

ORIGINAL

IN THE SUPREME COURT OF OHIO
2012

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

AL E. FORREST,

Defendant-Appellee

Case No. **12-0416**

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

Court of Appeals
Case No. 11AP-291

**NOTICE OF CERTIFIED CONFLICT
OF PLAINTIFF-APPELLANT STATE OF OHIO**

RON O'BRIEN 0017245
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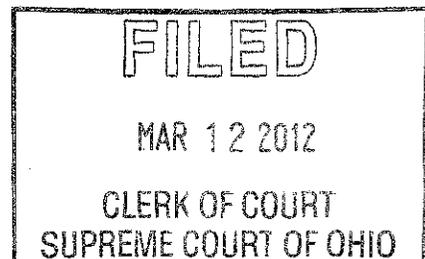
and

STEVEN L. TAYLOR 0043876 (Counsel of Record)
Chief Counsel, Appellate Division

COUNSEL FOR PLAINTIFF-APPELLANT

MICHAEL SIEWERT 0012995
307 East Livingston Avenue
Columbus, Ohio 43215
Phone: 614-224-6488

COUNSEL FOR DEFENDANT-APPELLEE



**NOTICE OF CERTIFIED CONFLICT
OF PLAINTIFF-APPELLANT STATE OF OHIO**

Plaintiff-appellant, the State of Ohio, hereby gives notice that, on March 8, 2012, the Franklin County Court of Appeals, Tenth Appellate District, certified a conflict in *State v. Forrest*, 10th Dist. No. 11AP-291, on the following question of law pursuant to its authority under Section 3(B)(4), Article IV, of the Ohio

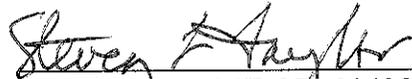
Constitution:

Whether the entire en banc court as defined in App.R. 26(A)(2) must participate in the decision whether to grant or deny an application for en banc consideration.

Attached are the Tenth District journal entry certifying the conflict and the Tenth District decisions. Also attached are the conflicting cases in *Kelley v. Ferraro*, 8th Dist. No. 92446, 2010-Ohio-4179, and *State v. Morris*, 9th Dist. No. 09CA0022-M, 2010-Ohio-5973, in which those courts, unlike the Tenth District, had the en banc court participate in the decision whether to grant or deny the application for en banc consideration.

Respectfully submitted,

RON O'BRIEN 0017245
Prosecuting Attorney



STEVEN L. TAYLOR 0043876
(Counsel of Record)

Chief Counsel, Appellate Division

Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail on this 12th day of Mar., 2012, to MICHAEL SIEWERT, 307 East Livingston Avenue, Columbus, OH 43215; Counsel for Defendant-Appellee.

Pursuant to S.Ct.Prac.R. 14.2(A)(3), a copy was also sent by regular U.S. mail on this 12th day of Mar., 2012, to the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.



STEVEN L. TAYLOR
Chief Counsel, Appellate Division

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO
2012 MAR -8 PM 1:02
CLERK OF COURTS

State of Ohio, :
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 Plaintiff-Appellant, :
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 v. :
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 Al E. Forrest, :
 :
 Defendant-Appellee. :

No. 11AP-291
(C.P.C. No. 09CR-07-3935)
(REGULAR CALENDAR)

JOURNAL ENTRY

For the reasons stated in the decision of this court rendered herein on March 8, 2012, it is the order of this court that the motion to certify the judgment of this court as being in conflict with the judgments of other Courts of Appeals is sustained, and, pursuant to the Ohio Constitution, Article IV, Section 3(B)94), the record of this case is certified to the Supreme Court of Ohio for review and final determination upon the following issue in conflict:

Whether the entire en banc court as defined in App.R. 26(A)(2) must participate in the decision whether to grant or deny an application for en banc consideration.

TYACK, J., BROWN, P.J., & BRYANT, J.

By *Mary Lynn*
Judge G. Gary Tyack

STEVEN L. TAYLOR
FR CO PROSECUTORS OFC
13TH FLOOR
373 SOUTH HIGH STREET
COLUMBUS, OH 43215

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Coersted J.
COURT OF APPEALS
TENTH DISTRICT OHIO

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT CLERK OF COURTS

State of Ohio,	:	
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Plaintiff-Appellant,	:	
	:	
v.	:	No. 11AP-291
	:	(C.P.C. No. 09CR-07-3935)
Al E. Forrest,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

DECISION

Rendered on March 8, 2012

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellant.

Michael Siewert, for appellee.

ON MOTION TO CERTIFY CONFLICT

TYACK, J.

{¶ 1} The State of Ohio has filed a second motion to certify a conflict in this case. The issue to be certified is:

Whether the entire en banc court as defined in App.R. 26(A)(2) must participate in the decision whether to grant or deny an application for en banc consideration.

{¶ 2} The State of Ohio is correct in its assertion that different courts of appeals handle motions for en banc consideration differently. Some submit the motion to the entire membership of the court. Some, as the Tenth District, submit the motions to the panel who decided the case originally to ascertain if there is arguable merit to the motions and only after that decision is made submit the issue to the full membership of the court.

{¶ 3} App.R. 26(A)(2)(a) reads:

Upon a determination that two or more decisions of the court on which they sit are in conflict, a majority of the en banc court may order that an appeal or other proceeding be considered en banc. The en banc court shall consist of all full-time judges of the appellate district who have not recused themselves or otherwise been disqualified from the case. Consideration en banc is not favored and will not be ordered unless necessary to secure or maintain uniformity of decisions within the district on an issue that is dispositive in the case in which the application is filed.

