IN THE SUPREME COURT OF FLORIDA

RONALD MCLEAN,

Petitioner,

v.

Case No. SC03-1732
Lower Tribunal No. 2D02-1322

STATE OF FLORIDA,

Respondent.
_____/

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT
STATE OF FLORIDA

BRIEF OF RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

The instant case is before this Court on a certified question of great public importance from the Second District Court of Appeal:

DOES SECTION 90.404(2)(b), FLORIDA STATUTES (2001) VIOLATE DUE PROCESS WHEN APPLIED IN A CASE IN WHICH IDENTITY IS NOT AN ISSUE?

Petitioner's Initial Brief raises seven Issues. However, only Issue I of the Initial Brief encompasses this Certified Question.

STATEMENT OF THE CASE AND FACTS

Petitioner was charged with capital sexual battery and lewd molestation. (V. 1: R. 36-38). The jury convicted him of attempted sexual battery and lewd molestation. (V. 1: R. 70-71). Petitioner was sentenced to 30 years in prison. (V. 1: R. 120). On appeal, Petitioner challenged the constitutionality of Section 90.404(2)(b) which expanded the use of Williams[1] Rule evidence in child molestation cases.

The relevant part of Section 90.404(2) provides as follows:

> (2) Other crimes, wrongs, or acts.--
> (a) Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of

[1] Williams v. State, 110 So. 2d 654 (Fla. 1959).

> mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.
>
> (b) 1. In a criminal case in which the defendant is charged with a crime involving child molestation, evidence of the defendant's commission of other crimes, wrongs, or acts of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.
>
> 2. For the purposes of this paragraph, the term "child molestation" means conduct proscribed by s. 794.011 or s. 800.04 when committed against a person 16 years of age or younger.

The relevant facts in the instant case are as follows:

> At approximately 11 p.m., J.N. awoke his grandmother and announced that he wanted to go home. He was fully dressed and had his knapsack packed. He seemed nervous, but he did not say anything to his grandmother. She drove J.N. home about 11:15 p.m.
>
> J.N.'s mother worked an early morning shift. When she returned from work in the early afternoon, she asked him why he had decided to come home the previous night. She was not permitted to provide hearsay testimony concerning this conversation but explained that the conversation caused her to report the matter to law enforcement.
>
> On the Monday following these events, Amy Wilkins, a case coordinator for the Children's Home Society, interviewed J.N. She had prior training and experience in interviewing children who report sexual abuse. J.N. told her that he woke up during the night at his grandparents' house. His "Uncle Ron" was rubbing J.N.'s bottom. J.N.

explained that Mr. McLean inserted his finger into J.N.'s bottom, but he did not specify that Mr. McLean inserted his finger into J.N.'s anus. J.N. claimed that his uncle told him not to report this incident to anyone. A medical examination performed at the time of this investigation did not reveal any physical evidence of sexual abuse.

J.N. was nine years old at the time of trial. After a lengthy examination to determine his competency, the trial court allowed J.N. to testify. His testimony was consistent with the information he had previously provided to Ms. Wilkins.

Mr. McLean made no incriminating statements, and he did not testify at trial. Thus, the statements made by J.N. at the time of the alleged incident and his testimony at trial were the primary evidence against Mr. McLean.

To strengthen the testimony from J.N., the State sought to introduce Williams rule evidence from a Mr. Chambers. At the time of the pretrial Williams rule hearing, Mr. Chambers was twenty-seven years old and lived out of state. He testified that, when he was younger, Mr. McLean had repeatedly molested him.

When he was a child and lived in Pennsylvania, Mr. McLean worked with Mr. Chambers' father in a factory. Mr. McLean often spent time with the Chambers' family. In 1986, when Mr. Chambers was twelve years old, Mr. McLean went on a hunting trip with Mr. Chambers and his father. On the first night of this trip, Mr. Chambers awoke to find Mr. McLean pressing his penis against Mr. Chambers' back and touching him under his underwear. Mr. McLean also touched Mr. Chambers' penis. Mr. McLean had been

> drinking prior to this event. Mr. Chambers pushed him away and went back to sleep. Later that same night, Mr. McLean returned and continued this conduct until Mr. Chambers ejaculated.
>
> Mr. Chambers testified that several months later similar conduct occurred at his family's "mini-farm." Again, this conduct occurred after Mr. McLean had been drinking. On this occasion, Mr. McLean attempted to penetrate Mr. Chambers' anus with his penis. Mr. Chambers did not recall Mr. McLean fondling his bottom. Within a few months, similar conduct occurred when Mr. Chambers was at Mr. McLean's house.
>
> Finally, on two more occasions, Mr. McLean assaulted Mr. Chambers while he was sleeping in a bedroom in Mr. Chambers' home. On one of these occasions, Mr. Chambers believed that Mr. McLean's penis penetrated his anus. On both of these occasions, Mr. McLean was a guest staying overnight in the home. By the final occurrence, Mr. Chambers was fourteen years old.
>
> Mr. Chambers ultimately reported this conduct to his mother. He testified that his mother and father confronted Mr. McLean, who confessed to these crimes. They agreed not to report the matter to the police so long as Mr. McLean sought help from their church's minister. Mr. Chambers did not see Mr. McLean again until he testified at this trial, did not know the victim in this case, and had never met the victim's family prior to this trial.

McLean v. State, 854 So. 2d 796, 797 (Fla. 2d DCA 2003).

The trial court determined Section 90.404(2)(b) applied, and the statute was not unconstitutional. The court further

conducted an analysis under Section 90.403 and determined it would be prejudicial to admit all of Chambers' testimony. The trial court excluded the hearsay evidence of McLean's confession to Chambers' parents and the evidence occurring in locations other than Chambers' home. The trial court admitted evidence relating to two events occurring in Chambers' home but excluded evidence regarding incidents at the camp-out, the mini-farm, and McLean's house. Id. at 799.

