

**ORIGINAL**

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : NO. 2010-1842  
Plaintiff-Appellant :  
-vs- :  
CARL M. MORRIS : On Appeal from the Ninth Appellate  
Defendant-Appellee : District, Medina, Ohio  
Case No. NO. 09CA0022-M

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**BRIEF OF AMICUS CURIAE ON BEHALF OF APPELLANT**

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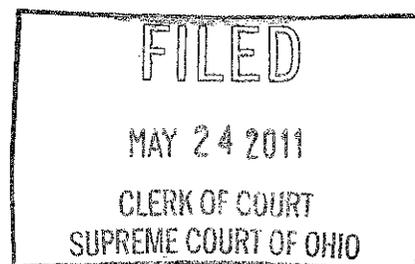
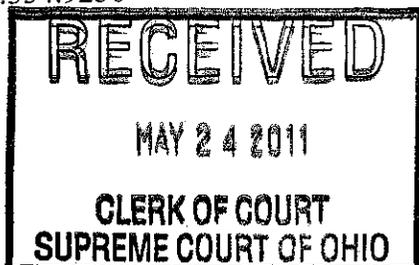
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## Introduction and Statement of Interest of Amicus Curiae

The thirty-four judges of the Cuyahoga County Court of Common Pleas preside over an extremely large number of criminal trials each year. Within the number of cases that go to trial each year, a significant number of those cases involve the application of Evid. R. 404(B). Due to the large volume of criminal cases litigated by the Cuyahoga County Prosecutor's Office, the citizens of Cuyahoga County have a compelling interest in the uniform application of a settled and commonly understood legal standard governing the admissibility of other crimes, wrongs or acts evidence under Evid. R. 404(B).

The Cuyahoga County Prosecutors Office, as amicus curiae in support of the State, submits that the Ninth District Court of Appeals erroneously applied a *de novo* standard review to the admission of other acts evidence. The Ninth District failed to recognize the trial court's unique role as a first-hand evidence gatekeeper. The Ninth District should have followed well-settled precedent from other Ohio appellate districts (and indeed, other courts throughout the nation) and reviewed the trial court's admission of other acts evidence for an abuse of discretion.

Appellate judges, reviewing a cold-record, should not review the admissibility decisions of trial judges *de novo*. If Ohio's trial judges knew that their gatekeeping role over the admissibility of evidence could be second-guessed and reversed by an appellate court for nothing more than a difference of legal opinion, they would be reluctant to make even cautious admissibility rulings.

The Ohio rules of evidence place primary emphasis on the idea that “[a]ll relevant evidence is admissible \* \* \*.” Evid. R. 402. If Ohio law were to make evidentiary rulings reviewable by the court of appeals *de novo*, the end result would be to skew the preferences of Ohio trial judges *against admissibility*, for fear of a subsequent *de novo* reversal. Your amicus therefore submits that the Ninth District’s application of *de novo* review runs directly counter to the traditional discretionary review given to trial court admissibility determinations.

In short, the Ninth District’s decision to apply *de novo* review not only subverts the traditional discretionary review given to trial court evidentiary rulings, but is also bad public policy for Ohio.

### **Statement of the Case and Relevant Facts**

Amicus Curiae the Cuyahoga County Prosecutor’s Office adopts and incorporates by reference the Statement of the Case and Statement of Facts as set forth by the appellant, the State of Ohio, in its merit brief.

### **Law and Argument**

**PROPOSITION OF LAW: OHIO’S TRIAL JUDGES PLAY A UNIQUE ROLE AS FIRST-HAND GATEKEEPERS WHEN DECIDING WHETHER TO ADMIT OR EXCLUDE EVIDENCE, AND THEIR DISCRETIONARY JUDGMENTS MUST BE REVIEWED FOR AN ABUSE OF DISCRETION RATHER THAN *DE NOVO*.**

It is well settled law throughout the State of Ohio that a trial court’s decision to admit or exclude evidence, including other acts evidence is reviewed by appellate courts under an abuse of discretion standard. The majority in *State v. Morris*, 9<sup>th</sup> Dist. No. 09CA0022-M, 2010-Ohio-4282, departed from this rule and called for a *de novo* standard of review. The *Morris* court reasoned that the question of whether

evidence is admissible an “other act” is a legal question, which in their view warrants a *de novo* standard of review. But the majority in *State v. Horne*, 9<sup>th</sup> Dist. No. 25238, 2011-Ohio-1901, opined that *Morris* was a departure from well-settled precedent and that they were obliged to follow the standard of review that has been applied by this Court time and time again.