{¶ 4} The rule does not literally state who shall make an initial determination that two or more decisions in a district are in conflict. The procedure used by the Tenth District is more efficient, especially in the vast majority of cases where no arguable merit is present. Many prisoners initiated cases fall into this category. Also, cases where one of the parties simply wants to delay, routinely fit into this category.

{¶ 5} Since there is a conflict among the districts as to the correct interpretation of App.R. 26(A)(2), the conflict is best resolved by the Supreme Court of Ohio.

{¶ 6} The motion to certify a conflict is granted. The issue set forth above is certified to the Supreme Court of Ohio for review.

Motion to certify a conflict granted.

BROWN, P.J., and BRYANT, J., concur.

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO

IN THE COURT OF APPEALS OF OHIO 2012 JAN 26 PM 12:56
TENTH APPELLATE DISTRICT CLERK OF COURTS

State of Ohio,	:	
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Plaintiff-Appellant,	:	
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v.	:	No. 11AP-291
	:	(C.P.C. No. 09CR-07-3935)
Al E. Forrest,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

JOURNAL ENTRY

For the reasons stated in the decision of this court rendered herein on January 26, 2012, it is the order of this court that appellant's motions are denied.

TYACK, J., BROWN, P.J., & BRYANT, J.

By: *Gary Tyack*
Judge G. Gary Tyack DW

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FILED
COURT OF APPEALS
FRANKLIN CO. OHIO
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IN THE COURT OF APPEALS OF OHIO
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TENTH APPELLATE DISTRICT
CLERK OF COURTS

State of Ohio,	:	
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Plaintiff-Appellant,	:	
	:	
v.	:	No. 11AP-291
	:	(C.P.C No. 09CR-07-3935)
Al E. Forrest,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

DECISION

Rendered on January 26, 2012

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellant.

Michael Siewert, for appellee.

ON MOTION

TYACK, J.

{¶1} The State of Ohio has filed a compound application and motion entitled: "Plaintiff-Appellant's Application for Reconsideration, Plaintiff-Appellant's Application for En Banc Consideration, Plaintiff-Appellant's Motion for Review of this Application for En Banc Consideration by all Eight Judges, [and] Plaintiff-Appellant's Motion to Certify a Conflict."

{¶2} The case involves the warrantless seizure of the person of Al E. Forrest, followed by a search of the motor vehicle in which he was present. A trial court judge

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conducted an evidentiary hearing in which she found the State of Ohio had not justified the warrantless seizure and search. As a result, she ordered suppression of the evidence.

{¶3} The State of Ohio appealed and a panel of this court remanded the case for additional findings and additional clarity as to the trial court's rulings.

{¶4} The trial judge conducted a second hearing and again ordered suppression of the evidence.

{¶5} The State of Ohio appealed once again and a different panel of this court affirmed the trial court's ruling.

{¶6} The State of Ohio wants to argue again that the police officer who seized Forrest had the right to do so under the stop and frisk rights granted to police under *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868.

{¶7} This is not a stop and frisk situation. Forrest was in the driver's seat of a parked vehicle. The police did not stop him. They did not frisk him. Instead, a police officer opened the door of the vehicle, reached across Forrest's body, grabbed Forrest's arm which was the closest to the center of the vehicle and pulled Forrest from the vehicle. The officer acknowledged during the evidentiary hearing on the motion to suppress that he had seen no illegal activity when he first ordered Forrest to get out of the vehicle and then seized Forrest. The officer's actions went far beyond stopping a citizen on a public sidewalk and patting the citizen down for weapons, the facts in *Terry*. Again, this was not a stop and frisk situation and *Terry* does not apply. The State of Ohio's discussion of a reasonable articulable suspicion of criminal activity all assumes a *Terry* stop occurred. No such stop occurred.

{¶8} The State's argument at times seems to imply that persons who live in a minority neighborhood have fewer rights under the Fourth Amendment to the United States Constitution than persons who live elsewhere if a police officer calls the neighborhood a "high crime neighborhood" or asserts that other persons have been arrested in the area. The Fourth Amendment applies throughout the nation. The strong preference for requiring police to get a warrant before seizing a person has been the law of the land for over 40 years, at least since the decision in *Katz v. United States* (1967), 389 U.S. 347, 88 S.Ct. 507.

{¶9} The Fourth Amendment jurisprudence has not proceeded to the point that a police officer can pull a citizen out of a parked vehicle merely because the citizen is parked in a minority neighborhood and acts surprised when he or she suddenly sees a police officer standing right outside his or her vehicle.

{¶10} The State of Ohio also, asserts once again, that the decision of the United States Supreme Court in *Herring v. United States* (2009), 555 U.S. 135, 129 S.Ct. 695 somehow worked a major change in Fourth Amendment law. It did not.

{¶11} In *Herring*, police officers made an arrest based upon an assertion from a nearby police agency that an active warrant existed. In fact, unbeknownst to the arresting officers and at least some officers of the nearby district, the warrant had been recalled. The United States Supreme Court found that the fruits of the arrest should not be suppressed under the circumstances.

{¶12} The differences from Forrest's case are striking. The officers here knew they had no warrants. They claimed they were approaching the vehicle to check on the

well-being of the occupants. They made no claim to having seen any illegal activity until after they had seized Forrest.

{¶13} The good-faith exclusionary rule claimed by the State of Ohio exists only in the context of searches and arrests where police believe they have a valid warrant. The rule does not apply to situations where no warrants exist or are believed to exist. The rule does not apply to Forrest's factual situations, which involves a deliberate seizure of the person, not negligent record keeping.

{¶14} The cases alleged by the State of Ohio as being in conflict with our decision in this case all involve stop and frisk situations. As noted above, the seizure of Forrest was not a stop or a frisk. No conflict exists such that a conflict should be certified.

