IN THE SUPREME COURT OF FLORIDA

OBA CHANDLER,

Appellant,

vs. CASE NO. 84,812

STATE OF FLORIDA,

Appellee.

_____/

AMENDED ANSWER BRIEF OF THE APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CANDANCE M SABELLA
Assistant Attorney General
Florida Bar No. 0445071
Westwood center
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 873-4739

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

STATEMENT OF CASE AND FACTS

On Sunday, June 4, 1989 at approximately 9:30 a.m. boaters discovered three decomposed female bodies floating in South Tampa Bay. (V87, T577-579, 583-584, 587, 593) The bodies were later identified as Mrs. Joan Rogers and her daughters, Michelle and Christe. (V88, T652-657) At the time of their deaths in 1989, Joan was 36, Michelle 17 and Christe was 14. (V89, T876)

Dr. Edward Corcoran, an Associate Medical Examiner, performed autopsies on all three women on June 4 and determined that the cause of death to each was asphyxiation caused either by strangulation from the ropes tied around their necks or by drowning. (V87, T608-609) Dr. Corcoran estimated that the women had died sometime between the evening of June 1 and the morning of June 2, 1989. (V87, T610) He described the bodies as being bloated and decomposed. (V87, T610, 629, 637) Each was nude from the waist down. (V87, T610, 629, 632) There was duct tape on the face or the head of Christe and Michelle. (V87, T610, 634) Christe and Joan's hands were each tied behind their backs with clothesline-type rope. (V87, T611, 629) Michelle's right hand had clothesline-type rope around the wrist but the left hand was free with only a loop of rope. (V87, T633) Michelle's ankles were bound with clothesline-type rope. (V87, T633) Joan and Michelle each had a yellow nylon rope around their neck which was attached to a concrete block. (V87, T629, 632) The concrete block around

Joan's neck had three holes in it. (V87, T630) The object tied to the yellow nylon rope around Christe's neck had been cut. (V87, T611) Christe and Joan's ankles were each tied together with yellow nylon rope. (V87, T611, 629) There were no fractures of the hyoid bones. (V87, T623) Besides ligature marks and discoloration behind the upper esophagus and darkening and hemorrhaging in the neck tissues of each woman, no other injuries were determined. (V87, T622-623, 628, 631, 636) Dr. Corcoran looked for and did not find any genital injuries. He did not look for semen nor did he expect to find any as semen would have decomposed or been washed away by the action of the water. (V87, T628, 643) From the contents of Joan Rogers' stomach, Dr. Corcoran was able to estimate that she last ate four to eight hours prior to her death. (V87, T631-632)

Dr. Bernard Ross, an expert regarding the characteristics of water movement in Tampa Bay, testified that all three of the bodies were dumped in Tampa Bay at the same location. Based on his study, Dr. Ross opined that none of the bodies could have been thrown from a land mass such as Gandy Bridge or Howard Frankland Bridge. (V89, T858-859)

At the time of their deaths, the Rogers were vacationing in Florida. (V89, T877) The evidence showed that on Thursday, June 1 at 9:34 a.m. the Rogers checked out of the Gateway Inn in Orlando and went to Tampa, They checked into the Days Inn in Tampa shortly after the noon hour on June 1, 1989. (V88, T689, 690; V89, T810-

815) Phone records from the hotel show that two calls made from the Rogers' room on June 1. One was placed at 12:37 pm for nine minutes and another call was placed locally in Tampa at 12:57 pm for less than a minute. (V88, T697) Harold Malloy, a guest at the Days Inn, saw the Rogers in the hotel's restaurant on June 1, between 7:00 and 7:30 p.m. The Rogers left the restaurant at about 7:30 or 7:35 p.m. (V90, T937-950) The general manager of the Days Inn, Rocky Point on the Courtney Campbell Causeway was alerted by housekeeping on June 8 that the Rogers' room did not appear to have been inhabited for a few days. (V88, T712, 714, 718) After an inspection of the premises, he contacted law enforcement who came out, secured the scene and obtained records from the hotel regarding the occupants. (V88, T658-661, T671)

Officers identified numerous personal articles, clothing, suitcases and papers belonging to the occupants. (V88, T728-730) There were canisters of film which had been exposed. These were developed and the last three pictures on the last roll of film showed the Days Inn Hotel, Room 251 and one of Michelle standing on the balcony of the hotel. (V88, T742) Dr. Kendal Carder, a professor of oceanography at the University of South Florida opined at trial that the photograph of Michelle was taken sometime between 6:20 p.m. and 8:20 p.m. on June 1, 1989. (V90, T955) Neither the camera nor the clothing depicted in the picture of Michelle was found in the victims' vehicle or among the evidence seized from Room 251 of the Days Inn. (V89, T805-807)

The police found the Rogers' locked car parked at a boat ramp on the causeway. (V88, T672; V 89, T823) There was sand wedged around the tires of the vehicle indicating it had been there for some time. (V89, T826) Detectives later found a set of car keys belonging to the victims' car in a purse known to belong to Michelle Rogers in the motel room. (V88, T744; V89, T804) A search of the vehicle revealed several exhibits, including a piece of Days Inn, Rocky Point stationery; (V89, T823) an index card with directions to Gateway Inn, Orlando; notebook paper with personal notes; a key to Days Inn Room 251; a Clearwater Beach brochure; a Hampton Inn coupon; a Jacksonville Zoo receipt and a road atlas. (V88, T764-765)

FBI Agent James Henry Mathis determined that a note handwritten on Days Inn stationery found in the victims' car was written by Joan Rogers. The note read, "Turn right. West W on 60, two and one-half miles before the bridge on the right side at light, blue w/wht." (V90, T1010)

Theresa Stubbs, an examiner of questioned documents for the FDLE at the Tampa Regional Crime Laboratory, examined the handwriting on the Clearwater Beach brochure and identified Oba Chandler as the writer. (V90, T1066-1069) From her analysis, Ms. Stubbs determined that the "Boy Scout, Columbus" portion of the writing on the brochure may have been written by Joan Rogers. (V90, T1079)

Rollins Cooper worked as a subcontractor for Oba Chandler in

the spring of 1989 for 3-6 months. He testified that on June, 1,1989, between eleven and twelve a.m. Chandler brought him some screen. Cooper asked Chandler why he was in such a big hurry and Chandler told him he had a date with three women. (V93, T1396-1399) Cooper met Chandler the next morning at 7:05 a.m. (V93, T1399-1400) Cooper thought Chandler was kind of grubby. When Cooper asked him why he looked like that he said that he had been out on his boat all night. Oba had a place next to his house where the scrap aluminum from the different jobs would be left. (V93, T1402) There were also some eight-by-sixteen building blocks laying there and a boat trailer. (V93, T1404-1406)

The state also presented the testimony of Judy Blair and her companion Barbara Mottram concerning Chandler's sexual battery of Judy Blair in Madeira Beach. Judy Blair testified that she and Barbara were in Florida on vacation from Ontario, Canada, when they met Chandler at a convenience store. Chandler told them that he knew the area and that he worked in the area; that it was a high-crime area and that two young girls should be very careful. He said his name was "Dave" and he worked in the aluminum-siding business. He said that he had a boat and because he knew the area so well, he would take them out on the boat and show them the area from the water. After they told him they were from Canada, he told them he was from upstate New York. (V94I T1595) His demeanor was very friendly, very warm. (V94I T1596) They made plans for the next day and what time he would pick them up. (V94I T1597)

Chandler invited both Judy and Barbara out on the boat.(V94, T1598) The next morning Barbara insisted that she did not want to go and Judy told her that the plans were made and that she had no way to get hold of the person. (V94, T1599) Chandler had told Judy that he would be coming from approximately two hours away. She decided to go even though Barbara would not be going. (V94, T1600) Wearing a white T-shirt, a pair of cotton shorts, sneakers and a bathing suit underneath, Judy met Chandler at 10:30 a.m. He was in an older blue and white boat. (V94, T1602-04) The interior bottom was white or off-white. There was a space under the bow; a storage area with equipment. (V94, T1605) She saw white ropes in the compartment down below. (V94, 1631-1632) Judy did not remember seeing any concrete blocks on the boat. (V94, T1631-1632) When Judy explained that Barbara wasn't coming, Chandler seemed disappointed. (V94, T1605)

He pulled some duct tape from the storage area and taped the steering wheel. He told Judy that he kept his boat lifted up out of the water on davits. (V94, T1606-1609) At approximately 4:30 he returned Judy to the docks. He said that he had some difficulty with his boat and he had to attend to it. He told her to go home and get dinner, her camera so she could take pictures of the sunset and get Barbara. He specifically asked Judy to get Barbara. They were to meet back later at the same dock after dinner. (V94, T1610)

Judy could not convince Barbara to go and Judy went back to

the dock by herself. She took her camera with her. The man was already at the dock. He seemed "ticked off" that Barbara did not come. It was still daylight when they got on the boat and went under the bridge into the gulf. (V94, T1612)

They drove through the gulf and stopped to take pictures of the sunset. Dave was in some of the pictures and Judy was in some of the pictures. They started to fish and Judy expressed concern that it was getting dark and she needed to get back; that people were waiting for her back on land. He started complimenting her and asked for her to give him a hug, (V94, T1613)

She thanked him for the compliments and declined to give him a hug. He pulled Judy towards him and started touching her arms and around her body. He told her he was going to have sex with her. She told him "no" and asked him to take her back home. She started screaming and he said, "You think somebody is going to hear you? " (V94, T1614) Judy was panicky and was pleading with him to take her back. At one point he started the boat; she thought to return to the shore. He took her further out in the water instead. (V94, T1615)

Chandler stopped the boat and told her, "You're going to have sex with me. There's no way around it. What are you going to do, jump over the side of the boat?" Judy continually screamed and tried to get away from him. He sat on the passenger seat and pulled his pants down and took the back of Judy's head and made her perform fellatio on him. He put a towel down on the bottom of the

boat and forcibly put her down. Judy was screaming and crying and he told her to "Shut up. Shut up. If you don't shut the fuck up, I'm going to tape your mouth. Do you want me to tape your mouth?" (V94, T1616)

He pulled down the bottom half of what she was wearing and said, "You're going to have sex with me." Judy was kicking and screaming and crying and he was saying, "I'll tape your mouth. I'll tape your mouth." At that point she became fairly quiet. He also made reference to the fact that, "Is sex really something to lose your life over?" He started fondling her vaginal area. She was menstruating and he found the tampon and he pulled it out. (V94, T1618)

At some point Chandler rolled Judy over onto her knees and attempted to penetrate her anally. She pleaded with him not to do that; that she had rectal cancer. He turned her over and penetrated her vaginally. He ejaculated, immediately pulled out, pulled his pants back up. He threw her a thermos bottle filled with water and told her to wash herself out. He took the camera, ripped the film out and threw it overboard. (V94, Tl620) Then he wiped down the camera. He told Judy, "I know you're going to report this, but please give me a chance to go home to tell my little old mother." He took her back to shore. He dropped her off on the other shore of the channel from Don's Dock. (V94, T1621) Judy walked home. She did not say anything to her mother or aunt or uncle when she got back. She just wanted to have a bath and go

to bed. (V94, T1622) After her mother and aunt and uncle left the condominium, Judy told Barbara what happened. She ultimately reported it to the police later that evening of the 16th. (V94, T1623) Judy gave a description of the clothing "Dave" was wearing the evening he assaulted her and identified it at trial. (V94, T1602)

Barbara confirmed Judy's testimony concerning how they met Chandler, that he was driving a black or very dark vehicle which resembled a Jeep Cherokee, that he was from upstate New York but resided in Florida and that he had to travel a little bit of a ways to get to Madeira Beach. (V94, T1541-1544)

Barbara confirmed that Judy came back to retrieve Barbara to go out on the boat. Judy said that both she and "Dave" (Chandler) wanted her to go on the sunset cruise. (V94, T1554) Barbara declined this second invitation. Judy took a camera with her. The next morning Judy related to Barbara what had happened to her the night before on the boat. Barbara testified that Judy was devastated. She was in shock. She was in tears and sobbing all day long.

Barbara picked Oba Chandler's photograph out of a photo pack, identified him in a lineup of people and in the courtroom. Barbara also identified a photograph of Chandler's car and a photograph of Chandler as being more consistent with the what he looked like in 1989 than in the courtroom. (V94, T1553, 1565)

Detective James Kappell, of the St. Petersburg Police Department testified that in September, 1989 he became aware that a rape had occurred in Madeira Beach involving two Canadian tourists. Kappell traveled to Canada to interview Judy Blair and Barbara Mottram. Kappell obtained a composite drawing of "Dave" . (V91, T1123-1124)

The description of the suspect's vehicle, boat and his composite was released to the press and seen by Chandler's neighbor Joann Steffey. (V90, T1016-1017) Ms. Steffey thought of Chandler when she saw the composite. She was aware that Chandler had a boat. It was blue and white with a blue top cover. Chandler had a black four-wheel drive vehicle. (V90, T1019-1020) In May, 1992 Ms. Steffey observed another newspaper article talking about the rape and the Rogers' homicides. The article contained a picture of the handwriting involved on a brochure. (V90, T1021) Upon seeing this second newspaper article, Ms. Steffey obtained a sample of Chandler's handwriting and concluded that it was the same. (V90, T1023) Ms. Steffey called the Task Force in St. Petersburg to notify them of her belief. Her neighbor FAX'd the handwriting sample to the police for their comparison.

Derek Galpin testified that he sold Chandler his boat. When he sold the boat to Chandler he told him that the English translation for the German name on the back of the boat meant Gypsy. The steering wheel was in pretty bad shape and had a black, very tacky sort of covering. Galpin also sold the residence to

Chandler. There were six, seven, or eight rough gray concrete blocks with two square holes in them on the side of the house. (V94, T1647-1651)

Robert Carlton bought the blue and white boat from Chandler in July/August, 1989. The boat trailer was parked on the side of Chandler's house and was sold with the boat. (V92, T1330-1335) The boat had a V-6 engine in it and a VHF radio in it. When Carlton got the boat from Chandler the interior was real clean. "It was spotless". (V92, T1343-1350) Carlton recalled seeing concrete blocks at the Chandler house and that some of the concrete blocks had three holes and some had two. (V92, T1360-1362)

Oba Chandler's daughter, Kristal Mays testified that she lived in Ohio. Chandler left when she was 7 and she did not see him again until the mid-eighties when she hired a detective to find her him. (V91, T1132) When the detective found Chandler he was incarcerated in Florida. Kristal and her sister, Valerie Lynn Troxell, visited him in the Spring of 1986. Lynn was also Chandler's daughter. (V91, T1133) Kristal was closer to Chandler than her sister. (V91, T1145) After Chandler was released from prison, Kristal and her family visited with the Chandler's in Florida.

In November of 1989 Chandler called her in Cincinnati and left a number at a Cincinnati motel where he could be reached. Kristal did not know he was coming to visit. Chandler told her that he wanted her and her husband to come to the motel; it was very

important. (V91, T1136) Chandler's Jeep was backed in front of another building, not the building he was staying in. The license plate was up against the building. (V91, T1137-1138) Kristal remembered that Chandler had a dark colored Jeep vehicle in 1989. (V91, T1140)

Upon entering the motel room, she observed numerous coffee cups, the ashtrays were overflowing with cigarette butts and her father was very anxious and nervous. She had not seen him act like that in the past. Chandler told them he couldn't go back to Florida because they were looking for him for a rape of a woman. Kristal remembered that Chandler's words were "I can't go back to Florida because the police are looking for me for the rape of a woman." (V91, T1161) Chandler later called and apologized for the way he had been acting. Chandler did not have luggage or appropriate clothing for that time of year. They had to buy him some clothes. (V91, T1142)

He later told Kristal, she couldn't remember whether he said "dock or pier, but he said that he picked a woman up, and she got away." (V91, T1162) Chandler did not give Kristal any further explanation of that statement. (V91, T1144) He told Kristal, "I can't go back to Florida because the police are looking for me because I killed some women." (V91, T1169) During none of these conversations did Chandler indicate that he was innocent of the things he was talking about. He never once indicated that the police had the wrong man. (V91, T1145) Chandler never said, "I am

innocent of the crime and never said I am the one who murdered the women." (V91, T1182) Kristal said that Chandler "did not directly to me say, I murdered the women. He did not say that directly to me." (V91, T1183) After that night, Kristal did not talk about this any more with her father. (V91, T1145) Chandler directed Kristal not to tell anyone where he was, including his wife, Debbie. Chandler wanted to trade the Jeep he had for the car Kristal had. (V91, T1146) Chandler did not indicate why he wanted to get rid of his vehicle. While he was there, Chandler sold Kristal some jewelry. At a later point in time, Chandler contacted Kristal and asked her to set up a phone call between he and his wife Debbie. (V91, T1147)

According to the telephone tolls for Kristal's number in 1989, there were a series of phone tolls to Tampa on November 10. Oba had called Kristal and wanted her to call Debbie and tell her to go to a phone booth. He said he couldn't call her at home; he was afraid his lines were tapped. (V91, T1148) After Kristal called her, Debbie went to the phone booth, called Kristal and told her she was at the phone booth. Chandler called Kristal back, told her to tell Debbie to go to another phone booth because he thought someone might be following her. (V91, T1149, 1150)

Kristal saw Chandler again in October, 1990. (V91, T1185) Chandler had Kristal's husband set up a drug deal. Chandler wound up taking some money from the drug dealers and leaving her husband literally holding the bag. (V91, T1186) Kristal's husband was

badly beaten up and almost killed. Their house was attacked by the drug dealers at some point. She was in nursing school at the time and she had to drop out and move her family out of the house. (V91, T1187)

Prior to Chandler's going back up to Cincinnati in 1990 and the incident with her husband, Kristal talked with Debra Chandler and Lula Harris about what her father had told her. (V91, T1208) Kristal asked them if there was any such crime in the state of Florida. They said there was nothing like that going on. Debbie thought he was having a nervous breakdown and told Kristal to tell him to go home. As a result of what they told her, Kristal told her sister Valerie Troxell, but did not call the police. (V91, T1211) Kristal said that she was upset with her father for what he had done but that she did not hate her father. (V91, T1188) Kristal wanted Rick to call the police on Chandler; to report to the police that he had put a gun on him. She said that she still did not understand why he did it, but that she was not angry with him anymore. (V91, T1189)

stop

Chandler was arrested on September 24, 1992 and this incident occurred in October, 1990. After Chandler was arrested Kristal cooperated with law enforcement to try to tape conversations that she had with him. (V91, T1190) Kristal admitted lying to her father by denying to him that she had cooperated with law

enforcement. The purpose of taping the conversations was to try to get some sort of an admission out of Chandler that he had done "this". (V91, T1191)

Kristal had previously been convicted of a crime involving dishonesty. She went on national television, Hard Copy, on January 26, 1994. They paid her $1,000 for her story. (V91, T1194) Kristal declined an offer to appear on the Maury Povich show. She was aware there was a $25,000 reward for Chandler's conviction but she did not consider herself "in the running for that". (V91, T1195) Two years before, on October 6, 1992, she gave a sworn statement to the State Attorney's Office concerning the case. (V91, T1197)

Valerie Lynn Troxell was Kristal Mays' sister and lived in Ohio. She was also Oba Chandler's daughter. (V91, T1218) Valerie recalled a time in the fall of 1989 when Chandler appeared unexpectedly in Ohio. (V91, T1219) She remembered him being very anxious. He was extremely upset. He was chain-smoking cigarettes and was different than he was on other occasions when she contacted him. (V91, T1220) Valerie asked him several times why he was acting that way and Chandler avoided the conversation. Then, he finally said that he had to get rid of a woman in Florida. That she was trying to say that he raped her. He never gave her any more details and he did not indicate that he was innocent or that he hadn't done it. (V91, T1221)