The Second District determined Section 90.404(2)(b) did not violate due process in cases where the identity of the accused is not an issue. The Second District further held that the trial court's reliance on this rule of evidence did not result in an ex-post facto application of a statute. Id.

SUMMARY OF THE ARGUMENT

Section 90.404(2)(b) does not violate due process or the ex-post facto clause and is constitutional. The statute still allows the trial court to balance relevance and prejudice in determining the admissibility of such evidence. Moreover, there is no Booker/Blakely violation since the collateral act evidence is admitted by clear and convincing evidence, and merely serves to corroborate a victim's testimony, not to enhance a sentence absent a jury's determination of guilt beyond a reasonable doubt.

Section 90.404(2)(b) does not violate the ex-post facto clause since it does not alter rules of evidence which would permit less or different testimony than was permitted at the time the offense was committed. Moreover, the Florida Legislature's enactment of this statute is within the legislative realm and does not violate separation of powers or equal protection.

The trial court did not err in utilizing the statute prior to its formal approval by the Florida Supreme Court. Moreover, the trial court did not abuse its discretion in admitting the collateral act evidence. The court conducted a valid balancing test in determining relevancy, pursuant to Section 90.403.

ARGUMENT

ISSUE I

SECTION 90.404(2)(b)DOES NOT VIOLATE FUNDAMENTAL DUE PROCESS. (As restated by Respondent).

Petitioner claims Section 90.404(2)(b) violates due process by admitting evidence which proves a defendant's bad character and propensity to commit the charged crime. Petitioner claims this statute seeks to eviscerate the long-standing jurisprudence of this State by destroying the Williams Rule "gate keeper" function and ignoring the traditional notion of relevance and unfair prejudice. The statute is not unconstitutional and does not violate due process. In actuality, the statute does not eliminate the relevance necessity. Rather, the statute clarifies an already existing evidentiary rule as was espoused by this Court's previous holding in State v. Rawls, 649 So. 2d 1350 (Fla. 1994). Section 90.404(2)(b) seeks to establish consistency and uniformity in determining the appropriateness of collateral act evidence in child molestation cases where identity is not an issue.

The standard of review for consideration of whether a statute is violative of due process is as follows:

> In considering the validity of a legislative enactment, this Court may overturn an act on due process grounds only when it is clear

> that it is not in any way designed to promote the people's health, safety or welfare, or that the statute has no reasonable relationship to the statute's avowed purpose.

Dep't of Insurance v. Dade County Consumer Advocate's Office, 492 So. 2d 1032, 1034 (Fla. 1986). Here, Section 90.404(2)(b) has a clear design to promote the health, safety or welfare, and the State has a reasonable relationship to the statute's purpose.

The due process language used in the Florida and U.S. Constitutions is virtually identical. Barret v. State, 862 So. 2d 44 (Fla. 2d DCA 2003). In Montana v. Egelhoff, 518 U.S. 37, 135 L. Ed. 2d 361, 116 S. Ct. 2013 (1996), the Supreme Court rejected the Montana Supreme Court's analysis that a statute eliminating voluntary intoxication violated due process. The Supreme Court held that in order to demonstrate a due process violation, the defendant had to establish that his right to have a jury consider evidence of his voluntary intoxication was a fundamental principal of justice. The court further noted that various evidentiary rules exclude relevant evidence. The United States Supreme Court held the Montana statute was not unconstitutional. While the exclusion of evidence might make it easier for the State to prove mens rea, such an effect is not unconstitutional because it does not violate a fundamental

principle of fairness. Id. at 55. Similarly here, the statute does not violate due process merely because it provides a rule which permits evidence to be presented against the defendant. Here, Petitioner's claim does not amount to a due process violation merely because Section 90.404 provides for a rule of evidence which may serve to corroborate the testimony of the child victim.

Statutes must be presumed constitutional, In re Estate of Caldwell, 247 So. 2d 1 (Fla. 1971), and they must be given the interpretation that will permit them to be upheld rather than one which would render them unconstitutional where such a choice exists, *e.g.*, Russo v. Akers, 724 So. 2d 1151, 1153 (Fla. 1998); Florida State Board of Architecture v. Wasserman, 377 So. 2d 653 (Fla. 1979); Leeman v. State, 357 So. 2d 703 (Fla. 1978); Caldwell. "When the constitutionality of a statute is questioned, and it is reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, a court must adopt the interpretation that will render the statute valid." Wasserman, 377 So. 2d at 656 (Fla. 1979); Brewer v. Gray, 86 So. 2d 799, 802 (Fla. 1956).

The rule in Florida has long been that when the constitutional validity of a statute is under attack, "the statute stands unless it conclusively appears that there are or

can be no conceivable circumstances upon which it can validly operate or that under no circumstances can it operate or be effective to accomplish the intended purpose, without violating organic rights." Hunter v. Owens, 80 Fla. 812, 828, 86 So. 839, 844 (1920); Knight & Wall Co. v. Bryant, 178 So. 2d 5 (Fla. 1965), cert. denied, 383 U.S. 958, 86 S. Ct. 1223, 16 L. Ed. 2d 301 (1966)." State v. Garner, 402 So. 2d 1333, 1335 (Fla. 2d DCA 1981), review denied, 412 So. 2d 465 (Fla. 1982).

"It is well established that all doubt will be resolved in favor of the constitutionality of a statute, *Bonvento v. Board of Public Instruction of Palm Beach County*, 194 So. 2d 605 (Fla. 1967),...and that an act will not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt." Knight and Wall Co. v. Bryant, 178 So. 2d 5 (Fla. 1965), cert. denied, 383 U.S. 958, 86 S. Ct. 1223, 16 L. Ed. 2d 301 (1966); State v. Kinner, 398 So. 2d 1360, 1363 (Fla. 1981); Burch v. State, 558 So. 2d 1, 3 (Fla. 1990).