{¶15} We do not find that two or more decisions of this appellate court are in conflict, so the requirements of App.R. 26(A)(2) are not met and en banc consideration is not permitted.

{¶16} As a result of the foregoing analysis, the State of Ohio's application for reconsideration is denied. The State's application for en banc consideration and related motions are denied. The motion for certification of a conflict is also denied.

Motions denied.

BROWN, P.J., concurs in judgment only.
BRYANT, J., concurs separately.

BRYANT, J., concurring separately.

{¶17} Although I agree with the majority that the state's motions be denied, I disagree to some extent with the majority opinion and so write separately.

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{¶18} The majority points out that this case does not involve a stop and frisk. I do not interpret the state's motion to suggest the case involves a stop and frisk as the officers approached defendant's vehicle. Rather, the state contends that the officers, on arriving at the vehicle, developed a reasonable suspicion that defendant was engaged in criminal activity. Our prior decision addressed that contention and found it unpersuasive.

{¶19} The state's motion for reconsideration does not raise issues this court failed to address in deciding the state's appeal. Accordingly, I would deny the state's motion for reconsideration. For the reasons the majority states, I, too, would deny the state's motions related to en banc consideration and its motion to certify a conflict.

FILED
CLERK OF COURTS
FRANKLIN CO. OHIO

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

2011 DEC -6 PM 12:08
CLERK OF COURTS

State of Ohio, :
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 Plaintiff-Appellant, :
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 v. :
 :
 Al E. Forrest, :
 :
 Defendant-Appellee. :

No. 11AP-291
(C.P.C. No. 09CR-07-3935)
(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on December 6, 2011, appellant's assignments of error are overruled. Therefore, it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellant.

TYACK, J., BRYANT, P.J., & BROWN, JJ.

By *Gary Tyack*
Judge G. Gary Tyack

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Cassett J.M.
CLERK
COURT OF APPEALS
FRANKLIN CO. OHIO

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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CLERK OF COURTS

State of Ohio,

Plaintiff-Appellant,

v.

Al E. Forrest,

Defendant-Appellee.

No. 11AP-291
(C.P.C. No. 09CR-07-3935)
(REGULAR CALENDAR)

DECISION

Rendered on December 6, 2011

Ron O'Brien, Prosecuting Attorney, and Steven L. Taylor, for appellant.

Michael Siewert, for appellee.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶1} The State of Ohio is appealing from the rulings of a judge of the Franklin County Court of Common Pleas who sustained a motion to suppress evidence. The State assigns two errors for our consideration:

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT MISAPPLIED THE LAW AND INCORRECTLY DECIDED AN ULTIMATE ISSUE IN THE CASE WHEN IT GRANTED DEFENDANT'S MOTION TO SUPPRESS.

All

SECOND ASSIGNMENT OF ERROR

EVEN IF A CONSTITUTIONAL VIOLATION DID OCCUR, THE TRIAL COURT ERRED BY ORDERING SUPPRESSION WITHOUT DETERMINING WHETHER THE VIOLATION RESULTED FROM DELIBERATE, RECKLESS, OR GROSSLY NEGLIGENT POLICE MISCONDUCT, OR FROM RECURRING OR SYSTEMIC NEGLIGENCE.

{¶2} Al E. Forrest ("appellee") was in a 2003 Ford Explorer parked along the side of the road in a residential neighborhood in Columbus, Ohio, when two police officers stopped their cruiser behind the Explorer. One of the officers, Kevin George, testified in an evidentiary hearing that he saw no illegal activity before he walked up to the vehicle. He also acknowledged that he saw no criminal activity as he approached the vehicle. He testified that he and his partner stopped their cruiser to "check on the well being" of the Explorer's occupants. (Tr. 17.)

{¶3} When appellee looked out of the window on the driver's side and saw Officer George standing beside the Explorer, appellee was surprised. His eyes seemed to get bigger and his mouth dropped open. The man in the passenger seat of the Explorer glanced at the officer and then looked straight ahead. The officer claimed he asked Forrest if he was "okay."

{¶4} Appellee moved his right hand from his lap toward the center console of the Explorer and then turned back toward Officer George.

{¶5} Officer George interpreted appellee's surprise as "nervousness" and his turning toward the officer as an effort to block the officer's view of the interior of the vehicle, even though the officer was asking Forrest a question.

No. 11AP-291

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{¶6} At the hearing on the motion to suppress, Officer George testified he could see both of appellee's hands and knew appellee was not holding a weapon. Officer George next noticed appellee had some money in his left hand and ordered appellee out of the vehicle. Appellee did not immediately get out of the vehicle. Instead, he rolled up the driver's window and took the keys out of the ignition.

{¶7} Officer George ordered appellee out of the vehicle a second time. Appellee merely looked straight ahead and held the keys. At the hearing, Officer George acknowledged that he still had not seen any illegal activity.

{¶8} Officer George next opened the door to the Ford Explorer, reached across appellee's body and grabbed his right hand. The officer started to pull appellee out of the vehicle.

{¶9} At no time did the officer have a warrant, either a search warrant or an arrest warrant. Warrantless searches and/or seizures are "per se unreasonable, subject to a limited number of well-delineated exceptions." See *Katz v. United States* (1967), 389 U.S. 347, 88 S.Ct. 507. For the State of Ohio to justify the warrantless seizure of Forrest and the search of Forrest's vehicle, the State had the burden of proving the existence of and applicability of one of the well-delineated exceptions. The trial judge who conducted the evidentiary hearing on Forrest's motion to suppress found that the State of Ohio did not prove the applicability of any of the well-delineated exceptions and sustained the motion to suppress.