Chandler had not brought any luggage or clothing with him to

Ohio that was appropriate for that time of year. He was trying to trade or sell his vehicle. Valerie recalled that it was one of the all-terrain, Jeep-type vehicles. He gave instructions for them to say that they had not seen him if anyone was trying to find him or look for him. (V91, T1222) Valerie said that Kristal related to her what her father had said to her during his visit to Ohio in 1989. (V91, T1224)

Valerie went on national television, Hard Copy, and received $1,000. (V91, T1225) She went on the show for the money. The only reason Valerie was upset with Chandler at the time of the trial was because he wrote a letter to her employer telling her the things she had disclosed to the FBI and put Kristal's job in jeopardy. (V91, T1226)

James Rick Mays lived in Cincinnati and was Kristal Mays's husband. He vacationed at Chandler's house in late July and early August, 1989. While Rick was visiting, Chandler took him on a couple of aluminum jobs during the day. (V91, T1227-1228) Chandler took Rick to John's Pass on Madeira Beach. During their travels, Chandler at some point began to talk about sex. As they were crossing the bridge, Chandler pointed off to the right, which was John's Pass and said that he picked up a lot of women at that point. He said that he had forcible sex with a lady that he had picked up from that area. (V91, T1229-1230) Chandler told Rick that he raped somebody and one of them got away. Rick recalled a time in the fall of 1989, approximately November 7 or 9th, when

Chandler showed up unexpected in Cincinnati, Ohio. (V91, T1234) Over the next day or two Rick had contact with Chandler. They rode together on an errand to Dayton. Kristal was not in the car. On the way to Dayton, Rick remembered Chandler saying that he told him they were looking for him for the murder of three women in Florida. (V91I T1244) The way Chandler talked, Rick thought that he actually did it. (V91, T1235) In none of the conversations did Chandler indicate to Rick that he was innocent or that the police were looking for the wrong man. (V91, T1248)

Another time during this period Chandler came to their house one evening and Kristal was there. (V91, T1235) Chandler said he could not go home because of the murders of the women in Florida. When they got back to the house, Chandler was talking a little bit about the either the rape or murders although Rick did not recall exactly what he said at that time. Chandler told them to tell anyone who called looking for him that they hadn't seen him. (V91, T1236) Rick was aware that his wife arranged a phone call between Mr. Chandler and his wife. (V91, T1237)

Subsequently, in 1990, Chandler went back to the Ohio area. He showed up at the door and said he ripped off the Coast Guard for some marijuana and that he had it tucked away and he wanted to know if Rick knew anybody that he could sell it to. Chandler said he'd pay Rick $6,000 to help him. Rick put Chandler in touch with a guy and they worked out a deal. Rick's role in the transaction was to pick up the money ($29,000) and bring it back to his house. (V91,

T1238) When Rick arrived with the money, Chandler was sitting in the front yard in his pickup and he had his gun out. Rick said, "You know, this isn't the way it's supposed to go." The guy walked around the other side and dropped the money into the other side of the truck and Rick was trying to get the keys away from Chandler so he couldn't start the truck and take off. Chandler brought the gun up to Rick's forehead and said, "Family don't mean shit to me." Chandler hit Rick with the gun and he had to let go. Chandler got the truck started and left with the money. (V91, T1239)

The guys took Rick back to their place. They thought Rick and Chandler were partners. They put a shotgun in Rick's mouth and threatened him. During this time, Chandler called and said, "Guess you know by now, you have been ripped off" and again, "Family don't mean shit to me." Chandler wanted to trade the money back for cocaine. The guys who were the purchasers let Rick go. (V91, T1240 When Chandler visited Mays in November, 1989, Rick said that Chandler may have said "accused" or "looking" for the raping of three women,

Mr. Kebel testified as to the phone bill of March 31, 1989 for the telephone number 813-854-2823. (V94, T1664) There was a collect call from Gypsy One in Clearwater billing area on May 15, 1989. The call was placed by the marine operator. There were four calls made on November 10, 1989 from Kristal Mays to the 813-854-2823 number subscribed to Debra Chandler. (V94, T1666-1667)

Ms. White discussed a toll ticket dated July 5, 1989. A

marine call was placed from the boat Cigeuner to 813-854-2823 in Tampa, Florida. The ticket was filled out by the operator at the time the vessel was providing the information to make the call. The name given was Obey, O-b-e-y. (V94, T1679-1680) The call started at 12:38 a.m. and was a two-minute-and-thirty-one second call. (V94, T1682) Ms. White testified as to a toll ticket for May 15, 1989 showing a toll call of two minutes eight seconds. This particular call connected at 5:49 p.m. (V94I T1686) Ms. White testified as to a toll ticket for June 2, 1989 showing a toll call made at 1:12 a.m. (V94, T1687) Ms. White testified as to a toll ticket for June 2, 1989 showing a connect time of 1:30 a.m. The call was a one-minute call. (V94, T1688) The length of the call made at one-twelve was five minutes. There was another call made on June 2, 1989 at 8:11 a.m. and the duration was for four minutes. Another call on that same date was made at 9:52 a.m. (V94, T1689) That call was for one minute. (V94I T1690)

According to the phone bill for 813-854-2823, subscriber Debra Chandler, several marine calls were indicated. The first one was for May 15, 1989. There were others for March 17, 1989 and five calls on June 2, 1989. There was one marine call on July 5, 1989. (V94I T1691-1692) Ms White actually went through and found the toll tickets on the microfiche in 1994. (V94, T1698)

Soraya Butler was a marine operator for GTE in 1989. Ms. Butler received a call on May 15, 1989 at about 5:49 p.m. The caller identified himself as Oba and his boat at Gypsy One. She

placed a call for him to Tampa. (V94, T1699-1701)

Elizabeth Beiro was a marine operator for GTE for 31 years. (V94, T1702) Ms. Beiro received a call on June 2, 1989 at about 1:12 a.m. The caller identified himself as being boat Gypsy One. The caller did not give a first name. The call was placed to 854-2823. Toll ticket for 1:30 a.m. on June 2, 1989 was placed by Gypsy One. The caller did not identify himself with a personal name. The collect call was sent to the same number as before. The boat that placed the call on July 5, 1989 at 12:38 a.m was the Zigeuner. The caller gave a personal name of Obey. The call went to 854-2823. (V94, T1704-1707)

Carol Voeller was a marine operator for GTE in 1989. She testified as to toll ticket dated June 2, 1989 at 8:11 a.m. The name of the boat calling was the Gypsy and the person calling did not give a personal name. The collect call was to Tampa number 854-2823. (V94, T1709-1710)

Frances Watkins was a marine operator for GTE in 1989. She testified that a collect call was made on June 2, 1989 at 9:52 a.m. from the boat Gypsy One. The caller identified himself as Obie. (V94, T1711-1712)

In September, 1992 Detective Halliday interviewed the victim, Judy Blair in the rape case that occurred in Madeira Beach. She described the shirt, shoes and hat that Chandler wore on that occasion. (V93, T1460) Subsequent to that interview in September, 1992, Detective Halliday participated in a search pursuant to

warrant of Chandler's residence in Port Orange. During the search law enforcement located a shirt matching the description given by Judy Blair. (V93, T1461) Detective Halliday also removed a hat and shoes that matched the general description given by Ms. Blair. (V93, T1462)

The search warrant was issued in the Madeira Beach rape case. It was the next morning that he returned to Mr. Chandler's house and searched. (V93, T1465) Law enforcement performed a meticulous search of the house. They did not find any ladies' purses, material coming from the purses, or clothing relating to the Rogers' case. (V93, T1469) The green mesh shirt, hat and shoes were seized in the Madeira Beach case based on Judy Blair's description. (V93, T1473)

Arthur Wayne Stephenson, an inmate in the Florida State Prison System was in the same cell as Chandler on October 23, 1992 and November 3, 1992. (V92, T1262-1263) At a point in time something was mentioned on the TV concerning the three women they found in the bay and the fact that a note had been found in their car by whoever had given them directions. There was a period of about 3-4 days when the TV would show pictures of recovering the bodies and the note and the handwriting. Chandler would say that he had met these three women somewhere in the area of the stadium on Dale Mabry and sometimes talked about the note. Chandler openly told Stephenson that he had met the three women. Chandler said he gave the women directions to a boat ramp on the Courtney Campbell

Causeway. Chandler said he lived in the area of the causeway. Chandler talked about having a boat. (V92, T1266-1269) Chandler was questioned by detectives about duct tape and the rape case that was mentioned on TV. Chandler told Stephenson that when he met the three women they were from the same state or the same area as he was. Chandler said one of the girls was very attractive. (V92, T1271-1273) Stephenson identified Oba Chandler in the courtroom. (V92, T1275) All of the statements made by Chandler to Stephenson were made in a period of about a month. (V92, T1277) (V92, T1281)

William Katzer, an inmate in the Florida State Prison system shared a jail cell pod with Chandler from January 16, 1993 to February 25, 1993. It was a four-man pod. Katzer shared a room with Daniel Toby and Chandler and David Rittenhouse shared the other room. At some point in time the program A Current Affair came on the TV. All four inmates were present. After the program aired, Chandler said that "if the bitch didn't resist" he "wouldn't' be here". Chandler said that he had an alibi to cover himself. He said that he had a duped videotape that his wife had where they were going to falsify the date so he would have an alibi for the case that was pertaining to the murders. Katzer became a witness after detectives approached him at the facility where he as at. Katzer identified Chandler in the courtroom. (V92, T1286-1292)

Blake Leslie, an inmate at the Pinellas County Jail with Chandler in the fall of 1992, testified that Chandler told him that

he took a young lady from another country for a ride in this boat. Her friend didn't want her to go. Once he got out 20-30 miles, he told her, "fuck or swim." He said the only reason she is still around is because somebody was waiting at the boat dock for her. Leslie was approached by law enforcement officers to see if he knew something about Chandler and he initially lied to them. Leslie had been convicted of 9 felonies. (V92, T1306-1312) Leslie never heard Chandler say anything about any murder, just about rapes. (V92, T1313)

Oba Chandler took the stand and testified that at the end of May, beginning of June, 1992 he was living with his wife, Debra, and daughter, Whitney, at 10709 Dalton Avenue, Tampa, Florida. At the time, he was an aluminum contractor and the name of the business was Custom Screens. (V98, T2166) The boat that he owned at the end of May and June, 1989, was a 21-foot Bayliner. It had a blue hull, white interior, blue canvas top. (V98, T2167) His only hobby was fishing. He said that he did not drink. (V98, T2168) He bought this 1976 Bayliner from Mr. Derek Galpin for $2,100 and sold it to Mr. Carlton for $5,000. (V98, T2168)

Bob Foley went over to Chandler's house on Memorial Day, 1989. (V98, T2167) They went out in the boat. It had a marine radio and Chandler knew how to use it. (V98, T2169) That weekend Chandler sold Mr. Foley a couch and when he returned home, Chandler, his wife and his daughter followed him back to about Sanford because the lights weren't working on his trailer. (V98, T2169) They

turned right around and drove home. (V98, T2170)

Chandler testified that he worked the week after Memorial Day, but he could not remember exactly what he did on May 31 or on June 1, 1989. (V98, T2170, 2175)

Chandler did recall meeting Michelle Rogers on June 1. According to him Christe was hanging out of the car and he never met Joan. He only spoke with Michelle; he never spoke with anyone else. (V98, T2180) Chandler was returning from an estimate and he stopped at a gas station on 50th and I 4. When he came back out, Michelle asked him if he knew where the Days Inn on Sixty was. There was a Days Inn right there where they were talking. He pointed it out to her and Christe stuck her head out of the car hollering, "Rocky Point. Rocky Point." Chandler told them they did not want this one. They wanted the one on Courtney Campbell Causeway. (V98, T2176) He said that he was very familiar with it. He gave them directions. He said to take the expressway and go around. He did not pay any attention to where they went. He said the conversation took a total of two minutes. (V98, T2177) Chandler indicated on a map introduced by defense counsel the directions he gave to the women. According to the map and his directions, in order to get on the interstate, one would have to go onto Columbus Drive; which was less than a mile away. (V98, T2179) Chandler said that he did not write the directions. That they had a pamphlet and he just wrote it on top of the pamphlet. (V98, T2180) He simply printed on the top of the brochure, "Route Sixty,

Courtney Campbell Causeway, Days Inn." (V98, T2181) That's all he said he did. He did not draw any directions. (V98, T2182) Chandler testified that he never saw those people again in his life. (V98, T2182) He did not kill those people. (V98, T2182) He did not take them out on his boat. (V98, T2182)

Chandler testified that he probably gave screens to Rollins Cooper on June 1 but he could not say so for sure because his memory was not like that, (V98I T2183) Chandler never told Rollins Cooper that he had a date with three women. Nor did he have a date with three women. Chandler did not recall whether he paid Rollins Cooper that day for the Betancur job but that based on the records, he obviously did. (V98, T2184)

Chandler was surprised to see the records which indicated that he was out on his boat that night. He thought it was the weekend before the Fourth of July. He recalled the night the calls were made and he was out fishing at the Gandy Bridge. He did not kill anybody that night. He went out about 9:30 or 10:00 that night. (V98, T2186)

He doesn't remember exactly what time it was when he got ready to go home, but when he started his engine up and was pulling his anchor in, the engine died. He started it again, it ran for a second and stopped. He got out his spotlight and started looking to see if he had an electrical problem. He started smelling gas. He pulled his big hatch away from my engine section and could smell a lot of gas in the bilge. It was obvious the bilge pump was

pumping, he had busted a hose and was totally out of gas. The boat had an inboard/outboard; with the inboard tank built into it. It had a forty-gallon tank below the deck. The top on the boat was fiberglass. (V98, T2187) He had a cover over the top of the engine which was hinged. The hinges would have to be loosened and the whole section would slide. He slid it forward and at that time he smelled a lot of gas. He called home about three times. His purpose was to get assistance and none came. He did not have anyone he could contact to go and get him and tow him. He was stuck on the boat and he just sacked out on the boat. (V98, T2188)

It got daylight and he called home. The Coast Guard came by and he flagged them down. They told him they would come back to give him assistance if they could. They couldn't. Another boat went by and he asked them for a tow to the marina. With daylight, Chandler could see what his problem was and he proceeded to tape the hose where it was leaking. It didn't hold too well, but it did okay. Two guys gave him a tow to the Gandy Bridge Marina, he got five bucks of gas and went back home. He called home again. Chandler testified that he kept tape and spare parts on his boat. (V98, T2189) The next day was June 2 and Chandler picked up two orders for jobs. (V98, T2190)

Eventually Chandler sold his boat to Mr. Carlton and bought a 26-footer with a cabin cruiser. Before he sold the boat he replaced the steering wheel because it was broken. Chandler said

there were no concrete blocks at his house. When he bought the house it was immaculate. (V98, T2191)

During the next week, Chandler testified that he and his wife went to a Fourth of July party, birthday parties, Memorial Day parties, out to dinner once or twice. Normal, everyday living. (V98, T2192) In the beginning of June, 1989 the only child around Chandler was his daughter, Whitney. His wife's son, Jay, came down later in the summer from school in Rhode Island. (V98, T2194)

To Mr. Zinober's final direct question, "Did you kill these ladies?" Chandler answered, "I have never killed no one in my whole life. I have never--it's ludicrous. It's ridiculous."

On cross examination, Chandler admitted that he had been convicted of a felony six times. He had been in custody since September, 1992. (V98, T2197) He said that he was not on the stand to talk about the rape trial; that he was not answering "no questions of the rape trial". He said he would talk about the Rogers homicide but that the rape case was still pending. (V98, T2200)

Assistant State Attorney Doug Crow asked Chandler if he was taking the Fifth Amendment and he replied, "Yes, I am." To which Mr. Crow replied, "You are afraid your answers may incriminate you, is that why you refuse to answer?" Chandler responded, "I have invoked my Fifth Amendment from the rape case from Madeira Beach. I will answer no questions, sir, that relates to that case." Mr. Crow continued, "You are afraid your answers may incriminate you?"

Chandler, "No." "Then you can't take the Fifth Amendment." (V98, T2200)

At this point during the exchange between the prosecutor and Chandler, the court injected, "That is correct." Chandler was directed, "Answer the question, or else you will have to invoke the Fifth Amendment privilege against self-incrimination." To which Chandler replied, "I invoke the Fifth Amendment."

Chandler testified that he left his fingerprints and handwriting on the pamphlet that the Rogers women had. He recalled the driver was Michelle as she had been standing on the driver's side of the car. (V98, T2203)

Chandler remembered reading in the paper about three bodies floating up in Tampa Bay. Four days later he recalled seeing the two girls' pictures, along with the mother's, in the paper. He did not realize that they were two of the same women he had met on June 1. He thought the pictures looked entirely different from the people he met. (V98, T2205) In November, 1989 Chandler saw a composite in the paper and it was only then that he realized that the women were the ones he had given directions to. The composite related to the Madeira Beach rape. (V98, T2206) Until May, 1994 when Chandler saw the marine toll bi ls for the evening of June 1, 1989 and the morning of June 2, he did not have any idea where he was. (V98, T2211)

Chandler testified that his boat has broken down before and he has stayed out all n ght in Tampa Bay numerous times. (V98, T2213)

He would go out fishing all night probably two nights a week. (V98, T2213)

Chandler believed that it was about fifteen minutes from the time the boat died and he could not restart it that he made the first phone call. (V98, T2217) He did not think that he knew the line was broken until the morning when it got daylight, He kept his tanks topped off and a forty-gallon tank was empty. He knew he had not used forty gallons of gas. He knew he had a leak. (V98, T2218) After Chandler called home, there was another six or seven hours and that he slept during that time. (V98, T2219)

He said he called the Coast Guard and they told him to call a towing service. That it would cost $100 an hour to tow him. He declined. (V98, T2220) Chandler did not call any commercial services nor any of his friends who had boats. (V98, T2221)

Chandler admitted that he had known since November, 1989 that he was a suspect in the murders. (V98, T2223) He admitted that he fled the state because he was afraid of the Madeira Beach case. It's connection to the homicide did not worry him that much. (V98, T2224) Chandler testified that after the composite came out in the paper and on TV he went to Deltona for three days to visit Leslie Hicks, a prior live-in girlfriend. He did not tell her that he was a suspect in a rape and murder. (V98, T2226) **He** said that he went up to Ohio to make money to obtain an attorney. He was afraid the police were looking for him and had his phone tapped. (V98, T2227)

While in Ohio he got with Rick and Kristal and obtained about

a thousand dollars and two ounces of cocaine. He did not give it to a lawyer. He returned to Deltona. He had Kristal arrange to have a phone call made to his wife, Debbie, through a pay phone. He wanted to see if the cops had been to his house on the Madeira Beach case. He was concerned about the Rogers' case, but he was more concerned about the Madeira Beach case. (V98, T2228) Chandler did not recall whether it was he who asked his wife to go to a second pay phone or if it was Kristal's idea. (V98, T2230)

Chandler admitted to Kristal that he was a suspect in a rape case. He said that he also mentioned to her that they were trying to link the Rogers homicide to the rape case. He told her that because he was nervous about it. He was scared. He did not want to go to jail. He needed money. He was not afraid of going to jail on the Rogers homicide. (V98, T2230) Chandler said that he told Kristal that he was innocent of both crimes. He denied that Kristal ever went to the bathroom. He said that she never left the room. (V98, T2231)

Chandler testified that neither Kristal nor Rick were shocked or upset with what he was telling them. He thought they were concerned about helping him obtain a lawyer. He was chain-smoking cigarettes, but he said that he always did. He smoked two, three packs a day. He said he also always drinks a lot of coffee. He was positive that he did not back his car up to the building so that the tag wouldn't be visible. (V98, T2232)

