Amendments to Florida Evidence Code

CHIEF JUSTICE: MR. McSHANE.

THE WRONG CASE.

CHIEF JUSTICE: I AM SORRY. LET'S SEE WHERE WE ARE. IT SAYS THE AMENDMENTS.

YES, SIR.

CHIEF JUSTICE: THANK YOU. MR. McSHANE, YOU MAY RELAX.

I HAPPEN TO KNOW MR. McSHANE. I AM SURE HE WAS QUITE HAPPY.

CHIEF JUSTICE: THAT'S RIGHT. I WAS USING YOUR NAME IN VAIN, SIR.

MY NAME IS VINCENT HOWARD. I AM THE CHAIR OF THE CODE OF RULES AND EVIDENCE COMMITTEE OF THE FLORIDA BAR ACTION AND WE ARE HERE REGARDING AMENDMENTS TO THE RULES OF EVIDENCE OF THE ALL OF THE AMENDMENTS HAVE BEEN PASSED BY THE LEGISLATURE, WHICH, OF COURSE, YOU ARE AWARE. THREE OF THE PROPOSED AMENDMENTS TO THE RULES OF CODE AND EVIDENCE OR RULES OF EVIDENCE OF THE FLORIDA BAR, WE DID NOT OPPOSE IN OUR REQUEST OR RECOMMENDATIONS TO THIS COURT, AND WE HAVE RECEIVED NO COMMENTS, EITHER OPPOSING OR BACKING THOSE PROPOSED AMENDMENTS FORM THE ONE THAT WE HAVE HERE, TODAY, WHICH I THINK WE NEED TO DISCUSS IN SOME DETAIL, IS THE PROPOSED AMENDMENT TO CHAPTER 90.404 OF THE FLORIDA STATUTES. THE AMENDMENT WOULD PROVIDE GENERALLY, IN CRIMINAL CASES IN WHICH THE DEFENDANT IS CHARGED WITH A CRIME, AS THEY CALL IT, OF CHILD MOLESTATION, EVIDENCE OF DEFENDANT'S OTHER CRIMES OR OTHER ACTS IS ADMISSIBLE AND MAY BE CONSIDERED ON ANY MATTER TO WHICH IT IS RELEVANT. THE COMMITTEE HAS OPPOSED THAT PROVISION. WE OPPOSED IT ON SUBSTANTIVE GROUNDS IN THE LEGISLATURE AND IT WAS OBVIOUSLY LOST. WE HAVE IDENTIFIED CERTAIN PROCEDURAL ASPECTS OF THE PROPOSED RULE, AND I WILL REFER TO IT HERE AS THE PROPOSED RULE, BECAUSE THAT IS OUR PURPOSE. FIRST, IT IS OUR POSITION THAT IT CONFLICTS, GENERALLY, WITH SECTION 90.104 OF THE FLORIDA STATUTES, THAT REQUIRES THAT INADMISSIBLE EVIDENCE NOT BE PLACED BEFORE THE JURY IN ANY MEANS, AS FAR AS IT MAY BE PRACTICAL, AND THE REASON IN THE COMMITTEE SPONSOR'S NOTE IS THAT, ONCE YOU HAVE IT BEFORE THE JURY, A CURATIVE INSTRUCTION IS BASICALLY AN EMPTY FORMALITY.

CAN WE GO BACK TO LET'S TAKE THE ORIGIN OF THIS PROPOSAL AND KIND OF ANALYZE IT A LITTLE BIT. I GUESS THERE IS REALLY NO ONE TO SPEAK IN FAVOR OF IT AT THIS POINT, BUT IN DOING THE ANALYSIS, IT DOES APPEAR THAT IT CAME FROM THE FEDERAL RUSE, AND THE CASE LAW DEVELOPED WITH REGARD TO THAT RULE IN THE FEDERAL COURTS. WHAT ARE YOUR THOUGHTS, WITH REGARD TO HOW THE FEDERAL COURTS HAVE DEALT WITH THIS PARTICULAR RULE AND THE BALANCING THAT IS DONE IN THE FEDERAL COURTS, SUGGESTING THAT MAYBE IT IS NOT QUITE AS HARSH AS IT WAS FACIALLY. WHAT DOES THE COMMITTEE THINK ABOUT THAT?

