**STATE’S MEMORANDUM IN RESPONSE TO MOTION**

**TO EXCLUDE COLLATERAL CRIMES EVIDENCE**

##### State of Florida

 COMES NOW the State Attorney of the Eleventh Judicial Circuit of Florida, by and through the undersigned Assistant State’s Attorney, and files this Memorandum of Law, which will establish that the collateral crimes evidence specified in the State’s Notice of Intent to Rely on Evidence of Other Crimes, Wrongs or Acts, should be admitted against the defendant.

 The defendant is charged with three counts of sexual battery against L.B. and one count of sexual battery against J.B., who is the brother of L.B. These crimes occurred while the defendant had custodial authority over J.B. and L.B., who had been left with him in his home where he and his wife conducted a baby-sitting service. The collateral crimes evidence involves sexual batteries committed against two other children, who, had also been placed in the defendant’s custody for the purpose of baby-sitting. All four children were under the age of six; and all the crimes occurred in the defendant’s house between March 1993 and June of 1994.

 Any discussion of the admissibility of collateral crimes evidence must begin with the landmark case of *Williams v. State*, 110 So. 2d 654 (Fla.), *cert. denied*, 361 U.S. 847 (1959). The “Williams Rule” derived from this case requires that collateral crimes evidence be admitted if it is relevant for any purpose other than to show the defendant’s bad character or propensity. Cases applying the “Williams Rule” have uniformly held that when a defendant is charged with a sex crime against a minor over whom he has familial or custodial authority, evidence of other crimes he has committed against minors over whom he likewise has authority is admissible.

 The State submits that the first basis for allowing the admission of the collateral crimes evidence in this case is that it establishes that the defendant was engaged in a common scheme or plan. *See Watkins v. State*, 363 So. 2d 575 (Fla. Dist. Ct. App. 1978). A case indistinguishable from this case is *Cantrell v. State*, 193 So. 2d 444 (Fla. 1966). In *Cantrell*, the defendant allowed neighborhood children to use a swimming pool he had constructed in his back yard. When the victim in the case for which he was convicted got a splinter on her way to the pool, the defendant enticed her into his bedroom where he committed a lewd and lascivious act upon her. The court upheld as proper “Williams Rule” evidence the testimony of two other children that the defendant had improperly fondled while in the swimming pool. Since the collateral crimes evidence established that the defendant was utilizing his pool to gain custody of children, it established a plan, scheme or design, which made it admissible under *Williams*.

 Also supporting this view upholding the admissibility of the collateral crimes evidence is *Whiteman v. State*, 343 So. 2d 1340 (Fla. Dist. Ct. App. 1977). In *Whiteman*, the defendant was convicted of three counts of sexual battery on his niece while she was under his familial and custodial control. The court held that the victim was properly allowed to testify to numerous other sex crimes which the defendant had committed against her. The court reasoned that these collateral crimes established that the defendant had engaged in a planned course of conduct in which he utilized his parental authority to reduce his niece to the status of a sexual plaything, thus affording him the opportunity to commit sexual battery upon her.

 The rationale of *Whiteman* was extended in *Epsey v. State*, 407 So. 2d 300 (Fla. Dist. Ct. App. 1981), in which evidence that the defendant had committed various sexual crimes against his five other children, both male and female, was admitted at his trial for sexual battery upon his granddaughter. The court allowed such evidence because it “… demonstrate(d) a unique common scheme or plan to systematically ravage and deflower the helpless young members of his own household.” *Id.* at 301.

 A review of the pertinent facts in this case establishes even more clearly than in *Cantrell*, *Whiteman*, and *Epsey* that the defendant engaged in a plan, the ultimate goal of which was to molest little children. The defendant and his wife set up a baby-sitting service in their residence. Having gained the trust and confidence of neighborhood parents, the defendant and his wife were able to obtain temporary custody of neighborhood children. The defendant would then wait until his wife left the residence, at which time he would utilize his custodial authority to commit sex crimes on the children left in his care. Since the collateral crimes evidence is necessary to establish this continuous and planned course of conduct by the defendant, it is admissible.

 In this memorandum, the defendant does not discuss the questions of whether the collateral crimes evidence in this case is admissible to show that he engaged in a planned course of conduct, which allowed him to molest children placed in his custody. Rather he devotes his entire memorandum to the separate legal argument that the crimes committed by the defendant against the four children are not sufficiently unique to allow the collateral crimes evidence to be admitted to show a pattern of criminality. While the existence of a planned course of activity by the defendant makes the collateral crimes evidence admissible without determining if the crimes were unique, an objective review of the relevant case law establishes that the requisite uniqueness is present, thus revealing a second basis for admissibility of the evidence.

