IN THE SUPREME COURT
THE STATE OF FLORIDA

ANN ELLIOTT BARBER,

Appellant

Case No. SC01-1006
5th DCA No: 5D00-2797

v.

STATE OF FLORIDA

Appellee.
_____/

REPLY BRIEF ON THE MERITS

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ARGUMENT: THE FIFTH DISTRICT ERRED IN RELYING ON ITS DECISION IN BARBER V. STATE, 781 So.2d 425 (Fla. 5th DCA 2001) IN DECIDING THE INSTANT CASE.

The Appellant responds to the State's arguments set forth in their merits brief as follows:

1. The Huddleston doctrine

The State suggests this Court should adopt the reasoning of the United States Supreme Court in Huddleston v. United States, 485 U.S. 681, 99 L.Ed.2d 771, 108 S.Ct. 1496 (1988). According to Professor Ehrhardt, Huddleston:

> "interpreted Federal Rule 104(b), which is the same as section 90.105, as not requiring the determination of the defendant's involvement in the other act or wrong by either a clear and convincing or preponderance of the evidence standard. Rather the Huddleston decision requires the trial judge to determine whether there is sufficient evidence for the jury to find that the defendant in fact committed the extrinsic offense. The trial judge must make a determination that this amount of evidence has been introduced, it is not simply a matter for the jury. In adopting this lower quantum of proof standard, the Supreme Court equated the judge's determination regarding the admissibility of *Williams* evidence with other conditional relevancy determinations."

Ehrhardt, Florida Evidence (2001) at page 194-195. Ehrhardt further opines ``that this "issue of the quantum proof may be one of form rather than substance."

> "Since *Williams* evidence must have its probative value weighed against its undue prejudice under section 90.403, similar fact evidence which is suspect in establishing the defendant's involvement should be

> excluded since the undue prejudice would substantially outweigh the probative value of such evidence."

Ehrhardt, Florida Evidence (2001) at 195. The Appellant believes the Huddleston decision is decidedly less clear on the role of the trial judge than Professor Ehrhardt has suggested. On one hand, the Huddleston court states Federal Rule 404(b) does not mandate "a preliminary finding by the trial court that the act in question occurred," stating such a holding would impose "a level of judicial oversight" that does not exist under the federal rules. 485 U.S. at 688. The court at this point in its decision seems to reject the entire notion of a gatekeeper role for the trial judge. However, later in the opinion, Chief Justice Rehnquist states the Government will not be allowed to "parade past the jury a litany of potentially prejudicial similar acts that have been established or connected to the defendant only by unsubstantiated innuendo." 485 U.S. at 689. The Chief Justice then states the method by which presentation of unsubstantiated innuendo is avoided is through application of Federal Rule of Evidence 104(b), which provides:

> "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."

Thus, as the Appellant understands Chief Justice Rehnquist's analysis, this litany of unsubstantiated innuendo would initially be presented to the jury under the

Huddleston doctrine, but the error in permitting this evidence in prematurely would be cured either by an order striking the evidence after its admission, or by a mistrial.

Section 90.104(2), Florida Statutes (2002), states that in cases tried before a jury, "a court shall conduct proceedings, to the maximum extent practicable, in such a manner as to prevent inadmissible evidence from being suggested to the jury by any means. Section 90.105(1), Florida Statutes (2002) states that except as provided in subsection (2) of that statute, "the court shall determine preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence." Both of these provisions are inconsistent with the Huddleston doctrine. Finally, the Appellant would note Section 90.105(2), Florida Statutes, is not identical to Rule 104(b) of the Federal Evidence Code. Federal Rule 104(b) was stated above. Section 90.105(2), Florida Statutes, states:

> "When the relevancy of evidence depends upon the existence of a preliminary fact, the court shall admit the proffered evidence when there is prima facie evidence sufficient to support the finding of the preliminary fact. If prima facie evidence is not introduced to support a finding of the preliminary fact, the court may admit the proffered evidence subject to the subsequent introduction of prima facie evidence of the preliminary fact."

