

THE STATE OF OHIO, HAMILTON COUNTY  
COURT OF COMMON PLEAS  
CRIMINAL DIVISION

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HAMILTON COUNTY, OH  
COMMON PLEAS  
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**FILED**

STATE OF OHIO	:	Case No. B1904419
Plaintiff	:	Judge Ghiz
vs.	:	STATE'S NOTICE OF INTENT TO USE EVIDENCE OF OTHER CRIMES, WRONGS, OR ACTS UNDER EVID. R. 404(B) and STATE'S NOTICE OF INTENT TO CALL EXPERTS
GEOFFREY DREW	:	
Defendant	:	

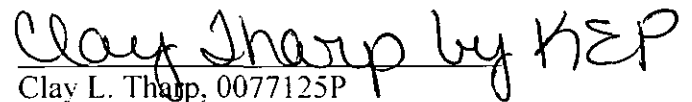
Now comes the State of Ohio, by and through the undersigned Assistant Prosecuting Attorneys, and hereby puts the defense on notice that the State intends to use all evidence listed in the State's Response and any Supplemental Responses to Defendant's Demand for Discovery, the State's Bill of Particulars, and the evidence turned over to the defense regarding (1) a second sexually abused boy from the same time period as P.N.; (2) witnesses that can testify to Drew's grooming actions of boys from the same time period as P.N.'s sexual abuse; (3) witnesses that can testify to Drew's grooming actions of boys in more recent times; and (4) an unindicted Unlawful Sexual Conduct with a Minor incident from when Drew had sexual intercourse with P.N. when P.N. was a teenager.

Further, the State puts the defense on notice that it intends to call two experts in its case in chief: First, the State intends to call Supervisory Special Agent Daniel O'Donnell from the FBI Behavioral Analysis Unit who will testify regarding the general subject matter of how offenders gain access to their victims; grooming behaviors; compliant victimization; and environmental



factors that could relate to how and when a victim discloses sexual abuse. Second, the State intends to call Heidi Malott who is the Clinical Program Manager of the Mayerson Center for Safe and Healthy Children at the Children's Hospital and/or Dr. Kathi Makoroff who is the Fellowship Director of Child Abuse Pediatrics at the Children's Hospital. The expected testimony will focus on the general subject matter of disclosures regarding child sexual abuse and why some children never disclose until they are adults. The expert will further testify regarding possible behavioral changes of a sexually abused child. It should be noted that the experts have not completed their reports yet and as such, the State reserves the right to supplement this Notice with additional or more specific topics of testimony.

Arguments on all matters are set forth in the attached Memorandum.

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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.

Interpreting both evidentiary rules, the Ohio Supreme Court has indicated that other act evidence is admissible when "the other act does in fact 'tend to show' by substantial proof of any of those things enumerated such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *State v. Broom*, 40 Ohio St.3d 277, 533 N.E.2d 682 (1988). It is important to point out that the State's burden with other act evidence is "substantial proof" rather than proof beyond a reasonable doubt:

Where evidence, tending to prove the commission of a similar act by an accused, is offered by the state under RC 2945.59, it is not necessary for the state to establish the identity of the accused as the perpetrator of the similar act by proof beyond a reasonable doubt, but is sufficient that it offers substantial proof that the alleged similar act was committed by the defendant.

*State v. Carter*, 26 Ohio St.2d 79, 269 N.E.2d 115 (1971). Supporting the same burden of proof as *Broom*, the First District Court of Appeals was clear in holding that other acts evidence is admissible once the State has shown substantial proof that the other acts were committed by the defendant and those acts tended to prove the exceptions stated in Ohio Evid. R. 404(B). *State v. Knight*, 131 Ohio App.3d 349, 722 N.E.2d 568 (1<sup>st</sup> Dist. 1998). In *Knight*, the defendant was indicted on six counts of bribery and four counts of sexual battery. The charges stemmed from his actions of coercing four different women to have sex with him while he was acting in his official capacity as a law enforcement officer. The trial court ruled that four separate trials would be held, one for each victim. The State filed its Notice of Intent to use the other three women's facts in the fourth woman's trial. The trial court denied the State's Notice and the State took an interlocutory appeal. The First District reversed the trial court, holding that the State did show substantial proof

of a “behavioral fingerprint.” The Court went so far as to opine that the other act evidence the State wanted to produce was a “textbook behavioral fingerprint:”

Each of the acts provides evidence of the abuse of a position of public trust in exchange for actual or expected sexual favors. In each, there is evidence that Knight, while in his official capacity as a police officer, stopped women on minor or nonexistent offenses and then used either the offenses or outstanding warrants as the club that he offered not to wield in exchange for sexual favors.

