

**IN THE SUPREME COURT OF OHIO**

<b>STATE OF OHIO</b>	)	<b>SUPREME COURT CASE</b>
	)	<b>NO. 2010-1842</b>
<b>Appellant,</b>	)	
	)	<b>ON APPEAL FROM THE</b>
<b>vs.</b>	)	<b>COURT OF APPEALS, NINTH</b>
	)	<b>APPELLATE DISTRICT</b>
<b>CARL M. MORRIS, JR.</b>	)	<b>09CA0022-M</b>
	)	
<b>Appellee.</b>	)	
	)	

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**APPELLEE'S MERIT BRIEF**

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**DAVID C. SHELDON (#0040523)**  
 669 W. Liberty Street  
 Medina, Ohio 44256  
 Tel: (330) 723-8788  
 Fax: (330) 723-4788  
 Email: [david@davidsheldonlaw.net](mailto:david@davidsheldonlaw.net)

**COUNSEL FOR APPELLEE**

**MATTHEW MEYER (#0075253) &  
 DANIEL VAN (#0084614)**  
 Assistant Prosecuting Attorney  
 Cuyahoga County Prosecutor's Office  
 The Justice Center  
 1200 Ontario Street  
 Cleveland, Ohio 44113  
 216-443-7800

**COUNSEL FOR AMICUS CURIAE,  
 CUYAHOGA COUNTY  
 PROSECUTOR OFFICE**

**DEAN HOLMAN (#0020915)**  
 Prosecuting Attorney, Medina County

**MATTHEW KERN (#0086415)**  
 Assistant Prosecuting Attorney  
 Medina County Prosecutor's Office  
 72 Public Square  
 Medina, Ohio 44256  
 330-723-9536  
 330-723-9532 fax

**COUNSEL FOR APPELLANT**

**DAVID A. ROMAKER, JR. (#0085683)**  
 Assistant Prosecuting Attorney  
 Wood County Prosecutor's Office  
 One Courthouse Square  
 Bowling Green, Ohio 43402  
 419-354-9250

**COUNSEL FOR AMICUS CURIAE,  
 OHIO PROSECUTING ATTORNEYS  
 ASSOCIATION**

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## STATEMENT OF FACTS

### (1) WITNESS SK

The State called SK as its first witness. She was born on May 25, 1993, and was fifteen (15) years-old at the time of trial (R. 58). SK's mother is Susan Klasek (formerly Morris) and her sister is Sarah. She and her sister have the same mother but have different fathers (R. 60-61). Her stepfather is Carl Morris and she remembered first living with him when she was going from kindergarten into first grade (R. 63). At the time she recalled first living with her stepfather, she, her sister and her mother were living on Pinecrest Drive in Brunswick, Ohio (R. 64). Her mom went by the name Susan Morris when she was married to her stepfather (R. 65).

She described her stepfather Carl as a really nice, kind, sweet and funny guy. He would always entertain the family by doing magic tricks with coins and cards (R. 66). SK acknowledged that she had talked with the prosecutor about her testimony prior to appearing in court (R. 66). She recalled Carl first performing magic tricks when she was in first grade. Carl's first trick he showed was when he used a blanket and put it under his feet and created the appearance that one of his feet would disappear. He then showed SK a trick where he would make her feel his thumb under the blanket and it would feel hard as a bone and then he would make it turn really soft. When she would feel it when it turned soft, it would actually be his penis (R. 68). SK would think his thumb felt like Jell-O (R. 68). Carl eventually showed SK that it was his penis and not his thumb underneath the blanket. She claimed that she and Carl would be lying on their backs next to each other and that he was "rubbing up and down on my thigh and it was very close to in between my legs." (R. 69).

While her stepfather was on his back, he would move his hands around his penis and move them up and down. At the time she saw these acts, she was confused and didn't know what he was really doing (R. 70). She claimed that nobody was around when Carl Morris did these things. She said her mom was working at Pizza Hut (R. 71). The prosecutor then asked if that is all her stepfather did, or did things go farther.

SK said farther and explained what she meant. Her first detailed account of what her stepfather did with his penis was significant in what the account *did not* say:

"A. After a period of time of slowly, I guess I would say, reassuring me that everything wasn't hurting me, that he would actually put his penis by my vagina and have, I guess, sex from there. He never completely went in me all the way."

"Q. Okay. Let me ask you a question, other than his penis, okay, you said touching you, where was his penis touching you?"

"A. On my vagina."  
(R. 72, emphasis added).

SK first said that Carl put his penis "by" her vagina, then said he wouldn't put it completely in her, and finally when asked by the prosecutor where his penis was touching her, SK stated "on" her vagina. SK indicated this touching first occurred when she was in first grade. When the prosecutor pressed her further to elaborate on the touching, SK again reiterated, "He would touch me on my vagina." (R. 73, emphasis added). She *denied* that he never put his fingers inside her vagina, and when the prosecutor asked her not only about when she was in first grade, but asked her about ever, SK stated that he would put his hands only on the outside of her vagina (R. 73).

When the prosecutor asked SK what was the most serious thing that occurred, in her eyes, between her and her stepfather, she stated, "Just the fact that

he would *touch* me with his penis. Every single time was most areas" (R. 74-75). She *did not say* the most serious thing was when Carl put his penis in her. She limited the most serious thing to Carl's touching of her with his penis. Then, when the prosecutor was not satisfied with her answers, *because she was not saying that Carl was putting his penis insider her*, the prosecutor, without any objection from defense counsel, switched to leading questions. Through a leading question, the prosecutor accomplished what he was unable to obtain through open-ended questions of SK:

"Q. Okay. Now, when you said he would touch you with his penis and put it in but not all the way in, would he actually insert his penis inside of you?"

"A. Correct."  
(R. 75).

