IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,224

PATRICK JAMES THOMPSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee,

_____________________________/

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

BRIEF OF APPELLANT

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PRELIMINARY STATEMENT AND EXPLANATION OF REFERENCES

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 Appellant unless otherwise indicated.

STATEMENT OF THE CASE

Appellant was charged with the first degree murder of Patricia Nigro in an indictment filed on January 19, 1984. (R.1598). On September 28, 1984, Appellant filed a Motion for an Order Prohibiting Williams rule testimony in his trial. (R.1670). Appellant stated that the sole purpose of the collateral crime testimony was to prove bad conduct and criminal propensity, that the act alleged in the indictment herein was dissimilar to the collateral crime, that the collateral crime was irrelevant, had insufficient probative value, and was very prejudicial. (R.1670-1671). Prior to the opening statements at trial, the defense counsel objected that the Court had not ruled on his Motion. (R.310-311). The defense stated that not knowing whether Williams rule evidence would be omitted until after the opening statements would prejudice the defense because defense counsel would discuss such matter in his opening statement. (R.311-312). Nevertheless, the Court did not rule.

During voir dire, the prosecution struck for cause several jurors who expressed opposition to the death penalty. (R.31, 151, 152, 154, 155, 196-197, 249-252, 286, 289, 292, 294).

At trial, the testimony of Janet Swift and Deborah Fifer, was proffered prior to the Court's ruling. (R.936-940, 1072-1084). Defense counsel again objected to the use of the collateral crime testimony. (R.1068, 1087-1089, 1090). The trial court ruled that the collateral crime evidence would be admissible. (R.1091). Thereafter defense counsel again objected to not having been afforded the opportunity of addressing the issue in

his opening statement and he also incorporated all written objections concerning the collateral crime evidence. (R.1091--1093). At the close of the State's testimony, the defense moved for a judgment of acquittal. (R.1116). Defense counsel stated that the circumstantial evidence adduced in this case was insufficient. (R.1116-1117). The trial court denied said Motion. (R.1118). The defense thereafter put on its case. The defense proffered the testimony of Johnny Mac Brown and Marvin Wilson. (R.1155-1161, 1163-1182). The trial court sustained the State's objection to the testimony of Johnny Mac Brown. (R.1228). Following the defense resting its case, it renewed its Motion for a Judgment of Acquittal. (R.1372). The trial court again denied the Motion for a Judgment of Acquittal. (R.1373). Subsequently, the trial court read a jury stipulation concerning the testimony which would have been given by one Nina Darling to the jury. (R.1374).

At the conclusion of the trial phase of the trial, the jury found the Defendant guilty of First Degree Murder. (R.1510). Thereafter the sentencing proceedings were held. (R.1519-1561). The jury recommended that life imprisonment be imposed upon the Appellant. (R.1561). The trial court ordered a presentence investigation and subsequently on November 8, 1984, the trial court, ignoring the jury's recommendation that a life sentence without possibility of parole for twenty-five (25) years be imposed, tabulated the aggravating circumstances and mitigating circumstances without giving the slightest credence to the jury's recommendation, and sentenced the Appellant to death. (R.1594, 1768-1773).

STATEMENT OF THE FACTS

Ralph Garner, a member of the Fort Lauderdale Police Evidence Section, testified as to the homicide scene on January 21, 1983. (R.361). Officer Garner described the processing of the crime scene, the collection of hairs and fibers and jewelry from the body of the victim. (R.390). Office Garner testified that three swabs were taken at the autopsy. (R.406). The oral and anal swabs were useless however. (R.406). Officer Garner testified that the reaction caused by Ninhydrin with the box where the victim was found, showed that many people had touched the box. (R.432).

The victim's aunt, Carolyn Amenta, testified that the victim had visited Fort Lauderdale in December, 1982. (R.455). She came with her sister and a friend. (R.455). While in South Florida she met John Sabio. (R.455). In January, the victim was in South Florida again and her aunt told her to pick up some personal items she had left at the aunt's house. (R.456). The victim had not called her aunt on Thursday, January 20, 1983, the day she drove up to Fort Lauderdale. (R.466). Mrs. Amenta testified that John Sabio called for the first time on Friday, January 21, 1983 at approximately 6:00 p.m. (R.467).

The victim's uncle, Sebastian P. Amenta, testified that in early January, 1983, he called a friend, Sergeant Patterson, with regard to a missing person report. (R.457). Amenta's niece had stayed at John Sabio's house on her second trip to Florida, in early January, 1983. (R.479).

John Sabio, an electrical engineer, testified that he met the victim at Yesterday's, a restaurant lounge in Fort Lauderdale, in December, 1982. (R.484). On January 10, 1983, the victim came back to South Florida to stay as a house guest of Mr. Sabio. (R.486). On Thursday, January 20, 1983, Mr. Sabio went to lunch at the Sea Shanty with the victim. (R.488-489). Mr. Sabio received an emergency call from the Port of Miami and proceeded there along with the victim. (R.490). The victim informed him that she was going to Fort Lauderdale to her uncle's house to pick up clothes and perfume she had left there. (R.490). The victim took Mr. Sabio's car. (R.494). Mr. Sabio testified that he had had sex with the victim the night before (Wednesday, January 19, 1983). (R.500).

Mr. Sabio also testified that the victim was expecting to see an ex-boyfriend in Florida. (R.512). He did not know when that ex-boyfriend was coming down and she was going to tell this person that she did not want to have anything to do with him anymore. (R.516).

Fort Lauderdale Police Department, Crime Scene Investigator, Detective Cone, testified that he searched the area where the victim was found for evidence. (R.521-523). Detective Cone found nothing to indicate that the crime had occurred in the area. (R.526). The victim had no shoes, she was wearing blue jeans and a green type sweater, short sleeve top. (R.527). Detective Cone attended the victim's autopsy. (R.531). At the autopsy it was found that the victim had little cuts on her hands, lacerations on the inside of each thumb and a swollen face. (R.531).

Sandra Yonkman, a Broward Sheriff's Office Latent Print Examiner, examined a latent print introduced into evidence as State's Exhibit No. 29 and opined that it was the left index finger of the Appellant. (R.548). The witness testified that this indicated that at some point in time, the Appellant touched the cardboard box. (R.552).

Chief Latent Prints Examiner for the Broward Sheriff's Office, Detective Richtarcik, testified that he had reached the same conclusion as Sandra Yonkman with regard to the latent fingerprint. (R.554).

Fort Lauderdale Police Detective Rice, testified that he responded to the crime scene. (R.557). Detective Rice testified that he assisted Detective Mundy and Detective Walley, that he spoke to Mark Springer, the individual who found the body. (R.557). He also testified that Detective Mundy and Detective Walley took an envelope with the Appellant's hair on January 17, 1984 to the FBI Laboratory in Washington, D.C. and requested that the FBI compare these with the hairs found on the victim. (R.561-562).

Ted Liquori, the owner of the Stadium Pub, behind which the victim's body was found in the dumpster, testified that he lived in an apartment in back of the pub. (R.566-567). Next to his apartment was the apartment occupied by Mark Springer. (R.566). Liquori, testified that he did not hear any unusual noises on January 21, 1983. (R.573). Nor did he recognize photographs of the victim. (R.573). However he testified that from a photograph in the newspaper, he recognized the victim as a girl who had been

in two or three times that week, and that she had come in with a slight man, approximately 150 pounds, 5'7" and about 45 years old. (R.575-576). This man, was not the Defendant. (R.577). Liquori believed he saw the victim in the Stadium Pub the evening of her disappearance. (R.577-578).

