IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC03-1732

RONALD MCLEAN,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

APPELLANT'S INITIAL BRIEF ON THE MERITS

On review from a question certified to be of great public importance by the Second District Court of Appeal in Case No. 2D02-1322

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PREFACE

This is an appeal originating from the Circuit Court of the Tenth Judicial Circuit in and for Polk County, Florida, the Honorable Charles L. Brown presiding. Ronald McLean was the defendant in the trial court and will be referred to as "defendant" in this brief. The State of Florida was the plaintiff in the trial court and will be referred to as "State" in this brief. The defendant is appealing the Second District Court of Appeal's decision to affirm his conviction and sentence.

The decision at issue was the first in the State of Florida to rule on the constitutionality of this statute. There is at least one other case on this issue under consideration in this Court that has been stayed pending the Court's resolution of the case at bar: Ortiz v. State, 869 So.2d 1278 (Fla. 4th DCA 2004) (SC04-751).

STATEMENT OF THE CASE AND FACTS

The factual history of this case was put forth in the Second District Court of Appeal's decision in this case, McLean v. State, 854 So.2d 796 (Fla. 2d DCA 2003).

After a jury trial, the defendant was convicted of lewd molestation in violation of Fla. Stat. § 800.04(5), Fla. Stat. (2000). The defendant was sentenced to 30 years imprisonment and designated a sexual predator.

The crime allegedly occurred on October 19, 2000. The defendant was visiting a relative when he allegedly went into the room of J.N., an eight year old child. J.N. awoke in his room that night and the defendant stuck his finger in J.N.'s bottom. The only evidence produced at trial was the testimony of J.N. and that of the Children's Home Society worker, who testified that J.N. said the same thing to her.

The defendant did not make any incriminating statements. A medical investigation did not reveal any physical evidence of sexual abuse.

Accordingly, the only evidence against the defendant was the word of J.N. alone.

To buttress its case, the State was allowed to introduce *Williams* rule[1] evidence.[2] The State was allowed to present evidence of two prior incidents that occurred with Mr. Chambers, who was now 27 years-old. Chambers testified that when he was 12 years-old the defendant assaulted him while he was sleeping in his home. A second assault occurred under the same circumstances when Chambers was 14 years-old.

Chambers said that on one of these occasions he believed that the defendant penetrated his anus with his penis. On both of these occasions the defendant was staying as a guest overnight in the home. The defendant was convicted and appealed.

The Second District affirmed the defendant's convictions and sentence. In so doing, the court certified the following question to be one of great public

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

[2] The defendant objects to the Second District's characterization here. The collateral act evidence admitted at trial was not *Williams* Rule evidence, as defined by the historical safeguards governing its use (as imposed by this Court). The evidence was actually 90.404(2)(b) evidence, which does not contain the safeguards of *Williams* rule evidence.

importance because the rule may apply in many serious trials throughout the State:

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

The Second District noted that the only previous consideration of this rule of evidence by this Court stemmed from a divided opinion that did not address the constitutional issues presented herein. The defendant's initial brief on the merits follows.

SUMMARY OF ARGUMENTS

Section 90.404(2)(b) effectively eliminates the presumption of innocence afforded anyone accused of child molestation. The Legislature's enactment of this section was only due to its abhorrence with the crime itself – not because collateral act evidence is somehow more relevant and less prejudicial to those accused of child molestation. The magnitude of the public outcry does not legitimize the evisceration of decades of jurisprudence against propensity evidence.

The defendant's right to due process of law was violated because the trial becomes fundamentally unfair. The victim's testimony is allowed to be bolstered based upon irrelevant and prejudicial evidence. The defendant's Sixth Amendment right to a jury trial was also violated because the jury only had to find that the collateral acts occurred based upon a preponderance of the evidence. The jury should have been instructed that it had to find beyond a reasonable doubt that the defendant committed the collateral acts.