*Id.* at 353. The *Knight* Court went on to comment about the defense’s argument: “The defense misses the point entirely when it tries to point out dissimilarities in details of the other acts. At best, such differences go to the weight of the evidence, not to its admissibility.” *Id.*

Regarding modus operandi and a behavioral fingerprint, the Ohio Supreme Court opined in *State v. Lowe*, 69 Ohio St.3d 527, 531, 1994-Ohio-345, 634 N.E.2d 616, 619:

Other acts may also prove identity by establishing a *modus operandi* applicable to the crime with which a defendant is charged. ‘Other acts forming a unique, identifiable plan of criminal activity are admissible to establish identity under Evid.R. 404(B).’ [citations omitted] “‘Other acts’ may be introduced to establish the identity of a perpetrator by showing that he has committed similar crimes and that a distinct, identifiable scheme, plan, or system was used in the commission of the charged offense.” [citations omitted] While we held in *Jamison* that ‘the other acts need not be the same as or similar to the crime charged,’ *Jamison*, syllabus, the acts should show a *modus operandi* identifiable with the defendant. [citations omitted] A certain *modus operandi* is admissible not because it labels a defendant as a criminal, but because it provides a behavioral fingerprint which, when compared to the behavioral fingerprints associated with the crime in question, can be used to identify the defendant as the perpetrator.”

In *State v. Love*, 1997 WL 292349 (1<sup>st</sup> Dist.), the Ohio Supreme Court allowed evidence of the sexual abuse of two other young women in Love’s rape trial involving a third victim. In each incident, the defendant chose a single mother with a prepubescent daughter; the abuse began shortly after the defendant became involved with the mother; and the manner of the abuse was the same, thus establishing the kind of behavioral fingerprint articulated by the Ohio Supreme Court in

*Lowe*. The *Love* Court declared, “We hold that although there were some differences in appellant’s conduct toward the three victims, the similarity of methodology tends to show that the same person committed all three molestations, even had the victims not identified appellant as the perpetrator. [citation omitted] The acts were committed in a similar setting, under comparative circumstances, with a common *modus operandi*.” *Id.* at 7.

In *State v. Jamison* (1990), 49 Ohio St.3d 182, the Ohio Supreme Court ruled in favor of allowing other acts evidence. The brief facts in *Jamison* showed that a man tending bar at the Central Bar in Cincinnati was found on the floor of the bar with severe blunt force trauma to his head. The cash register was open and empty. Eventually the bartender died as a result of those same injuries. Although law enforcement did its best to solve this Aggravated Robbery/Homicide, the case went cold. Five months later, law enforcement had a break in the case when they apprehended an individual that turned out to be an accomplice to Jamison. The accomplice flipped on Jamison and Jamison was indicted for capital murder. The State introduced evidence of seven additional Aggravated Robberies Jamison committed after he killed the bartender. Jamison was convicted.

Eventually, the Ohio Supreme Court accepted jurisdiction over the appeal. Our High Court ruled that all seven of the robberies were admissible in the homicide trial. *Id.* at 183. The key point of the *Jamison* decision was the holding that “the other acts need not be the same as or similar to the crime charged.” *Id.* “The words ‘like’ or ‘similar’ appear neither in R.C. 2945.59 nor in Evid.R. 404(B).” *Id.* 187. Instead, the focus should be on whether the other acts establish the exceptions under Evid.R. 404(B) such as identity or intent. The *Jamison* Court, in citing

*Barnett v. State* (1922), 104 Ohio St. 298, 303 went on to address other acts evidence to establish identity:

\*\*\*the law will not suffer itself to be handicapped by limiting the means or methods of identification to physical characteristics. Where the identity of the defendant is the question in issue, any fact which tends to establish the identity has probative value and is none the less competent evidence because it establishes a collateral fact nor because proof of such fact may incidentally involve proof of the commission of another offense. If the fact tends to establish the identity of the accused, it is competent evidence, no matter what else it may prove \*\*\*.

The *Jamison* Court then made reference to other Ohio Supreme Court cases where other act evidence of robberies were admissible. The Court cited to *Whiteman v. State* (1928), 119 Ohio St. 285 where the Ohio Supreme Court held that evidence of other robberies was properly admitted on identity in the Whiteman's armed-robbery case. The court also cited to *State v. Flonnory* (1972), 31 Ohio St.2d 124 where the Ohio Supreme Court upheld two other robberies admissible in a robbery-murder trial.

After a thorough review of prior case law, the *Jamison* Court held that the probative value of the other robberies to prove identity of the defendant in the homicide trial was "clearly illustrated" in the case. The High Court rested its decision on several comparison factors: (1) the other acts occurred close in time to the instant case; (2) all occurred within a general geographic location; (3) the location of the crime scenes ("the places robbed were all first floor, on the street, walk-in businesses"); (4) what was stolen ("in all cases, appellant physically took or attempted to take money from the register, except from Jack West who had no register"); (5) whether the robber acted alone or with an accomplice ("only one or two people appeared to be present"); (6) physical contact and/or force used; and (7) type of injuries, if any. *Id.* 186.