Thus, the Florida rule differs significantly from the Federal rule in that it imposes

at the very least a strong preference for a trial court's performance of a gatekeeper function. The rules are not so similar as to justify imposing the Huddleston doctrine on our state evidence code.

The only decision the Appellant is aware of acknowledging Huddleston in Florida is in Phillips v. State, 591 So.2d 987 (Fla. 1st DCA 1991), where the First District reaffirmed the proposition that the prosecution must establish the defendant committed the prior act by clear and convincing evidence. Huddleston was referenced at footnote 4, as was Professor Ehrhardt's commentary on the decision. Interestingly, the footnote in Phillips indicates that in the 1992 edition of his book on Florida evidence, Ehrhardt comments that Huddleston is "soundly reasoned." In the most recent editions, Ehrhardt has withdrawn this comment. See, e.g. Ehrhardt, Florida Evidence, 2001 Edition, at page 195.

The notion of a trial court striking improperly admitted *Williams* rule testimony **after** its presentation to the jury was addressed in Malcolm v. State, 415 So.2d 891 (Fla. 3rd DCA 1982), where the Third District condemned the adoption of this procedure because it "results in the jury's hearing the clearly prejudicial evidence in question, subject to its being later 'stricken' with only an accompanying instruction -- of legendary ineffectiveness--that it should be disregarded."

Not surprisingly, other jurisdictions have elected not to adopt the Huddleston doctrine. For example, the Court of Appeals of Oregon, in Rugemer v.

Rhea, 957 P.2d 184 (Oregon, 1998), ruled it was not bound by Huddleston, and stated the Huddleston decision has been "met with widespread rejection and criticism." 957 P.2d at 189. That court cited a footnote in the Oregon Supreme Court decision in State v. Pinnell, 806 P.2d 110, n. 14 (Oregon, 1991), where that court wrote:

> "Unrelated misconduct evidence has been described as 'the most prejudicial evidence imaginable against an accused.' [citation omitted]. Justice Cardozo stated that uncharged misconduct evidence can be a 'peril to the innocent.' People v. Zackowitz, 254 N.Y. 192, 172 N.E. 466, 468 (1930).

The Rhea court went on to state that "[g]iven the extreme dangers of such other act evidence, it is important to ensure that the act did, in fact, occur and that the accused party committed the act **before** the jury is allowed to consider it." 957 F.2d at 189. Both the Pinnell and Rhea court's borrowed a phrase from Government of Virgin Islands v. Toto, 529 F.2d 278, 283 (3d Cir. 1976) to illustrate the problem with the method proposed by the Huddleston court. That court stated "a drop of ink cannot be removed from a glass of milk." Thus the court ruled that the proponent of the 404(b) evidence must prove by a preponderance of the evidence the 404(b) act occurred, and the defendant is the person who committed the act. Finally, the Rhea court touched on an aspect of offering this evidence that is highly relevant to the instant case, when it stated:

> "Another reason to require a showing by a preponderance of the evidence that the other act occurred is that the other act and the charged act are mutually reinforcing. The evidence of the other act is intended to help prove that the party against whom it is offered committed the charged act but, by the same reasoning, the charged act reinforces the other act, thus increasing the likelihood that the jury will believe that *both* acts occurred. The requirement that the proponent of the other act evidence prove its connection to the party against whom it is being offered by a preponderance standard, before the jury is allowed to hear it, is some insurance against exposing the jury to **mutually reinforcing falsehoods**." [emphasis added].

957 P.2d at 190. It is the Appellant's position that in the instant case, the entire prosecution is based on mutually reinforcing falsehoods. The State bases its prosecution on the fallacious assumption that despite overwhelming medical evidence to the contrary, these two children were injured at a point in time when they were in the care of the Defendant. The medical evidence clearly demonstrates the injuries did not occur when the children were in the Defendant's care. The gravamen of the State's case is that since both children were in the Defendant's care at some point, then both children must have been injured by the Defendant. The State simply has chosen to ignore substantial evidence to the contrary since it does not comport with their conclusion.