This was an ex post facto law as applied to the defendant because the

new evidentiary section changed the quantum and quality of the evidence the State was permitted to use to prove its case. The section violated the separation of powers and the trial court erred when it applied the section before it was approved by this Court.

The section violates equal protection because there is no compelling reason to treat those accused of child molestation differently than those accused of any other crime.

Lastly, even if this Court allows the section to stand, the trial court erred by not properly balancing the 90.403 factors in concluding that the evidence was admissible. The trial court's holding was too general and too conclusory to permit the introduction of this evidence. This Court should require specific findings before this evidence may be used.

ARGUMENT I: SECTION 90.404(2)(b) VIOLATES THE DUE PROCESS CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS, REGARDLESS OF WHETHER IDENTITY IS AN ISSUE AT TRIAL

"*Whoever fights monsters should see to it that in the process he does not become a monster*." Friedrich Nietzsche. The public crusade against child molesters should not be used to erode individual rights by increasing the government's ability to convict defendants based upon prejudicial and irrelevant evidence.

The issue of the constitutionality of a statute is reviewed de novo. Everett v. State, 893 So.2d 1278, 1283 (Fla. 2004); Simmons v. State, 886 So.2d 399, 400 (Fla. 1st DCA 2004). The statute at issue, section 90.404(2)(b)1, Florida Statutes (2001), provides that:

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 that is relevant.

This section violates the due process clauses of both the United States and Florida Constitutions. In In re Amendments to the Florida Evidence Code, 825 So.2d 339 (Fla. 2002), Justice Pariente dissented from this Court's adoption of this section, in which Justices Anstead and Shaw concurred. The dissent concluded:

The majority of the Committee recommended that the Court not adopt the

amendment to section 90.404(2) based upon inherent conflicts between the

new legislation and sections 90.104(2) (the 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).

The addition of subsection (b) substantially abrogates a portion of the

Williams rule, as codified in section 90.404(2)(a), which provides for the admissibility of relevant similar fact evidence points to the commission of another crime. See Bryan v. State, 533 So.2d 744, 746 (Fla. 1988); *see also*

Charles W. Ehrhardt, *Florida Evidence*, § 404.9, at 181 (2000 ed.). This amendment to section 90.404(2) also conflicts with other cases from this Court, including Heuring v. State, 513 So.2d 122 (Fla. 1987), and Saffor v.

State, 660 So.2d 668, 670-71 (Fla. 1995), which expressly addresses the

parameters of the admission of misconduct in cases involving sexual abuse.

Id. at 341-342. (footnote omitted).

These observations and arguments are on point. The Florida Statutes and jurisprudence from this Court are now inherently contradictory and internally inconsistent. A rule of evidence should not override or create an exception for another rule (and case law) that prohibits the admission of this evidence.

In a case which applies by analogy, the United States Supreme Court recently held in Deck v. Missouri, 2005 WL 1200394 (May 23, 2005), that the

use of leg irons during sentencing violated the due process clauses of the Fifth and Fourteenth Amendments. Each of these Amendments is violated by the propensity evidence section at issue herein.

The high court noted that the law has long forbidden the use of leg irons. The same is true for propensity evidence. The court noted that the use of leg irons adversely affects the jury's perception of the defendant's character. This is certainly true herein.

The high court noted that the presumption of innocence is no longer a concern at sentencing, but still declared that the use of leg irons violates "a basic element of due process." The presumption of innocence certainly applies to the case at bar and this presumption and the related fairness of the fact finding process is violated by the use of propensity evidence.

Lastly, the high court ruled that the use of leg irons is inherently prejudicial and therefore the defendant did not have to demonstrate actual prejudice to make out a due process violation. The burden was on the State to prove beyond a reasonable doubt that the error did not contribute to the verdict. This is the exact case herein.

In sum, the perils of allowing bad character evidence during the guilt phase are much more grave than allowing the use of leg irons during the

sentencing phase.

