


IN THE SUPREME COURT OF FLORIDA

**FILED**  
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MICHAEL T. RIVERA,  
Appellant/Defendant,

vs.

CASE NO. 70,563  
Cir. no. 86-11716CF

STATE OF FLORIDA,  
Appellee/Plaintiff.

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APPELLANT'S INITIAL BRIEF

Death Penalty Appeal from the Circuit Court of the  
Seventeenth Judicial Circuit, Honorable John G. Ferris.

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STATEMENT OF THE CASE

The Appellant, Michael T. Rivera, was convicted of the first degree murder of Staci Lynn Jazvac. (Vol. 12, p. 2164, 2285). The jury, by a unanimous vote, recommended the death penalty. (Vol. 12, p. 2307) The trial court, finding four statutory aggravating circumstances, one statutory mitigating circumstance, and no non-statutory mitigating circumstances, sentenced Rivera to death. (Vol. 12, p. 2309-2313) Rivera's motion for new trial and/or judgment of acquittal was denied. (Vol. 12, p. 2297-2299) Rivera's trial counsel, special public defender Edward W. Malavenda, filed a timely notice of appeal. Malavenda withdrew as counsel and the undersigned was appointed Rivera's special public defender for purposes of this appeal. (Vol. 12, p. 2319, 2314, 2320)

STATEMENT OF THE FACTS

Re: Motion to Suppress Statements and Physical Evidence

Rivera's motion to suppress statements and physical evidence was denied by the trial court. (Vol. 12, p. 2222-2230) Late in the afternoon of January 30, 1986, Staci Jazvac rode her bicycle to a nearby shopping center to buy school supplies. When she did not return, her mother began searching. She came into contact with a Broward County Sheriff's Deputy who had found Jazvac's bicycle abandoned in a field next to the shopping center. A police search was begun. Detective Amabile of the Broward County Sheriff's Office was involved in the investigation

of Jazvac's disappearance from its inception. A number of suspects were questioned before Amabile came into contact with Rivera.

Star Peck telephoned the Broward County Sheriff's Office stating that she had received an unanimous call from a male who identified himself as "Tony". "Tony" told her that he had abducted and accidentally killed Jazvac. (Vol. 1, p. 5) Peck said that the caller had previously worked for her along with another individual, Casey McAshen. Amabile located a police report involving Casey McAshen which contained the name of Michael Rivera. Amabile ran a records check on Rivera and ascertained he had outstanding arrest warrants and criminal cases that were pending. Amabile did not ascertain that the public defender was representing Rivera on these cases. (Vol. 1, p. 34)

On February 12th, Amabile and Detective Scheff went to Rivera's residence, but he was not at home. (Vol. 1, p. 7) On February 13th, Amabile and Scheff returned to Rivera's residence. Scheff saw Rivera inside the house. Amabile and Scheff knocked on the door several times and yelled to Rivera. (Vol. 1, p. 34) Amabile and Scheff called for marked patrol units from the City of North Lauderdale Police Department. (Vol. 1, p. 35) After an hour, Amabile and Scheff coaxed Rivera out of the house. (Vol. 1, p. 35)

Detective Scheff went to Rivera's residence for the purpose of arresting him on the outstanding warrants, and to question him about Jazvac's disappearance. (Vol. 1, p. 55) After Rivera was coaxed out of the house, Scheff advised him of the

outstanding warrants and placed him under arrest. (Vol. 1, p. 57) He was not given his Miranda warnings. Nor, was he told that they wanted to talk with him about Jazvac's disappearance. (Vol. 1, p. 57-58) Rivera was merely told that they wanted to talk to him at the Sheriff's Office. (Vol. 1, p. 58) Scheff did not elaborate on the subject matter. Rivera made the remark, "If I speak to you, I'll spend the next twenty years in jail." Scheff did not question him on what he meant by that remark. (Vol. 1., p. 61)

At the Sheriff's Office, Scheff orally advised Rivera of his Miranda warnings. (Vol. 1, p. 7) Rivera was not asked to sign the standard written waiver of Miranda warnings form. (Vol. 1, p. 37) Rivera was questioned about Star Peck and Staci Jazvac. (Vol. 1, p. 61) Rivera admitted calling Peck, but said his statements were pure fantasy. (Vol. 1, p. 9) After an hour of questioning, Rivera was turned over to Detective Eastwood, the chief polygraph examiner for the Broward County Sheriff's Office. Amabile and Scheff told Eastwood that Rivera had admitted making an obscene telephone call to Peck during which he stated that he abducted, molested and killed Jazvac. (Vol. 1, p. 71) Eastwood explained the standard written consent form concerning the taking of a polygraph examination. Rivera signed the form. (Vol. 1, p. 71-72)

Rivera told Eastwood that he had nothing to do with the disappearance of Jazvac. Eastwood asked Rivera for his version of the telephone call to Peck. Rivera related his version to Eastwood. Eastwood conducted a polygraph examination. (Vol. 1, p. 72-73) Eastwood advised Rivera that the examination revealed

deception and asked for an explanation. Rivera admitted exposing himself to a young girl in the Coral Springs/Coconut Creek area. (vol. 1, p. 73) After two and one half hours of testing and questioning, Rivera admitting having access to a van on Monday and Friday which he used to expose himself to young girls. Rivera admitted exposing himself to a young girl who was pushing a bicycle. Rivera said that he often dreamed about exposing himself to young girls and forcing them to have sex with him. Eastwood asked Rivera when the last time he had such a dream. Rivera replied, "Two weeks ago when I had the van and I was in the Coral Springs." Eastwood aware the scenario was similar to Jazvac's disappearance, advised Rivera of his Miranda warnings. (Vol. 1, p. 75-76) Eastwood told Rivera that he was not under arrest, when in fact he was under arrest. (Vol. 1, p. 77)

Eastwood told Rivera that the situation he described was similar to Jazvac's disappearance. Rivera replied, "Tom, I've got to tell you this. It's bothering me. I was in Coral Springs. I grabbed a young girl. I pulled her into some bushes. I didn't do anything to her. I didn't hurt her. Someone was coming and I was scared **off**." (Vol. 1, p. 79) Rivera went on to say that he felt **so** badly about what had happened that he telephoned a woman who lived in the apartment complex where the incident happened. Rivera said that he got the woman's name and telephone off the bulletin board at the apartment complex. (Vol. 1, p. 79) Rivera said that he had the telephone number in a telephone book at his house.

Crying, Rivera said, "Tom, you have got to stop me. I



can't control myself. Put me in jail or kill me. I can't stop doing what I'm doing. I keep on doing these terrible things. I can't tell you. You will put me in jail. If you put in jail, they will kill me." (Vol. 1, p. 79-80)

Eastwood informed Amabile and Scheff that Rivera had made admissions concerning a young girl in Coral Springs. (Vol. 1, p. 12) Rivera told Amabile and Eastwood about an incident that occurred in July at an apartment complex on Sample Road in Coral Springs. Rivera said he had gone to the complex for the purpose of exposing himself to women. He admitted grabbing a young girl from behind, dragging her in the bushes and chocking her. (Vol. 1, p. 13) Rivera was turned over to Eastwood for further testing. He remained with Eastwood another two hours. (Vol. 1, p. 15)

Amabile and Scheff contacted Detective Asher of the Coral Springs Police. Asher came to the Broward County Sheriff's Office to question Rivera. Asher orally advised him of his Miranda warnings. Rivera admitted the incident in Coral Springs involving Jennifer Goetz. (Vol. 1, p. 16) Rivera was questioned about Jazvac's disappearance, but denied any involvement. He admitted making the call to Peck, and other obscene telephone calls to a Bobby Rubino's restaurant. (Vol. 1, p. 17)

Rivera agreed to allow the detectives to search his residence. Rivera signed a consent to search form. Detectives Hutchinson and Edwards searched Rivera's residence. (Vol. 1, p. 17, 65)

After 12 to 14 hours of polygraph examination and questioning, Rivera was charged with the Jennifer Goetz incident.

He was transported to the jail for booking.