Chandler denied telling Rick and Kristal to lie if anybody

called looking for him. He was concerned that the police might have had his phone tapped, but he did not think they might try to contact his two daughters in Cincinnati. (V98, T2233)

To the prosecutor's question, "Were you on Madeira Beach on May 14, 1989, Chandler replied, "I plead the Fifth, sir." (V98, T2234) He did admit to being familiar with the John's Pass area. (V98, T2234) He said that he had been out to that area prior to May, 1989. He did not have any jobs or friends in that area. Chandler plead the Fifth on response to five consecutive questions regarding the Madeira Beach rape. (V98, T2235)

Chandler admitted to keeping duct tape over the broken steering wheel of his boat. Chandler invoked his Fifth Amendment privilege twice more in the presence of the jury regarding the rape case. (V98, T2236)

The court admonished Chandler for refusing to answer the State's questions. He was told that because he had taken the stand, the State could ask him questions. He could plead the Fifth or answer the questions. The State asked another question regarding the Madeira Beach rape and, once again, Chandler plead the Fifth. Defense counsel requested a side-bar conference and asked for a continuing objection. (V98, T2237) This request for a standing objection was overruled because the court maintained that she had heard him answer some questions when she thought he might have taken the Fifth. He was not taking the Fifth every time. (V98, T2238)

Chandler said that he kept a knife on the boat but that he did not keep any other weapons on the boat. (V98, T2238) He said the knife was not a weapon; that it was used for fishing, cutting line, cutting rope, He kept anchor line on the boat. He had two one-hundred-foot anchors on the boat. He also had tie-off line which he kept up front on the boat. The Bayliner boat did not have any carpet in it at any time that Chandler knew of. (V98, T2239) The boat had a Volvo engine. On the morning of June 2, in daylight Chandler discovered he had a broken fuel line and he put tape over it. His bilge pump had pumped out forty gallons of gasoline into the bay. He said that he did not know when the gas had leaked out. It could have leaked out at his dock. (V98, T2240)

Chandler said that he had an automatic bilge on his boat. At daybreak he said that he saw three Coast Guard people in a Zodiac, two men and a woman. He flagged them down with his shirt. They came over to him and he asked them if the could tow him in. They replied that they had to--something like a body was on the rock or something was on the rock; and that they'd be right back. In the meantime, after about ten to twenty minutes, two guys came by Chandler in a boat. He flagged them. (V98, T2241) They came over and pulled him over to Gandy. He put five or six bucks of gas into the boat and went home. Chandler did not recall the time he was towed. (V98, T2242) The boat towed him to the Gandy Bridge Marina on the east side of Tampa Bay. He had been out about a quarter of a mile from where the boats have to go underneath the bridge. They

towed him about three to four miles at idle speed. (V98, T2243) It took maybe an hour. (V98, T2244) Chandler testified that he arrived home probably twenty minutes to half an hour after he left the marina. (V98, T2245) Chandler said that after he got home, he went to work. Based on the documents Chandler previously looked at, he had shown up between seven fifteen and seven thirty on June 2, 1989 at Ms. Capo's house. However, Chandler did not recall being there at that period of time. (V98, T226) Chandler recalled that there were a series of phone tolls made while he was still out on the boat between one and two a.m. and eight fifteen to nine fifty-two. (V98, T2247)

Chandler could not say for sure what time of day he went to Ashley Aluminum or Ms. Capo's. (V98, T2248) He did not recall talking to Ms. Capo that morning. He said that Rollins Cooper could have picked up the materials that morning. However, Cooper's signature was not on the material sheets for June 2. (V98, T2250)

At some point after his return to Deltona from Cincinnati, Chandler returned to his wife and daughter. He said that he didn't know why he returned. (V98, T2251) Chandler testified that he was still concerned that he could be arrested. He did not do anything to try to keep people from finding him. He went back to work. He admitted that he had fear in his head that he was a suspect and that his photograph was in the paper to the day he was arrested. In July, 1990 Chandler and his wife and daughter tried to move to California. He did not tell his friends, even Mr. Foley. (V98,

T2252) Chandler did not tell his daughter. He said that his sister did not know. That he was not close to his sister. He was not close to anyone in his family. They went to California for fifteen, twenty days. They found it was too expensive so they came back. They did not return to Dalton Avenue. (V98, T2253)

Chandler testified that his business was going under and he said that he couldn't afford the house. His wife's income was about a fourth of what she normally made. He had too many bills to pay. He had to let them foreclose on his house. (V98, T2254) Chandler testified that he left Cincinnati with twenty or thirty thousand dollars in his pocket as a result of the drug rip-off that he and Rick Mays did. He did not go to a lawyer to hire him. (V98, T2254)

At that time getting money for a lawyer on the Madeira Beach rape case was of no concern of his. After the drug deal, Chandler took the money and they moved to Sunrise. After that they moved to Ormond Beach. They stayed there a year. Then they moved to Port Orange. He did not tell Mr. Foley, who was living in Port Orange, that he was there. His family did not know where he was. The phone was in his daughter's name. (V98, T2255)

The phone was in her name because they had bad credit and couldn't get it in their name. He was concerned about being arrested in the Rogers homicide but he always thought it would be solved. He was more worried about doing a life sentence for a rape case. The Days Inn on Courtney Campbell Causeway was in the area

where he lived when he lived on Dalton Avenue. (V98, T2257)

Chandler testified that he had been in the canals back where the dock was at the Days Inn once or twice, but that he was not real familiar with it. (V98, T2257)

With the aid of a photograph of the full view of the engine of the boat, Chandler testified that the broken line was in the front of the engine. The gas line came up from the gas tank which was under the floor. (V98, T2261) The gas tank was below deck. Although he repaired the gas line, he did not know whether it was busted before the gas tank or not. (V98, T2262) Chandler had not ever heard of an antisyphon valve. He was aware of a device that would prevent the gas from leaking out but that was with the engine, not the tank. The line went only to the fuel pump. There was no valve there that stopped it from coming out. (V98, T2263) Although he did not know if it was the top or the bottom of the gas tank, Chandler said that the break in the line was where it went to the gas tank. (V98, T2264/2265)

Chandler testified that when he gave directions to Michelle and Christe, Michelle was out of the car and Christe was coming out over top of the driver's side window. Then Chandler corrected himself and said that although he did not know where Christe was sitting, she stuck her head out of the front window. (V98, T2266) Chandler could not recall whether it was the passenger or backseat window. Michelle handed him the brochure he wrote the directions on. (V98, T2267) The Rogers were parked down by the pumps at the

gas station and that is where he had pulled up. (V98, T2269 Chandler said that in giving Michelle directions, he never mentioned Boy Scout to them. He never mentioned Columbus to them. He could not recall what time of day it was. And he did not remember if they drove off while he was still there. He did not recall writing anything else on the brochure. He identified his handwriting in pencil on the brochure. (V98, T2270)

He had used their pencil. His handwriting was in pen at the bottom also. He had used their pen. Oba denied switching from pencil to pen. He said that he may have written both in pen. Could have been either. (V98, T2271) Chandler denied drawing a line, the circle, the X, or the words on the brochure. They were not a part of the discussion with the girls. (V98, T2273)

He did not have any casual conversation with them about Busch Gardens; where they were from. He did not notice that the tags on their car were from Ohio. He estimated Michelle's age to be anywhere from seventeen to nineteen. She was pretty. (V98, T2273) He did not pay much attention to Christe. He did not give them directions to the Westshore Mall.

Chandler had contact with Customs agents in 1991. He denied making repeated inquiries to them as to the status of the Rogers homicide investigation. (V98, T2274) The only case Chandler said he ever discussed with Customs was making money from selling drugs. He never discussed the Madeira Beach rape case with them. (V98, T2275)

The State questioned Chandler twice about the Madeira Beach rape and he plead the Fifth both times in the presence of the jury. (V98, T2275)

Defense counsel's motion for mistrial based upon Mr. Chandler being required to go over the privilege was denied in side-bar conference. (V98, T2276) [See V98, T2276-2281 for Chandler's invoking Fifth Amendment numerous times, answering some questions about the Madeira Beach rape and the court's ruling on defense counsel's motions and objections.]

Mr. Chandler totally disputed what Kristal and Rick May said; it never happened. He also disputed what some of the people from the jail testified as to what he had said. (V98, T2281)

The state presented several rebuttal witnesses. Among these witnessess was Detective Ralph Pflieger who testified that he reviewed all the evidence from the Rogers' hotel room and did not find any Maas Brothers receipts, bags, or merchandise tags. (V99, T2315-20)

A cellmate of Chandler's, Edwin Ojeda, testified that he overheard Chandler tell another prisoner, Daniel Maxwell, that his biggest mistake was leaving the note in the car. (V99, T2345)

Coast Guardsman Robert Wesley Shidner was recalled to the stand. He disputed Chandler's claim that on the morning after the Rogers were killed, he flagged down three Coast Guard people in a Zodiac, two men and a woman and that they told him they had "to-- something like a body was on the rock or something was on the rock;

and that they'd be right back." (V98, T2241) Shidner testified that the Coast Guard does not make routine patrols and that on June 2, 1989, there was not a crew out on Tampa Bay looking for a body. He also testified that the standard crew is two on a boat at a time, but that they had a three-person crew on June 4 to help retrieve the Rogers' bodies and that on June 2, 1989, the Coast Guard boat never left the St. Petersburg station. (V99, T2350-51)

To rebut Chandler's claim that he was out all night because he ran out of gas, the state presented a certified boat mechanic, James Hensley, who testified that Chandler's fuel line was possibly still the original, it was in good shape and showed no signs of repair. He also testified that gas dissolves tape so it would not repair a leaking gas line. Further, fuel does not leak out when there is a hole in the gas line because of the anti-syphoning valve. Even if the anti-syphoning valve failed, it would not have leaked because Chandler's tank was on the bottom of the boat with the gas line coming out of the top of the motor. If the gas line broke, the engine would suck air and stop, but the gas would stay in the tank. (V99, T2363-64)

Customs Officer Whitney Azure testified that Chandler asked him several times about the Rogers investigation. (V99, T2378-84)

At the close of the evidence the jury returned a verdict of guilty of murder in the first degree, as charged. (V101, T2710) The penalty phase was scheduled for the next day.

Chandler waived the presentation of any mitigating evidence.

Defense counsel put on the record that he would have called a mental health expert, as well as family members. Chandler confirmed that he did not wish to present any mitigating evidence. (V102, T2741-49)

The state presented judgment and sentences for prior armed robberies. (V102, T2765-66) The state also presented the armed robbery victims, Peggy Harrington and Robert Plemmons, who testified as to the underlying facts of the prior armed robberies. Peggy Harrington testified that while she was at a jeweler's remount show Chandler robbed her and a partner at gunpoint of $750,000 in jewelery. (V102, T2667-75) FDLE agent John Halliday testified that the gun, as well as some of the jewelery, was recovered during the search of Chandler's house on September 25, 1992. (V102, T2781)

Robert Plemmons testified that Chandler and another man kicked in the front door of his home in Holly Hill. Chandler hit him in the head with a pistol. Chandler took Plemmons' girlfriend in the bedroom where she was tied up on the bed and stripped from the waist down. Judge Schaeffer sustained an objection to Plemmons' testifying as to what his girlfriend told him had happened in the bedroom. (V102, T2792)

Chandler presented some documentary evidence as mitigating evidence, including college credits.

The jury returned three 12-0 recommendations for death. (V102, T2827-28)

SUMMARY OF THE ARGUMENT

Despite the striking similarities and the undeniable connection between the two cases, Chandler contends that the trial court erred in admitting collateral crime evidence. He maintains that the crimes were not sufficiently similar and did not share any sufficiently unique or unusual characteristics so as to be admissible as similar fact evidence. It is the state's position that this evidence was admissible both as similar fact evidence under section 90.404(2) to establish Chandler's identity, intent, motive and plan and as inseparable crime evidence under section 90.402.

Appellant contends as his second claim of error, that the trial court committed reversible error when it allowed the state to cross-examine him with regard to the sexual battery of Judy Blair, otherwise referred to as the Madeira Beach rape, despite defense counsel's assertion that Chandler would invoke his Fifth Amendment privilege with regard to the sexual battery. With regard to the harmfulness of the alleged error, Chandler alleges that the danger of the jury drawing adverse inferences of guilt from him having to invoke his privilege before the jury twenty-one times was so prejudicial that the error could not be harmless beyond a reasonable doubt. It is the state's position that no prejudice or error has been established as the questioning was proper cross-examination and Chandler conceded that the collateral crime could

be established.

At trial Appellant's daughter, Kristal Mays, testified that Chandler admitted to her that he had committed the murders and the rape. Chandler maintained at trial that Mays had fabricated the admissions. Chandler impeached Mays' testimony with evidence that she had two motives to fabricate her claim that Chandler admitted committing the murders to her; 1) Chandler's drug rip-off of Mays' husband and, 2) the payment she received to appear on a television show about Chandler's case. In order to rebut the charge of recent fabrication, the state was allowed to introduce a prior consistent statement made by Kristal Mays to law enforcement in 1992.

Chandler urges on appeal that Mays' 1992 statements to law enforcement were not admissible as they were made after her reason to fabricate existed. It is the state's contention that the trial court's denial of the defense objection was proper. The admission of this evidence was within the trial court's discretion and appellant has failed to show an abuse of that discretion.

Appellant's fourth claim is that the prosecutor violated his right to a fair trial by making numerous improper remarks during closing argument, including derogatory remarks about Chandler, comments on Chandler's assertion of his Fifth amendment privilege, his believability and his guilt, and attacks on defense counsel and his credibility. Appellant concedes, however, that except for one objection to a statement referring to Chandler's failure to tell his daughters that he was innocent, that none of the comments he is

now challenging was raised to the court below. This Court has long held that absent a showing a fundamental error, the failure to object to an alleged improper comment bars review. Wvatt v. State, 641 So.2d 355 (Fla. 1994); Street v. State, 636 So.2d 1297 (Fla. 1994); Waterhouse v. State, 596 So.2d 1008 (Fla. 1992). Fundamental error is error that goes to the foundation of the case or the merits of the cause of action and can be considered on appeal without objection. Crump v. State, 622 So.2d 963, 972 (Fla. 1993); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). **Accordingly,** the state maintains that this claim should be denied as it is procedurally barred.

With regard to the one comment that was raised to the court below, the trial court properly denied the objection as this argument was a proper response to a defense argument, Street v. State, 636 So.2d 1297 (Fla. 1994), and as a prosecutor may properly comment upon the defendant's failure to deny or explain incriminating facts when the defendant testifies. Caminetti v. United States, 242 U.S. 470, 492-95, 37 S.Ct. 192, 61 L.Ed. 442 (1917); Tucker v. Francis, 723 F.2d 1504 (11th Cir. 1987).

Appellant next claims that the trial court committed reversible error in violation of the dictates of Koon v. Dugger, 619 So.2d 246 (Fla. 1993), in accepting Chandler's waiver of his right to present testimony in mitigation. Although appellant concedes that the court inquired of both Chandler and defense counsel and that defense counsel delineated the witnesses and the

nature of their testimony, he contends that because defense counsel did not inform the court of the content of the testimony which could have been offered by prospective defense witnesses, that death sentences must be vacated and this case remanded for a new penalty phase before a new jury. It is the state's position that the trial court's inquiry and defense counsel's responses sufficiently comported with the dictates of Koon.

The state certainly agrees that Campbell v. State, 571 So. 2d 415 (Fla. 1990) requires the trial court to evaluate potentially mitigating evidence and to determine if it is supported by the evidence and whether, in the case of nonstatutory mitigating evidence, if it is truly mitigating in nature. The state does not agree that Judge Schaeffer's rejection of Chandler's father's suicide as a nonstatutory mitigating factor is a violation of Campbell. Campbell does not require a trial judge to blindly accept nonstatutory mitigating factors urged by a defendant without evaluation as to whether it was established and whether it is truly mitigating.

Appellant contends that the jury instruction given in the instant case was unconstitutionally vague. It is the state's contention that this claim is procedurally barred and without merit. To paraphrase this Court's holding in Whitton v. State, 649 So.2d 861 (Fla. 1994) "this instruction was approved in Hall v. State, 614 So.2d 473 (Fla.), cert. denied, --- U.S. ---, 114 S.Ct.

109, 126 L.Ed.2d 74 (1993), and [Chandler] has not presented an adequate reason to recede from that decision." 649 So.2d at 867.

Accordingly, as this claim is barred and the instruction is constitutional, Chandler is not entitled to relief. Furthermore, in light of the particular facts of this case appellant has failed to establish that error, if any, is harmful.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT VIOLATED APPELLANT'S DUE PROCESS RIGHT TO A FAIR TRIAL BY ADMITTING EVIDENCE THAT HE SEXUALLY BATTERED JUDY BLAIR.

In September of 1989, Detectives investigating the Rogers' homicides became aware of the May 15, 1989 rape of Canadian tourist Judy Blair onboard a boat in the Tampa Bay area. They immediately recognized the significance of the similar pattern reflected in the commission of the two crimes only days apart. Based on a composite drawing made by the rape victim Judy Blair, Chandler was apprehended and identified as the same person whose handwriting and palmprint were on the brochure in the Rogers' car.

The ability of the police to accurately predict that the same person was connected to both incidents is compelling evidence of the rape case's probative value. The common features of the crimes are difficult to ignore. Both cases involve the attempt to lure multiple young female tourists onto a blue and white boat by a stranger who exploits a chance encounter. The stranger, by both providing help, (directions or a car ride through a "high crime area") and engaging in small talk (claiming to be from the same area that the Canadians were from and actually being from the same state as the Rogers' women) presented such a nonthreatening demeanor that he convinced the women to voluntarily board his boat

within the first 24 hours after he had met them. The women in each instance were restrained physically, and based upon the absence of physical injury, controlled by intimidation. Duct tape was available to be used and was actually used or threatened to be used to cover their mouths to muffle screams and cries for help.

Significant portions of both incidents occurred on weekdays, indicating a flexibility of work schedule of the person initiating the assault and an exploitation of the lessened recreational boat traffic during weekdays. Both incidents occurred under cover of night and in extensive bodies of water which served to enhance secrecy and prevent discovery. In both cases, the victims' clothes were removed from the waist down. While the complete nature of the sexual assault on the Rogers' women cannot be reconstructed, all victims were clearly the recipients of unwanted sexual conduct by their assailant. In both instances the perpetrator called home to his wife via the marine operator. In one incident the victim was threatened with deadly force, in the second incident deadly force was actually used. The incidents occurred within a matter of days in areas with which Chandler concedes he was associated and to victims that Chandler admits meeting.

Despite these striking similarities and the undeniable connection between the two cases, Chandler contends that the trial court erred in admitting the collateral crime evidence. He

maintains that the crimes were not sufficiently similar and did not share any sufficiently unique or unusual characteristics so as to be admissible as similar fact evidence. It is the state's position that this evidence was admissible both as similar fact evidence under section 90.404(2) to establish Chandler's identity, intent, motive and plan and as inseparable crime evidence under section 90.402.

As a general rule, evidence of other crimes or acts may be admissible if, because of its similarity to the charged crime, it is relevant to prove a material fact in issue. Bryan v. State, 533 So.2d 744, 746 (Fla. 1988), cert. denied, 490 U.S. 1028, 109 S.Ct. 1765, 104 L.Ed.2d 200 (1989); Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959). The broad rule of admissibility based on relevancy, commonly known as the Williams rule, is codified at §90.404(2)(a), Florida Statutes. That provision provides: "Similar fact evidence of other crimes, wrongs or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but is inadmissible when the evidence is relevant solely to prove bad character or propensity." Fla. Stat. §90.404(2)(a). Although similarity is not a requirement for admission of other crime evidence, when the fact to be proven

is, for example, identity or common plan or scheme it is generally the similarity between the charged offense and the other crime or act that gives the evidence probative value. The similarities between the charged and collateral offense will necessarily differ depending on the purpose to be served and the issues to be proven.