Section 90.404(2)(b) effectively eviscerates the long-standing jurisprudence in the State of Florida that evidence should not be admitted at trial to prove the defendant's bad character and propensity to commit the crime at issue. The section violates the defendant's right to due process and a fair trial.

The statute seeks to *magically* declare that this evidence is now relevant, after decades of jurisprudence to the contrary. In fact, this evidence is by its very nature too prejudicial to ensure an accurate fact-finding process as opposed to its extremely weak relevance to the defendant's conduct at a later date.

The Legislature has effectively repealed the traditional notion of 404(b) evidence in child molestation cases, under the guise that molestation victims need special protection, but there was never any such protection given in the 404(b) category to begin with. The wisdom of Rule 404(b) is that the use of other crimes evidence to prove character and conduct involves the danger of too much prejudice and too much waste of time to be admissible for its slight probative value. The Florida legislature has created the opposite presumption with the statute at issue.

The fact is that the Legislature's enactment of this section was only due to its abhorrence with the crime itself – not because collateral act evidence is somehow more relevant and less prejudicial to those accused of child molestation.

The fact that child molesters may be more capable of recidivism is unpersuasive. An accused comes to court with the presumption of innocence. In fact, the defendant did not have any past convictions for child molestation. Therefore, the Legislature cannot presume that the accused is a child molester, just because he is charged with this crime. This constitutes unconstitutional bootstrapping. The statute might pass constitutional muster if the accused had actually been convicted of the collateral acts.

Absent proof of a prior conviction of child molestation, or proof that the particular defendant suffers from a psychological compulsion to molest, the statute is unconstitutional on its face and as applied in the case at bar. Absent proof of either of these two factors, collateral act evidence is not somehow more relevant to those accused of child molestation.

The Second District also erred when it placed too much weight on the fact that the defendant's identity was not at issue. The fact that the defendant's identity was not at issue does not make the propensity evidence

any more probative.

This Court must analyze an unfair trial claim from the perspective of the defendant, not the government. The fact that collateral act evidence makes it easier to justify the story of a vulnerable victim is not relevant. The fact that identity is not at issue is just an artificial distinction that does nothing to lessen the due process impact on the defendant.

The prejudicial impact of the collateral act evidence is vividly apparent in this case. There was no corroborating medical or physical evidence of abuse. The defendant did not make any incriminating statements. This case was a pure credibility battle between the accused and the victim. The section at issue makes trials fundamentally unfair because the victim's testimony is allowed to be bolstered by collateral act evidence and the defendant gets no special "enhancement."

For example, the defendant is not allowed to prove his good propensities by introducing evidence of specific instances of good conduct. Additionally, the defendant is not allowed to introduce the victim's prior sexual history, etc., due to Florida's rape shield law.[3] Simply, put the playing field is

[3] The defendant acknowledges that this argument would not apply to a younger child.

not a level one.

The *Williams* rule is the gatekeeper against wrongful convictions. The section at issue has destroyed this gatekeeper by ignoring traditional notions of relevance, unfair prejudice, and the similarity requirements which safeguard against the admission of propensity evidence. The integrity of the fact-finding process has been undermined in the name of public outrage. This is not constitutionally permissible.

Jurors may not care if sufficient evidence exists to convict the defendant of the crime at issue because they feel less responsible for convicting an individual who they know has committed bad acts in the past.

Allowing this section to stand creates a slippery slope to allow such evidence in every single criminal trial. The floodgates would be open and the rate of erroneous convictions would certainly increase.

The Second District found it significant that the federal version of this statute, Federal Rule of Evidence 414, has withstood constitutional scrutiny. This fact is far from dispositive in evaluating whether the statute at issue violates the Florida Constitution's due process clause. Article I, Section 9 of the Florida Constitution provides higher standards of protection than the United States Constitution. See Traylor v. State, 596 So.2d 957 (Fla. 1992);

Brown v. State, 484 So.2d 1324, 1328 (Fla. 3d DCA 1986); Hlad v. State, 585 So.2d 928, 932 (Fla. 1991) (Kogan, J., dissenting).