The Texas Court of Criminal Appeals, in Harrell v. State, 884 S.W.2d 154 (Tex. Cr. App. 1994) held that:

> "in deciding whether to admit extraneous offense evidence in the guilt/innocence phase of trial, the trial court must, under rule 104(b) make an initial determination at the proffer of the evidence, that a jury could reasonably find beyond a reasonable doubt that the defendant committed the extraneous offense."

884 S.W.2d at 160. The Harrell court interpreted Huddleston to still inevitably require some preliminary showing of relevance prior to its admission. The court made the admissibility question a relatively simple one:

> "If appellant committed the extraneous offense, the evidence is relevant and admissible, provided it is not too prejudicial and is offered for a proper purpose. [citation omitted]. However, if appellant did not commit the extraneous offense, the evidence is irrelevant and therefore inadmissible."

884 S.W.2d at 160.

The Supreme Court of Appeals for the State of West Virginia, in State v. McGinnis, 455 S.E.2d 516 (W.Va 1994), explained what motivated them to "reject the wisdom of Huddleston."

> "To expose the jury to Rule 404(b) evidence before the trial court has determined by a preponderance of the evidence that the acts were committed and that the defendant committed them would in our view subject the defendant to an unfair risk of conviction regardless of the jury's ultimate determination of these facts. We hold that the admissibility of Rule 404(b) evidence must be determined as a preliminary matter under Rule 104(a) rather than rule 104(b)."

455 S.E.2d at 527. The court went on to address the issue of uniformity between

the Federal and State interpretations of rules with essentially identical language. The court acknowledged this identity of language, and also acknowledged that decisions of the United States Supreme Court are entitled to "due consideration." However, the court determined that "our policy would not be served by undermining a long standing tradition of allowing judges to first decide the admissibility of potentially prejudicial evidence by a preponderance of the evidence. 455 S.E.2d at 527, n. 14. Professor Ehrhardt likewise makes reference in his treatise on Florida evidence to "the general maxim that federal decisions interpreting the Federal Rules of Evidence are 'persuasive guidelines' in interpreting a similar provision of the Florida Evidence Code." Ehrhardt, Florida Evidence (2001) at page 195. First of all, as indicated above, the relevant provisions (Federal Rule 104 and Florida Rule 90.105) are not that similar. Secondly, there are strong policy reasons for retaining, and even reinforcing, the current state of the law in Florida. Finally, the Appellant would suggest that Emerson was correct when he stated in his essay Self Reliance, that "a foolish consistency is the hobgoblin of little minds." To adopt the Huddleston doctrine is to seek consistency solely for consistency's sake. There is no compelling reason for adopting the Huddleston doctrine, and there are countless reasons being offered across the Nation for rejecting it.

The Supreme Court of Colorado, in People v. Garner, 806 P.2d 366 (Colo.

1991), rejected the idea of adopting the Huddleston analysis despite the identical language of the respective rules. 806 P.2d at 372. The court cited "Colorado's longstanding restrictive policy concerning the admissibility of other-crime evidence militates against adoption of the Huddleston." The court went on to state:

> "To submit other-crime evidence to the jury merely because the jury could reasonably find the existence of the conditional fact by a preponderance of the evidence creates a substantial risk that, regardless of the jury's ultimate determination of the conditional fact, the jury might well convict the defendant not on the basis of the strength of the prosecution's case but because the defendant is a person of bad character. Utilization of CRE 104(a) to resolve questions concerning the admissibility of other crime evidence avoids this risk by requiring the trial court to be satisfied by a preponderance of the evidence of the conditions precedent to admissibility before the other crime evidence is ever exposed to the jury. We hold, therefore, that the admissibility of other crime evidence must be determined as a preliminary matter by the trial court under CRE 104(a) rather than CRE 104(b)."

The Supreme Court of Arizona, in State v. Terrazas, 944 P.2d 1194 (Ariz. 1997) also clearly rejects Huddleston. The court held that "before admitting evidence of prior bad acts, trial judges must find that there is clear and convincing proof both as to the commission of the other bad act and that the defendant committed the bad act." 944 P.2d at 1198. The court cites numerous cases requiring pre-admission proof of the 404(b) acts, and further outlines the various state positions on the quantum of proof necessary for admission of 404(b)

evidence. 944 P.2d at 1197-8.

