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When Children and the Elderly Are Victims: Balancing the Rights of the Accused Against Those of the Victim

PROFESSOR CHARLES W. EHRHARDT*

Child sexual abuse prosecutions involve difficult societal issues as well as complex evidentiary and constitutional problems. The abusive act frequently occurs in private upon a young victim who proves an unpersuasive witness during a subsequent trial. Often only two eye witnesses exist, the victim and the accused, thus making the victim's credibility a critical issue. Because of the nature of these prosecutions, there has been a special focus on the principles regulating the admissibility of evidence in child abuse cases. Balancing the due process and constitutional rights of the accused against the interests of both the child and society in these cases has been difficult for the judicial system and the legislature. Recently, similar concerns have arisen when the victim of a criminal act is an elderly person who suffers the frailties of age. These Symposium Comments address a series of related issues dealing with the admission of: (1) out-of-court statements of both the child and the elderly victim; (2) expert testimony explaining the victim's conduct based on certain observed syndromes; and (3) prior acts of sexual misconduct.

I.

EXPERT TESTIMONY BASED ON SYNDROMES

During the prosecution of a child abuse case, expert testimony may be offered based on either Child Sexual Abuse Accommodation Syndrome ("CSAAS") or Child Sexual Abuse Syndrome ("CSAS") to prove that the abusive act occurred or to explain the subsequent conduct of the victim. One of the important issues in determining the admissibility of this evidence is whether either syndrome has the necessary scientific validity or reliability. Michael Stanger's Comment *Throwing the Baby Out With the Bathwater* labels the Florida Supreme Court's opinion in *Hadden v. State*¹ overbroad. *Hadden* ruled that testimony based on either syndrome was inadmissible in child sexual abuse prosecutions because the syndromes do not meet the *Frye* test of general acceptance

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1. 690 So. 2d 573 (Fla. 1997).

in the relevant scientific community.²

The development of Florida law relating to the admissibility of so-called syndrome evidence in child sexual abuse cases coincides with the resolution of the uncertainty in Florida as to whether the *Frye* standard or some other test applied to expert testimony based on scientific principles or methodologies. For example, in *Ward v. State*, the First District Court of Appeal applied a relevancy test and deemed testimony based on child abuse syndrome admissible.³ In *Kruse v. State*, the Fourth District Court of Appeal applied a Section 90.403⁴ balancing test and held that post-traumatic stress syndrome is admissible in a child sexual abuse case.⁵ After the Florida Supreme Court concluded that the *Frye* test applied,⁶ it held in *Flanagan v. State* that the expert testimony of a psychologist concerning offender profile syndrome is inadmissible because it is not generally accepted in the scientific community.⁷

The testimony of a mental health counselor based on CSAAS, concerning the symptoms typically associated with sexually abused children, was offered in *Hadden v. State* apparently as circumstantial evidence that the sexual abuse occurred.⁸ The District Court of Appeal certified to the Florida Supreme Court the question of whether the *Frye* standard should be applied to "testimony by a qualified psychologist that the alleged victim in a sexual abuse case exhibits symptoms consistent with those of a child who has been sexually abused."⁹ The *Hadden* decision restated that *Frye* applies to syndrome evidence, but the decision created uncertainty because the court's opinion went beyond the questioned certified. The court clearly stated: "[W]e align ourselves with those courts in other states . . . which have determined that a psychologist's syndrome testimony about CSAAS is inadmissible as substantive evidence of the defendant's guilt."¹⁰ This language is limited to expert testimony based on syndrome evidence offered to prove that the abusive act was committed on the victim. Near the end of the opinion, however, the court made the broader statement: "[T]his [syndrome] evidence may not be used in a criminal prosecution for child abuse."¹¹ This latter sentence may broaden the impact of the court's decision and create uncertainty concerning the admissibility of testimony based on CSAAS, when

2. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

3. 519 So. 2d 1082 (Fla. 1st DCA 1988).

4. 483 So. 2d 1383 (Fla. 4th DCA 1986).

5. FLA. STAT. § 90.403 (2001).

6. *Stokes v. State*, 548 So. 2d 188 (Fla. 1989).

7. 625 So. 2d 827 (Fla. 1993).

8. *Hadden v. State*, 690 So. 2d 573, 575 (Fla. 1997).

9. *Id.* at 573.

10. *Id.* at 577.

11. *Id.* at 581.

offered to rehabilitate the victim by explaining the victim's conduct after the victim's credibility has been attacked.