From that point forward in the trial, SK began to describe incidents, ten in all, where she claimed that Carl put his penis inside her vagina (R. 75). SK indicated that many times these incidents would occur when Carl was getting out of the shower and she would be in her mother's room on the bed watching television. Carl would have a towel around his waist and climb into bed and put the covers over him and take off his towel (R. 76). Her stepfather never grabbed her, pushed her or forced her to make these things happen (R. 76-77).

She indicated these incidents would occur sometimes when both her sister Sarah and mother were home. Her mother would be home sleeping or downstairs in the kitchen (R. 74). The door to the bedroom would be closed but unlocked. She stated that the sessions would last up to thirty minutes and her mom would oftentimes be downstairs. She said her mother would come upstairs to sleep, but she never did walk into the room while she and Carl were in the room together (R. 154-56). Despite the fact that SK knew what Carl was going to do when he came

out of the shower on these occasions, and that she could leave the room if she wanted to, she never did. She doesn't know why she never did (R. 154).

She told her parents about these incidents around Christmas of 2007. She also told her best friend, Deanna Bruno, about the incidents (R. 78). This happened in the downstairs bathroom of SK's friend Darla's house. She told Deanna before she told her parents (R. 80-81).

SK recalled, during leading questioning by the prosecutor, about a time when she was going to go to California with her mom to visit her half sister Sarah. Sarah was living there at the time, which would have been around August of 2006. Carl Morris had promised SK a ticket to California if her grades were good. Then, about a month or two later, SK found out she wasn't going; instead, her stepfather Carl was going with her mother. She became extremely upset (R. 83-86). She was sitting on the stairs of their home on Ascot Drive and was crying and pulling her hair. She was going to tell her father what had happened and her family. But she didn't (R. 86). Defense counsel did not object to the leading questions or object based on the relevancy of the questions. SK states that her stepfather stopped having sex with her in August or September, 2006 (R. 87).

SK could only recall two specific dates that Carl Morris had sexual intercourse with her. One was approximately April 22, 2003, when her mother went to the hospital to have a hysterectomy operation. The other occurred sometime between October 20, 2005 and November 1, 2005. SK did not recall these dates originally when she first went to the Brunswick Police Station following her disclosure to her parents (R. 90-94, 117-18, 120). The first incident in April, 2003, she could not recall any details. She claims she could only recall that her stepfather put his penis in her

vagina (R. 90). The prosecutor asked leading questions about the time and dates over objection by defense counsel (R. 90-91). The prosecutor also asked leading questions about what he specifically did to her. Defense counsel objected, and the court overruled the objection (R. 91). When the court overruled the objection, the State continued to lead the witness: "Q. On April 22<sup>nd</sup>, 2003 when your mom was in the hospital, did Carl Morris insert his penis in to your vagina?" "A. Yes, he did." (R. 91).

During SK's description of the second incident, the prosecution again led her to where the State wanted her to go. When she described the event, her description ruled out any possibility that her stepfather had inserted his penis inside her vagina. She recalled:

"Q. And when you said he used his penis, what did he do?"

"A. He didn't put his penis all the way inside of me, he partially did until—he kept on moving back and forth until finally he had an erection and then he used his towel to cover it." (R. 96).

When the prosecutor heard this response, and realized that a non-erect penis or flaccid penis cannot be inserted into the vagina, the prosecutor again led her without objection:

"Q. Okay. Did he put his penis in—obviously did he put part of his penis inside your vagina?"

"A. Yes." (R. 96).

SK claimed that Carl Morris, when he was done having sexual intercourse, would cover up his penis quickly with a towel and ejaculate. *According to SK, he did this to conceal evidence (semen) so she couldn't use it against him* (R. 96, emphasis added).

SK's stepfather left the house sometime around June 2007 (R. 122). After Carl left, SK experienced some mental problems. And, while her grades were good

while Carl Morris was living with her, her grades went down after he left (R. 125-26, 131). Although SK's stepfather no longer lived in the house between June and December, 2007, she never told her father or anyone else during that time about what Carl had done (R. 125-26, 138). Moreover, *after her stepfather left the home, SK continued to go places with him: camping, swimming, over to Carl's friend Bill's house. In fact, on some occasions, SK would ask Carl to take her over to Bill's house* (R. 138-41).

With respect to dates, SK indicated she was not sure. In fact, when defense counsel brought up the April 22, 2003 incident, SK stated:

"A. I can't—all I can say really say is I know that it's happened approximately ten times with him being inside of me. *I don't know exactly when, what happened when* (R. 163, emphasis added)."

She further stated she is not sure if it happened five times before April 22, 2003 (R. 163-64). During re-direct examination, she stated: "I have such a bad memory. I can't even remember half of anything." (R. 173, lines 4-5). She could not remember the first time her stepfather had intercourse with her (R. 136). Her mother gave her the date of the first incident involving intercourse where SK could recall details of the act (R. 119). She admitted that her memory was so bad that others had to help her narrow down times when incidents happened in the past (R. 91).

## **(2) SUSAN KLASEK**

Susan Klasek is the mother of SK and Sarah (R. 180). She indicated that ~~between October 18, 2007 and December 17, 2007, she and her children lived with her friend, Darla. Prior to October 18<sup>th</sup>, the family lived on Ascot Drive in Brunswick, Ohio (R. 181). She was married to Carl Morris for approximately six or seven years. He lived with Ms. Klasek and the two children during those six or seven years (R.~~

184). Ms. Klasek talked about an incident in August 2006 where her daughter became upset over a trip she was supposed to go on to California (R. 189-90). She testified, over objection by defense counsel, that SK was crying and pulling her hair out. Her husband was present and was "pacing." (R. 190).

Susan Klasek related an incident involving her daughter Sarah (R. 192). Counsel objected to any discussion about this incident involving Sarah (R. 192). Ms. Klasek kicked Mr. Morris out of the house as a result of the incident. When she talked to him about the incident, she claims that Carl Morris told her that "he didn't remember and if he did it, he was sorry because he was drunk." (R. 193). Defense counsel objected to Carl's statement, but the court overruled the objection (R. 193).