James Ongley, an associate medical examiner for Broward County, testified that he went to the scene on January 21, 1983 and that the body had been found at approximately 9:30 a.m. (R.588-592). The body was dry, as was the box in which it was found. (R.594). No shoes were found on the body. (R.596). Medical Examiner, Ongley, performed the autopsy. (R.595). The victim was 5'6" and 136 pound, she had a scratch on the left ankle. (R.596-597). The victim had a large number of bruises about the body - about her thighs, wrist, upper arm, chest wall, eyes, neck, numerous lacerations, and numerous small abrasions. (R.598). On the thumb of her right hand was a 2" lacerations. (R.598). There were two pale lines on each side of the neck. (R.598-599). Photographs depicting the injuries to the victim were introduced into evidence. (R.604, State's Exhibit Nos. 33, 34, 35, 36, 39, 40, 41, 39, 38, 42 and 37, R.605, 606). The defense counsel objected to the gruesomeness of the photographs. (R.603). The Court noted the objection and overruled. (R.603).

Medical Examiner, Ongley described the cuts as defensive wounds. (R.607). He described the internal injuries as bruising in the neck muscles, larynx, and trachea. (R.607). He testified that the cause of death was strangulation. (R.611). Medical

Examiner, Ongley testified that a "rape work-up" was done but that no trauma was found around the vagina and that no evidence of sexual battery was found. (R.617). One hair was found in the victim's mouth and no broken bones were found. (R.618). A bandaid was found on a cut on the victim's left thumb. (R.619). Death occurred between January 20 at 7:00 p.m. and January 21 at 4:00 - 5:00 a.m. (R.608).

Lori Schepp, Mark Springer's girlfriend, testified that he was at the Stadium Pub with her and friends the night before the body was found behind the Stadium Pub. (R.623-625). She testified that Springer went to McDonald's for approximately 20 minutes and then returned and that she left at 11:00 p.m. (R.625-626).

Fort Lauderdale Police Officer, Michael Gelatka, testified that he delivered the victim's clothes to the FBI Laboratory in Washington, D.C. (R.631).

Fort Lauderdale Police Detective, Michael Walley, testified that upon responding to the scene where the victim's body was found, he observed the victim in a Panasonic Stereo Box in a dumpster. (R.633-634). The box was in good shape and dry. (R.635). Detective Walley testified that there were some blood drippings in the box, but "not a lot ... considering the injuries that she had sustained". (R.635). Since the body was dry and it had rained throughout the day on January 20, 1983, Detective Walley opined that the victim was killed elsewhere, put in the box and placed in the dumpster. (R.635). Detective Walley spoke

with Mark Springer and took his statement. (R.637). He also noted that the victim had on gold necklaces and a turquoise watch, (R.638). He contacted John Sabio and took Mr. Sabio's statement. (R.641-642). Mr. Sabio's white cadillac was found on January 22, 1983 by a Broward Sheriff's Officer. (R.643). On January 24 and 27 traffic stops were done in the area to find witnesses to the abduction. (R.644). The stereo box in which the victim was found was processed to extract any evidence. (R.646). Detective Walley also contacted a Panasonic representative in Miami in order to make a determination as to what would have been contained in the box. (R.646). Detective Walley testified that Appellant`s apartment was near the site where the victim's car was stuck in the sand. (R.658). He further testified that in January, 1984 he obtained an arrest warrant for Appellant and that he went to Melbourne, Florida along with Detective Patterson and Detective Mundy. (R.660-661). Detective Walley saw a Panasonic stereo in Appellant's residence. (R.662). He obtained a search warrant and collected the stereo and a couple of pants. (R.662).

He also located Appellant's vehicle and the car was processed by the Crime Laboratory. (R.663-664). Detective Walley also conducted a photographic line-up on January 6, 1984 which was shown to Mark Springer, Karen D'Amico, and Mrs. McIntosh. (R.668-669). Appellant's hair was sent to the FBI Laboratory for tests. (R.672-673). Detective Walley testified that as a result of the road block set up at the site where the victim's car was recovered, police obtained all sorts of descriptions of people who believed they had seen the victim. (R.683-684). Some witness

stated that they had seen two men, and others stated that they had seen a man and a woman in the proximity of the automobile. (R.684). He also testified that the victim's traveling companion, Nina Darling, gave police the name of John Matos as someone with whom they had contact on the way down from Connecticut to Florida. (R.692-693). Detective Walley testified that Appellant's residence was two blocks from the scene where the body was recovered and that a luminol test was performed in Appellant's apartment and that no positive results were obtained. (R.694-700). He also testified that at the line-up, Mark Springer identified the person in position no. 1 as the person whom he had helped place the stereo box in the dumpster. (R.702-703). This person was not the Appellant, Patrick Thompson. (R.702-703). In addition, another witness, Karen D'Amico did not identify anyone at the line-up despite the fact that the only person who appeared in both the photographic line-up and the live line-up was the Appellant. (R.703). Mrs. McIntosh viewed the photographic line-up on January 14, 1984 and two days later on January 16, 1984 she viewed the live line-up. (R.704). Detective Walley testified that Appellant's attorney at the line-up was not allowed in the room where the line-up was conducted. (R.702).

Mrs. Philippa McIntosh testified that she saw two people standing near a cadillac at approximately 8:00 p.m. in January of 1983. (R.726-729). The cadillac was canary yellow with a vinyl top. (R.729). Mrs. McIntosh described the people she saw as a tall girl, with blonde hair and green top, and a short man

with wavy hair approximately 26, 27, or 28 who was clean shaven. (R.730, 733). Mrs. McIntosh picked Appellant from a photo line-up and a live line-up later on. (R.743-744). However, prior to identifying Appellant, Mrs. McIntosh had seen his photograph on a T.V. News Program. (R.746). She had seen Appellant's photograph in a news story identifying him as the suspect in the instant case (R.758-759). Prior to observing the T.V. News Story, Mrs. McIntosh had given a description to the police of a latin male with short hair and she had stated that the girl also looked latin. (R.754). Further, when Mrs. McIntosh picked Appellant's photograph in a line-up, she was told by the police officer that she had picked the "right" one. (R.764). In further questioning, Mrs. McIntosh admitted that she had previously called the hair of the man whom she had described to police as curly. (R.769).

Mr. McIntosh testified that he could not identify Appellant, although he had been driving with his wife when they observed the victim and the man who had approached her. (R.772-779, 780-786).

Mark Springer, a twenty-one (21) year old employee of the Stadium Pub testified that he helped someone put a stereo box into the dumpster. (R.796-799). He testified that the night before the body was found, he observed someone struggling with a box seeking to place it in the dumpster. (R.805). Springer testified that this person's car was tan with a vinyl top. (R.806). The man was 5'6" to 5'8" had black hair and weighed approximately 120-140 pounds. (R.807). When Springer found the body, he was afraid to tell the police that he had helped to put the box into

the dumpster. (R.807). However, Springer had spent 5-10 minutes with the person who placed the box in the dumpster. (R.815). Springer mentioned names of people in a motorcycle gang he knew. (R.815). The man who put the box in the dumpster knew these people. (R.816). The man was wearing what Springer described as waiter's clothes, black pants and a white shirt. (R.816). The man told Springer that there were ceramic pots in the box. (R.818). The man was wearing a name tag with the name Brian on the tag. (R.819).