THE FEDERAL RULE IS THE MODEL FOR THIS RULE. THIS LEGISLATION HAD BEEN PROPOSED TO MY KNOWLEDGE, ABOUT THREE YEARS AGO, AND FOR TWO YEARS WE HAD DISCUSSIONS BACK AND FORTH AND CERTAIN CHANGES WERE MADE. I HAVE REVIEWED SOME OF THE FEDERAL OPINIONS,

ALTHOUGH NOT AN EXHAUSTIVE REVIEW OF THE FEDERAL OPINIONS. I RESPECTFULLY DISAGREE. THE ONES I HAVE LOOKED AT, AND I DON'T HAVE COPIES HERE, SEEM TO IMPLY THAT, IN THE FEDERAL COURT THERE WAS A PRESUMPTION OF ADMISSIBILITY OF THIS EVIDENCE, AND THAT IS WHERE I THINK THERE IS A DIFFERENCE. FLORIDA LAW, AT LEAST THE WAY I READ IT, HAS A GENERAL RULE OF EXCLUSION, WHICH I TERM CHARACTER PROPENSITY EVIDENCE, AND I WILL EXPLAIN LATER WHY I THINK THIS GOES TO PROPENSITY EVIDENCE. THE LEGISLATURE, IN RESPONSE TO THREE OPINIONS BY THIS COURT, THE HERRING OPINION, RECALLS OPINION AND THE SAPLING OPINION. IN RAWLS AND HERRING, AND I DON'T WANT TO MISUNDERSTAND THE COURT'S OPINION, BUT FIRST IN STANDARDS REGARDING THE FAMILIAL SITUATION OF CONTACT AND THEN EXTENDING THAT TO CUSTODIAL PERSONS IN A NONFAMILIAL SETTING, IN OTHER WORDS SOMEONE THAT WOULD HAVE THAT CONTROL. THAT EXTENSION STILL RELIED ON A FINDING OF SIMILAR FACT EVIDENCE, AND, OF COURSE, 90.404 SPEAKS OF SIMILAR FACT EVIDENCE BEING ADMISSIBLE IN CRIMES IN GENERAL, TO SHOW CERTAIN MATTERS, MATERIAL FACTS OF ISSUE. THE DIFFICULTY WITH THIS LEGISLATION IS IT ELIMINATES ANY APPARENT REQUIREMENT FOR SIMILAR FACT EVIDENCE. AND IF YOU LOOK AT THE HERRING AND RECALLS OPINIONS, AND I AM SPEAKING CONCURRENTLY WITH JUSTICE WELLS'S OPINION, IT CAN BE CORROBORATIVE OF THE VICTIM'S TESTIMONY, BUT THE CORROBORATION OCCURS BECAUSE OF THE SIMILARITY OF FACTS. I BELIEVE JUSTICE ANSTEAD'S COMMENT WAS IT WOULD BE UNLIKELY THAT THE VICTIM COULD HAVE FABRICATED A VERSION OF THE EVENTS WHICH SHARE THE UNIQUE CHARACTERISTICS, AND THAT IS THE IN --

WHAT DO YOU THINK ABOUT, ALTHOUGH STILL NONSTATED IN THE RULE, STILL BRING BACK THE SIMILARITY ASPECT, AS THEY DO IN ANALYSIS. DO YOU SEE THAT THEY DO THAT OR NOT DO IT, OR IS IT JUST --

I HAD NOT READ THE TWO OPINIONS THAT YOUR HONOR REFERS TO.

HOW ABOUT SOME OF THE ONES THAT YOU HAVE LOOKED AT? LET'S TALK ABOUT THE ONES.

