OA 6-6-94



IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 82,793

AUGUSTAS J. RAWLS,

Respondent.

# RESPONDENT'S ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

## TABLE OF CITATIONS

STATUTES



CONSTITUTIONS



OTHER AUTHORITIES

IN THE SUPREME COURT OF FLORIDA

| | | |
|---|---|---|
| STATE OF FLORIDA, | : | |
| Petitioner, | : | |
| v. | : | CASE NO. 82,793 |
| AUGUSTAS J. RAWLS, | : | |
| Respondent. | : | |
| | : | |

RESPONDENT'S ANSWER BRIEF ON THE MERITS

## I PRELIMINARY STATEMENT

This is an appeal from the decision of the First District Court of Appeal below, Rawls v. State, 624 So.2d 757 (Fla. 1st DCA 1993).

Respondent, appellant in the district court and defendant in the circuit court, will be referred to by name or as respondent. Petitioner, appellee in the district court and prosecutor in the circuit court, will be referred to as the state.

## II STATEMENT OF THE CASE AND FACTS

Respondent accepts the state's statement of the case and facts as reasonably accurate.

## III SUMMARY OF ARGUMENT

Issue I: This court should affirm the decision below on this issue. The trial court's modification of the standard Williams rule jury instruction to include admission to corroborate testimony of the victim was error. A reasonable juror could have interpreted the instruction to mean that the court believed the similar fact evidence corroborated the victim's testimony. Any perceived comment by the court on the proper weight to give evidence or the proper result would be very prejudicial. This court should affirm the district court's reversal for new trial.

Issue II: If the issue is as framed by the state, then it is virtually indistinguishable from that in Saffor, infra, which is presently pending in this court.

Based on little argument and much assumption, the state assumed that the standard for the admissibility of the evidence here is that of Heuring, infra, which set the standard for the admissibility of collateral crime evidence in familial sexual abuse prosecutions. Respondent contends the correct standard for admissibility is set out in sections 90.401 through 90.404, Florida Statutes (the Florida Evidence Code). This court's decision in Heuring, which purportedly relaxed standards of

admissibility in such cases, left a number of questions unanswered. Heuring provides for admission to corroborate the alleged victim. However, credibility is not a fact in issue, merely a means by which to determine facts. Therefore, evidence which merely generally corroborates the testimony of another is inadmissible under sections 90.401 and 90.402.

Moreover, a close analysis of Heuring yields the conclusion that such evidence corroborates solely by establishing an accused's propensity to pedophilia. Propensity is expressly forbidden as grounds for admission of collateral crimes in section 90.404(2)(a), Florida Statutes. Finally, the court's pronouncement that the evidence's probative value outweighs its prejudicial effect circumvents the case-by-case balancing process required under section 90.403.

Therefore, collateral crime evidence in familial sexual abuse prosecutions must be governed by the standards applicable in other criminal cases. Determinations of admissibility must be made on a case-by-case basis. Here, the collateral evidence was inadmissible for two reasons: it did not bear on a material fact in issue, and it bore insufficient marks of similarity or shared unique characteristics. Any minimal relevance was substantially outweighed by the potential for unfair prejudice or confusion of issues.

If the court adheres to Heuring, the evidence was inadmissible because it was admitted to prove opportunity, plan or scheme, or lack of mistake, none of which were disputed issues.

## IV ARGUMENT

### ISSUE I

THE TRIAL COURT'S MODIFICATION OF THE WILLIAMS RULE JURY INSTRUCTION TO INCLUDE CORROBORATION AS A PERMISSIBLE PURPOSE WAS REVERSIBLE ERROR (restated).

In this capital sexual battery case, the First District Court ruled below that the similar fact/collateral crime evidence was admissible under the Williams rule, but that the trial court erred reversibly in modifying the standard jury instruction on Williams rule evidence. Rawls v. State, 624 So.2d 757, 760 (Fla. 1st DCA 1993); Williams v. State 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959), codified as § 90.404, Fla.Stat. The modification had to do with this court's decision in Heuring v. State, 513 So.2d 122 (Fla. 1987).

Although the state won in the district court on the issue of admissibility of the evidence, and lost only on the jury instruction issue, the state's merit brief barely acknowledges the instruction issue, and instead focuses almost exclusively on the admissibility of the evidence. The First District held the evidence was admissible on a non-Heuring theory; the state argues in its merit brief in this court that the evidence was admissible on a Heuring theory.

Assuming arguendo that the issue is in fact as it is framed by the state, then this case becomes virtually indistinguishable from that in Saffor v. State, 625 So.2d 31 (Fla. 1st DCA 1993) (en banc), review pending, no. 82,531 (Fla.

1994), which is pending in this court. Saffor is set for oral argument in August. It is fairly bizarre, however, that having won the issue, the state nevertheless argues that it should have won the same issue, but on a different theory. Respondent contends that the issue of admissibility under Heuring is or may be separate from the issue of modifying the jury instruction, and the two issues are not the same. On the other hand, it would be logical to address the issue of admissibility first, and only after that determination, to decide whether the jury instruction may be modified. This case could be viewed as going at the matter backwards, by deciding first whether the instruction may be modified.

Although the state barely addressed it, respondent views it as reasonable to discuss first whether the trial court erred in modifying the standard Williams jury instruction, which is the issue on which the state presumably appealed to this court. Respondent will address the admissibility of the evidence per se in Issue II, infra.

