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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 82,793

AUGUSTAS J. RAWLS,

Respondent.

_____/

REPLY BRIEF OF PETITIONER

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROLYN J. MOSLEY, #593280
ASSISTANT ATTORNEY GENERAL

JAMES W. ROGERS, #325791
BUREAU CHIEF-CRIMINAL APPEALS

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

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ISSUE

WHETHER THE TRIAL COURT ERRED IN GIVING A MODIFIED STANDARD JURY INSTRUCTION ON THE LIMITED USE OF COLLATERAL CRIME EVIDENCE.

Rawls states that he "properly objected to this instruction." (A.B. 10) He is partially correct. At trial, he objected to the jury instruction solely on the ground that "it's not in the form." (R. 230) By the time he reached the First District, he had abandoned that ground. In its answer brief in the First District, the State commented:

> By citing Freund v. State, 520 So. 2d 556 (Fla. 1988), Rawls implicitly concedes that this issue is without merit. See, also, Matter of Use by Tr. Cts. of Stand. Jury Inst., 431 So. 2d 594, 598 (Fla. 1981) in which the supreme court stated that the standard jury instructions were merely guides designed to assist the trial court in determining the applicable substantive law.

(AB. 18, fn 2)

Rawls misapprehends the trial court's ruling, the First District's holding, and the State's argument. The trial court modified the jury instruction consistent with the holding in Heuring v. State, 513 So. 2d 122 (Fla. 1987). The First District held that the modified jury instruction was erroneous on the theory that Heuring did not apply to the facts of this case; that is, the instant case did not involve a familial situation. The First District did not hold that the modified jury instruction was unauthorized under all circumstances. If that had been its holding, any discussion of Heuring would have been pointless.

The State in this Court argued that Heuring does apply to this case; that is, the instant case does indeed involve a familial situation. If Heuring applies to the instant case, obviously the jury instruction was a correct statement of the law, and the First District did not suggest otherwise. Indeed, the article cited in Heuring recommended that the jury be instructed on this particular use. It stated:

> If the evidence is deemed admissible for corroboration purposes by the trial judge, an additional jury instruction such as the following might be appropriate:
>
> a. Evidence was received that the defendant engaged in other (acts of unlawful sexual intercourse) (lewd or lascivious acts) (acts of sodomy) (acts of incest) with (persons other than the complainant).
>
> b. Such evidence, if believed, may be considered by you only for the limited purpose of tending to corroborate the testimony of the complainant.
>
> c. You must not consider such evidence for any other purpose.

Comment, "Defining Standards for Determining The Admissibility of Evidence of Other Sex Offenses," 25 U.C.L.A. Law Review 261, 291, n 138 (1977).

Citing three cases construing the sentencing guidelines, Rawls argues that the "familial context" should not be broadly construed because such a rule of evidence would be frequently used. These sentencing guidelines cases are irrelevant. The goal of the guidelines was to create uniformity in sentencing; that is, all defendants similarly situated were to receive

similar sentences. A departure reason that could be applied to most defendants, at the trial court's discretion, obviously would destroy uniform sentencing. Factors this common should be accounted for on the scoresheet. The primary purpose of the rules of evidence is to assist the jury in ascertaining the truth. Therefore, relevant and reliable evidence is generally admissible. How frequently evidence is admitted under a particular rule of evidence simply illustrates the importance of that type of evidence. Undeniably collateral crime evidence is essential to successful prosecutions of child sex offenders.

Citing three cases construing statutes that created crimes and punishment, Rawls argues that penal statutes must be strictly construed. That may very well be true,[1] but the instant case does not involve a penal statute. The rules of evidence are at issue here.

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[1] In United States v. Brown, 333 U.S. 18, 25-26 (1948), the supreme court stated:

> The canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose. It does not require magnified emphasis upon a single ambiguous word in order to give it a meaning contradictory to the fair import of the whole remaining language. *** [T]he canon "does not require distortion or nullification of the evident meaning and purpose of the legislation." Nor does it demand that a statute be given the "narrowest meaning"; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers. [citations omitted]

Rawls argues that the modified jury instruction cannot be given under any circumstances because not only was it a comment on the evidence, but the judge in effect vouched for the victim's credibility. (AB. 10) In support of this argument, Rawls cites cases in which one witness testified that he believed another witness was telling the truth. He also cites a Third DCA case in which the judge made an improper comment, but the opinion does not disclose what the judge said.