Although Springer identified the automobile he was never sure that it was the car he saw that night and he told the police he was not sure. (R.810). Mark Springer, the only witness who saw and spoke to the man who placed the box with the victim's body in the dumpster, testified that Appellant was not the man he helped with the box. (R.821). Appellant was not the man that Springer had spoken to for 10 minutes. (R.821). Mark Springer was 100% positive that Appellant was not the man who placed the box in the dumpster. (R.821-822, 827).

Broward Sheriff's Office Crime Laboratory Technician, Howard Seiden, testified that he performed a luminol test at the Appellant's apartment, off of Oakland Park Blvd. Such a test would reveal any trace amounts of blood. (R.830). Technician Seiden found no reaction to the test. (R.830).

Broward Sheriff's Office Crime Laboratory serologist, George Duncan, testified as to his analysis of several biological specimens in this case. (R.835-836). Mr. Duncan received the victim's clothes, a vial with swabs, a tube of the victim's

blood, pubic hair combing, scalp and pubic hairs, hair from the mouth and hand and fingernail clippings. (R.837-838). Mr. Duncan found two male sperm cells in the vaginal swab. (R.839-840). He testified that sperm cells can survive twenty-four to forty-eight hours (24 -48 hrs.) according to some authorities and three to four days according to other authorities while in the vagina. (R.861-862). Although seminal fluid can sometimes be typed, Duncan testified he could not type the swabbed sample. (R.862-863). Duncan testified that his findings were consistent with John Sabio's testimony that he had sex with the victim on Wednesday, prior to the Friday, January 20, 1985, when the victim's body was found. (R.876-877). Duncan also testified that he found a one-eighth (1/8) inch portion of a down feather on the victim's green sweater blouse (R.842)., and that a blood stain on the victim's blouse was consistent with type B blood (victim`s blood type). Duncan also examined the stereo box and found blood in there, however, he could not type it. (R.852). Duncan performed a luminol test for blood traces in Liquori's and Springer's apartments. (R.854). Duncan found a trace of blood in the north hand side apartment, on a three (3) square foot area of the carpet. (R.854, 869-870). However, he was unable to type this blood. (R.869-870).

Glen Wilson, a neighbor of Appellant's, testified that Appellant drove an older Plymouth in January of 1983. (R.884). Wilson testified that there was a baby seat in the car. (R.884).

Hermina Feigenbaum, the sister of Appellant's girlfriend, Julianne Feigenbaum, testified that she visited her sister in

January of 1983. (R.888-889). Hermina, who goes by the name of Marcie (and will hereafter be referred to by that name) testified that some of her sister's belongings were in a spare bedroom in Appellant's apartment on January 12, 1983. (R.889-890). Among those possessions were two stereo boxes containing a Panasonic stereo which her sister had bought in June, 1982. (R.890). Julianne was moving from Inverrary, in Broward County, to Palm Beach and she had left some of her belongings in Appellant's apartment. (R.891). On Wednesday, January 19, 1983, Marcie and her sister obtained some of her sister's belongings from Appellant's apartment. (R.895). However, the stereo and stereo boxes remained in the apartment. (R.895). Marcie testified that on Friday, January 21, 1983, when she visited her sister, she observed that her sister was arguing with Appellant about the lack of a box for the speakers. (R.897-898).

Lisa McGuire, who's husband, Warren, knew Appellant, and who lived with Appellant in 1982, identified Appellant's car and testified that Appellant had a baby seat in the car. (R.910-916).

Fort Lauderdale Police Detective, Philip Mundy, testified that he responded to the scene where the body was found. (R.918-920). When the victim was taken out of the box, Detective Mundy noticed that some blood was on her clothing, that there was a deep cut between the thumbs of both hands and that the victim was badly beaten about the face. (R.924). Detective Mundy testified that the zipper on the victim's jeans was halfway to three-fourths way down. (R.928). On the basis that the zipper

was down and that the victim had been beaten, Detective Mundy speculated that this was a sex related murder. (R.929).

Detective Mundy testified that he went to the scene where the victim's vehicle was stuck in the sand. (R.942). The car was, in fact, brought back to the scene and a road block was set up in an effort to find eye witnesses. (R.948). In May of 1983 Mark Springer gave police a composite of the man who he helped place the box in the dumpster behind the Stadium Pub. (R.950-951).

While executing an arrest warrant for Appellant, Detective Mundy saw a Panasonic stereo with two speakers in Appellant's apartment. (R.952-953). Detective Mundy testified that Appellant was extraordinarily calm when he was arrested for first degree murder. (R.954). Prior to the introduction of testimony concerning a conversation between Appellant and Detective Mundy a proffer of said conversation was made. (R.960-964). The Defense had no objection to Appellant's statements, however, there was a problem with the rights waiver form. (State's exhibit VVVV). The Defense objected that Appellant's writing that he reserved the right not to make a statement by placing the words "At my discretion" following the statement that he had agreed to speak with the police (R.964-965) constituted a comment on the Appellant's right not to make a statement. (R.964). Appellant objected to the introduction of this rights waiver card as a comment on his right to refuse to testify against himself, such a comment being, of course, a violation of the Fifth Amendment. The trial court overruled the Defense's objection. (R.965). When the rights waiver card was placed into evidence before the Jury, the Defense Counsel preserved his objection. (R.967).

Concerning his conversation with Appellant, Detective Mundy testified that Appellant said he was either working with his girlfriend or at home on January 20, 1983. (R.968). Appellant placed the stereo boxes in a dumpster at his apartment in late December or early January. (R.969-970). Appellant knew the Stadium Pub and people he knew would go there after Striker games. (R.970). However, Appellant did not go there himself. (R.970). Appellant had no knowledge of the case. (R.970-971). Detective Mundy obtained samples of Appellant's hair and sent them to the FBI. (R.973).

On cross-examination, Detective Mundy admitted that it was possible that someone who may have owned a stereo box left prints on it. (R.480). Mundy further testified that Mr. James McIntosh's description of the people in close proximity to the victim's vehicle were not at all the same as the description of Mrs. McIntosh. (R.990). He testified that he had no idea whether the person who put the box in the dumpster also left the fingerprint inside the box, however, he said it was possible. (R.1000). Detective Mundy admitted that the bandaid found on the victim was misplaced in the course of the investigation, that swabs taken by the medical examiner were mislabeled and that an inventory sheet was mislabeled in the course of the investigation. (R.1008).

Douglas Deedrick, a Special Agent of the FBI attached to the FBI Laboratory, testified that he was a specialist in hair and fiber analysis. (R.1030-1032). Agent Deedrick testified that a

feather on the victim's blouse was a duck feather. (R.1035). He compared Appellant's hair with a hair found in the victim's panties. (R.1037-1044), and he found that the one hair was consistent with Appellant's hair. (R.1045). Agent Deedrick testified that it can occur that hairs from different individuals may look the same microscopically. (R.1053). Other FBI agents had run into such cases. (R.1054-1055). Agent Deedrick testified that the hair samples sent to him could have originated from the same source. (R.1061). Agent Deedrick testified that hair analysis is not a basis for absolute personal identification. (R.1061).