In addition to overlooking well-settled precedent from not only this State but across the United States, the *Morris* Court did not consider that the full scope of “other act” analysis. Whether evidence is admissible as an “other act” involves more than just whether the evidence is proof of opportunity, motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Evid. R. 404(B) is a non-exhaustive list of permissive, non-propensity purposes. So long as the evidence is not admitted to prove conformity with bad character, your amicus submits that the question of admissibility is one of relevancy. This analysis must also include questions of relevancy, credibility and determinations of whether the probative value of the other act evidence outweighs any prejudicial effect. Thus, whether a trial court erred in admitting evidence under Evid. R. 404 is not just a purely legal question. If it is not a purely legal question than a strict *de novo* standard of review is not appropriate.

**I. Although Evidence Rule 404 bars propensity evidence, the admission of other acts evidence hinges on relevancy if offered for a non-propensity purpose.**

When a party offers “other acts” evidence, the proponent must provide a non-propensity reason for offering that particular piece of evidence. Once the non-propensity reason is offered, the trial judge must then determine the following:

- How is the evidence relevant to the non-propensity purpose?
- How probative is the evidence to the non-propensity purpose?
- Is the probative value of the evidence outweighed by prejudice?

The only restraint is that an “other act” cannot be used to “prove the character of a person in order to show action in conformity therewith.” Evid. R. 404 states:

**(A) *Character evidence generally.*** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, subject to the following exceptions:

**(1) *Character of accused.*** Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same is admissible; however, in prosecutions for rape, gross sexual imposition, and prostitution, the exceptions provided by statute enacted by the General Assembly are applicable.

**(2) *Character of victim.*** Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor is admissible; however, in prosecutions for rape, gross sexual imposition, and prostitution, the exceptions provided by statute enacted by the General Assembly are applicable.

**(3) *Character of witness.*** Evidence of the character of a witness on the issue of credibility is admissible as provided in Rules 607, 608, and 609.

**(B) Other crimes, wrongs or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The Seventh District Court of Appeals in *State v. Merritt*, 7<sup>th</sup> Dist. No. 09 JE 26, 2011-Ohio-1468 recently explained that “[t]he first sentence of Evid. R. 404(B) is essentially a restatement of the common law rule against the admissibility of other acts evidence [...] The second sentence of Evid. R. 404(B) provides a non-exhaustive list of recognized exceptions to the general rule.” *State v. Merritt*, supra. at ¶27. See also *State v. Turner*, 4<sup>th</sup> Dist. No. 08CA3234, 2009-Ohio-3114; *State v. Isaacs*, 6<sup>th</sup> Dist. No. WD-04-018, 2005-Ohio-2682; *State v. McIntosh* (2001), 145 Ohio App.3d 567. This Court also recognized that Evid. 404(B) provided a non-exhaustive list in *State v. Doran* (1983), 5 Ohio St.3d 187, 190, 5 OBR 404, 449 N.E.2d 1295. See also *State v. Watson* (1971), 28 Ohio St.2d 15, 275 N.E.2d 153, 57 O.O.2d 95.

