beyond a reasonable doubt. If the other-act evidence is admissible to prove identity when there is no other means of proving identity, it would be just as appropriate to introduce such evidence when there is other evidence of identity.

It is also difficult to understand how the issue of identity would not be considered "actually in dispute" for purposes of other-act evidence when, in fact, identity is sharply disputed. A criminal prosecution does not merely pose some abstract question as to the ability of the State's witnesses to identify the defendant as someone they know. It is the identity of the *perpetrator* that is an element of the offense. *State v. Tate*, 140 Ohio St.3d 442, 2014-Ohio-3667, ¶ 19 (assessing sufficiency of the evidence on "identity as the perpetrator"). "As with any other element, '[t]he identity of a perpetrator may be established by the use of direct or circumstantial evidence.'" *State v. Preston*, 8th Dist. No. 109572, 2021-Ohio-2278, ¶ 27.

When the defendant completely denies the actus reus and all other elements, he is *disputing* identity, not conceding it. Even when the State's witnesses can identify the defendant as the perpetrator, it is also true that the defense will dispute that identification by challenging their credibility and attempting to create doubts through counter-evidence. It is beyond peradventure that a defendant pursuing a complete-denial defense *will* be disputing the evidence identifying him as the perpetrator. In terms of necessity, it is appropriate for the State to introduce additional evidence of identity beyond just the witnesses' identification. Their prior acquaintanceship with the defendant should not

disqualify an entire class of evidence from admission when it is conceded that the evidence bears relevance to proving identity. A complete-denial defense *increases* the propriety of introducing other-acts evidence, rather than negating the admissibility of such evidence altogether.

Hartman is distinguishable on this point. The defendant in *Hartman* was not pursuing a complete-denial defense since the defense came around to conceding at trial that he had committed the sexual-conduct actus reus (albeit with the consent of the victim). Accordingly, there was less of a need to allow the introduction of the other-act evidence to confirm the defendant's identity as the actor involved in the incident.

Even so, *Hartman* still misconceived what was in dispute as to "identity." The defendant's concession of his identity as the actor in consensual sexual conduct is simply not the equivalent of a concession of his identity *as the perpetrator* in the forcible rape claimed by the victim. The State was seeking to prove the latter, and the defense was disputing the State's claim of identity in a forcible rape. Moreover, in proving the State's case, the prosecution can use other acts under Evid.R. 404(B) to rehabilitate the credibility of a witness where "[t]he testimony tended to make it more believable that [the witness] spoke truthfully when testifying * * *." *McNeill*, 83 Ohio St.3d at 442.

In the present case, the evidence of the defendant's scheme, system, or plan in sexually assaulting other young girls was probative of identity.

Such evidence would not represent an improper effort to prove the defendant's "character." As amended in 2022, the rule leaves in place an important limitation on the reach of the rule. The word "propensity" is often used as a short-hand phrase to describe the operation of the rule because the rule prohibits the use of other-act evidence to show

the person's character and to thereby show he was acting "in conformity therewith" (now "in accordance with"). But the rule does not per se prohibit "propensity" evidence. It is important to remember that the rule only bars the use of other-act evidence as proof of the person's *character* in order to prove that the defendant acted in accordance with that character. Evid.R. 404(B)(1). The text of the rule itself demonstrates that "propensity" or "accordance" do not always equate with "character", since, otherwise, the "character" language would be rendered wholly superfluous.

Under the plain text of the rule, there must be some distinction between "character" and "propensity." "[T]he conflation of character with propensity is enmeshed in our jurisprudence", but "[t]he concepts are not the same." See *State v. Jackson*, 368 Ore. 705, 735-36, 498 P.3d 788 (2021) (Garrett, J., concurring), citing NOTE: *Recognizing Character: A New Perspective on Character Evidence*, 121 Yale L.J. 1912, 1915-16 (2012). "Defining character as simply someone's propensity to act in a certain way does not distinguish between what is commonly perceived as character and other propensity-based qualities that courts have recognized are not character, such as habits, mental illnesses and genetic attributes, skills and abilities, or other traits of personality." *Id*. (footnotes omitted). Evidence Rule 404(B) is essentially an extension of Evid.R. 404(A) and is intended to preclude a prejudicial attack on the defendant's *character*. *Smith*, 49 Ohio St.3d at 140.