Both the evidence code and the jury instructions relating to similar fact, or Williams rule, evidence, enumerate specific purposes for which such evidence may be admitted and considered by the jury. The evidence code provides:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

§ 90.404(2)(a), Fla.Stat. (1991). The standard jury instruction to be given at the close of evidence provides:

> The evidence which has been admitted to show similar crimes, wrongs or acts allegedly committed by the defendant will be considered by you only as that evidence relates to proof of [motive] [opportunity] [intent] [preparation] [plan] [knowledge] [identity] [the absence of mistake or accident] on the part of the defendant.

In giving instructions, a trial court selects the appropriate choices and includes only those issues which are relevant.

A trial judge has the duty to instruct the jury properly on the law. See, e.g., Bello v. State, 547 So.2d 914 (Fla. 1989) (error to give transferred intent instruction if no evidence supported such instruction); Freund v. State, 520 So.2d 556 (Fla. 1988) (trial court has obligation to instruction on correct law notwithstanding standard instructions); State v. Dominguez, 509 So.2d 917 (Fla. 1987) (jury instruction inadequate if it fails to include an element of the offense).

Here, the correct law is contained in the standard instruction, which lists those uses enumerated by the evidence code. The code provides that these are the only issues for which similar fact evidence may be considered. The trial court apparently believed that Heuring, supra, permitted similar fact evidence to be used for corroboration. Assuming arguendo that Heuring survives intact this court's decisions here and in Saffor, Thomas, the First District explained Heuring. Thomas v. State, 599 So.2d 158 (Fla. 1st DCA) (on motion for rehearing), review denied 604 So.2d 488 (Fla. 1992). Heuring recognized

that, in cases of sexual battery on a child under 12 by a person with a familial relationship to the child, similar fact evidence has the effect of corroborating the child victim's testimony. The test for admissibility, however, remains one primarily of relevance to prove disputed issues of material fact - uses permitted by the evidence code. Thomas, 599 So.2d at 163. The jury is permitted to consider similar fact evidence only as it is relevant to one of the enumerated issues, although the result may be corroboration.

The state's argument, essentially, is that Heuring is not limited to crimes committed within a "familial context" but should apply much more broadly (State's Brief (SB), 20 et seq.), and should include the instant case within its scope. That is one of the questions this court must address. Apparently beginning with Coleman v. State, 485 So.2d 1342 (Fla. 1st DCA 1986), the First District Court has advocated a broad definition of "familial and custodial." Some cases, however, have taken a narrower view, such as Thomas, supra, which the state failed to cite in its brief.

Respondent contends that Coleman's position violates the rule that penal statutes are to be strictly construed. State v. Waters, 436 So.2d 66 (Fla. 1983); Ferguson v. State, 377 So.2d 709 (Fla. 1979); Reino v. State, 352 So.2d 853 (Fla. 1977). Courts may not "broadly construe" penal statutes in order to effectuate what they perceive as a social good.

Respondent would also remind this court of two points. First, the state relies heavily for its argument on a comment

from the UCLA Law Review (SB-22 et seq.); Comment, Defining Standards for Determining the Admissibility of Evidence of Other Sex Offenses, 25 UCLA L.Rev. 261 (1977). Respondent reminds the court that a comment is written by a law student, a very bright law student perhaps, but not a lawyer or law professor or anyone else who might, for example, be recognized as an expert in court. Nor apparently have the views of this comment been tested in court since 1977. At least, the state did not cite any court which has adopted the views espoused in the article.

Second, while the court may have an inkling from the state's argument that "familial context" should be broadly construed as to how wide will be the application of any rule the court adopts here, respondent would remind the court of what it said in Hall and Wilson. Wilson v. State, 567 So.2d 425 (Fla. 1990); Hall v. State, 517 So.2d 692 (Fla. 1988). In Hall, the question was whether abuse of familial authority was a valid reason for departure in the case of physical abuse of children. The court held it was not a valid reason, because so many children are abused in a familial setting that it would constitute a built-in reason for departure. In Rogers, the court also held that abuse of familial authority was not a valid reason for departure in the case of sexual abuse of children.

Inter alia, in Wilson, this court approved Laberge v. State, 508 So.2d 416, 417 (Fla. 5th DCA 1987), in which the district court said:

> While, of course, some such acts are committed by strangers to the children, unhappily experience shows that such statutes are most commonly violated by persons who take advantage of a trust position involving the care, custody, teaching, and training of children, such as educational, religious, social, and child care workers, relatives, stepparents and babysitters. . .

See also, Note, Are Children Competent Witnesses?: A Psychological Perspective, 63 Wash.U.L.Q. 815, 821-22 (1985):

> Identification of a perpetrator in sexual abuse cases is not a crucial issue because the perpetrator is usually a close friend or relative of the victim.41
>
> 41In a three-year study of New York City sexual abuse cases, concluded in 1971, researchers found that in 75% of the cases reported, the offender was a member of the child's own household, a relative not living in the neighborhood, a neighbor, a friend, or a person in the community with whom the child had frequent contact. Undeutsch, Courtroom Evaluation of Eyewitness Testimony, 33 Int'l Rev. of Applied Psychology 51 (1984); accord Berliner & Barbieri, The Testimony of the Child Victim of Sexual Assault, 40:2 J. of Soc. Issues, 125,126 (1984).

