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INTRODUCTION

The Ohio Rules of Evidence start from the proposition that “[a]ll relevant evidence is admissible.” Ohio Evid. R. 402. Rule 404(B) makes an exception for evidence of “other crimes, wrongs, or acts” when that evidence proves only the defendant’s propensity to commit crimes. But Rule 404(B) restricts the admission of other-acts evidence on just that one ground, and if the evidence bears on any other relevant issue, Rule 404(B) will not exclude it. A party may present other-acts evidence, for example, to prove a person’s motive, intent, knowledge, identity, and—as relevant to this case—plan.

Before this Court adopted the Ohio Rules of Evidence, R.C. 2945.59 governed the admissibility of other-acts evidence. No longer. The Modern Courts Amendment authorized this Court to preempt code-based evidence procedures, and this Court exercised that authority in adopting Rule 404(B). To the extent that the Rule conflicts with the statute, R.C. 2945.59 has “no further force or effect.” Ohio Const. Art. IV, § 5(B). The Rule and the statute substantially conflict in how they treat other-acts evidence offered to prove a plan. This brief therefore addresses only that issue, raised in the State’s second proposition of law.

When it comes to “plan” evidence, the Rule and the statute conflict on several scores. The statute favored exclusion, barring all evidence unless it fit one of the statute’s narrow exceptions. The Rule, on the other hand, favors inclusion, admitting all evidence unless it proves only propensity. Put another way, the statute was a fishing net, ensnaring all but a small category of other-acts evidence. The Rule instead operates as a fishing hook, plucking out only the worst sort of other-acts evidence. The Rule’s text and structure elsewhere reflect its bent in favor of admissibility. The statute listed five purposes for which other-acts evidence could be admitted, while the Rule lists all of those plus four more. Moreover, the statute’s list of purposes was exhaustive, while the Rule’s list is not. And the statute applied only to criminal cases, while

the Rule applies broadly to all proceedings governed by the Rules of Evidence. Given the text and structure of the Rule—in particular the reality that the Rule now admits much that the statute previously excluded—it is clear that Rule 404(B) preempts R.C. 2945.59.

The question on which this case turns is, What does the word “plan” in Rule 404(B) mean? The answer comes from the word’s ordinary meaning. A plan can describe the method by which someone repeatedly proceeds when faced with a particular set of circumstances—what might be called a *recurring-method* plan—and it can describe how a person intends to complete a specific project—what might be called a *single-episode* plan. A family’s budget plan falls into the recurring-method category: It defines how much the family will spend and save from each paycheck, over and over, in perpetuity. A family’s vacation plan, by contrast, falls into the single-episode category: It defines where the family will go and what they will do on a single trip. Rule 404(B), which favors admissibility, encompasses both meanings. Parties may introduce other-acts evidence to prove a recurring-method plan or a single-episode plan.

The court below therefore erred by relying on *State v. Curry*, 43 Ohio St. 2d 66 (1975), a case that pre-dated the Rules of Evidence. *Curry* interpreted “plan” evidence narrowly, consistent with the statute in force at the time. In particular, *Curry* limited “plan” evidence to two circumstances: (1) where the “[i]dentity of the perpetrator of the crime” was at issue; and (2) where the evidence “concern[ed] events which [we]re inextricably related to the alleged criminal act.” *Id.* at 73. The Eighth District reversed the conviction in this case because the trial court admitted evidence that did not fit one of *Curry*’s narrow categories. *Curry*, however, interpreted a statute that no longer governs, and the differences between Rule 404(B) and R.C. 2945.59 reveal that *Curry*’s precepts did not survive Rule 404(B)’s enactment.

This case presents an opportunity for the Court to clarify that Rule 404(B) is less restrictive than R.C. 2945.59, and that the Rule—not the statute and not *Curry*—governs the admission of “plan” evidence. Because these are pure legal questions that do not require this Court to sort through the record, the Court should vacate the judgment below and remand to the Eighth District for application of the correct law. The court of appeals, having analyzed this case before, has greater familiarity with the trial proceedings. It can therefore more efficiently answer whether the trial court acted properly in these particular circumstances.

STATEMENT OF AMICUS INTEREST

At stake in this matter is the interpretation of a frequently cited Rule of Evidence. The Ohio Attorney General, as the chief law officer of Ohio, has a compelling interest in the proper interpretation of Ohio’s Rules of Evidence. R.C. 109.02. Because the court of appeals reversed the trial court’s judgment based on an incorrect legal standard, the Attorney General asks this Court to vacate the judgment below.

