ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	)	SUPREME COURT CASE NO. 2013-0251
Appellant	)	
vs.	)	ON APPEAL FROM THE COURT OF APPEALS, NINTH APPELLATE DISTRICT 09CA0022-M
CARL M. MORRIS, JR.	)	
Appellee	)	MEDINA COUNTY COURT OF COMMON PLEAS CASE NO. 08CR0408

APPELLEE'S MERIT BRIEF

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

COUNSEL FOR APPELLEE

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

COUNSEL FOR *AMICUS CURIAE,*
JOHN MURPHY
Executive Director, Ohio Prosecuting Attorneys Association

CUYAHOGA COUNTY PROSECUTOR'S OFFICE

JOSEPH T. DETERS (0012084P)
Prosecuting Attorney

RACHEL LIPMAN CURRAN (#0078850P)
Assistant Prosecuting Attorney
230 East Ninth Street, Ste. 4000
Cincinnati, Ohio 45202
Tel: (513) 946-3091
Fax No. (513) 946-3021

COUNSEL FOR *AMICUS CURIAE,*
OHIO PROSECUTING ATTORNEYS ASSOCIATION

FILED
SEP 11 2013
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
SEP 11 2013
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

TABLE OF CASES ii

TABLE OF STATUES AND RULES iii

STATEMENT OF FACTS 1

ARGUMENT AND LAW 11

PROPOSITION OF LAW NO. 1
WHEN REVIEWING THE ALLEGEDLY ERRONEOUS ADMISSION OF EVIDENCE, AN APPELLATE COURT SHOULD ANALYZE WHETHER SUBSTANTIAL OTHER EVIDENCE SUPPORTS THE VERDICT 11

A. This Court Applies A Bifurcated Approach To Harmless Error Under Crim. R. 52(A) 11

1. This Court's Decisions Are *Stare Decisis:* Application of Constitutional Harmless Error Analysis To The Erroneous Admission Of 404(B) Evidence Is Established Precedent 12

2. This Court Has Found Erroneous Admission of Inflammatory 404(B) Evidence Materially Prejudicial And Reversible Error Without Reference To Harmless Error Analysis 14

B. *Bayless, Williams* And *Rahman* Are Either Inapplicable On Their Facts Or Should Be Overruled 16

C. The Ninth District Stands Alone As The Only Appellate Court In The State Which Does Not Apply Non-Constitutional Harmless Error Analysis 17

D. The Appellate Court Upset The Rule Of Law And The Doctrine Of *Stare Decisis* 17

E. Reading All Evidentiary Issues As Fair Trial Issues Renders Moot This Court's Non-Constitutional Harmless Error Jurisprudence 19

F. The Ninth District's Opinion Creates Rigid Rules And Mandatory Presumptions Contrary To The Intent Behind Harmless Error Review 20