Such evidence may also be admissible, even if not similar, if it is to prove a material fact in issue. Pittman v. State, 646 So.2d 167, 170-171 (Fla. 1994), citing, Brvan v. State, 533 So.2d at 747. See, also Crump v. State, 622 So.2d 963, 967-68 (Fla. 1993). *Relevance,* not necessity, is the standard for admissibility. The evidence need not prove the defendant's guilt of the charged offense if 'it is in the nature of circumstantial evidence forming part of the web of truth" proving the defendant to be the perpetrator, Brvant v. State, 235 So.2d 721 (Fla. 1970) or would "cast light" upon the character of the act under investigation. The State may intend to establish the prior crime or bad act for one or more of several purposes.

The requirement of similarity is most demanding and most strictly applied, when the collateral crime's relevance is to prove identity of the perpetrator through showing the use of a similar *modus operandi.* Courts have repeatedly held that the evidence must then show more than the mere similarity inherent in committing the same or similar crime. i.e., Braen v. State, 302 So.2d 485 (Fla.

App. 2d DCA 1974). The more demanding similarity requirement applicable to proving identity through *modus operandi* is not applicable when similar fact evidence is used to prove other issues such as intent or knowledge. Amoros v. State, 531 So.2d 1256 (Fla. 1988). See also, Brvan v. State, 533 So.2d 744 (Fla. 1988).

In the instant case, after hearing all the evidence, the trial court entered a detailed order setting forth the basis for admitting the collateral crime evidence.[1] The Court found as follows:

> The following are the similarities in the crimes that were tried (the three Rogers' homicides) and the Williams Rule testimony allowed at the trial (the Blair rape):
>
> 1) All the victims were tourists vacationing in the Tampa Bay Area.
>
> 2) The victims were all white females, ranging in age from 14 to 36. Judy Blair was 25, Joan Rogers was 36 and her two children were 14 and 17. While the Defendant asserts the age differences are significant dissimilarities, these women are, by this Court's assessment, all young. This is not the type dissimilarity in some of the cases where the victims are "young" and "elderly," Peek v. State, 488 So.2d 52 (Fla. 1986), or are 76 years old and 15 years old. White v. State, 407 So.2d 247 (Fla. 2d DCA 1981).
>
> 3) All the female victims are similar

[1]Appellant alleges that the trial court did not enter an order specifying the similarities until after the trial. (Brief of Appellant, pg 74) The record shows, however, that upon denying the Chandler's pretrial Motion in Limine to preclude the introduction of the collateral crime evidence, Judge Schaeffer entered an order delineating *some* of the apparent similarities and noting that the order was subject to revision or reversal upon the presentation of evidence. (V56, T9457-58)

in height and weight:

Joan Rogers	5'7" 125 lbs.
Michelle Rogers	5'6" 114 lbs.
Christie Rogers	5'4½" 95 lbs.
Judy Blair	5'5" 110 lbs.

4) All the victims (plus Barbara Mottram, Judy Blair's friend) met up with the Defendant, who was a stranger, by a chance encounter where he renders assistance to the victims. (Blair/Mottram -- Defendant is outside a 7-11 and the Defendant calls to the women and strikes up a conversation. He finds out they are tourists and tells them they are in a dangerous area and shouldn't be out walking after dark. He offers to drive them to John's Pass where they are planning to meet friends. Rogers -- The Rogers are looking for directions to their motel. A crude map of the area was found in the Rogers' car and directions on this map in two handwritings, one belonging to Joan Rogers and one belonging to Defendant. The Defendant's palm print is on this map. These directions appear to lead the Rogers from a point in Tampa to the Rocky Point Days Inn where the Rogers had rented a room on May 31, 1989 to arrive June 1, 1989. This indicates the Rogers met the Defendant in Tampa and he assisted them in locating their hotel.)

5) Within 24 hours of this chance encounter with the Defendant, all the victims agree to go for a sunset cruise with him.

6) The Defendant was non-threatening and convincing that he was safe to be with alone. Both Blair and Mottram state the Defendant was non-threatening. They described the Defendant as friendly, warm and one who invoked their trust. While we will never know what he said to the Rogers, one can only assume a mother would never allow her two daughters to go out on a boat with a virtual stranger at sunset unless he seemed very safe and non-threatening.

7) A blue and white boat was used for both crimes. Ms. Blair has identified Defendant's blue and white boat as the vessel where the rape took place. Joan Rogers wrote the general directions from the hotel to the boat ramp where her car was found. The note

said "blue w/ wht". Expert testimony established the Rogers' women were put in the water from a boat. The Defendant was on his boat when the murders occurred. The jury determined the Rogers were on the Defendant's blue and white boat.

8) A camera was taken to record the sunset in both crimes. Ms. Blair says the Defendant encouraged her to bring her camera to take pictures of the sunset, which she did. The Defendant ripped the film from her camera after the assault and destroyed it and wiped his prints from her camera. While we don't know what was said to the Rogers, it is clear a new roll of film was put into their camera before boarding the blue and white boat at sunset and their camera and the film in it has never been found.

9) Duct tape was used or threatened to be used. In the Blair case, when the victim began screaming and crying, the Defendant said "shut the fuck up or I'll tape your mouth shut." He threatened to tape her mouth shut several times. The Defendant had used duct tape on his steering wheel that day. Each Rogers victim had similar duct tape on her mouth/face. One can readily surmise it was used to quiet the screaming and crying of the Rogers' women during the Defendant's assaults.

10) There was a sexual motive for both crimes. Ms. Blair was raped by the Defendant. Her clothes were removed during the assault onlv from the waist down. All three Rogers' women were found naked only from the waist down. Since the Rogers' women's legs were tied together, no explanation exists except that their clothes were removed prior to being thrown in the water. It is inconceivable that this mother and her two daughters got naked from the waist down for a stranger. It is unknown whether the Rogers' women were raped or not since the state of decomposition does not allow the medical examiner to render such an opinion. However, the naked state of this mother and her two daughters allows this court to make the obvious conclusion that some non-consensual sexual activity occurred with the Rogers' women prior to their being thrown off the Defendant's boat.

11) The crimes occurred in large bodies of water in the Tampa Bay area on a boat under the cover of darkness. Ms. Blair was raped in the Defendant's boat at night in the Gulf of Mexico. The Rogers' women's bodies were found in Tampa Bay. Expert testimony established their bodies were thrown off a boat. The time of death establishes the crimes occurred during the late evening hours of June 1 or in the very early morning hours of June 2. Whichever it was, it was definitely dark.

12) Homicidal violence occurred or was threatened. The Rogers' victims were killed through homicidal violence. Ms. Blair alleges the Defendant threatened to kill her unless she had sex with him. The Defendant was upset Ms Blair did not bring Ms. Mottram with her for the sunset cruise. He had insisted she bring her. He told a jailhouse informant the only reason Ms. Blair was still "around" is because she had "someone waiting for her back at the dock" (presumably Ms. Mottram). It has always been the State's belief that if Ms. Mottram had gone with Ms. Blair, neither of them would be alive. (Based on what happened to the Rogers' women when <u>all</u> the witnesses were aboard the Defendant's boat, this theory is easily believed.)

13) The two crimes occurred within 17 or 18 days of each other. The Blair incident occurred May 15, 1989. The Rogers incident occurred either June 1, 1989 or the early hours of June 2, 1989.

14) Telephone calls were made to Defendant's home from his blue and white boat while he was in the water, either before or after both of these crimes.

Dissimilarities also exist, as they do in almost all Williams Rule cases. The significant dissimilarities are:

a) Restraints vs. no restraints. Ropes were used to bind the hands and feet of the Rogers' victims. Although rope was seen on the Defendant's boat by Ms. Blair, none was used. While this may seem significant at first blush, it must be remembered that Ms. Blair was intimidated by the Defendant and could easily be controlled without restraint by the larger Defendant who had the alleged

victim well out in the Gulf of Mexico with nowhere to go but to swim for it as she says the Defendant suggested. The same cannot be said for controlling three women. Surely one or two of the Rogers' victims could be roaming the boat (looking for a weapon, etc.) while the Defendant was attacking another victim, or all three could have ganged up on the Defendant. So restraints, such as rope, would be required to control three victims at one time, especially without other physical violence being used, such as knocking out a victim or beating the victims, etc. It should be noted that no such signs of trauma existed in any of the four victims.

b) Three victims were killed, unknown if raped -- one raped and only threatened to be killed. Depending on how one looks at this, this may be a similarity -- death vs. threats of death. No one knows why the different end results. Could it be Ms. Blair succumbed to the sexual advances of the Defendant and the Rogers did not ("Is sex worth losing your life over?) Could it be the Defendant had more violent thoughts that he would have carried out had Barbara Mottram agreed to accompany Ms. Blair as the Defendant insisted, and was disappointed when she did not. ("The only reason she is still around is because someone was waiting for her on the dock.") Were the three Rogers' women raped before they were thrown from the Defendant's boat, all naked from the waist down? ("They are looking for me for raping these women" or he was "accused of raping three women." One of these two statements was made by the Defendant to Rick Mays. In truth, he was being accused of murdering three women, and raping one. Only the Defendant would know if the three Rogers' women were raped. Was his statement to Rick Mays a Freudian slip?) In any event, this is not fatal. Many of the cases by the attorneys in their arguments regarding Williams Rule evidence have victims who live and others who don't. See for example, Schwab v. State, 636 So.2d 3 (Fla. 1994); Hoeffert v. State, 617 So.2d 1046 (Fla. 1993).

c) The concrete blocks. The Rogers' women were found with a rope around their neck

tied to a concrete block or some other heavy object. This is really a by-product of the murders. Clearly these were used in an effort to weight the bodies down to avoid detection. Since Ms. Blair was not killed, there was no purpose for a concrete block in the Blair rape.

It cannot be doubted that the unique similarities in these two crimes tie the same individual -- Oba Chandler -- to both crimes. After all, it was when the police made the connection between the two cases and it appeared in the newspaper that the Defendant himself knew of the connection and unexpectedly left town and went to see his daughter and son-in-law in a panic. There is no doubt that it was the connection made between the two cases that ultimately led to the Defendant's arrest for both.

Relevant evidence is admissible. The Blair rape case was relevant to help establish the Defendant's identitv as the Rogers' murderer. The Blair rape case was relevant to show the Defendant's plan, scheme, intent and motive to lure women tourists aboard his boat for a sunset cruise, and when it got dark, to commit violence upon them. The Blair rape case was relevant to establish Defendant's opportunity to commit the Rogers' murders aboard his boat. Without Judy Blair and Barbara Mottram's testimony, what jury could possibly believe Mrs. Rogers and her two children would board Chandler's boat for a sunset cruise within 24 hours of having met him? This was a critical question the State had to answer at trial. The Blair incident was relevant and necessary to answer the question. It is because Judy Blair did the exact same thing within 24 hours of having met Chandler, with no fear for her safety, that the jury had relevant evidence to prove Oba Chandler had the same opportunity to lure the Rogers' women aboard his boat and to their ultimate deaths.

Because the Williams Rule evidence is relevant for all of the above purposes, and not solely to prove bad character or propensity, the Williams Rule evidence is admissible, and, accordingly, it is

> Ordered and Adjudged that the request by the State to allow Williams Rule evidence of the Blair rape in the trial of the Roger's homicides is granted.
>
> (V68, R11579-83)

Appellant challenges both the legal and the factual basis for this order.

First, he claims that taken individually none of these characteristics is unique; that it is common to target tourists and women as victims, that blue and white boats are common, marine phone calls are common and that the commission of crimes during the two-week period between the crimes was common. This Court has repeatedly stated that the proper consideration is not whether the *individual* characteristics are unusual, but whether when "taken together these features establish a sufficiently unusual pattern of criminal activity." Crump v. State, 622 So.2d 963, 967-68 (Fla. 1993). In Crump this Court considered a similar argument and held that collateral crime evidence is admissible when the common features considered in conjunction with each other establish a sufficiently unusual pattern of criminal activity. This Court specifically stated:

> *Although the common features between Smith's murder and Clark's murder may not be* unusual *when considered individually, taken together these features establish a sufficiently unusual pattern of criminal activity.* The common features of the two crimes include: both victims were African-American women with a similar physical

> build and age (Clark was twenty-eight years old, five feet, two inches and weighed 117 pounds; Smith was thirty-four years old, five feet, five inches tall and weighed 120 pounds); Crump admitted to giving a ride to each victim in his truck in the same area, off Columbus Boulevard in Tampa; Crump admitted to the police that he argued with each victim while giving the victims a ride in his truck; both victims' bodies showed evidence of ligature marks on the wrists; both victims died from manual strangulation; both victims' bodies were found nude and uncovered in an area adjacent to cemeteries within the distance of a mile from each other; and the victims were murdered at different sites from where the bodies were discovered. *The cumulative effect of the numerous similarities between the two crimes establishes an unusual modus operandi which identifies Crump as Clark's murderer.* Thus, we find no error in the admission of the Williams rule evidence.
>
> Crump v. State, 622 So.2d 963, 967-68 (Fla. 1993).

Similarly, in Chandler v. State, 442 So.2d 171, 173 (Fla. 1983) this Court noted that while the common points shared by the defendant's Texas crime and the crime charged below may not be sufficiently unique or unusual, when considered individually, to establish a common modus operandi, that the points when considered one with another, establish a sufficiently unique pattern of criminal activity to justify admission of evidence of Chandler's collateral crime as relevant to the issue of identity in the crime charged.

Further, it must be noted that despite Chandler's claim that the rape and/or murder of young attractive female tourists on boats

is common, Chandler has not cited a single case that has remotely similar facts. Not surprisingly, a CDROM search of all Florida cases reported in Southern Second does not reveal any cases with remotely similar facts. Compare, Buenoano v. State, 478 So.2d 387 (Fla. 1st DCA 1985) (son drowned for insurance); Shapiro v. State, 345 So.2d 361 (Fla. 3d DCA 1977) (sale of murder victim's boat admissible Williams rule); Withers v. State, 104 So.2d 725 (Fla. 1958) (young boys sexually assaulted and drowned).

Chandler also urges that nine of the court's fourteen findings of similarity are unsupported by the evidence. He urges that the court's finding of similar age is incorrect because Judy Blair was 25 years old, whereas Joan, Michelle and Christe were 36, 17, and 14, respectively. What the trial court actually stated was that; "[t]he victims were all white females, ranging in age from 14 to 36. Judy Blair was 25, Joan Rogers was 36 and her two children were 14 and 17. While the Defendant asserts the age differences are significant dissimilarities, these women are, by this Court's assessment, all young. This is not the type dissimilarity in some of the cases where the victims are "young" and "elderly," Peek v. State, 488 So.2d 52 (Fla. 1986), or are 76 years old and 15 years old. White v. State, 407 So.2d 247 (Fla. 2d DCA 1981)." This Court has affirmed a trial court's finding of similar age where the victims were several years apart but nevertheless still young

women. Crump v. State 622 So.2d 963, 968 (Fla. 1993)(twenty-eight years old and thirty-four years old); Duckett v. State, 568 So.2d 891, 895 (Fla. 1990)(evidence established Duckett's tendency to pick up young women, where evidence indicates that the victim appeared to be older than her actual age, collateral crime evidence admissible). The Rogers and Judy Blair were all young attractive women who were similar in height and weight. The trial court's finding is well supported.

Regarding finding number 4, Chandler contends that the level of assistance he gave to Judy Blair was considerably different from the minimal assistance he gave to the Rogers. This argument is completely disingenuous. It is clear that Chandler provided the Rogers with assistance and that it was of sufficient magnitude as to convince Joan Rogers to take her two daughters on a boat trip with Chandler. A fact does not have to be identical to make it similar.

Chandler also challenges the court's finding that the promises of sunset photographs were used in both cases. Judy Blair testified that Chandler made such an offer to her and went so far as to assist her in this endeavor. The evidence also supports a conclusion that the Rogers were lured onto the boat with just such a promise; they had a camera that was missing, they had taken photographs at the hotel just before disappearing, and they

disappeared near sunset. (V94, T1610, 1613)

Finding number 6, Chandler's use of nonthreatening behavior, is supported by his own testimony and can be deduced from the evidence before the court.

Finding number 9, that duct tape was used or threatened to be used, is also well supported by the evidence. As the trial court found, when Judy Blair began screaming and crying, Chandler said "If you don't shut the fuck up, I'm going to tape your mouth shut" and threatened to tape her mouth shut several times. (V94 T1616,1618) Chandler had used duct tape on his steering wheel that day. As the court also noted, each of the Rogers victims had similar duct tape on her mouth/face. (V88, 89, 91, T742, 805-07, 950) The fact that Judy Blair was alone (despite his efforts to the contrary) limited the necessity to carry through on his threat to tape her mouth shut. With three victims to control, it takes no great leap of logic to ascertain Chandler's need to resort to taping or otherwise restraining his victims.

Appellant further suggests that the fact that the Rogers women were murdered and Blair was not, reflects a difference in result that precludes admissibility. The case law simply does not support this analysis.

The original Williams case itself illustrates that a difference in result does not eliminate the probative value of the

evidence. In Williams v. State, 110 So. 2d 654 (Fla.), cert. denied, 361 U.S. 847 (1959), the victim had been stabbed with an ice pick in the chest and repeatedly raped by an assailant who had waited hidden in her car in a Webb's City parking lot. This Court ruled that an earlier incident in which a potential victim had entered her vehicle in that parking lot and seen the defendant lying on the floor was relevant to showing the defendant's pattern of behavior, even though he had fled when confronted by the victim, been chased down by police and claimed to have mistaken the car for that of a family member.

More recently, in Schwab v. State, 636 So.2d 3, 6-7 (Fla. 1994), this Court reviewed a similar case and held:

> There are significant similarities among the four incidents. The victims ranged from eleven to fifteen years of age and had similar physical attributes, i.e., all were short, had blond hair, and weighed less than one hundred pounds. Schwab ingratiated himself with the family of one of the witnesses, as he did with the instant victim, and attempted to befriend the others before offering them rides. He held each at knife point and admittedly cut the instant victim's clothes off with a knife. *The major difference is that the instant victim, but not the others, was killed, but it is not required that the collateral crime "be absolutely identical to the crime charged."* Gore, 599 So.2d at 984. When considered together, the common points form a sufficiently unique pattern so as to be admissible, and the trial court did not err in admitting the testimony of these witnesses.
>
> Schwab v. State, 636 So.2d 3, 6-7 (Fla. 1994) (emphasis added)

Accord, Randolsh v. State, 463 So.2d 186 (Fla. 1984) (evidence of a previous gunpoint robbery was sufficiently similar to show a common modus operandi was used in a later robbery murder, even though the first victim was unharmed); Kight v. State, 512 So.2d 922 (Fla. 1987) (collateral crime evidence that the defendant had robbed another black cab driver at knife point was relevant in proving the murder of another black cab driver, even though the first drive had "fortuitously" escaped with his life); Duckett v. State, 568 So.2d 891, 895 (Fla. 1990)(first two victims were neither raped nor murdered and last was both sexually assaulted and murdered); Hoeffert v. State, 617 So.2d 1046 (Fla. 1993) (the use of collateral crime evidence approved where three prior victims were merely rendered unconscious and then choked in a different manner for apparent sexual gratification, as opposed to the murder victim who was found partially clothed in his residence and had died of asphyxiation.)