THEY SEEM, THE ONES I HAVE REVIEWED IN THE PAST COUPLE OF WEEKS, SEEM TO, I WOULD SAY THAT SOME OF THEM, THE OLDER ONES THAT CAME IN SHORTLY AFTER THIS RULE 414 WAS ENACTED BACK IN 1996, IF I RECALL, '95 OR '96, THEY DID NOT SEEM TO VIEW IT THAT WAY, AT LEAST THE DISTRICT COURT OPINIONS THAT I READ. THEY LOOKED AT IT AND SAID THERE IS A PRESUMPTION OF ADMISSIBILITY, AND WE ARE GOING TO LET IT IN, AND IN THE BALANCING TEST, THE PROBATIVE VALUE OF THE DEFENDANT WAS ALMOST ALWAYS LOST, AND THAT WAS OF CONCERN. CERTAINLY, IF YOU HAD READ OTHER CASES THAT YOU FEEL THEY ARE BRINGING BACK IN THIS SIMILARITY REQUIREMENT, I WOULD DEFER TO YOUR READING. I BELIEVE THAT THE SIMILARITY REQUIREMENT IN THE FEDERAL SYSTEM IS NOT A PART OF 414 OR 415. IT IS NOT WITHIN THE TEXT. IT IS WITHIN THE TEXT OF THE GENERAL FEDERAL WILLIAMS RULE, IF YOU PREFER.

IT YOUR READING OF STATUTE THAT, WHATEVER IT DOES WITH REGARD TO SIMILARITY, THAT THE SPECIFIC PURPOSE IS TO ALLOW THE EVIDENCE TO PROVE PROPENSITY?

YES.

AND TO ME THAT WAS THE MORE DRAMATIC ALTERATION OF THE WILLIAMS DECISION, CORRECT?

CERTAINLY.

NOW, THAT IS, THERE IS NOTHING ABOUT THAT THAT APPEARS TO BE PROCEDURAL. YOU WERE SAYING THERE WERE SOME PARTS OF THIS LEGISLATION PROCEDURE.

YES.

THE ALTERATION OF THE WILLIAMS RULE AS TO ALLOW EVIDENCE TO PROVE PROPENSITY TO COMMIT A CRIME, WOULD BE A SUBSTANTIVE CHANGE IN THE LAW.

I AGREE.

NOW, WE, OUR AUTHORITY TO REJECT A PROPOSAL, PROCEDURAL -- AND WE DON'T AGREE THERE SHOULD BE A DIFFERENT PROCEDURE, BUT WE HAVE OVER THE YEARS, AS A MATTER OF COMITY, PROCEED TO ALLOW SUBSTANTIVE, IF THEY DIDN'T CONFLICT WITH ANY OTHER THING INJURIES PRUDENCE, CORRECT? THERE ARE SUBSTANTIVE PROVISION INS OUR RULES OF EVIDENCE.

ON MOST INDICATIONS, YES, MA'AM, AND IN FACT THE COURT HAS PROVIDED THOSE AS TIMES.

SO IN A WAY, IF WE SAY THAT THIS IS NOT PROCEDURAL. IT IS SUBSTANTIVE. THAT IS ONE REASON TO NOT PUT IT IN THE EVIDENCE CODE, BUT THE OTHER REASON WOULD BE THAT, IF SOMEONE IS CONCERNED THAT THERE IS A CONSTITUTIONAL DEFICIENCY IN THE SUBSTANTIVE LAW, OTHERWISE THE LEGISLATURE HAS THE RIGHT, DID THEY NOT, TO CHANGE THE SUBSTANTIVE CRIMINAL LAW, UNLESS THEY ARE INFRINGING EITHER ON THE COURT'S RULE-MAKING POWER OR ON THE, OR THEY HAVE DONE SOMETHING THAT IS UNCONSTITUTIONAL.

YES, MA'AM. UNFORTUNATELY, IN THE LINE OF CASES I REVIEWED DATING BACK TO 1882, IT HAS BEEN RECOGNIZED BY THIS COURT THAT THE LEGISLATURE DOES HAVE AUTHORITY TO PASS LAWS REGULATING THE ADMISSION OR NONADMISSION OF EVIDENCE. THE PROCEDURAL ASPECTS THAT I SEE IN THIS CASE THAT I THINK SHOULD BE ADDRESSED BY THE COURT, YOU HAD IDENTIFIED IN ONE OF THE AREAS IS THE LAW GOING TO FACE THE CONSTITUTIONAL CHALLENGE, EITHER SUBSTANTIVELY OR PROCEDURALLY, LATER ON? I DON'T KNOW. WE DON'T HAVE A CASE IN CONTROVERSY BEFORE THE COURT RIGHT NOW. AND THAT IS A PROBLEM, IN TERMS OF TRYING TO MAKE A DECISION HERE.

