IN THE SUPREME COURT OF FLORIDA

CASE NO. SC

**DENNIS IRIZARRY,**

Petitioner,

-vs-

**THE STATE OF FLORIDA.**

Respondent.

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ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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# BRIEF OF PETITIONER ON JURISDICTION

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## INTRODUCTION

Petitioner seeks discretionary review of a Third District Court of Appeal decision that conflicts with decisions of this Court and of other districts as to the admissibility of *Williams* Rule evidence,[1] the jury instructions required when such evidence is received, and the proper analysis of harmless error claims as to such evidence. The symbol AA.@ refers to the lower court opinion and order denying rehearing, set forth in the Appendix.

## STATEMENT OF THE CASE AND FACTS

The District Court stated the facts as follows (A. 2-4, 5):

> The defendant was charged by information with kidnapping, burglary with assault or battery, aggravated battery with great bodily harm, and aggravated stalking. The State filed a notice of intent to rely on *Williams* . . . rule evidence . . . . [and] an amended notice alleging that in August 1992, when the victim was living in a domestic violence shelter with her children in New York, the defendant broke in, raped her, and beat her until she was unconscious (hereinafter referred to as the A1992 attack@).
>
> The defense filed a motion to strike the *Williams* rule notices. Following a hearing, the trial court ruled that the State could introduce evidence regarding the 1992 attack.
>
> At trial, the victim testified as to her relationship with the defendant. She was married to the defendant for twelve years which produced two children, Daniel and Dylan. . . . She testified that in 1992 while

[1] *See Williams v. State*, 110 So 2d 654 (Fla. 1959); Section 90.404(2), Florida Code of Evidence.

staying at a shelter, the defendant broke in, raped her and beat her unconscious. After the incident, she reconciled with the defendant and continued to live with him.

Years later, in January 2000, she and the defendant moved to Florida with the children. [A few months later] she told the defendant that the relationship was over and told him to leave.

. . . On November 12, 2001 . . . defendant came over and convinced [their son] Daniel to let him in, telling him he wanted to surprise his mother. When the victim came home, she went into Daniel=s room where she found the defendant hiding behind the door. . . . The victim . . . told the defendant that they should go outside. After they exited the apartment, the defendant grabbed her by the hair, dragged her back inside, locked the door, and punched her until she lost consciousness. . . .

The jury found the defendant guilty as charged, and he was later sentenced.

The District Court ruled as follows (A. 6-8):

The defendant contends that the trial court abused its discretion by permitting the State to introduce the 1992 attack. We disagree.

Pursuant to ***Williams***, as codified in section 90.404(2)(a), Florida Statutes (2001), A[s]imilar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including ... proof of motive, ... intent, ... or absence of mistake or accident.@ ' 90.404(2), Fla. Stat. (2001). The collateral evidence, however, is not admissible for the sole purpose of proving bad character or propensity. The primary test for admissibility of collateral crimes evidence is relevancy. ***See Griffin v. State***, 639 So.2d 966 (Fla.1994) . . . ; Williams, 110 So.2d at 658; ***Jackson v. State***, 403 So.2d 1063 (Fla. 4th DCA 1981) . . . . ***See also, Finney v. State***, 660 So.2d 674 (Fla.1995)(similarity is not always a prerequisite to admissibility). . .; ***Williams v. State***, 621 So.2d 413 (Fla.1993) (explaining that other crimes, whether factually similar or dissimilar to the charged crime, are admissible if the evidence is relevant to prove a matter of consequence other than bad character or propensity).

> The victim testified that the defendant was upset, that he grabbed her hair, dragged her into the apartment and beat her until she lost consciousness. The defendant, however, claimed that he accidentally pulled the victim=s hair, and that he struck her in self-defense after she began hitting him. The State introduced evidence of the 1992 attack in which the defendant beat the victim until she lost consciousness and raped her to show the controlling nature of defendant=s relationship with the victim, which included beating her until she lost consciousness, and his intent. We conclude that the collateral evidence was relevant to prove the defendant=s intent, the absence of mistake, and the controlling nature of his relationship with the victim, to dispute his claim that he had accidentally pulled the victim=s hair, and that he did not intend to harm her and had only struck her in self-defense. *See Wilchcombe v. State*, 842 So.2d 198, 199 (Fla. 3d DCA 2003) (holding that Atrial court did not abuse its discretion by allowing the state to introduce direct evidence of the controlling nature of [defendant=s] relationship with the victim@); *Simmons v. State*, 790 So.2d 1177, 1179-80 (Fla. 3d DCA 2001) (holding that prior battery was admissible to prove defendant=s intent to injure). Additionally, we find that the probative value of this relevant evidence substantially outweighs the danger of unfair prejudice especially since it did not become a feature of the trial, ' 90.403, Fla. Stat. (2001), and the 1992 attack was not too remote in time. *See Duffey v. State*, 741 So.2d 1192 (Fla. 4th DCA 1999) (holding that collateral crime that occurred twelve years prior to charged offense not too remote in time). Finally, we find that any error in the introduction of the collateral crimes evidence was harmless based upon the overwhelming evidence of guilt. DiGuilio, 491 So.2d 1129 (Fla.1986).
> Rehearing was denied on July 13, 2005 (A. 17).