What this means is that, if court were to broaden Heuring so that similar fact evidence were admissible merely to corroborate the child's testimony, in every case in which the child knows the defendant (apparently the ruling the state is seeking), the court should realize what it would be doing. It would be making similar fact/collateral crime evidence admissible in the vast, vast majority of cases of sex crimes against children. Perhaps the court would view this as an acceptable result, but it should not be deceived that its ruling would apply only to the occasional or extraordinary case.

The state never expressly bridges the gap from its argument the evidence is admissible to its argument the jury instruction may be modified. Presumably, the state believes that if the court were to accept the former proposition, the latter would follow as night follows day. Respondent believes otherwise.

By instructing the jury that it could consider the evidence in corroboration, the judge in effect commented on the evidence by vouching for the credibility of the victim-witness. Rawls, 624 So.2d at 760; see, State v. Townsend, ____ So.2d ____, 19 Fla.L.Weekly S202 (Fla. April 21, 1994); Feller v. State, ____ So.2d ____, 19 Fla.L.Weekly S196, 197 (Fla. April 21, 1994); Tingle v. State, 536 So.2d 202, 205 (Fla. 1988). Any suggestion by the judge of his opinion regarding facts or witnesses is improper. Rawls, 624 So.2d at 760; Reyes v. State, 547 So.2d 347 (Fla. 3d DCA 1989); see Fenelon v. State, 594 So.2d 292 (Fla. 1992). A reasonable juror could easily have interpreted the instruction given as a direction by the court to accept the victim's testimony as credible and corroborated. In so instructing the jury, the judge interfered with the jury's sacred duty to weigh the facts and assess the credibility of witnesses. Rawls properly objected to this instruction. As it was error, he is entitled to new trial.

ISSUE II

THE TRIAL COURT ERRED REVERSIBLY IN ADMITTING THE TESTIMONY OF THREE OTHER BOYS THAT APPELLANT RAWLS HAD COMMITTED SEXUAL ACTS ON THEM (restated).

Respondent has chosen to argue separately the state's main contention in its merit brief - that the collateral crime/similar fact evidence was admissible under Heuring, supra.

Similar fact/collateral crime evidence is inherently prejudicial to a defendant's right to a fair trial. Heuring, 513 So.2d at 124; Thomas, supra, 599 So.2d at 162. In fact, this court has held a violation of the Williams rule, to be presumed harmful. Peek v. State, 488 So.2d 52 (Fla. 1986); Williams, supra; Thomas, 599 So.2d at 164.

Although the state won in the district court on the issue of the admissibility of the Williams rule evidence, on appeal to this court, the state argues the trial court was permitted, under Heuring, to modify the instruction, and that the First District "misapplied, if not outright misinterpreted Heuring" (SB-19). Respondent disagrees with this assessment.

A. Admission of collateral crime/ similar fact evidence under Heuring

"To minimize the risk of a wrongful conviction, the similar fact evidence must meet a strict standard of relevance." Thomas, 599 So.2d at 162, quoting Heuring. Therefore, section 90.404, Florida Statutes, and accompanying decisional law require that the charged offense and collateral offense must both 1) be strikingly similar and also 2) share unique and distinguishing characteristics. Heuring; Turtle v. State, 600

So.2d 1214 (Fla. 1st DCA 1992). This court has very recently reaffirmed the need for striking similarity in Feller, supra. Third, the evidence must be clearly relevant to establish a material fact in issue such as identity, motive, opportunity, plan, knowledge, or absence of mistake or accident. Thomas, 599 So.2d at 162.

Fourth, even if relevant, such evidence may be inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, misleading the jury or unnecessarily cumulative evidence. Turtle, 600 So.2d at 1218. "If there is no bona fide dispute over a material fact that the similar fact evidence is offered to prove, then the probative value of such evidence necessarily has significantly less importance than its prejudicial effect, and the evidence should be excluded under section 90.403." Thomas, 599 So.2d at 162. Substantial prejudice may exist if the prosecution places undue emphasis on the collateral evidence, making it a feature of the trial.

In Turtle, a case also involving sexual battery on a child under 12, the First District considered testimony of alleged sexual conduct with a different child. The district court noted that the testimony on the collateral matter was extensive, and the prosecutor emphasized that evidence in arguments. 600 So.2d at 1217. The problem was exacerbated because the two boys had the same name. This court found that the extensive evidence and argument regarding this matter was attributable to

the state, not to defense tactics, and the admission was unduly prejudicial and deprived Turtle of a fair trial. Id. at 1218.

The First District reached a similar result in Thomas, supra. In that case of sexual battery on a child under 12, the trial court admitted evidence of a prior sex offense in Georgia which occurred over 12 years before the charged offense. The court noted that a collateral offense, to be admissible, must be strikingly similar to the charged offense, sharing unique characteristics, and also must be probative of a material fact in issue. 599 So.2d at 162.

In Thomas, the state argued that the defendant took advantage of young girls in his custody and, therefore, the "familial setting" rule should apply, making the collateral evidence relevant to show a pattern of criminality. The First District rejected that argument, noting that the Georgia victim was not related to that defendant by blood and she did not reside in the same household with Thomas. 599 So.2d at 163. The court also noted that neither opportunity, plan nor scheme were elements of the charged offense. Instead, the court found that the only possible inference that reasonably could be drawn from the evidence of the Georgia incident was a propensity for sexual offenses on young girls, which was improper. Id. at 163-64. The First District granted new trial, and this court denied review.