YES, MA'AM. I THINK IT IS, BECAUSE I THINK THAT IF YOU, AS A MATTER OF COMITY, I THINK THE COURT HAS GENERALLY DEFERRED TO THE LEGISLATURE IN THE AREA OF EVIDENCE. I AGREE, IN THE 2000 CYCLE, AS THE COURT MAYBE OBVIOUSLY REMEMBERS, THERE WAS A DISPUTE ABOUT THE ADMISSIBILITY OF DEPOSITION TESTIMONY AS SUBSTANTIVE EVIDENCE. THE COURT DECLINED TO ADOPT THAT LEGISLATION AS A RULE, SO IT DOESN'T ALWAYS HAPPEN. THE CONCERNS I HAVE AND THE CONCERNS THAT THE COMMITTEE HAS, THE LANGUAGE IN THE PROPOSED RULE, 221, IS IN LOGICAL CONFLICT WITH THE LANGUAGE ALREADY IN THE EVIDENCE CODE, IN BOTH 104, IN 404 SUBSECTION 1, WHICH GENERALLY IS AN EXCLUSION AREA RULE OF CHARACTER EVIDENCE, AND IN 404, THE GENERAL WILLIAMS RULE. IT BECOMES AN EXCEPTION BY AN EXCEPTION TO AN EXCEPTION TO AN EXCEPTION, DOWN THE FUNNEL THAT OCCURS IN A VERY CASE, THAT BEING CHILD MOLESTATION. WHEN IT IGNORES THAT POINT, IT IGNORES THE LOGICAL POINTS MADE BY JUSTICE ANSTEAD AND JUSTICE SHAW, IN THE RAWLS HEARING DECISIONS, THAT FOR CORROBORATION PURPOSES, THE EVIDENCE MAY BE ADMISSIBLE, BUT YOU HAVE TO HAVE SOMETHING YOU ARE CORROBORATING. OTHERWISE IT BECOMES SIMPLY PROPENSITY. PROPENSITY AND CORROBORATION ARE NOT, THEY ARE NOT INTERRELATED IN THAT SENSE. THERE HAS TO BE SOME LOGICAL POINT TO THE CORROBORATION. I KNOW MY TIME HAS ENDED HERE. I APOLOGIZE. ANY OTHER QUESTIONS, JUSTICE WELLS? MR.^CHIEF JUSTICE

THANK YOU VERY MUCH, MR. HOWARD. MS.^SAUNDERS.

MAYBES THE COURT. I AM PAULA SAUNDERS, AND I AM HERE TODAY, REPRESENTING THE FLORIDA PUBLIC DEFENDERS ASSOCIATION. WE SUPPORT THE COMMITTEE'S RECOMMENDATION NOT TO ADOPT THIS PROPOSED RULE, AND I AM INCOMPLETE AGREEMENT WITH THE COMMENTS THAT MR. HOWARD HAS MADE THIS MORNING. IF YOU LOOK --

WOULD YOU ADDRESS THAT, IS ONE AREA THAT I AM CONCERNED WITH, IS THAT IF 414 HAS BEEN INTERPRETED, ACTUALLY AS IT IS APPLIED, MORE CONSISTENTLY WITH THE WAY WE HAVE

LOOKED AT THE WILLIAMS RULE KINDS OF THINGS IN A 403 KIND OF BALANCING, WOULD IT ALLEVIATE THE PROBLEMS OR WOULD IT NOT? THAT YOU ARE CONCERNED WITH, THE ONES WE HAVE BEEN TALKING ABOUT, THE PROPENSITY ISSUES AND THOSE THINGS THAT WOULD BALANCE THAT OUT.

IF THIS COURT WERE TO ADOPT THE RULE, IT WOULD HAVE TO INTERPRET IT AS BEING PERMISSIVE, NOT BEING MANDATORY, AND IS REQUIRING THE SAME TRADITIONAL CASE BY CASE DETERMINATION OF RELEVANCY, IN WEIGHING OF THE PROBATIVE VALUE VERSUS PREJUDICE.

BUT DON'T WE DO THAT WITH OTHER AREAS, WHERE SOMETHING IS ADMISSIBLE, THEN WE STILL WEIGH IT UNDER 403?