Not only does the burden rest on the defendant as the party making the constitutional challenge, but the court must also apply the accepted judicial principle of construing the wishes of the legislative body in a manner that would make the legislation constitutionally permissible. State v. Ecker, 311 So. 2d 104, 109 (Fla.), cert. denied, 423 U.S. 1019, 96 S. Ct.

455, 46 L. Ed. 2d 391 (1975). "Whenever possible, a statute should be construed so as not to conflict with the constitution. Just as federal courts are authorized to place narrowing constructions on acts of Congress, this Court may, under the proper circumstances, do the same with a state statute when to do so does not effectively rewrite the enactment." Firestone v. News-Press Publishing Co., 538 So. 2d 457, 459-60 (Fla. 1989) (citations omitted), quoted in State v. Stalder, 630 So. 2d 1072, 1076 (Fla. 1994).

> It is a fundamental rule of statutory construction that, if at all possible, a statute should be construed to be constitutional. *See Van Bibber v. Hartford Accident & Indem. Ins. Co.*, 439 So. 2d 880, 883 (Fla. 1983). In fact, this Court is bound "to resolve all doubts as to the validity of [the] statute in favor of its constitutionality, provided the statute may be given a fair construction that is consistent with the federal and state constitutions as well as with the legislative intent." State v. Stalder, 630 So. 2d 1072, 1076 (Fla. 1994) (quoting State v. Elder, 382 So. 2d 687, 690 (Fla. 1980)).

St. Mary's Hospital, Inc. v. Phillipe, 769 So. 2d 961, 972 (Fla. 2000); State v. Stepansky, 761 So. 2d 1027, 1030 (Fla.), cert. denied, 531 U.S. 959, 121 S. Ct. 385, 148 L. Ed. 2d 297 (2000); State v. Keaton, 371 So. 2d 86 (Fla. 1979); White v. State, 330 So. 2d 3 (Fla. 1976). Moreover,

> It is a cardinal rule of statutory

> construction that a statute must be construed in its entirety and as a whole. State ex rel. Triay v. Burr, 79 Fla. 290, 84 So. 61 (1920); *see also* *State v. Gale Distributors, Inc.*, 349 So. 2d 150 (Fla. 1977) (finding that the entire statute must be considered, and effect must be given to every part of the provision under construction); *Florida Jai Alai, Inc. v. Lake Howell Water & Reclamation Dist.*, 274 So. 2d 522 (Fla. 1973) (holding that legislative intent should be gathered from consideration of the statute as a whole rather than from any one part thereof)....Where there is ambiguity and uncertainty in the words employed in a statute, we must look to the legislative intent for guidance.

Id. at 967-968.

It is often helpful, in construing a statute that is susceptible to more than one interpretation, to refer to the legislative history in order to ascertain the Legislature's intent. State v. Jefferson, 758 So. 2d 661, 665 (Fla. 2000), overruled in part on other grounds, Leonard v. State, 760 So. 2d 114 (Fla. 2000).

The Preamble to Chapter 2001-221, C.S.S.B. No. 2012 which is entitled: CHILD MOLESTATION--CHARACTER AND REPUTATION--EVIDENCE, states as follows:

> An act relating to character evidence; amending s. 90.404, F.S.; revising a provision of law governing character evidence to permit the admission of certain evidence of the defendant's commission of acts of child molestation under certain

> circumstances; providing a definition; providing an effective date.
>
> WHEREAS, the Legislature finds that in cases of child sexual abuse, the credibility of the victim is frequently a focal issue of the case, and
>
> WHEREAS, the Legislature finds that evidence which shows that an accused child molester has molested children at other times may be relevant to corroborate the victim's testimony, and
>
> WHEREAS, the Legislature finds that evidence which shows that an accused child molester has molested children at other times may have a probative value which outweighs its prejudicial effect.

Clearly the legislature intended to facilitate the admission of other instances of sexual abuse of children in order to corroborate the child/victim's testimony. More importantly, this section seeks to clarify and follow a line of cases in which collateral act evidence was admissible to corroborate the testimony of the child victim when identity was not an issue. The fingerprint requirement of Williams Rule evidence does not apply when identity is not in issue. Rawls, supra.

Section 90.404(2)(b)(1) does not seek to eliminate the relevance requirement for collateral act evidence. Rather, it seeks to clarify the circumstances when such evidence is admissible. The test for admissibility of collateral act evidence was relevance prior to the enactment of 90.404(2)(b),

and the test is still relevance subsequent to the enactment of the statute. "A trial court has wide discretion concerning the admissibility of evidence, and a ruling on admissibility will not be disturbed unless there has been an abuse of discretion." Huhn v. State, 511 So. 2d 583 (Fla. 4th DCA 1987). "The test for admissibility of evidence is relevance, not necessity." Huhn, 511 So. 2d at 588. "Any testimony relevant to prove the fact in issue is admissible unless precluded by some specific rule of exclusion." McCrae v. State, 395 So. 2d 1145 (Fla. 1980); Williams v. State, 110 So. 2d 654 (Fla. 1959). Section 90.404(2)(b) has not changed the relevance requirement.

It is well established that this is a rule of inclusion, not exclusion. Williams v. State, 621 So. 2d 413, 414 (Fla. 1993); Bradley v. State, 378 So. 2d 870, 872 (Fla. 2d DCA 1979). A trial court's ruling on the relevance of evidence should not be disturbed absent an abuse of discretion. Gaskin v. State, 591 So. 2d 917, 920 (Fla. 1991), cert. denied, 114 S. Ct. 328, 126 L. Ed. 2d 274 (1993).