Mr. Stanger argues that the *Hadden* court failed to differentiate between the two syndromes and further that CSAAS should be admissible to rehabilitate the credibility of a victim-witness. The Comment claims that testimony offered for that purpose is not subject to *Frye* and that testimony based on CSAAS would survive a *Frye* analysis in any event.¹² However, since *Frye* principles are generally applicable to social science theories and methodologies, including testimony based on certain observed syndromes, there is no apparent reason why *Frye* should not apply to expert testimony given during the prosecution's rebuttal case as well as when it is offered to rehabilitate another witness.¹³ Generally, all testimony based on new or novel scientific principles or methodologies is subject to a *Frye* screening regardless of when during the trial the testimony is offered.

Mr. Stanger's argument that testimony based on CSAAS meets the *Frye* standard when the testimony is used to rehabilitate or explain the behavior of the victim after that victim's actions have been questioned, however, may prevail. Florida courts have recognized that within a given community of experts the level of acceptance of methodologies and principles may change over time. For example, courts initially excluded expert testimony regarding battered woman syndrome because it was not based on principles bearing sufficient acceptance in the relevant scientific community.¹⁴ In later Florida decisions, however, courts found that the underlying methodology had developed to a point of general acceptance. Under current law, expert testimony based on the principle is admissible in Florida under *Frye*.¹⁵ Ultimately, a prosecutor may be able to demonstrate, through evidence offered at a *Ramirez-Frye*

12. I am less confident than Mr. Stanger that CSAAS would be seen by courts as passing the *Frye* test. Mr. Stanger relies primarily on *Jones v. State*, 640 So. 2d 1084 (Fla. 1994). In *Jones*, the Florida Supreme Court held that the Florida statutory rape statute is constitutional. In his concurring opinion, Justice Kogan found a compelling state interest in preventing sexual exploitation of young children. He relied in part on CSAAS in reaching his decision. He was careful, however, to explain that he was using it to explain the societal impact of childhood sexual exploitation and that the syndrome "has been controversial in other states when used to help prove child sexual exploitation in a criminal context." *Jones*, 640 So. 2d at 1090 n.8.

13. The court rejected an attempt to avoid the application of *Frye* to expert testimony based on a syndrome on the basis that it was admitted as "background" evidence in *Flanagan v. State*, 625 So. 2d 827 (Fla. 1993).

14. *Hawthorne v. State*, 470 So. 2d 770 (Fla. 1st DCA 1985).

15. *State v. Hixson*, 630 So. 2d 172, 174 (Fla. 1994) (stating that "Since this second *Hawthorne* opinion, the battered-spouse syndrome 'has gained substantial scientific acceptance to warrant admissibility.'"); see also *Brim v. State*, 695 So. 2d 268 (Fla. 1997) (finding that certain techniques used in analyzing DNA fingerprints is admissible under *Frye* due to increased acceptance of these techniques within the scientific and expert community).

hearing,¹⁶ that CSAAS if offered for rehabilitative purposes is generally accepted; validating Mr. Stanger's conclusion.¹⁷

II.

OUT-OF-COURT STATEMENTS OF VICTIMS WHO ARE CHILDREN OR ELDERLY

A. *Statements for Diagnosis or Treatment*

Frequently, it is important to the prosecution of a child sexual abuse case to determine the admissibility of out-of-court statements of a young child that either describe the abusive act or identify the abuser. When a child is treated by a pediatrician or psychologist, the child may relate the details of the abusive act as well as the identity of the abuser. If the child is incompetent to testify or is an ineffective witness in court, the admission of the child's hearsay statements to these professionals may determine whether there is sufficient evidence to submit the prosecution's case to the jury or for the jury to convict.

Prosecutors could attempt to admit these statements under section 90.803(4),¹⁸ the hearsay exception for statements made for the purpose of medical diagnosis or treatment. Although Federal Rule of Evidence 803(4) generally prohibits testimony concerning out-of-court statements to medical providers of fault or identity,¹⁹ in *United States v. Renville*²⁰ this prohibition was relaxed in the case of a young child who was sexually abused. The *Renville* court reasoned that the sexual abuse of "children at home presents a wholly different situation" from that normally encountered under Rule 803(4) since the identity of the abuser as a member of the family or household may be relevant to the child's treatment.²¹ Many courts have followed suit. Celina Contreras's Comment *Won or Lost the Battle* criticizes the Florida Supreme Court for not adopting the *Renville* court's approach in *State v. Jones*.²² In *Jones*, the

16. See *Ramirez v. State*, 651 So. 2d 1164 (Fla. 1995).

17. Judge Ervin's dissent in *Flanagan*, which was approved by the Supreme Court, noted that: "If . . . the defense has attacked a witness's credibility, the courts often permit profile or syndrome evidence for the purpose of only rehabilitating the witness by showing that such apparently inconsistent conduct is in fact consistent with the syndrome or characteristics of a sexually assaulted victim." *Flanagan v. State*, 586 So. 2d 1085, 1114 (Fla. 1st DCA 1991) *acq. in result* 625 So. 2d 827 (Fla. 1993).