It is also worth noting that in federal cases a full-blown evidentiary hearing is required before trial to determine the viability and credibility of the collateral acts evidence. Florida does not have this safeguard. In Florida, the evidence is allowed to come out for the first time during the trial itself.

This Court should require a mandatory pre-trial evidentiary hearing. This would also ensure that the defendant's procedural due process rights are respected. The defendant needs to be given fair notice that his trial is going to address uncharged crimes.

ARGUMENT II: PURSUANT TO *BOOKER* AND *BLAKELY*, THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO A JURY TRIAL WAS VIOLATED

This argument section is essentially a sub-section of the due process section above.

The process in which the collateral acts evidence was submitted to the jury violated the defendant's right to due process and his Sixth Amendment right to a jury trial based upon the United States Supreme Court's holdings in

United States v. Booker, 125 S.Ct. 738 (2005) and Blakely v. Washington, 124 S.Ct. 2531 (2004).

In the case at bar, the jury was required to find based upon a mere preponderance of the evidence that the collateral acts occurred. The jury should have been instructed, based upon Booker and Blakely, that they had to find beyond a reasonable doubt that the collateral acts occurred. The preponderance standard is unconstitutionally low and is in direct conflict with these two seminal decisions.

The United States Supreme Court has changed the legal landscape forever on what the Sixth Amendment right to a jury trial, and the principles of due process embodied therein, mean to someone who is accused of a crime.

The reason for requiring a beyond a reasonable doubt standard is that the collateral acts evidence becomes part of the State's burden of proof. The State will argue that only elements of the crime need to be proven beyond a reasonable doubt. This argument is unpersuasive.

Booker expressly holds that if a State makes an increase in a defendant's authorized punishment contingent on a finding of fact, that fact, no matter how the State labels it, must be found by a jury beyond a reasonable doubt. Id. at 749. This holding applies with equal force during the guilt stage.

In sum, the Sixth Amendment requires that any fact-finding done by the jury must be based on a beyond a reasonable doubt standard.

This fundamental principle was violated in the case at bar. The collateral act evidence undermined the fundamental fairness of the trial because the jury was allowed to find guilt based upon findings of fact it made on a standard lower than beyond a reasonable doubt. Again, it does not matter that the collateral acts evidence was not part of the elements of the crime. The collateral acts evidence became a defacto part of the State's burden of proof when the State introduced it into evidence.

Booker does reemphasize the holding of Apprendi [4] that the fact of a prior conviction for purposes of determining the length of the sentence does not need to be submitted to the jury to be proven beyond a reasonable doubt. This holding is due to the fact that the defendant's past has nothing to do with fact-finding in the guilt stage. This is not the case herein. This is not the sentencing stage.

Lastly, the defendant's Sixth Amendment right to a jury trial has also been violated in another way. The section at issue seeks to translate into fact

[4] Apprendi v. New Jersey, 530 U.S. 466 (2000).

that the defendant committed these collateral crimes, but there is no requirement that the defendant actually be convicted of these other acts. The statute deprives the defendant of his right to a jury trial on each of these collateral acts in violation of the Sixth Amendment – which necessarily violates his right to a fair trial in the trial at issue.

ARGUMENT III: THE APPLICATION OF SECTION 90.404(2)(b) IN THIS CASE VIOLATES THE PROVISION AGAINST APPLYING LAWS EX POST FACTO

There are four very general categories of ex post facto laws proscribed by the Florida and United States Constitutions: (1) laws that make conduct criminal that was not previously criminal, (2) laws that elevate the level of a criminal offense, (3) laws that increase the punishment for an offense, and (4) laws that alter the rules of evidence in a manner that permits a conviction with less or different testimony. See Carmell v. Texas, 529 U.S. 513, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000); Glendening v. State, 536 So.2d 212 (Fla. 1988).