SK's mother recalled SK disclosing information to her in December 2007. SK was upset, crying and pulling her hair (R. 194-95). The family was living on Clearbrooke Drive in Brunswick, Ohio at the time (R. 195).

The court permitted Susan Klasek to testify, over objection, about sexual problems she was having with her husband, Mr. Morris (R. 196). Ms. Klasek stated that when she didn't want to have intercourse with Mr. Morris, he would become verbally abusive, mentally abusive and kick the dog (R. 197). Then she began to describe incidents where, when she refused to have intercourse with her husband, her husband would masturbate and ejaculate in a towel. Defense counsel objected to this testimony and the court initially sustained the objection. Then the court, when counsel objected again, overruled the objection (R. 197, 199). The court noted a continuing objection to this topic of inquiry by the prosecution (R. 199).

**(3) DAVID KLASEK**

Mr. Klasek is the father of SK. He was formerly married to Susan Klasek (Morris). He became aware that his ex-wife, Susan, remarried a man named Carl Morris (R. 225-26). Mr. Klasek stated that his daughter SK had many emotional issues. He recalled first noticing her erratic episodic behavior when she was in second grade (R. 229). She acted like a dog and wanted to die (R. 229). SK, on one occasion, crawled like a dog. She wouldn't tell her father why she acted that way (R. 230). She hid on another occasion underneath the stairs at Mr. Klasek's house during a birthday party (R. 231).

Mr. Klasek then described an incident where SK didn't want her father, Carl, going to California with her (R. 235). Defense counsel did not object to this testimony. SK's father couldn't understand why his daughter didn't want Carl Morris to go. In his opinion, Carl was funny, a character, and that SK would "have more fun with him than you would with your mother." (R. 235). He observed this strange, acting out behavior of his daughter again in December on a couple occasions. He recalled one time when he confronted her about her MySpace account. SK was pulling her hair out and clawing her head (R. 236). Mr. Klasek, during this episode, was permitted to testify over objection that SK disclosed that "Carl raped me." (R. 238-39, 258-59) Following SK's disclosure, Mr. Klasek took his daughter to the police station and called Carl Morris on his cell phone (R. 239).

During cross-examination of Mr. Klasek, defense counsel attempted to show that the episode that led to SK's disclosure in December was not related to the incidents involving her stepfather. Mr. Klasek testified that his daughter asked him to slap her and he did (R. 239, 260-61, 263). The defense wanted to show that SK's

father slapped her because he found out she was bi-sexual. Also, the defense was attempting to show there were reasons for her depression and acting out that had nothing to do with her stepfather, Mr. Morris. The court, however, sustained the State's objection and allowed the defense only to elicit from Mr. Klasek that the MySpace information had nothing to do with Mr. Morris, and that he called his daughter a name that had nothing to do with Mr. Morris (R. 262-63). Mr. Klasek was disgusted with his daughter about what he learned from her MySpace account (R. 274-75). Mr. Klasek also heard his daughter saying there were voices in her head during delusional episodes, and SK mentioned "wolves" and "death" and "Azra" when she heard these voices (R. 277, 280).

#### **(4) SARAH JOHNSON**

Sarah Johnson is SK's sister. From January 2006 to approximately six weeks before she testified, she lived in California. At the time of trial, she was living with her mom on Clearbrooke Drive in Brunswick (R. 289-90). Prior to moving to California, she lived with her mother, grandmother, sister, and stepfather on Ascot Drive in Brunswick (R. 290).

Ms. Johnson related an incident involving her stepfather that occurred in her mother's bedroom on Ascot Drive (R. 300). Counsel objected to this testimony. The court overruled the objection and indicated that it was proper Rule 404(B) evidence (R. 294-96). The court also advised counsel, per their request, that it was going to give a cautionary instruction at that point, but did not give it at the time the testimony was allowed (R. 296, 300). Ms. Johnson stated that she walked into her mother's bedroom and Carl, who sitting on the edge of the bed, grabbed her by the waist, pulled her toward him, and made what she perceived to be a sexual comment (R.

300). Her mother was in the bathtub at the time. She said to Carl, "You're drunk," and went to her room. She told her mother the next day, and she kicked Mr. Morris out of the house (R. 301). The next day, Carl returned home and apologized to Sarah. He told her he doesn't remember the incident and that if he had done or said anything inappropriate, then he was sorry. He told Sarah he was drunk (R. 302). That was the only time anything like that ever occurred between Carl and her (R. 307, 310).

Ms. Johnson then described another incident, over objection, where she saw Mr. Morris on the couch underneath some blankets where they were close to each other. She stated she felt uncomfortable about what she saw and went and told her mom about the incident (R. 304-05).

Ms. Johnson stated that Carl Morris was a great stepfather, he was always funny, that she could talk to him, that he would give her advice, and that he was more like a friend to her than a stepfather (R. 305-07). She could confide in him and tell him things she couldn't tell her mother (R. 306). She admitted that she did not take the incident in the bedroom seriously because Carl was drunk (R. 309). During the entire five years she lived with her stepfather and sister, she only saw one incident that she thought was suspect (R. 311).

**(5) DEANNA BRUNO**

Ms. Bruno was a friend of SK (R. 317). Deanna Bruno related an incident that occurred at her friend Darla's house. She stated this was sometime in the fall of 2007 (R. 320). She had a conversation with SK in a bathroom in the basement of Darla's home. Counsel objected to this conversation. The court overruled the objection on the basis of Evid. R. 801(d)(1)(b) (R. 321). During this conversation, SK

related to Ms. Bruno that Carl, her stepfather, had raped her (R. 323). She cried when SK told her. However, SK had no emotion and seemed really cold (R. 323). SK did not give Deanna any details (R. 327).