As well, echoing the sentiments of the *Knight* Court in terms of admissibility of the other acts evidence, *Jamison* again confirmed that the defense “may and did argue all the differences to a jury. Such differences do affect the relative probative value of these events but not their admissibility. The weight to be given to this evidence is for the jury to determine.” *Id.* at 187.

Most importantly, the Ohio Supreme Court has laid out a three-part test to determine if other acts evidence is admissible. *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278. **First**, the court is to “consider whether the other acts evidence is relevant to making any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” *Id.* at ¶ 20. **Second**, the court is to consider “whether evidence of the other crimes, wrongs, or acts is presented to prove the character of the accused to show activity in conformity therewith or whether the other acts evidence is presented for a legitimate purpose, such as those stated in Evid.R. 404(B).” *Id.* **Third**, the court is to consider “whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice.” *Id.* In *Williams*, the defendant targeted J.H. in church and became a mentor to J.H. J.H. had no contact with his natural father and lived with his grandmother. Williams paid special attention to J.H. and bought him things. Eventually, Williams began to sexually abuse J.H. who was 14 years old. The Ohio Supreme Court upheld the trial court ruling allowing the State to produce testimony of a different victim, A.B. as other acts evidence.

Recently, in *State v. Smith*, 1<sup>st</sup> Dist. Hamilton No. C-170335, 2018-Ohio-4615, *appeal accepted for review*, 155 Ohio St.3d 1404, 119 N.E.2d 432 (Table), 2019-Ohio-943, the First District Court of Appeals took into consideration the case law previously mentioned and held that evidence of the defendant sexually assaulting a little girl and getting acquitted was still admissible

other acts evidence under Ohio law in a trial where it was alleged that he sexually assaulted another little girl. Citing to the first prong of the *Williams* test, the First District stated: “We conclude the evidence was relevant. The evidence from the witnesses tended to show the motive Smith had, and the preparation and plan he exhibited when targeting young, female family members under his care. In both instances, Smith had waited until the children were isolated, showed them pornographic images, rubbed their bodies with his hand first, and progressed to involving his genitals in the abuse.” *Id.* at ¶ 11. For the second *Williams* prong, the First District went on to find the other acts evidence properly admitted to show motive, intent, and absence of a mistake. *Id.* And finally for the third prong, the Court of Appeals ruled that the probative value of the other acts evidence was not substantially outweighed by unfair prejudice because the trial court repeatedly instructed the jury on the limited use of the evidence. *Id.*

Regarding instructions to the Jury, the State understands the need to have a jury instruction read to the jury about the other acts evidence. The State would ask the Court for the jury instruction under 2 OJI-CR 401.25 which states:

Evidence was received about the commission of (crime[s] (wrong[s] (act[s])) other than the offense with which the defendant is charged in this trial. That evidence was received only for a limited purpose. It was not received, and you may not consider it, to prove the character of the defendant in order to show that he acted in conformity with that character. If you find that the evidence of other (crime[s] (wrong[s] (act[s])) is true and that the defendant committed them, you may consider that evidence only for the purpose of deciding whether it proves the defendant’s motive, opportunity, intent or purpose, preparation or plan to commit the offenses charged in this trial or the identity of the person who committed the offense in this trial. That evidence cannot be considered for any other purpose.

A jury is presumed to follow the instructions given it by a trial judge. *State v. Garner*, 74 Ohio St.3d 49, 59, 656 N.E.2d 623 (1995). A reading of an instruction when the evidence



is provided in addition to having a written jury instruction would cure any possible unfair prejudice to Drew.

**III. OTHER ACTS EVIDENCE**

The State intends to offer evidence in the following four categories:

(A) a second sexually abused boy from the same time period as P.N.

(B) witnesses that can testify to Drew's grooming actions of boys from the same time period as P.N.'s sexual abuse

(C) witnesses that can testify to Drew's grooming actions of boys in more recent times

(D) an unindicted Unlawful Sexual Conduct with a Minor from when Drew had sexual intercourse with P.N. when P.N. was a teenager

**A. A Second Sexually Abused Boy From the Same Time Period As P.N.**

The State expects to call M.S. (Witness CC in discovery) who will testify that while he was a child less than 13 years of age and a student at St. Jude from 1985 thru 1987, Drew befriended him just like P.N.. Drew began grooming M.S. in a similar fashion as P.N.. Drew would make M.S. meet in his office alone like P.N.. Drew rubbed and touched M.S. inappropriately in a grooming pattern the same as P.N.. The grooming progressed to Drew eventually having repeated sexual conduct with M.S. consisting of fellatio and masturbation. Although this sexual abuse constituted Rape, the crimes fall outside of the statute of limitations and that is why the State cannot indict Drew on additional charges.