{¶10} We note initially that the police needed no suspicion of activity, legal or illegal, in order to walk up to or approach the Ford Explorer. What a person willingly displays in public is not subject to Fourth Amendment protection. However, Officer

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No. 11AP-291

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George went far beyond approaching the vehicle. He ordered Forrest out of the vehicle and then physically grabbed Forrest and started to pull him out of the Ford Explorer when Forrest did not honor the officer's order.

{¶11} The State of Ohio has analogized the facts here to a "stop" justified by *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868. The trial court judge did not reject the State's "Terry stop" theory without consideration. Instead, the trial court judge described the officer's state of mind as "nothing more than a hunch." The trial court also expressly found that the police "did not have an objective evidentiary justification to initiate the stop and conduct any search." The reference to "initiate the stop" is an apparent reference to the State of Ohio's argument that the law of "stop and frisk" under *Terry* applied here.

{¶12} The trial court clearly rejected the State of Ohio's assertion that the stop and frisk exception to the warrant requirement applied and was demonstrated. We also note the attempt to apply *Terry* to the facts here is inconsistent with Officer George's claim that he and his partner stopped to check the well-being of the Explorer's occupants. The officer's statement that he saw no criminal activity right up to the time he decided to order appellee out of the vehicle and then to physically remove appellee from the vehicle when appellee did not get out voluntarily is inconsistent with a stop and frisk.

{¶13} The State of Ohio has argued other warrant exceptions on appeal, none of which are persuasive. The automobile exception requires probable cause to search. See, for instance, *Carroll v. United States* (1925), 267 U.S. 132, 45 S.Ct. 280, and the many cases following it. It similarly requires no probable cause to arrest Forrest as the State argues probably cause to arrest and then search incident to arrest are present, but both fail because they are premised on Forrest's wrongfully refusing to obey the order to

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- 5 -

step out of the vehicle. The officer, however, had no basis to order Forrest out of the vehicle because he lacked reasonable articulable suspicion of criminal activity when Officer George reached across Forrest's body to grab his hand and pull him out of the vehicle. Since there was no lawful arrest, the search and seizure cannot be justified as a search incident to a lawful arrest.

{¶14} In short, the trial court's rejection of the State of Ohio's proffered exception to the warrant requirements was consistent with the evidence before it and the officer's own admissions.

{¶15} The first assignment of error is overruled.

{¶16} In the second assignment of error, the State of Ohio asserts the trial court should have applied the 2009 United States Supreme Court case of *Herring v. United States* (2009), 555 U.S. 135, 129 S.Ct. 695 to this case and used it as a basis to reach a different ruling on the motion to suppress.

{¶17} Simply stated, the facts in *Herring* bear little similarity to the facts of the present case. In *Herring*, police officers made an arrest based upon a warrant listed in a neighboring county's database. A search incident to that arrest yielded drugs and a gun. Later, the arresting officers discovered that the warrant listed in their computer records had been recalled months earlier. The failure of police in the adjoining county to update their database was, by the United States Supreme Court, seen as a simple act of negligence, but not such an error as to render the arrest illegal. The officers who arrested Herring had an honest, legitimate belief that a valid arrest warrant existed.

{¶18} The officers involved in the search and seizure of appellee had no warrant and had no basis for believing a warrant existed. *Herring* has no applicability to appellee's case. The trial court did not err by failing to apply it.

{¶19} The second assignment of error is overruled.

{¶20} Both assignments of error having been overruled, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT, P.J., and BROWN, J., concur.

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[Cite as *Kelley v. Ferraro*, 2010-Ohio-4179.]

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

LYNN ARKO KELLEY

Plaintiff-Appellant/Cross-Appellee

COA NO.
92446

LOWER COURT NO.
CP CV-589040

-vs-

COMMON PLEAS COURT

JAMES FERRARO, ET AL.

Defendants-Appellees/Cross-Appellants

MOTION NO. 435185

Date August 24, 2010

Journal Entry

{¶ 1} Defendants-appellees/cross-appellants James Ferraro and Kelley & Ferraro, LLP ("K&F") have moved this court for consideration en banc of the decision announced June 17, 2010. We are obligated to resolve legitimate conflicts on a point of law within our district through en banc proceedings should the court determine such a conflict exists. *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672; Loc.App.R.26. Having reviewed K&F's motion and finding no legitimate conflict on a question of law, K&F's motion for consideration en banc is denied.

{¶ 2} K&F contends that this court erred in reversing the trial court's denial of Kelley's motion for summary judgment because an appellate court cannot review a trial court's denial of a motion for summary judgment where the matter has gone to trial. But K&F did not raise the argument that a denial of summary

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judgment is not reviewable on appeal in its merit brief on appeal, despite Kelley's assignment of error that the trial court erred in denying her motion. Thus K&F's en banc request appears to be an after-the-fact attempt to bootstrap an argument that was never before presented to the court for consideration, and for this reason alone, its en banc request should be denied.

{¶ 3} With respect to the merits of K&F's en banc request, *Continental Ins. Co. v. Whittington* (1994), 71 Ohio St.3d 150, 642 N.E.2d 615, is the seminal case on the issue. *Continental* holds that when a motion for summary judgment is denied because the trial court found that there were material issues of fact, an ensuing trial will moot (or render harmless) any error in that decision. What K&F fails to mention in its motion is that *Continental* also holds that when a summary judgment is erroneously denied, and the issue is a *matter of law*, an ensuing trial does not render the error harmless, and the ruling is reviewable.

{¶ 4} K&F claims that the decision announced June 17, 2010, reversing the trial court's denial of Kelley's motion for summary judgment conflicts with two Eighth District cases: *McNulty v. PLS Acquisition Corp.*, 8th Dist. Nos. 79025, 79125, and 79195, 2002-Ohio-7220, and *Thomas v. Nationwide Mut. Ins. Co.*, 177 Ohio App.3d 502, 2008-Ohio-3662, 895 N.E.2d 217.