Similarly here, the evidence of the three other boys was not relevant to any disputed issue, but instead, suggested propensity, the very suggestion prohibited by the evidence code

and caselaw. Similarities were very general: the boys knew Rawls, the same act was alleged, all alleged he told them not to tell, and different locations were alleged. The few shared aspects were not "strikingly" similar or unique.

The district court opinion below held that the collateral acts here were "strikingly similar and shared some unique characteristic or combination of characteristics which set them apart from other offenses." Rawls, 624 So.2d at 760. The court set out these unique characteristics thus:

> Appellant befriended the boys' mothers, arranged to move into their homes, paid rent and bought groceries and was generous to all the family members, and then, in the same manner, sexually molested male youths of approximately the same age in their homes while no other person was present while instructing them not to tell anyone what occurred.

Id. A comparison with the evidence in Turtle is instructive:

> The similarities shown between the two incidents, Turtle argues, are that he befriended both boys, gave both boys gifts, allegedly molested both boys, and then told them not to tell anyone about the incidents.

600 So.2d at 1216. In Turtle, a psychologist, Dr. Hodges, testified about the characteristics of a pedophile:

> A pedophile generally makes themselves [sic] available to children. They put themselves in positions where they are going to have contact with children. For example, baby-sitting, coaching Little League, scout masters, teaching, . . . and then the idea is to provide attention, gifts. They are very generous individuals in developing the relationship. So there's a sense of loyalty. There's a sense of trust that makes it easier to sexually victimize a child. And then also the idea of

> what I talked about earlier, the betrayal, if someone is nice to me and gives me things, I don't want to betray them.

Id. at 1221. In Turtle, the First District avoided deciding whether the Williams rule evidence was similar enough, because it held the evidence became a feature of the trial and was unduly prejudicial under section 90.403, Florida Statutes. 600 So.2d at 1218.

Dr. Hodges' testimony, improper though it was in Turtle, nevertheless demonstrates that most of the characteristics which the district court here held to be both strikingly similar and to demonstrate unique characteristics, are not and do not. Most of the characteristics, far from being unique, are instead, typical of pedophiles, that is, someone who has sexual desires for children. Id. The district court here noted that Rawls befriended the boys' mothers - or the boys themselves, either way, he gains access. Access is not only typical, but is also a necessary prerequisite to committing the crime. As the First District noted in Thomas, opportunity is hardly ever at issue in cases of child sex crimes. Children are typically molested by someone with opportunity/access. In other words, far from being a unique characteristic, it is present in every case. Further, if the defendant is not a relative, friendship would be a typical way to gain access.

Rawls was generous to the families - a characteristic Hodges noted as typical. Rawls molested them in their homes - surely typical of more than half of sex crimes against children. He molested them while no one was present - typical of

the vast majority of sex crimes against children. He told them not to tell anyone - typical of half or more of sex crimes against children, and related to Hodges' discussion of betrayal.

That leaves these facts to be both strikingly similar and unique: 1) he rented a room from the mothers - everyone has to live somewhere; 2) he bought groceries - he bought his own groceries, which is hardly unusual of boarders; 3) he committed similar sex acts, 4) on boys of approximately the same age. It is true all the boys alleged that Rawls performed oral sex on them, but this could hardly be described as a distinctively unique sex act. All in all, the district court's ruling results from a superficial analysis of factors which, while similar, are not "strikingly" similar, and hardly so unique or distinctive that they had to be committed by the same person.

Even more significant than the court's questionable analysis of striking similarity and unique characteristics, however, was the court's offhand treatment of the last requirement of Heuring, which the First District has previously characterized as a "critical aspect of the test of admissibility," and that is whether it tends to prove a material fact in issue. Thomas, 599 So.2d at 162. In Heuring, this court noted that, when the child knows the defendant, identity is hardly ever at issue. In Thomas, the First District noted that neither opportunity nor scheme or plan was a disputed issue. Respondent contends, and Thomas supports the contention, that "opportunity" is scarcely ever an actual disputed issue in cases of child sex

abuse. The accused is typically a relative or acquaintance who has clearly had "opportunity" to commit the crime. As Rawls lived with the family, there is no dispute that he had opportunity, i.e., access to the child.

Against this background, in the instant case, the district court disposed of this "critical aspect" of the test thus:

> Second, the evidence was relevant to prove a material fact in issue, i.e., opportunity, plan, and/or absence of mistake or accident. This is so because the appellant's defense at trial was that he did not commit the charged offense, and that M.R. was mistaken.

Rawls, 624 So.2d at 760. Although the district court should know better by now, it still took a shotgun approach to the ground for admissibility. None of these matters was in fact a disputed issue: not opportunity, not plan, not absence of mistake or accident. Rawls did not testify that it happened by accident. The "mistake" to which the Williams rule refers is not a defense that the accuser is mistaken. Rather, it is like the defense alleged in Williams itself.

