IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC03-1732

RONALD MCLEAN,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

APPELLANT'S REPLY BRIEF

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

RYAN THOMAS TRUSKOSKI, ESQ.
RYAN THOMAS TRUSKOSKI, P.A.
FLORIDA BAR NO: 0144886
P.O. BOX 568005
ORLANDO, FL 32856-8005
(407) 841-7676

COUNSEL FOR APPELLANT

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ARGUMENT I: DUE PROCESS VIOLATION

The repeated theme in the State's brief is that the new statute is simply

a *clarification* of existing law, in an effort to maintain *uniformity*, and therefore it satisfies due process. These are not accurate characterizations.

The fact is that the statute eliminates the Williams Rule in child molestation cases. The statute does not clarify, but rather overrides this Court's decisions in Heuring v. State, 513 So.2d 122 (Fla. 1987), and Saffor v. State, 660 So.2d 668 (Fla. 1995), among others.

The Senate Staff Analysis of the bill cited by the State on page 19 of its brief specifically states that the point of the legislation is to "substantially relax" the Williams Rule in child molestation cases. Accordingly, the goal is not to "clarify" as the State suggests, but rather the goal is to alter.

The same Staff Analysis reveals that the Williams Rule is actually eliminated. It states that collateral acts evidence is "admissible regardless of how similar or dissimilar the other acts are compared to the charged crime." The text of the statute may as well just say that the Williams Rule no longer applies in child molestation cases.

The State deems it dispositive that the amended section 90.404(2)(b) permits other acts of child molestation "for its bearing on any matter to which it is relevant." However, the trial court in this case admitted the evidence solely to corroborate the victim's testimony and no other basis.

With the addition of subsection (b), section 90.404(2) becomes internally inconsistent. Evidence of other bad acts is not admissible under subsection (a) to show propensity to commit a crime, but under subsection (b) it would be admissible to show precisely that. "Corroboration" (of the victim's testimony) is just another word for "propensity."

Florida law is full of appellate decisions reversing convictions in other contexts when the State tries to "corroborate" its evidence by showing the defendant's "propensity" to commit a crime. See *e.g.*, Mann v. State, 787 So.2d 130 (Fla. 3d DCA 2001); Hebel v. State, 765 So.2d 143 (Fla. 2d DCA 2000); Schusler v. State, 760 So.2d 271 (Fla. 4th DCA 2000).

The State is attempting to carve out a new, alternate universe of relevancy in arguing that unrelated acts of molestation on other people separated by many years (and acts of a completely different nature) are somehow relevant to the charged crime. It is important to remember that the original Williams Rule required fingerprint-like evidence of similarity to be relevant.

The Florida Legislature has replaced this rule of evidence with the unstated reasoning of the, "if he did it once, he'll do it again" theory of

relevance, a theory rejected in decades of established law. Permitting evidence like this, which is similar only in that it meets the definition of "child molestation" in the statute, will result in convictions of innocent people who may have committed an act of child molestation in the past but did not commit the charged act, which is precisely the evil that decades of jurisprudence seeks to avoid.

It is axiomatic that every criminal defendant is presumed innocent and that due process requires that his guilt must be proven beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). See also Art. 1, Sec. 9, Fla. Constitution; Amendments V and XIV, U.S. Constitution.

Admitting collateral act evidence where the acts had not been charged or proven, had not been subjected to any standard of proof, and were vigorously disputed at trial, impairs the defendant's presumption of innocence.

The new statute is not merely a relaxation of a rule of evidence of a natural evolution of the Williams Rule, it actually destroys the presumption of innocence. Just as admitting prior burglaries or thefts would destroy the presumption of innocence for a person charged with burglary of theft,

admitting unproven and dissimilar incidents of long-ago child molestation creates an overwhelming danger of a conviction based on a “where there’s smoke there’s fire” mentality among jurors. No cautionary instructions to the jury could prevent it. This collateral act evidence is prohibited in every other type of case in Florida.

If this Court allows this statute to stand the legislature would be empowered to draft this type of statute for any crime it wanted. The legislative histories would read just like the preamble at issue herein:

WHEREAS, the Legislature finds that in cases of **[insert any crime here],**

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 **[insert same crime here] [has done this before]** may be relevant

to corroborate the victim’s testimony, and

WHEREAS, the Legislature finds that evidence which shows that an accused **[insert same crime here] [has done this before]** may have a

probative value which outweighs its prejudicial effect.

The Legislature will have the power to eliminate the Williams Rule in

every single criminal trial if this statute stands.