WILLIAM'S RULE EVIDENCE

Prior to the introduction of collateral crime evidence, the testimony of Janet Swift and Deborah Fifer was proffered, the defense vehemently objected to the use of this collateral crimes evidence. (R.1068, 1069, 1070, 1087, 1088, 1089, 1090). However the Court found that such evidence was admissible. (R.1091). Evidence of the collateral crime was introduced by the State in the testimony of Deborah Fifer. (R.1095). Ms. Fifer testified that on March 28, 1981 she left work at approximately 11:00 p.m. at the Church of Scientology on West Oakland Park Blvd. (R.1095-1096). When she unlocked her car door she observed a white male approximately 5'6" with dark hair with a nylon jacket over his hand. (R.1097). The man told Fifer that he had a gun and he ordered her to go with him. (R.1097). The man told her to do as he ordered and that she would not get hurt. (R.1097). They

drove for a period of time and wound up at a parking lot at St. Helen's Church. (R.1098). The man wanted sexual relations. (R.1099). Following the sexual relations, the man took Ms. Fifer back to her car walked her over and opened the door for her, they made plans to see each other again and the man kissed her good night and sent her on her way. (R.1102, 1103, 1108). Ms. Fifer identified that man as Appellant. (R.1104-1105). Ms. Fifer testified that she never saw gun during the incident. (R.1107). She was never hit, never kicked, nor was she caused bodily injury by Appellant. (R.1108). Ms. Fifer in fact, gave Appellant her office phone number as they were parting. (R.1109). On getting home she was undecided as to whether to contact the police. (R.1110). Ms. Fifer testified that Appellant was neither mean nor cruel and other than the forced sexual relations she was never harmed. (R.1112-1113). The testimony of Janet Swift was proffered with regard to the collateral crimes evidence. (R.936-940). Ms. Swift testified in March of 1981 Appellant was having marital problems during the period in which he was charged with sexual battery and kidnapping, (R.937), and that in January, 1983 he was having problems with his girlfriend, Julie. (R.937-938). She also testified that Robin was Appellant`s second wife and that he had previously been married to Peggy and that he had had marital difficulties there as well. (R.939). No charges have been made against Appellant during that period. (R.939).

EVIDENCE PRESENTED BY THE DEFENSE

Following this evidence the State rested. (R.1115). Appellant then moved for a Judgment of Acquittal stating that the circumstantial evidence was insufficient. (R.1116). The trial court denied Appellant's Motion. (R.1118).

Melissa Bass, a witness who observed the victim's Cadillac Seville stuck in the sand on the east side of Oakland Park Blvd. in January, 1983, testified that she saw a white female near the vehicle. (R.1119-1121). Ms. Bass offered to help however the woman was unresponsive and when a man showed up and parked on the west side of the street she turned and walked towards that individual. (R.1123).

Karen D'Amico, a bar maid at the Stadium Pub, testified that she thought she recognized the man who drove the car into the back of the Stadium Pub area towards the dumpster. (R.1144-1145). She described that man as having dark wavy hair, a beard, a mustache, stocky wearing a light blue uniform shirt from a gas station. (R.1145). She had seen this person in the bar previously. (R.1145). Ms. D'Amico prepared a composite for Detective Rice. (R.1145). She went to the live line-up and she was not able to identify anyone. (R.1146).

John Sabio, the victim's boyfriend, testified that he used an accountant whose business address was on the 1800 block in Fort Lauderdale the victim's car was found on 32nd or 33rd in the northwest section of town very close to that address. (R.1233-1236).

A neighbor of Appellant, Mr. Persad, testified that he lived in the same complex with Appellant, Appellant in fact was next door to him. Mr. Persad never saw a baby seat in Appellant's car. (R.1250).

Joe Klinowski, the manager of the complex where Appellant lived, testified that he never saw a baby seat in Appellant's car. (R.1253).

Scott Farrell, an employee of Carpet Systems, who was laying carpet at the Southern Bell office across the street from the site where the victim's car was stuck in the sand, testified that he saw more than one female in the proximity of the victim's car. (R.1268-1270). One woman had long brown hair and one had blonde hair. (R.1265-1270). Farrell observed a blue Impala with tinted windows stop and a man called to one of the girls. (R.1270).

Robin Thompson, Appellant's former wife, testified that there was one child born of the marriage on January 5, 1983 and that she had no knowledge of Appellant's having a car seat in January, 1983. (R.1277-1278).

Sharon Hebb, Appellant's first wife, (also known as Peggy), testified that she was married to Appellant in 1979 and that they had had two children. (R.1280-1281). Ms. Hebb had no knowledge of Appellant having a baby car seat in his car in January of 1983. (R.1281). The Appellant had some children's toys in his apartment. (R.1282).

Appellant, Patrick Thompson, testified in his own behalf. (R.1295). Appellant testified that Julie Feignbaum was his girlfriend and that she lived with him between the end of

October, 1982 to December, 1982. (R.1296). She kept some of her personal belongings in his apartment. (R.1296). He recalled that on January 21, 1983, a Friday, he took the Stereo to Julie Feigenbaum's apartment in Palm Beach. The speakers were not taken in their boxes. He just took the receiver and the phonograph in their individual boxes. (R.1300). Mr. Thompson threw out the boxes for the individual speakers on the Thursday night prior while he was preparing to go to Palm Beach. (R.1300). He did this as part of a clean up of his apartment making sure that all things which belonged to his girlfriend were going to Palm Beach. (R.1300). Mr. Thompson threw the boxes in the dumpster down stairs. (R.1301). On January 21, 1983, Appellant used a rental vehicle from Agency Rent-A-Car to get to Palm Beach because his own vehicle was not operating properly. (R.1301-1302). He had ordered the car previously. (R.1302). Appellant testified that he went to Palm Beach on January 21, 1983 to bring Julie's things up and to spend time with her. (R.1303).

Mr. Thompson testified that he was transferred by his employer, Pan American Tires, in mid February, 1983 to the Melbourne, Florida. (R.1305).

Mr. Thompson testified that following his arrest he discussed his whereabouts on the night of January 20, 1983 with Detective Mundy. (R.1309). Appellant testified that he told Detective Mundy that he could have been at a neighbor's house, a friend's house, or at home. (R.1309). A year after he had thrown out some boxes as refuse, Appellant could not recall the date he threw those boxes out. (R.1310).

Appellant did not own a car baby seat in January of 1983. (R.1312). After he was arrested in January, 1984, Appellant contacted his girlfriend, Julie, to try to recall where he was on January 20, 1983. However, she could not remember. (R.1317). In his cross-examination, Appellant stated he had been fired from Holbrook's because he had taken time off to be with his girlfriend and lied to his employer about the use of that time. (R.1327-1328).

George Tucker, the general manager for Pan American Tires in the Broward area, testified that he initially hired Appellant in January or February, 1983. (R.1339-1340). He further testified that Appellant was transferred to the store in Melbourne, in February. (R.1340).