The next morning, the body of Jazvac was discovered in a field in Coral Springs. (Vol. 1, p. 18) At 3:00 p.m. Amabile and Eastwood removed Rivera from the jail and took him to the Sheriff's Office. Rivera was orally advised of his Miranda warnings. (Vol. 1, p. 18-21) Amabile told Rivera that Jazvac's body had been found. He showed Rivera pictures of the body. Rivera became upset and said that he did not want to look at the pictures. Amabile left the interview room to consult with Sgt. Carney. Sgt. Carney told Rivera that tests would be run on Jazvac's body, and if a fingerprint was found, it would mean that he was there. Rivera replied, "I bet you do have **fingerprints.**" Rivera did not want to know if the fingerprints matched his. Rivera said that he did not know Jazvac. Rivera was shown another photograph of Jazvac. Rivera replied that he did not know her and had never met her. (Vol. 1, p. 23)

Rivera was shown the missing person poster with Jazvac's picture, Rivera stated that he might know Jazvac. Rivera told Carney and Amabile that he and a friend, Larry Nelson, talked to a girl that might have been Jazvac at a gas station on 31st Avenue and Commercial Blvd. (Vol. 1, p. 24)

Rivera was kept at the Sheriff's Office through the dinner hour. After dinner, Rivera said that he was with his brother the night Jazvac disappeared. Amabile replied that his brother's work records showed that he was off the night before Jazvac's disappearance. Rivera then stated that he couldn't remember where he was because he had blacked out. He said, "I

don't remember killing **Staci.**" (Vol. 1, p. 26) Amabile questioned him for another hour, but he made no other statements about Jazvac. He was left alone in the interview room for another hour. Unable to get him to confess, Rivera was taken back to the jail. (Vol. 1, p. 27)

On February 15th at 2:00 a.m., Amabile again had contact with Rivera at the jail. In response to a telephone call from Rivera, Amabile and Carney went to the jail. (Vol. 1, p. 27) He told them that he was convinced that he was with his brother the night Jazvac disappeared. (Vol. 1, p. 27) Rivera agreed to be interviewed on Monday. (Vol. 1, p. 28)

At 5:00 p.m. on Monday, Amabile and Scheff took Rivera from the jail to the Sheriff's Office. He was orally advised of his Miranda warnings. (Vol. 1, p. 28-29) Rivera said that he had spoken with his brother who had told him that they were together the night before Jazvac disappearance and not the night of the her disappearance. (Vol. 1, p. 29) Four or five times during the interview, Rivera stated that he had blacked out from free-basing cocaine and did not remember killing Jazvac. (Vol. 1, p. 30)

Lt. McCann came into the interview room and asked Rivera to write an autobiography about himself. He was given a legal pad and pencil. Rivera wrote 15 to 20 pages. He continued his writing till he was transported back to the jail at approximately 11:00 p.m. (Vol. 1, p. 31-32) Rivera gave the autobiography to Lt. McCann. (Vol. 1, p. 47)

Re: "Williams Rule" Evidence

Rivera filed a notice of objection to the use of "Williams Rule" evidence, or evidence of a collateral crime. Rivera objected to the introduction of the evidence concerning the Jennifer Goetz incident. In response to Rivera's objection, a pretrial hearing was held at which Amabile testified. (Vol. 1, p. 39) Both victims were small, petite 11 year old elementary school girls with similar hair coloring, who were alone when abducted. (Vol. 1, p. 100) Goetz was on her way to a bus stop, and Jazvac was on her way to a store. Jazvac was abducted from an open field, and Goetz was abducted from a wooded area. Both abductions occurred within a 3 to 4 mile radius of Rivera's home. Goetz was attacked from behind and she was strangled but survived. (Vol. 1, p. 103-105) Rivera had told Peck that Jazvac had been grabbed from behind and rendered unconscious by ether. Jazvac died from asphyxiation, but it could not be concluded that she was strangled. (Vol. 1, p. 103-104)

Rivera told Amabile that he liked to expose himself to young girls. In doing so, he became overwhelmed with the urge to rape and molest them. (Vol. 1, p. 107)

The incidents occurred six months apart. After each incident, a telephone call was made to a stranger wherein a confession was made. Each time the caller identified himself as "Tony". In each call "Tony" indicated that he was wearing pantyhose and/or a leotard. (Vol. 1, p. 109)

Jazvac disappeared at dusk. Goetz was attacked early in the morning. Goetz was attacked while walking a path in a wooded area of her condominium. Jazvac disappeared from an open

field. Goetz was manually strangled, while Rivera's statements to Peck was that he had placed an ether soaked rag over Jazvac's nose and mouth. During the Goetz incident, Rivera's intent was to expose himself to her, but he became overwhelmed with the urge to molest and rape her. When she resisted, he threatened to kill her. (Vol. 1, p. 117) As to Jazvac, he told Peck that she died accidentally after he placed the ether soaked rag over her nose and mouth. (Vol. 1, p. 117)

The trial court ruled that the evidence of the Goetz incident was admissible under the rationale of the "Williams Rule" and within the meaning and intent of Florida Statute 90.404(2).

Re: "Reverse Williams Rule" Evidence

The State moved in limine to prevent Rivera from introducing into evidence "**reverse**" Williams Rule evidence. (Vol. 12, p. 2254) Rivera sought to introduce evidence concerning the disappearance and death of Linda Kaliton. After Rivera was arrested and jailed, Kaliton, a young white female, disappeared while riding her bicycle. Nine days after Jazvac's body was discovered, Kaliton's body was discovered in the same field. Found near her body was the same type of pantyhose packages that were found near Jazvac's body. Like Jazvac, Kaliton had died as a result of asphyxiation/strangulation. (Vol. 1, p. 119) The trial court reserved ruling at the pretrial hearing, and advised Rivera's counsel to proffer the evidence during trial. (Vol. 1, p. 121)

The "reverse Williams Rule" testimony concerning the disappearance and death of Linda Kaliton was proffered on the

defense side of the case. After Rivera was arrested and jailed, Kaliton disappeared while riding her bicycle. Nine days after Jazvac's body was discovered, Kaliton's body was discovered in the same field. Found near her body were the same type of pantyhose packages that were found near Jazvac's body. Like Jazvac, Kaliton died of asphyxiation/strangulation. (Vol. 1, p. 119)

Detective Riley of the Coral Springs Police Department investigated the death of Linda Kaliton. On February 3, 1986, the body of Kaliton was discovered off Riverside Drive just south of Atlantic Boulevard in the same general area where Jazvac's body was found. (Vol. 9, p. 1615) Kaliton disappeared from the area State Road 84 and 117th Avenue, while riding her bicycle. (Vol. 9, p. 1615-1616) Discovered near her body was a pair of pantyhose. (Vol. 9, p. 1616-1617) Kaliton's bicycle was found abandoned and her body was transported to the Coral Springs area near where Jazvac's body was found. The only bodies that had ever been found in this area were Jazvac and Kaliton. (Vol. 9, p. 1628)

Dr. James Ongley, an assistant medical examiner, performed the autopsy on Kaliton. He opined that she died from asphyxiation. (Vol. 9, p. 1634)

Detective Scheff was called by the State in opposition to Rivera's motion. (Vol. 9, p. 1640) Jazvac was an 11 year old with a child-like body, and Kaliton was a 28 year old fully developed woman. (Vol. 9, p. 1640) Jazvac was found with her top pulled up and her pants unzipped while Kaliton was nude.

The medical examiner opined Kaliton had been sexually assaulted. The medical examiner was unable to determine whether Jazvac had been sexually assaulted. The State introduced a crime scene investigator's opinion that Jazvac had been sexually assaulted because of the condition of her underwear. Jazvac's body was found in a ditch near the canal, and Kaliton's body was found floating in the canal. (Vol. 9, p. 1641) There was an initial attempt to dump Kaliton's body at the scene where she was attacked. (Vol. 9, p. 1642) Both Jazvac and Kaliton had blond hair. (Vol. 9, p. 1647) Scheff was able to point out where Kaliton's body was found in the pictures that the State had introduced to show where Jazvac's body was found. (Vol. 9, p. 1650) Kaliton was abducted and killed while Rivera was incarcerated in the Broward County Jail. (Vol. 9p, 1654) The trial court denied Rivera's request that the **"reverse"** Williams Rule testimony concerning the Kaliton murder be admitted into evidence. (Vol. 9, p. 1664)

Re: Other Pretrial Motions

Rivera's motions to compel disclosure of mitigating and aggravating circumstances were granted. (Vol. 1, p. 121-122) Rivera's other pretrial motions, including but not limited to the constitutionality of the death penalty, and venue, were denied. (Vol. 12, p. 2165-2211, Vol. 1, 121-125)

Re: Proof of guilt at trial

Jazvac, an 11 year old middle school student, lived with her mother and step-father in the City of Lauderdale Lakes near the intersection U.S. Highway 441 and Oakland Park