STATEMENT OF CASE AND FACTS

Following a jury trial in the Cuyahoga County Common Pleas Court, Van Williams was convicted of five counts of rape, seven counts of kidnapping, five counts of unlawful sexual conduct with a minor, and six counts of gross sexual imposition. App. Op. ¶ 28. The court sentenced Williams to 20 years of imprisonment, to be followed by 5 years of post-release control. *Id.*; Trial Tr., vol. V, at 789 (Feb. 23, 2010). The court of appeals reversed.

When J.H. was fourteen years old, he developed a close relationship with Van Williams. They knew each other from church, where both sang in the men-and-boys choir. App. Op. ¶ 7. J.H. had no contact with his father, and he grew to see Williams as a mentor. *Id.*; Trial Tr., vol. II, at 207 (Feb. 18, 2010). Williams regularly picked J.H. up from his home and drove him to see friends, to the mall, and to Williams’s house. Trial Tr., vol. II, at 207-08. To provide J.H.

with spending money, Williams paid him to perform chores. *Id.* at 208. Williams also gave him gifts, including clothes, a watch, and video games. *Id.* at 208, 247. On one occasion, Williams bought J.H. an acoustic guitar and paid for his guitar lessons. *Id.* at 242-43.

In September 2008, Williams began sexually abusing J.H. *Id.* at 210; App. Op. ¶ 12. The first instance of abuse followed a massage: Williams rubbed J.H.'s back, then his legs, and finally his penis. Trial Tr., vol. II, at 211. When he finished fondling J.H., Williams told J.H. not to "tell anybody because he could go to jail." *Id.* at 212. On some occasions, the abuse proceeded like this. On other occasions, Williams pulled down J.H.'s pants and anally raped him. *Id.* at 218-28, 231-32. After the rapes, Williams wiped J.H. off with a cold rag and drove him home. *Id.* at 220. This pattern of abuse continued over several months until J.H. told a school counselor, which set into motion an investigation by Cuyahoga County authorities. *Id.* at 237. Williams pleaded not guilty to the ensuing charges and stood trial in February 2010.

At trial, the State introduced evidence that Williams had previously committed sexual abuse of another teenage boy. The witness, named A.B., testified that Van Williams had been his swim-team coach when A.B. was sixteen years old. Trial Tr., vol. III, at 390 (Feb. 19, 2010). A.B., like J.H., had an absent father and found in Williams a confidant. *Id.* at 391-92, 395. Williams took advantage of his close relationship with A.B., too. When traveling for a swim meet, Williams and A.B. fondled each other's penises and kissed. *Id.* at 396-97. Their conduct later progressed to mutual masturbation and oral sex. *Id.* at 397-98. For the duration of swim season, they engaged in fondling and oral sex after practice. *Id.* at 395, 398. After A.B. moved to another school district, he told a tutor, and the police got involved. *Id.* at 399-400. Williams resolved the case by entering a plea. *Id.* at 499.

In the trial below, the State introduced A.B.'s testimony under Rule 404(B). The prosecutor argued that Williams's abuse of A.B. and his abuse of J.H. revealed a common plan. The trial court agreed, finding A.B.'s testimony to be probative of Williams's intent and plan. App. Op. ¶¶ 20-21. The Eighth District believed that decision was an abuse of discretion and reversed. The court of appeals rested its holding on *State v. Curry*. Judge Gallagher, writing separately, noted that Evidence Rule 404(B), not R.C. 2945.59, "is the controlling law on 'other acts' evidence." App. Op. ¶ 86 (Gallagher, J., concurring). He then called on this Court to "assess the viability of statutes like R.C. 2945.59." *Id.* This Court granted review.

ARGUMENT

Although this court generally reviews evidentiary determinations for abuse of discretion, *State v. Perez*, 124 Ohio St. 3d 122, 2009-Ohio-6179 ¶ 96, that standard does not apply here. This brief's arguments address whether Rule 404(B) applies to this case and what the Rule means. These are pure questions of law over which this Court "has complete and independent power of review." *Indus. Energy Consumers of Ohio Power Co. v. Pub. Utils. Comm'n*, 68 Ohio St. 3d 559, 563 (1994) (per curiam); see also *Rohde v. Farmer*, 23 Ohio St. 2d 82, 90 (1970).