Williams was convicted of raping a woman. He had waited for the woman in her parked car. When arrested, Williams claimed to have gotten into a car which he mistakenly believed to be his brother's and fallen asleep, only to be awakened when the woman entered the car. He did not make this claim at trial. Nevertheless, at trial, the state introduced evidence that, on a different day, another woman had discovered Williams waiting in her parked car. She screamed, and he ran. When stopped soon after, Williams explained that he had gotten into

the car, mistakenly believing it to be his brother's, fell asleep, and was awakened when the woman entered the car. 110 So.2d at 657-58. This evidence tended to prove that his having entered the car was not a mistake. In contrast, a defense that the accuser is mistaken is not the defense of "mistake" within the meaning of the Williams rule.

B. Heuring vs. the evidence code

There is, however, a far more fundamental error here, to which the issue raised in Saffor, supra, is pertinent. In Saffor, the First District certified a question asking what is the correct standard to determine admissibility of collateral crime evidence.

In his brief to this court, Saffor argued that the standard sought by the district court is provided in the Florida Evidence Code, particularly sections 90.404(2)(a) and 90.403, Florida Statutes. Petitioner makes the same argument here. Admissibility must be determined under these provisions on a case-by-case basis, rather than in the aggregate via a "bright-line" rule.

Section 90.404(2)(a), Florida Statutes (1991), provides:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

Section 90.403 provides:

> Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.

In Heuring, supra, this court reaffirmed the traditional requirement of strict similarity of charged and collateral offenses for admission of the latter, even in cases involving sexual abuse of children. See also, Feller, supra. Then, in language subsequently interpreted as a relaxation of this rule, the court stated:

> Cases involving sexual battery committed within the familial context present special problems. The victim knows the perpetrator, e.g., a parent, and identity is not an issue. The victim is typically the sole eye witness and corroborative evidence is scant. Credibility becomes the focal issue. In such cases, some courts have in effect relaxed the strict standard normally applicable to similar fact evidence. These courts have allowed evidence of a parent's sexual battery on another family member as relevant to modus operandi, scheme, plan, or design, even though the distinction between sexual design and sexual disposition is often tenuous. We find that the better approach treats similar fact evidence as simply relevant to corroborate the victim's testimony, and recognizes that in such cases the evidence's probative value outweighs its prejudicial effect.

Id. at 124-125.

Although this obviously constituted a significant evidentiary pronouncement, it was made in terms so sparse that a number of questions remained unanswered. In observing that "credibility becomes the focal issue" in certain cases, was the court saying that credibility can itself become a material fact

in issue? Although it is always an issue bearing on facts, credibility is not itself an issue of fact. In the legal sense, credibility is the measure by which evidence of a fact is to be believed. To say that credibility is more in issue in one case than in another is only to recognize that each case is distinct, not to elevate credibility to a status equivalent to facts themselves. Second, how is a victim's testimony corroborated by evidence of other crimes? The proposition is not self-evident. When the collateral evidence concerns the same victim, it demonstrates that the accused specifically intended a course of conduct toward that victim. However, if the accused has committed the same type of crime against a different victim, evidence of that crime corroborates the testimony of the instant victim by portraying the accused as the type of person predisposed to commit the crime.

Together, the answers to these two question demonstrate the unavoidable conflict between Heuring and the evidence code. Heuring has been perceived as making credibility a material fact in issue, just as if it were an element of a crime, and as holding that corroboration, i.e., credibility enhancement, is itself a legitimate reason for presenting other crimes evidence. See, e.g., Calloway v. State, 520 So.2d 665, 668 (Fla. 1st DCA), review denied, 529 So.2d 693 (Fla. 1988). This notion is at odds with the Florida Evidence Code. Section 90.401 defines relevant evidence as evidence tending to prove or disprove a material fact. Corroboration alone tends to prove or disprove only the credibility of whatever is corroborated, and

credibility itself is not a material fact. Corroboration is information which does nothing more than guide an assessment of relevant evidence. Thus, if collateral crime evidence is relevant only to corroborate a victim, it fails the test of admissibility provided in sections 90.401 and 90.402 of the Florida Evidence Code.

Missing from this formulation is an explanation of how collateral evidence corroborates the testimony of an alleged child victim of familial sexual abuse. As stated above, if the collateral evidence concerns similar acts on the same victim, it corroborates the victim's testimony by showing that the accused had specific designs on that victim. In the same manner, in a murder prosecution, the defendant's previous violent encounters or attempts to kill a victim are relevant to the issue of intent to kill the same victim. The same cannot be said when the collateral evidence involves a victim or witness other than the accusing witness, and an entirely distinct episode. In that instance, the collateral crime evinces no specific intent as to the victim of the charged crime. It shows only a more generalized intent as to that type of victim, i.e., children. As commentators recognized shortly after Heuring was decided, it proves only propensity. See Note, Corroboration or Propensity? An Empty Distinction in the Admissibility of Similar Fact Evidence, 18 Stetson L.Rev. 2171 (1988).

In Flanagan v. State, 625 So.2d 827 (Fla. 1993), this court ruled pedophile profile testimony inadmissible, holding that the rules of evidence forbid establishing that an accused

"has a certain character trait to show that he acted in conformity with that trait on a certain occasion." Thus, as the law now stands in Florida, the state may establish a defendant's propensity to pedophilia by evidence of other crimes, though not by opinion testimony. The distinction has no rational basis. Both forms of character evidence are barred by section 90.404, Florida Statutes.

