IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,224

PATRICK JAMES THOMPSON,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

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ON APPEAL FROM THE SEVENTEENTH
JUDICIAL CIRCUIT COURT
IN AND FOR BROWARD COUNTY FLORIDA
THOMAS M. COKER, JR., JUDGE

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

	Page
TABLE OF CITATIONS	ii-vii
PRELIMINARY STATEMENT	
STATEMENT OF THE CASE	1-3
STATEMENT OF THE FACTS	3-19
SUMMARY OF THE ARGUMENTS	20-21
ARGUMENT	
POINT I	21-42
THIS DEATH SENTENCE IS PROPERLY IMPOSED BECAUSE THE AGGRAVATING CIRCUMSTANCES FAR OUTWEIGH THE MITIGATING CIRCUMSTANCES WHICH ARE NOT EVIDENT IN THE RECORD AND PROVIDE NO BASIS FOR THE JURY'S REJECTION OF THE DEATH SENTENCE.	
POINT II	42-47
EVIDENCE OF APPELLANT'S KIDNAPPING AND SEXUAL BATTERY OF DEBORAH FIFER WAS PROPERLY ADMITTED AS IT WAS RELEVANT AND NOT A FEATURE OF THE TRIAL.	
POINT III	47-49
ANNOTATION OF A PRINTED "RIGHTS WAIVER CARD" WITH THE WORDS "AT MY DISCRETION" BY APPELLANT, WHO NEVER REFUSED OR FAILED TO ANSWER IS NOT FAIRLY SUSCEPTIBLE TO INTERPRETATION AS A COMMENT ON HIS EXERCISE OF HIS FIFTH AMENDMENT RIGHTS.	
CONCLUSION	50
CERTIFICATE OF SERVICE	50

TABLE OF CITATIONS

	PAGE
Adams v. State, 412 So.2d 850 (Fla. 1982) cert.den. 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed. 2d 148	28
Alvord v. State, 322 So.2d 533, at 541 cert.den. 428 U.S. 923 S.Ct. L.Ed. (1976)	29
Andrews v. State, 172 So.2d 505 at 507 (Fla. 1st DCA 1965)	45
Barclay v. Florida, 103 S.Ct. 3418, 463 U.S. 939, 77 L.Ed.2d 1134, reh.den. 104 S.Ct. 209, 78 L.Ed.2d 185 (1983)	34
Barfield v. State, 402 So.2d 377 (Fla. 1981)	40
Blanko v. State, 452 So.2d 520 (Fla. 1984) cert.den. 1055 S.Ct. 940, 83 L.Ed.2d 953	24, 44
Bradford v. State, 460 So.2d 926 (Fla. 2 DCA 1984)	26
Brown v. State, 367 So.2d 616 (Fla. 1979)	38
Brown v. State, 10 F.L.W. 343 at 346 (Fla. June 27, 1985)	22, 38, 40
Buford v. State, 403 So.2d 943 (Fla. 1981) cert.den. 454 U.S. 1163	38
Bundy v. State, 455 So.2d 330, at 350 (Fla. 1984)	29
Burch v. State, 343 So.2d 831 (Fla. 1977)	40
Burr v. State, 466 So.2d 1051 (Fla. 1985)	37, 45
Cannady v. State, 427 So.2d 723 at 731 (Fla. 1983)	35
Card v. State, 453 So.2d 17, at 23, 24 (Fla. 1984)	32
Chambers v. State, 339 So.2d 204 (Fla. 1976)	41

TABLE OF CITATIONS (Continued)

	Page
Clark v. State, 379 So.2d 97 (Fla. 1979) cert.den. 450 U.S. 936, 101 S.Ct. 1402 67 L.Ed.2d 371 (1981)	34
Combs v. State, 403 So.2d 418 (Fla. 1981) cert.den. 456 U.S. 984, 102 S.Ct. 2258 72 L.Ed.2d 862 (1982)	32
Daugherty v. State, 419 So.2d 1067 at 1071 (Fla. 1982) cert.den. 459 U.S. 1228 (1983)	37
David v. State, 369 So.2d 943 (Fla. 1979)	47
Douglas v. State, 328 So.2d 18, at 22 (Fla. 1976	24
Doyle v. State, 460 So.2d 353 at 357 (Fla. 1984)	29
Duest v. State, 462 So.2d 446 at 449 (Fla. 1984)	30
Elledge v. State, 408 So.2d 1021 (Fla. 1981) cert.den. 459 U.S. 981, 103 St.Ct. 316, 74 L.Ed.2d 293 (1982)	25
Engle v. State, 438 So.2d 803 at 812 (Fla. 1983) cert.den.79 L.Ed. 2d 753 (1984)	37
Ferguson v. State, 417 So.2d 631 at 636 (Fla. 1982)	34
Francis v. State, 10 F.L.W. 328 (Fla. June 20, 1985)	22
Goodwin v. State, 405 So.2d 170 (Fla. 1981)	40
Griffin v. State, 10 F.L.W. 264 (Fla. May 24, 1985)	33, 39
Hall v. State, 403 So.2d 1321 (Fla. 1981) appli. for stay den. 420 So.2d 872 (Fla. 1982)	24
Hall v. Wainwright, 733 F.2d 766 at 774 (11th Cir. 1984) reh.den. 749 F.2d 733	24, 25
Hardwick v. State, 461 So.2d 79, at 81 (Fla. 1984)	34

TABLE OF CITATIONS (Continued)

	Page
Herring v. State, 446 So.2d 1049 (Fla. 1984)	33
Herzog V. State, 439 So.2d 1372 (Fla. 1983)	30
Hooper v. State, slip opinion (Fla. Aug. 15, 1985)	31
Hoy v. State, 353 So.2d 829 (Fla. 1977)	38, 40
Huff v. State, 437 So.2d 1087, at 1088 (Fla. 1983)	26
Jent v. State, 408 So.2d 1024, at 1032 (Fla. 1981) cert.den. 457 U.S. 1111, 102 S.Ct. 2616 73 L.Ed.2d 1322 (1982)	32
Johnson v. State, 393 So.2d 1069, at 1073 (Fla. 1981) cert.den. 102 S.Ct. 364, 454 U.S. 882, 70 L.Ed.2d 191, reh.den. 454 U.S. 1093.	22
Johnson v. State, 442 So.2d 185 at 189 (Fla. 1983)	35
Johnson v. State, 465 So.2d 499, at 507 (Fla. 1985)	29, 37
Jones v. State, 332 So.2d 615 (Fla. 1976)	41
King v. State, 390 So.2d 315 (Fla. 1980), cert.den. 450 U.S. 989, 101 U.S. 1529, 67 L.Ed.2d 825 (1981)	25
Lara v. State, 464 So.2d 117, at 1179, 1180 (Fla. 1985)	24
Lemon v. State, 456 So.2d 885 at 888 (Fla. 1984)	29
Lockett v. Ohio, 438 U.S. 586 (1978)	38
Lucas v. State, 376 So.2d 1149 (Fla. 1979)	25
McArthur v. State, 351 So.2d 972 (Fla. 1977)	26
McCrea v. State, 395 So.2d 1145 (Fla. 1980)	38

TABLE OF CITATIONS (Continued)

	Page
McKennon v. State, 403 So.2d 389 (Fla. 1981)	40
Mackiewicz v. State, 114 So.2d 684 (Fla. 1959) cert.den. 362 U.S. 965 reh.den. 362, 992 (1959)	45
Malloy v. State, 382 So.2d 1190 (Fla. 1979)	
Mann v. State, 453 So.2d 784 at 786 (Fla. 1984) cert.den. 105 S.Ct. 940, 83 L.Ed.2d 953	24
Martin v. State, 420 So.2d 583 at 584 (Fla. 1982)	38
Mason v. State, 438 So.2d 374 at 379 (Fla. 1983)	30, 37, 45
Maxwell v. State, 443 So.2d 967, at 971 (Fla. 1983)	22, 24
Messer v. State, 402 So.2d 341 at 347-349 (Fla. 1981)	36
Michael v. State, 437 So.2d 138 at 141 (Fla. 1983)	35
Miranda v. Arizona, 384 U.S. 436 (1966)	48
Morgan v. State, 415 So.2d 6, at 12 (Fla. 1982)	22
cert,den. 459 U.S. 1055, 103 S.Ct. 473, 74 L.Ed.2d 621	22
Neary v. State, 384 So.2d 881 (Fla. 1980)	40
Oats v. State, 446 So.2d 90 at 95 (Fla. 1984)	27
Odom v. State, 403 So.2d 936 (Fla. 1981) cert.den. 102 S.Ct. 1970, 72 L.Ed.2d 440 (1982)	40
Peak v. State, 395 So.2d 492 (Fla. 1980)	29
Peede v. State, 10 F.L.W. 397 (Fla. Aug. 15, 1985)	34
Phippen V. State, 389 So.2d 991 (Fla. 1980)	40
Province v. State, 337 So.2d 783 (Fla.) cert.den. 431 U.S. 969 (1976)	40
Ragland v. State, 358 So.2d 100 (Fla. 3rd DCA) cert.den. 365, So.2d 714 (Fla. 1978)	49
Riley v. State, 413 So.2d 1173 (Fla. 1982) cert.den. 981, reh.den. 459 U.S. 1138 (1983)	37

TABLE OF CITATIONS (Continued)

	Page
Rivers v. State, 458 So.2d 762 at 765 (Fla. 1984)	27
Rose v. State, 461 So.2d 84, at 87 (Fla. 1984)	22
Ross v. State, slip opinion (Fla. Aug. 15, 1985)	27
Routly v. State, 440 So.2d 1257, at 1265 (Fla. 1983)	30
Rowell v. State, 450 So.2d 1266 (Fla. 5th DCA 1984)	49
Scott v. State, 419 So.2d 1058 (Fla. 1982)	40
Sireci v. State, 399 So.2d 964, 971 (Fla. 1981)	38
Smith v. State, 403 So.2d 933 (Fla. 1981)	29
Smith v. State, 407 So.2d 894 at 902 (Fla. 1981)	30
Smith v. State, 424 So.2d 726 (Fla. 1982)	32
Stano v. State, 460 So.2d 890 at 892 (Fla. 1984)	29
State v. Dixon, 283 So.2d (Fla. 1973) cert.den. 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974)	30
State v. Prieto, 439 So.2d 288 (Fla. 3rd DCA 1983)	48
Stater v. State, 316 So.2d 539 (Fla. 1975)	40
Stevens v. State, 419 So.2d 1058 at 1064 (Fla. 1982)	35
Stokes v. State, 403 So.2d 371 (Fla. 1981)	40
Swan v. State, 322 So.2d 485 (Fla. 1975)	41
Sykes v. State, 373 F.2d 607 (5th Cir. 1966) cert.den. 386 U.S. 977, 87 S.Ct. 1172, 18 L.Ed. 2d 138	28

TABLE OF CITATIONS (Continued)

	Page
Tedder v. State, 322 So.2d 908 (Fla. 1975)	21, 41
Thompson v. State, 328 So.2d 1 (Fla. 1976)	40
United States v. Chilcote, 724 F.2d 1498, at 1502 (11th Cir. 1984)	
United States v. Hastings, 461 U.S. 499 (1983)	49
Valle v. State, 10 F.L.W. 381 (Fla. July 11, 1985)	37
Waterhouse v. State, 429 So.2d 301 at 307, (Fla. 1983) cert.den. 104 S.Ct. 415	30
White v. State, 466 So.2d 1031 (Fla. 1984)	24
White v. State, 402 So.2d 331 (Fla. 1981) cert.den. 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983)	24
Williams v. State, 110 So.2d 654 (Fla. 1959)	44
Williams v. State, 386 So.2d 538 (Fla. 1980)	37, 40
Wilson v. State, 330 So.2d 457 (Fla. 1976)	46
Wright v. State, 10 F.L.W. 364 (Fla. July 3, 1985)	34

OTHER AUTHORITIES

Fla. Stat. §90.404(2)(a)	44
Fla. Stat. §921.141(6)(b)	21
Fla. Stat. 921.141(3)	21
Fla. Stat. §921.141(5)(b)(d)(h)(i)	21

PRELIMINARY STATEMENT

Appellant was the defendant and Appellee was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

The parties will be referred to as they appear before this Court.