Boulevard. (Vol. 4, p. 728-729) Late in the afternoon of January 30, 1986, Jazvac rode her bicycle to a nearby drug store to buy some school supplies. When she did not return, her mother drove the route to the drug store looking for her. (Vol. 4, p. 733-734) She saw a Broward County Sheriff Deputy driving out of the field near the drug store with a bicycle in the trunk of his patrol car. Jazvac's mother identified the bicycle as belonging to her daughter. (Vol. 4, p. 734-736) A missing child's report was filed. Deputies searched the field where the bicycle was found, a nearby carnival, and the surrounding neighborhood. (Vol. 4, p. 737, 759-774)

With no clue as to the reason for her disappearance, a massive search effort was begun. The story of Jazvac's disappearance and her picture were broadcast on local television stations. Printed fliers, containing her picture and description, were distributed. (Vol. 4, p. 753-754)

Concerning suspected foul play, Jazvac's mother told the police that a former boyfriend, Daniel Slavik, was the only person who held a grudge against her. She related that she and Slavik had a child born out of wedlock which she put up for adoption. (Vol. 4, p. 748-749)

In response to the media blitz concerning Jazvac's disappearance, Kenneth Payton, who attended the same middle school as Jazvac, came forward with information. He and some friends had discovered Jazvac's bike abandoned in the field. They stole the flashlight off the bike. Later they threw the flashlight in a nearby canal. (Vol. 1, p. 774-783) Broward



County Sheriff diver, Bill Bushong, recovered the flashlight from the canal. (Vol. 4, p. 784-794)

Patsy Henry, a part-time cashier at the drug store, came forward. She had waited on Jazvac the night of her disappearance shortly before 7:00 p.m. (Vol. 4, p. 795-800; Vol. 5, p. 802-808)

On February 14<sup>th</sup>, Michael McDowell, a lawn supervisor for a pest control company, took a break in an field in the City of Coral Springs near Atlantic Boulevard and Riverside Drive. At about noon, McDowell parked his company truck near a stand of trees adjacent to a canal. As McDowell walked along the canal bank, he smelled a strong odor. He followed the odor into the bushes. There he found Jazvac's body lying in a ditch, face up. Her body was clothed in jeans, a t-shirt, and a blue jacket. The jeans were unzipped, and the t-shirt was pulled up with her lower chest exposed. (Vol. 5, p. 809-811) McDowell made contact with a nearby private security guard and the police were contacted. McDowell had visited this area before and had seen adult magazines and used pantyhose in the vicinity of where the body was discovered. (Vol. 5, p. 816) McDowell described the area as a place where people dump trash. McDowell told the police that on previous visits to the area he had seen two men living in a white Lincoln Continental automobile. (Vol. 5, p. 817-822)

Dr. Ronald Wright, the medical examiner, came to the scene. Wright observed what appeared to be a female body in the state of decomposition. The body was laying on its back and it appeared as if it had been dragged there. The upper part of the

body was decomposed from exposure to sunlight. The lower portion of the body was in tact. (Vol. 5, p. 837-842) Dr. Wright photographed the scene and had the body transported to his office for an autopsy. The cause of death was opined to be asphyxiation by a process of exclusion. Wright could not positively rule out that she had died of nature causes. Dr. Wright was unable to determine whether she had been sexually assaulted. (Vol. 5, p. 856, 874, 882, 887) The unzipping of her pants could have been caused by bloating as a result of her decomposition. (Vol. 5, p. 842)

Before the discovery of the body, Deputy Haarer, a crime scene technician, processed other possible grave sites, but found nothing. On February 14<sup>th</sup>, he went to the scene where the body was discovered. He photographed the scene. Items within a 100 foot radius of the body were collected. They included pornographic magazines, a sexual ointment called **"Maintain"**, 8 pairs of queen-size pantyhose, 13 pantyhose packages, beer bottles and soda cans.

Collected from Jazvac's clothing were pieces of candy, miscellaneous pieces of paper, a wallet size photograph of her, a ball point pen, and a watch. (Vol. 5, p. 916-969)

Alan Kasner operates a coin store across the street from the drug store where Jazvac was last seen alive. Eight days after Jazvac's disappearance, Rivera and another man sold him some coins. (Vol. 5, p. 978-988)

On February 7<sup>th</sup>, Deputy Snow interviewed Star Peck concerning the telephone call she had received. He referred Peck

to his supervisors and the deputies investigating Jazvac's disappearance. (Vol. 5, p. 989-992)

Detective Scheff was assigned to the Jazvac investigation on February 4th. He interviewed Jazvac's mother, step-father, natural father, Star Peck and Dennis Slavik, Jazvac's mother's former boyfriend. (Vol. 6, p. 1008)

On February 12th, he went to Rivera's house but he was not home. The next day he made contact with Rivera, took him into custody and transported him to the Broward County Sheriff's Office. During the trip to the Sheriff's Office, Scheff told Rivera that he wanted to discuss something with him when they got to the Sheriff's Office. Rivera replied, "If I talk to you guys, I'll spend the next twenty years in jail." (Vol. 6, p. 1011-1012)

At the Sheriff's Office, Rivera was advised of his Miranda warnings. (Vol. 6., p. 1013-1014) Rivera said that he had sexual problem with young girls. Scheff told him that he wanted to talk with him about the disappearance of Jazvac. Rivera asked why. Scheff told him that someone had said that he might known something about her disappearance. Star Peck was mentioned. They discussed the telephone call to Peck. (Vol. 6, p. 1014-1015) Rivera admitting making the phone call to Peck. He denied abducting or murdering Jazvac. He told Scheff that he found it sexually gratifying to fantasize about murdering or killing a young girl. (Vol. 6, p. 1015)

Scheff turned Rivera over to Detective Eastwood. He was with Eastwood for approximately 4 hours. (Vol. 6., p. 1016-1017) After Rivera's statements to Eastwood, Scheff

contacted Detective Asher of the Coral Springs Police Department. Asher and Scheff interviewed Rivera. Rivera indicated that in his fantasizing about raping young girls, that he had borrowed a van from a friend and driven to various neighborhoods looking for girls. (Vol. 6, p. 1017-1018) Rivera told Scheff that he would render the girls unconscious with ether that he got from a friend, Mark Peters. (Vol. 6, p. 1019)

While Scheff and Rivera were eating dinner, he asked Rivera whether Jazvac's body was in Broward County. Rivera replied that whoever was responsible for her disappearance didn't have much gasoline and no money to purchase it. It is his belief that the body would be found locally. (Vol. 6, p. 1020) Rivera agreed to a search of his home. After 13 to 14 hours of questioning he was taken to jail. (Vol. 6, p. 1021-1022)

The next day Jazvac's body was discovered in Coral Springs. Scheff went to the scene and observed the body. Concerning the area where the body was found, Rivera had previously told Scheff that he had been in that area driving his brother's off-road vehicle through the muddy fields. (Vol. 6, p. 1026)

Rivera had Peck's telephone number in his personal telephone directory. (Vol. 6, p. 1030-1032) He also had the telephone number for Bobby Rubino's restaurant. Rubino's number was of significance because Rivera had previously telephoned Rubino's restaurant telling them that he had abducted and murdered Jazvac after molesting her. (Vol. 6, p. 1033)

Rivera was questioned for 13 hours the first day.

(Vol. 6, p. 1040) Rivera admitted to Scheff that he made the phone calls but they were fantasy. He told Scheff that the contents of the telephone calls were sexually exciting. He never told Scheff that the calls were sexually exciting to the point of his committing murder. Rivera denied any involvement in the Jazvac abduction or murder. (Vol. 6, p. 1041-1042) Scheff acknowledged that Rivera's details of the crime as related to his callers were inaccurate. (Vol. 6, p. 1042-1043)

In September, 1985, Star Peck began receiving obscene telephone calls. The caller knew her name and referred to himself as **"Tony"**. On February 7, 1986, **"Tony"** called and said that he had done something terrible to a girl named Staci. He said he didn't mean to kill her and that her body was by Lake Okeechobee. **"Tony"** said that he had drugged her with ether and pulled her into a van. He said he had sex with her. Before this telephone call, **"Tony"** never mentioned anything about abducting or killing anyone. (Vol. 6, p. 1083-1107) **"Tony"** indicated to her that he had previously worked for her. Peck identified Rivera as having previously worked for her. (Vol. 12.)

