

MEMORANDUM IN SUPPORT OF THE MOTION FOR RECONSIDERATION

Now comes the State of Ohio, Appellant in this matter, by and through the office of the Medina County Prosecuting Attorney, and respectfully moves this Court to reconsider its February 2, 2011, decision declining jurisdiction to hear this case for the reasons stated in the attached Memorandum in Support of the Motion for Reconsideration.

Pursuant to S. Ct. Prac. R. 11.2(B)(1), an appellant may move the Court to reconsider its decision declining jurisdiction in a case. Under S. Ct. Prac. R. 11.2(A), a motion for reconsideration must be filed within ten (10) days after the Court's judgment entry or order is filed with the Clerk. The Court declined jurisdiction on February 2, 2011. Justices Lundberg Stratton, O'Donnell, and McGee Brown dissented from the decision declining jurisdiction.

This case involves a discretionary appeal of the decision of the Ninth District Court of Appeals reversing Carl Morris, Jr.'s convictions for Rape. The sole basis for reversing was the appellate court's determination that the trial court admitted other acts evidence in violation of Evid. R. 404(B).

The controversy in this discretionary appeal centers on the appellate court's determination of the admissibility of "other acts" evidence under Evid. R. 404(B). In this case, the appellate court applied a *de novo* standard of review to the admission of the other acts evidence and also found that specific other acts evidence was not relevant to proving any of the permissible purposes of such evidence. For the reasons which now follow, this Court should reconsider its decision declining jurisdiction and accept this appeal so that the Court can clarify the standard of review for other acts evidence as well as the standard of proof regarding whether evidence must "prove" a proper purpose or merely "tend to show" a proper purpose.

Proposition of Law I: THE COURT OF APPEALS ERRED IN APPLYING A DE NOVO STANDARD OF REVIEW TO THE ADMISSIBILITY OF “OTHER ACTS” EVIDENCE AND SUBSTITUTED ITS OWN JUDGMENT FOR THAT OF THE TRIAL COURT.

Without regard to existing Ohio Supreme Court precedent, in this case the Ninth District Court of Appeals became the only court in the state to hold that admission of “other acts” evidence under Evid. R. 404(B) is subject to *de novo* review on appeal. Compare *State v. Morris*, 9th Dist. No. 09CA0022-M, 2010 Ohio 4282, at ¶ 13, with *State v. Hooper*, 2d Dist. No. 22883, 2010 Ohio 4041, at ¶ 25; *State v. Adams*, 3rd Dist. No. 4-09-16, 2009 Ohio 6863, at ¶ 28; *State v. Kienzle*, 5th Dist. No. 2009 AP 03 0015, 2010 Ohio 2045, at ¶ 33; *State v. Wheeler*, 8th Dist. No. 93011, 2010 Ohio 1753, at ¶ 21; *State v. Ford*, 12th Dist. No. CA2009-01-039, 2009 Ohio 6046.

In so holding, a majority of the Ninth District unabashedly rejected the longstanding abuse of discretion standard for admission of other acts evidence under Evid. R. 404(B). *State v. Perez*, 124 Ohio St. 3d 122, 136, 2009 Ohio 6179, at ¶ 96, citing *State v. Diar*, 120 Ohio St. 3d 460, 2008 Ohio 6266, at ¶ 66; see also *State v. Conway* (2006), 109 Ohio St. 3d 412, 2006 Ohio 2815 at ¶ 61-62; *State v. Ahmed* (2004), 103 Ohio St. 3d 27, 40, 2004 Ohio 4190, at ¶ 78-79. In its place, the appellate court substituted the far more exacting *de novo* standard. *Morris*, 9th Dist. No. 09CA0022-M, 2010 Ohio 4282.

Although the Proposition of Law presented reads as a restatement of existing authority, the decision of the Ninth District in this case casts doubt on the applicability of the standard of review and attempts to usurp this Honorable Court’s constitutional role in our tiered system of jurisprudence. See generally Art. IV, Ohio Constitution. Moreover, the Court has not squarely addressed the question whether the admission of evidence under Evid. R. 404(B) is a legal determination or a question of evidence. While the Court has clearly indicated that the

admission of relevant evidence, including “other acts” evidence, rests in the trial court’s sound discretion, *see Perez*, 124 Ohio St. 3d at 136, 2009 Ohio 6179, at ¶ 96; *Diar*, 120 Ohio St. 3d 460, 2008 Ohio 6266, at ¶ 66; *Conway*, 109 Ohio St. 3d 412, 2006 Ohio 2815, at ¶ 61-62; *Ahmed*, 103 Ohio St. 3d at 40, 2004 Ohio 4190, at 78-79, it has not framed this standard in terms of legal versus evidentiary rulings. Therefore, the Court should accept jurisdiction of this case to resolve the conflict created by the Ninth District below and hold that the admission of other acts under Evid. R. 404(B) is an evidentiary matter resting in the sound discretion of the trial court.