The statutory amendment seeks to clarify the admissibility of collateral act evidence in child molestation cases. Prior to the enactment of this statute, lower courts struggled with its admissibility and inconsistent results followed. Some opinions required a strict standard of relevance that required

"strikingly similar" misconduct sharing some unique characteristic. See Heuring v. State, 513 So. 2d 122 (Fla. 1987); Saffor v. State, 660 So. 2d 668 (Fla. 1995). This court in Rawls, supra, found the collateral evidence "strikingly similar to the charged crimes." In Rawls the court determined evidence of similar sexual acts upon other children should be admissible to corroborate the victim's testimony whenever the defense is that the victim fabricated the incident, rather than identity.

> Rawls gained access to all of his victims in the same manner. First, Rawls, who was not related to any of the victims' families, befriended the boys' mothers. Then, he arranged to move into their homes... After gaining access, Rawls molested male youths of approximately the same age in their homes while no one else was present. He instructed all of his victims not to tell anyone what had occurred. Clearly, the charged and collateral offenses committed by Rawls share the unique combination of characteristics required to meet the strict standards of the Williams rule.

Section 90.404(2)(b) codifies the rule this Court established in Rawls. In Calloway v. State, 520 So. 2d 665 (Fla. 1st DCA), review denied, 529 So. 2d 693 (Fla. 1988), the court applied a relaxed standard when admitting collateral acts to corroborate the victim's testimony.

> The rigidity with which the similarity

> requirement is applied in cases wherein the collateral crimes are introduced to prove a fact such as identity of the perpetrator is not necessary in other situations such as the instant case where the evidence is relevant to corroborate the victim's testimony... We believe there was sufficient logical connection between the collateral offenses and the charged offenses to permit introduction for the purpose of the corroboration of the child victim's testimony.

Calloway, 520 So. 2d at 668.

In Calloway, the court properly permitted collateral evidence regarding the defendant's abuse of two other girls who were roughly the same age as the victim, who was the defendant's stepdaughter. The charged acts in Calloway were two counts of sexual battery while in custodial authority. The first collateral victim testified the defendant tickled and touched her breasts. The other collateral victim testified the defendant touched her breasts and vaginal area. Both collateral victims told the victim what the defendant had done, and the victim responded he had done similar things to her. The Calloway court applied a relaxed standard of similarity because the collateral crimes were relevant to corroborate the victim, not to prove identity.

"If identity was not a disputed issue, then the degree of similarity did not need to be as striking even in a non-familial

case." Rawls, 649 So. 2d at 1353; see also Morman v. State, 811 So. 2d 714 (Fla. 2d DCA 2002). "This line of cases created few, if any, bright lines and was difficult for trial courts to apply with any degree of confidence." McLean v. State, 854 So. 2d 796, 801 (Fla. 2d DCA 2003). See also State v. Richman, 861 So. 2d 1195 (Fla. 2d DCA 2003). The statutory amendment seeks to establish a more uniform and consistent application of collateral act evidence in child molestation cases. It does not seek an unfettered admission of all collateral acts committed by child molesters. Rather, the trial court still must conduct a balancing test in determining relevance against undue prejudice.

Petitioner claims the statute cannot stand since it is based on inherent conflicts between the new legislation and sections 90.104(2)(court should prevent inadmissible evidence from being suggested to the jury); 90.404(1)(character evidence is inadmissible to prove person acted in conformity with that character trait); and 90.404(2)(a)(similar fact evidence is inadmissible when relevant only to prove bad character or propensity). In Re Amendments to the Florida Evidence Code, 825 So. 2d 339, 341 (Fla. 2002), (Pariente, J., dissenting). However, Section 90.404(2)(b) must be read in conjunction with the other sections cited by the dissent, as well as the prior case law from this Court. There is no inconsistency as the

application of the new statute must be read in light of these other sections of the evidence code.

Collateral act evidence may not be admitted solely to show propensity or bad character. That proposition still stands under the statutory amendment. See Section 90.404(2)(a). The amendment merely permits the introduction of such collateral acts in a child molestation context when such acts are relevant. Moreover, the new statute does not seek to do away with Sections 90.104(2) or 90.404(1). The statutory amendment rather seeks to establish a more consistent application of collateral act evidence, rather than the resulting, often contradictory dichotomy that results. See Morman, 811 So. 2d 714 (Fla. 2d DCA 2002), (Altenbernd, J., concurring)(when identity of alleged perpetrator is not an issue, then Williams rule evidence is typically introduced to support credibility of the victim. If such evidence is admissible under a relaxed standard in the family context when identity is not an issue, it should be admissible under that same standard in most non-familial cases because its probative value and prejudicial effect is not significantly affected by the family context). The statutory amendment seeks to clarify the admissibility of such evidence, under a more uniform standard.

The Senate Staff Analysis to Committee Substitute for

Senate Bill 2012 states:

> The effect of this change is to substantially relax the Williams rule as it applies to criminal cases involving child molestation. Although the Florida Supreme Court relaxed the Williams rule for child sexual abuse cases occurring in the familial context in Heuring, and relaxed it even further in Rawls when it extended Heuring to a non-familial, custodial setting, the bill would relax the Williams rule for all child molestation cases, regardless of the presence of a custodial or familial setting. Under the bill, any evidence of prior or subsequent acts of child molestation would be admissible regardless of how similar or dissimilar the other acts are compared to the charged crime. However, the evidence would still be subject to the s. 90.403, F.S., scrutiny of weighing its probative value against its prejudicial effect. This relaxed standard is similar to the one contained in Rule 414 of the Federal Rules of Evidence.
>
> Staff Analysis and Economic Impact Statement of the Judiciary Comm. for C.S.S.B. 2012, 17th Leg., Reg. Sess., Character Evidence/Child Molestation (Fla. 2001).