Courts in other states have shed the pretense that collateral crime evidence in child sexual abuse cases is relevant per se to prove issues of intent, scheme, motive, etc. They have acknowledged that the collateral evidence is corroborative in that it portrays the defendant as a pedophile, one with a propensity to commit acts such as the crime charged. To wit, in State v. Edward Charles L., 183 W.Va. 641, 398 S.E.2d 123 (1990), the Supreme Court of West Virginia held:

> Therefore, collateral acts or crimes may be introduced in cases involving child sexual assault or sexual abuse victims to show the perpetrator had a lustful disposition to children generally, or a lustful disposition to specific other children, provided such acts occurred reasonably close in time to the incident(s) giving rise to the indictment. . . In adopting such an exception to W.Va.R. Evid. 404(b) we follow a number of other jurisdictions which have permitted such evidence to be admitted in sexual assault or abuse cases on the theory that such evidence shows the accused's incestuous and lustful attitude toward that particular person, and upon the theory that in cases involving child victims, a full disposition of the facts forming the context of the crime presents a fairer opportunity for the triers of fact to assess the credibility of the witnesses.

Id. at 133. A Missouri appellate court reached much the same conclusion in State v. Lachterman, 812 S.W.2d 759 (Mo.App. 1991), cert. denied, ____ U.S. ____, 112 S.Ct. 1666, 118 L.Ed.2d 387 (1992):

> We have always admitted evidence of prior sexual abuse of the victim of the crime on trial, calling it relevant toward establishment of the defendant's motive. The motive is obviously to satisfy a deviate sexual instinct, proclivity, propensity or disposition with this victim. Under the guise of the common scheme or plan exception, we admit evidence of defendant's sexual misconduct with the victim's siblings, and with other children in his custody and control. The "plan" is to fulfill the deviate sexual instinct, proclivity, propensity, or disposition to engage in sexual conduct with children. Thus, through a distorted application of the established exceptions to the general rule, we are today accepting the identical argument expressly rejected by the Supreme Court in the Atkinson cases forty-five years ago.
>
> We view such conduct as so unnatural and depraved that regardless of the relationship or similarity of status between the victim and other children subjected to like sexual abuse by the defendant, evidence that the defendant engaged in similar acts of sexual abuse of children of the same sex as the victim near in time to the acts charged tends to prove the defendant's guilt of the crime on trial. Evidence of repeated acts of sexual abuse of children demonstrates, per se, a propensity for sexual aberration and a depraved sexual instinct and should be recognized as an additional, distinct exception to the rule against the admission of evidence of uncharged crimes.

Id. at 768 (citations omitted). The word "propensity" recurs in the excerpts from Lachterman. The Charles court also discussed its holding in terms of a "sexual propensity exception."

398 So.2d at 132. Interpreting Heuring, the First District in Saffor stated that this court apparently determined "that the collateral crime evidence was corroborative because it demonstrated what some commentators have described as 'depraved sexual propensity.'" 625 So.2d at 34. Respondent suggests the obstacles to labeling it as such in Heuring were twofold: section 90.404(2)(a) expressly prohibits admission of collateral crimes solely to prove propensity, and the defendant's state of mind was not an element of the offense at issue, capital sexual battery. The Charles court gave such a straightforward assessment of the real purpose of such evidence for two reasons: lustful desire is an element of the crime which corresponds to capital sexual battery in Florida, and that state's analogue to section 90.404 does not expressly bar admission of collateral evidence to show a defendant's propensity. Accord, State v. Yager, 236 Neb. 481, 461 N.W.2d 741 (1990). (In Missouri, the rules governing admission of similar fact evidence are evidently a product of common law.)

Character, an impermissible purpose of collateral crime evidence in West Virginia and Nebraska, as here, is a general term; propensity is more specific. Section 90.404(2)(a) employs both terms, suggesting that its drafters intended to cover both the general and the specific. One described as being of questionable character has been generally maligned; one described as having questionable propensities has been tagged with specific flaws in his or her makeup. Dictionaries bear out the distinction. Thus, evidence demonstrating a

propensity, or, in the language of Cotita v. State, 381 So.2d 1146 (Fla. 1st DCA 1980), review denied, 392 So.2d 1373 (Fla. 1981), a "pattern of criminality," is not necessarily also evidence of bad character. This observation also calls into question the applicability of State v. Lopez, 170 Ariz. 112, 822 P.2d 465 (App. 1991), on which the district court indirectly relied in Saffor. 625 So.2d at 34. The Arizona evidentiary code also prohibits admission of collateral crimes solely to prove character, not propensity.

Developments in Missouri are of special interest, for that state's supreme court has recently selected from among several competing standards of admissibility. As noted above, an intermediate appellate court created a depraved sexual instinct exception in Lachterman, supra. The Missouri Supreme Court expressly rejected this exception, opting for admission as corroboration upon a high evidentiary showing. State v. Bernard, 849 S.W.2d 10 (Mo. banc. 1993). There the court said:

> Evidence of prior crimes is legally relevant, however, only if the probative value of the evidence outweighs its prejudicial effect. See Sladek v. State, 835 S.W. 2d at 314-315 (Thomas, J., concurring). Judge Thomas cautioned against using corroboration evidence casually because:
>
> [a]lthough we have called this exception corroboration, it really involves reasoning from the signature modus operandi based upon the propensity of the defendant to commit this type of crime to the conclusion that the defendant committed the crime charged. This reasoning goes squarely against the rationale for the general rule. This makes it particularly important that the requirement for a signature modus operandi be strictly enforced. Id. For

> corroboration evidence to be of sufficiently increased probative value so as to outweigh its prejudicial effect, the evidence must be more than merely similar in nature to the sexual assault for which the defendant is charged. See Sladek, 835 S.W.2d at 317 (Thomas, J., concurring). Evidence of prior sexual misconduct that corroborates the testimony of the victim should be nearly identical to the charged crime and so unusual and distinctive as to be a signature of the defendant's modus operandi. Id. This is a threshold requirement that must be met before the trial court can proceed to weigh any additional factors in determining the question of admissibility.
>
> For the reasons stated above, and subject to the constraints delineated there, this Court adopts a signature modus operandi/corroboration exception to the rule prohibiting evidence of prior uncharged misconduct.