18. FLA. STAT. § 90.803(4) (2001).

19. In *Torres-Arboledo v. State*, 524 So. 2d 403 (Fla. 1988), *cert. denied*, 488 U.S. 901 (1988), the Florida Supreme Court found that statements of fault made by a gunshot victim to an emergency room physician were not admissible under section 90.803(4) because they were not pertinent to treatment.

20. 779 F.2d 430 (8th Cir. 1985).

21. *Id.* at 437.

22. 625 So. 2d 821 (Fla. 1993).

Florida Supreme Court held that a child abuse victim's out-of-court statements that identified the abuser are inadmissible under the medical diagnosis exception and found that their admissibility should be determined under section 90.803(23),²³ the hearsay exception for victims of child abuse.

Ms. Contreras recognizes that statements made by young children to a physician may lack the reliability usually associated with similar statements by an adult as a result of the child's inability to understand that their medical diagnosis or treatment depends on the statements. Accordingly, she argues that statements by child abuse victims concerning identity should be admissible under section 90.803(4) and section 90.803(23). Ms. Contreras suggests that the Florida Supreme Court could adopt a set of special factors to be applied to out-of-court statements admitted under section 90.803(4) as opposed to section 90.803(23) in order to ensure that the statements are reliable.²⁴

Ms. Contreras's argument, however, conflicts with the legislative history of section 90.803(23). The *Jones* decision relied on legislative history connected to the adoption of section 90.803(23), the exception for statements of young children who are victims of sexual abuse. In *Jones*, the Florida Supreme Court concluded that the legislature did not intend to admit statements of identity or fault under section 90.803(4), the exception for reliable statements of young sexual abuse victims. This exception was enacted as a direct result of a highly publicized series of allegedly abusive acts which occurred in the Miami area. In 1985, legislation had been introduced to expand section 90.803(2), the hearsay exception for excited utterance, and section 90.803(4), the hearsay exception for medical diagnosis and treatment, so that these exceptions would cover out-of-court statements by child abuse victims.

These legislative deliberations occurred almost a year before *Renville* was decided. At that time, the leading case was *United States v. Iron Shell*,²⁵ an earlier Eighth Circuit decision in which the court held that the out-of-court statements of a nine-year-old victim of a sexual attack were inadmissible under Federal Rule of Evidence 803(4). In that

23. FLA. STAT. § 90.803(23) (2001).

24. A similar argument was rejected in *State v. Ocha*, 576 So. 2d 854, 855 (Fla. 3d DCA 1991). In *Ocha* the court rejected an argument that a special showing of reliability should be applied to statements of the victim for medical diagnosis and treatment. "The Evidence Code itself does not require such an additional showing. Instead, the courts have considered that the rationale underpinning the medical diagnosis and treatment exception applies to adults and minors alike, and treat a child declarant's statements as admissible under this hearsay exceptions. Questions about the age of the child and the circumstances under which the statement was made ordinarily go to the weight, rather than admissibility, of the testimony." *Ochoa*, 576 So. 2d at 856-57.

25. 633 F.2d 77 (8th Cir. 1980).

decision, the Eight Circuit Court of Appeals reasoned that “the statements concern what happened rather than who assaulted her. The former in most cases is pertinent to diagnosis and treatment while the latter would seldom, if ever, be sufficiently related.”²⁶ Thus, statements of identity generally were not admitted under the federal hearsay exception for statements to a medical provider, even in sexual abuse prosecutions, at the time when the Florida legislature passed section 90.803(23), the hearsay exception for victim of child abuse. The paradigmatic shift represented by *Renville* had yet to occur.

Prior to the passage of section 90.803(23), I testified before legislative committees and urged the Florida legislature not to expand the language of section 90.803(2) or section 90.803(4) to include statements of child abuse victims. Rather, I suggested that the Legislature adopt what became section 90.803(23), an exception for all reliable out-of-court statements of young child sexual abuse victims.²⁷ The proposed child abuse exception was adopted and the excited utterance and medical diagnosis and treatment exceptions remained unchanged. Although one could argue that section 90.803(23) is too restrictive because it contains an age limit, the judicial system’s preference for live testimony and face-to-face confrontation is better served by section 90.803(23), which requires a more mature child to testify that the defendant committed the crime as opposed to letting the prosecution rely on the victim’s out-of-court statement.