**(7) GREGORY KECK**

Dr. Keck is a psychologist in private practice. He indicated at trial that he had a bachelor's degree from the University of Akron in sociology, and a doctoral degree in psychology (R. 348-49). He stated that he sees children in his private practice who have been removed from their homes due to abuse and neglect (R. 349). He stated that a large number of children present with histories of sexual abuse (R. 350). Dr. Keck first saw SK on December 12, 2007 (R. 352). She had made a suicide attempt and had been transported to Southwest General Hospital (R. 351). SK initially gave no history of sexual abuse during the first encounter with Dr. Keck (R. 356, 375). It was not until January 8, 2008, that SK gave a history of sexual abuse (R. 357). The court overruled defense counsel's objection to the narrative history given to Dr. Keck by SK (R. 364).

Dr. Keck testified to SK's credibility. Over objection, the court permitted Dr. Keck to state the following:

"Q. You're sensitive about these issues, fair to say, and you investigate them clinically?"

"A. Yes."

"Q. Clinically *did you have any reason to disbelieve SK—*

MR. MACK: Objection.

BY MR. RAZAVI:

"Q. --based on your training and experience?"

MR. MACK: Objection.

THE COURT: Overruled. You may answer.

THE WITNESS: No.

(R. 368)(emphasis added).

Dr. Keck also opined in a letter that he wrote to the prosecutor that *he had no reason to disbelieve* the history SK gave him about the sexual abuse (R. 369)(emphasis added). He also stated that he wasn't sure he believed SK's report of hearing voices, but it wasn't due to her credibility that he didn't believe her (R. 370). Dr. Keck attempted to find out why SK was depressed. However, he did not receive complete information from her father or mother.

He did not know about the MySpace incident where SK's father smacked her. He did not know about SK's mother's substance abuse. He had no information about her acting like a dog. He was unaware of the incident when she pulled her hair out and was screaming (R. 378-79).

Defense counsel, on cross-examination, questioned the psychologist about the number of times SK had sexual intercourse with her stepfather (R. 379). According to Dr. Keck, the number of incidents was thirty between SK and Carl Morris (R. 379). Counsel also allowed a juror to ask a question about whether the thirty times of intercourse actually involved penetration. Dr. Keck used his letter to the prosecutor to refresh his memory. He then stated the thirty times involved *actual* penetration (R. 386-88).

#### **(8) DETECTIVE HENRY PAPUSHAK**

Detective Papushak is a detective with the Brunswick Police Department. He interviewed Carl Morris (R. 393, 399). He recorded the interview on videotape on January 3, 2008 (R. 406). Mr. Morris told Detective Papushak that he had received a phone call from Susan Klasek in which she accused Mr. Morris of being a pervert and that they were taking SK to the police station (R. 413, 458). Throughout the entire interview by Detective Papushak, Mr. Morris denied that he had ever touched

SK in a sexual manner. He stated that he never molested SK. He denied ever putting his penis inside her vagina (R. 457). He inquired of Detective Papushak whether the police could take her to the hospital to be examined by a doctor to see if she had been molested (R. 457). He stated that the reason he left his wife and stepchildren in June, 2007 was because he found out his wife had cheated on him (R. 457). Detective Papushak questioned Mr. Morris about whether he had opportunities to molest SK. He responded that while there were probably opportunities to do so, he never molested his stepdaughter (R. 464).

#### **CLOSE OF STATE'S CASE—RULE 29 MOTION**

Following the close of the State's evidence, the defense moved for a Rule 29 motion for acquittal. The court denied the motion. The defense also reminded the court that no cautionary instruction was given earlier in the trial regarding Sarah Johnson's other acts testimony. The court agreed to give that instruction during final jury instructions (R. 476-78, 484). The State introduced, without objection, the videotaped interview of the appellant, marked Exhibit 2 (R. 474-75).

#### **DEFENSE WITNESS BASILLIO IMBRIGIOTEA**

Mr. Imbrigiotea and Carl Morris had been friends for fifteen years. Mr. Morris began taking care of Basillio because he was a C6 quadriplegic (R. 487). Carl Morris became certified by the State to take care of his friend. He would come over to Mr. Imbrigiotea's house every night for about three hours. Carl Morris would wash dishes, make his friend something to eat, vacuum, and be his companion (R. 489-90). Carl would often bring his stepdaughter over to Basillio's house. On the numerous occasions that he was there with SK, Mr. Imbrigiotea never saw him do

anything inappropriate with his stepdaughter (R. 491-92). SK cared about Carl and got along very well with him (R. 493).

## ARGUMENT AND LAW

### PROPOSITION OF LAW NO. 1:

### **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**

The trial court allowed the State to introduce evidence of other acts committed by Mr. Morris. The defense objected to the introduction of this evidence. This evidence was extremely prejudicial to Carl Morris, Jr., and its introduction, as the Ninth District Court of Appeals found, prejudiced his right to a fair trial and constituted reversible error. The appellate court analyzed the trial court's admission of the prohibited "other acts" evidence under a *de novo* standard of review. In so doing, the court explained its reasoning:

In each of the cases cited by the State, the appellate court determined that the other-act evidence at issue tended to prove at least one of the things listed in the exception to the general prohibition against the use of character evidence. See Evid. R. 404(B). The appellate court did not determine in any of those cases that the trial court violated Rule 404(B) but acted within its discretion in doing so, which is what this Court would have had to determine in order to affirm Mr. Morris's convictions. Rather, they applied the standard presented in Rule 404(B) to the proffered other-act evidence and determined that the evidence was admissible under the rule. Therefore, despite the fact that in each case the appellate court made a broad statement that the admission of evidence rests within the discretion of the trial court, in practice, each Court reviewed the other-act evidence questions *de novo*. Cf. *Med. Mut. Of Ohio v. Schlotterer*, 122 Ohio St. 3d 181, 2009-Ohio-2496, at ¶13 ("When a court's judgment is based on an erroneous interpretation of the law, an abuse-of-discretion standard is not appropriate.") . . . Accordingly, an appellate court's review of the admission of evidence always potentially includes a discretionary element. That discretionary review, however, only takes place once it is determined that the evidence at issue is relevant and not otherwise inadmissible under another rule. For example, Rule 801 defines hearsay and Rule 802 prohibits its admission unless it falls within certain exceptions. There is no discretion involved in determining whether

testimony falls within the definition of hearsay or, if it does, whether it also comes within an exception to the prohibition to the admission of hearsay. If it is hearsay and does not fall within an exception, it must be excluded. An appellate court is in as good of a position as the trial court to determine whether proffered evidence is hearsay and whether it falls within an exception to the prohibition of the admission of hearsay as is the trial court. But, if the testimony is not hearsay, or is hearsay that falls within an exception, that does not mean it must be received. The trial court still has discretion to apply Rule 403 and exclude it. (Appellant's Brf., Appx. A-33 – 34)

The appellate court simply stated that the trial court does not have discretion to admit erroneous and prejudicial evidence. If the proffered evidence does not tend to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," then the court has *no* discretion to admit such evidence.

This appeal involves a distinction without a difference. While this Court has stated that admission of other acts evidence is reviewed under an abuse of discretion standard, application of that standard to this case does not change the outcome. As the Ninth District opined:

"Even under the abuse of discretion standard of review, this case would have to be reversed because the prosecutor proffered, and the trial court admitted, highly-inflammatory other-act evidence that did not fit within the requirements of Rule 404(B) of the Ohio Rules of Evidence, depriving Mr. Morris of a fair trial. Therefore, the standard of review is not a dispositive issue in this case." (Appellant's Brf., Appx. A – 47)

If this court determines that the appellate court applied the wrong standard of review, and reverses with instructions to apply an abuse of discretion standard of review, the appellate court will reach the same decision upon remand. The net effect of this appeal will be that Mr. Morris's right to a new trial will be delayed by eight to twelve months. Because the Ninth District has indicated the outcome, regardless of which

standard of review is applied, this Court should dismiss this appeal as improvidently allowed.

Mr. Morris's new trial should not be delayed another year while the parties argue the nuances of "de novo" standard of review versus "abuse of discretion." The appellate court has spoken. The trial court committed reversible error by admitting clearly erroneous evidence that materially prejudiced Carl Morris, Jr.'s right to a fair trial.

A. The Trial Court Does Not Have Discretion To Admit Erroneous Evidence That Materially Prejudices Carl Morris's Right To A Fair Trial

The State of Ohio argues that the trial court could act reasonably, not arbitrarily, and not unconscionably by admitting evidence that an appellate court would later determine is clearly inadmissible (Brief of Appellant, p. 18, subheading C.) The State is wrong.

If the proffered evidence does not fit within one of the exceptions enumerated in Evid. R. 404(B), the trial court does not have discretion to admit the evidence. Stated differently, if the trial court admits erroneous character evidence that does not fit any of the exceptions, then it *necessarily* is acting arbitrarily, unreasonably and unconscionably. This is precisely what occurred in this case. The trial court made the comment that it thought the evidence "could be relevant" and noted a continuing objection by defense counsel:

"Q. Ma'am, at any time during your relationship with Mr. Morris, would your disagreements or fights be surrounding the issue of sex?"

"A. Most of the time."

"THE COURT: Hold on a second, are you objecting?"

"MR. JOHNSON: Objection."

"THE COURT: Overruled."

"THE WITNESS: Yes."

"Q. And in what manner? What was the nature of the disagreement?"

"THE COURT: For the record, does the Defense want a continuing objection to this line of inquiry?"

"MR. JOHNSON: Continued, yes, your Honor."

"THE COURT: Okay. The record should note that the Defense has a continuing objection to the line of inquiry about sexual relationships between Mr. Morris and this witness and the objection's overruled. The Court thinks it could be relevant." (R. 195-96, lines 22 – 25, 1 – 21)

The trial court did not stop the trial and call the attorneys to a sidebar where the judge could have inquired from the prosecution where the prosecutor was intending on going with the evidence. Had the prosecutor informed the judge of his reasons for this evidence (that he believed it was proper 404(B) evidence), the judge could have made an informed, conscientious decision to exclude the evidence. Instead, the trial court allowed the prosecution to ask the witness about materially prejudicial character evidence that had nothing to do with the rape charge against Mr. Morris:

"Q. If you did not have sexual intercourse what, if anything, would Mr. Morris do?"

"A. It was verbal abusive, mental abusive and he even kicked and hit the dog."

(R. 197, lines 5 – 8)

The trial court's decision to allow this evidence over objection was arbitrary, without reason, and unconscionable. The Ninth District explained why admission of this evidence was prejudicial:

The State presented no evidence that an unfulfilling sexual life with one's spouse has a tendency to show motive for the rape of a child. Further, it presented no evidence that men with voracious sexual appetites are sexually attracted to young children. What is more, even if evidence of Mr. Morris's voracious sexual appetite were admissible, the added fact that he took out his sexual frustration by kicking the dog goes far beyond tending to prove that voracious appetite. The kick-the-dog evidence tended to show that Mr. Morris was prone to act out if his wife refused to have sex with him every day. 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. The testimony had no relevance to any fact at issue in the case and did not tend to prove any of the permissible topics enumerated in Rule 404(B) of the Ohio Rules of Evidence. The evidence that Mr. Morris kicked the dog out of sexual frustration was received by the trial court in violation of Rule 404(B) of the Ohio Rules of Evidence.