CONCLUSION 23

CERTIFICATE OF SERVICE 24

TABLE OF CASES

I. TABLE OF CASES PAGE

Chapman v. California, 386 U.S. 18 (1967) 12, 16

Harrington v. California, 395 U.S. 250 (1969) 12

State v. Adams, 53 Ohio St. 2d 223, 230 (1978) 13

State v. Bayless, 48 Ohio St. 2d 73, 106 (1976) 12, 16, 17, 21

State v. Burson, 38 Ohio St. 2d 157, 159-160 (1974) 15

State v. Conway, 109 Ohio St. 3d 412 (2006) 14

State v. Crawford, 32 Ohio St. 2d 254, 255 (1972) 12, 16, 17

State v. Curry, 43 Ohio St. 2d 66, 73-74 (1975) 15

State v. Davis, 1987 Ohio App. LEXIS 8262 (Franklin August 4, 1987) 17

State v. Echols, 128 Ohio App. 3d 677, 700 (Hamilton 1998) 17

State v. Eubank, 60 Ohio St. 2d, 13, 186-87 (1979) 13

State v. Greene, 2012 Ohio 5624 (Tuscarawas 2012) 18

State v. Gumm, 73 Ohio St. 3d 413, 426 (1995) 13, 17

State v. Hector, 19 Ohio St. 2d 167, 177-78 (1969) 14

State v. Lindsay, 2011 Ohio 4747 (Richland Sept. 19, 2011) 18

State v. Lowe, 69 Ohio St. 3d 527, 530 (1994) 21

State v. Lytle, 48 Ohio St. 2d 391 (1976) 13, 17, 18

State v. Morris, 2012 Ohio 6151 (Medina 2012) 22

State v. Rahman, 23 Ohio St. 3d 146, 151 (1986) 12, 16

State v. Schaim, 65 Ohio St. 3d 51, 63 (1992) 15

State v. Skatzes, 104 Ohio St. 3d 195 (2004) 13

State v. Smith, 2012 Ohio 2614 (Summit Oct. 24, 2002) 19

State v. Smith, 49 Ohio St. 3d 137, 143, 551 N.E. 2d 190 (1990) 19

State v. Thompson, 66 Ohio St. 2d 496, 499 (1981) 13, 17

State v. Tibbets, 92 Ohio St. 3d 146, 161 (2001) 13

State v. Treesh, 90 Ohio St. 3d 460, 483 (2001) 13, 17

State v. Webb, 70 Ohio St. 3d 325, 335 (1994) 11

State v. Williams, 6 Ohio St. 3d 281 (1983) 16

State v. Wright, 2011 Ohio 3575 (Cuyahoga July 21, 2011) 17

TABLE OF STATUTES AND RULES

United States Constitution, Fifth, Sixth and Fourteenth Amendments 11, 15, 18

Ohio Constitution, Article 1, Section 10 ..... 11, 15, 18

Evid. R. 404(B) 8, 11, 12, 13, 14, 15, 16, 17, 18, 21, 22, 23

R.C. §2945.59 ..... 14, 15, 16

STATEMENT OF FACTS

SK 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). 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). 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 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 <u>by</u> my vagina and have, <u>*I guess*</u>, 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 <u>on</u> my vagina." (R. 73, emphasis added). She *denied* that he ever 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 contradicted her earlier testimony when she stated there was nobody around and 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). 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 22nd, 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. 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 or flaccid penis cannot be inserted into the vagina, the prosecutor continued to lead 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). SK continued to experience 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, all that she could really say is that it happened ten times with him being inside of her. She stated that she didn't know "what happened when." (R. 163) 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 allegedly 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).

Susan Klasek, the mother of SK and Sarah, was married to Carl Morris for approximately six or seven years. (R. 180). 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 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. Later, when counsel objected again, the court overruled the objection (R. 197, 199). The court noted a continuing objection to this topic of inquiry by the prosecution (R. 199).

David Klasek is the father of SK. He was formerly married to Susan Klasek (Morris). (R. 225-26). David Klasek described Carl as funny, a character, and that SK would "have more fun with him than you would with your mother." (R. 235).

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).

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). He smacked his daughter. (R. 239) Immediately following his actions, SK disclosed to her parents, in this case her father, for the first time that "Carl raped me." Prior to smacking her, the father observed SK go into

a weird state of mind—her eyes were rolling in to the back of her head, she was pulling her hair out of her head, clawing her head and she begged her father to slap her. (R. 258-59, 265) 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 Klasek, defense counsel attempted to show that the episode that led to SK's disclosure in December was not related to the alleged incidents involving her stepfather. He 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 David 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).

SK's acting out was not limited to the one incident where her father smacked her. Her father testified that she had undergone "several episodes" of psychotic behavior. He described her as "going in to a place" and that "there's been trips to the hospital. There's been poison that has been drank." (R. 271) Mr. Klasek indicated that SK "had another place that she would go to for a few years and we could never figure it out and it had to do with eyes rolling in her head, pulling hair out and it didn't have to do with confrontation." He stated when she experienced these episodes, she didn't' know what was going on around her. (R. 272) He 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).

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 was 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). According to Sarah, Carl told her, "You don't know what I would do to you but your mother would get mad." (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).

Sarah 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).