In the instant case, we know that Chandler indicated a willingness to murder Judy Blair in the event she did not comply with his demands. This is true even though Chandler knew that Judy Blair's friend Barbara Mottram knew that Judy Blair was with Chandler and could possibly identify him, his boat, and his car. In the Rogers' case, no identifying witnesses were remaining. Furthermore, while the trial court in finding number 9 noted the

similar use of homicidal violence and the threat of homicidal violence, the court also noted in the category of dissimilarities that Chandler did not kill Judy Blair. Judge Schaeffer analyzed this distinction as follows:

> "Three victims were killed, unknown if raped -- one raped and only threatened to be killed. Depending on how one looks at this, this may be a similarity -- death vs. threats of death. No one knows why the different end results. Could it be Ms. Blair succumbed to the sexual advances of the Defendant and the Rogers did not ("Is sex worth losing your life over?) Could it be the Defendant had more violent thoughts that he would have carried out had Barbara Mot-tram agreed to accompany Ms. Blair as the Defendant insisted, and was disappointed when she did not. ("The only reason she is still around is because someone was waiting for her on the dock.") Were the three Rogers' women raped before they were thrown from the Defendant's boat, all naked from the waist down? ("They are looking for me for raping these women" or he was "accused of raping three women." One of these two statements was made by the Defendant to Rick Mays. In truth, he was being accused of murdering three women, and raping one. Only the Defendant would know if the three Rogers' women were raped. Was his statement to Rick Mays a Freudian slip?) In any event, this is not fatal. Many of the cases by the attorneys in their arguments regarding Williams Rule evidence have victims who live and others who don't. See for example, Schwab v. State, 636 So.2d 3 (Fla. 1994); Hoeffert v. State, 617 So.2d 1046 (Fla. 1993)."
>
> (V68, T11582-3)

As found by the trial judge, the evidence in the instant case clearly meets the striking similarity requirement and is admissible to prove a common modus operandi and therefore identity. However,

the evidence is also quite relevant and admissible to prove other material issues such as motive, to establish a common pattern of conduct and to disprove defense arguments. While the intent of the defendant when he tied the victims up, weighted their bodies down and threw them overboard may be readily apparent, his intent at the time of the confrontation when he gave them directions is of crucial significance. Chandler maintained that his was an accidental encounter and his motive was simply to assist the victims. Chandler's conduct with Barbara Mottram and Judy Blair establishes a'pattern that is relevant to and casts light on the nature of his actions in the Rogers case. As one court has noted, "The more frequently an act is done, the less frequently it is innocently done." Jensen v. State, 555 So.2d 414 (Fla. 1st DCA 1989).

Appellant's reliance on this Court's decision in Drake v. State, 400 So.2d 1217 (Fla. 1981) and Peek v. State, 488 So.2d 52 (Fla. 1986) is misplaced. In Drake this Court explained "The mode of operating theory of proving identity is based on 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 prove identity. Id. at 1219. The Court went on to rule inadmissible evidence that Drake had bound the hands of two women during separate sexual assaults, one whom he choked, a second

whom he struck, then broke off the attack. These cases were not sufficiently similar to the charged murder where the victim, although similarly bound, had been stabbed to death and there was no proof of rape or sexual activity. Since the only common thread in all three cases was the binding of the hands behind the victim's back, this was not of such a special character or so unusual as to point to the defendant. Id. Moreover, the Court rejected the State's suggestion that the evidence was relevant to show that fear of a parole violation on the first assault had motivated Drake to break off the assault on the second victim but rape, then murder, the final victim.

In Peek v. State, 488 So.2d 52 (Fla. 1986), this Court found even less similarity between the two sexual batteries than had been apparent in Drake. The white female victims lived in the same city and attacked within two months of one another. One had been severely beaten, strangled and tied to the bedpost after the assailant cut the phone wires and gained forced entry by cutting through the screen, while the other victim had not been bound or beaten, had not had her telephone wires cut and had not been subjected to a forced entry of her home. One victim was elderly, the other young; one was assaulted in daylight, the other in darkness.

Clearly, neither Drake nor Peek provides support for the

defense contention that the Madeira Beach rape case is insufficiently similar to justify admission. The Blair and Rogers' cases share a plethora of unusual circumstances, including that the victims targeted were female tourists, whom Chandler lured onto, then forcibly restrained on a blue and white boat in the Tampa Bay area waterways. In both incidents Chandler silenced or threatened victims with tape kept on the boat. Both had their clothes removed from the waist down. Neither group of women was accompanied by a male at the time of the first encounter; their attacker offered both assistance, both boarded the boat (perhaps for a second time) at or around sunset and took cameras with them onto the boat.

Although the uniqueness of the fact pattern in these cases has made it impossible to find a case directly paralleling the instant cases, Duckett v. State, 568 So.2d 891 (Fla. 1990) is analytically very similar. In Duckett, this Court approved the admission of evidence showing that the defendant had a "tendency to pick up young, petite women and make passes at them while he was in his patrol car at night, on duty, and in his uniform," Id. at 895. The victim in that case was a ll-year-old girl who was last seen with the defendant (a municipal police officer) at his patrol car near a convenience store. The victim's body was later found in a lake, having been sexually assaulted, strangled and drowned. A pubic hair similar to Duckett's was found in the victim's

underpants and tire tracks in the mud near the lake were the same make and design as used on the city's two police cruisers. No blood was found in the defendant's vehicle, nor was any mud or debris from the lake found on his person or on the cruiser. The State presented evidence of two sexual encounters between Duckett and young women as "Williams Rule" evidence. On one occasion Duckett had encountered a petite nineteen years old woman who was looking for her boyfriend. Saying he was also looking for her boyfriend, he drove the victim around. While in the car, he placed his hand on her shoulder and attempted to kiss her, but stopped when she refused. Some months later picked up a second, petite 18 year old woman who was walking along the highway. He drove her to a remote area, parked the car, then placed his hand on her breast, and attempted to kiss her. When she resisted, he stopped and drove her to where she requested. Clearly, there were dissimilarities in the age of the victims and in the end result. Neither of the "Williams Rule" victims were raped and, as in the instant case, only the final victim was murdered. Moreover, since the victim was dead and the defendant denied involvement, there was no direct evidence of exactly how or where the fatal assault had occurred.

The instant case presents far greater similarities than did the evidence held admissible in Duckett. As previously noted, all were tourists and were from areas of the country with which the

defendant could claim familiarity. Four of the five were much younger than Chandler and would be considered attractive. The age and maturity differences are no greater than the difference between 18 and 19 year olds in Duckett and the final 11 year old murder victim. Also the same variance in sexual activity is greater in Duckett than in the instant case. The Williams Rule victims in Duckett were touched and kissed but not raped as had been the murder victim. Although both victims had been the objects of the defendant's sexual intentions, the incidents do not reflect any greater degree of similarity than in the instant case.

The collateral crime evidence in the instant case is relevant and material to a number of issues and was properly admitted. The use of this evidence is not a case of the State using unnecessary evidence merely to show propensity or bad character. The evidence was a central and crucial point of the State's case. The evidence shows a common modus operandi, establishes the motive and intent in the defendant's contact with the victims and rebutted arguments attempting to explain these factors away.

Recently, this Court in Consalvo v. State, 21 Fla. Law Weekly 5423 (Fla. 10/12/96) held that evidence of a subsequent burglary was admissible in Consalvo's murder trial though it may not have qualified as similar fact evidence as it established how law enforcement discovered Consalvo's part in the murder and the

context in which Consalvo made certain inculpatory statements.[2]

This Court specifically stated:

> The evidence was also admissible as inextricably intertwined. As we noted above, claim three relating to the admission of evidence of the Walker burglary was not preserved for appeal. Nevertheless, even if it were preserved, it would be. In Florida, evidence of other crimes, wrongs and acts is admissible if it is relevant (i.e., it is probative of a material issue other than the bad character or propensity of an individual). Charles W. Ehrhardt, Florida Evidence § 404.9, at 156 (1995 ed.). See Hartlev v. State, No. 83,021, slip op. at 7 (Fla. Sept. 19, 1996) (citing Griffin v. State, 639 So. 2d 966 (Fla. 1994), cert. denied, 115 s. ct. 1317, 131 L. Ed. 2d 198 (1995)) (both stating that evidence of other crimes which are "inseparable from the crime charged" is admissible under section 90.402).
>
> *The Walker burglary was closely connected to the murder of Pezza and was part of the entire context of the crime. When the police caught appellant burglarizing the Walker residence, they found Pezza's checkbook on his person. It was also as a result of the Walker burglary that police placed appellant in custody. Furthermore, appellant was in jail for this burglary when he placed the incriminating call to his mother and stated that the police were going to implicate him in a murder.*
>
> Consalvo v. State, 21 Fla. Law Weekly S423 (emphasis added)

In the instant case, Detectives investigating the Rogers' homicides became aware of the May 15, 1989 rape of Canadian tourist

---

[2]In Consalvo this Court found that while it was improper for the prosecutor to argue the Walker burglary as similar fact evidence because it was not admitted for that purpose, it was harmless error because the evidence was properly admitted as inextricably intertwined.

Judy Blair. (V91, T1123-24) They immediately recognized the significance of the similar pattern reflected in the commission of the two crimes, only days apart. Chandler's former neighbor, Joan Steffey identified his boat, his car and his handwriting, based on a composite drawing made by the rape victim Judy Blair. (V90, T1016-1) Because of the rape connection, Chandler was apprehended and identified as the same person whose handwriting and palmprint were on the brochure in the Rogers' car. Furthermore, Chandler's flight to Ohio and the inculpatory statements Chandler made to the Mays were a result of the police connecting the two crimes. Chandler claimed that at the time he fled to Ohio he was only concerned about the rape because he did not connect the Rogers' photographs to the people he had given directions to until they made the handwriting connection.

Thus, in the instant case, as in Consalvo, Chandler was arrested for the Rogers' homicide because of the collateral crime arrest and the rape evidence was admissible to explain Chandler's flight out of state and the resulting inculpatory statements made to Rick and Krystal Mays. As Chandler claimed that the flight was not because he had made a connection to the women he met and gave directions to as the Rogers until well after he returned from Ohio. Chandler's claim was that the flight to Ohio was a result only of his fear that they were seeking him for the rape. Accordingly, as

this evidence was relevant and admissible as inextricably intertwined evidence, Chandler has shown no abuse of discretion. See, Henry v. State, 649 So.2d 1361 (Fla. 1994) (facts of prior murder of mother were so inextricably intertwined with murder of son that to separate them would have resulted in disjointed testimony that would have led to confusion.) Henry v. State, 649 So.2d 1366, 1368 (Fla. 1994) (facts relating to son's murder inextricably intertwined with facts pertaining to mother's murder and to try to totally separate the facts of both murders would have been unwieldy and likely have led to confusion.)

Chandler also argues that in light of Judy Blair's emotional testimony the collateral crime evidence should have been excluded. This claim was not asserted to the court below. Although counsel objected to Judy Blair's crying and claimed that it was prejudicial, he did not assert that the collateral crime evidence should be excluded or that its admission was erroneous due to prejudice resulting from Judy Blair crying on the witness stand. Accordingly, this aspect of the claim is barred.

Furthermore, the record does not support his claim of prejudice. Upon counsel's objection and his motion for mistrial Judge Schaeffer made the following factual finding, "That is about the least amount of emotion I've ever seen from a person who says she was raped in a courtroom. It was practically nothing. It

should -- could have been a great deal more and not brought any thought for a mistrial." (V94, T1646) The record also shows that defense counsel admitted that he did not hear Judy Blair cry out loud and he wasn't sure that she had tears in her eyes. Additionally, the court noted that the jury was immediately removed and that Judy Blair quickly regained her composure. (V94, T1646)

Chandler also raises the specter of improper prosecutorial comment with regard to the collateral crime evidence. However, a review of the state's closing argument shows that no objection was raised to the comments Chandler now challenges or on the basis that Chandler now asserts until after the state had finished closing argument. (V101 T 2629-38, 2669) The only objection raised during the final closing argument was a claim that the state had improperly commented on the defendant's right to remain silent. (V101 T 2645) The failure to raise a contemporaneous objection bars review of this claim. Waterhouse v. State, 596 So.2d 1008 (Fla. 1992).

Based on the foregoing the state urges this Court to find that the admission of the collateral crime evidence was within the trial court's discretion and that appellant has failed to show an abuse of that discretion or that harmful error has occurred.

ISSUE II

WHETHER THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO REMAIN SILENT REGARDING THE FACTS OF THE PRIOR SEXUAL BATTERY, BY REQUIRING CHANDLER TO REPEATEDLY INVOKE HIS FIFTH AMENDMENT PRIVILEGE BEFORE THE JURY IN RESPONSE TO THE STATE'S QUESTIONS ABOUT THE SEXUAL BATTERY.

Appellant contends as his second claim of error, that the trial court committed reversible error when it allowed the state to cross-examine him with regard to the sexual battery of Judy Blair, otherwise referred to as the Madeira Beach rape, despite defense counsel's assertion that Chandler would invoke his Fifth Amendment privilege with regard to the sexual battery. With regard to the harmfulness of the alleged error, Chandler alleges that the danger of the jury drawing adverse inferences of guilt from him having to invoke his privilege before the jury twenty-one times was so prejudicial that the error could not be harmless beyond a reasonable doubt. It is the state's position that no harmful error has been shown.

First, while the state maintains that no error was committed, Chandler's claim of prejudice is so preposterous, that it should be addressed at the outset. The problem with his contention that the jury may have inferred his guilt from the fact that he invoked the Fifth, is that *Chandler admitted in opening statements that the state could prove he was guilty of the Madeira Beach rape.* (V87, T547, V98, T2160-62) Furthermore, the state

presented both Barbara Mottram and Judy Blair who identified Chandler as the man who sexually battered Judy Blair on the blue and white boat off Madeira Beach approximately two weeks before the Rogers' murders. Thus, long before Chandler invoked the Fifth concerning the Madeira Beach rape, the jury had already accepted Chandler's guilt for the Madeira Beach rape. Therefore, any *inference* of guilt for the Madeira Beach rape from the invocation of the Fifth is undeniably harmless. Similarly, if it is Chandler's contention that the jury could have inferred that he was guilty of the Rogers' murder because he took the Fifth as to the Madeira Beach rape, the same reasoning applies. The jury was no more likely to think he was guilty of the murders because he generally refused to answer questions on cross-examination than it would have based on the defense's prior admissions concerning the Madeira Beach rape and Barbara Mottram and Judy Blair's identification of him. Under either premise, error, if any, is harmless beyond a reasonable doubt.

Secondly, the state maintains that no error has been shown. Chandler was a defense witness, not a state witness. Thus, Chandler's reliance on case law concerning comments on the defendant's right to remain silent, as well as the calling and questioning of a witness who intends to invoke the Fifth is misplaced. As the United States Supreme Court has made clear, "the case of an accused who voluntarily takes the stand and the case of

an accused who refrains from testifying (Bruno v. United States, 308 U.S. 287, 60 S.Ct. 198, 84 L.Ed. 257) are of course vastly 'different.'" Johnson v. U.S., 318 U.S. 18, 9 63 S.Ct. 549 (1943), citing, Raffel v. United states, 271 U.S. 494, 46 S.Ct. 566, 70 L.Ed. 1054 (1940). Further, "when a defendant voluntarily testifies to the merits, and not just upon a purely collateral matter, the prosecutor may comment upon the defendant's failure to deny or explain incriminating facts already in evidence." McGahee v. Massey, 667 F.2d 1357 (11th Cir. 1982), quoting, Callowav v. Wainwright, 409 F.2d 59, 65 (5th Cir. 1968), cert. denied, 395 U.S. 909, 89 S.Ct. 1752, 23 L.Ed.2d 222 (1969). See, also, Tucker v. Francis, 723 F.2d 1504 (11th Cir. 1984). As Chandler took the stand and testified fully as to his claimed defense, Chandler has failed to show that Judge Schaeffer abused her discretion in allowing the state to cross-examine him as any other defense witness.

Appellant's complaint that the prosecutor was allowed to question him about the Madeira Beach rape, thereby, forcing him to invoke the Fifth twenty-one times before the jury, was also raised by the infamous Patricia Hearst who claimed that she was compelled to invoke the Fifth forty-two times in response to questions about collateral bank robberies she had committed with the Siambanese Liberation Army. Upon denying the claim the court held:

> Appellant argues that even if she had no right to refuse to answer the government's questions, the court erred in allowing the prosecution to continue to ask questions which

it knew would elicit reseated assertions of the privilege against self-incrimination. We find that appellant's authorities do not support her proposition. Her cases involve situations in which the government or the 'defendant questioned a witness or a co-defendant, knowing that a valid, unwaived Fifth Amendment privilege would be asserted. E. g., United States v. Roberts, 503 F.2d 598 (9th Cir. 1974), cert. denied, 419 U.S. 1113, 95 S.Ct. 791, 42 L.Ed.2d 811 (1975); United States v. Beve, 445 F.2d 1037 (9th Cir. 1971); Sanders v. United States, 373 F.2d 735 (9th Cir. 1967). She fails to offer support relating to the very different problem, present in our case, in which the government attempts to cross-examine a witness-defendant who has previously waived his privilege against self-incrimination.

In determining whether it is improper for the government to ask a defendant questions which will result in an assertion of the privilege against self-incrimination, the central consideration is whether the defendant has waived his privilege as to the propounded questions. When a witness or a defendant has a valid Fifth Amendment privilege, government questions designed to elicit this privilege present to the jury information that is misleading, irrelevant to the issue of the witness's or the defendant's credibility, and not subject to examination by defense counsel. see Namet v. United States, 373 U.S. 179, 186-87, 83 S.Ct. 1151, 10 L.Ed.2d 278 (1963). Therefore, we do not allow this form of questioning,

But when a defendant has voluntarily waived his Fifth Amendment privilege by testifying in his own behalf, the rationale for prohibiting privilege-invoking queries on cross-examination does not apply. The defendant has chosen to make an issue of his credibility; he has elected to take his case to the jury in the most direct fashion. The government, accordingly, has a right to challenge the defendant's story on cross-examination. Brown v. United States,

supra, 356 U.S. at 154-56, 78 S.Ct. 622. The government mav impeach the defendant bv developing inconsistencies in his testimony; the government mav also successfully impeach him bv asking questions which he refuses to answer. If the refusals could not be put before the jury, the defendant would have the unusual and grossly unfair ability to insulate himself from challenges merely by declining to answer embarrassing questions. He alone could control the presentation of evidence to the jury.

Our view finds support in decisions construing the propriety of judicial and prosecutorial comment upon a defendant's refusal to testify. Griffin v. California 380 U.S. 609, 615, 85 S.Ct. 1229, 14 L.Ed.2; 106 (1965), held that neither the government nor the court may comment on an accused's exercise of his Fifth Amendment privilege by refusing to testify. But it has long been established that comment is allowed when a defendant fails to explain evidence against him after first waiving his privilege by taking the witness stand. Caminetti v United States, 242 U.S. 470, 492-95, 37 S.Ct. 192, 61 L.Ed. 442 (1917). (FN7) Since the offering of questions designed to elicit invocations of the Fifth Amendment is really only a form of comment upon the defendant's failure to testify, intended to present to the jury the government's interpretation of his credibility, we believe that the rule of Caminetti should apply to the present case.

We have concluded that appellant waived her privilege against self-incrimination with respect to her activities during the interval between her arrival in Las Vegas and her arrest in San Francisco. Therefore, it was permissible for the government to ask questions about this period, even though they led to 42 assertions of the Fifth Amendment.