Ray Rigsby, a district manager with Agency Rent-A-Car, testified that on January 21, 1983, Appellant had rented an `82 Dodge Diplomat. (R.1343). The car was reserved on January 20, 1983 during business hours (8:00 a.m to 5:30 p.m.) (R.1346). The Trial Court read a Stipulation to the Jury with regard to the testimony of Nina Darling. (R.1374). The Court told the Jury that the parties agreed that Nina Darling would have testified that she drove with the victim to Florida in early January, 1983, that they stopped in Virginia at a man named Jim Davis' place of employment. Jim Davis was not there, they did not speak with him; the purpose of the stop was for the victim to collect $200.00 to $300.00 as reimbursement for an earlier plane trip to Florida in 1982. Because Davis was not there, no money was received. On the way down they came in contact with a John

Matos, who was driving a Rolls Royce to Florida. They followed each other down and afterwards had no further contact. And that Nina Darling had not spoken to Jim Davis with regard to this case. (R.1375). The defense then rested and renewed its Motion for a Judgment of Acquittal. (R.1375). The Trial Court denied the Judgment of Acquittal. (R.1375).

In rebuttal, the State presented the testimony of Janet R. Swift. (R.1376). Ms. Swift testified that while Appellant was in her apartment, she saw a news report concerning the murder in the instant case and that Appellant was preoccupied with his problems concerning his girlfriend at the time. (R.1377).

In his closing argument, the prosecutor repeatedly made reference to the collateral crime evidence concerning Deborah Fifer. (R.1400, 1415). Further, the prosecutor told the Jury to disbelieve the Appellant because he had lied to his boss at one time. (R.1418). Prior to the rendering of the verdict, the Trial Court ruled on the allegation that Appellant had violated his probation by committing the crime in the instant case. (R.1508-1509). The Trial Court stated:

> "I'm inclined to the view that I would agree with Mr. Baron (defense counsel) that taken in the abstract, the finding of the Marlboro cigarette package in and of itself would not be sufficient. The identification of the automobile would not be sufficient. The eyeball witnesses to the Defendant being seen with the victim would not be sufficient. The location of the offense would not be sufficient. The testimony of Marcie regarding boxes would not be sufficient. The testimony of Janet Swift contradicting the Defendant's version that he had no knowledge of the offense prior to his arrest would not be sufficient. The contradictory statements made to Detective Mundy in and of themselves would not be sufficient. Even the fingerprint found on the box, the FBI testimony as to the matching of the hair samples individually taken perhaps would not be sufficient ..."

> Of course the burden is somewhat different on a violation of probation hearing as it is in a Jury Trial, and in so considering all of this testimony and considering that the totality of all these facts, I find that my conscience has been satisfied and I do find that Mr. Thompson has violated his probation ..."

Subsequently, the Jury returned a verdict of guilty as to first degree murder. (R.1510).

SENTENCING PHASE

During the sentencing phase, the only evidence introduced by the state was a document attesting to Appellant's adjudication for kidnapping and sexual battery which related to the case of Deborah Fifer. (R.1523, state's exhibit number 1, sentencing).

In mitigation, the defense presented the testimony of Christopher Thompson, Appellant's twenty-two (22) year old younger brother. Christopher testified that his brother was never violent and that the evidence against him was tenuous. (R.1525-1527). Timothy James Thompson, Appellant's older brother, told the jury that Appellant was not capable of getting physically harmful to a person. (R.1529-1530). A testimony concerning the prior collateral crime showed that absolutely no physical violence (other than the sexual act) was committed against Deborah Fifer. (R.1529). Timothy emphasized that some doubt as to guilt should be considered as a reason for giving a life sentence instead of a death sentence. (R.1530).

Appellant's father, James H. Thompson Sr., a retired police officer with some seventeen (17) years of experience, testified on behalf of his son. (R.1531-1532). Appellant had a normal childhood, he was never violent either in school, at work or in his private life. (R.1533). Other than the 1981 conviction for the sexual battery of Deborah Fifer, Appellant had never been in serious trouble in his twenty-seven (27) years. (R.1533). Mr. Thompson stated to the jury:

> "The only thing that I can tell the jury is that Pat was raised as a normal child, the same as everyone else is. He had the normal childhood diseases and the normal growing up problems that all boys have.
>
> I know in my heart that Pat could have never committed a crime as heinous as this one was. He is not a violent person. He's a jovial, joking charmer, who for the lack of any other word, he's not a violent person.
>
> When you deliberate today, I ask you to please, please take into consideration what I've said today.
>
> Pat is a good soul. He has made mistakes. He will pay for his mistake, but I'm sure that Pat never did what he's been convicted of in this court and when you deliberate, please find it in your heart. His life is in your hands."

Dr. Norman Carroll, a physician and a Deacon in the Catholic Church, testified that he met Appellant through Bible classes which he teaches at the Broward County Jail. (R.1537-1538). Appellant was in Dr. Carroll's class every Sunday for the past six to eight (6-8) months. (R.1538). Dr. Carroll got to know Appellant through the classes and through additional conversations after classes. (R.1538). Appellant actively participated in Bible class and supervised attendance of other inmates. (R.153). Appellant dealt with Deputies, not all of whom are cooperative, and with inmates, many of whom are not cooperative, and Appellant was able to get full crowds, despite his personal problems. (R.1539). Appellant was able to persuade people to attend in a benevolent way and everyone felt very welcome (R.1539). Dr. Carroll said of Appellant:

> "I never heard an ill word said of this man and I have never seen the least bit of threat or felt the least bit of threat from him in any way.
>
> On those two basis, we're all members of the same society. I respect the fact that on this circumstantial you found the man guilty, but I could never understand how you could ever send this man to his death. (R.1539)."

In his closing argument in this sentencing phase, the prosecutor argued that the jury should seek retribution. (R.1541). He argued that the murder was committed while the victim was being sexual battered. (R.1541). He also again brought up the previous sexual battery and kidnapping of Deborah Fifer. (R.1541).

In his closing, Defense counsel argued that there was no significant prior criminal record (R.1551), that there was some doubt as to Appellant's guilt, even though the jury had found that there was no legally reasonable doubt. (R.1548-1552). By the very fact that the jury deliberated for some five (5) hours before rendering a verdict, defense counsel argued, the existence of some doubts as to the circumstantial evidence presented was shown. (R.1548).

Following it's deliberations, the jury recommended that Appellant be given a life sentence. (R.1561).

Before sentence was pronounced on November 8, 1984, defense counsel reminded the court that a jury of twelve (12) had closely listened to evidence and that it has recommended that the court impose a life sentence. (R.1588). Defense counsel stated:

> "And although there are no statutory mitigating circumstances that are found in this PSI, I think that above everything else, the most important mitigating circumstance that this court must consider is that twelve (12) people after hearing everything felt that Patrick James Thompson deserved to live and not to die in the electric chair, and I ask this court to certainly consider that and give it the great weight it deserves...and the mitigating circumstance, the main one of the jury recommending life, I think, far outweighs that aggravating circumstance. (R.1588,1590)."

Other than noting that the jury had recommended life in his sentencing order (R.1768), the trial court paid no heed to the jury's recommendation. The trial court found three (3) aggravating circumstances and "maybe" a fourth (4th), it found no statutory mitigating circumstances and it ruled that there were no nonstatutory mitigating circumstances presented to the court. (R.1769-1771). The trial court ignored the testimony of Dr. Carroll, as well as, Appellant's father, and his three (3) brothers. Without regard to the jury's recommendation for a life sentence, the trial court imposed the penalty of death upon Appellant.

