IN THE SUPREME COURT OF FLORIDA

OBA CHANDLER,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 84,812

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

On November 10, 1992, the Pinellas County Grand Jury indicted the appellant, Oba Chandler, for three counts of first-degree, premeditated murder for the asphyxiation of Joan Rogers, Michelle Rogers, and Christe Rogers on or between June 1 and June 4, 1989, in violation of section 782.04 (l)(a), Florida Statutes (1987). (V 1, R 1-2)[1]

Chandler was tried before the Honorable Susan Schaeffer, Circuit Judge, and a jury on September 19 through 30, 1994. (V 83, T 1) The jury found Chandler guilty of first degree murder on each of the three counts of the indictment. (V 101, T 2710) The court entered judgments of guilt. (V 101, 2718) The jury unanimously recommended death for each of the murders. (V 102, T 2827-28)

On October 6, 1994, the court received additional evidence and heard argument of counsel regarding the sentences to be imposed. (V 74, R 12504-41) On November 4, 1994, the court imposed death sentences for each of the three murders. (V 68, R 11510-30; V 75, 12599-623; A 1-11)

The court found four aggravating circumstances: 1) prior convictions for capital and violent felonies -- robbery with a firearm on January 12, 1977, robbery with a firearm on July 23, 1993, and the three first degree murder convictions on September,

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[1] Page number references to the record on appeal are designated by V for the volume, R for the record proper, and T for the trial transcript. Page number references to the appendix to this brief are designated by A.

1994[2] (V 68, R 11520-21; A 1-2); 2) murder committed during the commission of a kidnapping (V 68, R 11521; A 2); 3) murder committed to avoid arrest (V 68, R 11522-23; A 3-4); and 4) heinous, atrocious, or cruel (HAC). (V 68, R 11523-24; A 4-5)

The court found no statutory mitigating factors were presented or proved. (V 68, R 11525; A 6) The court considered ten non-statutory mitigating circumstances urged by the defense and found: 1) The defense had not proven that Chandler assisted law enforcement as a confidential informant. (V 68, R 11525; A 6) 2) Chandler may have had the capacity for hard work, but the record did not establish that he had a good employment history. (V 68, R 11525-26; A 6-7) 3) Chandler's capacity to form loving relationships was not proven. (V 68, R 11526; A 7) 4) The defense had not proven that Chandler could be rehabilitated. (V 68, R 11527; A 8) 5 and 6) Good jail conduct had not been proven. (V 68, R 11527; A 8) 7) There was no proof of an abused or deprived childhood.' (V 68, R 11527-28; A 8-9) 8) Chandler's honorable discharge from the Marine Corps was entitled to little weight because he did not have a good military record. (V 68, R 11528; A 9) 9) The court gave little weight to the fact that it could impose three consecutive 25 year minimum mandatory life sentences. (V 68, R 11528-29; A 9-10) 10) Chandler's steadfast claim of innocence was irrelevant because

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[2] As to each murder, the court found the other two murders supported this aggravating factor. (V 68, R 11521)

[3] At the pre-sentencing hearing the state conceded that Chandler suffered childhood trauma because his father committed suicide when Chandler was ten years old. (V 74, R 12535)

residual doubt is not a mitigating circumstance. (V 68, R 11529; A 10)

Defense counsel filed a notice of appeal on December 1, 1994. (V 68, R 11541) The court appointed the public defender to represent Chandler on this appeal. (V 68, R 11531)

STATEMENT OF THE FACTS

A. The State's Case

Defense counsel filed a pre-trial motion in limine to exclude evidence of a collateral crime, the alleged sexual battery of Judy Blair in the Gulf of Mexico near Madeira Beach, Florida, on the grounds that it was irrelevant to any issue other than bad character and propensity, that the probative value of such evidence was outweighed by its prejudicial effect, and that the collateral crime evidence was not sufficiently similar to the charged offenses to be admissible. (V 44, R 7338-39) Defense counsel filed a memorandum of law in support of the motion. (V 51, R 8523-8562)

The state filed a notice of intent to use evidence of the alleged sexual battery and kidnapping of Judy Blair. (V 53, R 8873-75) The state filed a written proffer of the collateral crime evidence. (V 54, R 9045-9113) The state also filed a memorandum of law in support of its proposed introduction of collateral crime evidence. (V 54, R 9131-47)

The court conducted a pretrial hearing to determine the admissibility of the collateral crime evidence. (V 56, R 9457; V 73, R 12220-387) The court found the state's evidence that