Julius Minery, a carnival worker with a criminal record, was working a carnival near Jazvac's home. Two days before her disappearance, Rivera's brother, some other carnival workers, and Rivera were smoking "rock" cocaine. They smoked **"rock"** cocaine again the next afternoon. On January 30th, they met again. Rivera said that he would get some cocaine and went in the direction of Oakland Park Boulevard. Minery saw Rivera the day after Jazvac's disappearance driving a blue van. (Vol. 6, p. 1118-1134)

Dr. Steven Rifkin, a dentist and associate medical examiner, identified the dental impressions taken from the body as belonging to Jazvac. (Vol. 6, p. 1144-1147)

Detectives Berk, Hutchinson and Edwards searched Rivera's home on February 14th. They found telephone books with the telephone numbers of Peck and Bobby Rubino's. They found women's bathing suits, pantyhose, and leotards. (Vol. 7, p. 1204-1212)

Deputy Schoff, a latent fingerprint examiner, identified the left thumb print of Rivera on a paint thinner can. (Vol. 7, p. 1213-1231)

Anjela Greene, the manager of a 24 hour restaurant, had received obscene telephone calls for two years from a stranger. On February 7, 1986, at approximately 11:00 p.m., the same caller identified himself as "**Tony**". He said that he had Jazvac and that she would never be found. He said he had put ether over her face. Greene reported this call to the Sheriff's Office because this was the first call that had been threatening in nature. (Vol. 7, p. 1242-1251)

Dawn Soter was living at an apartment complex in Pompano in January, 1986. Rivera was visiting some friends at the complex and he was driving a light blue van. On January 31, 1982, she saw the same van parked in front of Rivera's house in North Lauderdale. (Vol. 7, p. 1253-1254)

Sgt. John Carney came into contact with Rivera on the afternoon of February 14th. Detective Amabile requested that he sit in on an interview of Rivera. Rivera stated that on January

30th, that he had been with his brother off-road driving his brother's truck. Later, they went to a carnival. When Rivera was confronted with the fact that his brother was working on the 30th, he said it may have been the 29th. Rivera said that he and a friend, Larry Nelson, may have seen Jazvac at a gas station. Rivera said that he did not remember killing Jazvac.

On February 15th, Carney and Amabile met with Rivera. He told them that he was positive that he was with his brother on January 30th. On January 17th, Carney and Amabile again made contacted Rivera and told him that his brother had said they were not together the night of January 30th. Rivera replied that he did not remember, because he had been free-basing cocaine and blacking out. (Vol. 7, p. 1261-1292)

Howard Seiden, a forensic technician with the Broward County Sheriff's Office Crime Lab, opined that a hair sample found in the van that Rivera had been operating may have come from Jazvac. He could not say that the hair was Jazvac's, nor could he eliminate Jazvac as the source of the hair sample. (Vol. 7, p. 1293-1319)

The day of his arrest, Amabile and Scheff turned Rivera over to Eastwood for questioning. He questioned Rivera for 4 hours. Rivera admitted to Eastwood that he had made obscene phone calls concerning the disappearance of Jazvac saying that he had abducted and killed her. However, he claimed that the calls were fantasy. He said that the date of Jazvac's disappearance that he was home alone. (Vol. 12, p. 1327)

Rivera told Eastwood that he liked to expose himself to young girls. He said that approximately two years ago in the

Coral Springs/Coconut Creek area that he had exposed himself to young girls. Eastwood asked why he liked the Coral Springs area. Rivera replied that there were allot of open fields and less chance of getting caught. Rivera said that he borrowed a friends van to get to the location. (Vol. 7, p. 1328-1329)

Eastwood asked him if he ever thought about picking up girls and forcing them to have sex with him. Rivera replied, "Yes, every time I get in a vehicle, I do something terrible." Eastwood asked what he meant. Rivera said nothing. Rivera said that he often thought about picking up girls and forcing them to have sex with him, but that he hadn't done it. (Vol. 7, p. 1329) Rivera said that the last time that he thought about it was two weeks ago when he had the van. (Vol. 7, p. 1330)

Eastwood asked him what so special about two weeks ago. Eastwood asked him if there was anything significant about any of the girls. Rivera replied that one of them was pushing a bicycle. (Vol. 7, p. 1330-1331) With that statement, Eastwood advised Rivera of his Miranda warnings. (Vol. 7, p. 1331) Rivera continued by stating that every time he got into a vehicle he did something terrible. Rivera said that he had pulled a young girl into the bushes of an apartment complex in Coral Springs. He said he felt badly about the incident and telephoned a woman admitting that he had attacked a girl. (Vol. 7, p. 1332-1333) After this statement, Rivera began to cry. He stated, "Tom, I can't stop myself. I can't control myself. Either kill me or put in jail, because I'm going to keep on doing what I'm doing if you don't stop me," (Vol. 7, p. 1332-1333)



As Rivera cried, Eastwood told him that he knew he had killed Jazvac. Eastwood asked him where the body was. Rivera replied, "Tom, I can't tell you. I don't want to go to jail. They will kill me for what I have done." (Vol. 7, p. 1333)

Rivera continued to cry and Eastwood continued to ask him where Jazvac's body was located. Rivera continued crying. At that point, Eastwood stopped the interview and made contact with Detectives Amabile and Scheff. Eastwood told Amabile and Scheff about the incident in Coral Springs. They then questioned Rivera. (Vol. 7, p. 1337)

Detective Eastwood interviewed Rivera again. Rivera was not cooperative. The interview terminated. (Vol. 7, p. 1338)

Detective Asher of the Coral Springs Police Department investigated an attack on Jennifer Goetz that occurred on July 10, 1985. Goetz was attacked behind a gazebo next to a swimming pool at her condominium complex. Four months after the attack, Asher interviewed Rivera. Rivera denied any involvement in the Goetz incident. (Vol. 7, p. 1369-1381) Goetz never identified Rivera as her attacker, and in fact she identified another person as her attacker. (Vol. 7, p. 1389) On February 13th, Asher was summoned to the Broward County Sheriff's Office to question Rivera about the Goetz incident. (Vol. 7, p. 1392)

Frank Zuccarello, an inmate with Rivera at the Broward County Jail, testified about conversations he had with Rivera. Rivera told him that he confessed to the Goetz incident to keep Detective Eastwood from questioning him about the Jazvac case.

Rivera admitted telling Peck that he had killed Jazvac. He said that trusting Peck was the biggest mistake of his life. Rivera said that he intended to fondle and molest Jazvac, but that when things got out of hand he choked her to death. Rivera said that his encounter with Jazvac was a random thing. He said he dumped the body in a rock pit area about two miles from his home. Rivera admitted trying to kill Goetz and that she survived because someone scared him away. (Vol. 8, p. 1402-1408)

Dr. William Lowry, a toxicologist, examined tissue samples from Jazvac's body. He found 11 substances in both her fat tissue sample and her muscle tissue sample. (Vol. 8, p. 1433) He examined the liquid found in the paint thinner can on which Rivera's fingerprint was found. An analysis of the liquid and the tissue samples revealed that 3 of the 11 substances were found both in the tissue samples and the liquid. (Vol. 8, p. 1435)

On July 10, 1985, Jennifer Goetz was attending a summer day camp at Pine Crest School. At approximately 8:00 a.m., she left her condominium to walk to the bus stop. As she walked to the bus stop a man grabbed her from behind with an arm around neck and an arm around her waist. She was pulled off the walkway. The man told her to shut up and not to struggle, or she would be killed. She was turned over on her stomach and passed out. When she came to, she was on her back naked with a bag over her face. The man ran and another man came to her. This man called the police. The man who attacked her had dark curly hair and was in his mid-twenties. (Vol. 8, p. 1453-1464)

Dr. Wright, the medical examiner, examined photographs of Goetz that were taken after the incident. The photographs duplicated hemorrhages of the eyelid. He opined that these hemorrhages were consistent with a person who had been strangled and was very close to death. (Vol. 8, p. 1466-1467)

William Moyer, an inmate at the Broward County Jail convicted of child molesting and awaiting a sentence reduction pending his testimony, testified about a conversation he had with Rivera. Rivera told him that something was bothering him. Rivera said, "I didn't do it. Tony did it," (Vol. 8, p. 1476) About two weeks later Rivera said that they had found some liquid on her body and her clothes. Later, he heard Rivera on the telephone using the name "Tony". Rivera said that a bicycle had been found in a field while he was at a pawn shop across the street. Concerning Frank Zuccarello as a witness against him, Rivera said that Frank was full of "shit". He said that he didn't use a van, he used his brothers blue truck. He said that the State could not prove anything. (Vol. 8, p. 1478)