## SUMMARY OF ARGUMENT

The Third District=s decision is in conflict with decisions of this Court and other districts because the *Williams* Rule evidence was more prejudicial than probative,

the trial court failed properly to instruct the jury as to the use of the evidence, and the admission of the evidence in this fashion was not harmless.

## ARGUMENT

**THE THIRD DISTRICT=S DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER DISTRICTS BECAUSE THE *WILLIAMS* RULE EVIDENCE WAS MORE PREJUDICIAL THAN PROBATIVE, THE TRIAL COURT FAILED PROPERLY TO INSTRUCT THE JURY AS TO THE USE OF THE EVIDENCE, AND THE ADMISSION OF THE EVIDENCE IN THIS FASHION WAS NOT HARMLESS**

A. The *Williams* Rule Evidence Was More Prejudicial than Probative

The *Williams* Rule evidence admitted in this case was the victim=s claim that the defendant, her husband, had raped her in a battered woman=s shelter in New York approximately 10 years prior to the offenses alleged in this case; defendant denied any rape, and the victim acknowledged that the defendant had been convicted only of criminal mischief, and had received only a non-custodial sentence.

The trial court ruled that this evidence had probative value to show absence of mistake or accident, and so instructed the jury, though no claim of mistake or accident was before the jury when this instruction was given. The Third District held the evidence admissible to show intent and the controlling nature of the relationship between the

defendant and the victim.[2] The ruling that the evidence was admissible is in conflict with this court=s decisions and decisions of other districts because the evidence was not probative and was severely prejudicial.

The District Court=s held the alleged rape relevant to prove intent, the controlling nature of defendant=s relationship with the victim, and that he did not, as he testified, grab her hair by accident. But these were neither the offenses charged nor material facts in issue. There was no claim that he had punched her by accident, nor was there any theory under which his offenses were burglary or kidnapping depending upon whether they flowed from a controlling relationship. Any Aintent@ the prior conduct showed was really propensity. And the prejudicial effect of showing an alleged rape, for which the defendant had evaded punishment, before any evidence of the facts relating to the charges in this case was put before the jury was overwhelming.

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[2] These were not the grounds for the ruling at trial, and therefore the jury was not instructed as to the use of evidence of conduct in 1992 to prove defendant=s intent in 2001. The allegedly controlling nature of he relationship was shown by direct evidence received without objection.

The cases cited by the District Court do not address the probative value or the prejudicial effect of the evidence here.

Evidence of the alleged rape should have been excluded because it was more prejudicial than probative. *See Gore v. State*, 719 So. 2d 1197, 1199-1200 (Fla. 1998) (unfair prejudice); *Steverson v. State*, 695 So. 2d 687, 688-90 (Fla. 1997); *Henry v. State*, 574 So. 2d 73, 74-75 (Fla. 1991) (more prejudicial than probative); *Farrell v. State*, 682 So. 2d 204, 206 (Fla. 5th DCA 1996) (Aprobative value was outweighed by its inflammatory nature and unfair prejudice@).

Here, the probative value of the evidence to prove the matters for which it was admitted was so slight that the prosecutor never mentioned it again after the initial prejudicial effect had been obtained. Evidence mentioned only once (such as a prior conviction) can be so prejudicial that exclusion is required where there is no countervailing probative value, even if the evidence does not become a Afeature.@ The evidence here potentially caused the jury to view the defendant as a rapist who had escaped punishment to injure his victim again; its effect in bolstering the victim=s credibility, and as to defendant=s credibility, character and propensity, far outweighs any probative value.

B. The Trial Court=s *Williams* Rule Instruction Was Inadequate

The prosecution presented the disputed claim of a 1992 rape before it presented any evidence pertaining to the charges in this case. The trial court instructed the jury that the rape evidence was relevant to a claim of mistake or accident. No evidence or argument as to mistake or accident was before the jury when this instruction was given. The jury thus could not have understood any proper use of this evidence. Instead, the jury would have understood that the evidence was relevant to the defendant=s credibility or, even worse, to the credibility of the alleged victim=s claims.