The Ninth District majority opinion in *Morris* held that the evidence that the victim’s “mother, who was once Mr. Morris's wife, testified that he wanted to have sex every day and would become verbally abusive and kick the family dog if she refused,” was in violation of Evid. R. 404(B). *State v. Morris*, 9<sup>th</sup> Dist. No. 09CA0022-M, 2010-Ohio-4282 at ¶24. The majority concluded, “The only possible reason for introducing that evidence was to demonstrate his character, that is, that he was both sexually frustrated and mean and aggressive. The obvious reason to present that evidence was to encourage the jury to conclude that Mr. Morris acted in conformity with that character by committing the rapes with which he had been

charged.” *Id.* The dissenting opinion, however, explained the context for the trial court’s judgment that the evidence was relevant:

[T]he trial court properly admitted Mother's testimony that Morris became verbally and mentally abusive, and would kick the dog, if she refused to have sex with him. The trial court could reasonably have interpreted this evidence as indicative of Morris' frustration when his wife refused his sexual advances, his anger at being rejected, and his plan to obtain sex with a victim who would not reject him. Mother's testimony in this regard “provided the context for the alleged crimes and made [Morris'] actions more understandable to the jurors.

The majority dismisses the State's argument that this testimony is indicative of Morris' “insatiable sexual appetite” which gives rise to his motive to sexually abuse S.K. I would conclude that the trial court did not abuse its discretion in admitting the testimony notwithstanding the weak argument by the State on appeal. That is not to say that a criminal defendant cannot be motivated by sexual gratification to commit rape. While I do not agree with the State's rationale in this case, the State nevertheless has the right to present its theory of the case as it chooses. While the testimony at issue may not evidence an “insatiable sexual appetite,” it may in fact evidence a motive for sexual gratification, or something completely different, such as power, control, or the opportunity to demean another. In any event, I would conclude that Mother's testimony that Morris would kick the dog when she refused his sexual advances was admissible pursuant to Evid.R. 404(B).

*State v. Morris*, 9<sup>th</sup> Dist. No. 09CA0022-M, 2010-Ohio-4282, ¶¶55-56. (Carr, J. dissenting).

As for the evidence of Morris’ sexual advances towards Sarah, the dissenting opinion explained that it believed that there was a valid purpose for admitting the contested evidence, within the trial court’s discretion:

I believe that the trial court properly admitted the testimony regarding the incident involving Morris and Sarah because it shows a common plan and opportunity to engage in sexual conduct with his step-

daughters. Morris pursued sexual activity with Sarah in his bedroom, a frequent location for the incidents with S.K. Evidence of his sexual advances while Mother was elsewhere and not likely to interrupt, coupled with his comment that Mother would be mad if she knew what he was pursuing, demonstrates his knowledge of the need for secrecy in these situations. Mother's testimony that she threw Morris out of the house after learning of his inappropriate conduct with Sarah emphasized that Morris knew he must make an effort to hide these activities from his wife.

*State v. Morris*, 9<sup>th</sup> Dist. No. 09CA0022-M, 2010-Ohio-4282, ¶53. (Carr, J. dissenting). See also *State v. Williams*, 8<sup>th</sup> Dist. No. 92714, 2010-Ohio-70; *State v. Russell*, 8<sup>th</sup> Dist. No. 83699, 2004-Ohio-5031; *State v. Ervin*, 8<sup>th</sup> Dist. No. 80473, 2002-Ohio-4093.

Where the “other acts” evidence in this case was offered for the non-propensity purposes described in the dissenting opinion, then it is well within the sound discretion of the trial judge to make the relevancy, probative value and prejudicial value assessments. Those assessments are not questions of law requiring *de novo* review. The questions with regard to the admissibility of evidence, and a trial court’s admission or exclusion of relevant evidence of are not disturbed absent an abuse of discretion. *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215, ¶107.

**II. It is a well settled legal principle that trial judges have great discretion in determining whether to admit or exclude evidence.**

It is well-settled law throughout the State of Ohio that appellate courts review a trial court’s decision to admit other acts evidence under an abuse of discretion standard. This Court on numerous occasions has applied the abuse of

discretion standard of review in reviewing the admission of other acts evidence. See *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565; *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810; *State v. Issa*, 93 Ohio St.3d 49, 2001-Ohio-1290, 752 N.E.2d 904.