ABSOLUTELY. BUT IF THAT IS THE INTERPRETATION THE COURT IS GOING TO MAKE, THEN I SUBMIT THAT THIS 2-B-1 IS SIMPLY REDUNDANT TO 2-A. I AM NOT SURE WHAT THE PURPOSE THE LEGISLATURE HAD, IN ENACTING THIS PROVISION, UNLESS IT WERE TO BE A MANDATORY PROVISION. IF YOU LOOK AT THE LANGUAGE OF 2-A, IT SAYS SIMILAR FACT EVIDENCE IS ADMISSIBLE, WHEN RELEVANT TO PROVE, AND THEN IT IDENTIFIES THE AREAS OF RELEVANCE. "B" READS THAT SIMILAR FACT EVIDENCE, IN CASES INVOLVING CHILD MOLESTATION, IS ADMISSIBLE. IT DOESN'T SAY IS ADMISSIBLE WHEN RELEVANT TO PROVE. IT SIMPLY SAYS IT IS ADMISSIBLE. SO THERE IS NO QUALIFIER THERE.

DOESN'T 1 HAVE, DEPENDING, AND OBVIOUSLY THIS HAS BEEN NOT INTERPRETED AND THE CONTENTION IS MADE THAT THIS IS AN ADOPTION ON THE FEDERAL RULE. ON THE OTHER HAND, CONTENTION IS MADE THAT THIS IS, REALLY, BASED ON CASE LAW NOT OF THIS COURT, BUT THE LAST, YOU KNOW, CLAUSE MAY BE CONSIDERED FOR ITS BEARING ON ANY MATTER TO WHICH IT IS RELEVANT, SO THE OBVIOUS REVERSE OF THAT WOULD BE THAT IT WOULDN'T BE CONSIDERED FOR ITS BEARING ON ANY MATTER TO WHICH IT IS NOT RELEVANT.

WELL, THEN, I AM CONFUSED AS TO WHAT THE POINT IS OF B, IF IT IS ONLY ADMISSIBLE, IF RELEVANT, AND THE QUALIFIER IS, IF RELEVANT, THEN WHY IS IT NOT COVERED UNDER 2-A. WHY DO WE NEED 2-B? I THINK 2-B IS SAYING THAT IT IS SIMPLY ADMISSIBLE.

WOULD YOU ADDRESS THE SUBSTANTIVE VERSUS PROCEDURAL ISSUE THAT IS THE AWESOME CONCEPT TO DEAL WITH.

I THINK THAT WE RUN INTO A SUBSTANTIVE-VERSUS-PROCEDURAL PROBLEM, IF THIS IS A MANDATORY RULE OF ADMISSIBILITY IN CHILD MOLESTATION CASES. THEN WE SAY TO THE TRIAL JUDGE, YOU NO LONGER HAVE DISCRETION TO DETERMINE ON A CASE-BY-CASE BASIS, WHETHER THE EVIDENCE IS RELEVANT, WHAT IT IS RELEVANT TO, AND THE JUDGE NO LONGER MAKES THAT WEIGHING OF THE PROBATIVE VALUE VERSUS THE PREJUDICE. THAT HAS ALWAYS, TRADITIONALLY, BEEN A JUDICIAL FUNCTION, AND WHAT THE LEGISLATURE IS SAYING IS THAT THE EVIDENCE IS SIMPLY ADMISSIBLE. YOU ARE TAKING AWAY THE JUDICIAL ROLE OF DETERMINING THE RELEVANCE IN MAKING A CASE BY CASE DETERMINATION ON THE PROBATIVE VERSUS PREJUDICE. IF YOU LOOK AT EVEN THE PRE-WILLIAMS CASES, THE 1959 WILLIAMS V STATE, YOU LOOK AT WILLIAMS V STATE, YOU LOOK AT ALL OF THE POST WILLIAMS CASES. THE CORNERSTONE OF ADMITTING SIMILAR FACT EVIDENCE HAS ALWAYS BEEN RELEVANCE I. IT HAS ALWAYS, SIMILAR FACT EVIDENCE HAS ALWAYS BEEN RELEVANT TO SOME PARTICULAR MATERIAL ISSUE IN DISPUTE IN THE CASE. THIS SECTION SAYS IT MAY BE CONSIDERED ON A MATTER TO WHICH IT IS RELEVANT, BUT IT DOESN'T CONDITION ITS ADMISSION ON BEING RELEVANT TO A MATERIAL ISSUE IN DISPUTE.