A notice of appeal was thereafter filed and this appeal follows.

ARGUMENT I

THE APPELLANT'S DEATH SENTENCE SHOULD BE REVERSED.

A. The Jury Recommendation of Life Imprisonment Was Improperly Disregarded By The Trial Court.

1. The Jury Recommendation.

On October 11, 1984 the jury advised and recommended to the Court that it impose a sentence of life imprisonment upon Appellant, Patrick James Thompson without possibility of parole for 25 years. (R.1561, 1713).

2. Judge Coker Disregarded The Life Recommendation.

Judge Coker's sentencing order of November 8, 1984 made only a single reference to the jury's recommendation:

> "After hearing argument of counsel and instructions from the Court, the Jury deliberated and returned and advisory sentence recommending life imprisonment." (R.1768).

Judge Coker did not address the reasonableness of the jury's findings. Nor does Judge Coker cite Tedder v. State, 322 So.2d 908 (Fla. 1975).

3. Judge Coker Did Not Give Proper Weight To The Jury Recommendation.

Pursuant to Tedder, Florida law requires that the Court follow a jury recommendation for life imprisonment unless "the facts suggesting a sentence of death" are so, "clear and convincing that virtually no reasonable person could differ." Id. at 1910. See Barclay v. State, ____ So. ____ (Fla. 1985), Case Number 64,765, opinion filed May 30, 1985, 10 FLW 299, as this Court stated in Richardson v. State, 437 So.2d 1091, 1095 (Fla. 1983):

> "[W]e cannot countenance the denigration of the jury's role implicit in (the trial court's) comments. It is well settled that a jury's advisory opinion is entitled to great weight, reflecting as it does the conscience of the community, and should not be overruled unless no reasonable basis exists for the opinion." McCampbell v. State, 421 So.2d 1072 (Fla. 1982);

The record in a capital case must be viewed objectively to determine whether the jury could have been influenced by the legitimate sentencing factors in making it recommendation. McCampbell, supra. Even when a judge makes findings of facts that are "within his domain as the trier of fact", the Court must still examine the record to determine whether the jury's giving different "credence to ... [the] testimony then the trial judge" is a permissible and reasonable application of the aggravating and mitigating factors. Cannady v. State, 427 So.2d 723, 731 (Fla. 1983). Thus this Court must not only decide if there is a factual basis for the Judge`s findings, it must also decide whether there is a rational basis for the Jury findings. Cannady, supra; Hawkins v. State, 436 So.2d 44, 47 (Fla. 1983).

Judge Coker has failed to demonstrate a sufficient basis under Tedder for disregarding the Jury's advisory verdict. The Tedder rule seeks to preserve the historic role of the Jury in the life/death decision making process. A Jury of twelve individuals represent the community conscience far better than those of a single judge. Given that Florida's statutory scheme does not provide for preemptive challenges of a Judge who repeatedly overrides jury recommendation against the death penalty and therefore the Tedder rule is the only protection against an automatic death penalty judge.

B. The Trial Court's Findings As To Aggravating Circumstances.

In its November 8, 1984 order, the Court found three and possibly four aggravating circumstances. The Court found that

the Defendant had been previously convicted of another capital felony or of a felony involving the use or threat of violence of the person (R.1769); the Trial Court found that the Defendant had committed the capital felony while he was engaged in or attempting to commit a sexual battery (R.1769); the Trial Court found that the capital felony was especially heinous, atrocious or cruel. (R.1770). Finally the Trial Court found that the aggravating circumstance of cold calculated and premeditated may or may not apply in this case. (R.1770).

1. A Rational Basis For A Jury Finding Rejecting The Applicability Of Subsection 5(b) Exists.

Section 921.141(5)(b) that the Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person was rejected by the Jury. At trial the testimony of the victim of the prior felony, Ms. Deborah Fifer, testified as to the nature of the incident. She testified that although Appellant forced her to engage in sexual relations with him, he never hit, never kicked, never showed a weapon, and never caused bodily harm, beyond the actual sexual contact. (R.1107, 1108, 1112-1113). Following the sexual relations, Appellant took Ms. Fifer back to her car, walked her over and opened the door. In fact, they made plans to see each other again and he kissed her good night. (R.1102, 1103, 1108). Thus the Jury having a rational basis upon which to conclude that the previous conviction did not involve the use or threat of violence such that proof beyond a reasonable doubt existed. Given that there is a rational basis for the Jury's findings, this statutory aggravating circumstance should have been rejected in light of the jury's recommendation.

2. Whether The Capital Felony Was Committed While The Defendant Was Engaged In Or Attempting To Commit Sexual Battery.

a. Trial Court Finding Is In Error.

Pursuant to State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), it is axiomatic that aggravating circumstances must be proved beyond a reasonable doubt. At trial medical examiner, James Ongley testified that the cause of death was strangulation. (R.611). Ongley testified that a "rape work-up" was done but that no trauma was found around the vagina and that no evidence of sexual battery was found. (R.617). Although serologist, George Duncan testified that he found sperm cells on a vaginal swab (R.839, 840) this was consistent with John Sabio's testimony that he had had sex with the victim on Wednesday, prior to the the Friday, January 20, 1985, the victim's body was found. (R.876-877, 500). Duncan testified that sperm cells can survive 24-48 hours according to some authorities and three to four days according to others while in the vagina. (R.861-862).

Further, the evidence that the victim had not been wearing a bra and that the zipper on her pants was three fourths (3/4) to one-half (1/2) way down does not constitute evidence beyond and to the exclusion of every reasonable doubt of a sexual battery. Further the trial court's statement in its sentencing order "John Sabio testified that she was missing her bra" misconstrues the testimony which was simply: Question: Did she always wear a bra that you knew of. Answer: Yes sir. (R.495). Surely, since the evidence of sperm cells can be explained by the fact that the victim had had sex with her boyfriend John Sabio, and since there is no other evidence of a sexual battery, this aggravating circumstance can not be upheld.

b. A Rational Basis Exists For the Jury Rejecting The Aggravating Circumstance That The Murder Was Committed While The Defendant Was Engaged In Or Attempting To Engage In A Sexual Battery.

The sentencing jury cannot be faulted as unreasonable for determining that there did not exist evidence to the exclusion of every reasonable doubt that the victim was killed while the Appellant was engaged in the commission or the attempt to commit a sexual battery. Only circumstantial evidence was found. The victim's pant's zipper was down and, assuming she had been wearing a bra, a bra was missing.

It would not be irrational for the jury to conclude that evidence beyond a reasonable doubt did not exist as to this aggravating factor. Therefore, the trial court was in error when it ignored the trial jury's recommendation.

c. Whether The Capital Felony Was Especially Heinous, Atrocious Or Cruel.

In order to support a finding of a heinous, atrocious or cruel homicide, the capital felony must be "apart from the norm of capital felonies" State v. Dixon, 283 So.2d 1, 9 (1973). In Tedder, this Court stated:

> "It is apparent that all killings are atrocious, and that Appellant exhibited cruelty, by any standard of decency, in allowing his injured victim to languish without assistance or the ability to obtain assistance. Still, we believe that the legislature intended something `specially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder."

Nothing about this beating and strangulation homicide set it apart from the norm.