This Court has held that “[t]he admission of other-acts evidence under Evid.R. 404(B) “lies within the broad discretion of the trial court, and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that has created material prejudice.” *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶ 66.

This traditional discretionary review given to the admissibility decision by trial courts can be traced to early American jurisprudence. In *Alexander v. United States* (1891), 138 U.S. 353, 11 S.Ct.350, 34 L.Ed. 954 and *Moore v. United States* (1893), 150 U.S. 57, 14 S.Ct. 26, 37 L.Ed. 996, the United States Supreme Court was asked to determine whether a lower court erred in its evidentiary rulings. *Moore v. United States* has continued application today. In *Moore*, the defendant was being prosecuted for the murder of Charles Palmer. The prosecution offered circumstantial evidence, some of which tended to show that the defendant was also guilty of the murder of another man named Mr. Camp. The evidence that Moore had killed Mr. Camp was offered as a motive for killing Charles Palmer. *Moore*, 150 U.S. 57, at 58.

The *Moore* court recognized the amount of discretion a trial judge has in its evidentiary rulings:

As intimated in the case of *Alexander v. U. S.*, 138 U. S. 353, 11 Sup. Ct. Rep. 350, where the question relates to the tendency of certain testimony to throw light upon a particular fact, or to explain the conduct of a particular person, there is a certain discretion on the part of the trial judge which a court of errors will not interfere with, unless it manifestly appear that the testimony has no legitimate bearing upon the question at issue, and is calculated to prejudice the accused in the minds of the jurors.

*Moore v. United States* (1893), 150 U.S. 57, 60, 14 S.Ct. 26, 37 L.Ed. 996 (emphasis added).

The *Moore* Court went on to provide an explanation of why the abuse of discretion standard is appropriate:

There are many circumstances connected with a trial, the pertinency of which a judge who has listened to the testimony, and observed the conduct of the parties and witnesses, is better able to estimate the value of than an appellate court, which is confined in its examination to the very words of the witnesses, perhaps imperfectly taken down by the reporter. It was said by Mr. Justice Clifford, in delivering the opinion of this court in *Castle v. Bullard*, 23 How. 172, 187, that 'whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, objections to the testimony on the ground of irrelevancy are not favored, for the reason that the force and effect of circumstantial facts usually, and almost necessarily, depend upon their connection with each other.' And in *Hendrickson v. People*, 10 N. Y. 13, 31, it is said that 'considerable latitude is allowed on the question of motive. Just in proportion to the depravity of the mind would a motive be trifling and insignificant which might prompt the commission of a great crime. We can never say the motive was adequate to the offense, for human minds would differ in their ideas of adequacy, according to their own estimate of the enormity of crime, and a virtuous mind would find no motive sufficient to justify the felonious taking of human life.'

*Moore v. United States* (1893), 150 U.S. 57, 60-61, 14 S.Ct. 26, 37 L.Ed. 996.

*Moore* highlights points applicable in modern trials. First, a trial judge in a better position to estimate the value of relevant evidence and also has the opportunity to observe the conduct of witnesses, including those who may offer other act testimony. Second, the value of “other act” evidence such as proof of motive depends on its connection with the other evidence been offered by the prosecution. Third, with regards to the question of “motive”, considerable latitude is allowed on the question of motive. What constitutes “motive” to commit an offense should not be underestimated, as the *Moore* Court recognized, as one virtuous mind may not find any motive sufficient to commit a particular offense.

Motive is just one non-propensity purpose to admit an “other act”. As stated above, Evid. R. 404(B) provides a non-exhaustive list of non-propensity purposes. Just as trial judges should have court latitude in admitting evidence that proves motive, they should have considerable latitude in admitting evidence for a proper non-propensity purpose. As recognized by the United States Supreme Court in *Moore*, a trial judge who has observed the conduct of the parties and witnesses is in a better position to estimate the value of evidence than an appellate court which relies on transcripts. As one court put it, “[c]ourts ought not to function in an artificially sterile environment [...] it must be remembered that the trial judge is Johnny-on-the-spot; he has savored the full taste of the fray, and his considerable discretion must be respected so long as he does not stray entirely beyond the pale.”