Deanna Bruno, a friend of SK's, related an incident that occurred at her friend Darla's house that occurred sometime in the Fall of 2007 (R. 317, 320). She had a conversation with SK in a bathroom in the basement of Darla's home. During this conversation, SK related to Ms. Bruno that Carl, her stepfather, had raped her (R. 323). SK had no emotion and seemed really cold (R. 323). SK did not give Deanna any details (R. 327).

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 gave <u>no</u> 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). 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 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, which contradicted SK's earlier testimony that it happened ten times (R. 379).

Detective Papushak, a detective with the Brunswick Police Department, interviewed Carl Morris (R. 393, 399). Mr. Morris told Detective Papushak that he 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 Papushak, Mr. Morris denied that he had ever touched SK in a sexual manner. He stated that he never molested SK and denied ever putting his penis inside her vagina (R. 457). He asked 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).

Defense witness Basillio 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:
WHEN REVIEWING THE ALLEGEDLY ERRONEOUS ADMISSION OF EVIDENCE, AN APPELLATE COURT SHOULD ANALYZE WHETHER SUBSTANTIAL OTHER EVIDENCE SUPPORTS THE VERDICT

A. This Court Applies A Bifurcated Approach To Harmless Error Under Crim. R. 52(A)

The State is correct that this Court traditionally has analyzed harmless error in the context of *constitutional vs. non-constitutional* error. However, the premise of the State's entire argument is that the trial court's erroneous admission of highly prejudicial 404(B) evidence does not amount to *constitutional* error. The State asserts that erroneous admission of 404(B) evidence can *never* violate the defendant's right to a fair trial guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution. Because the error in this case, the State argues, does not affect a constitutional right, then this Court should apply non-constitutional harmless error analysis. *See, e.g., State v. Webb,* 70 Ohio St. 3d 325, 335 (1994). That analysis requires the reviewing court to determine whether, excluding the erroneously admitted evidence, substantial other evidence exists to support the conviction. If such evidence exists, then the error is harmless. *Id.*

The State's premise is simply wrong. Carl Morris, Jr., has a right to a fair trial. That right cannot be disputed by the State. When the admission of erroneous and prejudicial 404(B) evidence impairs an accused's right to a fair trial, then the error is constitutional. The Ninth District Court of Appeals distinguished this case from the less stringent non-constitutional standard:

> Regardless of the fact that courts have sporadically applied a less stringent harmless-error standard in some cases involving non-constitutional errors in the admission of evidence, the higher standard applies in this case because "the injection of . . . inflammatory . . . material" violated Mr. Morris's right to a fair trial "as that term is understood under the [D]ue [P]rocess [C]lause of the [F]ourteenth [A]mendment." (Appendix A-28, Brief of Appellant)(citation omitted)

As the State correctly points out, if the error involves the deprivation of a constitutional right, this Court has required appellate courts to apply constitutional harmless error analysis. Under that analysis, this Court must determine whether "there is no reasonable possibility that the evidence may have contributed to the accused's conviction" and the "error was harmless beyond a reasonable doubt." *State v. Rahman,* 23 Ohio St. 3d 146, 151 (1986); *State v. Bayless,* 48 Ohio St. 2d 73, 106 (1976).

(1) <u>This Court's Decisions Are *Stare Decisis:* Application Of Constitutional Harmless Error Analysis To The Erroneous Admission Of 404(B) Evidence Is Established Precedent</u>

For the past forty years, this Court has consistently applied constitutional harmless error analysis to the erroneous admission of 404(B) evidence. In *State v. Crawford,* 32 Ohio St. 2d 254, 255 (1972), this Court, relying upon *Chapman v. California,* 386 U.S. 18 (1967) and *Harrington v. California,* 395 U.S. 250 (1969), applied *constitutional* harmless error analysis to the admission of prior acts evidence. The Court found the evidence appropriate, but "Even if error be assumed as to its admission in evidence, we conclude that such evidence was harmless error beyond a reasonable doubt." In 1976, this Court applied

constitutional harmless error analysis to an aggravated murder case involving the erroneous admission of 404(B) evidence. *State v. Lytle,* 48 Ohio St. 2d 391 (1976) In that case, the Court determined that the error was "harmless beyond a reasonable doubt." *See also, State v. Adams,* 53 Ohio St. 2d 223, 230 (1978) (constitutional harmless error review applied to improper admission of 404(B) evidence); *State v. Eubank,* 60 Ohio St. 2d 183, 186-87 (1979) (the trial court erroneously admitted 404(B) evidence; this Court found such error "harmless beyond a reasonable doubt")