McLean, 854 So. 2d at 801.

No due process violation occurred in the instant case. The State still must satisfy Section 90.403 which requires relevant evidence to be 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. Moreover, such evidence is

still inadmissible when relevant solely to prove bad character or propensity. See Section 90.404(2)(a). The Preamble to the amendment contains language that demonstrates a balancing, relevancy test is still to be employed in order to comply with due process requirements. It states in part, "the Legislature finds that evidence which shows that an accused child molester has molested children at other times **may** be relevant to corroborate the victim's testimony." (Emphasis added). Clearly the legislature intended such amendment to be read in conjunction with 90.403 and 90.404(2)(a), by making such amendment subject to relevancy limitations.

Moreover, the statutory amendment was modeled after Federal Rule 414. Federal Rule of Evidence 414 reads, in pertinent part:

> In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

In U.S. v. Castillo, 140 F.3d 874 (10th Cir. 1998), the Court addressed a due process constitutional challenge to the statute. "This rule allows the prosecution to use evidence of a defendant's prior acts for the purpose of demonstrating to the

jury that the defendant had a disposition of character, or propensity, to commit child molestation. In the cases to which this rule applies, it replaces the restrictive Rule 404(b), which prevents parties from proving their cases through "character" or "propensity" evidence... Here, the trial court admitted evidence of the defendant's prior acts of child molestation under Rule 414 for the purpose of demonstrating his character." Castillo, 140 F. 3d at 879.

The court in Castillo determined there was no due process violation when the evidence was relevant, but not overly prejudicial. The due process clause is invalidated by an evidentiary rule only if that rule violates fundamental concepts of justice. No such violation was present where Rule 403 requires balancing test and exclusion of relevant evidence when its prejudicial effect substantially outweighs its probative value. See also U.S. v. Lemay, 260 F. 3d 1018 (9th Cir. 2001); U.S. v. Meacham, 115 F. 3d 1488 (10th Cir. 1997), U.S. v. Mound, 149 F. 3d 799 (8th Cir. 1998). In United States v. Enjady, 134 F.3d 1427 (10th Cir.1998), the Court determined that Rule 414 did not violate due process where it was subject to the protections of Rule 403 and Rule 413.

In Ortiz v. State, 869 So. 2d 1278 (Fla. 4th DCA 2004), the Fourth District agreed with the Second District's holding in

McLean and similarly found Section 90.404(2)(b) did not violate due process and ex-post facto. The Fourth District certified the same question as was certified in McLean. See also Barrett, supra,(no due process violation where Section 775.051 eliminates defense of voluntary intoxication).

In the instant case, the statutory amendment to Section 90.404(2)(b) does not stand alone. The legislature clearly intended relevance to continue to be balanced against the danger of unfair prejudice. Therefore, there is no due process violation. Moreover, the statute merely seeks to follow the prior precedent established in Rawls which permitted such collateral act evidence to corroborate the victim, when identity was not at issue. Therefore, there is no due process violation and no constitutional infirmity.

ISSUE II

PETITIONER'S SIXTH AMENDMENT RIGHT TO A JURY TRIAL WAS NOT VIOLATED, PURSUANT TO BOOKER AND BLAKELY. (as restated by Respondent).

Petitioner claims his right to a jury trial was violated by the admission of collateral acts upon a mere preponderance of the evidence standard. Appellant claims the jury should have been instructed that they had to find beyond a reasonable doubt that the collateral acts occurred. However, before evidence of a collateral offense can be admitted under the Williams Rule, there must be clear and convincing evidence that the former offense was actually committed by the defendant. Audano v. State, 641 So. 2d 1356, 1358 (Fla. 2d DCA 1994). Here the evidence was credible and distinctly remembered by the collateral victim. The testimony was precise and explicit, and the witness was lacking in confusion as to the facts in issue. Slomowitz v. Walker, 429 So. 2d 797 (Fla. 4th DCA 1983).

In Moore v. State, 659 So. 2d 414, 417 (Fla. 2d DCA 1995), review denied, 670 So. 2d 940 (Fla. 1996), the fact that the collateral act in Moore was not a sexual battery while the charged act was, was not a "dispositive dissimilarity." The Second District in Moore put significant weight on the reliability of the collateral testimony. The collateral victim in Moore did not recall the incident in detail. Therefore, the

Second District reversed. The collateral act testimony in the instant case was clear and detailed. Identity is not an issue, and the trial court conducted a relevancy/balancing test in excluding some of the collateral acts. Accordingly, the collateral evidence must meet this clear and convincing standard before it is admitted.

Petitioner's reliance on United States v. Booker, 125 S. Ct. 738 (2005) and Blakely v. Washington, 124 S. Ct. 2531 (2004) is misplaced. Booker and Blakely stand for the proposition that it is improper to increase a defendant's sentence based on a fact that was not determined by a jury beyond a reasonable doubt. Here, McLean's sentence was not increased or determined by the collateral acts. He was facing the same degree felony, regardless of the inclusion of the collateral act testimony. Therefore, this issue is without merit as the jury determined his guilt beyond a reasonable doubt.

Petitioner further claims his Sixth Amendment right was violated where the collateral crimes could be admitted even if he had not been actually convicted of these prior acts. However, prior case law has established a procedural order for the admission of collateral act evidence. Such evidence is subject to the clear and convincing standard, and evidence of crimes for which a defendant has been acquitted is not

admissible in a subsequent trial. State v. Perkins, 349 So. 2d 161 (Fla. 1977). However, a conviction for other crimes or acts is not a prerequisite for the admission of evidence of those acts, so long as it is relevant to some issue other than bad character. Burr v. State, 550 So. 2d 444, 446 (Fla. 1989), cert.granted and judgment vacated on other grounds, 496 U.S. 914, 110 S. Ct. 2608, 110 L. Ed. 2d 629 (1990); Audano, supra.