{¶ 5} The *MuNulty* court stated, "the record shows that the parties presented sharply conflicting theories and evidence in their cross-motions for summary judgment to support their version of the relevant events. Thus, we find

that these matters involved *disputed issues of fact* which were properly submitted to a jury.” Id. at ¶95. (Emphasis added.) Accordingly, the principle of harmless error applied.

{¶ 6} In *Thomas*, this court found that “both parties filed motions for summary judgment on the coverage question. The trial court denied both motions because “[w]hether plaintiff can rebut the presumption of prejudice that was created when the subrogation issues of the defendant were destroyed is a *material issue of fact* to be determined by the trier of fact.” Id. at ¶6. (Emphasis added.)

{¶ 7} Both cases cited by K&F in its allegation of conflict involved summary judgments that were denied because there were material issues of fact. But in this case, the panel held that summary judgment was improperly denied *upon an issue of law*.¹ This is in accord with *Continental* and has no relevance whatsoever to the holdings in either *McNulty* or *Thomas*.

{¶ 8} There is further argument in K&F’s brief over the panel’s holdings concerning whether the Partnership Agreement contained a “death provision,” whether non-equity partners were “Partners” for purposes of the Agreement, and

¹Specifically, this court found that the language of the Partnership Agreement regarding Ferraro’s duty to treat Michael Kelley’s death as an event triggering the dissolution and winding up of the K&F partnership was plain and unambiguous. If a contract is clear and unambiguous, its interpretation is a matter of law and there is no issue of fact to be determined. *Inland Refuse Transfer Co. v. Browning-Ferris Ind. of Ohio, Inc.* (1984), 15 Ohio St.3d 321, 323, 474 N.E.2d 271.

whether the Estate could be a "Non-continuing Partner" under the Agreement. There were no material issues of fact involved in the decision regarding these issues; they were all decided as matters of law.

{¶ 9} Finally, K&F raises the doctrine of "invited error" apropos of Kelley's expert testifying on cross-examination that, in his opinion, an attorney not licensed to practice in Ohio cannot be a partner in an Ohio legal partnership. This opinion was not contained in any expert report submitted by Kelley, nor was it elicited upon direct examination by Kelley. Significantly, it is not an accurate statement of the law.

{¶ 10} K&F argues that somehow Kelley is "bound" by this statement elicited on cross-examination, or that since it was Kelley's witness who made the statement, she cannot be heard to argue that this is legally untrue. K&F cites no authority for this proposition, but casts its argument rather as "invited error."

{¶ 11} Professor Ruben was not introduced as an "expert on the law." There is only one expert on the law in any trial, and that is the judge presiding over it. He or she is the sole arbiter of what the law is. While Ruben opined that Ferraro's lack of Ohio licensure prohibited him from being part of an Ohio LLP, whether that was the law was a determination that could only be made by the trial judge.

{¶ 12} Under the doctrine of invited error, a party will not be allowed to take advantage of an error that he himself has invited or induced the trial court to

make. *State ex rel. Beaver v. Konteh* (1998), 83 Ohio St.3d 519, 700 N.E.2d 1256. Neither the Estate nor Lynn Kelley induced or invited this error. They did not present this proposition to the court; Professor Ruben did, not in a report, not on direct examination, but only upon cross-examination by K&F.

{¶ 13} After Professor Ruben made this statement, had the *plaintiff* then dismissed her claim under the contract or moved to have her claim “converted” to one in quasi contract, and then proceeded to cite the court’s granting of dismissal or conversion as error in the Court of Appeals, we would have had invited error.

{¶ 14} But that is not what happened. The *trial court* converted the contract claim into one of quasi contract in the following colloquy regarding both parties’ motions for directed verdict at the conclusion of the evidence:

{¶ 15} “THE COURT: I’ll make the following series of rulings: pursuant to the testimony of the plaintiff’s expert witness, Miles Ruben, this is no longer a contract case and the jury will be told that. All of the contract claims are hereby dismissed.

{¶ 16} “Count one, dissolution of Kelley & Ferraro; count two, winding up of the affairs of Kelley & Ferraro; count three, the accounting; count four, the breach of the Kelley & Ferraro partnership agreement, all of those are hereby dismissed.

This is a quasi contract case and the jury will be informed of this.” (Tr. 2581-2582).

{¶ 17} The court then proceeded to dismiss all other claims, the gravamen

of which are not at issue in this allegation of invited error. Finally, the court concluded at Tr. 2591: "Are there any other issues that we need to deal with at this point? *I will note the plaintiff's objection for the record.*" (Emphasis added.)

{¶ 18} Plaintiff did not request dismissal of the contract claims, nor did she move for "conversion" of the contract claim into a claim under quasi contract. All of this was done by the judge, and objected to by the plaintiff. This is not a matter of "invited error."

{¶ 19} Motion for consideration en banc is denied.

CHRISTINE T. McMONAGLE, JUDGE

CONCURRING:

PATRICIA A. BLACKMON, J.,
MARY J. BOYLE, J.
COLLEEN CONWAY COONEY, J.,
LARRY A. JONES, J.,
KENNETH A. ROCCO., J.,
MELODY J. STEWART, J.

CONCURRING IN JUDGMENT ONLY:

MARY EILEEN KILBANE, J.

RECUSED:

FRANK D. CELEBREZZE, JR., J.
ANN DYKE, J.,
SEAN C. GALLAGHER, A.J.,
JAMES J. SWEENEY, J.

[Cite as *State v. Morris*, 2010-Ohio-5973.]