The Florida courts have been uniform, with the exception of the Fifth District's decision in the instant case, that the quantum of proof necessary for admission of 404(2) evidence is "clear and convincing evidence." Smith v. State, 700 So.2d 446 (Fla. 1st DCA 1997); State v. Audano, 641 So.2d 1356 (Fla. 2d DCA 1994); Dibble v. State, 347 So.2d 1096,Fla. 2d DCA 1977); and Malcolm v. State, 415 So.2d 891 (Fla. 3d DCA 1982); Smith v. State, 743 So.2d 141 (Fla. 4th DCA 1999); State v. Norris, 168 So.2d 541 (Fla. 1964). The Appellant in the instant case is not seeking a change in that quantum of proof, only a reaffirmation of the existing proposition that prior to admission of 90.404(2) evidence, the moving party must satisfy the trial court, as a threshold matter, that the 404(2) act was a) committed and b) the defendant was the person who committed it.

This "clear and convincing" standard was also endorsed by the New Hampshire Supreme Court in State v. Michaud, 610 A.2d 354 (N.H. 1992). The court there held "[b]efore admitting evidence of prior bad acts under Rule 404(b), the trial court must determine that (1) the evidence is relevant for a purpose other than to prove character or disposition, (2) there is clear proof that the defendant committed the prior offense and (3) the prejudice to the defendant does not substantially outweigh the probative value of the evidence." 610 A.2d at 356.

Delaware likewise holds that before evidence is "admissible in a trial where

guilt or innocence is determined, other "bad acts" or crimes must be established by evidence which is plain, clear, and convincing". State v. Cohen, 634 A.2d 380 (Del. Super. 1992), citing Getz v. State, 538 A.2d 726 (Del. 1988). Louisiana has also held that before unrelated crime evidence is presented to the jury, the trial court must first find there is clear and convincing evidence the Defendant committed the unrelated crime. State v. Brooks, 541 So.2d 801, at 814 (La. 1989).

Interestingly, even if Huddleston is applied in the instant case, the evidence still must be excluded, as Judge Jacobus found under a 90.403 analysis that the prejudicial effect of the evidence outweighed its probative value. (R. 1409). That aside, if this Court were to adopt Huddleston, and for some reason reject Judge Jacobus' 90.403 analysis, the appropriate remedy would not be to affirm the Fifth District decision, but rather to remand to the trial court for proceedings consistent with Huddleston.

2. The real meaning of the word "fortuitous"

In their brief on the merits the State condemns Judge Jacobus' use of the word "fortuitous" in his ruling that the State's proposed 404(b) evidence was inadmissible at trial. (State's Brief at pages 42-43). Specifically, Judge Jacobus wrote that "[h]owever, in examining the facts, most of the facts that are similar are fortuitous." It is obvious from the State's argument that they are unfamiliar with the definition of "fortuitous." Webster's defines "fortuitous" as "occurring by

chance." The State makes a common error in equating "fortuitous" with "fortunate." Judge Jacobus clearly did not intend the usage the State suggests. His comment described his factual determination that the clear and convincing evidence in this case suggested the Defendant did not commit the 404(2) act alleged, and that the convergence of the two cases (based on mutually reinforcing falsehoods) is merely coincidental -- or -- fortuitous.

3. The other Barber decision and the issue of clear and convincing evidence.

The State asserts the Fifth District found in Barber v. State 781 So.2d 425 (Fla. 5th DCA 2001) clear and convincing evidence the Defendant committed the 90.404(2) act. First of all, one looks in vain for that express language in the decision. Second, even if that language were in the decision, it is impossible to fathom how the Fifth District could fairly come to that conclusion when the Defendant was denied an opportunity to present her case against that finding despite repeated attempts to litigate the matter. Finally, it is equally impossible to fathom how that finding has any relevance in the instant case where Judge Jacobus did allow a presentation from both sides on the issue, and thus made a ruling based on a complete record as opposed to the limited record created by the trial court's ruling in the other case.