Jones resolved a split between the district courts of appeal on the issue of whether statements of a child to a medical provider are admissible under section 90.803(4), the hearsay exception for statement to a medical provider, as well as section 90.803(23).²⁸ The Fourth District Court of Appeal found statements of identity of a child abuse victim inadmissible under section 90.803(4),²⁹ while the First District Court of Appeal said in dicta that they are admissible.³⁰ In *Jones*, the Florida Supreme Court addressed the issue for the first time and held these types of statements are inadmissible under section 90.803(4), consistent with the Florida Legislature’s intent.

Mrs. Contreras’s argument that section 90.803(4) should be interpreted to include statements of identity when the declarant is a young victim of sexual abuse if special judicially-created factors are applied to

26. *Id.* at 84.

27. The *Jones* decision cited to my testimony. *Jones*, 625 So. 2d at 825.

28. In *State v. Ocha*, 576 So. 2d 854 (Fla. 3d DCA 1991), the Third District Court of Appeal recognized, but did not decide, the issue.

29. *Hanson v. State*, 508 So. 2d 780 (Fla. 4th DCA 1987).

30. *Flanagan v. State*, 586 So. 2d 1085 (Fla. 1st DCA 1991) *acq. in result*, 625 So. 2d 827 (Fla. 1993).

determine reliability, acknowledges the problems with the reliability of these statements.³¹ Ms. Contreras apparently argues that, rather than apply the explicit case-specific reliability determination of section 90.803(23), it is better policy for the court to apply a set of factors not apparent on the face of section 90.803(4).

The significance of her criticism of *Jones* is unclear. Reliable statements of identity of a young child that are admissible under *Renville* would be sufficiently reliable to be admitted under the child hearsay exception. The special factors that *Renville* courts apply to ensure reliability of statements of identity offered under Federal Rule of Evidence 803(4), are similar to those applied to ensure the reliability of statements admitted in Florida under section 90.803(23). Federal courts and other jurisdictions have resisted the extension of *Renville* regarding statements of fault and identity into cases that do not involve child abuse. This restriction recognizes by implication the reliability concern, and the *Renville* exception is probably based on the need for the evidence when the child may be incompetent or an extremely ineffective witness if called to testify, as well as the nature of the offense.

If the victim of abuse is over eleven years of age, the prosecution is at a disadvantage under *Jones* because the child's out-of-court statements of identity to a medical provider are inadmissible under both sections 90.803(4) and 90.803(23).³² The policy concerns expressed in *Renville* and the legislative discussions are not as strong when the victim is not a young child. A victim who is older than eleven usually is able to testify and communicate what has occurred to the jury concerning the abusive act. The victim's live testimony furthers the constitutional preference for face-to-face confrontation and cross-examination, as embodied by the Florida Legislature's policy judgment in section 90.803(23) to include an age limit. Moreover, as *Jones* itself recognized, the decision is not a bar to the admission of all testimony concerning out-of-court statements of identity by a victim over the age of eleven. These out-of-court statements may be admissible as prior consistent statements,³³ statements of identification, excited utterances,³⁴ or under some other hearsay exception.

31. Why else would she advocate the application of a set of special factors that are not applicable to other statements offered under section 90.803(4), *Florida Statutes*?

32. FLA. STAT. § 90.803(23) (2001) (contains an age limit of eleven).

33. *State v. Jones*, 625 So. 2d 821 (Fla. 1993).

34. *Morgan v. Foretich*, 846 F.2d 941 (4th Cir. 1988); *United States v. Iron Shell*, 633 F.2d 77 (8th Cir. 1980).

B. *Statements of Elderly Victims*

In 1995, section 90.803(24)³⁵ was enacted, creating a hearsay exception for statements by elderly or disabled victims of enumerated violent crimes, including acts of abuse or neglect. The exception was modeled after the child abuse victim exception found in section 90.803(23). In *Conner v. State*,³⁶ however, the Florida Supreme Court held that section 90.803(24) is facially violative of the Due Process³⁷ and Confrontation Clauses.³⁸ As Stacy Schulman's Comment *The Florida Supreme Court v. The United States Supreme Court* points out, *Conner* is difficult to understand in light of the court's earlier decision upholding a similar constitutional challenge to section 90.803(23)—an almost identical statutory hearsay exception in which the most significant difference is that the declarant is a victim of child sexual abuse rather than a victim of a crime against the elderly or disabled.