Chandler convinced Ms. Blair to go out on his boat was both relevant and essential to the state's case. (V 73, R 12298-305) The court entered a pretrial order permitting the introduction of the evidence as relevant to prove motive, opportunity, intent, plan, or identity, and why Joan Rogers allowed herself and her daughters to accompany Chandler on his boat. (V 56, R 9457-58; V 74, R 12424-25) The court found that the alleged homicides and the alleged rape were not only sufficiently similar, but also shared a unique or unusual characteristic. (V 56, R 9457-58) However, the court did not specify what the similarities or unique characteristic were. Instead, the court reserved the right to amend the order to specifically note all unusual or unique similarities between the two alleged crimes after the trial. (V 56, R 9458)

In his opening statement, the prosecutor relied upon the evidence of the sexual battery of Judy Blair and told the jurors that it provided the connection between Chandler and the murders. (V 87, T 509, 514-28) Defense counsel moved for a mistrial because of the state's reliance on the collateral crime evidence and because the state was making that evidence a feature of the trial. The court denied the motion. (V 87, T 529)

The state presented evidence that boaters discovered the bodies of three women floating face down in Tampa Bay on June 4, 1989. (V 87, T 576-88) The Coast Guard recovered the bodies. (V 87, T 589-600) The Coast Guard recorded the locations of the bodies and provided this information to the St. Petersburg Police, who also responded to the locations of the second and third bodies.

(V 87, T 578-79, 599-604) The first body was found west of the ship channel, between the channel and Pinellas Point. (V 87, T 590) The second and third were found about three miles east of the St. Petersburg Pier, about 200 yards apart. (V 87, T 593)

Dr. Bernard Ross, an engineering professor at the University of South Florida and an expert on tidal flows, water movements, and the movement of floating objects in Tampa Bay (V 89, T 848-52), later determined that all three bodies were probably placed in the water in the area where the second and third bodies were found. A water current carried the first body to the place where it was found. (V 89, T 852-58) In his opinion, the bodies could not have been placed in the water from a bridge or the shore. (V 89, T 858)

All three bodies were nude below the waist and had duct tape around their mouths. (V 87, T 578, 584, 591-94, 610, 626-27, 629, 632-33, 635) The legs of each body were tied at the ankles, two with yellow nylon rope, and one with clothesline rope. (V 87, T 578, 587, 591-93, 611, 627, 629, 632-33) The hands of the first and third bodies were tied behind their backs with clothesline rope. (V 87, T 578, 587, 591, 593, 611, 627, 629) The arms of the second body were stretched forward, with clothesline rope tied around one wrist and the other wrist free from the loop at the end of the rope. (V 87, T 584, 633) Each body had yellow nylon rope tied around the neck. (V 87, T 578, 591, 593, 610-11, 627, 633-34) The rope on the first body was attached to a heavy weight which the Coast Guard could not dislodge or pull up, so they cut the rope. (V 87, T 591, 594-96, 611) The neck ropes on the second and third

bodies were tied to cinder blocks which were recovered from the bay. (V 87, T 593, 629, 634-35)

Dr. Edward Corcoran, an Associate Medical Examiner, performed autopsies on all three women on June 4 and determined that each died of asphyxiation, lack of oxygen to the brain, caused either by strangulation from the ropes tied around their necks or by drowning. (V 87, T 606-09, 641) He estimated that each died two or three days before the autopsy, on June 1 or 2. (V 87, T 609-10, 641) The bodies were bloated and decomposed. (V 87, T 610, 625, 629-30, 642) Dr. Corcoran looked for, but did not find any genital injuries. He did not look for semen because it would have been decomposed or washed away by the water. (V 87, T 628, 631) There was no evidence of sexual intercourse with any of the three women, but he would not have expected to find such evidence because of the decomposition. (V 87, T 642-43) There were ligature marks on their necks, but their hyoid bones were not broken. (V 87, T 622-23, 628, 630-31, 636) He did not find any other injuries. (V 87, T 610, 622, 628, 641) There was no natural cause, such as decomposition or water currents, for the bodies to be unclothed below the waist. (V 87, T 625-26) The bodies were identified as those of Mrs. Joan Rogers and her daughters, Michelle and Christe Rogers by a comparison with their family dental records. (V 88, T 652-57)

Mrs. Rogers and her daughters left their home in Ohio on Friday, May 26, drove down 1-75, and stopped at a motel in Dalton, Georgia. Next, they drove down I-75 and across on I-10 to a Days

Inn in Jacksonville. On Sunday, May 28, they went to Silver Springs, stopped at a Winn Dixie store on State Road 40, mailed a postcard in Barberville, Florida, and checked into a motel in Titusville. On May 29 they went to Sea World and checked into the Gateway Inn in Orlando. On Tuesday, May 30, they went to Epcot Center. On Wednesday, May 31, they went to MGM. The next morning, they checked out of the Gateway Inn at 9:34 a.m. (V 89, T 798, 809-17)