Amicus Curiae Attorney General's Proposition of Law:

Under Evidence Rule 404(B), the State may introduce other-acts evidence to prove a defendant's plan to commit multiple crimes using a recurring method.

A. Evidence Rule 404(B) governs the admission of other-acts evidence.

In reversing the trial court's judgment, the Eighth District relied on R.C. 2945.59 and a case interpreting that statute. But Evidence Rule 404(B), not R.C. 2945.59, governs the admission of other-acts evidence. The difference matters. Because the Eighth District applied

the wrong law and relied on an outdated standard, this Court should vacate the judgment below and remand for application of the correct law.

1. **As required by the Modern Courts Amendment, Rule 404(B) governs the admission of other-acts evidence to the extent the Rule conflicts with R.C. 2945.59.**

The Modern Courts Amendment of the Ohio Constitution gives the Supreme Court of Ohio rulemaking authority over procedural matters in Ohio's courts. Ohio Const. Art. IV, § 5(B). The Court exercised that authority in promulgating the Ohio Rules of Evidence. To ensure that vestiges of code-based procedures did not persist into the new rule-based era, the Amendment specifies that “[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.” *Id.* The Rules of Evidence thus preempt statutes that purport to govern evidentiary admissibility. The histories of R.C. 2945.59 and Rule 404(B) show that when it comes to other-acts evidence, “Evid. R. 404(B) controls, since it was adopted subsequent to the statute.” *State v. Jamison*, 49 Ohio St. 3d 182, 185 (1990).

History of R.C. 2945.59. R.C. 2945.59 grew out of Ohio's common law of evidence. At common law, the State could not introduce proof of a defendant's uncharged misconduct as circumstantial evidence of a defendant's propensity to commit crimes. In this Court's words, “a person may not be convicted of the crime charged upon a certain date by showing that upon other dates, previous or subsequent, he committed other crimes and offenses.” *State v. Reineke*, 89 Ohio St. 390, 391 (1914). This general rule came with several exceptions. The State could, for example, admit evidence of a defendant's other acts when they prove a plan—when “the various acts show a general scheme or system of criminal conduct.” *Id.* at 392.

In 1929, the General Assembly codified the State's rules governing criminal procedure. 113 Ohio Laws 123 (Apr. 22, 1929). As part of that effort, the legislature enacted an other-acts statute that was “simply a reiteration of the common law.” *Russo v. State*, 126 Ohio St. 114, 117

(1933). While the State generally could not introduce other-acts evidence, it could use other-acts evidence to reveal a “defendant’s scheme, plan or system.” G.C. 13444-19.

When the General Assembly recodified the General Code into the Revised Code, it made few changes to the other-acts provision. The statute enacted in 1953 remains the same today:

In any criminal case 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, 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, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

R.C. 2945.59. The Revised Code statute made no substantive change from its General Code predecessor. *See State v. Eaton*, 19 Ohio St. 2d 145, 153 (1969).

History of Rule 404(B). Evidence Rule 404(B) grew from a different tradition. By the 1970s, Ohio’s code-based evidence procedures had grown inefficient and in need of reform. No single source provided trial lawyers a comprehensive list of evidence rules; instead the rules were “scattered throughout judicial decisions, statutes, and court rules.” Paul C. Giannelli, *The Proposed Ohio Rules of Evidence*, 29 Case W. Res. L. Rev. 16, 60 (1978-79). Courts across the State did not uniformly apply the evidence code, leading to different practices in different regions. *Id.* Exacerbating these concerns, most “evidentiary questions arising in the course of a trial must be resolved very quickly.” Walker J. Blakey, *A Short Introduction to the Ohio Rules of Evidence*, 10 Cap. U. L. Rev. 237, 240 (1980-81). The lack of certainty and uniformity bogged down trial litigation. *Id.* To cure these problems, this Court exercised its authority under the Modern Courts Amendment to adopt a new rule-based system of evidence, following the lead of the federal government and other States.