Section 90.404(2)(b) facilitates a consistent administration of a rule of evidence. It does not add an element of the charged crime, nor does it increase the defendant's sentence based on a fact that is not proven to the jury beyond a reasonable doubt. Therefore there is no Blakely or Booker violation.

ISSUE III

SECTION 90.404(2)(b)(1) DOES NOT VIOLATE THE EX POST FACTO CLAUSE. (As restated by Respondent).

Petitioner claims the statutory amendment is unconstitutional as it violates ex-post facto. Such is not the case here where the statute amends a procedural evidentiary matter. McLean committed the charged acts on October 19, 2000. The legislature amended Section 90.404 in 2001, and it became effective July 1, 2001. McLean's trial occurred in November 2001, and the Florida Supreme Court adopted the rule on July 11, 2002.

There are four general categories of ex-post facto laws proscribed by the federal and Florida constitutions: 1) a law that makes conduct criminal that was not criminal before the law was enacted; 2) a law that aggravates a crime or makes it more severe; 3) a law that increases the punishment for an offense; 4) a law that alters the legal rules of evidence by permitting less or different testimony to obtain a conviction than was permitted when the particular offense was committed. Carmell v. Texas, 529 U.S. 513, 513, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000); Glendening v. State, 536 So. 2d 212 (Fla. 1988). Retrospective application of such laws is generally prohibited. Carmell, supra; Glendening, supra.

In Carmell, the United States Supreme Court held that the retroactive application of a Texas statute which allowed the state to secure a conviction based solely upon the child victim's testimony without any other evidence was unconstitutional. Since the Texas law affected the sufficiency of the evidence required to convict, as opposed to affecting the competency or admissibility of the evidence, the change resulted in less testimony to convict, which violated ex post facto.

However, the Supreme Court noted that ex post facto is not violated by procedural changes applied retrospectively that simply govern how certain evidence or testimony is admitted for consideration by the jury in determining guilt. Such procedural changes, the Court held, do not reduce the quantum of evidence necessary for a conviction, eliminate an element of the offense, increase the punishment, or lower the burden of proof. Thus, the Court concluded that rules of evidence are generally not implicated in ex post facto violations. State v. Dionne, 814 So. 2d 1087, 1092 (Fla. 5th DCA 2002).

In determining whether a rule of evidence implicates the prohibition against ex post facto laws, the key factor is whether it regulates "the mode in which the facts constituting guilt may be placed before the jury" or whether it is a sufficiency of the evidence rule which "governs the sufficiency

of those facts for meeting the burden of proof." Rules of evidence that fall into the former category may be applied retrospectively; rules that fit into the latter may not. Carmell, supra.

The Carmell court discussed the case of Hopt v. Territory of Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884), as a case that did not violate ex post facto. There, the defendant was tried for murder. At the time the defendant committed the murder, the law prohibited a convicted felon from testifying. After the murder, but prior to the defendant's trial, the law was changed to allow the testimony of convicted felons. When the prosecutor attempted to admit the testimony of a convicted felon that tended to inculpate the defendant, the defendant objected, arguing that application of the new law violated the Ex Post Facto Clause. The Court rejected that argument and held that changes in the rules of evidence that are "regulations of the mode in which the facts constituting guilt may be placed before the jury, can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offense charged." Id. at 589, 4 S.Ct. 202.

Thompson v. Missouri, 171 U.S. 380, 18 S.Ct. 922, 43 L.Ed. 204 (1898), also involved a change in the rules of evidence which did not have ex post facto implications. The case

involved the retrospective application of a law that allowed the testimony of a handwriting expert to be introduced into evidence when the law in existence at the time of the criminal act prohibited such testimony. Pursuant to Hopt, the Court rejected the defendant's ex post facto argument and held that the statute was a rule of evidence that governed the mode of presenting evidence to the jury.

In Glendening v. State, 536 So. 2d 212 (Fla. 1988), this Court determined the retroactive application of child victim hearsay pursuant to section 90.803(23), Fla. Stat. (1985) did not violate ex post facto principles. Laws violate Ex Post facto where they affect the legal rules of evidence and receive less, or different testimony in order to convict the offender by "changing the ingredients of the offense or the ultimate facts necessary to establish guilt, whereas changes in the admission of evidence have been held to be procedural." This Court found the Ex Post Facto Clause was not violated and relied on the decisions in Hopt and Thompson:

> The same reasoning which resulted in the Supreme Court's determination that the statutes in Hopt and Thompson were procedural leads to the conclusion that section 90.803(23), Florida Statutes, is also procedural and that the statute does not affect "substantial personal rights." As in Hopt, "the crime for which the present defendant was indicted, the punishment

> prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by" the enactment of section 90.803(23). 110 U.S. at 589-90. As in Thompson, section 90.803(23) "left unimpaired the right of the jury to determine the sufficiency or effect of the evidence declared to be admissible, and did not disturb the fundamental rule that the state . . . must overcome the presumption of his innocence, and establish his guilt beyond a reasonable doubt." 171 U.S. at 387. Accordingly, we conclude that the district court below correctly held that application of section 90.803(23) in the present case does not violate the prohibition against ex post facto laws.

Glendening, 536 So. 2d at 215.

Here, the amendment to the Williams rule statute does not change the burden of proof or the sufficiency of the evidence. Rather, the legislature has attempted to clarify a dichotomy in collateral act evidence which has developed by allowing corroboration of the victim in the familial context, while still employing a strict standard of similarity in non-familial child molestation cases. See Morman, supra.

