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Reply to Professor Ehrhardt

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Reply to Professor Ehrhardt

Professor Ehrhardt makes a number of important points in his response, all of which should be taken into account in discussing the admissibility of prior acts in child molestation cases. I shall, however, for brevity's sake, limit my reply to a whirlwind consideration of one particular issue: the consequences of Florida's adoption of rules similar to Federal Rules of Evidence 414 and 415 in place of the admissibility doctrine that has grown out of *Heuring* and its progeny.

Professor Ehrhardt points out that as a result of the adoption of provisions similar to Rules 414 and 415 by the Florida Legislature there probably will be a period of uncertainty while the courts define the factors to be taken into account in applying a section 90.403 balancing test to the new standards of admissibility. Although I agree that such uncertainty will ensue, I would go further to suggest that this uncertainty may *never* be resolved. The problem with Rules 414 and 415 is that their sweeping language apparently assumes that evidence of other child molestation offenses is legally relevant to whether or not a defendant has committed the charged offense. Rules 414 and 415 provide no guidance as to whether the prior act has to be one for which the defendant was convicted or even charged, and they do not distinguish between evidence of such acts offered by the complainant and evidence offered by someone else. This not only allows for the admission of evidence from prior charges for which the defendant may have been acquitted, bringing up double-jeopardy issues, but also for self-corroborating testimony by a complainant.¹ Nowhere does the language of Rules 414 and 415 state that they are subject to a Federal Rule of Evidence 403 balancing test, though some circuits have required it, and even if we assume that the Florida courts would require such a provision, or that the Florida legislature would be wiser than its federal counterpart and include one, the question would ultimately remain: why is this evidence probative of anything other than propensity? In such a case, the courts would either have to endorse propensity evidence or return to the same position where they began, trying to articulate a corroboration rationale. If the courts were to hold such evidence relevant for its propensity value, then we would find ourselves sliding down an extremely slippery slope,

1. I cannot in the space allotted even begin to examine the issue whether admissibility rules based on Rules 414 and 415 could survive a challenge based in the Florida constitution, but it is a question that certainly merits consideration.

abandoning our accusatorial system of justice in favor of an inquisitorial system.

GEORGE FRANKLIN