I READ THIS AS, REALLY, AGAIN, LEAVING OUT THE, A, THE FACT THAT WHEN THE EVIDENCE IS RELEVANT SOLELY TO ADD CHARACTER OR PROPENSITY, BECAUSE IT DOESN'T SAY THAT IN B, THAT IS BEING ELIMINATED, AND THAT IS WHAT THE FEDERAL RULE SAYS, WHICH IS THAT IT CAN BE, RELEVANCY IS, CAN BE PROPENSITY, WHICH IS TRULY WHAT THE WILLIAMS SAID, NO, YOU

CAN'T BE PUTTING IN PAST CRIMES TO SHOW PROPENSITY TO COMMIT A CRIME. THAT IS THE ESSENCE OR THAT CAN'T BE AN ISSUE OF PROPENSITY, BECAUSE YOU WOULD BE CONVICTING SOMEBODY BASED UPON THEIR PAST CRIMINAL ACTS, BUT I STILL SEE THERE BEING, I MEAN, IT STILL SAYS RELEVANCY. THERE IS STILL RELEVANCY IN THERE, BUT I GUESS GETTING BACK TO ANSWERING OR INTERPRETING THIS AS TRYING TO SEE WHAT THE LEGISLATURE MEANT, ARE YOU, THOSE ARE, YOU ARE SAYING THAT ANYTHING TO THE ADMISSIBILITY OF EVIDENCE IS, BY ITS NATURE, PROCEDURAL?

NO. I AM SAYING THE DETERMINATION AS TO WHETHER SOMETHING IS RELEVANT, THAT CASE BY CASE DETERMINATION, IS A JUDICIAL FUNCTION, AND IF THEY MAKE THIS EVIDENCE MANDATORILY ADMISSIBLE, IT IS TAKING AWAY FROM THE TRIAL JUDGE, THE ABILITY TO DETERMINE WHETHER THE EVIDENCE IS RELEVANT AND TO DO THE WEIGHING PROCESS THAT IS TRADITIONALLY A JUDICIAL FUNCTION AND SHOULD REMAIN A JUDICIAL FUNCTION.

BUT YOU ARE, YOU SEEM TO BE TRANSLATING THE WORD "IS ADMISSIBLE" INTO A MANDATORY. THAT IS HOW YOU READ THAT.

WELL, IF IT IS NOT MANDATORY, THEN I AM NOT SURE WHAT THE PURPOSE OF THIS PROVISION IS. THEN IT WOULD SEEM TO BE REDUNDANT OF 2-A.

AGAIN --

ALTHOUGH I AGREE WITH JUSTICE PARIENTE, THAT IT IS ELIMINATING THAT EXCEPTION FOR THE BAD ACT OF PROPOSE EPPSITY EVIDENCE. I DISAGREE WITH THAT, AND THAT IS A HUGE EXPANSION OF THE WILLIAMS RULE, AND IT IS VERY, VERY DANGEROUS.

NOW, THAT IS A SEPARATE ARGUMENT. THE QUESTION, THEN, IS ISN'T THAT ALTERATION OF THE WILLIAMS RULE SUBSTANTIVE?

THE WILLIAMS RULE IS SUBSTANTIVE, I AGREE.

SO IF THE RULE PRESERVES THAT THE JUDGE STILL HAS THE ABILITY TO WEIGH IT BUT SAYS WHEN YOU ARE WEIGHING IT, YOU CAN LOOK AT RELEVANCE TO SHOW PROPENSITY, THEN THIS WOULD BE A SUBSTANTIVE STATUTE THAT, ABS CONSTITUTIONAL BARS, THE LEGISLATURE WOULD HAVE THE RIGHT TO ENACT. CORRECT?

I DON'T -- NO. AND THE REASON WHY I DISAGREE WITH THAT IS THAT THE PROPENSITY EVIDENCE STILL HAS TO GO, ONE OF THE EQUATIONS IN THAT WEIGHING PROCESS, IN THE 403 PREJUDICE-VERSUS-PROBATIVE VALUE, SO IF THIS IS SAYING THAT IT COMES IN FOR PROPENSITY AND THIS IS NO LONGER A WEIGHING PROCESS, I DO THINK THAT ENCROACHES ON THE JUDICIAL FUNCTION.