Ohio did not pattern the Ohio Rules of Evidence after its statutory code of evidence. Instead it waited until the United States created the Federal Rules of Evidence in 1975, and then patterned the State's new evidence rules after the Federal Rules. *State v. Wallace*, 37 Ohio St. 3d 87, 89 n.3 (1988). Using the Federal Rules as a model shows a rejection of Ohio's old code-based evidence rules. After all, the point of the Modern Courts Amendment was to throw out archaic procedural codes. Using the Federal Rules as a model also embraces the "modern trend towards admissibility." Jack B. Weinstein, *The Ohio and Federal Rules of Evidence*, 6 Cap. U. L. Rev. 517, 527 (1976-77). This point is made clear by Rule 402: "All relevant evidence is admissible except as otherwise provided." Ohio Evid. R. 402. Against the backdrop of these two policies—rejecting Ohio's code-based evidence rules and adopting a policy of admissibility—the text of Ohio Rule 404(B) marks a clear break from R.C. 2945.59:

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

By the terms of the Modern Courts Amendment, Rule 404(B) governs the admission of other-acts evidence where it clashes with the statute. The Rule governs procedure and does not create, modify, or abridge substantive rights. *State v. Morris*, 2010-Ohio-5973 ¶ 2 (9th Dist.). To the extent that the Rule and the statute "conflict," the statute thus has "no further force or effect." Ohio Const. Art. IV, § 5(B). (The same goes for R.C. 2907.02(D) and 2907.05(E), which purport to govern the admissibility of evidence in rape and gross-sexual-imposition cases. To the extent their application to this case conflicts with Rule 404(B), they are preempted.) When it comes to "plan" evidence, Rule 404(B) and R.C. 2945.59 conflict on several scores.

2. Rule 404(B) conflicts with R.C. 2945.59 when a party seeks to use other-acts evidence to prove a plan.

The change from R.C. 2945.59 to Rule 404(B) enacted a sharp shift in favor of admissibility. R.C. 2945.59 was an *exclusive* rule, barring all evidence of other acts except evidence tending to show motive, intent, absence of mistake, absence of accident, or plan. The statute took its presumption from the common law: “[T]he *general rule* unquestionably is, that a distinct crime, in no way connected with that upon which the defendant stands indicted, can not be given in evidence against him on the trial.” *Brown v. State*, 26 Ohio St. 176, 181-82 (1875) (emphasis added). The default rule favored inadmissibility. Courts would admit other-acts evidence only when it met one of R.C. 2945.59’s limited exceptions.

Rule 404(B), by contrast, is an *inclusive* rule, admitting all evidence of other acts except evidence tending to prove only a defendant’s criminal propensity. The default rule now favors admissibility. Other-acts evidence may be introduced for any other relevant purpose. Noting this fundamental shift toward admissibility, one commentator wrote, “Anything previously admissible should now be admissible. Much, however, that was previously excluded will now be readily admitted.” Weinstein, 6 Cap. U. L. Rev. at 529.

Rule 404(B) also lists more circumstances in which other-acts evidence may be admitted. The Rule and the statute list five categories in common: motive, intent, absence of mistake, absence of accident, and plan. Rule 404(B)’s list keeps going, adding opportunity, preparation, knowledge, and identity. Not only that, but Rule 404(B)’s list is also not exhaustive. The Rule’s text indicates that other-acts evidence is admissible for non-propensity purposes “*such as*” the listed factors, indicating that other-acts evidence may be offered for purposes beyond those listed in the Rule. By contrast, R.C. 2945.59 listed a finite set of purposes for which other-acts evidence could be used, and when the General Assembly provides a list of exceptions in a

statute, that list is presumed exhaustive. *Thomas v. Freeman*, 79 Ohio St. 3d 221, 224-25 (1997). Unlike Rule 404(B), the statute did not use the phrase “such as” or any other language suggesting that its list was non-exhaustive. In this way, too, the Rule is broader than the statute.

The broader scope of Rule 404(B) points the same way. R.C. 2945.59 and its General Code predecessor by their terms applied only to criminal cases. R.C. 2945.59 (“In any criminal case . . .”); G.C. § 13444-19 (same). Rule 404(B), however, applies to *all* proceedings where the Rules of Evidence apply. *See* Ohio Evid. R. 101(A), (C). This difference provides more proof that the Rule’s drafters intended it to be broader than the statute.

Indeed, this Court has already begun to acknowledge that Rule 404(B) admits more other-acts evidence than R.C. 2945.59 did. In *State v. Jamison*, the defendant tried to exclude evidence of his plan by arguing that a statute-era case should control. 49 Ohio St. 3d at 185 (citing *State v. Hector*, 19 Ohio St. 2d 167 (1969)). This Court found *Hector* “distinguishable” in part because Rule 404(B) preempted R.C. 2945.59. *Id.* Because “Evid. R. 404(B) controls” and because the Court had “increasingly recognized the utility of other-acts evidence,” this Court rejected the defendant’s argument. *Id.* Implicit in that holding is a recognition that the Rule admits more evidence than the statute did.