In the three decades since *Lytle,* the Ohio Supreme Court has continued to apply the constitutional harmless error standard to the improper admission of 404(B) evidence. *See, e.g., State v. Thompson,* 66 Ohio St. 2d 496, 499 (1981) (applying constitutional harmless error review, this Court concluded there was a reasonable probability that 404(B) testimony contributed to the appellant's conviction and reversed); *State v. Gumm,* 73 Ohio St. 3d 413, 426 (1995) (capital murder case; this Court, assuming the challenged 404(B) evidence should not have been admitted, found beyond a reasonable doubt the jury would have convicted appellant); *State v. Treesh,* 90 Ohio St. 3d 460, 483 (2001)(this Court ruled "we believe it most unlikely that the 'other act' testimony contributed in any noticeable degree" to Treesh's convictions); *State v. Tibbets,* 92 Ohio St. 3d 146, 161 (2001) (improper admission of 404(B) evidence "was harmless beyond a reasonable doubt")

In its merit brief, the State attempts to persuade this Court that all the prior cases it cites (eight total) from this Court support its argument that non-constitutional harmless error analysis is the proper standard of review in this case. (Brief of Appellant, pp. 14-23) However, only three of those cases—*Skatzes, McKnight,* and *Conway*—involved the erroneous admission of 404(B) evidence. In *State v. Skatzes,* 104 Ohio St. 3d 195 (2004), this Court held that the improper introduction of Skatze's involvement in a hunger strike and

stopping up toilets at Mansfield prison violated Evid. R. 404(B). The Court concluded such error was harmless. This Court did not indicate whether it applied a constitutional or non-constitutional harmless error review. However, contrary to the State's claim that the Court "in effect" applied a non-constitutional harmless error analysis, this Court cited approvingly the *Gumm, supra,* decision, wherein this Court applied a *constitutional* harmless error review to admission of improper 404(B) evidence. Similarly, in *State v. Conway,* 109 Ohio St. 3d 412 (2006), this Court found the admission of Trent's testimony that Conway had committed another robbery and planned to kill another person, as well as Conway's alleged desire to kill more people, was improper 404(B) evidence. Nonetheless, the Court found it harmless and did not rise to the level of prejudicial error. Again, the Court's analysis was silent on constitutional or non-constitutional harmless error review. However, in reaching its decision, the Court cited approvingly, *Tibbetts, supra,* wherein this Court applied a *constitutional* harmless error analysis to the admission of improper 404(B) evidence.

This Court's prior decisions are *stare decisis.* The introduction of inflammatory and prejudicial 404(B) evidence rises to the level of constitutional error. This Court should follow its prior precedent and affirm the Ninth District Court of Appeals' decision to apply constitutional harmless error analysis to the inflammatory 404(B) evidence.

(2) <u>This Court Has Found Erroneous Admission of Inflammatory 404(B) Evidence Materially Prejudicial And Reversible Error Without Reference To Harmless Error Analysis</u>

This Court has found the erroneous admission of 404(B) evidence to be highly prejudicial and reversible error absent harmless error analysis. In *State v. Hector,* 19 Ohio St. 2d 167, 177-78 (1969), this Court held that introduction of other crimes allegedly committed by the accused was improper and violated R.C. §2945.59, Ohio's Other Acts Statute. The admission of such evidence prejudiced Mr. Hector's right to a fair trial and amounted to