While Deputy Furno was taking Moyer from one area of the jail to another, they came into contact with Rivera. Rivera told Moyer that he was the first person he was going to kill. (Vol. 8, p. 1501)

Detective Amabile's testimony was the same as Detectives Scheff and Eastwood. Rivera said he could easily obtain ether from a friend of his Mark Peters who uses it in his job with a mirror company. Rivera related that Peters owns a van. (Vol. 8, p. 1521-1522) Amabile testified about Detective McCann having Rivera write an autobiography. (Vol. 8, p. 1533-1536)

Peter Joseph Salerno, notorious criminal turned police informant, was incarcerated in the Broward County Jail with Rivera. While in the exercise yard, Salerno was approached by Rivera. Rivera said, "I don't know what you think of me. I didn't mean to kill the little Staci girl. I just wanted to look at her and play with her. I seen her on a bike and she excited me." Salerno replied, "Mike I don't care what you have done, but if it was my little girl you wouldn't be here in jail. I would blow your brains out. So if you want to lift weights, lift weights." (Vol. 8, p. 1576) Later, Salerno asked him about another incident involving an attempted murder of a little girl. Rivera replied that there were witnesses in that case. He said that there were no witnesses in the Jazvac case and that he would not be convicted. (Vol. 8, p. 1578)

Gail Mastendo, the manager of a 24-hour restaurant, received a number of obscene telephone calls in 1985 from a caller, who identified himself as "Tony". "Tony" would relate that he was wearing pantyhose and a black body suit, and masturbating while talking to her. On one occasion she attempted to have the telephone traced. She asked what he looked like. "Tony" said that he looked like the singer John Oates of the Hall and Oates singing group. (Vol. 8. p. 1579) "Tony" related that he did not like men or women but that he liked children. She asked how he knew that he liked children. He replied that he had had a child. He said that he liked to drive by school yards and watch the children. He said that he had grabbed a little girl and hurt her real bad. "Tony" became angry when she said

that a doctor could help him. (Vol. 8, p. 1590)

Re: Defense case

Rivera did not testify. The defense proffered the "reverse" Williams Rule testimony as set forth above.

Deputy Speiser, a security officer at the middle school that Jazvac attended, testified that before Jazvac's disappearance he was alerted to be on the look out for a man in a van who was hanging around the school. He confronted the individual, who was not Rivera, and ran a records check on him. It revealed that he had previously been arrested for a sexual assault on a minor child. (Vol. 9, p. 1670-1672)

Dr. Abdulah Fattah, a former medical examiner, rendered an opinion concerning the injuries to Jennifer Goetz and the significance of those injuries. Dr. Wright had testified that the injuries to Goetz' eyes were caused by manual strangulation. In contradiction, Dr. Fattah opined that her injuries could have been caused by her being thrown to the ground. (Vol. 9, p. 1687)

Detective Edwards was called to impeach the testimony of Julius Minery. Edwards had taken a statement from Minery during the course of the investigation. Minery told Edwards that he was with Rivera between 6 and 7 p.m. the night of Jazvac's disappearance. (Vol. 9, p. 1704-1705) Minery came into contact with Rivera, his brother Peter, and Anthony Wade later that same evening. (Vol. 9, p. 1705-1706)

Detective Kreitz, the day Jazvac's body was discovered, searched the area where it was discovered. He collected some pantyhose. After Kaliton's body was found, he searched the same

area and found additional pantyhose. (Vol. 9., p. 1715-1716)

Dr. Walter Matusiak, a toxicologist at the Broward County Medical Examiner's Office, testified that Jazvac's body tissues were never examined for the substance "ether" to confirm, or deny Rivera's story about using ether.

Peter Rivera, Rivera's brother, testified that Rivera was with him on the night of Jazvac's disappearance. They went to a coin shop and from there to a convenience store to buy beer. (Vol. 9, p. 1733) From there they went in Peter's truck to the carnival. They met a carnival worker who asked them to get him some drugs. (Vol. 9, p. 1734) They left and got him some drugs. The next evening Peter went back to the carnival to collect the money for the drugs. (Vol. 9, p. 1735)

John Meham was called to impeach the testimony of Bill Moyer, a State's witness that had testified to certain admissions Rivera had made to him. Moyer told Meham that Rivera had never made any admissions to him. Moyer told Meham that he and Frank Zucarella were making a deal with the State to give testimony against Rivera by claiming that he made certain admissions to them. (Vol. 9, p. 1760-1763)

Re: Penalty Phase and Imposition of Death Penalty

At the penalty phase, Rivera requested eight special instructions which were denied.

The trial court followed the jury's recommendation and sentenced Rivera to death. The trial court found four statutory aggravating circumstances. First, that Rivera had previously been convicted of the offenses of attempted murder in the first

degree, kidnapping, aggravated child abuse, and aggravated battery stemming from the Goetz incident. (Vol. 20, p. 1923)

Rivera was previously convicted of the charge of burglary with an intent to commit a battery stemming from a 1980 incident involving an adult female. Rivera was previously convicted of the offense of indecent assault upon a female child stemming from a 1980 incident where Rivera exposed himself to a 12 year old child. (Vol. 10, p. 1929, 1934)

Second, the murder was committed while Rivera was engaged in the commission of one of the enumerated felonies, to wit: that the murder was committed during the commission of the offenses of kidnapping and sexual battery. Jazvac was abducted from an open field and that her body was found several miles away. There was an attempt to, or actual commission of a sexual battery based upon Rivera's statements and the circumstantial evidence that when she was found her jeans were unzipped and her underwear were torn. (Vol. 12, p. 2310)

Third, that the murder was especially heinous, atrocious and cruel, based upon the medical examiner's testimony that Jazvac was bruised before death and that she died of asphyxiation. (Vol. 12, p. 2310)

Fourth, that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The trial court found there were no pretense of moral or legal justification shown by the evidence and Rivera's statements. Rivera's statements collectively showed a cold, calculated, and premeditated manner of homicide. (Vol. 12, p. 2311)

The trial court found one statutory mitigating circumstance to wit: that the murder was committed while Rivera was under the influence of extreme mental or emotional disturbance. (Vol. 12, p. 2311)

The trial court found no non-statutory mitigating circumstances. The trial court considered the testimony of Rivera's mother, brother, sister, and a friend, Linda, and the lengthy psychological testimony of Dr. Patsy Ceros-Livingston, a psychologist.

Linda, an acquaintance of Rivera, testified about an incident that occurred after they attended a concert. After the concert, Rivera dropped her off at her home where she lived with her parents. An hour later, Rivera telephoned her stating that he wanted to talk. Linda chastised Rivera because of the lateness of the call explaining that her parents would complain. She hung-up telling him to call her in the morning. About two hours later, she received a strange telephone call from an individual that she believes was Rivera. The man sounded very frustrated capable of doing anything. The man threatened her and her mother. Because of the strange nature of the call, she reported it to the police.

Having considered the aforementioned, the trial court found that the sum total of their testimony did not constitute *a* non-statutory mitigating circumstance.

The trial court finding four statutory aggravating circumstances and one statutory mitigating circumstance followed the jury the unanimous recommendation and imposed the death



penalty.

#### SUMMARY OF ARGUMENT

Rivera challenges that the State's "Williams Rule" evidence relating to identity did not satisfy this Court's stringent requirement of similarity plus uniqueness pointing to the defendant.

Next, Rivera urges this Court to construe Florida Statutes 90.402, 90.403, and 90.,404(2) to allow defendant's in criminal cases to introduce "reverse Williams Rule" evidence. Rivera challenges that his "reverse Williams Rule" evidence should be admitted because (1) it was relevant evidence that tended to directly or indirectly disprove his guilt, and (2) it should have been allowed in rebuttal to the State's "Williams Rule" evidence. What's good for the goose is good for the gander.

Lastly, Rivera challenges the propriety of his death sentence. The trial court found four statutory aggravating circumstances. The record supports the finding of two statutory aggravating circumstances. The trial court erred in finding that the murder was heinous, atrocious, and cruel, and that it was committed in a cold, calculated, premeditated manner. The trial found one statutory mitigating circumstances, and no non-statutory mitigating circumstances. The un rebutted testimony of the court appointed expert reveals that there were two additional statutory mitigating circumstances, and non-statutory mitigating circumstances.