Not every preference or method or skill employed by a person in a prior act would rise to the level of being a "character" trait so as to be barred by Evid.R. 404(B)(1). A person might adopt particular preferences or methods in the commission of crimes, such as choosing particular types of weapons, as opposed to others, and choosing

particular kinds of victims in particular locations and circumstances. Proving these kinds of preferences does not equate to proving a "character" trait. See *United States v. Doe*, 149 F.3d 634, 638 (7th Cir.1998) ("character evidence typically involves personality traits, such as diligence, aggressiveness, honesty, and the like, that create a propensity for acting in certain ways under certain conditions."; but rule would not "exclude evidence of the methods of safecrackers or cat burglars."); *United States v. Moran*, 503 F.3d 1135, 1145 (10th Cir. 2007) (evidence of prior knowing possession of weapon was relying on "a kind of propensity inference", but "the inference is specific and does not require a jury to first draw the forbidden general inference of bad character or criminal disposition").

The State is not proving "character" when it demonstrates the defendant's employment of particular methods amounting to a scheme-system-plan. It is not "character" that an offender would adopt particular tried-and-true opportunistic methods to insinuate himself into a household as a would-be "romantic" partner for a female head of household who has young children he can exploit. It is not "character" that he would adopt a preference for youthful victims who are most likely to be intimidated by a "father figure" type with disciplinary authority in the household or that he would use methods to isolate these victims. Instead of proving "character," proving the offender's use of such methods demonstrates the involvement of someone who is experienced in such methods and who has honed his use of such methods. And when the defense is completely denying involvement and claiming that the victims are making everything up out of whole cloth, it is probative to show that the defendant is experienced in using such methods and that such experience is consistent with the victim's testimony showing the defendant's use of such methods. Indeed, by their own terms, Evid.R. 404(B)(1) and

(B)(2) show that proving the defendant's use of a "plan" on other occasions is "another purpose" allowed by the rule and is simply not the same thing as proving the defendant's "character" in order to show that he acted in accordance with that "character." Given the efficacy of limiting instructions as already discussed, the trial court's limiting instructions would be sufficient to prevent the jury from misusing the "plan" evidence to reach some sort of broader conclusion about the defendant's "character."

D. Proper Joinder

In the defense motion filed on April 11, 2022, entitled "motion to sever offenses and to order separate trials," the defense mainly relied on Crim.R. 14 in asking the trial court to sever the four groups of offenses. In the defense's ultimate request for relief, the defense relied exclusively on Crim.R. 14, requesting "the Court, pursuant to Criminal Rule 14, to sever the offenses charged against the Defendant in a single indictment and order separate trials relating to each alleged victim." (4-11-22 Motion, at 3)

The motion briefly referenced whether joinder of the offenses had been proper to begin with under Crim.R. 8(A), but the defense made only the tepid claim that "it does not appear" that any of the grounds for joinder existed. (*Id.* at 2)

On appeal, the defense put in more effort to the improper-joinder argument. But the Fifth District did not rule on it.

Any claim of improper joinder under Crim.R. 8(A) would be frivolous. As the rule itself indicates, counts can be joined when they, inter alia, "are of the same or similar character" or "are part of a course of criminal conduct" or represent two or more acts "constituting parts of a common scheme or plan." Crim.R. 8(A).

Under the "same or similar character" provision, the joined offenses "need only

be similar in nature," not identical. *State v. Bennie*, 1st Dist. No. C-020497, 2004-Ohio-1264, ¶ 18. In *State v. Schaim*, 65 Ohio St.3d 51 (1992), the Court concluded that the crimes of raping an adult adopted daughter, sexual imposition as to an adult employee, and GSI as to a minor daughter, were properly joined. The Court recognized that "[j]oinder is liberally permitted to conserve judicial resources, reduce the chance of incongruous results in successive trials, and diminish inconvenience to the witnesses." *Id*. at 58. It then held that, "[w]hile the three types of charged offenses are not the same, they are of a similar character, and are properly joined in the same indictment under Crim.R. 8(A)." *Id*. at 58. The Court rejected a narrow definition of "same or similar character" that would prevent joinder of such offenses in a single indictment. *Id*. at 58 n. 6. The crimes charged as to all of the victims in the present case all had the similar character of involving the sexual exploitation of young children.