The State points out on page 13 of its brief that the relevancy requirement is not eliminated. This is not accurate. The statute itself is telling trial judges that any acts of molestation, no matter how dissimilar or old, are now relevant. The statute may not eliminate the relevancy requirement, but it defines it so broadly that the practical effect is elimination. There are no limitations on the collateral evidence. Anything goes. Further, the statute is implicitly stating that the undue prejudice factor no longer exists.

The magic declaration that any act of child molestation is relevant and not prejudicial eliminates the presumption of innocence and is fundamentally unfair. Because of this fundamental unfairness, due process is violated.

The State repeatedly comments in its brief that in the wake of the statute collateral act evidence is still not admissible to prove bad character. **Significantly however, the State fails to address how the collateral act evidence in this case was relevant for anything other than to prove propensity or bad character.** The State's silence here is the fatal flaw in this case. The old and dissimilar collateral act evidence admitted under this statute was not relevant to prove anything but propensity and bad character. As a result, the defendant's due process rights were violated.

ARGUMENT II: SIXTH AMENDMENT VIOLATION

The case of United States v. Booker, 125 S.Ct. 738, 769 (2005), which was decided after the Second District decided this case, expressly states that its holding applies to all cases that are on direct review. Accordingly, this Court should address this issue. This Court should reverse because the Sixth Amendment violation herein is a fundamental structural defect which impermissibly harmed the fact-finding process in this case.

The State correctly points out on page 23 of its brief that the current state of the law in Florida is that collateral act evidence must be proven by clear and convincing evidence to be admissible. Henrion v. State, 895 So.2d 1213, 1216 (Fla. 2d DCA 2005). See also State v. Norris, 168 So.2d 541, 543 (Fla. 1964). However, this burden of proof is unconstitutional as violative of the Sixth Amendment.

The jury should have been instructed that they had to find that the collateral acts were committed by proof beyond a reasonable doubt. This is required by the Sixth Amendment. The clear and convincing standard requires less proof than the beyond a reasonable doubt standard. In re Ford-Kaus, 730

So.2d 269, 276 (Fla. 1999), *citing* In re Davey, 645 So.2d 398, 404 (Fla. 1994). Accordingly, the clear and convincing standard is unconstitutionally low in a criminal trial.

The State asks this court to limit the application of Booker and Blakely to sentencing enhancements. However, these seminal decisions clarify what the right to a jury trial means. The principles of Booker and Blakely certainly apply to the guilt phase as well as the sentencing phase. These two cases mandate that any factual decisions made by the jury must be based on a beyond a reasonable doubt standard. This burden is the cornerstone of the American judicial system.

The State further maintains that because the defendant was facing the same degree of felony whether or not the collateral act evidence was admitted, there was no violation because the defendant's sentence was not increased. However, the State misses the fundamental point. The defendant's sentence was not increased on this finding, it was actually based on this finding. There is no accurate proof of guilt if some of the jury's findings are based on facts determined under a clear and convincing standard of proof.

ARGUMENT III: EX POST FACTO VIOLATION

The application of Fla. Stat. § 90.404(2)(b), Florida Statutes (2001), to this case made it easier to convict the defendant on less evidence than was required before the law was enacted. The Second District in McLean relied on a flawed argument when it stated that the law was valid because a defendant could be convicted on the victim's word alone both before and after the implementation of the statute. See also State's brief at p. 30.

Under this reasoning, an allegation that is fantastical or imagined can be propped-up with far more solid but grossly dissimilar similar fact evidence, thereby obtaining a conviction where none could have been had before. This has occurred herein.

A law is ex post facto if it alters the rules of evidence in a manner that permits a conviction with "different" testimony. See Carmell. This new statute allows a brand new type of damaging evidence to be admissible. This is certainly "different" enough to violate ex post facto prohibitions.

The statute alters the sufficiency of the facts that may be introduced into evidence at trial for meeting the burden of proof. By allowing additional facts to be submitted to the jury, which were never allowed before, the State's

burden of proof is lessened. Before collateral acts were deemed insufficient to the burden of proof. Now, those facts are sufficient to be used in meeting the burden of proof. The State's burden of proving the facts of the charged crime is effectively lessened and made less significant by allowing evidence of collateral acts.

CONCLUSION

For all the foregoing arguments and authorities set forth, 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: John M. Klawikofsky, Esq., Concourse Center 4, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607-7013 on this 2nd day of August 2005.

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RYAN THOMAS TRUSKOSKI, ESQ.

RYAN THOMAS TRUSKOSKI, P.A.
Florida Bar No. 0144886
Appellate Attorney for Defendant
P.O. Box 568005
Orlando, FL 32856-8005
(407) 841-7676

CERTIFICATE OF FONT COMPLIANCE

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 2nd day of August 2005.

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RYAN THOMAS TRUSKOSKI, ESQ.

Appellate Attorney for Defendant