STATE OF OHIO)
)ss:
COUNTY OF MEDINA)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO,

C.A. No. 09CA0022-M

Appellee

v.

CARL M. MORRIS, JR.

Appellant

JOURNAL ENTRY

{¶1} The State of Ohio has moved this Court for en banc consideration of this appeal. See *State v. Morris*, 9th Dist. No. 09CA0022-M, 2010-Ohio-4282. Under Rule 26(A)(2)(a) of the Ohio Rules of Appellate Procedure, if a majority of the court of appeals judges in an appellate district determine that two or more decisions of the court on which they sit are in conflict, the court “may order that an appeal or other proceeding be considered en banc.” The State has argued that the cases it has cited conflict with the opinion of this Court in this matter and consideration en banc is necessary to secure uniformity of decisions within the district. This matter is not appropriate for en banc consideration, however, because the differing description of the standard of review applicable to the admission of other-acts evidence does not create a true conflict within the district and the standard of review applicable to the admission of other-act evidence is not dispositive of this matter.

{¶2} Under the common law, evidence of other crimes committed by the accused was not admissible to show the accused's "propensity or inclination to commit crime." *State v. Morris*, 9th Dist. No. 09CA0022-M, 2010-Ohio-4282, at ¶11 (quoting *State v. Curry*, 43 Ohio St. 2d 66, 68 (1975)). A statutory exception was created for criminal cases "in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material" R.C. 2945.59. In such criminal cases, "any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved . . . notwithstanding that such proof may show or tend to show the commission of another crime by the defendant." *Id.* After the Modern Courts Amendment to the Ohio Constitution was adopted in 1968, the Ohio Supreme Court began to promulgate rules of practice and procedure for the various courts of the state. Ohio Const. Art. IV, § 5(B). Under the constitutional procedure, all rules proposed by the Supreme Court become effective "unless . . . the General Assembly adopts a concurrent resolution of disapproval." *Id.* In 1980, the Ohio Supreme Court adopted Rule 404 of the Ohio Rules of Evidence under the authority of article IV section 5(B) of the Ohio Constitution, giving the rule legal effect over any conflicting laws then existing. *Id.* Under Evidence Rule 404(B), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. [But], [i]t may . . . be admissible . . . [to prove] motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

{¶3} The State of Ohio has argued that this case must be considered en banc because its application of the de novo standard of review to the questions regarding the admission of evidence under Rule 404(B) of the Ohio Rules of Evidence conflicts with this Court's prior precedent. In *Morris*, this Court cited a de novo standard of review as applicable to the questions of "[w]hether 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" *State v. Morris*, 9th Dist. No. 09CA0022-M, 2010-Ohio-4282, at ¶13.

{¶4} The State has cited eleven other-acts-evidence cases in which this Court has made the broad statement that the admission or exclusion of evidence rests in the discretion of the trial court. See *State v. Halsell*, 9th Dist. No. 24464, 2009-Ohio-4166, at ¶11; *State v. Patel*, 9th Dist. No. 24030, 2008-Ohio-4693, at ¶16; *State v. Blazo*, 9th Dist. No. 23054, 2006-Ohio-5418, at ¶9; *State v. Arnott*, 9th Dist. No. 21989, 2005-Ohio-3, at ¶35; *State v. Kolvek*, 9th Dist. No. 21752, 2004-Ohio-3706, at ¶24; *State v. Owens*, 9th Dist. No. 21630, 2004-Ohio-601, at ¶16; *State v. Starcher*, 9th Dist. No. 03CA0014-M, 2003-Ohio-6588, at ¶21; *State v. Basford*, 9th Dist. No. 03CA0043-M, 2003-Ohio-5613, at ¶5; *State v. Galloway*, 9th Dist. No. 19752, 2001 WL 81257 at *5 (Jan. 31, 2001); *State v. Moore*, 9th Dist. No. 19544, 2000 WL 422412 at *2 (Apr. 19, 2000); *State v. Patton*, 9th Dist. Nos. 16475, 16634, 1995 WL 283767 at *3 (May 10, 1995). In nine of the State's cited cases, this Court determined that the other-act evidence did tend to prove at least one of the permissible issues listed in Evidence

Rule 404(B). In one case, the other-act evidence was never provided to the jury, so the trial court did not analyze whether it fit within the requirements of the rule. *State v. Moore*, 9th Dist. No. 19544, 2000 WL 422412 at *2 (Apr. 19, 2000). In the final case, this Court determined that the trial court had incorrectly admitted other-act evidence that did not fit within the requirements of the rule and reversed the judgment on that basis. *State v. Halsell*, 9th Dist No. 24464, 2009-Ohio-4166, at ¶18.

{¶5} In *Halsell*, this Court wrote that the other-act testimony the trial court had admitted was “a textbook example of improper character evidence.” *State v. Halsell*, 9th Dist No. 24464, 2009-Ohio-4166, at ¶18. Mr. Halsell was charged with attempted murder and related counts stemming from an incident involving a man being shot in the back as he ran from an altercation in 2008. The State offered, and the trial court admitted, other-act evidence including testimony from a police officer that, in 2002, Mr. Halsell had been a passenger in a car stopped by police and was found to have a gun and crack cocaine in his possession at the time. The State also offered testimony from a Halsell family friend who said that Mr. Halsell had shot her in the back with a BB gun nine years earlier, when he was a juvenile. The trial court told the jury that this testimony was to be considered for the limited purpose of showing Mr. Halsell’s “identity, plan, absence of mistake, or common scheme or mode of operation in the crime in question.” *Id.* at ¶15. This Court reversed, determining that the testimony “[did] not serve to identify any peculiarities, idiosyncrasies, or pervasive modus operandi on the part of [Mr. Halsell]” and was offered merely to demonstrate Mr. Halsell’s proclivity to carry or use a firearm. *Id.* at ¶18.