**B. Witnesses That Can Testify to Drew's Grooming Actions of Boys from Same Time Period As P.N.'s Sexual Abuse**

"Grooming refers to deliberate actions taken by a defendant to expose a child to sexual material; the ultimate goal of grooming is the formation of an emotional connection with the child

and a reduction of the child's inhibitions in order to prepare the child for sexual activity.” *State v. Williams, citing United States v. Johnson*, 132 F.3d 1279, 1283 (9<sup>th</sup> Cir. 1997), fn. 2. “Shaping and grooming” describes the process of cultivating trust with a victim and gradually introducing sexual behaviors until reaching the point of intercourse.” *Id.*

The State expects to offer the testimony of several witnesses who will testify that on multiple occasions, they saw Drew inappropriately touching young boys who were the same gender as P.N. and who were around the same age as P.N.. Their testimony will show that Drew touched these boys in the same manner as P.N. and in the same physical locations of the school or music room as P.N.. This evidence is offered to demonstrate the knowledge and plan, i.e. the *modus operandi*, of Drew and his grooming behavior. Drew’s plan was to target little boys and act like he was their friend in an effort to gain their trust and confidence. He would begin physical contact with the boys – first around the neck, shoulders and back, then to the legs and so forth. Drew’s motive and plan was to gain the trust of the boys so that he could have sexual relations with them. The fact that he did this to multiple little boys goes towards his knowledge and the absence of mistake. And his intent was to finally get a little boy alone so as to sexually abuse the child in order for Drew to become sexually gratified.

The following are the witnesses that can testify regarding Drew’s grooming of little boys back in the late 1980s and early 1990s which is the time period of the indictment:

1. The State plans to call **Witness B (A.L.)** who was a student at St. Jude during the time period stated in the indictment. While in 2<sup>nd</sup> thru 5<sup>th</sup> grades, Drew touched Witness B, a boy less than 13 years of age, by rubbing his shoulders, neck, upper back and lower back. Drew placed his hands under the shirt of the child, touching his bare back and chest. The touchings occurred on school property and lasted several seconds. Witness B was very upset by these encounters, and avoided Drew whenever possible.

2. The State plans to call **Witness V (N.B.)** who was a student at St. Jude during the time period stated in the indictment, During that period, he witnessed Drew's grooming behavior with Witness B. Witness V observed Drew touch Witness B on several occasions, rubbing his shoulders and back, and the reaction of Witness B to these unwanted and inappropriate touchings. Witness V will testify that he and his friends never wanted to get caught alone with Drew because it was unknown what would happen and because other students would make fun of anyone being "alone with a creep."
3. The State plans to call **Witness H (T.G.)** who was a clergyman at St. Jude during the time period from 1992 to 1993 when Drew was on staff as Music Director. During that time period, Witness H often observed Drew touching young boys in an inappropriate manner. Drew put his hands on the children's shoulders for long periods of time, and rubbed them. Witness H approached Drew about "crossing boundaries" and told Drew that what he was doing was inappropriate. Drew only rebuffed Witness H.
4. The State plans to call **Witness J (P.D.)** who was a clergyman at a local parish during the time period from 1987 thru 1992. During that time period, Witness J attended a meeting at St. Jude Parish, and encountered Drew outside the Church, loading a station wagon with four to five minor boys. Witness J inquired as to what was going on and Drew explained that they were all going on vacation together. Witness J found this to be highly unusual and inappropriate as the boys were kids. On other occasions, Witness J witnessed Drew engaged in grooming behavior by rubbing on young children inappropriately. Witness J was also told by concerned Church parishioners and employees that Drew was engaged in grooming behaviors with other children.
5. The State plans to call **Witness L (J.A.)** who attended St. Jude and then Elder High School during the time period of 1981 to 1991. While at St. Jude, Drew often touched and rubbed the Witness, a boy less than 13 years of age, particularly on his shoulders. Witness L will testify that the touchings were completely unwanted, and very upsetting. Witness L will also testify about the grade school boys Drew would target including one fourth grade boy who had a suicide in his family and was particularly vulnerable. Further, Witness L can testify that either in 1988 or 1989, Drew took some Elder boys, age 15, out of town to Chicago where he allowed them to drink alcohol, took them to a comedy show that was inappropriate for juveniles and allowed one of them to order soft porn on the single hotel room television.
6. The State plans to call **Witness Y (J.L.)** who was a student at St. Jude School from 1990 to 1998. During that time period, Drew reached down boys' shirts to rub their backs, shoulders, and necks. Witness Y remembered the boys squirming in discomfort when Drew would touch them. Drew also touched

Witness Y in the same fashion and on multiple occasions. Witness Y found the touchings very alarming and upsetting.