amounted to reversible error. Similarly, in *State v. Burson,* 38 Ohio St. 2d 157, 159-160 (1974), this Court found that evidence of the appellant's violent conduct toward Hattery did not show appellant's scheme, plan, identity or his absence of mistake or accident. The admission therefore violated R.C. §2945.59 and its admission prejudiced Burson's right to a fair trial. This Court reversed. *Accord, State v. Curry,* 43 Ohio St. 2d 66, 73-74 (1975)(This Court held that introduction of the prior sexual act incident of December 22, 1972, was improper "other acts" testimony and constituted prejudicial error. The Court ruled that appellee was entitled to a new trial) In *State v. Schaim,* 65 Ohio St. 3d 51, 63 (1992), this Court held that joinder of prejudicial "other acts" counts in appellant's indictment for rape violated Evid. R. 404(B); the Court found that such joinder materially prejudiced appellant's right to a fair trial and constituted reversible error without reference to harmless error analysis)

While the preceding cases fail to discuss constitutional vs. non-constitutional harmless error, it is a reasonable inference from those cases that improper admission of 404(B) evidence is constitutional error when it materially prejudices the accused's right to a fair trial.

Constitutional harmless error analysis *is* the proper standard of review for *all* appellate courts when analyzing a trial court's erroneous admission of 404(B) evidence. The admission of such inflammatory and prejudicial evidence implicates the accused's right to a fair trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution.

B. *Bayless, Williams* And *Rahman* Are Either Inapplicable On Their Facts Or Should Be Overruled

The Ninth District relied upon *State v. Bayless,* 48 Ohio St. 2d 73 (1976), because *Bayless* is an "other acts" case from this Court wherein the Court applied a constitutional harmless error analysis. That is why the State doesn't like the case. In *Bayless,* this Court followed its earlier precedent in *Crawford, supra,* that required the Court to apply the constitutional harmless error standard derived from *Chapman v. California,* 386 U.S. 18 (1967). The trial court in *Bayless* permitted rebuttal testimony from two sheriff's deputies that appellant had made threats to kill the two deputies while in custody following his arrest for multiple murders. This Court held that none of the testimony, either on cross-examination of the appellant or through the rebuttal witnesses, fit within any of the "other acts" exceptions listed in R.C. §2945.59. After reviewing all of the other evidence, this Court found the error in the admission harmless beyond a reasonable doubt.

Bayless is one "other acts" case among the many cited by Carl Morris that establishes constitutional harmless error review as the appropriate standard of review. *Bayless,* like the others, is *stare decisis.* The Ninth District's reliance on *Bayless* is totally appropriate. If this Court were to overrule *Bayless,* it would have to overrule forty years of cases applying the same standard of review. However, that would defeat the doctrine of *stare decisis.* Moreover, as argued later herein and contrary to the State's claim, *many* appellate courts in addition to the Ninth District have relied upon *Crawford, supra,* and its progeny.

The other two cases cited by the State, *State v. Williams,* 6 Ohio St. 3d 281 (1983) and *State v. Rahman,* 23 Ohio St. 3d 146 (1986), are not apposite to the facts of this case because they involved different constitutional errors. Neither case involved 404(B) evidence. This Court, therefore, need not overrule either one. They stand on their own grounds.

C. The Ninth District Stands Alone As The Only Appellate Court In The State Which Does Not Apply Non-Constitutional Harmless Error Analysis

D. The Appellate Court Upset The Rule Of Law And The Doctrine Of *Stare Decisis*

The appellee has combined the above two subheadings because they are intertwined. The issue before this Court is not whether the Ninth District Court of Appeals ever applies non-constitutional harmless error analysis to the erroneous admission of evidence. The issue in this case is whether the Ninth District properly applied this Court's constitutional harmless error analysis to the erroneous admission of 404(B) evidence. The unequivocal answer to that question is yes. *Bayless, supra; Crawford, supra; Lytle, supra; Thompson, supra; Gumm, supra; Treesh, supra.* The fact that the other appellate courts apply non-constitutional harmless error analysis to the erroneous admission of *non-404(B)* evidence is immaterial to this discussion and the claimed error before this Court.

Moreover, the Ninth District's decision in this case does not conflict with the decisions of every other appellate district in the state. On the contrary, several appellate courts follow *Crawford, supra,* and its progeny in the application of constitutional harmless error review to the erroneous admission of other acts evidence.