*United States v. Tierney* (1<sup>st</sup> Cir. 1985) 760 F.2d 382, 387. See also *United States v. Jordan* (1<sup>st</sup> Cir. 1997), 121 F.3d 695.

Ohio has also long-standing rule that discretionary review should be afforded to trial court decisions about the admission or exclusion of evidence. It has been said that "the admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage* (1987), 31 Ohio St.3d 173, 31 OBR 375, 510 N.E.2d 343, paragraph two of the syllabus. See *State v. Finnerty* (1989), 45 Ohio St.3d 104, 107, 543 N.E.2d 1233, 1237; *State v. Hymore* (1967), 9 Ohio St.2d 122, 128, 38 O.O.2d 298, 302, 224 N.E.2d 126, 130. It was said in *Hymore* that:

It is commonplace in a criminal trial for the prosecution to trace the defendant's steps prior to the time of an alleged crime. In fact it is so well settled that the prosecutor may show antecedent circumstances that shed light upon an alleged crime that no party to this case has found any authority contra. The only limitation upon this general rule, as it applies to this case, is relevancy, and, although the test of relevancy is not always an easy one, we feel that the best test is: Where a particular fact tends to render probable a material proposition in issue then that fact is relevant.

The trial court has broad discretion in the admission and exclusion of evidence and unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, this court should be slow to interfere.

*State v. Hymore* (1967), 9 Ohio St.2d 122, 128, 38 O.O.2d 298, 302, 224 N.E.2d 126, 130. *Hymore* reflects that the question of admissibility is often one of relevancy, a question which different minds can differ.

Along with questions of relevancy comes a question of whether the probative value of relevant evidence is outweighed by prejudice. The admission of other acts

evidence or any evidence will ultimately involve a determination of whether the probative value of evidence is outweighed by any prejudicial value. As the United States Supreme Court in *Old Chief v. United States* (1997), 519 U.S. 172 has suggested trial courts must consider the full evidentiary context of the case, as it understands it, when making an evidentiary ruling. As the Court explained in *Old Chief*:

As for the analytical method to be used in [Federal] Rule 403 balancing, two basic possibilities present themselves. An item of evidence might be viewed as an island, with estimates of its own probative value and unfairly prejudicial risk the sole reference points in deciding whether the danger substantially outweighs the value and whether the evidence ought to be excluded. Or the question of admissibility might be seen as inviting further comparisons to take account of the full evidentiary context of the case as the court understands it when the ruling must be made.

*Old Chief v. United States* (1997), 519 U.S. 172, 182-183, 117 S.Ct. 644.

Case law from this State suggests that evidentiary rulings are reviewed in the context that they are developed at trial. They are not simply looked at in a vacuum as presented in a motion in limine. Rulings on a motion in limine does not preserve the record for appeal, because:

The ruling is as [ sic ] tentative, preliminary or presumptive ruling about an evidentiary issue that is anticipated but has not yet been presented in its full context. An appellate court need not review the propriety of such an order unless the claimed error is preserved by an objection, proffer, or ruling on the record when the issue is actually reached and the context is developed at trial.

*State v. Maurer* (1984), 15 Ohio St.3d 239, 473 N.E.2d 768 citing Palmer, Ohio Rules of Evidence Manual (1984).

This reflects the principle that evidence is not viewed by itself. Instead when a party objects to evidence, a ruling is made by the trial judge based on the context of what has developed at trial. The trial judge who has presided over the proceedings, at the time the objection is made, is in the best position to make the determinations of admissibility.