It appears the State's position in this case is that this Court should 1) ignore

the significant evidence suggesting many of the injuries sustained by these two children occurred prior to them having any contact with the Defendant, 2) rely instead on the incomplete record of the first trial, and 3) find that it is appropriate for a district court of appeal to rule based not on the record before them, but on the significantly different record in a separate case. One looks in vain for any support for this proposition in the annals of Florida legal history.

4. The significance of the conviction in the other Barber case as foreclosing the issue of admissibility

The State asserts Judge Jacobus "departed from the essential requirements of law in going behind the jury verdict," when issuing his ruling barring presentation of the 90.404(2) evidence by the State. If the Defendant had been convicted in the other case without the use of 90.404 evidence, the State might have a legitimate point. She was not. In fact, in the first trial of the instant case, the State did not present the *Williams* rule evidence they seek to offer now. The result was a hung jury, and a mistrial.

Furthermore, if the Defendant had been convicted in the other case with the use of 90.404 evidence, and that ruling was no longer the subject of litigation, the State might likewise have a legitimate point. The situation in this case at the point Judge Jacobus ruled is entirely different. There was no final appellate disposition of the *William's* rule issue when he was asked to decide the issue of admissibility.

Some background may be helpful.

Judge Jacobus originally refused to hear the *Williams* rule issue in the instant case when the Fifth District issued its original ruling in Barber v. State (now on appeal via discretionary review in SC01-1007). The Fifth District originally affirmed the conviction without opinion (per curiam affirmed). Based on that ruling, the trial judge declined an invitation by the Defendant to rehear the matter of admitting the *Williams* rule evidence in the instant case, and specifically found that the concepts of res judicata and collateral estoppel applied and barred further litigation of the matter, despite a pending motion for rehearing before the Fifth District. This was the posture of the instant case on the day trial was to commence. It was in fact on the day the trial was to begin that the Defendant's counsel received correspondence from the Fifth District granting rehearing, and setting aside its "PCA" holding. (Ultimately, the Fifth District issued the written opinion which is being appealed in the SC-01-1007 case). With no appellate disposition of the companion case, Judge Jacobus no longer felt bound by prior court rulings of the other circuit court judges on the issue of whether the State had to make a preliminary showing before 90.404(2) evidence was admitted, and agreed with the Defendant that a pre-admission hearing on the 90.404(2) evidence was appropriate. From the Defendant's point of view, the timing of the Fifth District's decision to grant rehearing was truly "fortuitous," both in terms of the proper use of the word,

and even in terms of the State's definition. Judge Jacobus was absolutely correct in making his own determination on the admissibility of this evidence when litigation of the other matter had not concluded.

5. The State's argument concerning the Fifth District's comment: "That was all that was required by the motions that were filed."

Both sides have quoted the language contained at 781 So.2d 427-8 of the Barber opinion. For purposes of this discussion, it is necessary to quote it again.

> "Barber contends that because no clear and convincing evidence was presented prior to admission before the jury that the former offense was actually committed by her, the court erred by allowing the evidence. We disagree. The State is only required to give notice of its intent to rely on *Williams* rule evidence pursuant to section 90.404(2)(b), Florida Statutes (1997). Barber responded with a motion to strike, which was heard and denied. That was all that was required by the motions that were filed."

The State is apparently suggesting the Defendant made no other motions, oral or written, with regard to the admissibility of this evidence. That assertion is erroneous. The court is free to review the record on this issue, and to that end, the Appellant would refer the Court to pages 495 through 501 of the trial transcript in SC-01-1007.

CONCLUSION

The Appellant prays this Honorable Court reinstate the order excluding the

State's proposed *Williams* in the above styled action, and thus reverse the ruling of the Fifth District Court of Appeal in State v. Barber, 783 So.2d 293 (Fla. 5th DCA 2001).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Robert Butterworth, Attorney General, State of Florida, c/o Ann Phillips and Kellie Nielan, 444 Seabreeze Boulevard, Daytona Beach, Florida 32118 this ___ day of March, 2002.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the requirements of Rule 9.210(a) have been complied with. This brief was computer generated, and a "Times New Roman 14 font" was used.

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