Evidence Rule 102 is plainly not implicated by the circumstances of this case. Rule 102 provides that “the rules shall be construed to state the principles of the common law of Ohio unless the rule clearly indicates that a change is intended.” Ohio Evid. R. 102. But for all the reasons laid out above, Rule 404 “clearly indicates” that the drafters intended a change from R.C. 2945.59. Had the drafters meant to restate the common law, they would not have adopted text plainly contrary to it. That puts this case in the company of *State v. Dever*, 64 Ohio St. 3d 401

(1992), where this Court held that the text of Evidence Rule 803(4) evinced a clear indication that the drafters intended a change from the common law. *Id.* at 411.

Nor do the Staff Notes to Rule 404(B) require a different interpretation. The Staff Notes assert that “Rule 404 codifies existing Ohio law” and that “[t]he rule is in accord with R.C. 2945.59.” Ohio Evid. R. 404, Staff Notes (1980). But saying the Rule merely restates the statute does not make it so. For one, the statute applied only in criminal cases, while the Rule applies in all cases. For another, the text and structure of the laws share little in common, as this section has explained. And finally, the Staff Notes amount, at most, to the Rules’ legislative history, and when the text of a law is plain, “no . . . examination of the legislative history is warranted.” *State ex rel. Canales-Flores v. Lucas Cnty. Bd. of Elections*, 108 Ohio St. 3d 129, 2005-Ohio-5642 ¶ 28. The Staff Notes cannot trump the plain text of Rule 404(B).

It is worth noting that this philosophy in favor of admissibility helps defendants too. Any party, not just the State, may introduce other-acts evidence. And defendants commonly offer evidence of a third party’s other acts to exculpate themselves. This evidence—sometimes called “reverse 404(B)” evidence—may be used to establish a claim of self-defense (by showing that the victim had been the aggressor) or a claim of innocence (by showing that someone else committed the crime). Rule 404(B)’s bias in favor of admissibility thus helps both the State in catching the right perpetrators and defendants in escaping unwarranted liability.

At bottom, the Rule’s breadth goes far toward resolving this dispute. We know that the Rule favors admissibility. We know, too, that the Rule lists more purposes for which other-acts evidence may be admitted than the statute listed, and that the Rule’s list is not exhaustive. And we know that the Rule applies in all cases, not just criminal matters. With all those metrics

pointing in one direction, it is clear that Rule 404(B) is broader than and conflicts with R.C. 2945.59.

B. Rule 404(B) allows evidence of both “recurring-method” and “single-episode” plans.

This Court has never given Rule 404(B) an independent interpretation. So when can a party introduce evidence of a person’s “plan” under the Rule? The answer comes from the Rule’s text and structure.

1. The word “plan” in Rule 404(B) encompasses both recurring-method plans and single-episode plans.

Because the Evidence Rules do not define the term “plan,” this Court should look first to the word’s ordinary meaning. *See State v. Anthony*, 96 Ohio St. 3d 173, 2002-Ohio-4008 ¶ 11. A dictionary published in 1976—at the exact time the Evidence Rules Advisory Committee was drafting the Rules—defines “plan” as “a method of proceeding,” or “a scheme or program for making, doing, or arranging something.” *Webster’s New World Dictionary* 1088 (2d ed. 1976). Consistent with these definitions, courts have admitted evidence of two types of plans.

First, courts allow evidence of *recurring-method* plans. This type of evidence shows that a defendant repeatedly commits a crime or completes a task by following a particular blueprint. For example, a federal court has allowed “plan” evidence to prove that an employee has repeatedly claimed bogus expenses in order to embezzle funds from his employer. *United States v. Rodriguez-Estrada*, 877 F.2d 153, 154-55 (1st Cir. 1989). A state court likewise has allowed evidence of a rapist’s repeated plan to hide in the backseats of women’s cars at a particular shopping center, then attempt to assault the women. *Williams v. State*, 110 So. 2d 654, 656-58, 663 (Fla. 1959). These criminals engage in recurring-method plans because they use the same blueprint for a crime, over and over, even though the crimes might be separated in time.