### *Application in Ohio*

Appellate courts throughout the State of Ohio apply the abuse of discretion standard of review when determining if a trial court erred in admitting other acts evidence. See *State v. Edwards*, 1st Dist. No. C-100200, 2011-Ohio-1752, ¶19; *State v. Reed*, 2nd Dist. No. 2002-CA-03, 2002-Ohio-5413, ¶30; *State v. Harrington*, 3rd Dist. No. 8-01-20, 2002-Ohio-2190, ¶17; *State v. New*, 4th Dist. No. 08CA9, 2009-Ohio-2632, ¶21; *Mt. Vernon v. Hayes*, 5th Dist. No. 09-CA-00007, 2009-Ohio-6819, ¶19; *State v. Hernandez*, 6th Dist. No. L-06-1388, L-06-1389, 2009-Ohio-386, ¶32; *State v. Clemons*, 7th Dist. No. 10 BE 7, 2011-Ohio-1177, ¶106; *State v. Ogletree*, 8th Dist. No. 94512, 94512, 2011-Ohio-819; *State v. Moore*, 10th Dist. No. 07AP-914, 2008-Ohio-4546, ¶32; *State v. Kitcey*, 11th Dist. No. 2007-A-0014, 2007-Ohio-7124, ¶66; *State v. Waters*, 12th Dist. No. CA2002-11-266, 2003-Ohio-5875, ¶12.

Not only is the “abuse of discretion” standard uniformly applied across the appellate districts, it has been applied time and time again by this Court in reviewing death penalty cases. See *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶ 66; *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810; *State v. Issa*, 93 Ohio St.3d 49, 2001-Ohio-1290, 752 N.E.2d 904.

### *Application by Federal Courts*

The federal circuit courts of appeals typically apply some form of abuse of discretion standard of review. For example, the Sixth Circuit Court of Appeals stated that while they generally review a district court's Rule 404(b) determination for abuse of discretion, they noted that in another case they, "reviewing for clear error the district court's determination that the "other act" took place, de novo the district court's determination that the evidence was admissible for a proper purpose, and for an abuse of discretion the district court's determination regarding the probative value of the evidence." *United States v. Stokes* (6<sup>th</sup> Cir. 2010), 392 Fed.Appx. 362.

The Eighth Circuit Court of Appeals has explained that "a district court's decision to admit evidence under Federal Rule of Evidence 404(b) for abuse of discretion and reverse[s] only when such evidence clearly had no bearing on the case and was introduced solely to prove the defendant's propensity to commit criminal acts." *United States v. Thomas*, 593 F.3d 752, 757 (8<sup>th</sup> Cir.2010).

The Third Circuit Court of Appeals described their review as follows: "[t]o the extent that our review of the district court's Rule 404(b) ruling requires us to interpret the rules of evidence our review is plenary, but, if the evidence could have been admissible in some circumstances, we would review the district court's decision to admit evidence ... for an abuse of discretion." *United States v. Daraio*, 445 F.3d 253, 259 (3<sup>d</sup> Cir.2006) (citation omitted).

While the circuit courts of appeals offer different variations of the standard of review, it appears that is reviewed to some extent under an abuse of discretion standard. See *United States v. Gravenhorst* (1<sup>st</sup> Cir. 2006), 190 Fed. Appx. 1; *United States v. Curley* (2<sup>nd</sup> Cir. 2011), -- F.3d ----, 2011 WL 1532212; *United States v. Lee* (3<sup>rd</sup> Cir. 2010), 612 F.3d 170; *United States v. Thorpe*, (4<sup>th</sup> Cir. 2007), 253 Fed. Appx. 329; *United States v. Percel* (5<sup>th</sup> Cir. 2008), 553 F.3d 903; *United States v. Stokes* (6<sup>th</sup> Cir. 2010), 392 Fed.Appx. 362; *United States v. Conner* (7<sup>th</sup> Cir. 2009), 583 F.3d 1011; *United States v. Henderson* (8<sup>th</sup> Cir. 2010), 613 F.3d 1177; *United States v. Banks* (9<sup>th</sup> Cir. 2008) 514 F.3d 959, 975-976; *United States v. Grant* (10<sup>th</sup> Cir. 2007), 233 Fed.Appx. 840; *United States v. Watley*, (11<sup>th</sup> Cir. 2009), 318 Fed.Appx. 871.