Rather than focus on the criteria outlined in *Ohio v. Roberts*³⁹ to determine whether a recently adopted hearsay exception complies with the Confrontation Clause, one should look to *Idaho v. Wright*.⁴⁰ *Wright* is a better guide because it interpreted a statement of a child abuse victim to a pediatrician that was admitted under a state's residual hearsay exception, and because Justice O'Connor established the parameters for determining whether a statement admitted under an exception that is not firmly-rooted has "particularized guarantees of trustworthiness."⁴¹ In her opinion, Justice O'Connor held that the only factors to consider in making this determination are "those that surround the making of the statement and that render the declarant particularly worthy of belief."⁴² Justice O'Connor rejected the use of other evidence at trial that corroborates the truthfulness of the hearsay statement. The *Wright* Court applied this analysis and found that the admission of the child's statements to the pediatrician under Idaho's residual exception violated the defendant's confrontation rights. The Court reasoned that the trial court impermissibly relied upon evidence to corroborate the truthfulness of the child's statement; the factors which surrounded the making of the statement were too few to ensure that the statement possessed particularized guarantees of trustworthiness.

In its decision, the *Wright* Court also rejected the approach of the

35. FLA. STAT. § 90.803(24) (2001).

36. 748 So. 2d 950 (2000).

37. U.S. CONST. amend XIV.

38. U.S. CONST. amend VI.

39. 448 U.S. 56 (1980).

40. 497 U.S. 805 (1990).

41. *Roberts*, 448 U.S. at 66.

42. *Wright*, 497 U.S. at 819.

Idaho Supreme Court, which had found that the introduction of the statement violated the Confrontation Clause⁴³ because the interview lacked sufficient procedural safeguards. The Court noted that the pediatrician failed to videotape the interview, asked leading questions, and had a preconceived idea the interview was with a child abuse victim.⁴⁴ The Court held that the United States Constitution did not impose "a fixed set of procedural prerequisites to the admission of such statements at trial,"⁴⁵ and the Idaho Supreme Court's imposition of procedural requirements for the admission of child hearsay statements in sexual abuse cases was inappropriate or unnecessary.⁴⁶

The cases interpreting the constitutionality of section 90.803(23) are important because the language of section 90.803(24) tracks the language of section 90.803(23). In *Perez v. State*,⁴⁷ the Florida Supreme Court held that section 90.803(23) was constitutional. In that opinion, the court commented:

Although the legislature provided a list of various elements that the court may consider in determining whether the time, content, and circumstances of the child victim's statement provide sufficient safeguards of reliability, . . . the list is not exhaustive, as demonstrated by that portion of the subsection which provides that the court may also consider 'any other factor deemed appropriate.' Indeed there could be no exhaustive list of elements to be considered. Each declaration, factually, will present varying elements relevant to the factors of time, content and circumstance and the determination of reliability cannot rest upon any specific calculation.⁴⁸

Subsequently, in *State v. Townsend*,⁴⁹ the Florida Supreme Court reaffirmed its ruling in *Perez* in light of *Idaho v. Wright*⁵⁰ and mentioned a number of factors that could be considered in determining the reliability of an out-of-court statement by a child.⁵¹

In considering whether the exception for statements of the elderly violates the accused's confrontation rights, the *Conner* court reached a result contrary to its decision in *Townsend*. The *Conner* court appears to be concerned about two issues. First, the court is concerned with the breadth of the statute; apparently section 90.803(24) applies to most declarants over the age of sixty, rather than being limited to declarants,

43. U.S. CONST. amend VI.

44. *Wright*, 497 U.S. at 812-813.

45. *Id.* at 818.

46. *Id.* at 818-19.

47. 536 So. 2d 206 (Fla. 1989).

48. *Id.* at 210.

49. 635 So. 2d 949 (Fla. 1994).

50. 497 U.S. 805 (1990).

51. *Townsend*, 635 So. 2d at 957-58.

such as a young children, who may prove to be ineffective witnesses or may be found incompetent to testify at trial. Second, the court was unable to discern any factors that could be used by the trial court to determine whether the out-of-court statement of an elderly declarant is reliable.⁵²

The *Conner* court was concerned with its inability to compile a "list" of factors that could be applied by the trial courts in determining reliability. The *Perez* decision, however, rejected a requirement for such a list as did the United States Supreme Court in *Wright*. Justice O'Connor's opinion also indicated that the following factors could be applied to determine reliability of the child's statement: (1) spontaneity and repetition of the statement; (2) the mental state of the declarant; (3) the use of terminology unexpected of a child of similar age; and (4) the lack of a motive to fabricate. Both *Wright* and *Perez* recognized that it is not possible to have an exhaustive list of factors applicable to all abuse cases, since each out-of-court statement will present varying elements of time, place, and circumstance.