 Defendant’s cases most on point are *Joseph v. State*, 447 So. 2d 243 (Fla. Dist. Ct. App. 1983); *State v. Maisto*, 427 So. 2d 1120 (Fla. Dist. Ct. App. 1983); and *Sias v. State*, 416 So. 2d 1213 (Fla. Dist. Ct. App. 1982), which hold that sexual crimes committed against different children are not sufficiently unique in and of themselves. Unfortunately for the defendant, however, *Joseph*, *Maisto*, *Sias*, and the other cases he cites are distinguishable from the instant case, since in none of the cases were the defendants charged with utilizing custodial authority to effectuate their crimes. Every Florida court, which has considered a case that included this factor, found the requisite uniqueness.

 In *Cotita v. State*, 381 So. 2d 1146 (Fla. Dist. Ct. App. 1980), the defendant was charged with committing a lewd or lascivious act upon his five-year-old daughter. Evidence that the defendant committed the same type of sex act on two girls, ages nine and ten, who lived nearby, was admitted at trial. The court upheld the admission of the collateral crimes evidence because it established “a pattern of criminality.” The requisite similarity was the custodial relationship between the accused and the victims. All these factors are present in the instant case. Indeed, as recognized in *Jones v. State*, 398 So. 2d 987 (Fla. Dist. Ct. App. 1981), even if there are differences between the sexual episodes, the other factors would still warrant the admission of the evidence.

 In *Hodge v. State*, 419 So. 2d 346 (Fla. Dist. Ct. App. 1982), at the defendant’s trial for committing vaginal sex upon his stepdaughter, his natural daughter was allowed to testify that he had committed oral sex upon her eight years earlier. In upholding the admissibility of this testimony, the court reasoned:

Appellant’s use of his familial authority to forcibly commit sexual battery upon a second young female member of his family, provided sufficient “identifiable points of similarity” and the “level of uniqueness” as to qualify as similar fact evidence. *Id.* at 348.

 A case, which upholds the admissibility of the collateral crimes evidence in this case on both the plan and pattern of criminality bases, is *Potts v State*, 427 So. 2d 822 (Fla. Dist. Ct. App. 1983). In *Potts*, the defendant was charged with sexual battery upon an 11-year-old girl who was sleeping in his home. According to the victim, the defendant inserted his fingers into her vagina and fondled her chest. At trial, the victim’s sister testified that the defendant had performed oral sex upon her when she was 12 and the prior summer when she was staying with the defendant. In addition, two of the defendant’s sisters testified to various sexual crimes committed by the defendant some 12 and 18 years earlier. In upholding the admissibility of the collateral crimes evidence, the court reasoned that the use by the defendant of his custodial or familial authority showed an intent to commit the act charged. The court also ruled that, despite the difference in the acts, the locale, and the up to 18 years duration between acts, the fact that the defendant was using his custodial or familial authority established “identifiable points of similarity” and a “level uniqueness” sufficient to establish a pattern of conduct.

 While *Cotita*, *Jones*, and *Potts* would support an argument that the mere fact that the defendant utilized his custodial authority to molest the children in this case would be sufficient to justify the admission of the collateral crimes evidence, the presence of additional factors unquestionably establish the requisite “identifiable points of similarity” and “level of uniqueness.” The children who are the alleged victims in this case, and the children who would testify to the defendant’s collateral crimes, were all placed in the defendant’s residence and subject to his custodial authority because of his baby-sitting service. All the children were under the age of six at the time of the crimes. The defendant would wait until his wife, the only other adult who was present during the baby-sitting, would leave the house before committing the crimes. He would then take his victims, who had been watching television, and place them on the living room couch or a bed. Next, he would remove only that part of his victim’s clothing which would enable him to commit a sexual battery. In committing his crimes, the defendant would be careful not to physically injure his victims. Clearly these “identifiable points of similarity” demonstrate a “level uniqueness” sufficient to establish a pattern of conduct.

 It should also be noted that collateral crimes evidence is admissible to rebut an anticipated defense. *Williams v. State*, 110 So. 2d 654 (Fla.), *cert. denied*, 361 U.S. 847 (1959). Thus, independent of the foregoing argument in support of admissibility, the State would also argue that should the defendant interpose a defense such as accident, mistake by the victim, or alibi, the collateral crimes evidence would be admissible.

 WHEREFORE, the State respectfully requests this Honorable Court to grant State’s Motion to Include Collateral Crimes Evidence in this case.

 Respectfully submitted,

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 Assistant State Attorney