In addition to the "same or similar character" provision, joinder is also proper when the offenses arise from a course of criminal conduct. Given the facts disclosed in the State's memo opposing the motion to sever, the facts readily demonstrate such a course of conduct. As this Court has recognized for purposes of the "course of conduct" capital specification, there need only be "some factual link" between the crimes, i.e., some discernable "connection, common scheme or some pattern or psychological thread that ties [the offenses] together". *Sapp*, ¶ 52 (quoting another case). "[F]or instance, the factual link might be one of time, location, murder weapon, or cause of death" and can include "a similar motivation" on the part of the offender and "victims who are close in age or who are related." *Id*. ¶ 52. "[O]ffenses can have significant differences in 'factual circumstances and modi operandi,' and yet constitute a single course of conduct." *Perez*,

¶ 80 (citing *Sapp*, ¶ 58). Nevertheless, the age and gender of the victims can create commonalities for purposes of determining whether there was a common modus operandi, see *Clinton*, ¶ 108, and it is logical that similar commonalities would help establish that the crimes were committed as part of the same course of conduct as well. See, also, *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, ¶ 44 (same MO included fact that "[b]oth victims were young girls."); *State v. Coleman*, 45 Ohio St.3d 298, 299 (1989) ("majority of the victims were young black females").

"[T]he length of time between offenses does not necessarily determine whether the offenses form a course of conduct", and "all the circumstances of the offenses must be taken into account." *Sapp*, ¶ 55-57 (citing with approval out-of-state cases allowing time frames 26 months apart and over 13 years); see, also, *Perez*, ¶¶ 81-82 ("eight-month separation * * * is not dispositive"; citing *Sapp*, which allowed time gap of one year and cited cases allowing 26 months and over 13 years); *State v. Davis*, 8th Dist. No. 107925, 2019-Ohio-4672, ¶ 31 (18 months).

While the various time frames involved in the individual indicted offenses here occurred across an 18-year time period, this is sadly a result of the defendant's repeated use of the same tactics over the years in multiple household settings in which he could exploit young victims he could shame or intimidate into keeping the abuse "secret." "It is common knowledge in child sex abuse cases that the victims often internalize the abuse, and in some instances blame themselves, or feel somehow that they have done something wrong. Moreover, the mental and emotional anguish that the victims suffer frequently inhibits their ability to speak freely of the episodes of abuse." *State v. Hensley*, 59 Ohio St.3d 136, 138-39 (1991). Saying that the clock ran out on the course

of conduct merely because it was just "too long" would wrongly reward the offender and his efforts in targeting vulnerable children.

For all of the foregoing reasons, the indicted acts would also fit within the provision allowing joinder for acts that there were part of a common scheme or plan. In all respects, joinder was appropriate.

> **Amicus OPAA's Second Proposition of Law.** When a party files an application for en banc consideration pursuant to App.R. 26(A)(2), all full-time judges of that Court of Appeals who are not recused or disqualified from the case must participate in determining whether to grant or deny the application. (App.R. 26(A)(2), applied; *State v. Forrest*, 136 Ohio St.3d 134, 2013-Ohio-2409, overruled)

When the State filed its application for en banc consideration, only three of the six active judges in the Fifth District ruled on the application. This Court accepted review of the State's contention that all of the active judges should have participated in the ruling.

Granting review suggests a willingness to revisit this Court's decision in *State v. Forrest*, 136 Ohio St.3d 134, 2013-Ohio-2409, which held that App.R. 26(A)(2) does not always require participation by the entire en banc court in denying the application for en banc consideration and that it is sufficient if only the original three-judge panel participates and rejects the party's claim that there is an intradistrict conflict.

This willingness to revisit *Forrest* is appropriate after *State v. Maldonado*, __ Ohio St.3d __, 2024-Ohio-2652, which addressed the same rule governing en banc consideration and emphasized that the rule must be construed as a whole. *Id.* ¶ 11 ("that single sentence in App.R. 26(A)(2)(a) must be considered in the context of the entire rule"; "as a whole" interpretation applies). This Court unanimously rejected the Eighth District's decision to employ en banc consideration before the three-judge panel had ruled on the case. Even

though the first sentence in App.R. 26(A)(2)(a) did not preclude en banc consideration before the panel's decision, the provisions in App.R. 26(A)(2)(b), (c), and (d) implied and presupposed that the three-judge panel's decision would precede en banc consideration. *Maldonado*, ¶¶ 12-17. The rule must be "[r]ead in its entirety." *Id.* ¶ 25.

This "as a whole" interpretive method undercuts the approach used by the four-justice majority in *Forrest*. Using the "as a whole" interpretive approach, then-Justice Kennedy dissented in *Forrest* and concluded that "when App.R. 26 is construed as a whole, it is more reasonable to interpret App.R. 26(A)(2)(a) as indicating that the en banc court makes the determination whether an intradistrict conflict exists." *Forrest*, ¶ 22. The Chief Justice agreed with that dissenting view, and a third justice also dissented, asserting that the rule required that the en banc court participate in ruling on the application.