Mrs. Rogers and her daughters checked into the Days Inn on Rocky Point Island in Tampa shortly after noon on June 1, 1989. (V 88, T 689-94, 705-06) Michelle called her boyfriend, Jeffrey Feasby, in Ohio. (V 89, T 921-28) Harold Malloy, another hotel guest, saw the Rogers having dinner in the hotel restaurant between 7:00 and 7:30 p.m. (V 90, T 937-43, 950)

Housekeeping employees noticed that the condition of the Rogers' room did not change from June 2 to June 8, except for finding a wet shower and wet towels on June 2. Their belongings were there, but the beds were never slept in, and no one was there. (V 88, T 710-19) On June 8, the hotel manager learned of this and called the police. (V 88, T 658-60) Tampa police officers came and spoke to the manager, then secured the room and obtained the hotel records for the room. (V 88, T 669-72, 720-23) The police found the Rogers' car parked at a boat ramp on the causeway. (V 88, T 672; V 89, T 820-22)

In court, Tampa Police Officer Wilkins identified photos of the car, the hotel room, the hotel, and Oba Chandler's residence at

10709 Dalton. Aerial photos of the area showed the locations of the hotel, boat ramp, and Chandler's house. (V 88, T 672-85) Chandler's house was located on a canal with access by water to both the boat ramp and the hotel. (V 88, T 687)

The Rogers' hotel room was processed for fingerprints, but none of the prints found in the room were made by Chandler. (V 88, T 731-32, 745, 755-56, 759, 778-81) Canisters of exposed film were found and taken to the Tampa Police film lab for developing. (V 88, T 734-35) The last three photos were taken in the room at the Days Inn. One was overexposed, the second showed Michelle in the hotel room, and the third showed the balcony. (V 88, T 742-43) An optics expert determined that the balcony photo was taken around 7:20 p.m., plus or minus one hour. (V 90, T 951-66) Four swimsuits and Michelle's purse were found in the room. The purse contained a set of car keys for the Rogers' car. (V 88, T 743-44, 757-59)

The Rogers' car, a blue, two-door, 1986 Oldsmobile Calais with an Ohio tag, (V 89, T 820-22) was photographed at the boat ramp. (V 88, T 762) The car was impounded and searched. (V 88, T 762-62) Several exhibits were found in the car, including Days Inn stationery, an index card with directions to the Gateway Inn in Orlando, notebook paper containing personal notes, a Clearwater Beach brochure, a Hampton Inn coupon, a Jacksonville Zoo receipt, a key to Days Inn Room 251, and a road atlas. (V 88, T 763-65) Fingerprints were found on the Hampton Inn coupon and Clearwater Beach brochure. (V 89, T 838-44) Four fingerprints were found on

the car, two from the passenger-side vanity mirror, and two from the rear quarter panel on the exterior. (V 88, T 765-66, 774) The car was very clean, like it had been through a carwash. (V 88, T 774)

St. Petersburg Police Detective Ralph Pflieger went to the dock with the Coast Guard on June 4, to the room at the Days Inn on June 8, and to the Rogers' car at the impound lot. (V 89, T 798-99) He looked for, but did not find, the camera used to take the photo of Michelle in the hotel room, the clothing Michelle was wearing in the photo, and the shorts worn by another woman in the photo. (V 89, T 800-05) Michelle's purse was found in the hotel room. It contained her identification, a passbook, a checkbook, and a set of keys for the car. (V 89, T 804) No purses or wallets were found in the car. (V 89, T 805) He also looked through the evidence collected by Lovejoy, but he did not find the camera, clothing shown in the photo, wallets, or purses. (V 89, T 806-07) State's exhibit 76-A was a white, lined card with handwritten notes which was found in the console area of the car. (V 89, T 807-08) State's exhibit 76-C was a sample of Michelle's handwriting obtained from her father. (V 89, T 808) State's exhibit 54 was a blow-up photo of a brochure with directions written on it which was found in the car. (V 89, T 815-17)

Tampa Police Detective Melvin Duran went to the boat ramp on June 8 and observed Officer Wilkins standing by the Rogers' car, Duran noticed a sheet of Days Inn stationery on the front passenger seat. (V 89, T 823) When the car was moved, Duran noticed that

sand had built up around the tires, so he inferred that the car had been there for some time. (V 89, T 826-27) Duran went to the impound lot with Det. Pflieger to search the car for a camera and purses, but he did not find them. (V 89, T 828-30, 837) The gas gauge indicated the tank was full. (V 89, T 830)

Hal Rogers testified that he is a dairy farmer with a family farm. His wife Joan and daughters Michelle and Christe actively helped him with the farm work. (V 89, T 876, 891) Joan also worked the midnight shift as a forklift operator at Peyton's Northern in Indiana. (V 89, T 890-91) At the time of their deaths, Joan was 36 years old, Michelle was 17, and Christe was 14. (V 89, T 876)