However, there appear to be factors that can ensure the necessary particularized guarantees of trustworthiness for statements offered under section 90.803(24), recognizing that each statement will factually present varying "elements relevant to the factors of time, content and circumstance and [that] the determination of reliability cannot rest upon any specific calculation."⁵³ Many of the same factors which have been deemed to be relevant in determining reliability under section 90.803(23) also would be relevant to the reliability of a statement offered under section 90.803(24)—for example: (1) spontaneity and consistent repetition of the statement; (2) the mental state of the declarant, the lack of a motive to fabricate; (3) whether the statement was made at the first opportunity following the incident; and (4) whether the statement was in response to questions.

While the text of section 90.803(24) sets forth some factors that the Florida Legislature deemed relevant to the issue of reliability, the *Conner* court found that the list is inadequate and does not ensure that out-

52. Ms. Schulman argues that although there are no factors or list of factors that could guarantee the reliability of statements made by the victims in physical abuse cases that are admissible under section 90.803(23), *Florida Statutes* the statute has withstood constitutional muster. She reasons that, even if there are no factors that guarantee reliability under section 90.803(24), a similar constitutional analysis and result should follow. The Florida Supreme Court, however, has never interpreted the constitutionality or meaning of section 90.803(23) in the context of a physical abuse prosecution. If the Florida Supreme Court concludes that there are no factors which provide 'particularized guarantees of trustworthiness' to statements of physical abuse, the admission of hearsay statements under section 90.803(24) will violate the confrontation rights of the accused.

53. *Perez v. State*, 536 So. 2d 206, 210 (Fla. 1989); see *Wright*, 497 U.S. at 822.

of-court statements of the elderly are reliable. If it remains sound public policy to recognize this hearsay exception when out-of-court statements are offered by the prosecution in criminal cases, it is incumbent upon the legislature to consider whether additional factors might ensure reliability and to include them in an amendment to section 90.803(24).⁵⁴

III.

PRIOR ACTS OF ABUSE

George Franklin's Comment *Navigating Between Extremes* thoughtfully analyzes Florida case law regarding the admissibility of uncharged misconduct evidence (a/k/a "similar fact evidence" or "*Williams* rule evidence"⁵⁵) in child sexual abuse prosecutions. In *Heuring v. State*, the Florida Supreme Court held that in a prosecution for sexual battery upon a child in a familial or custodial setting a prior act of abuse that shares significant similarities with the charged act is admissible under section 90.404(2), the Florida equivalent of Federal Rule of Evidence 404, to corroborate the testimony of the child-victim.⁵⁶ Subsequently, the court expanded this use of collateral crime evidence to any case involving child sexual abuse where the prior and charged offenses are "strikingly similar."⁵⁷ This latter decision indicates that one of the significant points of similarity that can be considered by the trial court is whether both offenses occurred in a familial or custodial setting.⁵⁸

The balance between the competing interests in these cases is difficult: the need for a fair trial of the accused against the egregious nature of the crime and the difficulty in prosecuting a case where the victim is a young child and the offense occurs in private. The root of the problem

54. During the 2000 session of the Florida Legislature, a bill was introduced to amend section 90.803(24), *Florida Statutes* in light of *Conner*. The following factors were included in the language of the exception to be considered by the trial court in determining reliability: the statement's spontaneity; whether the statement was made at the first available opportunity following the alleged incident; whether the statement was elicited in response to questions; the mental state of the elderly person; when the incident was reported; whether the elderly person used terminology unexpected of a person with his or her disability; the motive or the lack of motive to fabricate the statement; the vagueness of the accusations; the possibility of any improper influence on the elderly person; and contradictory statements by the elderly person. Fla. CS for SB 2048 (2000). This amendment to section 90.803(24) was not enacted by the legislature and no similar legislation was introduced during the 2001 session.

55. See generally CHARLES W. EHRHARDT, *FLORIDA EVIDENCE* § 404.9 (2001).

56. 513 So. 2d 122 (Fla. 1987).

57. *Saffor v. State*, 660 So. 2d 668, 671 (Fla. 1990).