U.S. v. Hearst 563 F.2d 1331 (9th Cir. 1977) (emphasis added)

Judge Schaeffer found that this evidence was relevant.

Accordingly, inquiry into the rape was appropriate even if it resulted in Chandler taking the Fifth.

Further, despite Chandler's contention that he was forced to take the Fifth, obviously the state would have preferred that Chandler answer all of the questions propounded regarding the rape and given the trial court's ruling that the evidence was relevant, it is the state's position that Chandler had waived the privilege and should have either been compelled to answer the questions or be subject to having his direct testimony stricken. Ellis v. State, 550 So.2d 110 (Fla. 2d DCA 1989) (When Ellis took the stand and denied guilt, he was subject to proper cross examination by the state. When Ellis refused to testify, the trial court had the authority to advise the jury to disregard Ellis's testimony.) Given these alternatives, Chandler's being permitted to invoke the Fifth without requiring him to answer was surely the optimum option.

Moreover, Judge Schaeffer couldn't have been more right when she said, "None of us has any idea what he is going to say." (V98, T2163) The fact'is Chandler did respond to numerous questions about the Madeira Beach rape, (V98, T2234-35, 2277-78) as well as his actions in reference to the rape investigation. (V98, T2206-7, 2224-25, 2228-29, 2231, 2251, 2275) The state's entire cross-examination" of Chandler regarding any reference to the rape of

---

'The record shows that Chandler's testimony encompassed over 119 pages of transcript. Of that 119 pages, 31 pages were on direct,

Judy Blair in Madeira Beach was a very minor part of the state's examination and is set forth in the record as follows:

> Q What happened to make you realize that in November of '89?
> A I seen a composite in the paper.
> Q That related to the rape of Judy Blair, did it not?
> A I refuse to answer any questions that relates to the --
> Q Not asking you if you did it, I'm saying what did the composite relate to? What did you read in the paper? You testified to that.
>
> (V98, T2206)
>
> * * *
>
> Q What made you realize then it was the people you gave directions to?
> A Composite in the paper -- okay? -- had something to do with the Madeira Beach rape?
> Q That's correct.
> A Okay. It said in the paper, "We're linking these two together." I looked, and it shocked me, and that's when I recognized her,
>
> (V98, T2207)
>
> * * *
>
> Q Did you flee the state?
> A Yes, I did.
> Q Because you were afraid?
> A Because I was afraid of the Madeira Beach case, yes, I was.
> Q You were just afraid of the beach case?
> A That's right.
> Q The connections to the homicide had nothing to do with it?
> A Didn't worry me that much.
> Q Didn't really?

---

83 pages were on cross, 2 pages on redirect and 2 pages on recross.

A No.

Q You weren't concerned about the fact that you were potentially identified in the Madeira Beach rape case and it just so happened that the police connected this with the Rogers case? The connection with the Rogers case didn't concern you?

A Worried me, but I figured you people would find out who did it.

(V98, T2224-2225)

* * *

A Mr. Crow, I did not want to have to have a PD. If I was arrested on the Madeira Beach case, I needed money to obtain an attorney. I went to Ohio. I got with Rick and Kristal to try to obtain some money.

(V98, T2228)

* * *

Q Why did you do that?

A To see if the cops had been to my house on the Madeira Beach case.

Q Still aren't concerned about the Rogers case?

A Yes, I was, but I was concerned more about the Madeira Beach case.

(V98, T2228)

* * *

THE WITNESS: Because I thought possibly my phone had been tapped.

Q (By Mr. Crow:) On the Madeira Beach rape case?

A Yes.

(V98, T2229)

* * *

Q Tell me how it came out, Mr. Chandler.

A I went to the motel, checked in,

give her a call. They stopped up, started talking with Rick about building money up. I needed some cash. Said all he had was two ounces of cocaine he could front me. I said, "That's fine."

She wanted to know what I was doing in Cincinnati, so I told her that I had been accused of a rape from Madeira Beach, and they found three women floating in Tampa Bay they're trying to link me with.

That was it.

Q Did you tell her you were innocent of both crimes?

A Did I tell her that I was innocent?

Q Yeah.

A Most certainly did. She never went to no bathroom. She never left the room.

(V98, T2231)

* * *

Q Let's talk about May 14, 1989. Were you on Madeira Beach that evening?

A I will not discuss the rape case.

Q I'm not asking about the rape case yet. I'm asking if you were on Madeira Beach on May 14, 1989.

A That's where you're going, so I won't answer.

Q Refuse?

A Yes.

THE COURT: We'll have to have a procedure here. You cannot refuse to answer his questions unless you invoke your Fifth Amendment privilege, which is your right not to incriminate yourself. You can't simply tell him, "I will not answer that," because I can force you to answer it unless you say, "I refuse to answer that on the grounds it might incriminate me."

THE WITNESS: Every time he asks me, I say, "I plead the Fifth."

THE COURT: You can say, "I plead the Fifth." And we now know what that means.

THE WITNESS: Okay.

Q (By Mr. Crow:) The question was:

Were you on Madeira Beach on May 14, 1989?

A I plead the Fifth, sir.

Q You familiar with the John's Pass area?

A Yes, I am,

Q Had you been out there on occasions prior t May of 1989?

A Yes, I have.

Q Did you have jobs out in that area?

A Never.

Q Did you have friends in that area?

A No.

Q Were you in the John's Pass area on May 14?

A I plead the Fifth, sir.

Q Did you meet Judy Blair and Barbara Mottram in the parking lot of a convenience store?

A I plead the Fifth, sir.

Q Do you know Barbara Mottram and Judy Blair?

A I plead the Fifth, sir.

Q Did you recognize them?

A I plead the Fifth, sir.

Q Refusing to answer because you might incriminate yourself?

A I plead the Fifth, sir.

Q Are you afraid your answers will incriminate you?

THE COURT: Mr. Crow, you don't need to get into that anymore. I have explained to the jury what the Fifth Amendment is. He doesn't have to say it every time.

You understand each time he pleads the Fifth, he's invoking his right not to incriminate himself. That's his right. He can do that. We are all clear on that.

(V98, T2234-2236)

* * *

Q Did you do that when Judy Blair was on the boat with you?

A I am pleading the Fifth, sir.

Q Did you rape Judy Blair on May 15?

MR. ZINOBER: I'm objecting. Every

time he inquires him, it's in front of the jury.

THE COURT: Overruled.

Q (By Mr. Crow:) Did you rape Judy Blair on May 15, 1989.

A I am refusing to answer any questions about the rape case. It has no bearing on the Rogers. I plead the Fifth.

THE COURT: Sir, sir, sir, please don't have me have to tell you this again. You don't have the right to refuse to answer his questions unless your lawyer gets me to sustain an objection.

You can invoke the Fifth. You cannot refuse to answer his questions. You have taken the stand, and he has a right to ask you questions. You must plead the Fifth or answer his questions.

Q (By Mr. Crow:) Tell me the conversation you had with Barbara Mottram and Judy Blair in the parking lot of the convenience store on Sunday, May 14, 1989.

A I plead the Fifth.

MR. ZINOBER: May we approach?

THE COURT: You may.

(The following is a side-bar conference held out of the hearing of the jury.)

MR. ZINOBER: So I don't have to keep jumping up and down, can I have a standing objection to the -- otherwise --

THE COURT: No, you can't. You can object every time. I can't give you a continuing objection because there may be things that I would agree on an objection.

You will have to object, but -- and no matter -- what is the standing objection to?

MR. ZINOBER: Mr. Crow inquiring -- asking questions that are reasonably designed to elicit testimony about the Madeira Beach rape case. He will be pleading the Fifth each time.

THE COURT: That's overruled, because I have heard him -- I have heard him answer some questions when I thought he might have taken the Fifth. He is not pleading the Fifth every time. I'm

sorry, he's not.

MR. CROW: I'm not requiring him to do anything. I will prefer him to answer the question.

MR. ZINOBER: Just so everybody understands why I am jumping up and down.

(V98, T2236-2238)

* * *

Q What made you feel you were no longer in danger as a result of the publicity on the Madeira Beach rape case?

A I don't know. I just went home.

(V98, T2251)

* * *

Q You never discussed the Madeira Beach rape case?

A Of course not,

Q Never asked them about the Rogers homicide?

A I never did, no.

Q I'll ask you a couple of questions, and I have a feeling I know your response, on the Madeira Beach rape case. When you first contacted -- had contact -- with Judy Blair and Barbara, did you use a false name?

A I plead the Fifth.

MR. ZINOBER: Objection, your Honor. Objection, your Honor. He's asking him to break the privilege.

THE COURT: Overruled.

Q (By Mr. Crow:) What was your response?

A I plead the Fifth.

Q You refuse to answer?

Have you ever used the name Dave?

MR. ZINOBER: Objection, your Honor. He's asking the witness to tread upon the privilege.

THE COURT: Overruled.

THE WITNESS: I plead the Fifth.

MR. ZINOBER: May we approach?

THE COURT: You may.

(The following is a side-bar conference

held out of the hearing of the jury.)

MR. ZINOBER: I move for mistrial based upon his requiring Mr. Chandler to go over the privilege..

THE COURT: Overruled.

(Thereupon, the proceedings at side-bar were concluded, and the trial resumed before the jury as follows.)

MR. CROW: Proceed, your Honor?

THE COURT: You may.

Q (By Mr. Crow:) Did you invite Barbara and Judy Blair out for a sunset cruise on your boat?

MR. ZINOBER: Objection. Privilege.

THE WITNESS: I plead the Fifth.

MR. ZINOBER: Objection. Privileged.

THE COURT: Overruled.

Q (By Mr. Crow:) You said?

A I plead the Fifth.

Q Did you take Judy Blair out that evening?

MR. ZINOBER: Objection. Privilege. I'm sorry.

Q (By Mr. Crow:) Did you take Judy on your boat that evening?

THE COURT: Overruled. We are going to have to have a little procedure here. You will have to let me put a ruling on the record.

Your objection?

MR. ZINOBER: Privilege.

THE COURT: Overruled.

Q (By Mr. Crow:) I'm not sure what way my question. I'm sorry. I got lost.

Did you take Judy Blair out in your boat that evening from John's Pass?

A I plead --

MR. ZINOBER: Objection. Privilege.

THE COURT: Overruled.

THE WITNESS: I plead the Fifth.

Q (By Mr. Crow:) Once you were out on the boat with her, did you make sexual advances towards her?

MR. ZINOBER: Objection. Privilege and outside the scope.

THE COURT: Overruled.

THE WITNESS: I plead the Fifth.

Q (By Mr. Crow:) Did you at any point ask her what you were going to do, swim for

it?

MR. ZINOBER: Objection. Privilege. Outside the scope.

THE COURT: Overruled.

THE WITNESS: No.

Q (By Mr. Crow:) You never told her that?

A No.

Q Did you ever at any point threaten to shut her up with duct tape?

A No.

MR. ZINOBER: Objection. Privilege.

THE COURT: You're claiming privilege, and he's trying to answer the question.

Mr. Chandler, do you wish to invoke the right not to incriminate yourself or answer these questions?

THE WITNESS: Plead the Fifth all the way on the Madeira Beach case.

THE COURT: Then you can't be answering some and not answering others.

THE WITNESS: I understand.

THE COURT: What is your answer to whether or not you threatened to put duct tape around her mouth?

THE WITNESS: I plead the Fifth on that.

Q (By Mr. Crow:) Did you at any point ask her to have sex with something what --

MR. ZINOBER: Objection. Privilege.

THE WITNESS: I'm sorry?

MR. ZINOBER: Instruct my client you have to wait until I make the objection. Objection. Privilege and outside the scope.

THE COURT: Overruled.

THE WITNESS: I plead the Fifth on that.

MR. CROW: No further questions.

MR. ZINOBER: May we approach?

THE COURT: You may.

(The following is a side-bar conference held out of the hearing of the jury.)

MR. ZINOBER: Your Honor, again, move for mistrial based upon, One, the disclosure of the Williams Rule evidence;

and, secondly, Mr. Crow's questions which caused my client to invoke the Fifth in front of the jury.

THE COURT: Well, it's overruled, But as I indicated, some of the questions your client apparently wanted to answer. You may have wanted to invoke the Fifth, but sometimes he didn't.

So that's why you don't have a standing objection, because some of it he wanted to answer and some he didn't.

MR. CROW: Just for the record, since I've been repeatedly maligned by the accusations that I was causing Chandler to invoke the Fifth Amendment, I want to clarify he has a Fifth Amendment right. I wanted answers to my questions. That is what I would prefer.

It was his election and not my desire that he response in the way that he did.

THE COURT: The record is clear. It was Mr. Crow's position last night, Mr. Zinober, that he did not think he had a Fifth Amendment privilege and didn't want him to plead the Fifth. He wanted answers to the questions.

And it was you and your client who indicated that you wanted to invoke the Fifth, thought that I should make a ruling he had the right to invoke the Fifth.

Now, I had to do it one way or another. I had to either make him answer or invoke the privilege. Seems to me that I did what you wanted me to do, which was to allow him to invoke the Fifth.

Mr. Crow wanted answers. He lost, you won. So your request for a mistrial is denied.

(V98, T2275-2280)

Once Chandler took the stand he opened himself up to cross-examination extending to the entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make

clearer the facts testified to in chief, Buford v. State 403 So.2d 943, 949 (Fla. 1981); Coxwell v. State, 361 So.2d 148 (1978), "his credibility may be impeached and his testimony assailed like that of any other witness, and the breadth of his waiver is determined by the scope of relevant cross-examination. It is well settled that the appropriate subjects of inquiry and the extent of cross-examination are within the sound discretion of the trial court. Cruse v. State, 588 So.2d 983, 988 (Fla. 1991): Rose v. State, 472 So.2d 1155, 1158 (Fla. 1985), Smith v. Illinois, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968). Nowhere "is there even a suggestion that the waiver and the permissible cross-examination are to be determined by what the defendant actually discussed during his direct testimony. Rather, the focus is on whether the government's questions are 'reasonably related' to the subjects covered by the defendant's testimony." U.S. v. Hearst, 563 F.2d 1331 (9th Cir. 1977). Chandler "has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts." Brown v. United States, 356 U.S. 148, 154-55, 78 S.Ct. 622, 626, 2 L.Ed.2d 589, 596-97 (1956).

A review of the state's questions in the instant case shows that they were relevant to the crime charged and 'reasonably related' to his testimony. Chandler testified that he fled to Ohio after the Madeira Beach rape and that the statements he made to the Mays were a result of his fear of apprehension for the Madeira

Beach rape. (V98, T2206-7, 2294-25, 2228-29, 2231, 2251, 2275) He also testified that he barely spoke to the Rogers, that he did not take them out on his boat and that he did not recognize their photographs. Thus, the facts of the rape were relevant to put his actions and statements in context and to establish that his actual concern was fear of apprehension for the murders of the three Rogers women. This ruling by the trial court was within her discretion and appellant has failed to show an abuse of that discretion.

In Shafter v. State, 374 So.2d 1127, 1128 (Fla. 1st DCA 1979), the court held that where the defendant took the stand and testified that he had been given the stereo by his girlfriend and, since he already had a tape player, he returned it for a refund, the State was properly allowed to cross-examine the defendant concerning a collateral offense of petty larceny. The court stated:

> On appeal, defendant contends that it was error to allow the State to cross examine him concerning the collateral offense, regardless of its relevancy to the offense on trial. Defendant contends that the evidence should have been presented as part of the State's case in chief. Cited in support of this contention are the cases of Watts v. State, 160 Fla. 268, 34 So.2d 429 (1948) and McArthur v. Cook, 99 So.2d 565 (Fla. 1957) which deal with the proper method of questioning of a defendant who takes the stand concerning his previous conviction of a crime. The rule of those decisions is not applicable here, however, since the testimony was not elicited by way of attack on defendant's character generally and credibility as a witness. Here the testimony was relevant and admissible under Williams v. State, 110 So.2d 654 (Fla.

1959) to show a pattern, plan or scheme and was proper to refute defendant's testimony on direct examination as to the circumstances of the JM Fields incident.

In Oliva v. State, 346 So.2d 1066 (Fla. 3d DCA 1977) the court held that evidence of a prior criminal transaction between the parties was properly brought out on cross examination. In that case the defendant testified that until the date of the alleged sale of cocaine, he had never seen the State witness who testified he sold her cocaine; that he had never given her cocaine, and that he had never bought anything of value from another of the State's witnesses. The State was allowed to bring out on cross examination of the defendant, and in its case on rebuttal, that there had been a prior meeting of the parties; that defendant had negotiated with both of the State's witnesses and furnished them with a sample of cocaine and that he had in fact received cash from both witnesses. The District Court held that the cross examination of the defendant was proper under Rule 3.250, Fla. R. Crim. P. and, further, that the evidence would meet the test of the Williams Rule because the evidence "showed a method of operation which was the same as employed in the sale with which defendant was charged." (346 So.2d at 1068)

Shafter v. State, 374 So.2d 1127, 1128 (Fla. 1st DCA 1979), See, also, Warner v. State, 638 So.2d 991, (Fla. 3DCA 1994) (prosecutor's cross-examination of Warner and comments during closing argument proper.) Johnson v. State, 380 So.2d 1024 (Fla. 1979) (once defendant chooses to take stand he may be examined as other witnesses on matters which illuminate the quality of testimony).

Finally, the state maintains that for the most part Chandler's claim that cross-examination exceeded the scope of direct is

procedurally barred. To the extent that this claim was asserted prior to Chandler's testimony, it is the state's position that said request was premature. Until Chandler's testimony was complete, Judge Schaeffer could not determine what evidence was within the scope of his testimony or to what extent he may waive his Fifth Amendment privilege. With regard to Chandler's challenge that the cross-examination was beyond the scope of direct, this claim has been waived by counsel's failure to renew his objection until the end of Chandler's cross-examination. The state submits the following in support of this position:

> MR. ZINOBER: Your Honor, the next witness would be Mr. Chandler. Mr. Chandler does want to testify in front of the jury about the Rogers homicide because of the circumstance of the Williams Rule, which we objected to. He does not wish to talk to the jury about the Madeira Beach case.
>
> He also does not, quite frankly, want to invoke his Fifth Amendment right in front of the jury.
>
> THE COURT: Speak up, counsel.
>
> MR. ZINOBER: He does not wish to invoke the Fifth Amendment right in front of the jury. He's being placed in a position essentially, in my perspective, of having to give up one Fifth Amendment right to invoke another.
>
> I would, first of all, move for a mistrial based upon the admission of the Williams Rule evidence.
>
> THE COURT: That is denied.
>
> MR. ZINOBER: I'd ask for the Court's pretrial ruling or I'd ask for the Court's ruling if he gets on the stand, he plans to invoke his Fifth Amendment as far as the Madeira Beach sexual battery case is concerned.
>
> THE COURT: Any objection from the State?
>
> MR. CROW: Judge, if that's procedure the

Court feels is correct, we'll --

THE COURT: As we discussed last night and no ex parte conversations, this is something the Court was made aware of. I can understand the dilemma he's in.

I don't wish to prohibit him from testifying in this case. However, I made a ruling that the Madeira Beach rape case is relevant to this homicide.

He certainly has a pending case and has the right, certainly. Maybe he doesn't without objection from the State. I certainly do not object to his invoking the Fifth Amendment right.

His privilege against himself -- I can understand why he doesn't want to do that, but I know of nothing that would suggest that he can testify about a case and then elect not to answer State Attorneys' questions they're going to ask.

They're going to ask questions about that case. There does seem to be a case that **you** will recall the State provided me last night, and I don't remember which case it was. However, it appeared that the Defendant was objecting to the State cross-examining the Defendant regarding collateral crime, and they said there was no error in that.