{¶6} There have been other cases in which this Court has held that a trial court incorrectly ruled on whether proffered other-act evidence tended to prove one of the permissible topics for the use of character evidence and/or whether that topic was at issue in the case. In *State v. Hahn*, 9th Dist. No. 3020-M, 2000 WL 1420288 (Sept. 27, 2000), the trial court admitted other-act evidence in a case involving a burglary charge. Mr. Hahn's neighbor, Mr. Corbett, said that he had found Mr. Hahn naked in the Corbett family apartment, but Mr. Hahn denied it. The trial court admitted testimony regarding an incident of public exhibitionism that Mr. Hahn had committed eighteen years earlier because it concluded it was relevant to Mr. Hahn's purpose in entering the Corbett apartment. This Court reversed the burglary conviction because the testimony regarding Mr. Hahn standing in his own apartment window masturbating eighteen years before had little relationship to whether he was guilty of breaking and entering an empty apartment with intent to expose himself to his neighbor on this occasion. This Court pointed out that the two incidents are far removed from one another temporally and not similar "except in their most general description." *Id.* at *3.

{¶7} In *State v. Bronner*, 9th Dist. No. 20753, 2002-Ohio-4248, the trial court admitted evidence that the defendant in a child rape case had previously been involved in drug use, had been arrested for cocaine use, served a six-month sentence at Oriana House, had exposed the child to marijuana smoke, and had been in an altercation with police. The trial court ruled that the State could present all of the other-acts testimony to rebut Mr. Bronner's implication that the State's witness, the father of Mr. Bronner's

girlfriend and grandfather of the victim, did not like him because he was African-American. *Id.* at ¶52. This Court determined that the disputed character evidence was irrelevant, unnecessarily prejudicial, and “was not relevant to proof of guilt of the defendant of the offense in question.” *Id.* at ¶65, 89. This Court further held that the other-acts evidence did not tend to establish any of the permissible issues under Evidence Rule 404(B). *Id.* at ¶89. This Court in *Bronner* emphasized that, due to “the prejudice that might result from the admission of such evidence, the Ohio Supreme Court has indicated that both Evid. R. 404(B) and R.C. 2945.59 are to be strictly construed against the state and conservatively applied by the trial courts.” *Id.* at ¶93 (citing *State v. DeMarco*, 31 Ohio St. 3d 191, 194 (1987)). Furthermore, “[d]oubts should be resolved against admissibility.” *Id.* (citing *State v. Broom*, 40 Ohio St. 3d 277, 282 (1988)). This Court then held that the other-act evidence was not properly admitted because it “does not come within any of the enumerated matters [under the statute or the rule] and is not relevant to proof of guilt of the defendant on the charged offenses.” *Id.* at ¶94.

{¶8} In *State v. Deyling*, 9th Dist. No. 2672-M, 1998 WL 46753 at *2 (Jan. 28, 1998), this Court held that the trial court incorrectly admitted testimony from Mr. Deyling’s live-in girlfriend in a domestic violence trial. The testimony indicated that Mr. Deyling had once struck his girlfriend during an argument at some time prior to the events at issue. The trial court overruled Mr. Deyling’s objection to the other-act evidence, but limited its use to proving “the absence of accident or the defendant’s intent or purpose to commit the offense charged.” *Id.* at *1. Due to the fact that Mr.

Deyling's defense was that his girlfriend's injuries were self-inflicted, this Court disagreed with the trial court and held that the other-act evidence "was not properly admissible on [those] bas[e]s" *Id.* This Court also held that the evidence was not admissible on the issue of identity because the victim accused the man she lived with of inflicting her injuries while he claimed they were self-inflicted. *Id.* at *2. Thus, identity was not at issue in the case, making other-act evidence tending to prove identity inadmissible. *Id.* The other-act evidence could not be properly admitted to prove any of the proposed exceptions to the rule against the admission of such evidence. *Id.* As this Court determined that the error was not harmless, it reversed the judgment. *Id.* at *3.

{¶9} In *State v. Wilkins*, 135 Ohio App. 3d 26, 32 (1999), this Court reversed a rape conviction because it determined Mr. Wilkins was prejudiced by the erroneous admission of testimony from a woman he had been convicted of raping twelve years earlier. This Court agreed with Mr. Wilkins that the other-act evidence did not fall within the requirements of the statute or the rule because it was "relevant only to show one's propensity to commit the crime charged" *Id.* at 29. The evidence of the prior rape was not admissible to prove a scheme, plan, or system because there was no evidence to connect the two rapes and evidence of the first crime did nothing to explain the events that culminated in the current charges. *Id.* at 32. Furthermore, identity was not at issue in the case because Mr. Wilkins admitted driving the victim to the video store. *Id.* at 31. Therefore, the issue was not whether the victim could

identify Mr. Wilkins as her attacker, but whether he raped her while she was in his car.

Id.

{¶10} In addition to the five cases just mentioned, this Court has reversed at least four other trial court decisions based on violations of the prohibition against the admission of other-act evidence. See Evid. R. 404(B); R.C. 2945.59; *State v. McKinney*, 9th Dist. No. 01CA0038, 2002-Ohio-3194, at ¶22; *MGM Landscape Contractors Inc. v. Berry*, 9th Dist. No. 20979, 2002-Ohio-6763, at ¶15; *Gosden v. Louis*, 116 Ohio App. 3d 195, 217 (1996); *State v. Bersch*, 9th Dist. No. 1883, 1984 WL 4734 at *1 (Feb. 1, 1984); *State v. Clay*, 9th Dist. No. 10519, 1982 WL 5024 at *2 (May 26, 1982). In these cases, this Court did not weigh the evidence or consider its credibility. It merely applied the evidence to the standard presented in Evidence Rule 404(B) and/or Section 2945.59 of the Ohio Revised Code. In each case, this Court determined that the proffered other-act evidence did not meet the requirements of the rule or the statute, making the evidence inadmissible.