Petitioner argues that the law has altered the rules of evidence to permit a conviction with less or different testimony. Such is not the case because “a prima facie case of lewd molestation could be established by the testimony of the victim both before and after this amendment to the rule of evidence. This rule permits additional testimony that may cause

a jury to be more likely to believe the victim, but this is a qualitative change in the law that does not alter substantial personal rights." McLean, 584 So. 2d at 803. In Glendening, 536 So. 2d at 214 this Court rejected a similar ex post facto challenge to the hearsay exception for certain statements of child victims in Section 90.803(23), Florida Statutes (1985). Here, Section 90.404(2)(b) provides for a more uniform admission of collateral act evidence which may corroborate the child victim. Such admission is accompanied by a trial court's balancing relevancy and prejudice. Also, the trial court provides a limiting instruction for the jury to consider such evidence only as to corroboration. Further, the rules of evidence are still applicable to the instant case. The evidence must still be relevant, and not admitted solely for the purpose of showing propensity. Therefore, there is no ex post facto violation.

ISSUE IV

THE FLORIDA LEGISLATURE'S ENACTMENT OF 90.404(2)(b) IS NOT UNCONSTITUTIONAL AS VIOLATIVE OF THE SEPARATION OF POWERS. (as restated by Respondent).

Petitioner claims Section 90.404(2)(b) violates the separation of powers doctrine. **(ISSUE IV)**. Petitioner claims the legislature has impermissibly infringed upon the province of this Court. However, there is no separation of powers violation. Petitioner further claims the statute violates his right to equal protection since it is treating persons accused of child molestation differently than other persons accused of a crime. **(ISSUE VI)**. Such claims are meritless. Section 90.404(2)(b) is not unconstitutional.

Here, there is no separation of powers violation. Courts do not impose on a duly-elected legislative body their own views regarding the wisdom of the legislation. State v. Ashley, 701 So. 2d 338, 343 (Fla. 1997)(stating: "the making of social policy is a matter within the purview of the legislature, not this Court"); Brown v. State, 672 So. 2d 861 (Fla. 3d DCA 1996)(stating that it is the "Courts' duty to give effect to legislative enactment despite any personal opinions as to their wisdom or efficacy"). Instead, the reasonable relation test merely requires that the legislation be rationally related to a

legitimate governmental objective or purpose. D.P. v. State, 705 So. 2d 593 (Fla. 3d DCA 1997)(holding that a city ordinance prohibiting minors from possessing jumbo markers or spray paint did not violate federal or state constitutional due process clauses).

In the instant case, it was within the domain of the legislature to enact such rule of evidence in response to prior case law. There is a "strong presumption in favor of the constitutionality of statutes. It is well established that all doubt will be resolved in favor of the constitutionality of a statute. Bonvento v. Board of Public Instruction of Palm Beach County, 194 So. 2d 605 (Fla. 1967). Although §90.404(2)(b) is a procedural rule, the statute was approved by this Court, to the extent that it was procedural. In re Amendments to the Florida Evidence Code, 825 So. 2d at 341. Moreover, it is an extension of this Court's prior holding in Rawls, and therefore there is no separation of powers violation. The legislature merely clarified apparent inconsistencies in case law involving collateral crime evidence. See Morman, supra.

Moreover, there is no equal protection violation. Petitioner's claim that the statute permits accused child molesters to be convicted of less evidence than other accused persons is without merit. In Daniels v. O'Connor, 243 So. 2d

144 (Fla. 1971), appeal dismissed sub nom., Daniels v. Hirshberg, 406 U.S. 902, 92 S. Ct. 1611, 31 L. Ed. 2d 813 (1972), this Court stated:

> When the differences in treatment between those included and those excluded from the class bear a real and substantial relation to the purposes sought to be attained by the act, the classification is valid as against an attack under the equal protection clause.
>
> ...The equal protection clause demands only that the rights of all persons in a class must rest upon the same rule under similar circumstances....Cases are legion in which one class of persons urges denial of equal protection when they are required to do something another class is not. However, if all in the complaining class are treated alike, and the requirement they must meet bears reasonable relation to the object of the legislation, an attack on the legislation based upon denial of equal protection will generally fail.
>
> Rather, the court must limit its inquiry to whether there is a rational basis for the statutory classification...."[O]ur duty [is] to give effect to legislative enactments despite any personal opinions as to their wisdom or efficacy. No principle is more firmly embedded in our constitutional system of separation of powers and checks and balances." Moore v. State, 343 So. 2d 601, 603-04 (Fla. 1977).See also *State v. Yu*, 400 So. 2d 762 (Fla. 1981), *appeal dismissed sub nom. Wall v. Florida*, 454 U.S. 1134, 102 S. Ct. 988, 71 L. Ed. 2d 286 (1982). The rational basis test: is intended to permit the legislature to make most public policy decisions without interference from the courts. "This inquiry employs a relatively relaxed standard reflecting the Court's awareness that the

> drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one." [Massachusetts Board of Retirement v.] Murgia, 427 U.S. [307,] at 313, 96 S. Ct. [2562,] at 2567[, 49 L. Ed. 2d 520 (1976)]. "[L]egislative classifications are valid unless they bear no rational relationship to the State's objectives." Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 501, 99 S. Ct. 740, 762, 58 L. Ed. 2d 740[, 768] (1979). A classification is not unconstitutional merely because it is imperfect. Dandridge v. Williams, 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970). "Put another way, a statutory classification such as this should not be overturned 'unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.'" Barry v. Barchi, 443 U.S. 55, 67, 99 S. Ct. 2642, 2650, 61 L. Ed. 2d 365 (1979) (quoting Vance v. Bradley, 440 U.S. 93, 97, 99 S. Ct. 939, 943, 59 L. Ed. 2d 171 (1979))....