7. The State plans to call **Witness Z (L.R.)** who was a student at St. Jude during the time period from 1985 thru 1993. Witness Z served as an altar boy, and was less than 13 years old. Drew often rubbed on Witness Z's shoulders and touch him inappropriately.
8. The State plans to call **Witness U (M.S.)** who attended Elder High School from 1988 to 1990 as a Freshman and Sophomore. Drew was the assistant band director and Witness U was in the band. Drew would touch Witness U's shoulders and legs with both hands. Witness U also saw Drew rub and touch other students on multiple occasions. In a separate incident, when Witness U was fourteen or fifteen years old, in 1990, Drew invited him to Drew's home. Witness U believed that other students would be there so he accepted the invitation. However, when Witness U arrived, he found it was only he and Drew. Drew took Witness U to the basement which made Witness U extremely uncomfortable. Drew went upstairs for a moment, and Witness U quickly made a phone call home, requesting to be picked up immediately. Drew returned to the basement, and requested that Witness U sit on the couch next to him. Witness U refused, and related that his grandfather was on the way to pick him up.

C. **Witnesses That Can Testify to Drew's Grooming Actions of Boys in More Recent Times**

The State has found multiple witnesses who can testify that Drew's grooming behavior with minor boys continued on. This evidence is offered to show knowledge of grooming P.N. and the absence of mistake or accident regarding the touching of P.N.. Drew's *modus operandi*, his grooming behavior, had not changed one bit.

1. The State plans to call **Witness N (K.C.)** who was employed at St. Anthony Church in the early 2000s while Drew was in the Seminary and also interning at St. Anthony. Witness N observed Drew on multiple occasions with a young boy, (Witness W). On these occasions, Witness N saw Drew's hands upon the child's shoulders. Witness N thought Drew's actions were inappropriate, and became concerned. Witness N then attended a meeting at the Seminary, and saw Drew present with the same boy. Alarmed, Witness N questioned the boy about his reasons for being at the Seminary, and he responded that it was at the

- invitation of Drew to take him on a tour. Witness N filed a formal complaint but is unsure of the outcome.
2. The State plans to call **Witness W (P.B.N.)** who attended St. Anthony Church in the early 2000s. At the ages of 15 to 17 years old, Witness W attended Mass alone as the witness' parent taught Sunday school. During this time, Drew befriended Witness W. After time, Drew invited Witness W to tour the Seminary with him. Witness W accepted, and upon arrival, Drew directed Witness W to Drew's "private room." While alone in the room, a man passed by and noticed them. The man came to the doorway and refused to leave until Drew and Witness W left. On other occasions, while in Church, Drew would approach Witness W from behind and say inappropriate things, offering Witness W a massage, or claiming that he knew someone that could give the child a massage. Drew would also frequently touch Witness W on his shoulders and the small of his back. Witness W found this unsolicited contact very upsetting and alarming.
  3. The State plans to call **Witness G (D.A.)** who was at St. Rita School, at a time period from 2005-2006 when Drew was employed there. Drew often rubbed on Witness G's shoulders, as well as other boys less than 13 years of age. Drew whispered in the boys' ears, including Witness G's ear. Drew touched the boys on the ears and rubbed his face on the boys' faces. While in 8<sup>th</sup> grade, approximately forty or fifty boys drafted and signed their name to a typed letter requesting the school to "have Father Drew stop touching them." The group of boys gave the signed letter to the school principal and Drew. The boys were told they were being ridiculous and were forced to apologize to Drew.
  4. The State plans to call **Witness C (A.Z.)** who was an altar boy in 2011 while Drew was a Priest. Drew would give Witness C unsolicited hugs. On one occasion, after Sunday mass, Drew told Witness C that Witness C had nice legs and suggested that Witness C should wear pants because his legs were distracting.
  5. The State plans to call **Witness BB (L.K.)** who was an employee of St. Maximillian Kolbe Church in 2012 when Drew was assigned there. Witness BB will testify and has proof in the form of a hotel bill that Drew went out of town on Church business and stayed at a Wyndham Hotel. While at that hotel, Drew charged two phone calls to his hotel bill, paid for by the Church. Both calls were found to be associated with a male massage service, "Relaxin with Gavin", that specialized in home "male for male" nude massages and which also included sex in some instances.

**D. An Unindicted Unlawful Sexual Conduct with a Minor From When Drew Had Sexual Intercourse with P.N. When P.N. Was a Teenager**

After three years of sexual abuse, P.N. transferred to a different school for a year. When P.N. returned to St. Jude, he had grown very tall and had become much larger. Drew left P.N. alone after that. However, the effects of Drew's abuse stayed with P.N. and P.N. became sexually promiscuous at an early age. At age 14 or 15, P.N. went online to an AOL chatroom. P.N. ended up chatting with a male about meeting up. That male questioned P.N. to make sure he wasn't an Elder student, which P.N. was not. The two met in a parking lot and the male ended up being Drew. They went to a house on Montana Avenue where sexual intercourse occurred even though P.N. was still a minor. Although Drew committed an Unlawful Sexual Conduct with a Minor crime, the statute of limitations barred an indictment against Drew on this charge.