The symbol "R" will denote the Record on Appeal.

All emphasis in this brief is supplied by Appellee unless otherwise indicated.

STATEMENT OF THE CASE

Appellee accepts Appellant's Statement of the Case subject to the following additions and clarifications:

On September 21, 1984, Appellee filed a Motion for Pretrial Conference to Determine the Admissibility of "Williams Rule" Testimony. (R 1367). Appellee stated grounds for the admission of the similar fact evidence were that:

The testimony was necessary to establish the modus operandi, intent, identity, and to show a common scheme, plan and design.

On Monday, October 1, 1984, counsel for Appellant and counsel for Appellee were granted an opportunity to discuss the above motions. (R 7-8). The trial court ruled that, as he as yet was unaware of what the evidence would show regarding the instant charges, he would take the motions under advisement. However, the Court cautioned the prosecutor not to mention the prior offense evidence until it was proffered outside of the presence of the jury. (R 8). The trial court said, "We'll be taking that up at the time subsequent. That will not be mentioned til the Court has ruled." (R 9).

At trial, the Court heard proffered testimony and argument about the collateral crime. (R 936-94, 1068, 1072, 1084-1089) The trial court ruled that the collateral crime evidence was sufficiently similar to establish its admissibility under the"Williams" rule. (R 1091).

Appellee presented testimony about Johnnie Mack Brown, showing that he had a reputation for providing false information to

the police and that he had a bad reputation for truth and veracity. Also, Marvin Wilson testified that he never made the statement Brown alleged he made. (R 1158-1162, 1203-1210, 1211-1212, 1216-1218, 1219-1220).

The trial court denied Appellant's Motion for New Trial stating "that circumstantial evidence standing alone is sufficient to support a verdict. It's a jury question." (R 1373).

At the conclusion of the guilt phase of the trial, the jury found the Appellant guilty of first degree murder (R 1510). Appellee introduced documentary evidence of Appellant's prior adjudication of guilt of kidnapping and sexual battery. (R 1523, 1524). Appellant introduced testimony by his brother, Christopher Thompson (R 1525-1527), his brother, Timothy Thompson (R 1529-1530), his father, (R 1531-1533) and Dr. Carroll, a deacon (R 1537-1539). These individuals testified as to Appellant's character for not committing the crime of which he had been found guilty. The jury returned with a recommendation that life imprisonment be imposed upon Appellant. (R 1561). The trial court then ordered a presentence investigation. On November 8, 1984, the trial court, after hearing additional testimony and argument, (R 1568-1592), and after reviewing the presentence report (R 1593), found three aggravating circumstances applied against Appellant, one additional aggravating circumstance might be properly applied against Appellant and no mitigating circumstances were found to apply for Appellant. (R 1593).

The trial court sentenced Appellant to death for the murder of Patricia Nigro. (R 1594). The trial court judge reduced his reasons to writing and his sentencing order appears in the record with the sentence. (R 1767-1773).

STATEMENT OF THE FACTS

Appellee accepts Appellant's Statement of the Facts subject to the following additions and clarifications:

At about 6:00 p.m. on Thursday, January 20, 1983, Patricia Nigro dropped off her boyfriend, John Sabio, at a freighter tied up in the Miami River. (R 487-490). They had just finished a long lunch at a restaurant which had been extended because an electrical storm kept knocking out the restaurant's stove. (R 487-490). Patti said, "I'm looking forward to seeing you at home soon. Don't work too late." (R 505). Patti was wearing blue jeans, a green velour blouse, dark blue shoes, a watch, four or five gold chains, and was carrying a purse which contained between $60.00 and $80.00 in cash. (R 494, 495). She planned to go to Ft. Lauderdale, to her Aunt and Uncle's house, to pick up some perfume, socks and a nightgown she had left there during her vacation before Christmas in 1982. (R 457, 490).

Around midnight, on Thursday, January 20th, Mark Springer, a young handyman and part-time cook at the Stadium Pub in Ft. Lauderdale, went to put his pool cue back in his apartment behind the pub. (R 804). On his way, he saw a nicely dressed man with black hair straining to put a box into the dumpster. (R 805, 806). Springer told the man that he couldn't dump things in their dumpster, but then helped

him put the box into the trash bin. (R 805). The man told Springer that he was dumping some ceramic parts. The next morning Springer, nosing around for anything of value, found the strangulated, cut and bruised body of Patricia Nigro. (R 818). John Sabio's Cadillac Seville was found on Saturday, January 22, 1983, stuck in the"sugar" sand off Northwest 33rd Avenue, about 100 feet from the parking lot of St. Helen's Church. (R 384). The rear door could not be locked. (R 387). It appeared she may have become stuck while trying to make a "U" turn to head east, toward her Aunt and Uncle's house, as she was unfamiliar with the roads in the area, and her Aunt and Uncle live at N.E. 34th Street, while the car was found at N.W. 33rd Avenue in Ft. Lauderdale. (R 461, 462).

Mark Springer reported finding the body which was inside a Panosonic stereo speaker box (R 346-349). The body was dressed in a green velour top and blue jeans. (R 349). Police checked Springer's and a bystander's arms and hands for scratches, etc., and found nothing. (R 351, 352). The ground was damp, indicating that it had rained the night before. (R 353). The unusual feature of the box was that it was completely dry, and sitting on top of the garbage. This would indicate that the box was either put into the dumpster late the night before or early in the morning of Friday, January 21st. (R 363, 364, 594). Patricia's body did not have any shoes on. (R 369) and the zipper on her jeans was open. (R 376, 609, 928). One latent identifiable fingerprint was lifted from the box (R 392, 431). It matched Appellant's on 29 points, although 8 are normally sufficient. (R 544, 549, 553-555).

At the autopsy, it was found that full rigor mortis had set in. (R 594). She had been dead for 6 to 12 hours. (R 595). She was 5'6" tall and weighed 136 pounds (R 597). An external examination revealed a large number of bruises on her thighs, lower extremities, wrists, upper right arm, interior chest wall, eyes and neck. Her face was badly swollen. (R 530, 598-604). There was a 3 cm. circular contusion on her upper left abdomen. Her eyelids were bruised. There were also numerous lacerations. There was one on her right upper forehead. There was a regular circle scratch on her left ankle. There was an irregular laceration into the muscle inside of her left arm. On her left wrist there was a laceration into the muscle. On the third, fourth and fifth fingers on her left hand were numerous small abrasions. The thumb on her right hand had a 2 cm. laceration. (R 598-604). A band-aid had been placed on her left hand (R 930). Patricia's neck had two pale lines, one on each side. One was 5 mm. wide and the other was 4.5 mm. wide. There was extensive bruising on her upper abdomen and chest which was made with a knee or a fist. Such bruising would require a hard blow with a hand. (R 605). The bruises and cuts were made before Patricia died. (R 606). The wounds on the hands were defensive wounds. (R 607, 931).

The marks on Patricia's neck showed that she would have been unable to scream after she had been grasped there. (R 607, 608). Her neck muscles, larynx and trachea were bruised all around. (R 607). The time of death was estimated at somewhere between 7:00 p.m. on

January 20th, and 4:00 or 5:00 a.m. on January 21st. Dr. Ongley testified that because of the heat in Florida it was difficult to establish a more accurate estimate.

Dr. Ongley testified that Patricia could have been strangled with her bra. This was because of marks that were present. (R 611). The injuries on the body indicated that there had been a struggle. Patricia Nigro was strangled for at least four minutes. (R 612-613), and she was conscious for at least one full minute. (R 613).

The bruises and cuts on the body all occurred at about the same time. The most likely cause of death was manual strangulation. (R 615-616).

Patricia Nigro's Aunt and Uncle, Carolyn and Sebastian Amenta stated that Patricia Nigro came to Florida in December 1982. Patricia met John Sabio whom her Uncle considered a fine man (R 473), and she went with him to the Ft. Lauderdale Boat Parade on December 18, 1982. (R 455). Patricia stayed another six days with the Amentas. (R 456). Then she went home for the Christmas holidays but she returned to Florida around January 11th and stayed at John Sabio's mother's house in Miami. (R 456). Patricia had left some perfume, socks and a nightgown at her Aunt's house. (R 457). On January 21st, John Sabio's mother called Mrs. Amenta and told her that Patricia was missing. (R 460). Mr. Amenta got very concerned and finally called the police. The police asked if he would come down and try to identify an unknown body. (R 475-476). Mr. Amenta was shown some pictures of the body, but he could not identify his niece. (R 476-477). Mr. Amenta testified that Patricia Nigro did not know

the roads in the area and was staying with the Sabios in Miami.

John Sabio, said the last time he saw Patricia Nigro was about 6:00 p.m. on Thursday, January 20th after he and an engineer he was working with had gone to lunch with her. (R 487-490). He said that Patricia had discussed going to Ft. Lauderdale to pick up her belongings and he assumed that was where she was. (R 490). He let her take his car because he could get a ride home with his partner. Sabio expected to meet the victim back at his home. (493). Sabio indicated that Patricia Nigro always wore a bra. (R 495).

Patricia's Uncle then called Sabio and asked if he could identify the victim's jewelry. He said he could, and went to the Ft. Lauderdale Police Department where he did so. (R 497). Sabio testified that Patricia's hands were uninjured when he last saw her. (R 499).

Officer Walley was the individual who first compared a file fingerprint of Appellant, Patrick James Thompson, with the print taken from the Panasonic stereo speaker box. This was done on January 3, 1984. Officer Walley testified that Appellant lived very close to where Patricia Nigro's car became stuck in the sand. He lived only about two blocks away. (R 656, 694). There was a dumpster located at Appellant's apartment complex. (R 659).