In ordinary usage, people commonly use the word “plan” to describe recurring-method plans. A cell-phone plan defines how many minutes a user can talk each month, over and over, for as long as the contract lasts. A meal plan defines how often a college student may eat in the dining hall each week, over and over, for as long as the semester lasts. And a workout plan defines how far a jogger will run each day, over and over, for as long as her willpower lasts.

Second, courts allow evidence of *single-episode* plans. This type of evidence shows the distinct components of a person’s scheme to complete a single primary crime or other objective. The individual acts leading up to the ultimate crime amount to “different acts in a drama.” 2 John Henry Wigmore, *Evidence in Trials at Common Law* § 304, p. 250 (James H. Chadbourn rev. 1979) (quoting *People v. Stout*, 4 Park Cr. 71, 127 (N.Y. 1858)). In one example from a federal court, a criminal had the ultimate goal of burglarizing a post office. As part of his broad plan, he burglarized a store to obtain a cutting torch and oxygen bottles that he later used in the post-office burglary. *Lewis v. United States*, 771 F.2d 454, 455-56 (10th Cir. 1985). In an example from a state court, a man had the ultimate goal of raping a child. The abuser kissed and fondled the child for several months in order to lower the child’s resistance to sexual contact. *State v. Paille*, 601 So. 2d 1321, 1323-24 (Fla. Ct. App. 1992). The court admitted evidence of the uncharged instances of abuse as part of his broader plan to rape her. *Id.* at 1323.

This interpretation of “plan” also fits with the word’s ordinary usage. A lesson plan defines what an educator will teach during a single class period. A peace plan defines when nations will resolve a single conflict. And a game plan defines how Ohio State will defeat Michigan in a single game.

The lesson of all these cases is that federal and state courts will allow other-acts evidence to prove both recurring-method and single-episode plans. Both have probative value. As Dean

Wigmore has explained, recurring-method plans assist the factfinder because they involve “such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.” Wigmore, *Evidence in Trials at Common Law*, § 304, p. 249. Single-episode plans, meanwhile, have probative value because they reveal the defendant’s grand design. Given Ohio Rule 404(B)’s bias in favor of admissibility, the Rule admits evidence of both recurring-method plans and single-episode plans.

2. *State v. Curry* does not govern interpretation of Rule 404(B).

The court below rested its holding on this Court’s decision in *State v. Curry*, 43 Ohio St. 2d 66 (1975). *Curry* adopted a narrow view of plan evidence, in keeping with the restrictive statute that applied at the time. In particular, *Curry* limited “plan” evidence to two circumstances: (1) where the “[i]dentity of the perpetrator of the crime” was at issue; and (2) where the evidence “concern[ed] events which [we]re inextricably related to the alleged criminal act.” *Id.* at 73. The Eighth District reversed the conviction in this case because the trial court admitted evidence that did not fit one of *Curry*’s narrow categories. App. Op. ¶ 58. But *Curry* interpreted R.C. 2945.59, which has “no further force or effect” following the adoption of Rule 404(B). Ohio Const. Art. IV, § 5(B). It follows that the *Curry* rule likewise has no further force or effect unless the logic behind *Curry*’s interpretation of R.C. 2945.59 applies equally to Rule 404(B). It does not. Differences between the text of the Rule and the text of the statute reveal that Rule 404(B)’s enactment abrogated *Curry*.

The “identity” subcategory. According to *Curry*, R.C. 2945.59 allowed the State to introduce other-acts evidence to prove a defendant’s plan when the perpetrator’s identity was at issue. 43 Ohio St. 2d at 73. The statute did not separately list “identity” as one of the purposes for which the State could introduce other-acts evidence. Instead this Court read the word “identity” into the phrase “scheme, plan or system.” A perpetrator’s plan was probative of his

identity when “he has committed similar crimes within a period of time reasonably near to the offense on trial, and [when] a similar scheme, plan or system was utilized to commit both the offense at issue and the other crimes.” *Id.* The word “plan” thus provided the textual foothold when the State wanted to prove a defendant’s identity.