POINT 1

THE INTRODUCTION OF SIMILAR FACT EVIDENCE,  
OR "WILLIAMS RULE" EVIDENCE IN THE STATE'S CASE-IN-CHIEF  
CONSTITUTES REVERSIBLE ERROR

Rivera challenges that the State's introduction of similar fact evidence, or "**Williams Rule**" evidence relating to the Jennifer Goetz incident constitutes reversible error. One of the most litigated issues in criminal law is the State's use of similar fact evidence. In Williams v. State, 110 So.2d 655 (Fla. 1959) this Court held that similar fact evidence is admissible to prove a fact in issue. Provided the probative value of the similar fact evidence outweighs its prejudice. If it appears that the evidence relates solely to character or propensity, then its probative value can never outweigh its prejudicial. The Florida Evidence Code codified the "Williams Rule" at Florida Statute 90.404 (2) (a) which provides:

**"Similar** fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but is inadmissible when the evidence is relevant solely to prove bad character or **propensity.**" (emphasis added)

The Law Revision Council Note following the Statute sets forth a four-part test to determine the admissibility:

(1) the evidence must be relevant and have probative value in proof of the instant case of some material fact or facts in issue;

(2) it must not have as its sole purpose to show bad character;

(3) it must not have as its sole purpose to show propensity; and

(4) its admission must not be precluded by some other specific exception or rule of evidence.

The State may seek to introduce similar fact evidence as proof of the elements of the crime, or as anticipatory rebuttal of a possible defense. In the case sub judice, the similar fact evidence was introduced as proof of ~~identity~~. The state knew before trial, as evidenced by its objection to Rivera's "reverse" Williams Rule testimony, that Rivera was asserting that he was not the perpetrator of the crime. The State knew that Rivera was not asserting an affirmative defense, such as accident or self-defense. Thus, the similar fact evidence was not introduced as anticipatory rebuttal of an affirmative defense.

When the State attempts to prove a defendant's identity by proof of commission of another crime with similar modes of operation, this Court has been stringent in its requirement of similarity. This Court has held that admissibility must be based not only upon similarity, but on the "unusual nature of the factual situation being compared." In Drake v. State, 400 So.2d 1217 (Fla. 1981), the material issue to be resolved by the similar fact evidence was identity. In holding the introduction of the similar fact evidence was reversible error, this Court stated:

"The mode of operating theory of proving identity is based upon both the similarity of and the unusual nature of the factual situations being compared. A mere general similarity will not render the similar facts legally relevant to show identity. There must be identifiable points of

similarity which pervade the compared factual situations. Given sufficient similarity, in order for the similar facts to be relevant the points of similarity must have some special character or be so unusual as to point to the defendant." Drake v. State, supra at 1219

This Court found that the only similarity between the two crimes was that Drake met the victims at a bar and they were found with their hands tied behind their backs. This Court noted that while there was some similarity, the similar facts offered would still fail the unusual branch of the test. Meeting in bars, or the binding of hands occurs in many crimes involving many different defendants.

In Peek v. State, 488 So.2d 52 (Fla. 1986) this Court reversed the defendant's first degree murder, sexual battery and unauthorized use of a motor vehicle convictions because of improper introduction of similar fact evidence. The similar fact evidence involved the defendant's commission of a prior sexual assault on an elderly woman. The sexual battery at trial involved a sexual battery and first degree murder of a young woman. The charged crime and the collateral offense occurred within two months of each other, in the same suburb, and both victims were white females. This Court reiterated that when similar fact evidence is introduced to prove identity that admissibility must be based not only upon similarity, but on the unusual nature of the factual situations being compared. This Court found the two crimes dissimilar because of the *modus operandi* and age of the victims.

In Robinson v. State, 13 FLW 123 (Fla. 2 DCA 1987), the Second District Court of Appeal considered the introduction

of similar fact evidence as prove of identity. The Second District relying on this Courts reasoning in Drake v. State, supra stated, "A mere general similarity will not render the similar facts legally relevant to show identify. There must be identifiable points of similarity which pervade the compared factual situations... Given sufficient similarities, the point of similarity must have some special character or be so unusual as to point to the defendant." Both the charged crime and the similar fact evidence concerned a sexual battery. The crimes were committed within the same year, within the same geographic location, at the same time at night, and on elderly victims. However, this Court noted that the *modus operandi* differed significantly. In the crime charged the perpetrator broke into the victim's home by cutting through her bedroom screen. He threw her on the floor and forced her to have sexual intercourse with him in a darken room. He then pulled her off the floor and forced her to let him out the back door. In the similar fact case, the perpetrator attacked the victim outside in front of her home. He forced her to the ground and unsuccessfully attempted to have sexual intercourse. He dragged her into the building into a fully lit room and had sexual intercourse. After the attack, he turned the lights on and off in a "peculiar manner" and examined objects in her apartment.

In the case sub judice, the similarities between the charged offense and the similar fact are:

- (1) the crimes were committed within six months of each other;

(2) although the crimes were committed in different cities miles apart, it could be argued that they were committed within the same geographic locale;

(3) both the victims were 11 years old;

(4) both victims were grabbed from behind.

The aforementioned similarities do not satisfy the "unusual" branch of the test. The age of the victims, the broad geographic locale, and the fact both victims were grabbed from behind are not so unusual, or of such a special character as to be unique.

The dissimilarities are:

(1) Goetz was attacked early in the morning and Jazvac at dusk;

(2) Goetz was manually choked while Jazvac was incapacitated with ether;

(3) Goetz was striped nude, and Jazvac was clothed but with an indication of a sexual assault; and

(4) Goetz was sexually assaulted within a few feet of where she was grabbed, while Jazvac was pulled into a motor vehicle and transported to another location.

In summary, as Jazvac rode or walked her bike through an open field near a busy shopping center an ether soaked rag was placed over her nose and she was dragged into a waiting motor vehicle. She was assaulted in the motor vehicle, and either killed in the motor vehicle or at the location where her body was dumped. Jazvac's clothes were disheveled indicating a sexual attack, but nonetheless she was clothed. In contrast, Goetz was attacked early in the morning as she walked through a wooded area of her condominium complex. She was unclothed and attacked

within a few feet of where she was grabbed. There was no indication that Rivera used any type of chemical substance to incapacitate her. The fact that both victims were attacked from behind is a similarity without uniqueness. The element of surprise is a common element of most attacks.

Rivera challenges that the Goetz incident became a feature of the trial. The "feature versus incident!! doctrine was first enunciated in Williams v. State, 117 So.2d 473 (Fla. 1960). This Court in finding that the collateral crime evidence was relevant and therefore admissible become the nonetheless, found that the State had gone too far in the proof of the collateral crime. This Court concluded that this "overkill" caused the collateral crimes evidence to transcend the bounds of relevancy, thereby making the collateral crime evidence a feature instead of an incident of the trial. This Court found that the collateral crime evidence was prejudicially disproportionate.

In Green v. State, 228 So.2d 297 (Fla. 2 DCA 1969), the defendant was prosecuted for assault with intent to commit murder. The State introduced testimony concerning a killing that occurred a few hours before for which the defendant was convicted of manslaughter. The Second District Court found the collateral crime evidence to be relevant. However, it found that the collateral crime evidence became a "feature" of the trial. Judge McNulty in his concurring opinion reversing the defendant's conviction, noted that five of the eight prosecution witnesses testified substantially about the collateral crime evidence.

Compare, in the case sub judice, nine of the State's witnesses testified about the Goetz incident. Detectives Amabile, Scheff, Carney and Asher testified about the admissions Rivera had made to them about the Goetz incident. The three jailhouse informants, Moyer, Zuccarello, and Salerno, testified about the Goetz incident. Medical examiner Wright testified about pictures depicting Goetz physical condition after the attack. Lastly, Goetz herself testified. The volume of the evidence relating to the Goetz incident coupled with the number of witnesses who testified about the Goetz incident coupled with Rivera's admission of the Goetz incident, caused the collateral crime evidence to become a **"feature"** of the trial.

The introduction of the similar fact evidence is not harmless error. The standard by which harmless error is determined is whether after an examination of the entire record on appeal, "including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition and even closer examination of the impermissible evidence...there is a reasonable possibility that the error effected the verdict...If the appellate court cannot say beyond a reasonable doubt that the error did not effect the verdict, then the error is by definition harmful." DiGuilio v. State, 491 So.2d 1129, 1135, 1139 (Fla. 1986).

Within this analytical framework, the legitimate evidence upon which the jury could have relied consisted of admissions by Rivera and circumstantial evidence. The circumstantial evidence consisted of the following facts:

(1) that Rivera lived within a few miles of both



the point of the abduction and where the body was dumped:

(2) that Rivera had been near the locale of the abduction the night of the abduction:

(3) that Rivera had previously been in the area where the body was dumped;

(4) that Rivera's fingerprints were found on a container containing a toxic liquid and that a chemical analysis of the liquid and the body tissue of Jazvac revealed that of the 11 substances found in the liquid that 3 of those substances were also found in her body tissues.