The problem is I made a ruling. I may be wrong. And if I am, that's fine. But the ruling I made is for various things. The Madeira Beach rape case is admissible in the murder case..

State is obviously going to want to inquire of Mr. Chandler.

He has two choices. He can answer their questions, or he can invoke his Fifth Amendment privilege.

Counselor, you are the one that told the State they could prove a rape.

MR. ZINOBER: Your Honor, he does not plan -- that's the basis of it. He does not plan -- recognizes the State was going to be presenting evidence based upon the Court's ruling, and it's our decision we're not going to defend the rape in this case. And that is the position we have taken. That's the position that we are holding.

THE COURT: No way do I want to prohibit

Mr. Chandler from testifying before this jury. *No way do I want to prohibit the State from cross-examining Mr. Chandler about matters that I have ruled axe relevant to this case.*

That puts Mr. Chandler in a tough dilemma. That really isn't my concern. That's your concern and Mr. Chandler's concern.

MR. ZINOBER: Your Honor --

THE COURT: Ready for the jury?

MR. ZINOBER: If I may speak? Along those lines, I would also be taking the position that, quite frankly, I am going to be limiting my direct examination, and I'm not going to be talking about the rape case in my direct examination.

THE COURT: *Please don't* **ask** *me in advance to make some ruling on what I'm going to rule based on something that I haven't heard about, whether or not the State's cross is beyond the scope of direct. I don't want to hear it, I have no intention of telling you whether -- if you object and it's beyond the scope, I have no idea how I'll rule.*

None of us has any idea what he is going to say, and I can't rule magically, so don't ask that.

MR. ZINOBER: May we approach briefly? We don't need the court reporter.

THE COURT: You knew how the Court was going to rule. We went over this last night with everybody present. I'm sure you talked to your client after that. Certainly cannot come as a surprise to you or to your client.

This is exactly what I said last night. The State indicated it was their belief he shouldn't even be allowed to invoke the Fifth Amendment right. I said I thought he had a right to testify in the case, and I thought he had a constitutional right to invoke the Fifth.

He does want to testify or doesn't?

MR. ZINOBER: One second, please.

He is going to testify.

(V98, T2160-2164)

As Chandler's request for a standing objection *was denied,* it

was incumbent upon him to renew the objection contemporaneous with any objectionable questioning. Although defense counsel objected based on privilege regarding questions concerning the Madeira Beach rape, he did not object based on scope until Chandler had almost finished testifying and then it was only concerning three questions: 1) "Once you were out on the boat with her, did you make sexual advances toward her?" 2) "Did you at any point ask her what you were going to do, swim for it? 3) "Did you at any point ask her to have sex with something what--." (V98, T2277 -79)

Thus, Chandler's contention that this questioning was beyond the scope of his direct testimony is procedurally barred because Chandler did not raise a contemporaneous objection on this basis. The failure to raise a specific contemporaneous objection bars review. Peterka v. State, 640 So.2d 59, 70 (Fla. 1994); Geralds v. State, 674 So.2d 96, 99 (Fla. 1996); Jackson v. State, 648 So.2d 85, 90 (Fla. 1994); Finney v. State, 660 So.2d 674, 683 (Fla. 1995); Barwick v. State, 660 So.2d 685, 697 (Fla. 1995); Garcia v. State, 644 So.2d 59, 62 (Fla. 1994); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

The state submits that when Chandler's testimony is read in context the focus of the state's questioning clearly centered on Chandler's culpability for the death of the Rogers women, that questioning concerning the Madeira Beach rape was relevant and that Chandler has failed to show harmful error.

ISSUE III

WHETHER THE TRIAL COURT ERRED BY ALLOWING THE STATE TO PRESENT A PRIOR CONSISTENT STATEMENT BY KRISTAL MAYS.

At trial Appellant's daughter, Kristal Mays, testified that Chandler admitted to her that he had committed the murders and the rape. Chandler maintained at trial that Mays had fabricated the admissions. Chandler impeached Mays' testimony with evidence that she had two motives to fabricate her claim that Chandler admitted committing the murders to her; 1) Chandler's drug rip-off of Mays' husband and, 2) the payment she received to appear on a television show about Chandler's case. In order to rebut the charge of recent fabrication, the state was allowed to introduce a prior consistent statement made by Kristal Mays to law enforcement in 1992.

Chandler urges on appeal that Mays' 1992 statements to law enforcement were not admissible as they were made after her reason to fabricate existed. It is the state's contention that the trial court's denial of the defense objection was proper. The admission of this evidence was within the trial court's discretion and appellant has failed to show an abuse of that discretion.

It is well established that prior consistent statements are generally inadmissible to corroborate or bolster a witness' trial testimony. Rodriguez v. State, 609 so. 2d 493 (Fla. 1992). Moreover, because prior consistent statements are usually hearsay; they are inadmissible as substantive evidence unless they qualify

under an exception to the rule excluding hearsay. Id. at 150 citing, Charles W. Ehrhardt, Florida Evidence, 801.8 (1992). Statements offered to rebut a charge of recent fabrication are excluded from the definition of hearsay. §90.801(2)(b) Florida Statutes (1991).

In the instant case, Mays' prior statement was admitted in response to the state's questioning on redirect concerning the payment she received for going on television in 1994. (V91, T1197) The following discussion ensued:

REDIRECT EXAMINATION

BY MR. CROW.

Q Talking about law enforcement, you are talking about being a witness in the case and talking to the attorneys?
A That's right.
Q You made scheduling appointments to interrupt your schedule to come down here to be a witness?
A Yes, I did.
Q Let's talk about the money that you received for going on TV. You received a payment for that?
A Yes, I did.
Q You said that was in 1994?
A Yes.
Q Back two years before that, in 1992, did you give a sworn statement to the State Attorney's Office concerning this case?
A Yes, I did.
Q And in that sworn statement back on October 6 --
MR. ZINOBER: May we approach?
THE COURT: You may.
(The following is a side-bar conference held out of the hearing of the jury.)
MR. ZINOBER: I don't see where this is admissible at this time as a prior consistent statement.

THE COURT: I didn't know what it is.

MR. CROW: Prior consistent statements -- tried to impeach her by accepting money, and there's a suggestion of fabrication and motive that developed after this statement was given.

And I'm allowed to go back and give a statement that existed prior to that motive arises. He didn't impeach her based upon payment of money in 1994, and I'm allowed to bring up the fact that she said exactly the same thing two years earlier before that was ever discussed or ever arose. That's when it's allowed to come in for --

MR. ZINOBER: The motive was the drug deal. That's what I hit. That arose afterwards, as well as does not change the issue of what it is basically if the motive arises prior to the time that the consistent statement is made and then a prior consistent statement cannot come in.

If it arises afterwards, it could. But the point here was that prior consistent -- the motive arose before, and it was because of the cash.

THE COURT: What could you possibly be getting in before the jury? She got paid a thousand dollars in 1994. If it wasn't -- but she got paid it saying something. Must be something juicy or they wouldn't want it,

Are you saying she made it up to get a thousand dollars?

MR. ZINOBER: She made the statement -- she already made the statement prior to that. She then makes it again, and she's getting more money.

Motive arose before that. The statement she gave -- she gave the statement prior to giving the statement -- this statement -- okay? -- before she gave the statement to the State Attorney's Office.

THE COURT: You're making no sense to me. Maybe I'm not hearing you. Tell me again. Motive --

> MR. ZINOBER: In other words, the question is, if it's a prior consistent statement, and the motive to lie -- okay? -- arises before the time that the prior consistent statement is made, then it is not admissible. It's only admissible if the motive arises after October.
>
> THE COURT: I thought she said she was on Hard Copy in '94.
>
> MR. ZINOBER: Correct. But the motive I hit arose before that with the drug deal. That was motive.
>
> THE COURT: That may be what you're suggesting and if you want to tell the jury, that's okay. But the jury is going to think -- the way it came across to me is that you were suggesting to them that she lied to get a thousand dollars on Hard Copy, and now I know what Hard Copy is, they wouldn't at all be interested if she was going to say he never said anything.
>
> So it comes across as you're suggesting she said this because she's paid money to say it.
>
> Your objection is overruled.
>
> (V91 T1197-1200)

While it is true that Chandler also questioned Mays about the drug rip-off and the fact that she remained angry with her father over it, it is also true that defense counsel also insinuated that Mays' appearance on Hard Copy gave her a motive to fabricate because she received payment for her appearance. The 1992 statements were admitted to rebut the inference that Mays' appearance on Hard Copy provided her with a motive to fabricate. It was never suggested to the jury that the statements to the state investigator were made before the drug rip-off.[4] The admission of

---

"Chandler also contended that Mays failure to state in her pretrial deposition that Chandler had admitted killing the women was further

this statement was within the trial court's discretion and appellant has failed to show an abuse of that discretion. Rodriguez v. State, 609 So. 2d 493 (Fla. 1992) (defense counsel's reference to a plea agreement with the state during cross-examination was sufficient to create an inference of improper motive to fabricate); Jackson v. State, 599 So.2d 103, 107 (Fla. 1992) (taped statement admissible to rebut the inference codefendant had a motive to fabricate in light of agreement to testify against Jackson); Alvin v. State, 548 So. 2d 1112, 1114 (Fla. 1989) (tape recording of statement made by witness to police shortly after he was stopped by police was admissible in murder prosecution to rebut inference that witness had fabricated story implicating defendant because State granted him immunity in exchange for his testimony); Dufour v. State, 495 So. 2d 154, 160 (Fla. 1986), cert. denied, 479 U.S. 1101 (1987) (trial court could allow introduction of State witness' former statement as prior consistent testimony tending to rebut implications of improper motive or recent fabrication, where defense had raised those implications through impeachment during cross-examination).

Furthermore, error, if any, is harmless. Alvin v. State, 548 So. 2d 1112, 1114 (Fla. 1989). The jury knew that the drug rip-off

---

evidence that the statement was fabricated. Not only was this rebutted by the prior consistent statement, but also, by an examination of the deposition itself. The deposition reveals that Mays told defense counsel that Chandler said the police were looking for him because he had killed the women.

was before the statements given to the state attorney's office and defense counsel was given the opportunity to recross the witness concerning these statements. (V91, T1214)

ISSUE IV

WHETHER THE PROSECUTOR'S COMMENTS IN CLOSING ARGUMENT VIOLATED CHANDLER'S DUE PROCESS RIGHT TO A FAIR TRIAL.

Appellant's fourth claim is that the prosecutor violated his right to a fair trial by making numerous improper remarks during closing argument, including derogatory remarks about Chandler, comments on Chandler's assertion of his Fifth amendment privilege, his believability and his guilt, and attacks on defense counsel and his credibility. Appellant concedes, however, that except for one objection to a statement referring to Chandler's failure to tell his daughters that he was innocent, that none of the comments he is now challenging was raised to the court below. This Court has long held that absent a showing of fundamental error, the failure to object to an alleged improper comment bars review. Wvatt v. State, 641 So.2d 355 (Fla. 1994); Street v. State, 636 So.2d 1297 (Fla. 1994); Waterhouse v. State, 596 So.2d 1008 (Fla. 1992). Fundamental error is error that goes to the foundation of the case or the merits of the cause of action and can be considered on appeal without objection. Crump v. State, 622 So.2d 963, 972 (Fla. 1993); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Accordingly, the state maintains that this claim should be denied as it is procedurally barred.

Even where a challenged comment is the subject of a contemporaneous objection, this Court has repeatedly recognized

that "wide latitude is permitted in arguing to a jury." Thomas v. State, 3.26 So.2d 413 (Fla. 1975); Spencer v. State, 133 So.2d 729 (Fla. 1961), cert. denied, 369 U.S. 880, 82 S.Ct. 1155, 8 L.Ed.2d 283 (1962), cert. denied, 372 U.S. 904, 83 S.Ct. 742, 9 L.Ed.2d 730 (1963). Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments. Spencer. The control of comments is within the trial court's discretion, and an appellate court will not interfere unless an abuse of such discretion is shown. Thomas; Paramore v. State, 229 So.2d 855 (Fla. 1969), modified, 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 751 (1972). "A new trial should be granted only when it is 'reasonably evident that the remarks might have influenced the jury to reach a more severe verdict of guilt than it would have otherwise done.' Darden v. State, 329 So.2d 287, 289 (Fla.1976), cert. denied, 430 U.S. 704, 97 S.Ct. 308, 50 L.Ed.2d 282 (1977). Each case must be considered on its own merits, however, and within the circumstances surrounding the complained of remarks. Id. Compare, Paramore with Wilson v. State, 294 So.2d 327 (Fla. 1974). Breedlove v. State, 413 So.2d 1, 8 (Fla.), cert. denied, 459 U.S. 882, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982)." Bonifav v. State, 21 Fla Law Weekly S301 (Fla. 1996). A determination as to whether substantial justice warrants the granting of a mistrial is within the sound discretion of the trial court.' Sireci v. State, 587 So.2d 450 (Fla. 1991).

'Contrary to appellant's assertions, no motion for mistrial was made with the single objection. (V101, T2645-46) At the

A mistrial is appropriate only when the error committed is so prejudicial as to vitiate the entire trial. King v. State, 623 So.2d 486 (Fla. 1993).

With regard to the one comment that was raised to the court below, defense counsel argued that neither Rick nor Krystal Mays testified Chandler actually admitted killing three women to them, but, rather, that they testified he had only told them he was accused of a rape and that the police were trying to link it to a triple homicide. (V100 T 2539) In response to this argument, the state argued that Chandler didn't tell them he was innocent either. After this comment defense counsel objected on the basis of an alleged comment on the Defendant's exercise of his Fifth Amendment privilege. The court overruled the objection finding that Chandler testified and that the comment was not in reference to the invocation of his fifth amendment privilege. The trial court properly denied the objection as this argument was a proper

---

conclusion of closings, defense counsel moved for a mistrial on two grounds: Madeira Beach rape being a feature of the State's argument and the case and the State's making a reference to a "sort of a smokescreen effect of my witnesses". (V101, T2669). The court also denied this motion with this explanation:

> "I don't know about that, but if there was, that objection is something that you need to make when you hear it to give me an opportunity to correct it. If you hear something you want to object to, you need to do it like you did the other times so that way the attorney can have an opportunity to fix it, if that's the case."

response to the defense argument, Street v. State, 636 So.2d 1297 (Fla. 1994) and as a prosecutor may properly comment upon the defendant's failure to deny or explain incriminating facts when the defendant testifies. Caminetti v. United States, 242 U.S. 470, 492-95, 37 S.Ct. 192, 61 L.Ed. 442 (1917); Tucker v. Francis, 723 F.2d 1504 (11th Cir. 1987).

Chandler also asserts as error numerous comments made during closing arguments that were not the subject of a contemporaneous objection below. Therefore, the state maintains that all of the following comments are barred from review. Wvatt v. State, 641 So.2d 355 (Fla. 1994); Street v, State, 636 So.2d 1297 (Fla. 1994); Waterhouse v. State, 596 So.2d 1008 (Fla. 1992). The first comment Chandler challenges was the prosecutor's direction to the jury to 'think about all the things he wouldn't talk about and didn't say[.]' (V101, T2618) Chandler asserts that this statement was a comment on the exercise of his Fifth Amendment privilege regarding the sexual battery of Judy Blair.

A review of the record shows that not only did Chandler fail to object to the comment, but, that the comment was not a reference to Chandler's exercise of his Fifth Amendment privilege regarding the sexual battery of Judy Blair. To the contrary the record reveals that the comment was made in response to an argument made by defense counsel that his client took the "stand and looked you in the eye and told you he didn't do it." The prosecutor actually stated:

> "Mr. Zinober says his client took the stand and looked you in the eye and told you he didn't do it. Well, think about all the things he wouldn't talk about and didn't say and all the things he didn't remember.
>
> "And let's look at what he finally says. Every fact, almost everything that came out of his mouth on the witness stand was a lie."
>
> (V101, T2618)

This argument was a proper response to defense counsel's argument and does not constitute fundamental error.

Chandler also challenges several other remarks made by the State during closing, including the prosecutor referring to a "charade" that has gone on and accusations of defense counsel being "cowardly" and of "despicable" behavior as being attacks on defense counsel and his theory of defense. Appellant asserts that the State injected personal feelings and beliefs into the closing arguments and called Chandler "malevolent," "chameleon-like," and "a brutal rapist or conscienceless murderer." (V101, 2630). As none of the foregoing comments were the subject of an objection below, appellant is not entitled to relief on these claims. Sims v. State, 21 Fla Law Weekly S320 (Fla. 1996) (failure to object contemporaneously when prosecutor referred to defendant as a liar, accused defense counsel of misleading the jury, and bolstered his attacks on Sims' credibility by expressing his personal views and knowledge of extra-record matters not properly before Court on appeal and will not be considered.) See, also, Craig v. State, 510 So.2d 857, 864 (Fla. 1987), cert. denied, 484 U.S. 1020, 108

S.Ct. 732, 98 L.Ed.2d 680 (1988)."

Furthermore, even if this claim was not procedurally barred, appellant is not entitled to relief. In Estv v. State, 642 So.2d 1074, (Fla. 1994) this Court found no merit to Esty's claim that he was entitled to a new trial because the trial court failed to grant a mistrial after the prosecutor made improper comments during closing argument describing Esty as a "dangerous, vicious, cold-blooded murderer" and warning the jury that neither the police nor the judicial system can "protect us from people like that" as the challenged comments were not so prejudicial as to vitiate the entire trial. Esty v. State, citing, Duest v. State, 462 So.2d 446, 448 (Fla. 1985). This Court further noted that the control of the prosecutor's comments is within a trial court's discretion, and a court's ruling will not be overturned unless an abuse of discretion is shown. Esty v. State, citing, Durocher v. State, 596 So.2d 997, 1000 (Fla. 1992).

In light of the fact that the prosecutor's arguments did not "either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise" Spencer v. State, 645 So.2d 377, 383 (Fla. 1994), no reversible or harmful error has been demonstrated and relief should be denied. Estv v. State, 642 So.2d 1074 (Fla. 1994).

ISSUE v

WHETHER THE TRIAL COURT ERRED BY ACCEPTING APPELLANT'S WAIVER OF HIS RIGHT TO PRESENT MITIGATING TESTIMONY TO THE PENALTY PHASE JURY.

Appellant next claims that the trial court committed reversible error in violation of the dictates of Koon v. Dugger, 619 So.2d 246 (Fla. 1993), in accepting Chandler's waiver of his right to present testimony in mitigation. Although appellant concedes that the court inquired of both Chandler and defense counsel and that defense counsel delineated the witnesses and the nature of their testimony, he contends that because defense counsel did not inform the court of the content of the testimony which could have been offered by prospective defense witnesses, that death sentences must be vacated and this case remanded for a new penalty phase before a new jury.[6] It is the state's position that the trial court's inquiry and defense counsel's responses sufficiently comported with the dictates of Koon.

---

[6]To support his claim, Chandler relies on Justice Barkett's dissent in Hamblen v. State, 527 So. 2d 800 (Fla. 1988). This Court in Wuornos v. State, 20 Fla. L. Weekly S481 (Fla. 1995), rejected this argument stating, "As her second issue, Wuornos argues that her waiver of rights in the penalty phase should be invalid for the reasons stated in Justice Barkett's dissent in Hamblen v. State, 527 So.2d 800, 805-09 (Fla. 1988) (Barkett, J., dissenting). We disagree. A majority of this Court has never embraced Justice Barkett's views. To the contrary, we have held that "[a]t the trial level, the defendant is entitled to control the overall objectives of counsel's argument," including a waiver of the right to present a case for mitigation. Farr v. State, 656 So.2d 448, 449 (Fla. 1995)."