OPAA respectfully submits that the *Forrest* dissenters had the better of the argument. Consistent with the interpretive approach recently used in *Maldonado*, and looking at the rule *as a whole*, this Court should recognize that the rule leaves no room for the panel to act alone to deny the application for en banc consideration. The views of the *Forrest* dissenters are supported by the rule's text, while the majority's conclusion in *Forrest* allowing a panel-only denial on lack-of-conflict grounds represents a strained and problematic reading of the rule.

This Court has concluded that, "if the judges of a court of appeals determine that two or more decisions of the court on which they sit are in conflict, they must convene en banc to resolve the conflict." *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, paragraph two of the syllabus. As a result of *McFadden*, this Court adopted App.R. 26(A)(2), providing in part as follows:

> **(2) En banc consideration.**
>
> **(a)** Upon a determination that two or more decisions of the court on which they sit are in conflict, a majority of the en banc court may order that an appeal or other proceeding be considered en banc. The en banc court shall consist of all full-time judges of the appellate district who have not recused themselves or otherwise been disqualified from the case. Consideration en banc is not favored and will not be ordered unless necessary to secure or maintain uniformity of decisions within the district on an issue that is dispositive in the case in which the application is filed.
>
> **(b)** The en banc court may order en banc consideration sua sponte. A party may also make an application for en banc consideration. An application for en banc consideration must explain how the panel's decision conflicts with a prior panel's decision on a dispositive issue and why consideration by the court en banc is necessary to secure and maintain uniformity of the court's decisions.

It makes sense that the decision whether to allow en banc consideration is itself a decision of the "en banc court." A court's decision whether to convene as an "en banc court" should be a collective decision of the entire en banc court, not just the decision of as few as two judges on a three-judge panel. Moreover, the rule does not purport to authorize panel-only review of the question of whether an intradistrict conflict exists. The rule only mentions that the "en banc court" will make that determination, stating that "[u]pon a determination that two or more decisions of the court on which *they* sit are in conflict, a *majority of the en banc court* may order that an appeal or other proceeding be considered en banc." App.R. 26(A)(2)(a) (emphasis added). The rule requires a "determination" of whether an intradistrict conflict exists, and, in the midst of setting forth that requirement, the rule also refers to "they," which is closely followed by a reference to the "majority of the en banc court." All of this aligns with "they," i.e., the "majority of the en banc court,"

making the needed "determination." The rule then specifies that "[t]he en banc court shall consist of all full-time judges of the appellate district who have not recused themselves or otherwise been disqualified from the case." Under this language, only "they," i.e., only the majority of the en banc court, can make the determination of intradistrict conflict and thereupon grant the application for en banc consideration.

This conclusion is consistent with the policies underlying en banc review. As stated in *McFadden*, "[t]he principal utility of determinations by the courts of appeals in banc is to enable the court to maintain its integrity as an institution by making it possible for a majority of its judges always to control and thereby to secure uniformity and continuity in its decisions, while enabling the court at the same time to follow the efficient and time-saving procedure of having panels of three judges hear and decide the vast majority of cases as to which no division exists within the court." *McFadden*, ¶ 16 (internal quote marks omitted). In *Maldonado*, this Court again emphasized that "the purpose of en banc proceedings was to allow a court of appeals to secure uniformity and continuity in its decisions." *Maldonado*, ¶ 19 (internal quote marks omitted), citing *McFadden*, ¶ 16. Part of securing uniformity would be determining whether there is a conflict to begin with.

The *Forrest* majority strained to find a gap in the rule's language. The majority noted that the application process was set forth in App.R. 26(A)(2)(b) and provided no indication as to which body would review the application, and, likewise, the language in App.R. 26(A)(2)(a) was silent on whether the application would be submitted to the en banc court. *Forrest*, ¶¶ 10-12.

This analysis suggests that the majority was using a "divide and conquer" approach instead of interpreting the rule as a whole. Paragraphs (A)(2)(a) and (A)(2)(b) when read

together readily disclose that it would be the en banc court deciding the application. The party's application under paragraph (A)(2)(b) expressly seeks "en banc consideration." Paragraph (A)(2)(b) requires that the party explain "why consideration by the court en banc is necessary." And paragraph (A)(2)(a) indicates that the en banc court is the body that orders the appeal to "be considered en banc" and that "they," i.e., the "majority of the en banc court," will be involved in the "determination" of whether there is a conflict. It is not hard to connect these dots and to conclude that the rule, as a whole, provides that the en banc court will make the determination of the intradistrict conflict.