Aside from this being a procedurally-barred issue, Rawls is wrong on the merits. The judge did not tell the jury, directly or indirectly, that he believed the child was truthful. The jury was told that evidence of other crimes, wrongs, or acts allegedly committed by the defendant had been admitted in evidence. (R. 234) It was further told that there were only nine ways in which this evidence could be used. One of these nine ways was corroboration of the victim's testimony. Id. Finally, the jury was told that the defendant was not on trial for a crime not included in the information. Id. This was a limiting instruction for the defendant's benefit. Without this instruction, the jury might have misused the evidence. By its very nature, a limiting instruction is a comment on the evidence. However, this type of commentary is not improper.[2]

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[2] This issue has been thoroughly briefed in Salgat v. State, Case No. 83,216, currently pending in this Court. Judicial comment on the evidence is a constitutionally acceptable practice, which has its roots in the common law. It also has the support of law school professors. To the extent that judges cannot comment on the evidence in this state, it is because the legislature forbids

Rawls further argues that the modified jury instruction cannot be given under any circumstances because it is not authorized by the evidence code (another ground not raised at trial). He contends that the enumerated uses "are the only issues for which similar fact evidence may be considered." (AB. 6) He is mistaken. Section 90.404(2)(a), Florida Statutes 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. (e.s.)

Neither does Professor Ehrhardt suggest that Heuring was wrongly decided. Charles W. Ehrhardt, Florida Evidence 181-185 (West 1994).

The State cannot emphasize enough that the jury must be instructed on the theory of admissibility announced in Heuring. A limiting instruction which omitted the very ground on which the evidence was to be considered by the jury would be nonsense.

After noting that the First District has advocated a broad definition of "familial and custodial," Rawls states, "Some cases, however, have taken a narrower view, such as Thomas [v. State, 599 So. 2d 158 (Fla. 1st DCA 1992)], which the state **failed** to cite in its brief." (e.s.) (AB. 7) Rawls suggests that

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it. § 918.10(1), Fla. Stat. (1993); Gibson v. State, 7 So. 376, 378 (1890).

the State was either incompetent or unethical for not citing Thomas. Rawls is mistaken. Thomas is not binding authority on this Court. Thomas was a split-panel (2 to 1) decision written by Judge Zehmer and decided before the en banc decision in Saffor v. State, 625 So. 2d 31 (Fla. 1st 1993). Judge Zehmer was unable to persuade the First District to his views and became a dissenter in Saffor. The State is under no duty to bring a disfavored nonbinding decision to this Court's attention.

This Court accepted jurisdiction of this case based on conflict relating to the meaning of a "familial or custodial" situation as referred to in Heuring. The substance of the State's argument in its initial brief was that a tenant residing in the child's home and sleeping in the child's bed fell within the definition of a familial situation. In his answer brief, Rawls has raised a smorgasbord of unpreserved issues as to why he is entitled to a new trial. He argues: (1) the collateral crime evidence should never have been admitted because (a) it was not unique and strikingly similar, (b) it did not relate to a disputed issue in the case, and (c) it became a feature of the trial; and (2) a modified jury instruction should not have been given because (a) the evidence code forbids it, (b) Heuring was wrongly decided, and (c) the judge commented on the evidence and vouched for the credibility of the victim.

Except for the above comments, the State respectfully declines to address the merits of these unpreserved issues, unless directed to do so by this Court. It is an enormous waste

of scarce resources to argue issues that this Court does not intend to address. Convicted criminals have nothing to lose, and everything to gain, by raising every issue imaginable as they progress through the appellate process. The State would emphasize once again that the collateral crime evidence was not objected to when it was admitted at trial, and only one nonmeritorious objection (it's not in the form) was made to the modified jury instruction. See Feller v. State, 19 Fla. L. Weekly S196, 198 (Fla. April 21, 1994) ("When the child's collateral crime testimony was introduced during trial, defense counsel raised no objection and thus did not preserve the issue for appellate review"). Were it not for the First District's conduct in deciding this case on an issue it raised sua sponte, this case would not even be before this Court for review. It appears that the function of trial courts has been reduced to that of gathering data for a higher court to make a decision. The pyramidal structure of our judicial system cannot support such a radical approach to decisionmaking.

CONCLUSION

For the above reasons, this Court should quash the decision below, approve the giving of the contested jury instruction, and adopt the reasoning in the cases relied on by the State in its initial brief on the applicability of Heuring.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROLYN J. MOSLEY, #593280
ASSISTANT ATTORNEY GENERAL

JAMES W. ROGERS, #325791
BUREAU CHIEF-CRIMINAL APPEALS

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing reply brief has been furnished by U.S. Mail to Josephine L. Holland, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida, 32301 this 24th day of May, 1994.

Carolyn J. Mosley
Assistant Attorney General