Id at 17. Accord, Billings v. Commonwealth, 843 S.W.2d 890 (Ky. 1992). This choice, if made in Florida, leads directly back to sections 90.403 and 90.404(2)(a), Florida Statutes.

In his dissenting opinion in Saffor, Judge Allen interpreted Heuring in a substantially similar manner, and noted that Professor Ehrhardt shares this perspective. 625 So.2d at 40 (Allen, J., dissenting), citing to Ehrhardt, Florida Evidence, § 404.18 (1993 ed.). Indiana, too, has abolished its "depraved sexual instinct" exception to the rule excluding evidence of other crimes. Lannan v. State, 600 N.E. 2d 1334 (Ind. 1992). There the court held that even the special empathy evoked by child sex victims cannot support continued use of an exception that allows the prosecution to accomplish what the general propensity rule is designed to prevent.

From the foregoing, it is clear that authorization of the general admission of similar fact evidence to corroborate the victim's testimony actually functions to permit introduction of evidence relevant solely to prove propensity. Cf. Paquette v. State, 528 So.2d 995, 996 (Fla. 5th DCA 1988); Gilliam v. State, 602 So.2d 986 (Fla. 4th DCA 1992) (Farmer, J., specially concurring). In this respect, Heuring is in conflict with section 90.404(2)(a), Florida Statutes. In stating that the better approach recognizes that "the evidence's probative value outweighs its prejudicial effect," Heuring is also in conflict with section 90.403, which requires a balancing of probative value and prejudice on a case-by-case basis. As these rules of evidence effectuate an accused's constitutional rights to trial by an impartial jury, the presumption of innocence and proof of guilt beyond a reasonable doubt, use of evidence contravening these principles violate the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution and their counterparts in article I, sections 9 and 16 of the Florida Constitution. Cf. State v. Yager, 461 N.W.2d at 751-752 (Shanahan, J., dissenting), and authorities cited therein.

Rules of evidence may be either procedural or substantive. In re Florida Evidence Code, 372 So. 2d 1369 (Fla. 1979). Section 90.404 has both qualities, although respondent submits that paragraph (2)(a) is primarily if not wholly substantive. Although this court is exclusively authorized to promulgate rules of practice and procedure, it cannot contravene the plain language of a statute and usurp the authority of the

legislature to make substantive evidentiary law. Respondent respectfully asserts that the court has done so in Heuring, violating article III, section 1 of the Florida Constitution, which vests lawmaking power in the legislature. See Anderson v. State, 549 So. 2d 807, 812 (Fla. 5th DCA 1989) (Cowart, J., dissenting) (Heuring should not be read to effectively and unconstitutionally amend section 90.404(2)(a)), review denied, 560 So.2d 232 (Fla. 1990).

Should the legislature wish to permit collateral crime evidence in these cases to demonstrate a lustful disposition, it may add this exception to the evidence code, and this court may adopt the amended provision as a rule of court, as it has done in the past. See, e.g., In re Amendment of Florida Evidence Code, 497 So. 2d 239 (Fla. 1986). These actions would, of course, be subject to constitutional challenge. Unless and until the statute is amended, however, the conflict between Heuring and section 90.404(2)(a) must be resolved in favor of the plain meaning of the statute. The court should hold that admission of collateral crime evidence in cases of sexual abuse in the familial context is governed by the terms of sections 90.403 and 90.404, Florida Statutes, as well as sections 90.401 and 90.402.

In so holding, the court should resist pleas to rule that such evidence is generally or uniformly relevant to prove a material fact in issue under one of the alternatives listed in section 90.404(2)(a). In his separate opinion in Saffor, Judge Ervin took this position regarding opportunity:

> My position is simply that once sufficient proof is presented establishing a familial-type relationship in a given case, the important similarity between the charged and collateral crimes is that the child victim in each situation is placed in an extremely vulnerable position, which makes him or her far more susceptible to the dissolute influence of adult family-type members, and such differences as gender, location, types of offenses, or time are simply immaterial to a reasoned decision regarding the admissibility of collateral crime-evidence under such circumstances.

625 So.2d at 38 (Ervin, J., concurring and dissenting). In effect, Judge Ervin proposes raising opportunity to the status of material fact by judicial pronouncement in every familial sexual abuse case. Id. at n.10. In fact, opportunity is seldom at issue in this type of case; any adult except a stranger from whom the alleged victim flees has the opportunity to commit the crime. As Judge Zehmer observed in his majority opinion in Thomas, supra, opportunity is not an element of sexual battery (or lewd assault, another common charge involving sexual activity in the familial context).