The fourth proscription has been violated in this case. The defendant's alleged criminal act took place on October 19, 2000. The statute at issue was

not enacted until July 1, 2001. See ch. 2001-221, § 1. The defendant's trial took place in November 2001. The statute should not have been used against the defendant because it had not yet been enacted when his alleged crime was committed.

This Court specifically stated in In re Amendments to the Florida Evidence Code, 825 So.2d 339, 341 (Fla. 2002), that it was adopting this section only to the extent that it was procedural. This Court left open the question of whether this rule was procedural and expressly left open all of the other challenges to the statute in the absence of an actual case or controversy before it.

The section at issue altered the rules of evidence in such a manner that a conviction was made more likely with the introduction of this type of testimony – a type that had never been admissible before. The mode in which the facts are to be placed in front of the jury was qualitatively tipped in favor of the State alone.

The nature of this evidence reduces the State's burden to prove the case beyond a reasonable doubt because it is equally plausible that the jury will convict because the defendant is a bad guy, and not based upon the evidence on the charge at issue. Therefore, the State's burden of proof was

lessened with this rule.

Since the testimony now is essentially "less" and unequivocally "different," the rule violates ex post facto provisions. The rule reduces the quantum and quality of permissible evidence.

ARGUMENT IV: THE FLORIDA LEGISLATURE'S ENACTMENT OF THIS SECTION IS UNCONSTITUTIONAL AS VIOLATIVE OF THE SEPARATION OF POWERS

Section 90.404(2)(b) violates the separation of powers doctrine and is an unlawful usurpation of this Court's rulemaking authority under Article V, Section 2(a) of the Florida Constitution. This section of the Florida Constitution mandates that the Florida Supreme Court shall adopt rules for the practice and procedure in all courts. This rule-making authority is exclusive to this Court. See Boyd v. Becker, 627 So.2d 481, 484 (Fla. 1993).

The Florida legislature has impermissibly infringed upon the province of this Court when it decided to enact this evidentiary section because it did not like this Court's past decisions on this issue.

This Court held in Caple v. Tuttle's Design-Build, Inc., 753 So.2d 49, 53 (Fla. 2000), that in order to ascertain whether there is an infringement on this

Court's rulemaking authority we must first determine whether the statute is procedural or substantive. If we find that the statute is substantive and that it operates in an area of legitimate legislative concern, then we are precluded from finding it unconstitutional.

This court echoed this holding in Jackson v. Department of Corrections, 790 So.2d 381 (Fla. 2001), when it held that the copy requirement of the Prisoner Indigency Statute was unconstitutional as a violation of the separation of powers and was a usurpation of the Florida Supreme Court's exclusive rulemaking authority.

The Second District has already held that the statute at issue herein is procedural. If this Court agrees, then the statute is unconstitutional as violative of the separation of powers. Article 2, Section 3, Florida Constitution. The Florida legislature should not be permitted to enact rules of courtroom procedure directed at how trials may be run and burden of proof attained.

The court in State v. Richman, 861 So.2d 1195, 1197 fn 1 (Fla. 2d DCA 2003), noted that the specific holding of this Court's decision in Heuring v. State, 513 So.2d 122 (Fla. 1987), was effectively superceded by the adoption of 90.404(2)(b)(1), Florida Statutes (2002).

In Crumbley v. State, 876 So.2d 599, 602-603 (Fla. 5th DCA 2004), the

court held that section 90.104 is procedural and it is the prerogative of the Florida Supreme Court to enact rules that regulate court procedure.

Similarly, this Court held in State v. McFadden, 772 So.2d 1209, 1213 (Fla. 2000), that section 90.610(1) involves a matter of court procedure solely within the province of this Court to enact pursuant to Article V, section 2(a) of the Florida Constitution. The section at issue herein also violates the separation of powers doctrine.