The admissions of Rivera are fully set forth in the statement of facts subsections relating to the motion to suppress statements and proof of guilt. An analysis of that evidence reveals that he never admitted to any law enforcement personnel that he abducted and killed Jazvac. The telephone calls to Peck and Mastendo were anonymous calls that the State linked to him by use of his surname "**Tony**" and the fact that he had worked for Peck. Zuccarello, Moyer, and Salerno were hardened criminals facing harsh sentences with hope that their testimony would result in their being sentenced to significantly less time.

Concerning the similar fact evidence, the Goetz incident, this is the only incident that Rivera admitted committing to law enforcement officers. He admitted the attack to four detectives, and that admission was a key piece of evidence. It must be concluded that there is a reasonable

possibility that his admission to four detectives of having committed a similar offense affected the verdict. It can not be concluded beyond a reasonable doubt that his admission to four detectives that he committed that offense, while denying the participation in the charged offense, did not effect the verdict.

In Keen v. State, 12 FLW 139 (Fla. 1987), this Court held that the properly admitted evidence produced at trial against Keen was sufficient to support a jury verdict of guilty. Yet, this Court concluded that the evidence against Keen, which consisted of circumstantial evidence, Keen's statements, and accomplice testimony, was not overwhelming. This Court was unable to conclude beyond a reasonable doubt that the prosecutor informing the jury, under the guise of a question, that Keen had previously attempted to murder his brother's wife had no impact on the verdict. This Court concluded that common sense would indicate to the contrary.

Compare, in Keen, the prosecutor, while cross-examining Keen, asked him if he had previously attempted to murder his brother's wife. An objection was raised and the question was never answered. This Court concluded that the prosecutor's question during the guilt phase, improperly put prejudicial information before the jury which had no relevance except to show Keen's bad character and propensity for violence. This Court in holding that Keen's right to a fair trial was compromised stated, **"In** our system of criminal justice, one of the primary functions of the judiciary generally, and of this Court in capital cases specifically, is to ensure that the rights of the individual are

protected." Keen v. State, supra at 141.

In the case sub judice, the conduct complained of went well beyond the mere asking of a prejudicial question which was not answered. Detectives Amabile, Scheff, Eastwood, and Asher testified about Rivera's admissions concerning the similar fact evidence. In addition jail house informants, Moyer, Zuccarello, and Salerno testified about Rivera's admissions concerning the similar fact evidence. Jennifer Goetz testified about the incident involving her. Dr. Wright, the medical examiner gave testimony concerning the similar fact evidence. At least nine of the State's witnesses testified about the similar fact evidence.

Accordingly, because it was error to admit said evidence and because it cannot be concluded beyond a reasonable doubt that the evidence did not have an impact on the verdict, Rivera's case should be remanded for a new trial with instructions that the evidence is not admissible in the State's case-in-chief.

## POINT 2

THE "REVERSE WILLIAMS RULE" EVIDENCE WAS RELEVANT  
EVIDENCE TENDING TO DISPROVE RIVERA'S GUILT.  
EXCLUSION OF THE EVIDENCE CONSTITUTES REVERSIBLE ERROR.

Rivera challenges that the trial court's exclusion of his "reverse Williams Rule" is reversible error. Rivera sought to introduce evidence of an abduction rape-murder substantially similar to the Jazvac case. Within a few days after his incarceration, a woman riding a bicycle was abducted, sexually

assaulted, and murdered by asphyxiation. Her body was dumped within a few feet of where Jazvac's body had been found. Like the Jazvac case, pantyhose were found in the area.

This question of the admissibility of "reverse Williams Rule" evidence by a defendant appears to be a case of first impression for this Court.

Florida Statute 90.401 provides, "Relevant evidence is evidence tending to prove, or disprove a material fact."

(emphasis added) Relevant evidence encompasses evidence tending to establish negative as well as positive facts. Florida Statute 90.402 provides, "All relevant evidence is admissible, except as provided by law." If an accused offers evidence which has substantial probative value and the evidence does not confuse or prejudice, all doubt should be resolved in favor of admissibility. Moreno v. State, 418 So.2d 1223, 1225 (Fla. 3 DCA 1982); Holt v. United States, 342 F.2d 163 (5th Cir. 1965); Commonwealth v. Keizer, 385 N.E.2d 1001 (Mass. 1979). If evidence tends, in any way, even indirectly, to prove an accused's innocence, it is error to deny its admission. Moreno v. State supra at 1225; Chandler v. State, 366 So.2d 64 (Fla. 3 DCA 1979); Watts v. State, 354 So.2d 145 (Fla. 2 DCA 1978).

In Moreno v. State supra the Third District Court held that the defendant should be allowed to introduce similar fact evidence that someone else committed the crime, because an accused may show his innocence by proof of the guilt of another. That view has been adopted by the First District Court:

"While most cases generally involve the offer

of similar fact evidence by the prosecution against a defendant in a criminal case, there is nothing in the language of [Florida Statute 90.404(2)] which precludes the use of evidence offered by a defendant in a criminal case, or by a parties in a civil action. See C. Erhardt, Florida Evidence, section 404.9 (2d Ed 1984)" Brown v. State, 513 So.2d 213 (Fla. 1 DCA 1987)

Other jurisdictions have long held that defendants may introduce similar fact evidence. In Commonwealth v. Murphy, 185 N.E. 486 (Mass. 1933), identity was the key issue. The Massachusetts Supreme Court held the defendant should have been allowed to introduce evidence that another person similar in appearance was committing similar crimes after the defendant was incarcerated. See also Commonwealth v. Keizer, 385 N.E.2d 1001 (Mass. 1979) reaffirming Commonwealth v. Murphy supra.

In State v. Bock, 39 N.W.2d 887 (Minn. 1949), the prosecution introduced similar crime evidence. The defendant sought to introduce similar crime evidence to disprove his guilt, but the trial court excluded his evidence. The Supreme Court of Minnesota in reversing the defendant's conviction stated:

Where the state has introduced evidence of other crimes to establish identity, the defendant is entitled to rebut the inference that might be drawn therefrom by showing that the crimes have been committed by someone else... He should have the right to show that crimes of a similar nature have been committed by some other person when the acts of such other person are so closely connected in point of time and method of operation as to cast doubt upon the identification of the defendant as the person who committed the crime charged against him. State v. Brock supra at 892 (emphasis added)

In State v. Garfole, 388 A.2d 587 (N.J. 1978), the defendant was convicted of threat to take life, assault with a

weapon, carnal abuse, and lewdness. The defendant sought to introduce similar fact evidence concerning four other episodes. The prosecution objected on the grounds of relevancy. The trial court excluded the evidence unless the prosecution adduced similar fact evidence against the defendant. The intermediate appellate court affirmed the trial court's ruling, not on the grounds of relevancy, but on the ground that the incidents were not sufficiently similar to establish that one person was the perpetrator in all. The trial court thought such evidence to be completely without relevance. While the intermediate appellate court required the proof to meet the same "high degree of similarity" of offenses when the evidence is offered by the prosecution.

The New Jersey Supreme Court rejected both arguments. "The same concept of relevancy which justifies submission of other-crimes evidence by the State supports it when proffered by the defendant." State v. Garfole supra at 590. The court went on to hold that a lower standard degree of similarity of offenses may justly be required of a defendant using other-crimes evidence defensively than is exacted from the State, because when such evidence is used by the prosecution it has the distinct capacity of prejudicing the defendant. The court reasoned that when a defendant is offering that kind of proof exculpatory, prejudice to the defendant is no longer a factor, and simple relevance to guilt or innocence should suffice as the standard of admissibility. The court concluded that a lesser standard of a similarity is justified by the consideration that the defendant

need only engender reasonable doubt of his guilt whereas the prosecution must prove guilt beyond a reasonable doubt.

Rivera would urge this court to adopt the reasoning of the Third District Court that:

(1) where a defendant offers evidence which is of substantial probative value and such evidence tends not to confuse a prejudice, all doubt should be reserved in favor of admissibility;

(2) where evidence tends, in any way, even indirectly, to prove an defendant's innocence, it is error to deny its admission; and

(3) a defendant may show his innocence by proof of the guilt of another.