Rule 404(B), by contrast, *does* separately list “identity” as one of the purposes for which the State may introduce other-acts evidence. The separate listing of “identity” and “plan” shows that the word “plan” no longer provides the textual basis for proving a perpetrator’s identity. Now “plan” and “identity” are separate, and the word “plan” in Rule 404(B) must mean something else. The Eighth District’s interpretation therefore not only contradicts the clear intent of the Rule’s drafters, it also violates a cardinal rule of statutory interpretation: that a statute “must be construed as a whole and given such interpretation as will give effect to every word and clause in it.” *State ex rel. Myers v. Bd. of Educ.*, 95 Ohio St. 367, 372-73 (1917). Only interpreting the word “plan” to have independent meaning keeps faith with the text and structure of Rule 404(B).

The “inextricably related” subcategory. R.C. 2945.59, as interpreted by *Curry*, also allowed evidence of a defendant’s “plan” when the plan was “inextricably related” to the charged offense. 43 Ohio St. 2d at 73. This exception recognized that sometimes it is “virtually impossible to prove that the accused committed the crime charged without also introducing evidence of the other acts.” *Id.* In other words, the State could introduce “plan” evidence when the story of the crime otherwise would be incomplete.

Here again, the difference in text between R.C. 2945.59 and Rule 404(B) shows that this *Curry* exception has no continuing force under the Rule. The statute used the term “any acts”: The State could not introduce evidence of “*any acts*” of the defendant unless the evidence fit one

of the statute's narrow exceptions. The Rule, on the other hand, uses the term "other acts": The State may not introduce evidence of "other acts" of the defendant to show propensity. This difference is not merely cosmetic. Prohibiting evidence of "any acts" would presumptively bar the admission of inextricably related acts (as *Curry* implicitly concluded), while prohibiting evidence of "other acts" would not.

The experience of the federal courts shows the way. Like Ohio Evidence Rule 404(B), Federal Rule of Evidence 404(b) refers to "other acts." Focusing on that phrase, several federal courts of appeals have held that inextricably intertwined acts are always admissible because they are not subject to Rule 404(b) analysis. *See, e.g., United States v. Luster*, 480 F.3d 551, 556 (7th Cir. 2007); *United States v. Gobbi*, 471 F.3d 302, 311 (1st Cir. 2006); *United States v. Thomas*, 74 F.3d 676, 678-79 (6th Cir. 1996). By the federal courts' logic, "Rule 404(b) only applies to 'other' crimes, wrongs, or acts, not acts directly related to (i.e., 'inextricably intertwined' with) the crime on trial." *Luster*, 480 F.3d at 556. "Thus, the evidence is not 'other acts' evidence at all and, accordingly, Rule 404(b) is not implicated." *Gobbi*, 471 F.3d at 311.

To be sure, this Court has cited *Curry* in a handful of cases since the adoption of Rule 404(B). And in dicta this Court has said that Rule 404(B) "is in accord with R.C. 2945.59." *State v. Broom*, 40 Ohio St. 3d 277, 281 (1988). These passing references to the statute, however, do not suffice to establish *Curry*'s ongoing validity. First, no party in any case postdating Rule 404(B), including *Broom*, seems to have argued that the Rule and the statute have different meanings when it comes to "plan" evidence. That explains why the Court has never spoken on this issue and also why *stare decisis* does not prevent this Court from interpreting Rule 404(B) on a clean slate. Second, as far as the *Broom* Court was concerned, Rule 404(B) was "in accord" with R.C. 2945.59. In that case, the State introduced other-acts

evidence to show intent, motive, and identity. *Broom*, 40 Ohio St. 3d at 281-83. All three of those are purposes for which the State may introduce other-acts evidence under both the Rule *and* the statute. When the statute and the Rule come to the same result, it is no surprise that the Court has not considered whether they have independent meaning.

That explains the decisions in *State v. Thompson*, 66 Ohio St. 2d 496 (1981) (per curiam), and *State v. Hutton*, 53 Ohio St. 3d 36 (1990). In *Thompson*, the defendant was charged with gross sexual imposition of his daughter, which required proof that he had sexual contact with her before her thirteenth birthday. 66 Ohio St. 2d at 499; *see* R.C. 2907.07(A)(4). The prosecutor presented evidence that the defendant engaged in sexual contact with his daughter *after* she turned 13, arguing that this subsequent abuse showed the defendant's "scheme, plan or system." 66 Ohio St. 2d at 498. Citing *Curry*, the Court rejected this argument because the challenged evidence proved only that the defendant had a criminal propensity—"that it was likely he had sexual contact with [his daughter] prior to her 13th birthday because he engaged in similar conduct thereafter." *Id.* The same result would obtain under Rule 404(B): Evidence relevant to prove only criminal propensity is inadmissible under both the statute and the Rule. Likewise in *Hutton*, this Court relied on *Curry* in concluding that the trial court abused its discretion when it introduced evidence that the defendant had committed an unrelated rape. 53 Ohio St. 3d at 39-40. The error, however, was harmless given the "overwhelming" evidence against the defendant. *Id.* at 41. So again, the result in *Hutton* would have been the same under either the statute or the Rule. Here, Rule 404(B) and R.C. 2945.59 do not come to the same result. This case, unlike *Thompson* and *Hutton*, therefore requires consideration of the Rule's independent meaning.