58. *Id.* This is not the exclusive purpose of admitting evidence under section 90.404(2), *Florida Statutes* in sexual abuse prosecutions. Evidence is admissible under section 90.404(2) to prove any relevant fact or issue other than propensity or bad character. *Heuring* recognized that "corroboration" of a sexual abuse "victim's testimony" is a permissible purpose, which is different than propensity. *Heuring*, 513 So. 2d at 125. Arguably, section 90.404(2) is not expanded by this line of cases.

in determining how to achieve a proper balance in this area in Florida may have originated in the *Heuring* decision itself. There, the issue briefed and argued before the Florida Supreme Court was whether collateral evidence of a prior act of abuse was admissible to prove a “pattern of criminality” on the part of the defendant.⁵⁹ After rejecting the evidence offered for this purpose under section 90.404(2), the court’s decision adopted the “bolstering the testimony of the victim” theory even though neither party briefed or argued that issue.⁶⁰ The theoretical basis underlying *Heuring* was not fully set forth and the cases subsequently interpreting it have not been able to supply the rationale. In fact, there is enough uncertainty that two recent commentators have been unable to agree whether *Heuring* expands or limits the use of collateral crime evidence in child sexual abuse cases.⁶¹

The *Heuring* opinion’s lack of a clearly enunciated rationale is one reason it is difficult to understand the *Heuring* progeny. One of the justifications for the decision in *Heuring* is that the testimony of the victim is corroborated because evidence of a prior sexual offense committed by the accused that shares sufficient similarity to the victim’s account of the charged offense makes it less likely that the accused fabricated testimony regarding the charged offense. A second justification, which is similar, is the doctrine of chances.⁶² The Florida Supreme Court, however, has never directly embraced either of these theories.⁶³ Finally, it may be argued that the evidence of prior acts corroborates that a criminal act occurred, rather than indicating the defendant’s propensity to commit the criminal act. The problem with these theories is that it is difficult, if not impossible, for the jury to distinguish between evidence that is offered for any of the above purposes and evidence that is offered to show the defendant’s propensity to commit the abusive act.⁶⁴ As a result of this difficulty, the dangers that justify the exclusion of propensity evidence—that the jury will give the propensity evidence too much

59. *Heuring*, 513 So. 2d at 125.

60. *Id.*

61. Compare David M. De La Paz, *Sacrificing the Whole Truth in Florida’s Deteriorating Admissibility of Similar Fact Evidence in Cases of Child Sexual Abuse*, 15 N.Y.L. SCH. J. HUM. RTS. 449 (1999) with Richard J. Sanders, “A Dangerous Bend in the Ancient Road:” *The Use of Similar Fact Evidence for Corroboration*, 74 FLA. B. J. 40 (Feb. 2000).

62. See EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 4.01 (1984).

63. See *Saffor v. State*, 660 So. 2d 668 (Fla. 1995) (Anstead, J., concurring) (approving portion of First District dissent setting forth the rationale for *Heuring*).

64. See *Farrill v. State*, 759 So. 2d 696, 702 (Fla. 2nd DCA 2000) (Altenbernd, A.C.J., concurring) (“No matter whether we justify the introduction of this evidence as ‘corroborative’ of a witness’ testimony, or relevant to ‘motive,’ ‘intent,’ or ‘plan,’ I think we ought to admit that it is actually introduced, or at least relied upon by jurors, because it is a prior behavior that we believe, with or without scientific basis, to be validly predictive of subsequent sexual misconduct by the defendant.”).

significance or will convict because the accused is a bad person—are also present when evidence is offered to corroborate the victim's testimony.

One barrier to understanding Florida case law regarding uncharged misconduct evidence is the erroneous assumption that evidence must be similar in order to be admissible under section 90.404(2). Admissibility of this evidence depends on its relevancy, not on its similarity. While sufficiently unique similarities may supply the basis for admitting uncharged misconduct evidence to prove issues such as identity, evidence of other crimes that is not similar is admissible to prove any material fact or issue. Additionally, not all similar fact evidence is admissible under section 90.404(2).⁶⁵

The lack of a theoretical rationale as well as the court's incorrect assumption that the evidence is admissible simply because it is similar, make it difficult to understand when evidence offered to corroborate the testimony of the victim has sufficient similarity to be admitted under the "corroboration" theory. There is little guidance from Florida courts to determine when the necessary similarity is present. Some appellate decisions have resorted to listing both similar and dissimilar factors in determining whether the evidence was admissible.⁶⁶ The difficulty with this approach, however, is in understanding which similarities or dissimilarities are significant. In compiling any list of similarities, the items to be included depend upon the person compiling the list, creating a risk that the person making the list may skew the factors consciously or subconsciously in order to achieve a desired outcome. In fact, one appellate judge who authored a concurring opinion that used a list of factors to determine whether there were sufficient similarities to admit the evidence recently wrote that "that the district courts' efforts to identify relevant factors in this analysis have added little to the existing case-by-case method,"⁶⁷ and that he "frankly doubt[s] . . . that [he has] . . . the expertise to determine what specific behavior is validly predictive of subsequent sexual misconduct."⁶⁸

Mr. Franklin questions the policy of restricting the use of collateral crime evidence to prosecutions of child sexual abuse in a familial or custodial setting. The successful prosecution of crimes involving physical abuse of a child, sexual battery upon an adult, and other crimes that frequently occur in private, similarly depend on the credibility of the

65. I discuss this point in EHRHARDT, *supra* note 55, § 404.9.

66. See *Shipman v. State*, 668 So. 2d 313 (Fla. 4th DCA 1996); *Moore v. State*, 659 So. 2d 414 (Fla. 1995).

67. *Farrill*, 759 So. 2d at 702 n.2. (citing EHRHARDT, *supra* note 55, § 404.18, at 207).