(Appellant's Brf., Appx. A -12 - 13)

The State of Ohio makes several repeated references to the judge's *attitude* when ruling on the admissibility of other acts evidence. *Webster's New World Dictionary* at p. 38 defines attitude as: "1 a bodily posture showing mood, action, etc. 2 a manner showing one's feelings or thoughts 3 one's disposition, opinion, etc." In order to apply the State's standard of "attitude" to the judge's ruling, attorneys would have to watch the judge's *bodily posture* or his *manner* or his *disposition* when ruling on an objection. Does the State really believe that is a workable or realistic method of "abuse of discretion" review to observe the trial judge's attitude? Can any appellate court know what the trial judge's *bodily posture* or *disposition* was on a particular ruling? Obviously, matters not noticed in the record cannot be reviewed by this court.

This Court gave a very understandable definition of "abuse of discretion" in *State v. Custer* (1940), 137 Ohio St. 448, 451: "The meaning of the term 'abuse of discretion' in relation to the present controversy connotes something more than an error of law or of judgment. Black's Law Dictionary (2 Ed.), 11. Such term has been defined as "'a view or action ' that no conscientious judge, acting intelligently, could honestly have taken.'" Applying that definition to the trial court's ruling in this case, the trial judge could not have acted conscientiously by allowing this prejudicial character evidence. Mr. Morris's acts of being mentally and verbally abusive to his wife, as well as hitting and kicking the dog, had no connection or bearing whatsoever on whether he raped his stepdaughter. The State even attempts to shift the blame away from the trial court and points the finger at the defense. The State blatantly misrepresents to this Court that the witness "volunteered" the prejudicial evidence without being asked a question by the prosecution. This clearly erroneous and prejudicial character evidence was in direct response to the prosecutor's question!

Despite the fact that defense counsel preserved the issue for appeal by objecting at the appropriate time, the State of Ohio blames the defense for not moving to strike the testimony after it came out. Ohio Rule of Evidence 103 addresses the preservation of error for appellate review. That rule states, in pertinent part:

Evid. R. 103(A) provides that:

(A) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) **Objection.** In case the ruling is on admitting **evidence**, a timely **objection** or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context \* \* \*.

(Emphasis added).

Here, the defense made the appropriate objections at the appropriate times.

Defense counsel, once he preserved the issue for appeal by timely objecting, had no further obligation to move to strike. Moreover, once the trial judge overruled his objection(s), there would be no reason for him to believe the trial court would strike the very testimony that the court just allowed. The State of Ohio claims, incredulously, “the trial court did not err because the trial court was not asked to take any action.” (Appellant’s Brf., p. 23) Defense counsel *specifically* asked the court to take action when he *objected* to the prosecutor’s questions regarding Mr. Morris’s and his wife’s disagreements or arguments about sex. Counsel was asking the court to *keep out* the inflammatory, prejudicial character evidence that eventually came before the jury.

The second instance where the trial court allowed prejudicial, improper character evidence to go before the jury involved an incident between Carl Morris, Jr. and Sarah Johnson, his other stepdaughter. The trial court permitted Susan Klasek to testify about an incident involving her daughter Sarah Johnson. The court also permitted Sarah Johnson to testify about this prior incident. Counsel objected to the testimony from both witnesses about this prior act. SK’s sister related that she was in her mother’s bedroom when Carl Morris, who was sitting on the edge of the bed, grabbed Sarah by the waist and pulled her toward him. According to Sarah, Carl told her, “You don’t know what I would do to you but your mother would get mad.” (R. 300). She perceived that comment by Carl to be sexual in nature. She informed her mother about the incident the next day, and Susan Klasek kicked Carl Morris out of the house. Sarah did not take the incident seriously, because she

believed Carl was drunk. The mother stated that Mr. Morris didn't remember the incident and that if he did it, he was sorry because he was drunk. Sarah recalled that this was the only incident of its kind between her and her stepfather in the five or six years they lived together. She stated that Carl Morris was a great stepfather.

The Ninth District Court of Appeals ruled that the trial court erred in admitting this prejudicial character evidence. The court opined:

The incident that Sarah described was not part of a single criminal transaction involving the rapes of her half-sister and was, in fact, wholly unrelated to the rape charges Mr. Morris was facing. Additionally, identity was not an issue in this case, so other act evidence tending to prove identity was not admissible. *Curry*, 43 Ohio St. 2d at 73 . . . Sarah's testimony did not have any tendency to show a common scheme, plan, or system for Mr. Morris raping a child. At worst, the evidence tended to show that Mr. Morris had a desire to engage in sexual activity with Sarah. A man's attempt to engage in sexual activity with an adult, married woman does not demonstrate a common scheme, plan, or system for using a child under the age of ten or thirteen for his sexual gratification, even if the two are sisters. This is especially true in this instance because the incident described by Sarah bore no real similarity to the crimes charged. S.K. did not testify that Mr. Morris ever approached her while drunk or in any way similar to that described by Sarah. According to S.K., Mr. Morris never grabbed her or said anything similar to that which he allegedly said to Sarah. Sarah's testimony was not admissible as evidence of a common scheme, plan, or system under Evidence Rule 404(B).

(Appellant's Brf., Appx. A -14 – 15)

The appellate court also concluded that the erroneous evidence did not prove motive to rape SK. "If Sarah's testimony is believed, Mr. Morris, while drunk, expressed his desire to engage in sexual activity with her. Even if motive had been at issue, Sarah's testimony was not admissible because there is a fundamental difference between a man's desire to engage in sexual activity with his wife's adult daughter and his desire to rape his wife's little girl." *Id.* at A -15. Finally, the court indicated the prejudice to Mr. Morris by the admission of this evidence: "Sarah's testimony regarding the comment Mr. Morris made to her

reflected poorly on his character and did not tend to prove any of the enumerated topics deemed acceptable under Evidence Rule 404(B). Sarah's testimony of this subject had no probative value other than to encourage the jury to make the inference prohibited by Rule 404 of the Ohio Rules of Evidence." *Id.* at A – 16.