Here, the statute does not treat sex offenders differently than others charged with crimes. Rather it attempts to treat accused child molesters uniformly by providing a rule of evidence which can be applied consistently and relevantly. Section 90.404((2)(b) does not violate separation of powers and equal protection. Rather, it promotes a rule of evidence which instructs trial courts how to properly admit collateral act evidence, and minimizes inconsistent application of this rule.

ISSUE V

THE TRIAL COURT DID NOT ERR BY UTILZING THE SECTION AT ISSUE BEFORE IT WAS FORMALLY APPROVED BY THE FLORIDA SUPREME COURT. (as restated by Respondent).

This Court adopted the statutory amendment in Section 90.404(2) to the extent they were procedural. See In Re Amendments to the Florida Evidence Code, 825 So. 2d 339 (Fla. 2002).

Here, Petitioner claims the trial court erred in using Section 90.4040(2)(b) prior to it being approved by this Court. This issue was addressed by the Second District in McLean, 854 So. 2d at 804, n.7.:

> n7 We note that the supreme court adopted this rule and other rules in July 2002 but indicated that they became effective "on the dates they became law." In re Amendments to the Florida Evidence Code, 825 So. 2d at 341... Apparently, the supreme court intends to allow trial courts to utilize a rule of evidence during the period between its legislative enactment and its adoption by the supreme court if the trial court determines that the new rule of evidence is procedural and does not violate the prohibition against ex post facto application. Obviously, the trial court uses the new rule at the risk that it may later be disapproved by the supreme court. See, e.g., Jones v. R.J. Reynolds Tobacco Co., 830 So. 2d 854 (Fla. 2d DCA 2002).

Since this Court approved the rule, this issue has no

merit. See also Crumbley v. State, 876 So. 2d 599 (Fla. 5th DCA 2004)(when Florida Supreme Court adopts previously enacted amendment to the evidence code that is procedural, it usually specifies that the effective date of the rule is the date the Legislature designated as the effective date of the enactment.

ISSUE VI

SECTION 90.404(2)(b) DOES NOT VIOLATE EQUAL PROTECTION. (As restated by Respondent).

This issue is addressed in Issue IV of this Brief.

ISSUE VII

THE TRIAL COURT PROPERLY APPLIED SECTION 90.403.(as Restated by Respondent).

Petitioner claims the trial court erred in its application of Section 90.403, Fla. Stat. (2001). He argues that the testimony of Mr. Chambers' was unduly prejudicial in light of Section 90.403. Here, Mr. Chambers' testimony was proffered before the trial court. The court weighed the probative value against its prejudicial effect. As the prosecutor pointed out to the court, the Senate analysis of the new bill stated "that no matter how relaxed the rule may be, the evidence would still be subject to 90.403 scrutiny of laying its probative value against its prejudicial effect. (V. 2: T. 171).

The court determined that allowing all of William Chamber's proffered testimony into evidence would be unduly prejudicial. (V. 2: T. 199). The court allowed the testimony as to the incidents that occurred in the family home. The court excluded the incidents that occurred at Appellant's residence, a camping trip, and anything outside of the family home. The court further did "not allow any testimony as to confrontation, admissions of guilt, statements by the defendant that he needed help or treatment." (V. 2: T. 200).

"A trial court has wide discretion concerning the

admissibility of evidence, and a ruling on admissibility will not be disturbed unless there has been an abuse of discretion." Huhn, supra. "Any testimony relevant to prove the fact in issue is admissible unless precluded by some specific rule of exclusion." McCrae v. State, 395 So. 2d 1145 (Fla. 1980); Williams v. State, 110 So. 2d 654 (Fla. 1959). Here, the trial court did not abuse its discretion in admitting the collateral act testimony of Mr. Chambers.

Further, Appellant did not timely renew his objection and has not preserved this issue for appeal. (V. 3, T. 354). Feller v. State, 637 So. 2d 911 (Fla. 1994) (defense counsel failed to raise objection when collateral crime evidence was introduced at trial and did not preserve issue for appeal).

Mr. Chambers' trial testimony was limited. Appellant would sometimes spend the night at the Chambers house. On several occasions he would press up against him, wearing nothing at all. He also tried to anally penetrate him. (V. 3: T. 357). Mr. Chambers was between the ages of 12-14 at the time of the events. (V. 3: T. 358).

Here, the trial court limited much of the collateral act testimony. He only admitted that evidence relating to incidents which occurred inside the family residence where Petitioner was an overnight guest. Petitioner claims the Second District

opinion essentially conceded that the two collateral acts described by Mr. Chambers would not have been admissible under the previous version of the statute and accompanying case law. (Initial Brief, p. 22). However, this is an inaccurate reading of the Second District's holding. The Second District determined:

> It is not entirely clear to this panel whether the evidence admitted in this case under the new statute could also have been admitted under this earlier line of case... **Because identity was not an issue in this case, perhaps the holding in Rawls would have would have permitted this evidence to be introduced**... We decline to issue a hypothetical ruling that it would have been error to admit Mr. Chambers' testimony under the old case law, but the trial judge certainly could have exercised his discretion to exclude this testimony because it lacked the required similarity.

Mclean, 854 So. 2d at 801.

Here, the trial court did not abuse its discretion in admitting such collateral act testimony. As the Second District held, "we cannot hold that the trial court abused its discretion when it admitted only those portions of Mr. Chambers' testimony that related to incidents occurring inside a family residence where Mr. McLean was an overnight guest." McLean, 854 So. 2d at 801. Thus the trial court properly balanced relevance against undue prejudice, and admitted portions of the collateral act testimony.

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Respondent respectfully requests that this Honorable Court affirm the opinion of the Second District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by E-Mail and U.S. Regular Mail to Ryan Thomas Truskoski, Esq., P.O. Box 568005, Orlando, Florida 32856-8005, this 25th day of July, 2005.

_____
COUNSEL FOR RESPONDENT

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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COUNSEL FOR RESPONDENT