Rivera would urge this Court to adopt the reasoning of the New Jersey Supreme Court that:

(1) a lower standard of degree of similarity is applicable to a defendant using collateral crime evidence defensively;

(2) when a defendant is offering collateral crime evidence exculpatory, prejudice to the defendant is no longer a factor, and simple relevance to guilt or innocence is the standard of admissibility;

(3) a defendant may use collateral crime evidence defensively if it reasonably tends, alone or with other evidence, to negate his guilt.

In conclusion, Rivera's "reverse Williams Rule" evidence was admissible. The fact that it may not satisfy the "unusual test" of the rule of similarity, does not make the evidence inadmissible. The dissimilarity between the "reverse

Williams Rule" evidence and the charged offense goes to the weight of the evidence, and not its admissibility.

The "reverse Williams Rule" was a key part of Rivera's two-prong defense. First, he contended that his admissions were pure fantasy. Second, as proof thereof he sought to show that there was another perpetrator. Its exclusion is not harmless error.

Accordingly, Rivera's conviction should be reversed and his cause remanded for a new trial with directions that the "reverse Williams Rule" evidence be admitted.

### POINT 3

#### THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY.

The trial court found four statutory aggravating circumstances, one statutory mitigating circumstance and no non-statutory mitigating circumstances. Rivera concedes that there is basis in the record for finding two aggravating circumstances, to-wit: (1) that the defendant was previously convicted a felony involving the use or threat of violence to another person, and (2) that the capital felony was committed while the defendant was engaged in, or was an accomplice, in the commission of, or an attempt to commit or flight after committing or attempting to commit one of the enumerated felonies. (Vol. 12, p. 2309)

Rivera challenges the trial court's finding that the murder was a special heinous, atrocious or cruel. The law is clear to be considered heinous, atrocious or cruel, a homicide was must accompanied by such additional acts as to set the



homicide apart from the normal homicide. The homicide must be a consciousless or pitiless crime which is unnecessarily torturous to the victim. "Heinous" means extremely wicked or shocking or evil; "atrocious" means outrageously wicked and vile; and "**cruel**" means designs to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. State v. Dixon, 283 So.2d 1 (Fla. 1973); Tedder v. State, 322 So.2d 908 (Fla. 1975); Lewis v. State, 398 So.2d 432 (Fla. 1981). Within certain factual patterns death by strangulation and stabbing has been found to be heinous, atrocious, or cruel. Brown v. State, 473 So.2d 1260 (Fla. 1985), cert. denied. 106 S.Ct. 607, 88 L.Ed.2d 585; Medina v. State, 466 So.2d 1046 (Fla. 1985); Johnson v. State, 465 So.2d 499 (Fla. 1985), cert. denied, 106 S.Ct. 186 88 L.Ed.2d 155. However, the death in the case sub judice, is not within the parameters of the aforementioned cases. In the case sub judice, the State's theory was that Rivera attacked Jazvac from behind as she walked her bike through the field. That he rendered her unconscious by placing a rag soaked with ether or some other toxic substance over her mouth or nose. She was then pulled into the motor vehicle. Thereafter, there was a sexual battery, or attempt to commit a sexual battery. The medical examiner opined that death was by means of asphyxiation, but he was unable to opine that whether there had in fact been strangled. Consistent with the State's toxicologist's testimony, it appears that death, or at least unconsciousness was caused the ingestion of a toxic substance.

There is no proof as to how long Jazvac was conscious

after Rivera grabbed her from behind; no proof as to whether she was conscious during any sexual battery or attempt thereof; and no proof that she was conscious during the asphyxiation process such that she suffered the fear, pain, and anxiety set forth in Brown, Medina, and Johnson.

Rivera challenges the trial court's finding that the murder satisfied the requirements of the statutory aggravating circumstance that it was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. This aggravating circumstance focuses more on the defendant's state of mind than on the method of killing, and ordinarily applies to those murders which are characterized as executions or contract murders, although that description is not intended to all inclusive. Cannadav v. State, 427 So.2d 723 (Fla. 1983); Johnson v. State, supra. Premeditation must be beyond that normally sufficient to prove premeditated murder. "The premeditation of a felony cannot be transferred to a murder which occurs in the course of that felony for the purposes of this aggravating factor, nor can the fact that it takes the victim a matter of minutes to die once the process begins to support this finding," Hardwick v. State, 461 So.2d 79, 81 (Fla. 1984), cert. denied, 471 U.S. 1120 (1985); Livingston v. State, 13 FLW 187 (Fla. 1988). "Calculated" has been given the plain and ordinary meaning, "to plan the nature of the beforehand: think out... to design, prepare, or adapt by aforethought or careful plan," Webster Third International Dictionary at 313 (1981); Rogers v. State, 511 So.2d 526 (Fla. 1987). "Calculation consists of a careful plan of prearranged design." Rosers v.

State, supra.

In Hansbrough v. State, 509 So.2d 1081 (Fla. 1987), this Court found this aggravating circumstance to be inapplicable where the case appeared to a robbery that got out of hand, resulting in a stabbing of the victim. Compare, in the case sub judice, the State's conviction was predicated upon Rivera's inculpatory admissions. The State urged the jury and trial court to believe Rivera's admissions and used them as the grounds for his conviction. If his admissions form the basis of his conviction, then the substance of those admissions concerning how the death occurred should be controlling, except where they conflict with other circumstantial or scientific evidence. The sum total of those admissions are:

(1) Rivera did not know Jazvac before the day of their encounter;

(2) Rivera's contact with Jazvac was a random spontaneous act;

(3) Rivera just wanted to look at and play with Jazvac;

(4) Rivera did not intend to kill Jazvac: and

(5) Jazvac died during the attack when things got out of hand.

His chance encounter with Jazvac which resulted in a sexual battery, or attempted sexual battery during which she died of asphyxiation, is similar to the robbery that got out of hand resulting in the stabbing incident in the Hansbrough.

While there is ample evidence to support simple premeditation, there is insufficient evidence to support to

premeditation described in the statute, which must bear the indicia of "**calculation**". The record does not support a finding of such heightened premeditation. Rivera's admissions were that she died during the course of a sexual battery that went awry.

Concerning statutory mitigating circumstances, the trial court found that the murder was committed while the defendant was under the influence of an extreme mental or emotional disturbance. The trial court did not find that Rivera acted under extreme duress or under substantial domination of another person, or that his capacity to appreciate the criminality of his conduct, or perform his conduct to the requirements of law was substantially impaired. In finding that these statutory mitigating circumstances did not exist, the trial court ignored, or completely discounted the unrebutted expert testimony of Dr. Ceros-Livingston.

Dr. Ceros-Livingston, a court appointed expert, over a period of 7 1/2 hours on three different occasions, interviewed Rivera and administered a battery of psychological tests. She was asked to opine within a reasonable degree of psychological certainty whether Rivera acted under extreme duress, or under the substantial domination of another person. (Vol. 11, p. 2047) She opined that he had a borderline personality between neurosis and psychosis such that he may be suffering a form of schizophrenia such that he might conclude that he was under the domination of another person. (Vol. 12, p. 2048)

She was asked to opine whether Rivera's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

She opined "Yes" adding that he is a very impulsive person. The unrebutted testimony of the court appointed expert establishes two additional statutory mitigating circumstances.

The trial court found no non-statutory mitigating circumstances. To make such a finding, the trial court had to ignore, or completely discount Dr. Cerros-Livingston's unrebutted Based upon her interview and the battery of psychological tests she administered, she opined that Rivera had a boarder line personality disorder. She opined that he had a identity problem in terms of his sexual behavior, exhibitionism, voyeurism, and transvestism. (Vol. 12, p. 2033-2035)

In summary, the record supports the finding of two statutory aggravating circumstances, three statutory mitigating circumstances, **and** non-statutory mitigating circumstances. Based upon the foregoing, the death penalty is proportionately incorrect, and should be vacated and a life sentence incurred. Lloyd v. State, 13 FLW 211 (Fla. 1988).

#### CONCLUSION

For the reasons expressed in Point 1, Rivera would pray that his conviction be reversed and his caused remanded for a new trial with instructions that evidence of the Goetz incident is inadmissible in the State's case-in-chief. For the reasons expressed in Point 2, Rivera would pray that his conviction be reversed, and his cause remanded for a new trial with instructions that the "reverse Williams Rule" evidence be admitted. Should the court deny his request for a new trial,

Rivera would pray that the court vacate his death sentence and sentence him to life imprisonment with a 25 year mandatory minimum sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed to Assistant Attorney General, Joy B. Shearer, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401 this 27 day of June, 1988.

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