68. *Id.* at 701.

victim since no eye witnesses exist. There appears to be no rationale for limiting the use of collateral crime evidence to a child sexual abuse victim's testimony, other than the vile nature of the charged offense and the difficulty of proving that the defendant committed the abuse.

Mr. Franklin argues that the approach of the United States Congress in enacting Federal Rule of Evidence 414 was unsound policy. Under the Federal Rules of Evidence, prior acts of child molestation are admissible to prove any relevant issue in a child abuse prosecution, including propensity. Federal appellate decisions have also required that statements admitted under Federal Rule of Evidence 414 must also pass a Federal Rule of Evidence 403 balancing test in order to insure that there is no prejudice.⁶⁹ The Federal Rules of Evidence treat child abuse or molestation cases differently than other criminal or civil cases where propensity evidence is regularly excluded. This differential treatment conflicts with the tenet that the same rules of evidence should apply to the trial of all cases and that special evidentiary rules for particular cases should not be applied.

Subsequent to Mr. Franklin's presentation at the symposium, the Florida legislature amended section 90.404 by adding language in subsection (b) that is similar to Federal Rule of Evidence 414.⁷⁰ The amendment, which became effective on July 1, 2001, substantially relaxes the prohibition on the admissibility of similar fact evidence to prove the propensity of the accused to commit the charged act of child molestation. Thus, *Heuring* and *Saffor* apparently lose their significance. The amendment expands the admissibility of prior acts of abuse. Now, evidence of prior acts of child abuse are admissible to show the defendant's propensity to commit the charged act of abuse or molestation in addition to corroborating the testimony of the victim. Most prosecutors will probably offer the evidence for the former purpose.

The Florida Legislature, however, may have created a new period of uncertainty in Florida. Evidence of prior acts of abuse offered under the amended section 90.404(b) is now subject to a section 90.403 balancing.⁷¹ The factors that must be considered by the trial court in undertaking this balancing must be defined by the Florida appellate courts.

69. See, e.g., *United States v. McHorse*, 179 F.3d 889 (10th Cir. 1999); FED. R. EVID. 403.

70. Fla. CS for SB 2012 (2001). Section 90.404(b), *Florida Statutes* now provides:

"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 purpose 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." FLA. STAT. § 90.404(b) (2001).

71. See *Henry v. State*, 574 So. 2d 73 (Fla. 1991); *Bryan v. State*, 533 So. 2d 744 (Fla. 1988).

Recently, one federal court outlined the following factors to consider when evaluating a statement under Federal Rule of Evidence 414 and 403: (1) the similarity of the prior act to the charged act; (2) the temporal proximity of the prior act to the charged act; (3) the frequency of the prior acts; (4) the presence of lack of intervening circumstances; and (5) the necessity of that evidence beyond the testimony of the witnesses already offered at trial.⁷² Additionally, the Rule 403 balancing test must be made on the record in the federal courts.⁷³

Although the Florida courts usually view federal decisions interpreting a Federal Rule of Evidence as persuasive guidelines for interpreting a given provision of the Florida Evidence Code that is based on a Federal Rule of Evidence,⁷⁴ determining the appropriate factors and the manner that they should be weighed in the section 90.403 balancing will take time. Perhaps the uncertainty in defining adequate similarity under *Heuring* and *Saffor* will be less, at least in the near term, than the uncertainties involved in the admission of evidence under sections 90.404(b) and 90.403.⁷⁵

72. See *Doe v. Glanzer*, 232 F.3d 1258 (9th Cir. 2000).

73. See *id.* at 1268; see also *United States v. Velarde*, 214 F.3d 1204, 1211 (10th Cir. 2000); FED. R. EVID. 403.

74. See *Dinter v. Brewer*, 420 So. 2d 932, 934 (Fla. 3d DCA 1982).

75. There may also be a period of uncertainty until the Florida Supreme Court determines whether section 90.404(b) is substantive or procedural and, if the latter, whether the court will adopt it through its rule-making authority. See *In re Amendments to the Florida Evidence Code*, 782 So. 2d 339 (Fla. 2000).