{¶11} What this Court has never done is determine that a trial court's admission of other-acts evidence in violation of Rule 404(B) or Section 2945.59 was not reversible because it was not an "abuse of discretion." In certain cases, this Court has determined that the error was harmless under the circumstances, but it has never deferred to a trial court's incorrect determination that other-act evidence was admissible when the evidence was not permitted by the statute or the rule. Thus, despite the fact that this Court has frequently made a broad statement that the admission of evidence rests within the discretion of the trial court, in practice, this

Court reviews other-act evidence issues de novo. As this Court has, in practice, been applying a de novo standard of review to this question despite referring to an abuse of discretion standard, *State v. Morris*, 9th Dist. No. 09CA0022-M, 2010-Ohio-4282, at ¶13, does not conflict with this Court's prior precedent.

{¶12} Regardless of the semantics used in this Court's treatment of Evidence Rule 404(B) questions, this appeal is also not appropriate for en banc consideration because the standard of review is not a dispositive issue in this matter. According to the Ohio Rules of Appellate Procedure, "[c]onsideration en banc is not favored and will not be ordered unless necessary to secure or maintain uniformity of decisions within the district on an issue that is dispositive in the case in which the application is filed." App. R. 26(A)(2)(a). 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.

{¶13} Character evidence tending to prove that the defendant has a propensity to commit the crime charged is precisely the type of evidence Rule 404 was designed to exclude. Evid. R. 404(B) ("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."). Evidence that Mr. Morris had kicked the family dog because his wife refused to have sex with him has no tendency to prove a motive to rape a child, an

opportunity to rape a child, an intent to rape a child, preparation to rape a child, a plan to rape a child, knowledge of or relating to the rape of a child, the rapist's identity, or the absence of a mistake or accident on Mr. Morris's part. See Evid. R. 404(B). "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 . . . 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." *State v. Morris*, 9th Dist. No. 09CA0022-M, 2010-Ohio-4282, at ¶25. Similarly, evidence that, on one occasion while he was drunk, Mr. Morris made a sexually suggestive comment to his wife's adult daughter had no tendency to prove any of the enumerated issues under Rule 404(B) in regard to the rape of a child. Contrary to the State's argument, the comment was not admissible to prove a common scheme and motive because the two acts were neither part of the same criminal transaction nor sufficiently similar to prove the identity of the perpetrator. *Id.* at ¶28 (citing *State v. Schaim*, 65 Ohio St. 3d 51, 63 n.11 (1992)). Even if Mr. Morris's inappropriate comment to the adult woman had borne a sufficient similarity to the rapes described by the child victim so as to aid in proving the identity of the perpetrator, identity was not at issue in this case. *Id.* at ¶17-18 (quoting *State v. Lowe*, 69 Ohio St. 3d 527, 531 (1994)) (describing the "unique, identifiable plan of criminal activity" required to create a "behavioral fingerprint which . . . [could] be used to identify the defendant as the perpetrator"). The child testified that Mr. Morris molested her over the course of several years while they lived in the same house. The question in this case was not who had molested the child, but

whether she had been molested by her step-father. Neither the State nor Mr. Morris suggested to the jury that anyone else could have committed the acts. Because identity was not at issue, even if the State had offered other-act evidence that tended to prove identity, it would not have been admissible under Evidence Rule 404(B). *Id.* at ¶28 (citing *State v. Curry*, 43 Ohio St. 2d 66, 73 (1975)). 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.

{¶14} The State's application for en banc consideration is denied.

Clair E. Dickinson, Presiding Judge

Moore, J.

Belfance, J.

Concur

Whitmore, J.

Dissents, Saying:

{¶15} As noted by a majority of the panel members in this Court's previous order, denying the State's motion to certify an inter-district conflict on this same issue, the Ohio Supreme Court has definitively applied an abuse-of-discretion standard of

review in appeals from evidence introduced through Evid.R. 404(B). See *State v. Morris* (Nov. 22, 2010), 9th Dist. No. 09CA0022-M, at ¶4, quoting *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, at ¶96 (“The 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.’”), quoting *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, at ¶66. Many other decisions from this Court have done the same, see, e.g., *State v. Halsell*, 9th Dist. No. 24464, 2009-Ohio-4166, but *State v. Morris*, 9th Dist. No. 09CA0022-M, 2010-Ohio-4282, did not. That is a conflict.

{¶16} As to App.R. 26(A)(2)(a)’s requirement that a conflict be outcome-determinative for en banc certification, I cannot say that the application of the abuse-of-discretion standard of review would not be dispositive in this case. It is not clear from the *Morris* opinion why the trial court admitted certain evidence below, such as the victim’s sister’s testimony. Absent any knowledge as to how the trial court exercised its discretion, I cannot jump to the conclusion that the court abused it. Thus, I dissent from the decision to deny the State’s motion for en banc consideration.

Carr, J.

Dissents, Saying:

{¶17} I agree with Judge Whitmore’s statement that an intra-district conflict exists. Moreover, I believe that the application of the abuse of discretion standard of review in this case is outcome determinative, as I indicated in my dissent to the

majority's disposition of the appeal. See *State v. Morris*, 9th Dist. No. 09CA0022-M, 2010-Ohio-4282, at ¶45-63 (Carr, J., dissenting).