"[A] court cannot pick out one sentence and disassociate it from the context, but must look to the four corners of the enactment to determine the intent of the enacting body." *State v. Wilson*, 77 Ohio St.3d 334, 336 (1997). "A statutory provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Util. Air Regulatory Group v. EPA*, 573 U.S. 302, 321 (2014) (internal quote marks and ellipses omitted). Provisions must be construed together as an interrelated body of law. *State v. Moaning*, 76 Ohio St.3d 126, 128 (1996).

One particular claim by the *Forrest* majority especially strains credulity.

> The rule expressly gives just one task to the en banc court, i.e., to "order" the en banc proceeding, and the rule assumes that the conflict "determination" has already taken place at that point. We therefore conclude that App.R. 26(A)(2) is silent as to who must participate in the initial review of an application for en banc consideration and the assessment whether an intradistrict conflict exists. It permits, but does not require, the en banc court to undertake these tasks.

Forrest, ¶ 12. However, as *McFadden* had already established, the determination of whether an intradistrict conflict exists is the sine qua non of ordering en banc consideration. The en banc court *must* order en banc consideration when it finds that a conflict exists. While there is some discretion in deciding whether a conflict exists, "if the judges of a court of appeals determine that two or more decisions of the court on which they sit are in conflict, they must convene en banc to resolve the conflict." *McFadden*, paragraph two of the syllabus; *In re J.J.*, 111 Ohio St.3d 205, 2006-Ohio-5484, paragraph two of the syllabus ("duty-bound to resolve conflicts"). Thus, conflict determination cannot be divorced from ordering en banc consideration in the way *Forrest* suggests; the two go hand-in-hand. The determination controls the issuance of the order. If only the panel is making the determination of conflict, then the *panel* is controlling the issuance of the order and tying the hands of the en banc court as a whole, which, given the determination of a conflict, *must* issue the order. And, overall, *McFadden*'s syllabus is clear in requiring that the en banc court itself make the conflict determination. To say that the en banc court need not make any conflict determination at all turns the process upside down.

Some might argue that, when the panel finds a conflict, the en banc court can still exercise its own judgment to confirm or override that determination. The *Forrest* analysis seemed to suggest there could be an override when the panel finds a conflict, stating that "[i]f * * * the panel determines that a conflict does exist, the matter must then be submitted to the en banc court for a final determination of whether to order en banc consideration." *Forrest*, ¶ 18. The problem is that the rule makes no provision for this kind of two-tiered determination of whether a conflict exists. The rule provides for only one determination, not two, and there is no room given in the rule for a second determination of conflict or for

overriding an initial panel determination of conflict. Given that the rule was designed to implement *McFadden*, and given that ordering en banc consideration is a fait accompli upon the determination of an intradistrict conflict, it represents an anti-*McFadden* approach to set up panel-only review as a precursor to en banc court review.

Then-Justice Kennedy's dissent in *Forrest* interpreted the rule as a whole and concluded that the entire en banc court must consider whether an intradistrict conflict exists. Under this "as a whole" approach, it is noteworthy that the rule provides for panel-only decisionmaking as to applications for reconsideration in App.R. 26(A)(1), while, as to en banc review, "[t]he word 'panel' never appears in App.R. 26(A)(2)(a). The only subject in the first sentence of App.R. 26(A)(2)(a) is 'majority of the en banc court.' Therefore, I believe that the more logical and reasonable interpretation of App.R. 26(A)(2)(a) is that the en banc court makes the initial determination whether an intradistrict conflict exists." *Forrest*, ¶¶ 20-28 (Kennedy, J., dissenting). As Justice O'Donnell also stated in dissent, the conflict determination must be performed by the en banc court, and any effort by rule or otherwise to delegate that duty to the panel alone would be invalid. *Forrest*, ¶¶ 30-31; see, also, *Maldonado*, ¶ 18 (local rule conflicts with App.R. 26(A)(2) and therefore is invalid).