#### ***Application in other states***

A review of court decisions by courts of last resort in other states shows a number of courts applying an abuse of discretion standard of review when review other acts evidence. *State v. Villalobos* (Ariz. 2010), 225 Ariz. 74, 235 P.3d 227; *Rohrbach v. State* (Ark. 2008), 374 Ark. 271, 287 S.W.3d 590; *Yusem v. People* (Colo. 2009), 210 P.3d 458; *State v. Jacobson* (Conn. 2007), 283 Conn. 618, 930 A.3d 628; *In re J.A.L.* (Iowa 2005), 694 N.W.2d 748; *Price v. State* (Miss. 2005), 898 So.2d 641; *State v. Knowles* (Mont. 2010), 357 Mont. 272, 239 P.3d 129; *State v. Chavez* (Nebraska 2011), 281 Neb. 99, 793 N.W.2d 347; *State v. Glodgett* (N.H. 2000), 144 N.H. 687, 690, 749 A.2d 283; *State v. Sena* (N.M. 2008), 144 N.M. 821, 825, 192 P.3d 1198; *State v. Huber* (S.D. 2010), 789 N.W.2d 283; *State v. Brown* (Vt. 2010) 15 A.3d 107.

While many courts use apply an abuse of discretion standard of review, some courts apply a hybrid or mixed standard of review. See *State v. Hicks* (W. Va. 2011) –S.E.2d ---, 2011 WL 1457212; *State v. Fisher* (Wash., 2009), 165 Wash.2d 727, 2002 P.3d 937.

For example the Supreme Court of Appeals of West Virginia has recently explained the standard of review as follows:

[t]he standard of review for a trial court's admission of evidence pursuant to [West Virginia Evidence] Rule 404(b) involves a three-step analysis. First, we review for clear error the trial court's factual determination that there is sufficient evidence to show the other acts occurred. Second, we review de novo whether the trial court correctly found the evidence was admissible for a legitimate purpose. Third, we review for an abuse of discretion the trial court's conclusion that the "other acts" evidence is more probative than prejudicial under Rule 403.

*State v. Lively* (W. Va. 2010) 226 W.Va. 81.

**III. The majority in *Morris* refers to decisions which applied a *de novo* standard of review to questions of law. Recent decisions from the Ninth District reflect application of the *abuse of discretion* standard of review.**

The majority in *Morris* applied the *de novo* standard of review arguing that the other acts analysis is a legal question. The Ninth District held, "Whether proffered other-act evidence has a tendency to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident and whether any of those things is of consequence to the determination of the action in a given case are questions of law." See *State v. Morris*, 9<sup>th</sup> Dist. No. 09CA0022-M, ¶13. See also *State v. Thomas*, 9<sup>th</sup> Dist. No. 10CA009756, 2011-Ohio-1629, ¶10.

The same has been said of whether evidence falls within a hearsay exception. See *State v. Denny*, 9th Dist. No. 08CA0051, 2009-Ohio-3925, at ¶4 citing *Medical Mutual of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, 909 N.E.2d 1237. Both *Morris* and *Denny* relied upon this Court's opinion *Schlotterer*.

In *Schlotterer*, this Court determined that in general, while discovery orders are reviewed under an abuse-of-discretion standard, the question of whether the information sought is confidential and privileged from disclosure under the physician-patient privilege is a question of law that is reviewed de novo. *Schlotterer*, supra. at ¶13. The *Denny* court which cited *Schlotterer* recognized that while the admissibility of evidence is an abuse of discretion, “[w]hen a court’s judgment is based on an [arguably] erroneous interpretation of law, an abuse-of-discretion standard of review is not appropriate.” *State v. Denny*, 9th Dist. No. 08CA0051, 2009-Ohio-3925 (the word arguably inserted in original). The Ninth District’s insertion of the word “arguably” changes the rule of law in *Schlotterer*. As opined in *Denny* it might be said that one just need to have an “argument” that an evidentiary ruling is erroneous to warrant a *de novo* standard of review. The exception to the rule as opined in *Schlotterer* merely stated that the abuse of discretion standard of review does not apply if the evidentiary ruling is erroneous. The evidentiary question in *Schlotterer* as stated above was whether information sought was privileged from disclosure under R.C. 2317.02(B)(1).