Mrs. Philippa McIntosh testified that she and her husband saw two people standing by the side of the Cadillac and they could almost touch the car from their car. (R 727-730). Mrs. McIntosh described the victim. (R 731); Patricia Nigro didn't act as if she needed help and, because a young man was with her, Mrs. McIntosh figured he would help. (R 732). The man was shorter than the

victim, about 5' 7" or 5' 8" tall, about 26 to 28 years old and clean shaven. (R 733-734). She saw the defendant's picture on television, during a news show, and knew it was him. (R 739, 747). She picked out Appellant's photo in two photo line-ups.(974). She testified that the photograph on television had no effect on her ability to pick out Appellant's photograph. (R 742, 762). Mrs. McIntosh said she had no doubt about the person she picked out at the live line-up. Appellant was the man at the car with the victim. (R 745). She identified Appellant in open court. (R 747). Her husband, the Reverend, testified that his wife probably saw them better as she was on their side of the car and, besides, he was driving. He told his wife when he saw the photograph and she said, "That's him". (R 777). Reverend McIntosh identified Appellant as the man who was standing by Patricia Nigro's car. (R 778-779).

Mark Springer testified he saw a man straining to put the box into the dumpster. Springer described the guy's car as a four door, light tan with a brown-tannish vinyl top. There was a scratch on the back of the car. He described the man as being between 5' 6" and 5' 8" tall, 120 to 140 pounds, nicely dressed with black hair. (R 807). Springer admitted that he could recognize cars better than faces. (R 809, 826). He identified the car which was in several State Exhibits as the car he saw behind the Stadium Pub. (R 663-667). This was Appellant's automobile. He said the car left heading south, toward Oakland Park Boulevard. (R 811). Springer testified that the car had a baby seat in it. (R 819).

The car also had a name tag which said Brian. (R 819).

George M. Duncan, a serologist, found intact sperm cells on the vagina swab (R 839). Duncan found a hair inside of the victim's panties. (R 848). This hair was later examined by the F.B.I. Crim Lab. and found to match Appellant. (R 1044-1045). Other hairs found on the body in Sample Q-8 also matched Appellant. (R 369, 1047).

Glen Wilson testified that in December, 1982, and January 1983, he saw a baby seat in Appellant's car. (R 883-886). Wilson stated that some time in January or February, 1983, at about 11:30 p.m., he saw Appellant moving items out of his apartment. (R 886).

Marci Feigenbaum, the sister of Appellant's one-time girl-friend, Julianne Feigenbaum, remembered Appellant's apartment. While in his apartment on Wednesday, January 19th, she saw some Panasonic stereo boxes. The stereo belonged to her sister, Julie. Marci testified that Julie was moving to Palm Beach. (R 891). Marci saw a small bed which Appellant said was for his son, Patrick, Jr., who was three or four years old at the time. (R 893, 894). On Friday, January 21st, her sister had a five or ten minute argument with Appellant because Appellant did not bring the speaker boxes with him when he delivered the stereo to Palm Beach. (R 898). Appellant told Julie that he had forgotten the speaker box and left it in his apartment. (R 899). Appellant was acting nervous on January 21st, and did not want to go back to Dt. Lauderdale that night for dinner. He said he wanted to stay in Palm Beach (R 900-901). Appellant was wearing a long sleeved pink shirt on Friday, January 21st. (R 902). Marci identified the speaker box in which

Patricia Nigro's body was found as the box she had seen in Appellant's apartment. (R 899).

Lisa Maguire testified that she and her husband lived with Appellant in October and November 1982. She helped Julie move her stereo equipment and other boxes into the apartment. Lisa saw a baby seat, along with a lot of kid's toys in Appellant's apartment. When the children would visit Appellant, the baby seat was taken out of the apartment. (R 912-913). One could see Oakland Park Boulevard and 31st Street from the apartment. (R 915-916).

Detective Mundy found a Marlboro cigarette box-type package on the ground in front of the dumpster. (R 921). The only other things found near the dumpster were the stereo speaker box and the body. (R 922). Mundy testified that when he discovered Appellant's fingerprints matched the print taken from the stereo box, and that Appellant lived near where the victim's car was stuck at the time she was killed, an arrest warrant was issued for Appellant (R 952). Mundy found the automobile Appellant was driving in January 1983. He showed the car to Mark Springer who identified it as the car that he saw parked next to the dumpster on the evening of January 20, 1983. (R 956). Upon returning Appellant to Broward County after his arrest, Mundy testified that he had the vehicle drive past the scene of the crime. When they passed the spot where the victim's Cadillac was stuck, Appellant "leaned forward in his seat and put his hands up to his face and he didn't look back up until we got onto Oakland Park Boulevard. He seemed shaken". (R 957-958). Appellant was smoking Marlboro regular cigarettes from a box-type package. (R 958).

Detective Mundy testified that he gave the Rights Waiver Card to Appellant after asking him if he wanted to answer any questions. He asked the Appellant to read the card and fill in his responses. Appellant put yes to all of the questions but one. At that point he wrote "at my discretion." Appellant explained to Detective Mundy that he was referring to the part that says that he could refuse to answer questions as the Detective was speaking to him. Detective Mundy testified that Appellant meant that if the Detective asked Appellant a question that Appellant didn't want to respond to, Appellant could refuse to answer. (R 963). Detective Mundy testified that Appellant understood that he could stop talking to him at any point at his discretion. Appellant also understood that if the Detective asked him something he didn't want to answer, he did not have to answer. (R 964). Appellant told Detective Mundy that at one time or another he did have a stereo system and the boxes in his apartment (R 961), and that in late December or early January he threw the boxes all away. (R 962). Appellant told the Detective that he had no knowledge of the homicide, not even from television shows. (R 962).

Deborah Fifer proffered her testimony. The trial court ruled to allow her testimony because he found that there were numerous similarities between the cases, including the fact that both offenses occured in the evening, which had not been mentioned by either counsel. The judge also observed that Patricia Nigro was apparently not acquiescing as Deborah Fifer had but this would not prevent the introduction of the evidence. (R 1091). Deborah Fifer testified that on March 17, 1981, she was 28 years old, and an executive with the

Church of Scientology, eight blocks from St. Helen's Church. She worked until 11:00 P.M., and then walked from her building to her car. (R 1095-1096). Appellant approached her, honked a couple of times and pulled up next to her. She unlocked her car and ignored Appellant but he got out of his car and came toward her (1096-1097). Appellant was clean shaven, and had a white nylon jacket over his hand. He told her he had a gun and he requested that she go with him. (R 1097). She thought she better do what he said or she wouldn't live very much longer. She followed him. He told her to get into his car, which she did. Appellant told her, "you do what I tell you to and you won't be hurt." Deborah said, "If you don't hurt me I'll do anything you ask me to." (R 1097). Deborah told him that, "Because I was afraid that he was going to kill me." (R 1098). As they passed a car Appellant said "If you scream I'll kill you." He drove on to St. Helen's Church on Oakland Park Boulevard and parked in the church parking lot. (R 1098). The car was about 100 feet from the sandy area where Patricia Nigro's Cadillac was stuck (R 1099).

Appellant told her that he wanted sex. She decided rather than being hurt or killed she would act willingly. She tried to talk but he said, "That's enough of this. I want you to take off your clothes." She did because she was frightened for her life. (R 1099). She had a bra on which she took off along with her other clothes. Then Appellant removed his clothing and asked her to perform oral sex on him. She did so because she was frightened. Then he said, "That's enough of that," pushed her over on to the passenger seat, entered her vagina with his penis, and ejaculated. She told him that she wouldn't mention this to anyone because she was frightened for her life. She was trying to convince him that she wanted to see him

again and that she really liked him and that she was sorry that it had to happen this way. There Deborah said she hoped she could convince Appellant that she was sincere so that he wouldn't harm her. Appellant said that if she was lying it would be bad for him because he wouldn't do well in a jail enviornment. (R 1100-1101). Appellant gave the false name of Richie and told her he was in the service and a girl had jilted him and that was why he raped her. Appellant said he was sorry about raping her. (R 1102). Deborah reported the incident to the police. When she next saw Appellant, she pointed him out to police. She identified Appellant in the courtroom. (R 1104).

Defense counsel asked her "Isn't it true that the defendant was very nice to you, treated you--." Deborah answered, "I have a hard time saying that somebody is nice to me when they are abducting me and sexually assaulting me, but he wasn't nasty or mean or cruel." (R 1113).

The Court found that there was sufficient circumstantial evidence to establish a prima facie case and allowed the case to go to the jury. (R 1118).

The defense presented Melissa Bass, a black lady, who saw the victim's car between 7:00 p.m. and 9:00 p.m. in January, 1983. Melissa was with her friend, Elton Trotman, a black man. (R 1118-1121). Melissa stated that the victim appeared disoriented or frightened. Melissa testified, "It was a very strange situation." (R 1122). Melissa saw a man pull up in a car. The victim walked toward him, then Melissa and Elton drove off. (R 1123). She said the man's car pulled into the area of St. Helen's Church parking lot.

The man was 5' 8" to 5' 9" tall, clean cut, not sloppy. The man had on a jacket. (R 1127-1128). Melissa testified that she thought the victim may have felt more comfortable with a white person coming toward her than herself, a black woman. (R 1129).

Karen D'Amico, a barmaid at the Stadium Pub, testified that she had seen such a person as she described in the bar and thought that it was him. (R 1145). Karen testified that her first priority was to serve drinks to the patrons. (R 1150). She testified that she got a better look at the car than the person driving. (R 1153).

The defense then called John Sabio, who testified that his accountant had an office on N.W. 18th Street. (R 1234). Sabio testified his accountant's office was very close to where the victim's car was found and that both were in the northwest quadron of Ft. Lauderdale. (R 235). On a map, it appears that these two locations are approximately two miles apart.

John Persad, who lived next door to Appellant from September 1981 to May 1983, testified he never saw a baby seat in Appellant's car. He also testified that he was not in Appellant's house very often. Persad testified he never heard anything unusual in January 1983. (R 1250-1251). Persad identified Appellant's car as being the same car which Mark Singer had identified. Mr. Persad said that Appellant's car was running in January 1983 (R 1251-1252).

Robin Lee Thompson, a former wife of Appellant, said she was separated from Appellant in January 1983. She said they had a child, born January 5, 1983. She did not know if Appellant had a child car seat. She and Appellant were divorced August 3, 1984. She was Appellant's second wife. She was pregnant in December 1982 and

January 1983, and then gave birth. She said Appellant had other children from his first wife, Peggy. (R 1277-1279).

Sharon (Peggy) M. Hebb, Appellant's other former wife, divorced Appellant in 1979. They had two children, who were ages 5 and 3 at the time of the murder. She did not know if Appellant had a car seat in his car. She testified that Appellant had a green peg board with a seat attached to it for the children. She was not at Appellant's apartment very often, however, and did not know Lisa and Bill McGuire. (R 1280-1283).

Appellant took the stand in his own defense. In January 1983, he was 27 years old, was 5' 5-1/2" tall and weighed approximately 130 pounds. (R 1295-1296). Appellant testified that there were three stereo boxes, one for the receiver, one for the phonograph and two speaker boxes. (R 1298). He testified that the stereo was left in Ft. Lauderdale when Julie and her sister took other things to Palm Beach on Wednesday. Appellant said he took the stereo to Palm Beach on Friday (R 1299).

Appellant testified he put papers in the biggest box and threw the boxes into the dumpsters downstairs at his apartment on Thursday, January 20th. Appellant testified he didn't want to go back to Ft. Lauderdale on Friday because it was late so he stayed in Palm Beach. (R 1303-1304).