The three busiest appellate districts in Ohio all apply constitutional harmless error analysis. *State v. Wright,* 2011 Ohio 3575, ¶55 (Cuyahoga July 21, 2011)(applying constitutional harmless error to improper admission of other acts testimony; court determined error was not harmless beyond a reasonable doubt and reversed); *State v. Davis,* 1987 Ohio App. LEXIS 8262, ¶¶ 5-6 (Franklin August 4, 1987)("[P]rior decisions in this state have established that the erroneous admission of evidence regarding prior bad acts . . is harmless only where there is no reasonable possibility that the error contributed to the finding of guilt;" court determined error was prejudicial and reversed); *State v. Echols,* 128 Ohio App. 3d 677, 700 (Hamilton 1998)(Court determined that trial court's joinder of all charges

amounting to other acts evidence deprived Echols of his Fourteenth Amendment due process rights to a fair trial and reversed)

In addition to the Ninth District, the Fifth District Court of Appeals also applies constitutional harmless error review regarding improper admission of 404(B) evidence. *State v. Greene,* 2012 Ohio 5624, ¶¶38-39 (Tuscarawas 2012)["Moreover, based on the lack of overwhelming evidence of appellant's guilt, we cannot say that the appellant was not prejudiced by the admission of the other acts evidence . . . To find an error harmless, an appellate court must be able to declare a belief that the error was harmless beyond a reasonable doubt," citing *State v. Lytle,* 48 Ohio St. 2d 391 (1976)]; *accord, State v. Lindsay,* 2011 Ohio 4747, ¶¶74-77 (Richland Sept. 19, 2011)("Even though the admission of the prior bad acts was erroneous, we would conclude, from a review of the entire record, that such error would be 'harmless beyond a reasonable doubt'")

Carl Morris, Jr. agrees with the State's comment that "the doctrine of *stare decisis* is the bedrock of the American judicial system." (Brief of Appellant, p. 30) That is why the Ninth District's decision applying this Court's precedent must be affirmed. The Ninth District's decision relies upon four decades of this Court's jurisprudence. Its decision is also consistent with the other appellate courts' decisions cited above that follow this Court's constitutional harmless error analysis. This Court's decisions are *stare decisis* and must be followed. The erroneous admission of 404(B) evidence implicates the accused's right to a fair trial under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

In this case, the Ninth District determined that the inflammatory and prejudicial 404(B) evidence erroneously admitted by the trial court was not harmless beyond a

reasonable doubt. Because the Ninth District applied the correct standard of harmless error review, this Court should not disturb its findings or conclusion.

E. Reading All Evidentiary Issues As Fair Trial Issues Renders Moot This Court's Non-Constitutional Harmless Error Jurisprudence

The State is doing everything it can to obfuscate the issue. The Ninth District is not converting evidentiary issues into fair trial issues. The State is attempting to portray the Ninth District as some renegade district that has gone off the reservation. The State references the Ninth's decision in *State v. Smith,* 2012 Ohio 2614 (Summit Oct. 24, 2012) In that case, the prosecutor elicited testimony from the witness that the appellant's brother had offered her money not to testify in court. In addressing this bribery attempt, the Ninth District cited this Court's analysis from another case:

> In this case, the greater harm to Ms. Smith was not that she did not know about Ms. Smith-Cage's statement before Ms. Smith-Cage testified, but that the prosecutor elicited the statement in front of the jury. Accordingly, our focus is on whether Ms. Smith-Cage's testimony about the bribery attempt affected Ms. Smith's substantial rights.
>
> Following the sidebar, the trial court struck Ms. Smith-Cage's statement and instructed the jury "to disregard that last statement." It also told the jurors that "[a]ny such statement on that cannot be blameful against these two separate Defendants." While charging the jury, the court further told the jurors that "[t]he evidence does not include any answers to questions that I've instructed you to disregard."
>
> Despite the fact that the court instructed the jury to disregard Ms. Smith-Cage's answer, we conclude that there is a reasonable possibility that the prosecutor's improper questions affected the outcome of the trial. *See State v. Smith*, 49 Ohio St. 3d 137, 143, 551 N.E.2d 190 (1990).
> *Id.* at ¶¶18-20.