**IV. APPLICATION OF LAW TO OTHER ACTS EVIDENCE**

As mentioned above, the *Williams* 3-prong test is as follows:

		Yes	No
<b>First Prong:</b>	Is other acts evidence relevant?		
<b>Second Prong:</b>	Does other acts evidence support a 404B exception: motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?		
<b>Third Prong:</b>	Does the probative value substantially outweigh the danger of unfair prejudice?		
		If all 3 answers are yes, then other acts evidence is admissible	If there is 1 no answer, then other acts evidence is not admissible

**A. A Second Sexually Abused Boy From the Same Time Period As P.N.**

As for the first prong of *Williams*, the evidence of a second victim in this case is relevant just as the First District found the evidence in *Smith* to be relevant. As mentioned before, the *Smith* Court found relevance in the other acts evidence of additional victims because it “tended to show the motive Smith had, and the preparation and plan he exhibited when targeting young, female family members under his care. In both instances, Smith had waited until the children were isolated, showed them pornographic images, rubbed their bodies with his hand first, and progressed to involving his genitals in the abuse.” *State v. Smith*, 2018-Ohio-4615 at ¶ 11. Similarly, in this case the other acts evidence about M.S. also tends to show the motive Drew had, and the preparation and plan Drew exhibited when targeting young, male boys, who were students at St. Jude. He isolated both boys just as Smith did with both girls. Just like in *Smith* where the grooming process was similar with both *Smith* victims, Drew began the grooming cycle in the same way with P.N. and M.S. - first with inappropriate touching of the neck and back, then legs, then genitals which then led to sexual abuse.

For the second prong, the evidence that M.S. can provide would be properly admitted under the exceptions to Evid.R. 404(B). In the *Smith* case, the evidence of a second victim was admitted to show motive, intent, and absence of a mistake. Similarly, in the Drew case, evidence that M.S. was sexually abused in almost the exact same manner as P.N. would show motive, intent and absence of mistake as well. It would also go to plan as to the avenue Drew took in grooming his victims.

Finally, as for the third *Williams* prong, the probative value of the evidence M.S. can provide is not substantially outweighed by unfair prejudice to Drew. As the *Smith* Court found,

“The trial court’s repeated instructions on the limited use of the evidence guarded against the danger of undue prejudice. [citation omitted] The effect of the testimony presented by V.M. and L.S. was not so unfairly prejudicial that the trial court abused its discretion when admitting it.” *Id.* at ¶ 13.

Because the other acts evidence of Drew sexually abusing M.S. (1) is relevant, (2) is offered to prove exceptions to Evid.R. 404B) and (3) the probative value outweighs any unfair prejudice, the State asks this honorable Court to allow the admission of the M.S. other acts evidence.

**B. Witnesses That Can Testify to Drew’s Grooming Actions of Boys from Same Time Period As P.N.’s Sexual Abuse**

Just as evidence of a second victim is relevant, so is evidence of Drew’s conduct towards other little boys during the time period contained in the Indictment, and thus, the first *Williams* prong is met again. In *Williams*, the Supreme Court found that “A.B.’s testimony was relevant because it tended to show the motive Williams had and the preparation and plan he exhibited of targeting, mentoring, grooming, and abusing teenage boys; if believed by the jury, such testimony could corroborate the testimony of J.H.” *State v. Williams*, 134 Ohio St.3d 521 at ¶ 22. Further, “A.B.’s testimony that Williams received ‘some type of sexual gratification’ also is relevant to show that Williams’ intent was sexual gratification.” *Id.* Similarly, the other acts evidence of inappropriately touching boys that were around the same age as P.N., who went to the same school as P.N., who were all touched in the same way (neck, back, on top of and under shirt) as P.N. is relevant as it tends to show the motive Drew had and the preparation and plan he exhibited of targeting, mentoring and grooming young little boys. Drew’s intent was for sexual gratification.



For the second prong, the grooming evidence from the late 1980s and early 1990s would be properly admitted under the exceptions to Evid.R. 404(B). In *Williams*, the High Court stated, “the state did not offer the evidence of the Williams-A.B. relationship to show that abusing J.H. was in conformity with Williams’ character. In fact, the trial court gave two limiting instructions that this evidence was *not* being offered to prove Williams’ character.” *Id.* at ¶ 23. As argued above, the other acts evidence of grooming will be offered to show motive, preparation, plan and intent and will not be used to show conformity or to attack the character of Drew.