An added layer of concern arises because, in this case, there is no indication that the Fifth District has acted to adopt the initial-panel-only approach. The *Forrest* majority portrayed the issue as a matter of judicial administration and internal organization and also recognized that the various courts of appeal can decide to bypass the panel if they so choose. *Forrest*, ¶¶ 12, 17. In *Forrest*, the panel's statements at least suggested that the court of appeals as a whole had adopted an informal policy that operated to delegate the conflict-determination issue to the panel as an initial stage of review. *State v. Forrest*, 10th

Dist. No. 11AP-291, 2012-Ohio-938, ¶¶ 2-4. But the statements of the panel herein contain no such indications, stating only that "[w]e, the panel" were adopting this approach. Moreover, there is no local rule in the Fifth District setting forth such an approach, and, after *Forrest*, courts should be using formalized rule-making in such matters. *McFadden*, ¶ 20 ("procedure for initiating and engaging in en banc review should be dictated by a procedural rule", such as the Eighth District's local rule). Such rule-making would require a majority of the sitting judges to form the requisite quorum to adopt the rule. See R.C. 2501.07. Given the absence of any rule and the absence of even any statement of informal court-wide policy, the Fifth District panel's decision to proceed on its own here would not be cognizable as a valid exercise of the appellate court's court-wide prerogative under *Forrest* to choose the panel-only approach. For aught that appeared in this ruling, the decision to choose a panel-only approach here was solely the ad hoc decision of the panel, and such decision would not sufficiently establish a court-wide policy approved by a sufficient quorum of the judges of that district so as to be cognizable under *Forrest*.

When required to engage in rule-making, the quorum of judges likely would take into account the "big picture" institution-wide aspects of en banc procedure and their own prerogatives as decisionmakers within that institution-wide scheme. The Tenth District after *Forrest* adopted Tenth Dist. Loc.R. 15, which still allows a unanimous panel to deny the application by concluding that no intradistrict conflict exists. But the rule further provides that "[i]f any member of the three-judge panel finds that a conflict does exist, the application for en banc consideration shall be submitted to the en banc court for determination." The Tenth District rule also provides that, if there was a visiting judge on the original panel, a full-time member of the court must be substituted into the panel to

review the application for en banc consideration. Informal policy-making would be less likely to consider implementing these kinds of nuanced features.

Finally, the defense might contend that the issue of panel-only consideration of the conflict issue is harmless, since the three panel members rejected the notion of a conflict and, at best, the participation of the remaining three judges of the en banc court could only result in a tie 3-3 vote. An equally-divided court would mean that the application fails and the panel decision remains in place. It bears emphasis, though, that the defense would have the burden of proving that the error was harmless, since "the burden [is] on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment." *Chapman v. California*, 386 U.S. 18, 24 (1967).

"En banc is defined as '[w]ith all judges present *and participating*; in full court.'" *McFadden*, ¶ 10 (emphasis added). Accordingly, the process should involve full participation by all full-time judges on an institution-wide basis. In many situations, the non-panel members would be able to bring a wealth of judicial experience and knowledge to the review of the application. The non-panel member(s) may have written the earlier decision(s) that are now claimed to be in conflict. It cannot be assumed that judges on the panel would be so close-minded as never to be influenced by deliberating with their non-panel colleagues. A harmless-error conclusion would give short shrift to the benefits of full-court deliberation and the prerogatives of non-panel members,

In any event, the panel decision would be considered invalid because of the absence of a quorum of the en banc court participating. See *Monfort Supply Co. v. Hamilton Cty. Bd. of Zoning Appeals*, 1st Dist. No. C-080048, 2008-Ohio-6829, ¶ 15 ("board simply had no power to proceed without a quorum."); *Hubay v. Ohio Elections Comm.*, 10th Dist. No.

23AP-108, 2023-Ohio-4801, ¶ 14. The prejudice would be in the panel having purported to deny the State's application without the requisite power to act.

CONCLUSION

For the foregoing reasons, amicus curiae OPAA respectfully urges that this Court reverse the Fifth District's judgment and reinstate the defendant's convictions.

If this Court only reaches the issue regarding en banc consideration, this Court should vacate the three-judge panel's order denying en banc consideration and should remand the matter to the Fifth District so that the entirety of the en banc court can deliberate on and rule upon the State's application for en banc consideration.

Respectfully submitted,

/s/ Steven L. Taylor
STEVEN L. TAYLOR 0043876
Counsel for Amicus Curiae OPAA

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was e-mailed on October 10, 2024, to the following counsel of record: Stephen E. Palmer, Palmer Legal Defense 511 South High Street, Columbus, Ohio 43215, spalmer@palmerlegaldefense.com; Sarah A. Hill, Assistant Prosecuting Attorney, 349 W. Main Street, Suite 101, Lancaster, Ohio 43130, sarah.hill@fairfieldcountyohio.gov.

/s/ Steven L. Taylor