Both the State of Ohio and the dissent in *State v. Morris*, 9<sup>th</sup> Dist. No. 09CA0022-M, 2010 Ohio 4282, argued in the court below that the incident between Sarah Johnson and Carl Morris, Jr. showed a "behavioral fingerprint" which evidenced Mr. Morris's modus operandi and the identity of the crime itself. However, the Sarah Johnson incident did not have the peculiar characteristics or common features with the rape allegations involving SK.

For example, in *State v. Craig* (2006), 110 St. 3d 306, this Court determined that because other acts evidence demonstrated similarity between the locations, idiosyncratic manner, and the age of the victims involved in two rapes, "the evidence of the first rape tend[ed] to show the identity of the perpetrator of the second." *Id.* at ¶144. In *State v. Cromartie*, 9<sup>th</sup> Dist. No. 06CA0107-M, 2008 Ohio 273, the Ninth District discussed the similarity between the other acts and the crimes charged:

The other acts evidence in this case characterizes Defendant's persistent, threatening, and frequently violent reaction to rejection by his love interests. It demonstrates technological savvy, use of tools and weapons, destruction of physical property, false criminal allegations, and complaints about Defendant's own allegedly ill health, as well as repeated use of rental vehicles and the notably peculiar practice of hiding in the cargo areas of automobiles. This "idiosyncratic pattern of conduct" is sufficient to be probative in this case, and the trial court did not err by determining that Evid.R. 404(B) permitted the testimony at issue. See *State v. DePina* (1984), 21Ohio App.3d 91, 92. *Id.* at ¶15.

Unlike *Craig* and *Cromartie*, *supra*, the Sarah Johnson incident bore no similarity to nor did it share peculiar characteristics with the rape allegations against SK. The incident where Carl Morris, Jr. grabbed his stepdaughter Sarah and made a sexual comment had nothing to do with the rape charges. There was absolutely no similarity between that incident and the testimony of SK about what occurred between her and her stepfather. The act against Sarah did not involve any sexual contact. SK testified that Carl never grabbed her, hurt her or threatened her. SK never stated that Carl Morris ever made a comment to her which she perceived to be sexual. SK never testified that Carl smelled of alcohol or appeared "drunk."

The charge of rape involves "sexual conduct." Sexual conduct includes fellatio, cunnilingus, vaginal or anal intercourse, or penetration, however slight, of the vagina or anus with any object or body part. Ohio Rev. Code §2907.01(A). The incident between Sarah Johnson and Mr. Morris does not involve any element of proof required for the commission of rape. The Sarah Johnson act does not tend to prove any of the exceptions noted under the rule, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The defense specifically advised the court that the prior act is not consistent at all with SK's allegations of rape. The defense specifically objected to this line of questioning. The defense *specifically* asked for a cautionary instruction *at that time*.

The trial court's response painted a picture of "abuse of discretion:"

"Q. Tell us what occurred on this occasion."

"A. I went in to my mother's bedroom and Carl was sitting on the edge of the bed."

"MR. JOHNSON: Objection, Your Honor. May we approach?"

"THE COURT: Sure."

"THE COURT: Do you believe that she's going to testify to all of this?"

"MR. RAZAVI: Your Honor, all of it."

"THE COURT: Okay."

"MR. RAZAVI: All of it."

"THE COURT: Let him read it. You're objecting because you think this is prejudicial under 403, right?"

"MR. MACK: Correct."

"THE COURT: Okay. But I think it's covered by 404, 404(B) so the question is, do you want me to give a cautionary instruction?"

"MR. MACK: We do, Judge, but this is not consistent conduct with what's been described in court here."

"THE COURT: First of all, it's in the same bedroom. Second of all, he's grabbing her and you can certainly interpret that as a sexual come-on is up to the juror so yes, it's similar enough."

"MR. MACK: But the case law—"

"THE COURT: *Here's the point, all right? I've already made the ruling so you're not going to talk me out of it. The only question is do you want a cautionary instruction? You won't waive your objection. I'll put a continuing objection to this on the record, but do you want a cautionary instruction?*"

...

"MR. MACK: We do wish to have a cautionary instruction."

(R. 294, lines 16 – 22; R. 295, lines 2 – 25, R. 296, lines 1 – 10, 23 – 24)(emphasis added)

Even when defense counsel attempted to point out the case law against this type of evidence, the trial court cut him off. The trial court told counsel it didn't matter what he said, that the decision was made, and counsel was *not* going to change the court's mind. This is a prime of example of a judge abusing his discretion. Had the trial court given counsel the opportunity to address cases such as *Craig* and *Cromartie, supra*, the court could have made a rational, conscientious and thoughtful decision to exclude the evidence. Instead, the judge made an *arbitrary* and *unreasonable* decision to allow prejudicial character evidence before the jury. The trial court further abused its discretion by failing to give the *requested* cautionary instruction.

B. The Ninth District Court Of Appeals Applied *Stare Decisis* When It Followed This Court's Precedent In *Med. Mut. Of Ohio v. Schlotterer* (2009), 122 Ohio St. 3d 181, 2009 Ohio 2496

The appellate court determined that the trial court must decide in the first instance, as a matter of law, whether the proffered evidence fits within one of the exceptions noted in Evid. R. 404(B). If the court determines that it does not, then it must exclude the evidence. In that instance, it has no discretion to admit such evidence. However, on the other hand, if the trial court determines that the evidence does fall within one of the exceptions, then the court must exercise its discretion under Evid. R. 403 and determine whether the probative value of such evidence is substantially outweighed by its potential prejudicial effect upon the jury. The first question involves a question of law and, therefore, the court properly applied *Schlotterer, supra*. Ohio Rev. Code §2945.59 was enacted prior to Evid. R. 404(B)

and codifies the exception to introduction of character evidence. It is substantive law just as the privileged communications statute, O.R.C. §2317.02, is substantive law. The court of appeals interpretation did not disregard this Court's precedent. It applied precedent.