BUT ALL OF THIS IS TO SAY, IF WE WERE TO AGREE WITH THE COMMITTEE, THAT THIS ISN'T THE PLACE TO FIG YOUTH OUT WHAT IS MENTOR NOT MEANT BUT TO LET THIS COME UP IN A CASE IN CONTROVERSY. IS THAT WHAT YOU ARE ADVOCATING? BECAUSE WE ARE CERTAINLY NOT SAYING THAT WE COULDN'T DO IT AT THIS POINT. WE ARE JUST DECIDING WHETHER WE ARE GOING TO PUT THIS INTO OUR EVIDENCE RULES.

WELL, IF THE COURT IS GOING TO DO THAT, THEN I THINK IT NEEDS TO CLARIFY THAT THIS PROVISION IS NOT MANDATORY AND IT WOULD NOT ALLOW PROPENSITY EVIDENCE TO COME IN.

YOU ARE SAYING THAT THAT HAPPENS AND IT NOT COME IN, THAT THAT BE CLARIFIED OR THAT IT NOT BE ADOPTED?

NO. I THINK THIS IS A VERY DANGEROUS POSITION, AND I AM ADVOCATING THAT THE COURT NOT ADOPT IT. IF THE COURT IS INCLINED TO ADOPT IT, THEN I THINK THAT THERE NEEDS TO BE SOME

CLARIFICATION PROVISION.

BUT SIMPLY IF THE COURT DIDN'T ADOPT IT AS PART OF THE EVIDENCE CODE, DOES NOT STRIKE IT OUT OF THE STATUTE. I MEAN, THE CIRCUIT JUDGE IN THERE IS STILL GOING TO HAVE TO DO, DEAL WITH THIS STATUTE AND COMPLIANCE STATUTE.

THAT IS TRUE, AND THERE IS GOING TO HAVE TO BE SOME LITIGATION OVER WHAT THIS PROVISION ACTUALLY MEANS.

CERTAINLY, THAT THAT WILL FOLLOW, REGARDLESS OF WHETHER IT IS TECHNICALLY IN SECTION 90 OR NOT. BUT IT SEEMS TO ME THAT WHAT I AM PUZZLED BY IS WHAT IS GAINED BY NOT GOING AHEAD IN THE NORMAL COURSE, PUT IT IN THE EVIDENCE CODE AND THEN ALLOW IT TO BE TESTED.

WELL, I THINK WHAT THIS PROVISION DOES IS OPEN A FLOOD GATE TO PROPENSITY EVIDENCE, AND THAT IS VERY DANGEROUS, AND THE COURT HAS, ON NUMEROUS TIMES, SAID THAT EVIDENCE IS NOT RELEVANT, JUST BECAUSE THE CRIME IS IN A SENSE THE SAME NATURE AS THE CHARGED OFFENSE. THEY SAID IN GREEN, IN 1966, AND THE COURT SAID IT AGAIN IN PEEK, IN 1986. WHAT THIS DOES IS ALLOW EVIDENCE, MERELY BECAUSE IT IS THE SAME TYPE OF CRIME. WE HAVE NEVER CARVED AN EXCEPTION IN THE EVIDENCE CODE, BASED ON THE NATURE OF THE CRIME, WITH VERY FEW EXCEPTIONS. NOTABLY THE HEARSAY IN THE CHILD SEXUAL BATTERY CONTEXT. AND IN THAT CASE, THERE ARE VERY SPECIFIC REQUIREMENTS TO DETERMINE THE RELIABILITY OF THE EVIDENCE BEFORE IT IS ADMITTED. THIS IS NO SIMILAR SAFEGUARD. THIS IS SAYING THAT PROPENSITY EVIDENCE COMES IN, JUST BECAUSE OF THE NATURE OF THE CRIME.

CHIEF JUSTICE: THANK YOU, MS.^SAUNDERS. THANK YOU, COUNSEL, AND AS SAID RIGHT BEFORE THE RECESS, WE ARE VERY APPRECIATIVE OF YOUR TIME AND EFFORT THAT THE COMMITTEES HAVE PUT IN ON STUDYING THESE MATTERS THAT ARE PRESENTED AND YOU HAVE COME HERE AND MAKING THE PRESENTATION.