Typically, there may not be a dispute about whether a trial judge correctly interprets Evid. R. 404(B). There may; however, be arguments that the “other act”

evidence is not *relevant* to prove motive, or that the probative value of the evidence (offered to prove motive) is substantially outweighed by its prejudicial value. These are not “erroneous interpretations of law” but instead issues regarding the value of evidence, which must be viewed in the context of the entire trial.

In *State v. Horne*, 9<sup>th</sup> Dist. No. 25238, 2011-Ohio-1901; however, the majority held that they were obliged to follow precedent from this Court.<sup>1</sup> The *Horne* court opined:

The Ohio Supreme Court has held that “[t]he admission of such evidence lies within the broad discretion of the trial court, and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that has created material prejudice.” [...] This Court has typically applied this standard of review in regard to the admission of other acts evidence, most recently in *State v. Brown*, 9<sup>th</sup> Dist. No. 25287, 2011-Ohio-1041, at ¶ 19–20; see, also, *State v. Halsell*, 9<sup>th</sup> Dist. No. 24464, 2009-Ohio-4166, at ¶ 10–19; *State v. Stevenson*, 9<sup>th</sup> Dist. No. 24408, 2009-Ohio-2455, at ¶ 22–27; but, see, *State v. Morris*, 9<sup>th</sup> Dist. No. 09CA0022-M, 2010-Ohio-4282, at ¶ 13 (applying a *de novo* standard of review). Although this Court has veered in recent weeks from applying the abuse of discretion standard of review, see *State v. Thomas*, 9<sup>th</sup> Dist. No. 10CA009756, 2011-Ohio-1629, at ¶ 10, we note that we are duty bound to follow the precedent established by the Ohio Supreme Court, and we do so now. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. [...] An abuse of discretion demonstrates “perversity of will, passion, prejudice, partiality, or moral delinquency.” [...] When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court.

*State v. Horne*, 9<sup>th</sup> Dist. No. 25238, 2011-Ohio-1901, ¶8.

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<sup>1</sup> One of the concurring judges opined that the portion of the decision discussing the standard of review was dicta.

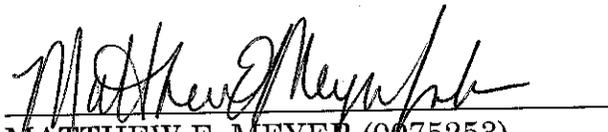
## Conclusion

Amicus curiae the Cuyahoga County Prosecutor's Office respectfully submits that this Honorable Court should firmly hold that an abuse of discretion standard of review applies to the admission of other acts evidence in Ohio. The abuse of discretion standard recognizes a trial judge's broad discretion in admitting and excluding evidence and takes account that a trial judge is in the best position to evaluate the admissibility of evidence within the context of the trial proceedings.

The judgment of the Ninth District in *Morris* should be reversed and remanded for application of the abuse of discretion standard of review.

Respectfully submitted,

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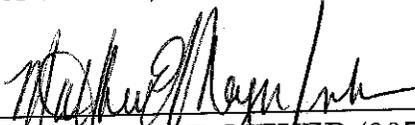
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Certificate of Service

A copy of the foregoing brief of Amicus Curiae the Cuyahoga County Prosecutor's Office in support of Appellant, the State of Ohio, has been sent by regular U.S. Mail this 23<sup>rd</sup> day of May, 2011 to Matthew Kern, Esq., Medina County Prosecutor's Office, 72 Public Square, Medina, Ohio 44256, David Sheldon, Esq., 669 West Liberty St., Medina, Ohio 44256, Paul A Dobson, Esq., and David E. Romaker, Esq., Wood County Prosecutor's Office, One Courthouse Square, Bowling Green, Ohio 43202.

  
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