Appellant remembered telling Detective Mundy that he could have been at home, at his neighbors, or at some friend's house on January 20, 1983. He did not remember. (R 1309). Appellant told Detective Mundy that he had thrown the stereo boxes away. (R 1309). Appellant testified that he said he knew where the Stadium Pub was, because his brother and friends used to go there after Striker games,

but Appellant always went home. (R 1311-1312). Appellant denied ever seeing a Cadillac or the girl in it. (R 1311). Appellant identified his car from State Exhibit 68, which was the same vehicle which Mark Springer identified. (R 1311).

Appellant denied raping Deborah Fifer. He testified that he said "hello" to her and asked her if she wanted a drink. He said she told him, "I could use a little action," and after she got in his car she said "I ain't been laid in over a month." Appellant then stated she said "Well, let's go to your place," and Appellant told said he told her,"no, I'm married." When he asked her about her place she said she had room mates. (R 1313-1314). Appellant then testified that Deborah Fifer said, "what's wrong with yours?" meaning Appellant's car. Appellant said he said, "Nothing. Are you serious?" Then he said Deborah Fifer said, "yeah." Appellant then testified he drove to the church parking lot where he had intercourse after Deborah Fifer took off all of her clothes and helped Appellant out of his clothes. He said he was with her for forty-five minutes to an hour. (R 1315). Appellant testified Deborah Fifer yelled out "I'm coming." Then they got dressed, and Appellant took her back to her car. Appellant said she told him she enjoyed herself and that she wanted to see him again. She gave him her phone number and a good night kiss. (R 1316). Appellant denied having any weapon and denied telling Deborah Fifer not to go to the police. (R 1317).

Appellant could not establish his whereabouts on January 20th. (R 1317). He also denied doing what the indictment charged him with having done. (R 1318).

Appellant admitted he had been convicted of felonies on two prior occasions. He testified that St. Helen's Church, where he took

Deborah Fifer, is right across the street from where Patricia Nigro's car was located. (R 1330). He testified that he gave Deborah Fifer his correct name, not a false name. (R 1320). In January, 1983, Appellant was clean shaven, and at trial he looked as he did in January, 1983. (R 1322-1323). Appellant admitted the speaker box was in his apartment on Wednesday, January 19, 1983. He also testified that on Friday, he took the stereo to Palm Beach and the turntable and the receiver were in boxes and the speakers were not. (R 1325). Appellant admitted Julie asked where the speaker box was. (R 1326). Appellant said he had thrown the box away, even though Julie's sister, Marcie said he said he had left it at his apartment. (R 1327). Appellant couldn't remember telling the police he had thrown away all of the stereo boxes. (R 1327).

Appellant admitted he lied to his employer and had been fired for it. (R 1328). Appellant admitted that he smokes Marlboro cigarettes, which come in a box package. (R 1329). Appellant testified he knew nothing about the murder. (R 1329). Appellant did not recall being at home on Thursday, January 20, 1983, even though Appellant knew there were records of telephpne calls made from his residence at 4:30 p.m. on January 20, 1983 and at 1:30 a.m. on January 21, 1983. (R 1330). Appellant admitted he was driven by where he lived and where Patricia Nigro's car was stuck. He said he was a nervous wreck at the time. (R 1332). Appellant agreed there was a question asked of him by Julie about the stereo box on January 21, 1983. He testified there was no argument however. (R 1332-1333). Appellant said he threw the speaker box out on Thursday, just before he went up to Palm Beach. He admitted he believed he told the Detective he threw the stereo boxes out in December or the 1st of January 1983. (R 1334). Appellant could

not remember the exact time he threw the speaker box away on Thursday. (R 1335).

Appellant admitted Julie was upset on Wednesday, January 19th because she had just found out Appellant was still married. Appellant had never told Julie he was married although she lived with him for over a month. (R 1336-1337). Appellant admitted that on Thursday, January 20, 1983, he and Julie were having problems in their relationship. (R 1338). Appellant admitted he and his wife were having problems in March of 1981, when Appellant met Deborah Fifer. (R 1138).

Ray Rigsby, of Agency Rent-A-Car System, testified that Appellant returned the rental car approximately ten days later although he had initially reserved it for only four days (R 1344-1348).

The defense rested and moved for a judgment of acquittal. The judge denied the motion. (R 1375).

The State called Janet Swift, who testified that she was with Appellant when he heard a T.V. broadcast about the victim being found in a dumpster while Appellant was at their house in January 1983. She testified that she heard it was a grizzly murder and saw pictures of the victim's stabbed hands. She also heard that the body was put in the Stadium Pub's dumpster. When the witness remarked that it was vicious and that she hoped that the "so and so" was caught, Appellant said to her, "You know, I'm upset about Julie. Please let's not talk about this." Janet Swift said, "But Pat, my gosh, what's happening?" Appellant said "Jan, change the subject." (R 1376-1377). She said that Appellant shuddered while he said, "Change the subject." (R 1378). She testified she was mistaken when earlier she said she had seen Appellant on the night of January 20th, because the Super Bowl was the following week. (R 1378). The State then called Elton Trotman, who was with

Melissa Bass. He saw a Cadillac stuck in the sand on 33rd Avenue, saw a car pull up and someone got out of the car and walked toward the Cadillac. He said the other car was dark beige with a vinyl top. It was an older model car. He said that car was like the car in State Exhibit 65, which was Appellant's car. (R 1381-1382).

At sentencing, the only additional evidence presented by the State were documents evidencing Appellant's prior convictions for kidnapping and sexual battery. (R 1524).

SUMMARY OF THE ARGUMENTS

I. The aggravating circumstances of (A) a prior conviction for sexual battery and kidnapping involving the threat of violence, to wit: "He said he would kill me or shoot me," etc.; (B) murder committed while attempting or engaging in sexual battery, as a hair was inside the victim's panties, sperm cells were found, her bra was missing, modus operandi was shown, etc.; (C) especially heinous, atrocious and cruel as the victim was severely beaten, suffered defensive wounds, was strangled with her bra and by hand, and was aware of what was happening to her; and (D) cold, calculated and premeditated, as the victim was especially vulnerable, taken from her disabled car, then strangled, first by her bra and then by hand, pursuant to a plan he told his prior victim to avoid detection and subsequent apprehension, and no legal nor moral pretense or justification was shown, far outweigh the (E) mitigating circumstances which are not supported by the record. There was no medical or psychological testimony to support Appellant's claimed mental or emotional disturbance, and the testimony that Appellant was a good son, brother and Christian is insufficient to form a reasonable basis for a mitigating circumstance. Therefore, (F) the trial judge properly overruled the jury's recommendation and imposed a sentence of death because there are valid aggravating circumstances and the jury's recommendation is clearly an unreasonable rejection of them and is likely based upon an unreasonable appeal to their sympathies. Guilt was proven beyond a reasonable doubt. The death sentence is appropriate.

II. Similar crime evidence disclosed at least 15 points of similarity pervading the prior case and the instant case. The testimony was relevant and probative and did not become a feature of the trial.

III. Notation of Rights Waiver Card with words "at my discretion" is an acknowledgement of understanding and not a impermissible comment on an assertion of Fifth Amendment rights, especially when Appellant never refused to answer any question.

ARGUMENT

POINT I

THIS DEATH SENTENCE IS PROPERLY IMPOSED BECAUSE THE AGGRAVATING CIRCUMSTANCES FAR OUTWEIGH THE MITIGATING CIRCUMSTANCES WHICH ARE NOT EVIDENT IN THE RECORD AND PROVIDE NO BASIS FOR THE JURY'S REJECTION OF THE DEATH SENTENCE.

Appellant argues that the trial judge improperly disregarded the jury's recommendation of a life sentence because he failed to demonstrate a sufficient basis, under the Tedder test, 322 So.2d 908 (Fla. 1975), for his imposition of the death sentence. (Appellant's Brief, 29). However, the trial judge clearly sets forth his findings of the aggravating and mitigating factors in his sentencing order. (R1768-1773). The record clearly supports the trial judge's findings of the aggravating circumstances of previous convictions of crime involving the use or threat of violence; murder while engaged in or attempting a sexual battery; heinous, atrocious and cruel; and cold, calculated and premeditated. Fla. Stat. §921.141(5)(b)(d)(h)(i). A review of the evidence contained in the record reveals insufficient mitigation to outweigh the substantial aggravating circumstances. Fla. Stat. §921.141(3)

The Tedder test was satisfied and this Court must therefor conclude that the sentence imposed was appropriate under the law. Brown v. State, 10 F.L.W. 343 (Fla. June 27, 1985); Francis v. State, 10 F.L.W. 328 (Fla. June 20, 1985).

A. APPELLANT'S PRIOR CONVICTION FOR SEXUAL BATTERY AND KIDNAPPING INVOLVED THE THREAT OF VIOLENCE.

Appellee introduced documentation of Appellant's previous conviction for kidnapping and sexual battery into evidence during the sentencing phase of the trial. (R 1524). Documentation of a previous conviction, by itself, is sufficient to support this aggravating factor. Rose v. State, 461 So.2d 84 (Fla. 1984); Maxwell v. State, 443 So.2d 967 (Fla. 1983); Morgan v. State, 415 So.2d 6 (Fla. 1982) cert.den. 459 U.S. 1055; Johnson v. State, 393 So.2d 1069 at 1073 (Fla. 1981) cert. den. 454 U.S. 882, reh.den. 454 U.S. 1093.

However, Appellee further supported this aggravating factor at trial with the testimony of the victim of Appellant's previous crimes, Deborah Fifer. (R 1095-1115). As Miss Fifer told the jury, she was leaving her office, where she had worked late in her position as an executive with the Church of Scientology, when Appellant approached her.

> He told me he had a gun and he requested I go with him. (R 1097).
>
> * * *
>
> He said, "you do what I tell you to do and you won't be hurt." (R 1097).
>
> * * *
>
> He said he would kill me or shoot me. (R 1104).

Appellant also told Deborah that if she were to scream he would kill her. (R 1098). Her testimony, both on direct and cross-examination, is replete with numerous statements of her fear of losing her life,and her decision to do anything Appellant requested to survive the attack.

(R 1097, 1098, 1099, 1100, 1101, 1102, 1104, 1109, 1110, 1113, 1115). She said she decided to be a cooperative victim as opposed to getting killed. To convince Appellant she was sincere, she decided rather than chancing being murdered by Appellant, to act as if she was enjoying herself, to convince him that she would not report him to the police. (R 1099, 1100, 1101, 1103, 1110, 1112).

Despite being previously convicted of the sexual battery and kidnapping of Deborah Fifer, Appellant testified that she seduced him and she made plans to see him later and even kissed him goodnight. (R 1313-1317). Appellant's version of this kidnapping and sexual battery paints a picture of a "romantic evening", with Appellant and Miss Fifer in his car in the church parking lot. (R 1315-1317). However, upon being questioned by Appellant's counsel, who asked Deborah Fifer whether Appellant was very nice to her during the whole ordeal, she replied:

> I have a hard time saying that somebody is nice to me when they're abducting me and sexually assaulting me,...(R 1113).