In Koon this Court established the procedure that must be followed when a defendant, against counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase. Id. at 250. Counsel must inform the court on the record of the defendant's decision. Counsel must indicate whether there is mitigating evidence that could be presented and what that evidence would be. The defendant must then confirm on the record that counsel has discussed these matters with him, and despite counsel's recommendation, that he wishes to waive presentation of penalty phase evidence. Id. This Court established this rule because of "the problems inherent in a trial record that does not adequately reflect a *defendant's waiver of his right to present any mitigating evidence*" and to avoid situations such as occurred in Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991), where the court found that defense counsel latched onto Blanco's waiver without first investigating potential mitigating evidence. Id. See, also, Allen v. State, 662 So.2d 323 (Fla. 1995); Elam v. State, 636 So.2d 1312 (Fla. 1994). In Koon this Court explained the impetus to the rule:

> In contrast to Blanco, this is not a situation in which counsel "latched onto" the defendant's instruction and failed to investigate penalty phase matters. O'Steen investigated potential mitigating evidence before trial. He reviewed the 1982 psychiatric reports and talked with Dr. Wald regarding guilt and penalty phase issues. In addition, O'Steen knew about Koon's family history, his background, and his chronic alcoholism. O'Steen testified that he talked with Koon about presenting penalty phase

> witnesses. Although O'Steen did not present penalty phase testimony, he argued the existence of mitigating factors based upon testimony presented in the guilt phase. O'Steen argued that Koon lacked the capacity to conform his conduct to law due to his intoxication; that Koon was a good father, a good provider, and a hard worker; and that Koon was generous toward his friends. Under these facts, we find no error in O'Steen following Koon's instruction not to present evidence in the penalty phase.
>
> Although we find that no error occurred here, we are concerned with the problems inherent in a trial record that does not adequately reflect a defendant's waiver of his right to present any mitigating evidence.
>
> 619 So.2d 250

Consistent with the intended purpose of Koon, this Court in Elam v. State, 636 So.2d 1312 (Fla. 1994), reviewed an alleged Koon violation and, citing, Durocher v. State, 604 So.2d 810 (Fla. 1992) made it clear that relief was not warranted on similar facts.[7] In Durocher, this Court held that:

[7] Elam was prior to Koon's effective date.

> "[W]e have consistently held that a defendant may, if done knowingly and voluntarily, waive participation in the penalty phase. E.g., Pettit v. State, 591 So.2d 618 (Fla.1992); Henry v. State, 586 So.2d 1033 (Fla.1991); Anderson v. State, 574 So.2d 87 (Fla.), cert. denied, --- U.S. ---, 112 S.Ct. 114, 116 L.Ed.2d 83 (1991); Hamblen. Here, the trial court swore in Durocher, had him take the stand, and questioned him closely on two different days on his understanding of what he was giving up and what he was risking by pleading guilty and waiving the presentation of mitigating evidence. The record shows that Durocher understood the consequences of his decision and that he freely, voluntarily, and knowingly waived participation in the penalty phase.
>
> * * *
>
> . . . Durocher's counsel told the court that, if given the opportunity, he would have presented testimony about Durocher's life and family and from the mental health experts who had examined Durocher. Durocher adamantly reiterated that he did not want any mitigating evidence introduced."
>
> 604 So.2d at 811-12

As the record in Durocher revealed sufficient information to establish that Durocher "freely, voluntarily, and knowingly" waived participation in the penalty phase after being apprised of potential evidence that could be put on in mitigation, this Court held this issue to be without merit.

The following excerpt from record in the instant case just as clearly establishes that Chandler "freely, voluntarily, and knowingly" waived participation in the penalty phase after being apprised of potential evidence that could be put on in mitigation.

> THE COURT: Okay. I did want to note for

the record that you had requested and received a confidential expert. I presume that the confidential expert examined the Defendant for possible relevant mitigation.

MR. ZINOBER: That's correct.

THE COURT: And I understand you won't be calling that expert.

MR. ZINOBER: That's correct.

THE COURT: You also had mentioned to me when we were going over the possible jury instructions yesterday that you had some family members that you might wish to present, that your client was going to request that you not present them.

THE COURT: (sic) That's correct. Your Honor, may I make an objection while we are on the other point?

THE COURT: I'm sorry. On?

MR. ZINOBER: On the expert, not calling him. I would like to object for the record to him, and I don't have the case, but the recent Supreme Court pronouncement that, if we list an expert for --. Dillbeck -- if we list an expert for penalty phase, that they have the right to have their expert basically examine my client prior to -- prior to penalty phase.

THE COURT: Well, they wouldn't, in my court. You can list that, but I guarantee you if you listed an expert, and the State required me to allow him be examined, I wouldn't allow it.

MR. ZINOBER: Then we still might be calling him.

THE COURT: I would have told them to get that expert in the event that the Defendant was convicted, and they could get right to it right after the guilt phase.

But I didn't have to make that decision, and I didn't have to list them, because -- but, I mean, I -- obviously, you could list your expert now if you wanted to, and then they would make their motion, and I presume you still don't plan to list the expert.

MR. ZINOBER: No.

THE COURT: All right. Now, can we talk a little bit about the family members that you might have wanted to call. And your client does not wish for you to call them?

MR. ZINOBER: Yes, your Honor. We can speak about it. Do you want me to list?

THE COURT: Well, I think what happens is that a client does have a certain amount of control over what is presented in the penalty phase.

However, I think there is a case -- and I don't have it at my fingertips -- but what it says is, if the Defendant has told the defense counsel not to call relevant mitigation, that defense counsel is, Number One, obligated to tell the Court that; and, Number Two, the Court then is obligated to tell you what you would have -- who you would have called and what they would have said, basically.

And then Mr. Chandler has got to, in essence, acknowledge that he understands and acknowledge that he understands it could have been helpful and, in essence, announce that he wish that not be presented.

MR. ZINOBER: Well, we have the Defendant's wife, who I believe would say good thins (sic) about Mr. Chandler.

THE COURT: All right.

MR. ZINOBER: Quite frankly, we have considered in other particular circumstances the daughter -- his youngest daughter -- Whitney.

THE COURT: Okay.

MR. ZINOBER: His sisters, Lula Harris, Helen Gonzalez, Elma O'Rourke (phonetic), Rosie DeBartoley (phonetic). Those are his sisters who would generally say favorable things about him.

THE COURT: His son?

MR. ZINOBER: His son, Jeff. Sonya Gibson, who he wasn't married to but is Jeff's mother, would say very favorable things about Mr. Chandler.

Her son, Michael Singleton, would say favorable things about Mr. Chandler.

THE COURT: Have you gone over with our (sic) client what those favorable things are?

MR. ZINOBER: Generally, yes.

THE COURT: Okay. Mr. Chandler, I don't necessarily mean for your lawyer to stay here and stand here and tell me exactly what these people would say, but I presume that he has

been over with you the possibility of calling any and all family members that you have to speak about you and your life and your background and anything that would be favorable to this jury in making this decision.

Has he gone over that with you?

THE DEFENDANT: Yes, he has, and I have made a decision, your Honor. to call no one.

THE COURT: And do you understand, sir, that I am obliged to tell you by law that this could be a mistake because these people could very well put some favorable information before this jury to persuade them to recommend a life sentence, as opposed to a death sentence?

Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: And you've had plenty of time to talk this over with your lawyer?

THE DEFENDANT: Yes.

THE COURT: And it is your decision that you have instructed your lawyer not to call these people. Is that correct?

THE DEFENDANT: That's correct.

THE COURT: Is there anything else that we need to put on the record?

(V102, T2741-2745)

* * *

MR. ZINOBER: It's my understanding, Jim, from our discussion yesterday, that you don't have any objection to the introduction of the records from the --

MR. HELLICKSON: My understanding is that they want to introduce a degree of some kind.

MR. ZINOBER: It's college credits.

MR. HELLICKSON: I hadn't seen this document yesterday. I would like to take a look at it. I understand it to be a degree from a federal prison.

(V102, T2747)

* * *

MR. ZINOBER: Your Honor, also, I think I

should mention that I did advise Mr. Chandler that his mother, Margaret Furr, could be a potential witness. I forgot to mention that.

THE COURT: You mean one you would call if your client let you?

MR. ZINOBER: Yes. Candidly speaking, she is not as -- you know, at this point in her life, she is a little -- her mental capacity is not quite there.

MR. CROW: I understood that she was possibly unable to testify. She received a subpoena; she called me and said that she had had a stroke and couldn't stand up and couldn't come to court.

MR. ZINOBER: Right. My point is, that was somebody we talked about, and --

THE COURT: And Mr. Chandler has indicated you did not want to call her.

Is that correct, Mr. Chandler?

THE DEFENDANT: Yes.

THE COURT: Same question as before. Obviously, if she were competent to testify, obviously she could help you in front of this jury.

THE DEFENDANT: She's competent, but she wouldn't understand none of the procedure. So --

THE COURT: You do not want her called?

THE DEFENDANT: No, ma'am.

(V102, T2748-2749)

* * *

MR. HELLICKSON: State would rest, your Honor.

THE COURT: Defense may call your first witness.

MR. ZINOBER: Your Honor, we don't have any witnesses to present. We do have a couple of documents to present.

THE COURT: All right.

MR. ZINOBER: Introduce Defendant's Exhibit One A and One B, which was some records of courses he completed while Mr. Chandler was previously in prison.

THE COURT: All right. That will be received.

(Thereupon, Defendant's Penalty Phase Exhibit

1, A-B, was received into evidence.)

MR. ZINOBER: Okay. Also, I have a stipulation between the defense and the State. We are having a formal one typed up, but the analysis of the telephone records from the Pinellas County Jail reflected for the period November 1, '92, through November 30, '92, the telephone number of Margaret Meadows, the Defendant's mother, was called approximately eighty-five times.

THE COURT: All right.

MR. HELLICKSON: What are the dates, your Honor?

MR. ZINOBER: November 1, 1992, through November 30, 1992.

THE COURT: Members of the jury, when a stipulation is entered into between the State and the defense, that means that no proof needs to be brought in regarding that matter. That means you are to accept that as true because it's been stipulated.

Is there anything else?

MR. ZINOBER: There is nothing -- one **second.**

Nothing further.

THE COURT: Can I see you all at the bench.

(The following is a side-bar conference held out of the hearing of the jury.)

THE COURT: I don't know if this needs to be on the record or not, but didn't you have some pictures of him and his baby you wanted to put in?

MR. ZINOBER: Let me ask him if he'll allow us to do that.

THE COURT: I remember somehow I had a copy of those.

MR. CROW: The ones with the tackle box.

MR. SANTA LUCIA: That's the only one we had.

THE COURT: I remember that was one of the pictures y'all were objecting to. There was one of just him and --

MR. ZINOBER: Let me see if he'll allow us to do that.

THE COURT: All right. We'll let -- are they his pictures?

MR. SANTA LUCIA: They were his.

THE COURT: We'll let you put them in; and

if you want to substitute a copy later, we'll give them back to him.

(Thereupon, the proceedings at side-bar were concluded, and the trial resumed before the jury as follows.)

MR. CROW: Mr. Zinober, did you want this marked as an exhibit?

MR. ZINOBER: Yes, if you would.

Your Honor, I would like to move to introduce into evidence Defendant's exhibits Two and Three, which Two is a copy of photographs of Oba Chandler and his daughter, Whitney, when Whitney was a toddler; and Exhibit Three is a photograph of Whitney Chandler more recently.

THE COURT: All right.

(Thereupon, Defendant's Penalty Phase Exhibit 2 and Exhibit 3 were received into evidence.)

MR. ZINOBER: If I can publish them to the jury.

Defense has nothing further.

(V102, T2795-2798)

Chandler and his counsel were thoroughly questioned by Judge Schaeffer and the resulting record is sufficient to satisfy this Court's purpose in requiring such an inquiry. Nowhere in Koon does this Court hold that a full blown evidentiary hearing by way of proffer is required. Rather, the purpose of Koon was to insure that counsel had sufficiently investigated mitigating evidence in order to advise his client. Compare,. The record in the instant case satisfies this requirement. Accordingly, this claim should be denied.

Furthermore, even if the inquiry was insufficient, at no time has this Court held that a trial court's failure to do an adequate inquiry is per se reversible error. Clearly, given the horrific

facts of the instant case and the record that is before this Court, which includes evidence of the type of mitigation that was available to Chandler, the failure to specify the content of family member testimony that was alleged to be favorable to Chandler is harmless beyond a reasonable doubt and does not require a new penalty phase.'

---

[8]The record includes depositions from a number of Chandler's family members. (R 1862, 882, 9230, 9336,9472) Significantly, Chandler made it clear that, "Family don't mean shit to me" and that he was not close to his family. (Vol 91, T1239)

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN REJECTING CHANDLER'S CLAIM OF CHILDHOOD TRAUMA AS A MITIGATING CIRCUMSTANCE.

Chandler contends that since this Court's decision in Campbell v. State, 571 So. 2d 415 (Fla. 1990) requires the trial court to evaluate potentially mitigating evidence and to determine if it is supported by the evidence and whether, in the case of nonstatutory mitigating evidence, if it is truly mitigating in nature, Judge Schaeffer erred in rejecting his claim of childhood trauma resulting from the suicide of his father when he was ten years old. The state certainly agrees that Campbell requires the trial court to evaluate potentially mitigating evidence and to determine if it is supported by the evidence and whether, in the case of nonstatutory mitigating evidence, if it is truly mitigating in nature. The state does not agree that Judge Schaeffer's rejection of Chandler's father's suicide as a nonstatutory mitigating factor is a violation of Campbell. Campbell does not require a trial judge to blindly accept nonstatutory mitigating factors urged by a defendant without evaluation as to whether it was established and whether it is truly mitigating. To the contrary, this Court in Rogers v. State, 511 So.2d 526, 535 (Fla. 1987), rejected this argument, stating:

> The effects produced by childhood traumas, on the other hand, indeed would have mitigating weight if relevant to the defendant's character, record, or the circumstances of the

> offense. See Eddings, 455 U.S. at 112-13, 102 S.Ct. at 875-76. However, in the present case Rogers' alleged childhood trauma does not meet this standard of relevance. No testimony on this question was presented during the penalty phase, and Rogers raised the issue for the first time on appeal. Indeed, the only evidence of such a trauma in the record is the following notation in the presentence investigation:
>
> [Rogers] was raised under the impression that his mother was dead but found out that she was not dead when he went in the service , . . As far as his mental health, [Rogers says] "I'd say I'm in pretty good shape considering the stress I've been under. The strain, worrying about my family."
>
> We thus find that the record factually does not support a conclusion that Rogers' childhood traumas produced any effect upon him relevant to his character, record or the circumstances of the offense so as to afford some basis for reducing a sentence of death. See Sireci v. State, 399 So.2d 964 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982).
>
> Rogers v. State, 511 So.2d 526, 535 (Fla. 1987)

Judge Schaeffer's order reflects that her evaluation of the contention as follows:

> 7. The Defendant was only ten years old when his father committed suicide.
>
> It is a mitigating factor if a Defendant has had a deprived childhood, or has suffered abuse as a child, or other matters such as this. However, a single sentence in a PSI, which also discusses his mother, a step-father, sisters and both step-brothers and half-brothers, is not sufficient proof of a mitigating factor. The Defendant lived with his mother after his father died. His mother remarried when he was thirteen, and he lived with them until he was seventeen when he voluntarily left home to live with his sister;

> and then decided to live on his own. (This information is contained in the 1977 PSI).
>
> If child abuse or a deprived childhood existed in Defendant's case, he voluntarily elected not to present any evidence of it. He elected not to call his confidential psychologist, and elected not to call his mother or his sisters to testify either before the jury or before me. Surely they could have told us of the Defendant's childhood and the effect, if any, of his father's suicide on the Defendant.
>
> There is no proof, therefore, in the record, of the mitigating factor of child abuse, or a deprived childhood.
>
> *(v68,* T11527-28)

Similarly, in the most recent review of Farr this Court held:

> "we find no error in the trial court's rejection of the case for mitigation. At the trial level, the defendant is entitled to control the overall objectives of counsel's argument. Hamblen. Here, Farr himself controverted the case for mitigation, which was his right. Id. *It is within the trial court's discretion to reject either opinion or* factual *evidence in mitigation where there is record support for the conclusion that it is untrustworthy.* Walls v. State, 641 So.2d 381, 390 (Fla.1994), cert. denied, --- U.S. ----, *115* S.Ct. *943,* 130 L.Ed.2d"
>
> Farr v. State, 656 So.2d 448, 449-50 (Fla. 1995) (emphasis added)

As Chandler has failed to show that the court's rejection of his claim of childhood trauma was an abuse of discretion, relief should be denied on this claim.

Furthermore, in light of the 12-0 jury recommendation of death for all three death murders and the substantial aggravating circumstances found by Judge Schaeffer, error, if any, was harmless

beyond a reasonable doubt.[9] Cook v. State, 581 So. 2d 141 (Fla. 1991).

[9]The Court found four aggravating circumstances; prior violent felony, during the course of kidnapping, avoid arrest, heinous, atrocious., or cruel.

ISSUE VII

WHETHER THE JURY INSTRUCTION FOR THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE WAS UNCONSTITUTIONALLY VAGUE.

Appellant contends that the jury instruction given in the instant case was unconstitutionally vague. It is the state's contention that this claim is procedurally barred and without merit.

Although appellant did object to the giving of the instruction, he does not represent, and the undersigned counsel cannot find, that an alternate instruction was suggested to the trial court. This Court has made it clear that challenges to the constitutionality of an instruction are barred unless counsel submits an alternate limiting instruction. Beltran-Lopez v. State, 626 So.2d 163, 164 (Fla. 1993).

Furthermore, as this claim has been repeatedly rejected by this Court on the merits, appellant is not entitled to relief. The jury was given the full instruction on heinous, atrocious, or cruel now contained in Florida Standard Jury Instructions in criminal cases. (T3039) This Court has consistently rejected claims that the statute or the new jury instructions are unconstitutionally vague.

> Because of this court's narrowing construction, the United States Supreme Court upheld the aggravating circumstance of heinous, atrocious, or cruel against the vagueness challenge in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913

> (Fla. 1976). Unlike the jury instruction found wanting in Espinosa v. Florida, U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992) the full instruction on heinous, atrocious and cruel now contained in the Florida Standard Jury Instruction in Criminal Cases, which is consistent with Proffitt was given in Preston's case.

Preston v. State, 607 So.2d 404 (Fla. 1992). Accord, Stein v. State, 632 So.2d 1361 (Fla. 1994); Hall v. State, 614 So.2d 473 (Fla.), cert. denied, --- U.S. ----, 114 S.Ct. 109, 126 L.Ed.2d 74 (1993).

To paraphrase this Court's holding in Whitton v. State, 649 So.2d 861 (Fla. 1994) "this instruction was approved in Hall v. State, 614 So.2d 473 (Fla.), cert. denied, --- U.S. ----, 114 S.Ct. 109, 126 L.Ed.2d 74 (1993), and [Chandler] has not presented an adequate reason to recede from that decision." 649 So.2d at 867

Accordingly, as this claim is barred and the instruction is constitutional, Chandler is not entitled to relief. Furthermore, in light of the particular facts of this case appellant has failed to establish that error, if any, is harmful.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority the decision of the lower court should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CANDANCE M. SABELLA
Assistant Attorney General
Florida Bar ID#: **0445071**
2002 N. Lois Avenue, Suite 700
Westwood Center
Tampa, Florida 33607
(813) 873-4739

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copy of the foregoing has been furnished by U.S. Regular Mail to the Office of the Public Defender, Polk County Courthouse, P. 0. Box 9000, Drawer, P.D., Bartow, Florida 33831, this 9 January, 1997.

COUNSEL FOR APPELLEE