If this Court determines that application of a *de novo* standard of review was inappropriate and violated *stare decisis*, this Court still should not reverse. The appellate court's decision does not create a "double bind" or "considerable chaos" if this Court were to affirm. Under either standard—abuse of discretion or *de novo* review—the appellate court's function is still the same. It must determine whether admission of evidence was proper or improper. As the Ninth District explained:

"Regardless of the semantics used in this Court's treatment of Evidence Rule 404(B), this appeal is also not appropriate for *en banc* consideration because the standard of review is not a dispositive issue in this matter . . . Even applying an abuse of discretion standard of review, this case would be reversed because the trial court *does not have discretion to admit evidence that is prohibited* by Rule 404(B). Regardless of what this Court calls it, Mr. Morris was prejudiced by the admission of highly inflammatory testimony that tended to prove that Mr. Morris was the type of man who might act in a sexually inappropriate manner with his step-daughter."  
(Appellant's Brf., Appx. A – 45)(emphasis added)

Contrary to the State's argument, if this Court allows the Ninth District's decision to stand, it will not pit appellate courts against trial courts when it comes to evidentiary rulings. Under either standard of review, the result will be the same. A trial court acts arbitrarily and unreasonably when it allows prejudicial and inflammatory character evidence that does not fit within one of the exceptions under Evid. Rule 404(B) before the jury. Evidence improperly admitted remains improper, whether the appellate court applies an abuse of discretion standard or a *de novo* standard of review.

C. If This Court Reverses And Remands This Case To The Appellate Court With Instructions To Apply An Abuse Of Discretion Standard, Carl Morris, Jr. Requests That This Court Instruct The Appellate Court To Consider All Assignments Of Error Raised On Direct Appeal

In the event this Court agrees with the State of Ohio and reverses the Ninth District's decision, then Carl Morris, Jr. requests that this Court instruct the appellate court to review all assignments of error raised by Mr. Morris on direct appeal.

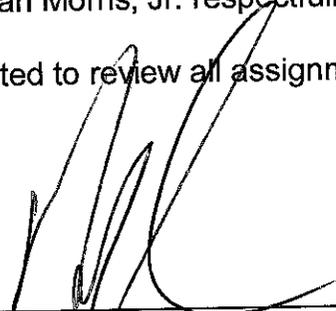
In his direct appeal, Mr. Morris raised six assignments of error. The appellate court only considered one. Another assignment of error raised a *State v. Boston* (1989), 46 Ohio St. 3d 108 challenge. The trial court, over objection of defense counsel, allowed a psychologist to testify that he had no reason to *disbelieve* SK's account of her sexual encounters with her stepfather and opine in a letter to the prosecutor that *he had no reason to disbelieve* the history SK gave him about the sexual abuse. Since this case hinged on the credibility of SK, the appellate court should review *all* assignments of error.

**CONCLUSION**

The State of Ohio requests that this Court perform a vain act. The State wants the Court to reverse and remand this case to the Ninth District Court of Appeals with instructions for the court to apply an abuse of discretion standard of review to Mr. Morris's claimed 404(B) error. However, the Ninth District has already stated that regardless of which standard of review is applied—*de novo* or abuse of discretion—the result would be the same. The appellate court would reverse the trial court. That court allowed prejudicial and inflammatory character evidence to be introduced. This Court is not required to perform a vain act. This appeal should be dismissed as improvidently allowed.

The Ninth District Court of Appeals did not violate *stare decisis*. The decision to admit or exclude 404(B) evidence is always a question of law in the first instance. The trial court does not have discretion to admit improper and prejudicial character evidence that does not fall into a delineated exception under the rule. In so doing, the appellate court properly followed *Schlotterer, supra*. Carl Morris, Jr. respectfully requests that the Ninth District's judgment be affirmed.

If this Court reverses and remands, Carl Morris, Jr. respectfully requests that the Ninth District Court of Appeals be instructed to review all assignments of error raised on direct appeal.



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DAVID C. SHELDON  
Attorney for Carl Morris, Jr.

**CERTIFICATE OF SERVICE**

I hereby certify that true and accurate copies of the foregoing Brief of

Appellee were forwarded to:

**DEAN HOLMAN (#0020915)**  
Prosecuting Attorney, Medina County

**WILLIAM D. MASON (#0075253)**  
Prosecuting Attorney, Cuyahoga County

**MATTHEW KERN (#0086415)**  
Assistant Prosecuting Attorney  
Medina County Prosecutor's Office  
72 Public Square  
Medina, Ohio 44256  
330-723-9536  
330-723-9532 fax

**MATTHEW MEYER (#0075253) &  
DANIEL VAN (#0084614)**  
Assistant Prosecuting Attorney  
Cuyahoga County Prosecutor's Office  
The Justice Center  
1200 Ontario Street  
Cleveland, Ohio 44113  
216-443-7800

**COUNSEL FOR APPELLANT**

**PAUL A. DOBSON (#0064126)**  
Prosecuting Attorney, Wood County

**COUNSEL FOR AMICUS CURIAE,  
CUYAHOGA COUNTY PROSECUTOR'S  
OFFICE**

**DAVID A. ROMAKER, JR. (#0085683)**  
Assistant Prosecuting Attorney  
Wood County Prosecutor's Office  
One Courthouse Square  
Bowling Green, Ohio 43402  
419-354-9250

**COUNSEL FOR AMICUS CURIAE,  
OHIO PROSECUTING ATTORNEYS  
ASSOCIATION**

By ordinary U.S. Mail this 17<sup>th</sup> day of July, 2011.

  
\_\_\_\_\_  
DAVID C. SHELDON  
Attorney for Carl Morris, Jr.