Finally, the probative value of the other acts evidence of grooming does not substantially outweigh the danger of unfair prejudice to Drew. As the *Williams* Court held, “[t]his evidence is not unduly prejudicial because the trial court instructed the jury that this evidence could not be considered to show that Williams had acted in conformity with a character trait. This instruction lessened the prejudicial effect of A.B.’s testimony and A.B. corroborated J.H.’s testimony about the sexual abuse . . . [t]he prejudicial effect did not substantially outweigh the probative value of that evidence.” *Id.* at ¶ 24.

Because the other acts evidence of Drew’s grooming habits of little boys during the time period contained in the Indictment (1) is relevant, (2) is offered to prove exceptions to Evid.R. 404(B) and (3) the probative value outweighs any unfair prejudice, the State asks this honorable Court to allow the admission of the grooming other acts evidence.

**C. Witnesses That Can Testify to Drew’s Grooming Actions of Boys in More Recent Times**

For the same reasons stated in Section B above, the testimony regarding grooming actions are relevant, offered to prove exceptions to Evid.R. 404(B) and the probative value outweighs any unfair prejudice. The testimony of the more current grooming is relevant because it again

demonstrates knowledge, motive, absence of mistake and intent. This evidence corroborates that the inappropriate touchings of P.N. was not accidental or a mistake. It is relevant as it tends to show the motive Drew had and the preparation and plan he exhibited of targeting, mentoring and grooming young boys. Drew's intent was for sexual gratification. The additional evidence of the phone calls to a male massage parlor corroborate the fact that Drew is attracted to the male gender which corroborates P.N.'s testimony. None of the evidence is offered to attack Drew's character. And further, jury instructions from the Court regarding the limited use of the testimony would cure any unfair prejudice to Drew. As such, evidence of Drew's actions in the early 2000s should be admissible.

It should be noted that Evid.R. 404(B) does not have any time constraints. As such, should the defense argue that this grooming evidence is too remote in time to the sexual abuse of P.N., that argument should fail. For example, *Williams* involved an 11-year gap between the other acts evidence and the time of the underlying crimes. *Id.* at ¶ 3-5. Subsequent to the *Williams* decision, a court even found 404(B) evidence to be admissible when there was a 20 year time gap. *State v. Herrington*, 8<sup>th</sup> Dist. Cuyahoga No. 101322, 2015-Ohio-1820, ¶ 34.

**D. An Unindicted Unlawful Sexual Conduct with a Minor From When Drew Had Sexual Intercourse with P.N. When P.N. Was a Teenager**

Although the indicted sexual abuse of P.N. occurred when he was a child at St. Jude, there was one more time when Drew had contact with P.N. This encounter occurred when P.N. was 14 or 15 years old. Essentially, the two engaged in sexual intercourse which constituted Unlawful Sexual Conduct with a Minor. However, because that charge is different than Rape, the statute of limitations has run and the State was unable to indict Drew for this crime. That said, the State will offer this evidence as other acts evidence. It is relevant because it again supports P.N.'s

testimony that Drew was attracted to boys, that Drew wanted to have sex with boys, that Drew operated in secrecy (he asked P.N. in the AOL chatroom if he went to Elder as Drew worked at Elder and didn't want to be caught having sex with a student there), and that Drew was able to perform the sex acts required to constitute Rape. Because this other acts evidence is being offered under the exceptions for 404(B) and not to attack Drew's character, the evidence should be allowed. And because the Court would give multiple jury instructions on how the evidence could be used, there would be no undue prejudice against Drew. As such, all three *Williams* prongs are met and the other acts evidence of the Unlawful Conduct with a Minor should be admitted.

#### **V. EXPERTS**

The State plans on calling two experts in its case in chief. First, the State intends to call Supervisory Special Agent Daniel O'Donnell from the FBI Behavioral Analysis Unit who will testify regarding the general subject matter of how offenders gain access to their victims; grooming behaviors; compliant victimization; and environmental factors that could relate to how and when a victim discloses sexual abuse. Second, the State intends to call Heidi Malott who is the Clinical Program Manager of the Mayerson Center for Safe and Healthy Children at the Children's Hospital and/or Dr. Kathi Makoroff who is the Fellowship Director of Child Abuse Pediatrics at the Children's Hospital. That expected testimony will focus on the general subject matter of disclosures regarding child sexual abuse and why some children never disclose until they are adults. The expert will further testify regarding possible behavioral changes of a sexually abused child. It should be noted that the experts have not completed their reports yet and as such, the State reserves the right to supplement this Notice with additional or more specific topics of testimony.

Evid.R. 702, which governs the admissibility of expert testimony, states that:

A witness may testify as an expert if all of the following apply:

(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

(C) The witness' testimony is based on reliable scientific, technical, or other specialized information \* \* \*.