Nor was opportunity at issue either here or in Thomas. Of course, when opportunity is a disputed issue in a particular case, relevant collateral crime evidence may be admissible. However, a decree that such evidence is admissible across the board on opportunity - or for any other purpose outlined in section 90.404(2)(a) - suffers the same defect as admission generally to corroborate the victim. See generally, 2 J.Myers, Evidence in Child Abuse and Negligence Cases, §§ 6.18, 6.22,

6.24-6.26. The admission of collateral crime evidence must rise or fall on the particular facts and issues of each case.

Therefore, this court should hold in Saffor and here that sections 90.401 through 90.404, Florida Statutes, provide the standards to be applied on a case-by-case basis in determining admissibility of collateral crime evidence in cases involving sexual battery within the familial context and hold here that collateral crime evidence was not admissible.

C. Other matters

While the district court rejected this argument, the state argued that "familial context" should be broadly construed (SB-21). Respondent has argued to the contrary that penal statutes must be strictly construed. Heuring suggests that, in a case of sexual conduct by a person in familial authority, similar fact evidence is in effect used to corroborate the child victim. 513 So.2d at 124-25. Rawls, however, was not charged with sexual conduct by one in a position of familial authority, nor did any evidence prove he had a familial or custodial relationship with the children. Rather, he was a short-term boarder in the children's home (he had been there 10 days). Regardless, the crucial question remains one of relevance. Nothing about the three other allegations is probative of any disputed issue.

Further, even if relevant, the admission of collateral crime evidence here was error because that evidence became a feature of the trial. The state presented not one, not two, but three other boys who alleged that Rawls had committed

sexual acts on them. The collateral evidence overshadowed the evidence regarding the offense charged. The admission of unnecessarily cumulative evidence can itself be reversible error. Pardo v. State, 596 So.2d 665 (Fla. 1992). The district court, however, held that:

> . . .it was the defense counsel's own trial tactics, i.e., calling numerous witnesses to impeach the credibility of the collateral-crime witnesses, which emphasized the collateral-crime evidence.

624 So.2d at 760. The court's ruling puts a defendant between a rock and a hard place, so to speak. The state gets to admit collateral crime evidence, thus changing the trial from more or less a one-on-one credibility contest, with no supporting physical evidence, but then, if the defendant actually defends against the collateral crime evidence by calling witnesses, the court has ruled the defendant will not be able to argue that the evidence improperly became a feature of the trial. That is, if the defendant wishes to call impeachment witnesses, it comes at the cost of being able to argue that the evidence he sought to exclude was unduly prejudicial. This ruling contributed to the unfairness of Rawls' trial.

Defense counsel had no choice but to attack the collateral witnesses as well as possible. To ignore possible impeachment by discrediting the three other boys would have been to ignore a viable defense and guarantee defeat. Thus, the defense presented witnesses discussing these three boys and their allegations in an attempt to impeach their testimony. The result was an increased focus on the collateral incidents, but it was an

unavoidable of the trial court's ruling permitting these witnesses to testify. Once the court permitted the state to present these incidents, the collateral evidence usurped the trial and Rawls was forced to try to defuse its impact. The consequence was that the state benefitted twice: first, from its own presentation of collateral evidence, and then, from the defense's inevitable focus on the collateral evidence. To say that the defendant caused the unfair emphasis by putting on a defense is a gross distortion of who should bear the responsibility of introducing collateral crime evidence.

In closing argument, the prosecutor emphasized to the jury these collateral allegations:

> There's the testimony here today that was from [M.R.], a 9-year-old child, [T.S.], a 12-year-old child, [J.F.], a 16-year-old young man, and [K.F..], a 20-year-old man. He likes to fool around with young boys. [M.R.] was nine, [T.S.] was around that age, and the older two boys testified that they were around that age when it occurred to them.

(R-199). The prosecutor stressed to the jury that these four boys, and he referred to each specifically, had to go through the difficult process of testifying at trial (R-205).

The prosecutor then urged the jury to consider all four incidents together:

> To reject the testimony of [M.R.] is to reject the testimony of [J.F.], [K.F.], and [T.S.]. Do you really believe that all four of them would come in here and make something up about this man?

(R-207). He repeated this tactic:

> And you're gonna have to ignore his testimony and you're gonna have to ignore [T.S.]'s testimony when he looked this man in the eye and said that's what happened to him. You're gonna have to ignore [J.F.]'s testimony when he looked him in the face and said, that's what he did to me, too. And you're gonna have to ignore [K.F]. That's what you're gonna have to do to acquit this man.

(R-224). And finally:

> Today [M.R.] told you the truth, [T.S.] told you the truth, [J.F.] told you the truth, [K.F.] told you the truth, and truth is that this man is guilty of the crime he's charged with.

(R-228). In Turtle, similar use of similar fact evidence was held to be reversible error. It was here also.

The similar fact evidence was not strikingly similar to the charged offense and was not relevant to any disputed issue. The trial court should not have admitted it. Even if could be considered relevant, its unfair prejudice outweighed its probative value because that evidence became a feature of the trial. Respondent is entitled to a new trial.

## V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent requests that this Court affirm the district court opinion as to the jury instruction, but quash it as to the admissibility of the Williams rule evidence, and remand for new trial.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Carolyn J. Mosley, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to Mr. Augustas Rawls, P.O. Box 17789, Pensacola, Florida 32522, this 29 day of April, 1994.

KATHLEEN STOVER