ARGUMENT V: THE TRIAL COURT ERRED BY UTILIZING THE SECTION AT ISSUE BEFORE IT WAS FORMALLY APPROVED BY THE FLORIDA SUPREME COURT

This argument is an extension of Argument IV above. The defendant's trial took place in November 2001. This Court did not amend the evidence code until July 11, 2002. See In re Amendments to the Florida Evidence Code, 825 So.2d 339 (Fla. 2002). This Court back-dated the effective date of the Amendments to July 1, 2001, the date they became law.

The trial court violated the defendant's due process rights when it utilized a provision of the evidence code that had not been ratified by this Court. At the time of the defendant's trial this court was still considering the

amendments.

Accordingly, the rule was not a valid part of the evidence code when it was utilized against the defendant. See Crumbley v. State, 876 So.2d 599, 602 (Fla. 5th DCA 2004) ("[W]hen the Legislature enacts a procedural rule of evidence, it must be adopted by the supreme court").

Since the law was an unconstitutional violation of the separation of powers, there was no basis whatsoever to impose it on the defendant. It was not properly enacted or ratified and therefore it should not have been used.

ARGUMENT VI: THE USE OF THIS SECTION VIOLATED THE DEFENDANT'S RIGHT TO EQUAL PROTECTION UNDER THE LAW

"The constitutional right to equal protection mandates that similarly situated persons be treated alike . . . Equal protection is not violated simply because persons are treated differently. When considering a statute that abridges a fundamental right, courts are required to apply the strict scrutiny standard to determine whether the statute denies equal protection." Level 3 Communications, LLC, v. Jacobs, 841 So.2d 447, 454 (Fla. 2003) (citations omitted).

"The heart of an equal protection argument is that the State has adopted a classification that affects two or more similarly situated groups in an unequal fashion." B.S. v. State, 862 So.2d 15, 17 (Fla. 2d DCA 2003).

The defendant's fundamental right of liberty is implicated in this case so this Court must apply a strict scrutiny analysis. Strict scrutiny is also required because the underlying issue is whether the trial was fair.

The State of Florida has created a classification where those persons accused of a child molestation are treated differently than any other persons accused of a crime. There is no compelling reason (or even a rational reason) for this difference. The law should apply equally to all citizens accused of a crime.

The defendant hereby incorporates by reference all of the arguments made in Argument I on due process.

ARGUMENT VII: EVEN IF SECTION 90.404(2)(b) PASSES CONSTITUTIONAL MUSTER, THE TRIAL COURT ERRED BY ADMITTING THE EVIDENCE IN VIOLATION OF SECTION 90.403

Section 90.403 mandates that 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.

Significantly, the Second District in the opinion at issue, 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. This proposition is correct. The two collateral acts were not sufficiently similar and hence were not relevant to the case.[5]

Interestingly, the trial court first held that allowing in all of the proffered testimony of Mr. Chambers would be unduly prejudicial and that the jury would not convict based upon the crime at issue. (Vol. 2, p. 199). The trial court then perfunctorily limited Mr. Chambers' testimony to only those incidents which occurred in the family home. Id.

It is not sufficiently clear how the trial court balanced the 403 factors. This is a fatal flaw. The trial court's holding was too general and too conclusory to permit introduction of this evidence. This Court should require

[5] Greater uniqueness and familiarity is required with non-familial acts. Without substantial similarities, the evidence is only relevant to prove bad character.

specific findings before this evidence may be used. This case can be reversed based upon this issue alone.

CONCLUSION

For all the foregoing arguments and authorities set forth herein, the Appellant/Defendant, RONALD MCLEAN, respectfully requests this Honorable Court to reverse the Second District's decision and remand for a new trial, answer the certified question in the affirmative, and address the other constitutional infirmities in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the Office of the Attorney General, Attn: Helene S. Parnes, Esq., Concourse Center 4, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607-7013 on this 27th day of May 2005.

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I HEREBY CERTIFY that the instant brief has been prepared with Times New Roman 14-point font in compliance with Fla.R.App.P. 9.210(a)(2) on this 27th day of May 2005.

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