At first glance, this distinction may seem to be one without a difference. The decision of the Ninth District Court of Appeals in this case, however, draws that very line in citing to a since-abandoned case from the Second District over twenty (20) years ago applying the wrong standard of review, rejecting the State’s motion to certify a conflict and refusing to hear the case *en banc*. This Court, therefore, should accept jurisdiction of the instant appeal to resolve the conflict actually created by the court of appeals whether relevant other acts evidence is subject to *de novo* testing as a legal conclusion or abuse of discretion review of evidentiary rulings.

Proposition of Law II: THE COURT OF APPEALS PREJUDICIALLY ERRED IN FINDING THAT APPELLEE’S SEXUAL ADVANCE TOWARD THE VICTIM’S ADULT SISTER UNDER THE SAME CIRCUMSTANCES HE RAPED THE VICTIM OR THAT HIS PUNITIVE CONDUCT TOWARD THE DOG WAS INADMISSIBLE.

This Court should also reconsider its decision declining jurisdiction over the second proposition of law. The Ninth District Court of Appeals below held that evidence that Appellee Morris made sexual advances towards the child victim’s adult sister was not relevant to show that he raped the child victim. In addition to proving the identity of the child victim’s rapist, the evidence was specific enough to reveal motive and a common scheme or plan in that Appellee

Morris expressed to the adult sister that he would have sex with her if he could do so without repercussions. This evidence tended to show that Morris considered all of the women in the house to be legitimate sexual objects for his pleasure, so long as it did not become known to his girlfriend (the child victim and adult sister's mother). Even construing its admission strictly against the state, *State v. DeMarco* (1987), 31 Ohio St. 3d 191, 194, this evidence tends to explain the elaborate efforts Morris undertook to maintain secrecy and thus prove his identity as the person who raped the child victim, show Morris' motive to rape the child victim, and demonstrates his common scheme or *modus operandi* in committing the offense. Each use is part of the non-exhaustive list of permissible purposes other acts evidence. Evid. R. 404(B).

This Honorable Court should therefore reconsider its decision declining jurisdiction insofar as the State presented relevant, admissible evidence which was nevertheless held inadmissible on appeal under an erroneous standard of review. To the extent that resolution in Appellant's favor on Proposition of Law I would render moot the second proposition, the State nevertheless asks this Court to consider Proposition of Law II because it goes to specific subparts of Evid. R. 404(B): identity; motive; and common scheme or plan.

In this case a majority of the court of appeals applied the wrong standard of review, disregarded the determination made by the trial court which was supported by a sound reasoning process, and instead made its own determination whether the evidence was admissible. See *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 219, 450 N.E.2d 1140 (abuse of discretion means more than a mere error of law or judgment and noting that a court of appeals errs when it substitutes its judgment for that of the trial court). A majority of the Ninth District concluded that had it been deciding the evidentiary issue at trial it would not have admitted the evidence, and therefore reversed Morris' conviction. This decision flies in the face of existing precedent

from the Ohio Supreme Court, and entreat to this Court to accept the appeal is all that stands in the way of appellate courts applying *de novo* review to every evidentiary ruling, under Evid. R. 404(B) or even Evid. R. 402. The decision below is doubly troublesome because a majority of the appellate court would disregard the Rules of Evidence themselves and require that other acts evidence conclusively prove a contested Evid. R. 404(B) purpose as opposed to the standard for all relevant evidence: whether it has *any tendency* to make the existence of any fact of consequence more probable or less probable. Evid. R. 401 (defining “relevant evidence”) (emphasis added).

Given the attempted usurpation of this Court’s constitutional role in our state government by the appellate court below, this Honorable Court should reconsider its previous decision declining jurisdiction and accept this case for review.

CONCLUSION

For all of the foregoing reasons, this Honorable Court should reconsider its February 2, 2011, decision declining jurisdiction in this case and accept jurisdiction over this case.

Respectfully submitted,

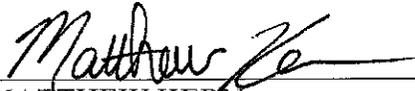
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above Motion for Reconsideration was sent regular U.S. mail to David Sheldon, Counsel for Appellee Carl Morris, Jr., 669 West Liberty Street, Medina, Ohio 44256, this 8th day of February, 2011.



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