In sum, Rule 404(B) abrogates *Curry*. The word "plan" in Rule 404(B) cannot be read to encompass either of *Curry*'s subcategories. The "identity" and "inextricably related"

subcategories may have made sense when R.C. 2945.59 governed other-acts evidence, but they do not fit the text and structure of Rule 404(B).

C. This Court should remand to the Eighth District to apply the correct standard for admissibility under Rule 404(B) to the facts of this case.

The final hurdle concerns the application of Rule 404(B) to the facts of this case. The court below relied on *Curry* in holding that the trial court abused its discretion. Nothing in the record shows that the court of appeals inquired whether Williams's prior acts constituted a recurring-method plan that would be admissible under Rule 404(B). It therefore did not evaluate the trial court's decision under the correct standard. Because this inquiry requires a study of the record that can be performed more efficiently by the court of appeals, this Court should remand the case for application of the proper legal standard.

Few could doubt that the evidence related to J.H. mirrored the evidence related to A.B. As he did with J.H., Williams stood as a father figure to A.B., whose biological father was absent. App. Op. ¶ 7; Trial Tr., vol. III, at 391-92. As he did with J.H., Williams developed a mentorship relationship with A.B. App. Op. ¶ 7; Trial Tr., vol. III, at 395. As he did with J.H., Williams drove A.B. to various places, including to locations where Williams abused him. App. Op. ¶ 7; Trial Tr., vol. III, at 415-18. And as he did with J.H., Williams sexually abused A.B. All of that suggests that the evidence of Williams's abuse of A.B. was relevant to prove a recurring-method plan.

Yet relevance is a fact-specific question—here, one better answered by the court below, given the additional considerations involved. If the Court determines that A.B.'s testimony is admissible under Rule 404(B), its job does not stop there. It must then determine whether that evidence's "probative value is substantially outweighed" by "danger of unfair prejudice, of confusion of the issues, or of misleading the jury" or by "considerations of undue delay, or

needless presentation of cumulative evidence.” Ohio Evid. R. 403. The Rule 403 inquiry is distinct from the Rule 404 inquiry. *See State v. Williams*, 79 Ohio St.3d 1, 11-12 (1997) (analyzing each Rule separately). Both the Rule 404 and the Rule 403 determinations require a review of the whole record, in order to understand how the challenged evidence fit in the context of the trial.

This Court’s task gets no simpler if it determines that the A.B. evidence should *not* have been admitted. Even if this Court would not have admitted the evidence in the first instance, it must decide whether the trial court’s decision amounted to an abuse of discretion. *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266 ¶ 66. It must also consider whether the trial court’s limiting instruction cured any error. Ohio Evid. R. 105. And if the trial court abused its discretion, then the reviewing court must determine whether that evidentiary error was nevertheless harmless. *See State v. Skatzes*, 104 Ohio St. 3d 195, 2004-Ohio-6391 ¶ 110. All of this involves a fact-intensive inquiry, requiring careful examination of all the circumstances surrounding both the other-acts evidence and the charged offense. The court of appeals, having engaged in these inquiries previously (under a different legal standard) has greater familiarity with the whole record. This Court should therefore remand to the Eighth District to determine whether the trial court committed reversible error in admitting evidence of Williams’s prior acts of sexual abuse.

CONCLUSION

For these reasons, the Court should vacate the judgment below and remand.

Respectfully submitted,

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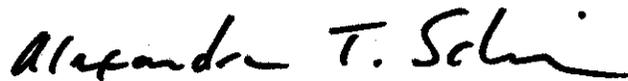
I certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Michael DeWine in Support of Appellant State of Ohio was served by U.S. mail this 18th day of May, 2012, upon the following counsel:

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