As evidenced by the record of Appellant's previous convictions, Miss Fifer's version of the events, which she reported to the police (R 1103), overwhelmingly demonstrated Appellant's prior sexual battery and kidnapping involved the use of force beyond a reasonable doubt.

Even Appellant's defense counsel did not contest the validity of the sexual battery and kidnapping convictions! At sentencing, he argued:

> You've heard about prior conviction of Pat Thompson, you've heard Deborah Fifer testify. Of course you will consider that. You have already considered it in your verdict and now a certified copy of a conviction or two convictions showing you that this case happened in 1981 as she suggested.
>
> But as Mr. Thompson said, that was one incident, not two. It was a kidnapping and sexual battery, the driving in

the car and, as Miss Fifer indicated and so as Mr. Thompson said,... (R 1551).

In addition, the presentence investigiation report contained evidence of Appellant's prior conviction for kidnapping and sexual battery. (R 1749). This evidence was never challenged by Appellant. Where an unchallenged presentence investigation report shows a previous conviction and the circumstances surrounding the offense, it is sufficient to support a finding of this aggravating circumstance. Douglas v. State, 328 So.2d 18, at 22 (Fla. 1976).

The combination of the documentation of Appellant's previous sexual battery and kidnapping convictions, together with Deborah Fifer's testimony that Appellant used the threat of violence to accomplish the kidnapping and sexual battery, establishes this prior conviction beyond any reasonable doubt. Mann v. State, 453 So.2d 784 at 786 (Fla. 1984), cert. den. 105 S.Ct. 940. In Mann, documents served as evidence of the prior conviction for burglary, and the victim testified to establish the aggravating circumstances of unnatural carnal intercourse to prove the use or threat of violence. Ibid, at 785.

Accordingly, the trial judge properly found this aggravating factor applies to Appellant, as the previous conviction, being a felony involving the threat of violence, is a valid aggravating factor which justifies the court's imposition of the death penalty in the absence of mitigating circumstances. Lara v. State, 464 So.2d 1173 at 1179 (Fla. 1985); Blanko v. State, 452 So.2d 520 (Fla. 1984), cert.den. 1055 S.Ct. 940, armed robbery; White v. State, 466 So.2d 1031 (Fla. 1984), where, as here, Appellant did not challenge his previous conviction of a felony involving the use or threat of violence to the person; Maxwell v. State, supra, armed robbery; Hall v. State, 403 So.2d 1321 (Fla. 1981), application for stay den. 420 So.2d 872 (Fla. 1982), Hall v. Wainwright,

733 F.2d 766, at 774 (11th Cir. 1984), reh.den. 749 F.2d 733, where a prior conviction of assault with intent to commit rape was found sufficient to support this aggravating circumstance; Elledge v. State, 408 So.2d 1021 (Fla. 1981), cert.den. 459 U.S. 981 (1982); White v. State, 403 So.2d 331 (Fla. 1981), cer.den. 103 S.Ct.3571 (1983), where a prior attempted rape conviction was found to support, with other factors, the trial court's imposition of the death sentence, over a jury recommendation of life imprisonment; King v. State, 390 So.2d 315 (Fla. 1980), cert.den. 450 U.S. 989 (1981); Lucas v. State, 376 So.2d 1149 (Fla. 1979).

B. THE MURDER WAS COMMITTED WHILE APPELLANT WAS ENGAGED IN OR ATTEMPTING TO COMMIT SEXUAL BATTERY.

Appellant argues that there is no evidence of sexual battery and that this aggravating circumstance cannot be upheld. (Appellant's Brief, 31). Appellant completely ignores substantial evidence of an attempted sexual battery, which is also a statutory aggravating factor.

The evidence is that Patricia Nigro's body was found wearing her jeans, top and panties. (R 349). Her bra, which her boyfriend testified she always wore (R 495), was missing. (R 349). Patricia's jeans were unzipped (R 376) and a hair, microscopically matching Appellant's hair, was found inside of her panties. (R 1044-1045). Sperm was found on the victim's vaginal swab. (R 839-840). The medical examiner testified that the marks on her neck indicated she had been strangled with her bra strap (R 611), and that the homicide was consistent with a rape or attempted rape homicide. (R 609).

The F.B.I. Agent testified that the only hairs found in the victim's panties microscopically matched hair of the victim and of Appellant. (R 1044). Other hairs, also matching Appellant's hair,

were found on the victim's feet and between her toes. (R 369).

The victim's body was bruised all over the front, on her thighs, lower legs, wrists, upper right arm. chest wall, eyes and neck. (R 379-380, 530, 531, 598-604). There were no marks on her back (R 929). This is consistent with the State's argument that she was trapped on her back. (R 1463). Her forehead was lacerated. Her left ankle was scratched. Her left arm and wrist were cut into the muscle. The fingers of her left hand had numerous abrasions. Her right thumb had a 2 centimeter laceration. (R 598-604). The wounds on her hands were defensive wounds. (R 607). The damage to her neck, larynx and trachea are consistent with being strangled to keep her from screaming. (R 607-608).

Appellant attempts to isolate the evidence of the attempted sexual battery, taking the evidence out of context and wholly ignoring the totality of the evidence presented at trial. However, in this case, all the evidence, viewed together, proves beyond any reasonable doubt that Appellant attempted to commit a sexual battery upon Patricia Nigro before he murdered her. There is no other rational explanation for a hair like the Appellant's being inside of Patricia Nigro's panties, with more of these hairs being found on her feet and between her toes, while her bra was missing, her jeans were unzipped, and there was sperm found in her vagina. "circumstantial evidence alone is sufficient to convict in a capital case in the absence of a reasonable alternative theory." Huff v. State, 437 So.2d 1087 at 1088 (Fla. 1983); McArthur v. State, 351 So.2d 972 (Fla. 1977); Bradford v. State, 460 So.2d 926 (Fla. 2 DCA 1984). Appellant offered no contradictory evidence upon which the jury could have concluded otherwise. As unrebutted circumstantial evidence is sufficient to sustain a conviction, so must it also be sufficient to support a finding of an aggravating circumstance.

The facts are inconsistent with any finding other than that the Appellant committed or attempted to commit a sexual battery upon Patricia Nigro before he killed her. In the case of Rivers v. State, 458 So.2d 762, at 765 (Fla. 1984), it was stated that a finding of an aggravating circumstance may be based upon a very strong inference from the circumstances. In Ross v. State, slip opinion, (Fla. August 15, 1985), this Court found aggravating and mitigating circumstances may be proved by circumstantial evidence. While the circumstances of an aggravating factor must be proven by the State beyond a reasonable doubt, in this case, the evidence of a sexual battery perpertrated by the Appellant upon Deborah Fifer provides permissible evidence of premeditation which may be used to prove these circumstances. Oats v. State, 446 So.2d 90, at 95 (Fla. 1984).

This case is clearly unlike McArthur, where the State's allegedly damning evidence included such subjective examples as the defendant's emotional state and her making coffee for the ambulance crew after her husband's shooting death. This Court found that subjective evidence too ambiguous. In this case, the State introduced objective scientific evidence. A hair matching the Appellant's was found inside the victim's underwear, which was worn on her body inside her jeans. The zipper was pulled down. The box in which the victim's body was found contained Appellant's fingerprint on the inside. This box was further identified as coming from Appellant's apartment. Other hairs identical to Appellant's were found on the victim's feet. Further, the victim's bra was missing and the medical examiner testified that it appeared she had been strangled with a bra strap, yet her top was on when her body was found. Some of her hair had been torn out and there were sperm cells found in her vagina.

> "The trier is entitled, in fact, bound to consider the evidence as a whole; and in law as in life, the effect of this is much greater than the sum of it's parts."

Sykes v. U.S., 373 F.2d 607 (5th Cir. 1966), cert.den. 386 U.S. 977.

There is sufficient competent evidence for this Court to conclude that the trial judge's finding that the murder was committed during the commission of, or during the attempt to commit, a sexual battery is correct. Adams v. State, 412 So.2d 850 (Fla. 1982) cert.den. 459 U.S. 882.

C. THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL BEYOND A REASONABLE DOUBT AND NO RATIONAL BASIS EXISTS FOR REJECTING THIS AGGRAVATING CIRCUMSTANCE.

Appellant argues that the trial judge erred in finding this aggravating factor because "nothing about this beating and strangulation homicide set it apart from the norm." (Appellant's Brief, 32). Appellant argues simply that because there were no broken bones, there is a rational basis for rejecting the crime as being heinous, atrocious and cruel. Supra, 33.

Appellee submits that beyond a shadow of doubt this aggravating circumstance is supported by the record and no rational person could logically find otherwise.

The victim, Patricia Nigro, had, before she died, been beaten from head to foot. (R 379, 380, 530, 531, 598-604). She had bruises on her lower legs, thighs, upper arm and wrists. She had deep cuts on both hands and on her left arm, into the muscle. She had a scratch on her ankle and abrasions on her fingers. (R 598-604). Patricia's face was badly swollen. (R 530, 531). So badly swollen that Ted Liquori testified:

> I tried to identify the victim, Patricia Nigro, but not the body itself, a photograph of the body, and I wouldn't recognize that girl from my daughter. Her face was distorted and her eye was closed. You couldn't see one eye. So I wouldn't know who she was (R 574).

Extensive bruising on Patricia's upper abdomen and chest were made by a knee or fist before she died. (R 605, 606). The medical examiner testified there was evidence she may have been strangled by her bra, which left line marks on her neck. (R 611). There was evidence of a struggle. Some of her hair was pulled out. (R 611, 1047, 1048). Patricia was strangled for at least four minutes by her killer's hands. (R 612, 613, 615, 616).

This Court has long held that murder by strangulation is heinous, atrocious and cruel. Johnson v. State, 465 So.2d 499, at 507 (Fla. 1985); Lemon v. State, 456 So.2d 885 at 888 (Fla. 1984); Doyle v. State, 460 So.2d 353, at 357 (Fla. 1984); Bundy v. State, 455 So.2d 330, at 350 (Fla. 1984); Adams v. State, supra; Smith v. State, 407 So.2d 894 (Fla. 1981); Peak v. State, 395 So.2d 492 (Fla. 1980); Alvord v. State, 322 So.2d 533, at 541 (Fla. 1975), cert.den. 428 U.S. 923, (Fla. 1976).

Further, it cannot be rationally questioned that Patricia Nigro was subjected to great pain and agony, not only from her physical injuries, but from the mental agony of knowing that she would soon die at Appellant's hands. This is evidenced by injuries showing the victim's awareness, such as her obviously painful defense wounds, the bra strap marks on her neck, the extensive and severe bruising, and the marks on her neck which are consistent with her attacker choking her to prevent her from screaming. Further, the medical examiner testified that it took her at least four minutes to die and that she was conscious for at least one minute. The manner of her death was clearly heinous, atrocious and cruel. See Stano v. State, 460 So.2d 890, at 893

(Fla. 1984); Waterhouse v. State, 429 So.2d 301, at 307 (Fla. 1983), cert.den. 104 S.Ct. 415; Routly v. State,440 So.2d 1257, at 1265 (Fla. 1983); Smith v. State, supra.