Associate medical examiner, James Ongley testified that when a person dies the blood settles to the lowest point due to gravity -- this phenomena is called lividity. (R.618-619). This

phenomena can make the injuries look more severe and cause puffiness. (R.619). Although there were internal injuries consistent with a strangulation and some laceration to the hands, there were no broken bones found. (R.607, 611, 618). There was no evidence that any blunt instrument was used to batter the victim. Unlike Peek v. State, 395 So.2d 492 (Fla. 1980) where the victim was shown to have broken ribs and contusions on her head and body, the victim in the instant case had no broken bones. In sum, the trial court was in error when it found that this homicide was apart from the norm in that it was heinous, atrocious and cruel. Nothing about the victim's death sets it apart as more torturous than a number of beating, stabbing or shooting cases where this court has vacated findings based on Subsection 5(h). See, Halliwell v. State, 323 So.2nd 557 (Fla. 1975), Herzog v. State, 439 So.2nd 1372 (Fla. 1983), a case were Judge Coker's override of a recommendation for a sentence of life imprisonment was overturned by this Court. In Herzog a finding that the homicide was heinous, atrocious and cruel was overturned were the victim was gagged, an attempt to smother her with a pillow failed, and the killer finally used a telephone cord to strangle her. Reviewing the manner in which death was imposed, this court found that in the factual context of Herzog, the evidence was insufficient, to justify the application of Section 5(h) as an aggravating factor. Id at 1380.

d. The Jury Had A Rational Basis For Rejecting The Aggravating Circumstance of Heinous, Atrocious And Cruel.

In light of the fact that the instant homicide was not outside the norm of such crimes, the Jury, representing the conscience of the community, had a rational basis for rejecting this aggravating circumstance. Judge Coker's finding to the contrary therefor must be overturned.

e. Whether The Capital Felony Was Committed In A Cold, Calculated, And Premeditated Manner Without Any Pretense Of Moral Or Legal Justification.

The trial court found that this circumstance may or may not apply to this case. (R.1770). In order to support finding under this aggravating circumstance, there must be evidence beyond a reasonable doubt that there was a heightened degree of premeditation, calculation or planning. Hill v. State, 427 So.2d 816 (Fla. 1982), cert. denied ______ U.S. ______ 103 S.Ct. 1262, 75 L.Ed.2d 488 (1983). There was no evidence of heightened premeditation, calculation or planning in this case. The trial court sought to support its finding with evidence that the victim's car had been stuck in a swale in soft sand. In and of itself, this evidence may show that the victim was vulnerable. However, this does not constitute evidence of calculation or heightened premeditation on the part of the killer. Further, as with the aggravating circumstance of heinous, the disposal of the body is irrelevant to the issue of heightened premeditation. See Herzog, supra; Simmons v. State, 419 So.2d 316, 319 (Fla. 1982).

Further the State's introduction of collateral crime evidence, evidence that Appellant had previously approached a

Deborah Fifer and forced sexual relations, and that he had never physically assaulted or beaten her, also negates the finding of heightened premeditation.

C. <u>The Trial Court Erred In Finding No Mitigating Circumstances.</u>

1. <u>Extreme mental or emotional disturbance</u>.

At trial the State introduced the evidence of Janet Swift. Ms. Swift testified that in March, 1981 Appellant was having marital problems during the period in which he was charged with sexual battery and kidnapping, (R.937), and that in January, 1983 he was having problems with his girlfriend, Julie. (R.937-938). This testimony was relied upon by the State in an effort to introduce the collateral crime's evidence into this trial. Further, in its cross-examination of Appellant the State elicited that he was having marital problems at the time of the sexual battery, and that he was having problems with his relationship with his girlfriend, Julie, at the time of the murder of the victim. (R.1336-1337, 1338). In addition, the State elicited in cross-examination that Appellant had been fired from his job just prior to January, 1983. (R.1327-1328).

Thus evidence supporting one statutory mitigating circumstance, Section 921.141(6)(b) was in the record. The Jury therefore had a rational basis upon which to find such a mitigating factor.

In addition to the above, the defense presented mitigating evidence in the course of the sentencing phase of the trial. Appellant's brothers, Christopher Thompson, Timothy Thompson, and James Thompson, testified that Appellant was never a violent person. (R.1526, 1533-1534). In his statement to the jury Appellant's father stated:

> "The only thing that I can tell the jury is that Pat was raised as a normal child, the same as every-one else is. He had the normal childhood diseases and the normal growing up problems that all boys have. I know in my heart that Pat could have never committed a crime as heinous as this one. He is not a violent person. He is a jovial, joking charmer who for the lack of any other word he is not a violent person." (R.1535).

In addition, Appellant presented the testimony of Dr. Norman Carroll. Dr. Carroll, a deacon in the Catholic church, testified that Appellant was actively participating in bible classes while in jail. (R.1537-1538). Dr. Carroll testified that Appellant dealt with deputies and inmates, that Appellant was able to persuade people to attend classes in a benevolent way and that "I never heard an ill word said of this man and I have never seen the least bit of threat or felt the least bit afraid of him in any way. (R.1539). Therefore, the jury had ample evidence in the record on which it could conclude that non-statutory mitigating circumstances existed. Such non-statutory mitigating circumstances as (1) Appellant was normally a non-violent person and (2) that Appellant had made a very good adjustment to prison life.

In addition, given the circumstantial evidence upon which Appellant was convicted, the finding of a fingerprint on the box in which the victim's body was found, the conflicting evidence concerning identification of the killer, Mark Springer`s 100% positive denial that Appellant was the man whom he helped place the box containing the victim's body in the dumpster and the lack of any direct evidence, the jury may have been influenced by a doubt as to Appellant's guilt. Although this doubt, as reflected

by their verdict was not one which they deemed "legally reasonable", nevertheless it was one which may have swayed their recommendation. Appellant submits that such a doubt is a valid consideration when it comes to recommending a life sentence. In light of the above the Tedder standards simply were not met. The trial court erred in overruling the jury because facts "suggesting a sentence of death should be [so] clear and convincing that virtually no reasonable person could differ." The circumstances in this case simply do not fit under that definition.

D. Proportionality.

In its role as the final arbiter of the sentence, this court must review other cases where jury recommendations have been overruled. See, e.g. Beauford v. State, 403 So.2d 943 (Fla. 1981), cert. denied 454 U.S. 1163, 102 Supreme Court 1037, 71 L.Ed. 2d 319 (1982); Herzog, supra, and cases cited therein at 1381. Further, it must compare this case with cases involving similar facts. See, Herzog at 1381. In light of such cases, Appellant submits that the jury recommendation was proper and that therefore this Court must reverse the sentence and remand the cause to the trial court with instructions to impose a sentence of life imprisonment.

ARGUMENT II

THE TRIAL COURT ERRED IN ALLOWING IRRELEVANT COLLATERAL CRIME EVIDENCE TO PREJUDICE THE JURY.