In *State v. Boston*, 46 Ohio St.3d 108, 545 N.E.2d 1220 (1989), syllabus, the Supreme Court held that an "expert may not testify as to the expert's opinion of the veracity of the statements of a child declarant." In *Boston*, the defendant was alleged to have had sexual conduct with his two year old daughter. During the trial, one expert for the State testified that the victim had not fantasized her abuse and had not been programmed to make accusations against her father. The second expert for the State testified that the victim was telling the truth. The Supreme Court reversed the conviction "on the basis that such statements constituted improper 'bolstering evidence' because it is the fact finder, not the so-called expert or lay witnesses, who bears the burden of assessing the credibility and veracity of witnesses." *Id.* at 129.

However, in *State v. Stowers*, 81 Ohio St.3d 260, 263, 690 N.E.2d 881 (1998), the Ohio Supreme Court pointed out that *Boston* did not exclude testimony that offers additional support for the truth of the facts testified to by the victim, or which assists the fact finder in assessing the victim's veracity. As the Twelfth District concluded, "[t]his distinction recognizes the reality that, indirect bolstering of a victim's credibility is not the same as the direct rendering of an opinion as to a victim's veracity that was involved in *Boston*." *State v. Boles*, 2013-Ohio-5202, ¶ 30. In *Boles*, "Dr. Bassman was established by the state as an expert in sexual abuse. His

testimony centered on the nature of grooming and the methods that are typically employed by sexual predators in order to groom a child. Dr. Bassman was declared an expert in sexual abuse by the trial court and was subsequently permitted to testify about grooming without objection from appellant.” *Id.*, ¶ 26. Likewise, the State intends to call Supervisory Special Agent Daniel O’Donnell to testify in general about sexual abuse and grooming procedures. The State has no intention of soliciting testimony from Agent O’Donnell as to his opinions regarding Drew and whether Drew himself engaged in grooming.

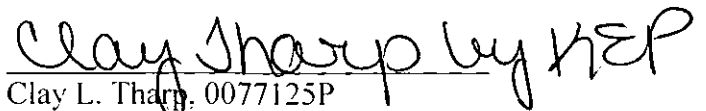
Further, the State plans on calling Heidi Malott or Dr. Kathi Makoroff from the Mayerson Center of Children’s Hospital to testify regarding child disclosures and possible behavioral issues of children who are sexually abused. This testimony is permissible as well. In *State v. Rucker*, 2012-Ohio-185, the First District Court of Appeals opined:

In this case, Dr. Makoroff did not offer an opinion as to the truth of J.J.’s statements, testimony which is proscribed by *State v. Boston* [citations omitted]. Instead, Dr. Makoroff testified that generally children who are sexually and physically abused may have no subsequent behavioral changes, or they may exhibit ‘acting out’ behaviors, such as getting in trouble in school, not listening to their parents, running away from home, or promiscuous behavior. An expert witness is permitted to testify that the behavior of an alleged child victim of sexual abuse is consistent with behavior generally observed in sexually abused children. *State v. Stowers*, 81 Ohio St.3d 260, 161, 690 N.E. 2d 881 (1998). So the trial court did not err by allowing Makoroff to testify about J.J.’s behavior being consistent with having been sexually abused.

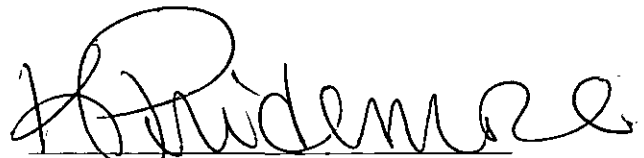
As such, the State anticipates that Heidi Malott and/or Dr. Kathi Makoroff will testify in general about the subject matter and will opine as to whether P.N.’s testified behavior was consistent with having been sexually abused.

**VI. CONCLUSION**

For all of the reasons stated above, the State submits that all other acts evidence listed passes the Williams 3-prong test. All of the other acts are relevant. The evidence is being presented to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, as well as the defendant's state of mind. And with the Court's jury instructions on the matter, Drew will suffer no unfair prejudice because of the testimony. Finally, the State's calling of two expert witnesses is permissible and allowable in this case.



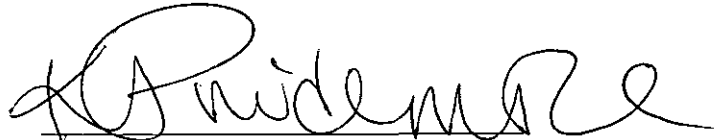
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CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was served upon each party or attorney of record in the proceedings for each party by Ordinary U.S. mail on the 16th day of March, 2020 and by email on the 13<sup>th</sup> day of March, 2020.

A handwritten signature in black ink, appearing to read "Katherine E. Pridemore". The signature is written in a cursive style with a large initial "K" and a long, sweeping underline.

Katherine E. Pridemore