The manner in which Patricia Nigro died sets this crime apart from the norm of capital felonies. See State v. Dixon, 283 So.2d 1 (Fla. 1973), cert.den. 416 U.S. 943 (1974). She was not killed quickly and painlessly, but instead suffered from defensive wounds and bruises and other lacerations and then was strangled, with her bra strap, and also with her killer's hands. According to the medical examiner, Dr. Ongley, she lingered, unable to breathe for at least four minutes, and she was aware of what was happening to her for at least one minute. (R 612-613). This killing was certainly "unnecessarily tortuous to the victim." Dixon at 9, and, in view of other cases addressing this point, heinous, atrocious and cruel. See Brown, supra, at 345, where the victim had numerous bruises, and had been asphyxiated by a gag or garote, and raped; Duest v. State, 462 So.2d 446, at 449 (Fla. 1984), where the victim lived for a few minutes after the fatal stabbing; Mason v. State, 438 So.2d 374, at 379 (Fla. 1983), where, as here, the victim was not killed quickly and painlessly, but instead lingered, unable to breathe and aware of what was happening to her.

Appellee points out the factual distinctions between the instant case and Herzog v. State, 439 So.2d 1372 (Fla. 1983) which is cited by Appellant. In Herzog, the victim was found to be under the heavy influence of methaqualone and had inflicted injuries upon herself so that it was impossible to discover where the defendant had injured her. The victim was unconscious at the time of the act that caused her death. Ibid at 1380. Patricia Nigro was found to have only a minimal amount of alcohol (.02 mg%) in her blood, from having wine at lunch. (R 620).

Thus, no evidence suggests she would not have been fully aware of the pain inflicted upon her, and nothing suggests she would have been fully able to appreciate the mental agony of knowing that she soon would die at Appellant's hands.

Based upon all the evidence, the finding of the manner of death being heinous, atrocious and cruel, is fully supported.

D. THE MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION BEYOND A REASONABLE DOUBT AND NO RATIONAL BASIS EXISTS FOR REJECTING THIS AGGRAVATING CIRCUMSTANCE.

Appellee recognizes that the trial judge equivocated in applying this aggravating circumstance. Nevertheless, the trial judge did find that Appellant took advantage of Patricia Nigro's vulnerability, and murdered her without any pretense of moral or legal justification. This aggravating circumstance clearly exists.

The evidence shows that the victim's neck was injured in a manner consistent with being strangled with her bra. (R 611). But the medical examiner also testified that although markings on the outside of her neck were consistent with a ligature such as a bra, the most severe injuries are within Patricia Nigro's neck itself, and around her voice box, which he testified are the injuries seen with strangulation by hand. (R 615, 616).

Murder by strangulation evinces a cold, calculated design to kill, as opposed to a single shot from a firearm during an outburst of anger. Alvord v. State, supra. Evidence of the use of a ligature, such as a bra or dishtowel, further supports heightened premeditation. Hooper v. State, 10 F.L.W. 393 (Fla. August 15, 1985).

The trial judge's finding recites that the victim was a lone female, in unfamiliar surroundings, in a borrowed auto, stuck in the sand (R 1770). There was testimony that her car could have been seen from Appellant's apartment window. (R 915-916). Although several people drove by and offered help to the victim, she did not acknowledge them, but appeared to be in shock, confused and did not know what to say. (R 1128). Appellant was identified as being with the victim at the time. (R 739, 747). She was thereafter vulnerable and he clearly had the opportunity to observe her situation. The victim was not murdered at her car as there was no evidence of a struggle found near by. (R 943). She was transported to another location, killed, then again transported, to the dumpster, as no evidence of any struggle was found at that location. (R 922). Transportation of victims to their place of death, under similar circumstances, serves to prove premeditation in Stano v. State, supra. In that case, the victims were first struck to stun them so they would not attempt to exit the vehicle, then they were driven to an isolated area and ordered from the car. The defendant shot one and strangled the other. In Card v. State, 453 So.2d 17, at 23 (Fla. 1984), after the victim was severely cut upon her fingers, she was abducted, driven eight miles, and then had her throat cut. In Routly, supra, the victim was bound, gagged and kidnapped, thrown into a trunk, forcibly removed from the trunk and shot to death. In Smith v. State, 424 So.2d 726 (Fla. 1982), the victim was robbed, sexually battered and taken to the woods where she was shot. The victim in Combs v. State, 403 So.2d 418 (Fla. 1981), cert.den. 456 U.S. 984 (1982), was lured to a wooded area on a pretense of taking a short cut to a party and was shot and robbed. The victim in Jent v. State, was beaten, then thrown into a car trunk and driven to a game preserve where she was

raped and burned to death, 408 So.2d 1024, at 1032 (Fla. 1981) cert.den. 457 U.S. 1111 (1982). The above cases all contain evidence that the murderers preyed upon the particular vulnerabilities of their victims, as Appellant did here.

Execution style or contract murders or witness elimination murders are not the only murders which can be included within the definition of cold, calculated and premeditated. Griffin v. State, 10 F.L.W. 264 (Fla. May 24, 1985); Herring v. State, 446 So.2d 1049 (Fla. 1984); Hooper, supra.

There must merely be heightened premeditation to apply this aggravating circumstance as it had been applied in prior cases. Griffin, Herring, supra.

The above recited facts, together with the Modus Operandi of Appellant, as described by his earlier victim, Deborah Fifer, clearly shows Appellant had the heightened level of premeditation required to support this factor. As Fifer testified, Appellant threatened her, with death, unless she cooperated. (R 1097-1115). Additionally, Appellant told her that he was afraid she would go to the police and Appellant told her he was afraid of being imprisoned. Deborah Fifer was able to convince Appellant that she would not turn him in, and she was set free, unharmed. (R 1099-1112). But, she then went to to the police (R 1103), and Appellant was arrested, tried and convicted for abducting and sexually battering her, despite her convincing assurances that she would not do so. (R 1524). Patricia Nigro was strangled in a manner consistent with her assailant preventing her from screaming. Appellant had told Deborah Fifer that he would kill her if she screamed. The fact that Appellant had committed a similar crime against Deborah Fifer, threatening to kill her if she screamed may be used to prove the cold

calculation of this aggravating circumstance beyond a reasonable doubt. Oats v. State, supra, at 95. This case, with the strangulation of the victim to prevent detection and subsequent apprehension, thus presents facts which prove this factor within the limits imposed in Hardwick v. State, 461 So.2d 79, at 81 (Fla. 1984), which requires cold calculation before the murder itself.

There is nothing to indicate that Patricia Nigro provoked the attack in any way or that Appellant had any reason to commit the murder. There was sufficient evidence for the trial court to find this circumstance applicable and no rational reason for the jury to reject it. Mason v. State, supra. Appellant denied the murder and, consequently, no legal nor moral pretense or justification was shown. Hooper v. State, supra.

Even if this Court does not conclude that there existed sufficient evidence of heightened premeditation for the trial court to apply this aggravating circumstance at sentencing, where, as here, other valid aggravating circumstances exist in the absence of mitigating circumstances, the Court should affirm the death sentence. Wright v. State, 10 F.L.W. 364 (Fla. July 3, 1985); Barclay v. Florida, 103 S.Ct. 3418, 463 U.S. 939, reh.den. 104 S.Ct. 209 (1983); 343 So.2d 1266 (Fla. 1977), Aff. 411 So.2d 1310 (Fla. 1982); Ferguson v. State, 417 So.2d 631, at 636 (Fla. 1982); Clark v. State, 379 So.2d 97 (Fla. 1979), cert.den., 450 U.S. 936 (1981). See Hooper v. State, supra, where this Court recently held it would affirm the death sentence even if cold, calculated and premeditated was not found, because the remaining aggravating factors outweighed the mitigating factors. Peede v. State, 10 F.L.W. 397 (Fla. Aug. 15, 1985) where heightened premeditation did not exist, but one remaining aggravating circumstance outweighed one marginal mitigating circumstance.

E. THERE ARE NO MITIGATING CIRCUMSTANCES PRESENT

The only statutory mitigating circumstance Appellant now claims exists is that the murder of Patricia Nigro was committed while Appellant was under the influence of extreme mental or emotional disturbance. (Appellant's Brief, 35; Fla. Stat. 921.141(6)(b)). Appellee suggests there is no evidence to support this mitigating factor. It was not even mentioned in Appellant's sentencing argument, (R 1548-1553), even though the prosecutor had specifically argued it did not apply. (R 1544).

Although this mitigating factor was instructed upon, and the jury was, of course, permitted to consider it, even now the only basis argued by Appellant for this factor is that Appellant was "having problems with his girlfriend, Julie," in January 1983, "that Appellant had been fired from his job just prior to January, 1983," and, "that in March 1981, Appellant was having martial problems," at the time he kidnapped and sexually battered Deborah Fifer. (Appellant's Brief, 35). There was no medical or psychological testimony about Appellant and there was no testimony that such "problems" affected Appellant to the extent that his faculties were ever impaired. His own family's testimony at sentencing shows this. (R 1535). The evidence cannot support this mitigating circumstance. cf. Johnson v. State, 442 So.2d 185 at 189 (Fla. 1983), where psychological and psychiatric testimony in conflict and factor was properly denied; Michael v. State, 437 So.2d 138 at 141 (Fla. 1983), no psychiatric evidence and defendant's mother knew of no significant psychological problems; Cannady v. State, 427 So.2d 723 at 731 (Fla. 1983), despite drug use, defendant's conduct of committing crime, fleeing scene and disposing of evidence conclusively showed reasoning and understanding; Stevens v. State, 419 So.2d 1058 at 1064 (Fla. 1982), psychiatrist reported no extreme mental or emotional disturbance and no testimony

supported claim of impaired capacity; Smith v. State, supra, even medical testing did not compel application of a mitigating factor in sentencing; Hall v. State, supra, despite testimony he was "high" on drugs, the trial court could still reasonably find the testimony did not establish the mitigating factors; Messer v. State, 402 So.2d 341, at 347-349 (Fla. 1981), detailed psychological report supports rejection of this factor unless extreme mental or emotional disturbance existed. Further, this Court has consistently held that "finding or not finding a specific mitigating circumstance applicable is within the trial court's domain, and reversal is not warranted simply because an Appellant draws a different conclusion." Stano v. State, supra, citing Smith v. State, 407 So.2d, supra.