The trial court=s ruling cannot be reconciled with the requirement that the jury be instructed as to the limited purposes for which *Williams* Rule evidence can be admitted and used. In *Robertson v. State*, 829 So. 2d 901, 908 (Fla. 2002), this Court emphasized the importance of proper instructions pursuant to Section 90.404(2)(b)(2) of the Florida Evidence Code: Aa cautionary instruction is required when requested pursuant to section 90.404(2)(b)(2) so that the jury is specifically apprised of the limited purpose for which the jury is to consider the evidence.@ *Robertson*, 829 So. 2d at 908. Indeed, *Robertson* quoted the statute: the court shall Acharge the jury on the limited purpose for which the evidence

is received and is to be considered.@

Here the trial court literally gave the mandated instruction, telling the jury that the evidence about to be presented was to be considered for the limited purpose of proving motive and the absence of mistake or accident, but the course of the proceedings made the instruction incomprehensible to the jury, particularly since the prosecutor never referred to the *Williams* Rule evidence in connection with any claim of mistake or accident. The prosecution had chosen to present the *Williams* Rule evidence before any evidence pertaining to the claims in this case, when no claim of mistake or accident was before the jury.

There was, accordingly, no way the jurors could relate the rape claim to any claim of mistake or accident (or even to motive). The intended purpose of the required instruction was entirely frustrated. In the circumstances, it is inconceivable that the jurors took the evidence as anything other than a compelling indication of the victim=s credibility and the defendant=s lack of credibility, bad character and evil propensity. It may well be that the jury convicted defendant, without regard for his guilt or innocence of the charges (particularly the burglary and kidnapping charges) here, because it believed he had raped his wife 10 years before.

Finally, since the District Court=s theory that the evidence was admissible to show intent and the controlling nature of the relationship had not been at all the grounds upon which the trial court admitted the evidence, the jury was not instructed at all as to the use of this evidence for those purposes.

C. The District Court=s Harmless Error Analysis Is in Conflict with Decisions of this Court

Under the applicable harmless error cases, the question is not, as the district court here indicated, whether the evidence that the Court finds credible is overwhelming. Rather, the question is whether the Court can say beyond a reasonable doubt that the exclusion of the evidence whose exclusion was sought would have made no difference. *See DiGuilio v. State*, 491 So. 2d 1129, 1136, 1138 (Fla. 1986) (State must show Athat there is no reasonable possibility that the error contributed to the conviction@); *accord, Lee v. State*, 531 So. 2d 133, 136-37 (Fla. 1988); *see also Goodwin v. State*, 751 So. 2d 537, 546-47 (Fla. 1999); *Oliveros v. State*, 835 So. 2d 335 (Fla. 3d DCA 2003); *Ousley v. State*, 763 So. 2d 1256, 1257 (Fla. 3d DCA 2000).

Florida has adopted the rule that A[o]verwhelming evidence of guilt does not negate the fact that an error that

constituted a substantial part of the prosecution=s case may have played a substantial part in the jury=s deliberation and thus contributed to the actual verdict reached, for the jury may have reached its verdict because of the error without considering other reasons untainted by error that would have supported the same result.@ *DiGuilio*, 491 So. 2d at 1136, quoting Chief Justice Roger Traynor=s dissent in *People v. Ross*, 67 Cal. 2d 64, 429 P. 2d 606 (1967), *rev=d sub nom*, *Ross v. California*, 391 U.S. 470 (1968); *see also Lee*, 531 So. 2d at 137.

Erroneous admission of *Williams* Rule evidence Ais presumed harmful error because of the danger that a jury will take the bad character or propensity for crime thus demonstrated as evidence of guilt of the crime charged.@ *Straight v. State*, 397 So. 2d 903, 908 (Fla. 1981); *accord, Robertson v. State*, 829 So. 2d 901, 913-14 (Fla. 2002); *Williams v. State*, 110 So. 2d 654, 662-63 (Fla. 1959); *see Castro v. State*, 547 So. 2d 111, 114 (Fla. 1989); *State v. Lee*, 531 So. 2d 133 (Fla. 1988); *Gonzalez v. State*, 559 So. 2d 748 (Fla. 3d DCA 1990); *Harris v. State*, 427 So. 2d 234 (Fla. 3d DCA 1983).

The Court cannot say here that there is no possibility that the *Williams* Rule evidence contributed to the conviction

because the *Williams* Rule evidence went to the credibility of both the victim and the defendant. The jury here might have disbelieved or discredited all or most of the testimony now found Aoverwhelming,@ and convicted defendant because of testimony concerning an disputed claim of rape 10 years before the events in this case. In view of the manner in which the prosecution sought to use the *Williams* Rule evidence to show defendant=s bad character and evil propensity, the Court can hardly say in retrospect that it didn=t matter.

## CONCLUSION

The Court should grant discretionary review.

Respectfully submitted

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y:_____
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Meredith L. Balo, Assistant Attorney General, Office of the Attorney General, Criminal Appeals Division, 444 Brickell Avenue, Suite 950, Miami, Florida 33131 on July 29, 2005.

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Assistant Public Defender

## CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the type used in this brief is Courier New 12 point, except that the headings are in 14 point proportionately spaced Times New Roman.

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ROY A. HEIMLICH
Assistant Public Defender