In this Court's *Smith* decision cited by the Ninth, the Court applied a *constitutional* harmless error analysis to testimony about attempts by persons other than the accused to bribe witnesses. The Court concluded in that case that there was no "reasonable possibility that the improperly admitted evidence contributed to the conviction." *Id.* at

143, HN 12. Thus, the Ninth District applied this court's constitutional harmless error analysis and found that the error was not harmless.

From that one case, in which the Ninth District correctly applied this Court's precedent, the State now argues that the Ninth District is reading all evidentiary issues as fair trial issues. If the State is going to accuse an appellate court of improper appellate review, it had better back it up. The State's accusation is unsupported by reference to the *Smith* case.

In the present case, the Ninth District followed *stare decisis.* The appellate court did nothing wrong. Its constitutional harmless error review is backed by forty years of this Court's precedent. That precedent should continue, and all appellate courts should apply constitutional harmless error review to the erroneous admission of other acts evidence.

F. The Ninth District's Opinion Creates Rigid Rules And Mandatory Presumptions Contrary To The Intent Behind Harmless Error Review.

Similar to the previous argument, the State is trying to confuse the issue before the Court. This case is not about what the Ninth District Court of Appeals is doing in all of its cases involving evidentiary issues. The issue is whether the court applied the appropriate standard of review. That question has already been answered. Despite the fact that the Ninth applied the correct analysis, the State is now making sweeping allegations that the Ninth District apparently is analyzing all evidentiary issues under "the far more exacting constitutional harmless error standard." (Brief of Appellant, p. 36) The State's argument is built upon misdirection, smoke and mirrors, and legal obfuscation.

In reaching its decision, the Ninth District pointed to the prosecutor's exploitation of the inflammatory 404(B) evidence had how it contributed to Mr. Morris's conviction:

> Setting aside the erroneously admitted character evidence, there is not overwhelming evidence of Mr. Morris's guilt in this case. In the absence of any confession, physical evidence, or eyewitnesses other than S.K. to sexual conduct or even sexual contact between Mr. Morris and S.K., the State's case rested largely on S.K.'s credibility.
>
> Although Sarah testified that in all her years of living with Mr. Morris, that drunken comment was the only inappropriate advance he ever made toward her, the State did its best to convince the jury that her testimony was evidence of Mr. Morris's motive and intent and plan to rape a little girl. During the State's closing argument, the prosecutor advised the jury that, "if you want to know a little bit about [Mr. Morris's] motives and his intent and his intent for [S.K.], just look at how he treated his other stepdaughter . . . ." Later in closing argument, the prosecutor said that S.K.'s story is "corroborated by the sister who had an incident with him that showed a similar plan and preparation and intent."
>
> The prosecutor directly asked the jury to equate the sexual comment allegedly made to the adult sister to the alleged rape of the younger sister. The prosecutor told the jury that there was evidence of "it happening to [S.K.'s older sister]." Thus, the State blatantly attempted to persuade the jurors that they should convict Mr. Morris of raping the child victim based on evidence that he had done "it" to her older sister. In fact, the jury had heard absolutely no evidence that Mr. Morris had raped Sarah when Sarah was a child. They also had not heard any evidence that he had raped Sarah when she was an adult. Even so, the State used that improperly admitted evidence to attempt to persuade the jury to make the very leap in logic that is forbidden by Rule 404(B) of the Ohio Rules of Evidence. That is, if Mr. Morris is the type of man who would be willing to cross that moral boundary with his wife's adult daughter, then the jury should also believe he is "the type of person" who would rape his wife's nine or twelve-year-old daughter. *State v. Lowe*, 69 Ohio St. 3d 527, 530, 1994 Ohio 345, 634 N.E.2d 616 (1994).
>
> The effect of the errors in this case is extensive because the inflammatory material was not limited to a brief, isolated comment. The State elicited testimony regarding the incident between Mr. Morris and Sarah from three witnesses, and referenced it on seven different occasions during closing argument, including referring to Sarah as Mr. Morris's "victim." This Court cannot say that "there is no reasonable possibility that the evidence may have contributed to the . . . conviction." *State v. Bayless*, 48 Ohio St. 2d 73, 106, 357 N.E.2d 1035 (1976). It seems quite likely that the average juror would have considered the erroneously admitted evidence and would have found it easy to believe that Mr. Morris, being sexually frustrated and perverted, was likely guilty of raping his young stepdaughter. The improperly admitted other-acts testimony