The only other evidence of mitigating circumstances Appellant claims is the non-statutory mitigating circumstance evidence that "Appellant's brothers, Christopher Thompson, Timothy Thompson, and James Thompson, testified that Appellant was never a violent person (R 1526, 1533-1534)." This testimony is obviously rebutted by his prior conviction and by the instant jury verdict. His father testified he was normal (Refuting Appellant's aforementioned claim of extreme mental or emotional disturbance); that Appellant could never have committed a crime as heinous as this one (despite the jury's verdict), and that Appellant is not a violent person (Also clearly refuted by the prior conviction and the jury's verdict). Deacon Carroll's testimony, the only other testimony relied on by Appellant, merely shows that Appellant made a good adjustment to prison life. (Appellant's Brief, 36). Appellant shows no authority for his claim that the above evidence could reasonably be the basis for the jury's recommendation of life imprisonment. The trial judge repeatedly stated he found no mitigating circumstances, statutory

or non-statutory,existed (R 1593, 1594, 1771). This Court recently upheld a jury override where mitigating testimony at sentencing was that Appellant was "a good man and raised a Christian." Burr v. State, 466 So.2d 1051 (Fla. 1985). Other death sentences with findings of no non-statutory mitigating circumstances where similar family background and character testimony was presented are Johnson v. State, 465 So.2d at 507, "Appellant presented testimony about his family background, including the favorable opinions of friends, relatives, and neighbors, many of whom believed him to be non-violent and of good character"; Williams v. State, 437 So.2d 133 at 136, 137 (Fla. 1983) cert.den. 104 S.Ct. 1690 (1985). "Defendant presented evidence from relatives and friends that he is a good person and was kind to them." See also Valle v. State, 10 F.L.W. 381 (Fla. July 11, 1985).

Appellant's argument upon this issue merely registers his disagreement with the lack of weight given by the trial judge to his mitigation evidence.

> The trial judge need not have expressly addressed each non-statutory mitigating factor in rejecting the same, and we will not disturb his judgment simply because Appellant disagrees with the conclusions reached.

Mason v. State, supra, at 380.

> Because he failed to find the mitigating factors which [the defendant] urged does not mean that he [the trial judge] did not consider the evidence. It lies within his province to decide whether a particular mitigating circumstance in sentencing is proven and the weight to be given it. Smith v. State, 407 So.2d 894 (Fla. 1981); Lucas v. State, 376 So.2d 1149 (Fla. 1979).

Riley v. State, 413 So.2d 1173 (Fla. 1982); cert.den. 981, reh.den. 459 U.S. 1138 (1983); Daugherty v. State, 419 So.2d. 1067, at 1071 (Fla. 1982); cert.den. 459 U.S. 1228 (1983).

Appellee suggests that this Court will find, as it did in Engle v. State, 438 So.2d 803 at 812 (Fla. 1983) cert.den. 79 L.Ed.2d 753 (1984), that the trial judge did consider the non-statutory mitigating

circumstances raised by Appellant and simply found that none existed.

Appellant's argument that the weight of evidence in the guilt phase is a valid non-statutory mitigating circumstance is without merit. It ignores this Court's opinion in Buford v. State, 403 So.2d 943 (Fla. 1981), cert.den. 454 U.S. 1163, which states, in the opinion affirming a jury "override" death sentence:

> If defendant's testimony were accepted as creating a reasonable doubt, he should not be found guilty of murder in the first degree for his participation in the murder would not be proved... .
>
> A convicted defendant cannot be "a little bit guilty." It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy.

Ibid, at 953.

The trial judge heard all the mitigation evidence offered by Appellant, even though much of it could have been excluded under Lockett v. Ohio, 438 U.S. 586 (1978); Sireci v. State, 399 So.2d 964 (Fla. 1981). He found no mitigating circumstances present.

When there is competent substantial evidence to support the conclusion of the trial judge concerning his sentencing responsibilities, his determination is final. Martin v. State, 420 So.2d 583 at 584 (Fla. 1982). Where there is no reasonable basis for the jury to find this mitigating circumstance exists, although they must have in view of their advisory verdict in the face of several aggravating circumstances, the decision of the trial judge to impose the death sentence over the jury recommendation of life is proper. McCrae v. State, 395 So.2d 1145 (Fla. 1980); Hoy v. State, 353 So.2d 826 (Fla. 1977).

F. THE TRIAL JUDGE PROPERLY OVERRULED THE JURY'S RECOMMENDATION AND IMPOSED A SENTENCE OF DEATH.

As was stated in Brown v. State, supra, at 346:

> This Court has recognized that where there are aggravating circumstancesmaking death the appropriate penalty, and the jury's recommendation is not based on some valid mitigating factor (statutory or non-statutory) discernible from the record, it is proper for the trial judge to overrule the jury's recommendation and impose a sentence of death. See e.g. Porter v. State, 429 So.2d 293 (Fla., cert.denied 104 S.Ct.202 (1983); Bolender v. State, 422 So.2d 833 (Fla. 1982), cert,den. 103 S.Ct. 2111 (1983); Stevens v. State, 419 So.2d 1058 (Fla. 1982) cert,denied, 459 U.S. 1228 (1983); Miller v. State, 415 So.2d 1262 (Fla. 1982), cert.denied, 459 U.S. 1158 (1983); McCrea v. State, 395 So.2d 1145 (Fla. 1980), cert.denied, 454 U.S. 1041 (1981); Johnson v. State, 393 So.2d 1069 (Fla. 1980), cert.denied, 454 U.S. 882; Dobbert v. State, 375 So.2d 1069 (Fla. 1979), cert.denied, 447 U.S. 912 (1980); Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. denied 439 U.S. 920(1978); Barclay v. State, 343 So.2d 1266 (Fla. 1977) cert. denied 439 U.S. 892 (1978); Douglas v. State, 328 So.2d 18 (Fla.) cert. denied 429 U.S. 871 (1976).

Relying upon the foregoing arguments and the evidence contained in the record, supporting the existence of the aggravating circumstances, and the absence of any mitigating circu,stances, Appellee strongly suggests that this Court must find that there is nothing in mitigation to provide reasonable support for the jury's recommendation of a life sentence. The Tedder test was satisfied and the sentence imposed was appropriate under the law.

Assuming arguendo, that this Court rejects an aggravating circumstance found by the trial court, the sentence of death should still be affirmed. Such an error does not necessarily require resentencing. e.g., Sireci v. State, supra. Here there are several valid mitigating circumstances. In such a case, the weighing process is not injuriously affected and reversal is not required. Brown supra, at 347, see also, Griffin v. State, supra, at 266, where three of five aggravating factors were rejected and death sentence affirmed.

Even if this Court does determine evidence of a mitigating factor exists, Appellee directs this Court's attention to the following cases,

where, as here, this Court found the facts justifying death are so clear and convincing that no reasonable person could differ despite the existence of some evidence mitigating circumstances, and affirmed the death sentence. See Brown, Johnson, Porter, Miller, McCrea, Dobbert, Hoy, supra, Scott v. State, 419 So.2d 1058 (Fla. 1982).

The facts of this case present no reasonable basis for the jury's recommendation and are distinguishable from the cases in which this Court reversed death sentences imposed over a jury recommendation. cf. Herzog, supra, Odom v. State, 403 So.2d 936 (Fla. 1981), cert.denied 456 U.S. 925 (1982), McKennon v. State, 403 So.2d 389 (Fla. 1981), Stokes v. State, 403 So.2d 377 (Fla. 1981), Phippen v. State, 389 So.2d 991 (Fla. 1980), Neary v. State, 384 So.2d 881 (Fla. 1980), Thompson v. State, 328 So.2d 1 (Fla. 1976), where the aggravating circumstances were outnumbered or equalled by mitigating circumstances; Goodwin v. State, 405 So.2d 170 (Fla. 1981), Barfield v. State, 402 So.2d 377 (Fla. 1981), and Stater v. State, 316 So.2d 539 (Fla. 1975), where the defendant was either not present or merely accompanied a triggerman; Malloy v. State, 382 So.2d 1190 (1979), where defendant's accomplices pled to a lesser charge and received relatively minor sentences; Brown v. State, 367 So.2d 616 (Fla. 1979), 16 year old defendant whose accomplices did not receive the death penalty and one became immune from prosecution because of speedy trial rule; Smith v. State, 403 So.2d 933 (Fla. 1981), and Province v. State, 337 So.2d 783 (Fla.) cert.den. 431 U.S. 969 (1976), where the trial court did not articulate aggravating circumstances or reasons for rejecting jury verdict; Williams v. State, 386 So.2d 538 (Fla. 1980), only one aggravating circumetance; Burch v. State, 343 So.2d 831 (Fla. 1977), where the defendant, in a factually similar case, was

established to be mentally disturbed and the trial judge found he was substantially impaired in his capacity to conform his conduct to law; Chambers v. State, 339 So.2d 204 (Fla. 1976), defendant under the influenc of extreme mental or emotional disturbance and victim consented to the act causing death, at 209; Jones v. State, 332 So.2d 615 (Fla. 1976), defendan was established as being under extreme mental or emotional disturbance by testimony of psychiatrist and psychologist; Tedder v. State, supra, risk to many persons, in kidnapping, versus defendant was only 20 years of age; Swan v. State, 322 So.2d 485 (Fla. 1975), co-defendant received life sentence, defendant was only 16 years old, versus heinous, atrocious and cruel.

Finally, the defense counsel's sentencing argument was devoid of any discussion of the aggravating versus mitigating circumstances save his "whimsical doubt" lecture to the jurors to rethink their guilty verdic and, since they took five hours, they should rethink their doubts even if they "may not be legally reasonable doubts." Further, defense counsel appealed to the jury's sympathy with his reference to Appellant never seeing his children, never seeing his wife, from whom he was divorced, and never seeing his family. Such an appeal to the jury's sympathies is improper but was nevertheless allowed by the trial judge. Such an argument may well have resulted in the jury's recommendation for life.

Recognizing this Court must review the sufficiency of the evidence to sustain the finding of guilt pursuant to Florida Rule of Appellate Procedure 9.140(f), Appellee states it has proven Appellant's guilt beyond a reasonable doubt, and as authority Appellee relies upon the facts contained within the record, as summarized within its statement of the facts, and the foregoing arguments, wherefore, this Court must affirm the conviction of Appellant. In light of the foregoing, it is clear that the

jury had no reasonable basis for its recommendation. A comparison of all the facts and circumstances of this case with those presented in the many other capital appeals that have come before this Court will clearly show that death is the appropriate sentence and is not out of proportion to the sentences approved by this Court in similar cases. Brown v. State, supra.

POINT II

EVIDENCE OF APPELLANT'S KIDNAPPING AND SEXUAL BATTERY OF DEBORAH FIFER WAS PROPERLY ADMITTED AS IT WAS RELEVANT AND NOT A FEATURE OF THE TRIAL.

Appellee moved to admit evidence of Appellant's prior kidnapping and sexual battery of Deborah Fifer, before the trial began, on the basis of proving modus operandi; intent, knowledge or motive; common scheme, plan or design; and identify. (R 1637). Appellant objected (R 1670-1671) and the trial court heard a proffer (R 1072-1084) before ruling the evidence admissible and properly instructing the jury upon collateral crime evidence (R 1094).