Appellant was on trial for the homicide of Patricia Nigro in January, 1983. The victim was found in a box, in a dumpster, there were deep cuts between the thumbs of both hands and the victim had been badly beaten about the face. (R.918-920, 924). The victim had a large number of bruises about the body, about her thighs, wrists, upper arm, chest wall, eyes, neck, and numerous lacerations and abrasions. (R.598). There were internal injuries to the neck muscles, larynx and trachea. (R.687). The victim had been strangled. (R.611). Further, the medical examiner had testified that a "rape work-up" was done but that no trauma was found around the vagina and that no evidence as sexual battery was found. (R.617). In an effort to convict Appellant, the State introduced testimony from Deborah Fifer, the victim of a sexual assault and kidnapping. (R.1095). Ms. Fifer testified that in March, 1981 she was approached by Appellant at 11:00 p.m. in the parking lot of her work place. (R.1095-1096). Appellant told Fifer that he had gun. (R.1097). And he told her that if she did as he ordered, she would not be hurt. (R.1097). They drove about for a period of time and since the man wanted sexual relations they stopped in a parking lot, had a conversation, and had sexual relations. (R.1098-1099). Following the forced sex act Appellant took Ms. Fifer back to her car and walked her over and opened the door for her; they made plans to see each other again and Ms. Fifer gave Appellant her number. Appellant kissed Ms. Fifer good night and sent her on her way. (R.1102, 1103,

1108). Ms. Fifer testified further that she never saw a gun during the incident. (R.1107). She was never hit, never kicked, nor was she caused bodily injury by (R.1108). She further testified that Appellant was neither mean nor cruel (R.1112-1113).

Despite the obvious differences between the collateral crime and the instant case, and over vehement defense objections, the trial court permitted Ms. Fifer's testimony into evidence. Appellant submits that the trial court erred reversibly. In Williams v. State, 110 So.2d 654 (Fla.) cert. denied 361 U.S. 847 (1959), this Court held that evidence of similar crimes is admissible for any purpose if relevant to any material issue, other than propensity or bad character, even though such evidence points to the commission of another crime. The material issue to be resolved in this case is identity, which the prosecutor sought to prove by allegedly showing Appellant's mode of operation. As stated in Drake v. State, 400 So.2d 1217 (Fla. 1981):

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

The only similarity between the two incidents is that the State alleged that Appellant committed both and that both involved female victims. However, there are many dissimilarities. In the incident concerning Deborah Fifer there was only a sexual assault. There was not bodily harm done to the victim. In fact, Deborah Fifer established a rapport with Appellant such that she seriously considered not reporting the

incident. By contrast in the instant case, the victim was badly beaten. In the instant case there is little if any evidence of sexual abuse. A finding of sperm on a vaginal swab of the victim, Patricia Nigro, is consistent with her boyfriend's testimony that he had had sex with her the night before her disappearance. (R.500). This analysis was confirmed by serologist George Duncan of the Broward Sheriff's Crime Laboratory. (R.876-877). The fact that both crimes occurred within a given area of Fort Lauderdale, is simply insufficient to support its introduction.

As it was with Drake, the State below argued that the victim's murder was accomplished in order to avoid capture. In response, Appellant would refer this Court to its words in Drake:

> "This argument is not persuasive, especially in light of the fact that there is no evidence that this reason for stopping the attack on P.B. was such a fear. No other basis for relevancy has been offered to this court, nor can we fathom any basis ourselves. Purely and simply, the similar facts evidence in this case tends to prove only two things -- Propensity and bad character." Id at 1219.

In the instant case, Drake is squarely on point. See also White v. State, 407 So.2d 247 (Fla. 2nd DCA, 1981) (a mere general similarity between two crimes is insufficient). Flowers v. State, 386 So.2d 854 (Fla. 1st DCA, 1980). In his closing argument, the prosecutor repeatedly made mention of the collateral crime evidence in an effort to obtain a conviction. (R.1400, 1415, 1466).

Given the tenuous circumstantial evidence in this case, the fact that there existed a perfectly reasonable hypothesis for the presence of Appellant's fingerprint on a stereo box which he possessed and which he disposed of, and the very tenuous evidence of an alleged sexual battery on the victim Patricia Nigro, it can not be said that the evidence presented by the State was harmless. In sum collateral crime evidence in this case, tended to prove only two things, propensity and bad character. Appellant's right to a fair trial pursuant to the Florida Constitution and to the United States Constitution was thereby destroyed. Appellant's conviction must therefore be reversed.

ARGUMENT III

THE TRIAL COURT ERRED REVERSIBLY WHEN IT PERMITTED THE STATE TO INTRODUCE INTO EVIDENCE STATE'S EXHIBIT VVVV, A RIGHT'S WAIVER CARD UPON WHICH APPELLANT HAD WRITTEN THAT HE HAD AGREED TO SPEAK TO THE POLICE "AT MY DISCRETION"

At trial the State introduced into evidence State's Exhibit VVVV, a Right's Waiver Card upon which the Appellant had written that he would speak with the police "at my discretion". (R.963). When asked what he understood this to mean, Detective Mundy testified:

> "What happened was I gave the form to Mr. Thompson after the first question and asked him to read it and fill in his responses and he put yes to all the questions except that one. At that one he wrote At my discretion and I asked him what do you mean by that and he explained to me that he was referring to the part that says that he could refuse to answer questions as I was speaking to him. So if I would have asked him a question that he didn't want to respond to, he would do so, and that's what he said he meant by it." (R.963).

Defense counsel objected that this constituted a comment and Appellant's right to remain silent. (R.964-965). The trial court overruled defense objection. (R.965).

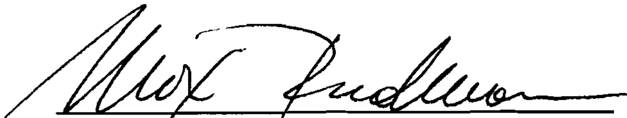
In a well settled line of cases, this court has held that a comment which is fairly susceptible to being interpreted by the jury as referring to the Appellant's failure to testify or as a comment on the Appellant's exercise of his right to remain silent when initially confronted, is per se reversible error. David v. State, 369 So.2d 943 (Fla. 1979); Trafficante v. State, 92 So.2d 811 (Fla. 1957). Appellant's reservation of a right to stop speaking with the police "at my discretion" is "fairly susceptible" to being interpreted as a comment on his exercise of his Fifth Amendment rights. Therefore a per se reversible error

was committed when the trial court allowed into evidence the Right's Waiver Card. Cf. State v. Burwick, 442 So.2d 944 (Fla. 1983), See also, Kinchen v. State, 432 So.2d 586 (Fla. 4th DCA 1983).

CONCLUSION

On the basis of the foregoing argument and citations of law, Appellant requests that this Court reverse the Judgment of Conviction and Sentence of Death entered below and remand with instructions that he be discharged therefrom, or alternatively, he be granted a new trial, or alternatively that he be sentenced in accordance with the Jury recommendation of life.

Respectfully submitted,



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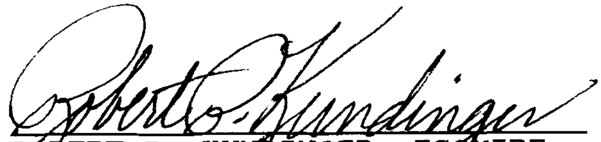

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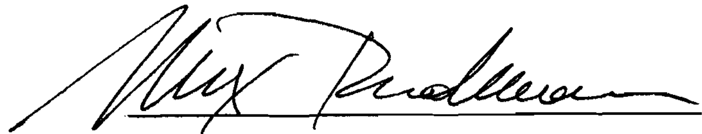
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to ROBERT S. JAEGERS, Assistant Attorney General, 111 Georgia Avenue, West Palm Beach, Florida, 33401, this 30th day of June, 1985.



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