> put inflammatory evidence of Mr. Morris's character before the jury. In a case based largely on S.K.'s credibility, evidence that Mr. Morris had once propositioned her older sister had a great probability of tipping the scale in favor of S.K.'s credibility and against Mr. Morris's. Based on a review of the entire record, this Court cannot "declare a belief that the error was harmless beyond a reasonable doubt." Id. (citations omitted)
> *State v. Morris*, 2012 Ohio 6151, ¶¶53, 57-59 (Medina 2012)(Appellant's Appendix, pp. A-28, 30-32)

In addition to the improper 404(B) evidence relating to the incident between Sarah and Carl Morris, Jr., the Ninth District also addressed the prejudice of Susan Klasek's testimony:

> The evidence that Mr. Morris would become verbally abusive toward his wife and even kick the dog if she refused to have sex with him every day is less inflammatory, but was similarly aimed at convincing the jury that Mr. Morris is a sex-crazed pervert.
> *Id.* at ¶56. (Appellant's Appendix, A-30)

The trial court erroneously admitted inflammatory 404(B) evidence in a case that hinged largely upon the credibility of Carl Morris, Jr.'s stepdaughter. SK had psychological issues, had a poor memory, and told inconsistent accounts of how often the alleged sexual incidents occurred. There was no physical evidence. There were no eyewitnesses. A psychologist was allowed to testify, over objection, that he had no clinical reason to disbelieve SK's account of what happened. He 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. This is another claimed error that was never addressed by the appellate court. However, the Ninth District's constitutional harmless error analysis is based on this Court's precedent. The court's very cogent analysis of why Carl Morris, Jr., is entitled to a new trial should not be disturbed.

CONCLUSION

The Ninth District Court of Appeals applied the correct constitutional harmless error analysis and concluded that the erroneously admitted 404(B) evidence contributed to Carl Morris's conviction. The Ninth District applied this Court's precedent dating back forty years. If *stare decisis* is the bedrock of American Jurisprudence, then this Court should affirm the Ninth District's decision and allow Carl Morris, Jr., to have a new trial. He has a right to a *fair* trial where inflammatory and prejudicial other acts evidence is excluded. He respectfully requests that this Court affirm the decision of the Ninth District Court of Appeals.

If this Court determines that a non-constitutional harmless error analysis is appropriate and reverses and remands with instructions to apply that standard, Carl Morris, Jr. respectfully requests that the Court instruct the Ninth District to consider *all* assignments of error raised in the court below.

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

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

JOHN MURPHY
Executive Director, Ohio Prosecuting Attorneys Association

JOSEPH T. DETERS (0012084P)
Prosecuting Attorney

RACHEL LIPMAN CURRAN (#0078850P)
Assistant Prosecuting Attorney
230 East Ninth Street, Ste. 4000
Cincinnati, Ohio 45202
Tel: (513) 946-3091
Fax No. (513) 946-3021

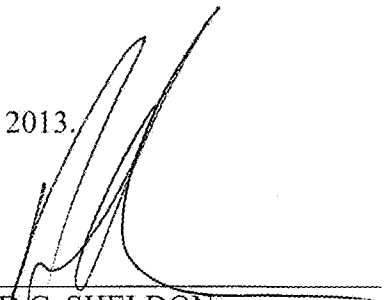
COUNSEL FOR *AMICUS CURIAE*, OHIO PROSECUTING ATTORNEYS ASSOCIATION

TIMOTHY J. MCGINTY
Prosecuting Attorney, Cuyahoga County

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'S OFFICE

By ordinary U.S. Mail this 10th day of September, 2013.



DAVID C. SHELDON
Attorney for Carl Morris, Jr.