Deborah Fifer testified that on March 17, 1981, she was 28 years old. (R 1072, 1095). (The victim, Patricia Nigro was 27 when she died. (R 473)). She was of similar build with the victim (R 1085) and her hair was then shoulder length, as was the victim's. (R 1078). Both March 17, 1981, and January 20, 1983, were weekdays. (R 1073). It was in the evening, she testified, that Appellant approached her (R 1078, 1095) (and it was in the evening that Patricia Nigro's car was stuck. (R 727-730). Appellant abducted Deborah Fifer by threatening her with what he said was a gun. A weapon was obviously used on Patricia Nigro. He took her in his car eight blocks to the St. Helen's Church parking lot (R 1073, 1098) where he forced her to submit to sexual acts. (R 1075,

1099). The St. Helen's Church parking lot is only 100 feet from where Patricia Nigro's car was stuck. (R 1076, 1099). Both locations are within sight of Appellant's apartment. (R 915-916). Appellant told Deborah Fifer, "If you scream, I'll kill you." (R 1079, 1098). Patricia Nigro was strangled in a manner consistent with preventing a scream. (R 607-608). Appellant ordered Deborah Fifer to remove all her clothing, including her bra, before he forced sexual intercourse upon her in the passenger seat of his car, and he ejaculated in her. (R 1075, 1100, 1101). Then he let Fifer get dressed. (R 1101). When Patricia Nigro's body was found (inside a speaker box also containing Appellant's fingerprints), her bra was missing and her pants zipper was pulled down, but the rest of her clothing was on. (R 349). A hair matching Appellant's was found <u>inside</u> of her underpants. (R 349, 376, 1042). Sperm was found on the victim's vaginal swab (R 839-840).

Appellant gave Deborah Fifer a false name, Richie (R 1078, 1102), and told her a story that he was in the service. (R 1102). The man who put the box in the dumpster told Mark Springer his name was Brian (R 819), and told a story about members of a motorcycle gang. (R 815). Appellant told Deborah Fifer he was sorry and acted remorseful. (R 1102, 1103). The victim's body was found with a band-aid on her badly cut hand. (R 930).

Appellant told Deborah Fifer that if she were lying to him about her promise not to tell the police it would be really bad for Appellant because being in a jail enviornment would be "just totally terrible," (R 1101). She was afraid he was going to kill her so she made a "date" with Appellant to better her chance for surviving (R 1101-1102).

Evidence was proffered, in the testimony of Janet Swift, that Appellant was having martial problems in March 1981 (R 937), and in

January 1983, he was having problems with his girlfriend, Julie. (R 937-938). This shows a similar state of mind at the time both crimes were committed. Comparing these facts to other cases in which the Florida Courts have admitted collateral crime evidence, Infra, not only has Appellee clearly presented evidence relevant and probative upon the issues of modus operandi; intent, knowledge or motive; common scheme, plan or design, and identity, but also on the issues of opportunit preparation and state of mind.

Appellant claims the only similarity between the two crimes is that the State alleged that Appellant committed both and that both involved female victims. (Appellant's Initial Brief, page 39). Appellee needs only direct attention to the above listed pervasive similarities to show that the trial judge did not abuse his discretion.

> The trial court is afforded broad discretion in determining the admissibility of extrinsic act evidence, and its decision will not be reversed absent an abuse of discretion.

United States v. Chilcote, 724 F.2d 1498, at 1502, (11th Cir. 1984), cert. den. 104 S.Ct. 2665. Blanco v. State, 452 So.2d 520 (Fla. 1984).

The test for admitting evidence revealing other crimes is:

> [E]vidence of any facts relevant to a material fact in issue except where the sole relevancy is character or propensity of the accused is admissible unless precluded by some specific exception of rule of exclusion.

Williams v. State, 110 So.2d 654 (Fla. 1959). This test has been codified as stating:

> 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 it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

Fla. Stat. §90.404 (2)(a).

This Court and other courts in this State, have continuously found evidence of similar crimes admissible under circumstances equivalent to, and in many cases less compelling than, those present in this case. In Andrews v. State, 172 So.2d 505, at 507 (Fla. 1st DCA 1965), testimony that a collateral crime was committed against a person in an age group comparable to the victim in the crime charged, at the same place, and under almost identical circumstances, was found clearly relevant and admissible as bearing upon the defendant's identity, intent, plan and design. In Mason v. State, supra, this Court upheld the admission of a collateral crime committed .8 mile away from the charged crime, where the witness was threatened with death and the victim was stabbed in the heart, similar points of entry and weapons were used, and towels and fingerprints were found at both scenes. The basis of relevancy was stated as being the issue of identity and modus operandi. Motive and intent were the basis of relevancy in Mackiewicz v. State, 114 So.2d 684 (Fla. 1959), cert,den. 362 U.S. 965, reh.den. 362 992 (1959), where testimony that the defendant had previously robbed another hotel and believed the police were on to him, was admitted to explain why he shot a police officer at a second hotel. Where the two incidents took place in the same general area..., the same modus operandi was involved, the same type of victim was involved, this Court recently upheld the admission of a collateral crime to demonstrate the defendant's motive, intent and state of mind. Randolph v. State, 463 So.2d 186, at 189 (Fla. 1984).

In Burr v. State, 466 So.2d 1051 (Fla. 1985), this Court upheld the admission of a store clerk's testimony that during an earlier crime the Appellant told him he was going to kill him. This was found to be admissible to prove both the identity and intent of the Appellant at his trial for murder of another store clerk.

Clearly there is more than a mere general similarity between the kidnapping and sexual battery of Deborah Fifer and the sexual battery and murder of Patricia Nigro.

Appellee also submits that where as here the identity of a criminal defendant is a material issue, evidence of a collateral crime to which the defendant can be positively connected is relevant and therefor admissible where there is more than a mere general similarity. Here there are at least 15 points of similarity which pervade these two factual situations. (See comparison of Deborah Fifer's testimony to facts of this case, *supra*.) The testimony of Deborah Fifer before the jury consists of less than twenty pages, including direct, cross, and redirect examination. The total prosecutor's "repeated" references to her testimony is:

"unlike Deborah Fifer who you heard from" (R 1400);

then, fifteen pages later he said:

> "Deborah Fifer testified and remember she said it's just a few blocks away. He approached her a few blocks away, took her where? A hundred feet from where Patricia's car is found. Remember, she said something else that's interesting. She said that afterwards he felt sorry. He felt sorry. Well, remember there's a bandaid on Patricia."

and, lower on the same page he said:

> Well, remember Deborah Fifer when he approached her he had a coat on, if you recall, and said he had a weapon. (R 1415).

And then, 51 pages later, in rebuttal to Appellant's closing argument, the prosecutor argued:

> He says there is no similarity in Deborah Fifer. Where was she abducted? How far? How many blocks away was she abducted and where was she taken? To the church. How far from where he lived? No similarity. And of course I think its obvious from the evidence and from the photographs Patricia Nigro resisted. Deborah didn't resist. Patricia had to resist. She was beaten and strangled and choked. (R 1466).

In Wilson v. State, 330 So.2d 457 (Fla. 1976), this Court found that

references to collateral crimes on almost 600 pages of the transcript did not rise to the level of error. Most certainly the scant evidence and brief arguments cited above cannot support any contention that the collateral crime became a "feature" of the instant case at trial.

There was clearly no error on the part of the trial judge in permitting the admission of evidence of the collateral crime through the testimony of Deborah Fifer.

POINT III

ANNOTATION OF A PRINTED "RIGHTS WAIVER CARD" WITH THE WORDS "AT MY DISCRETION" BY APPELLANT, WHO NEVER REFUSED OR FAILED TO ANSWER, IS NOT FAIRLY SUSCEPTIBLE TO INTERPRETATION AS A COMMENT ON HIS EXERCISE OF HIS FIFTH AMENDMENT RIGHTS.

There is no evidence in the record that Appellant ever refused or failed to answer any question asked of him by Detective Mundy. (R 960-971). And, Appellant never exercised his Fifth Amendment right to refuse to answer any questions. He even testified at trial. (R 1295-1338). Yet, Appellant claims that his own writing, which appears on the rights waiver card is so susceptible of interpretation by the jury as a comment upon his right to remain silent that it is per se reversible error. (Appellant's Initial Brief, page 42).

The case law in Florida requires that a comment, by the State, to be error, must be "fairly susceptible" to being interpreted by the jury as a comment upon the defendant's assertion of his privilege against self incrimination. David v. State, 369 So.2d 943 (Fla. 1979). However, "fairly susceptible" should not be interpreted as meaning (as Appellant apparently is suggesting) by some convoluted stretch of the imagination, under the most tortured twisting of semantics, and deviod of rationality and common sense. Rather, Appellee suggests, the proper interpretation would be made in light of all the surrounding circumstances.

Here, Appellant made the notation on the rights card. Rather than evidencing the Appellant's strained interpretation, the notation merely corrobrates Appellant's understanding of the Miranda warnings which he, by law, must be advised of and which he must affirmatively show he understands before questioning can commence. Miranda v. Arizona, 384 U.S. 436 (1966). (The quotation of Detective Mundy contained in Appellant's Brief, page 42, was a response to Appellant's counsel's question during a proffer, outside the presence of the jury, and was not repeated before the jury (R 963)).

After receiving Detective Mundy's proffered testimony upon the issue of voluntariness of Appellant's custodial communications, upon which issue the rights waiver card was an integral piece of evidence, the trial court determined that the Appellant's notation "at my discretion was, as Detective Mundy testified, merely additional evidence that Appellant understood that he could, at his discretion, stop answering questions, as it was his constitutional right to do so. (R 964-965).

The cases cited by Appellant all state the law with respect to comments by prosecutors upon defendant's failures to testify. In this case we are not remotely presented with this issue. Rather, we are presented with a written statement by the Appellant, himself, not indicating an assertion of his Fifth Amendment right against self-incrimination, but instead, indicating his intelligent waiver of that right prior to answering the detective's questions. See Williams v. State, 353 So.2d 588 (Fla. 3rd DCA 1977), cert.dismissed, 372 So.2d 64 (fla. 1979 where, as here, the defendant did not seek to exercise the right to remain silent.

As in State v. Prieto, 439 So.2d 288 (Fla. 3rd DCA 1983), pet. rev. den. 450 So.2d 488 (Fla. 1984), Detective Mundy's testimony

establishes that Appellant never invoked his Fifth Amendment privilege against self-incrimination. In Prieto, and Ragland v. State, 358 So.2d 100 (Fla. 3rd DCA) cert. den. 365 So.2d 714 (Fla. 1978), even though the defendants failed to answer one or two questions, comments upon their failure to answer were not violative of their constitutional rights when said rights were not invoked. Here, Appellant never refused to answer any questions.

There is no fair basis at all for Appellant's interpretation that his own notation on the rights waiver card would be interpreted by the jury as a harmful or adverse comment by the State upon Appellant's exercise of his right to remain silent, because Appellant did not chose to remain silent.

Even if this Court should conclude that Appellant's notation is a comment or assertion of his privilege against self-incrimination, the Appellant clearly did not attempt to assert this privilege and therefore the introduction of evidence of such a comment or assertion is harmless error. Rowell v. State, 450 So.2d 1266 (Fla. 5th DCA 1984); United States v. Hastings, 461 U.S. 499 (1983).

CONCLUSION

Based upon the foregoing arguments, as supported by the evidence and the authorities contained therein, the judgment of guilt and the sentence of death must be AFFIRMED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by U.S. Mail to MAX RUDMANN, ESQ., 2295 Corporate Boulevard, N.W., Suite 211, Boca Raton, Florida 33431, and to ROBERT P. KUNDINGER, ESQ., 2605 East Atlantic Boulevard, Suite 203, Pompano Beach, Florida this 29th day of August 1985.

Of Counsel