Mr. Rogers became aware of their plan to go to Florida a couple of weeks before they left. (V 89, T 876-77) They had never been to the Orlando and Tampa area before. In May and June, 1989, the Rogers did not have any friends, relatives, or acquaintances in the area. (V 89, T 877) The sole purpose of the trip was to take a vacation. (V 89, T 877-78) Mr. Rogers expected them to return on June 3 because Joan had to return to work and Michelle was supposed to start summer school on Monday, June 5. He last heard from his wife and children on the prior Monday evening, Memorial Day. Joan called and said they planned to go to Epcot Center and to MGM or Disney World. (V 89, T 878) He never heard from them after they arrived in Tampa. (V 89, T 879) Mr. Rogers became concerned when they had not returned by Tuesday and contacted the authorities. (V 89, T 880)

Mrs. Rogers and her daughters took a 35 mm Nikon camera with them which was never recovered. Joan had a purse and wallet that were never returned. (V 89, T 879) Michelle carried a wallet which was never returned. (V 89, T 880)

Mr. Rogers provided writing samples to the police: Joan's calendar, a postcard from her dated May 29, 1989, Joan's notes of her plans for the trip, Christe's test paper, and one of Michelle's test papers. (V 89, T 880-83) Mr. Rogers identified Michelle's handwriting on state exhibit 76-A, an index card. (V 89, T 883-84) He also identified the box for the missing camera, which he found at home and provided to the police. (V 89, T 884-85) He identified a photo of Joan taken a day or two before Mother's Day in 1989, a photo of Michelle in her prom dress taken two or three weeks before the trip, and a photo of Christe from the film found in the hotel room. The photos were admitted in evidence over defense counsel's renewed objections. (V 89, T 886-90)

Mr. Rogers further testified that his mother had a trailer in Ellenton, Florida, just south of the Sunshine Skyway Bridge, but neither he nor his wife had ever been there. (V 89, T 905, 920) His mother sometimes went down there during the winter, but he thought she was in Michigan in May and June, 1989. (V 89, T 920) He did not consider his mother to be a relative. (V 89, T 921) In March, 1989, Rogers was billed for a series of calls made from the 813 area code and charged to his phone. (V 89, T 906, 919-20)

Sharon Baumgardner was a personnel assistant for Peyton's Northern, a Kroger and Super X distribution center, in Bluffton,

Indiana, across the state line from Wilshire, Ohio. Joan Rogers worked there in 1989. (V 90, T 974-75) Baumgardner identified Mrs. Rogers' handwriting on several documents from her personnel file, state's exhibits 73 A-J. (V 90, T 976-78) Mrs. Rogers first submitted a vacation request in the spring of 1989 on March 13 for the week of June 4 to 10. On March 15, she submitted a second vacation request for May 29 to June 2, which she later changed to May 29 to June 5. She looked very tired and burned out. (V 90, T 978-79)

Freida Schwierterman worked with Mrs. Rogers at Peyton's Northern doing stock work and filling out work orders on a daily basis. (V 90, T 980-81) When describing an item with two colors, it was their routine practice to put the predominant color first. (V 90, T 990, 995) Mark Sauers also worked with Mrs. Rogers at Peyton's Northern. He identified state's exhibit 75 as machine operative tests filled out by Mrs. Rogers. (V 90, T 996-97)

Agent James Henry Mathis, an FBI handwriting expert, examined a note written on Days Inn stationery, compared it with known samples of Joan Rogers' handwriting, and determined that she wrote the note. The note stated, "Turn right. West W on 60, two and one-half miles before the bridge on right side at light, blue W/WHT." (V 90, T 1007-10) Louis Hupp, an FBI fingerprint specialist, examined the note and found ten identifiable fingerprints, one made by Joan Rogers, and nine made by Christe Rogers. (V 90, T 1012-15)

In September, 1989, Officer James Kappel of the St. Petersburg Police became aware of an alleged rape in Madeira Beach involving a Canadian tourist. He then traveled to Canada to interview the alleged rape victim, Judy Blair, and her friend, Barbara. (V 91, T 1123-24) A Canadian sketch artist prepared a composite drawing based on their descriptions. (V 91, T 1124-25) Kappel obtained descriptions of the suspect and his vehicle and boat. (V 91, T 1125) The composite and descriptions were published on November 3 in a press release which indicated there was a connection between the rape and the murders. (V 91, T 1126-27)

Joann Steffey lived at 10713 Dalton Avenue in Tampa. Oba Chandler lived two doors east of her. He moved in around December, 1988. (V 90, T 1016-17) Chandler had a boat which he kept in his driveway for a long time, then put it behind the wall around the house on a trailer. She never saw it hanging on davits. The boat was blue and white. Chandler had a black four-wheel-drive vehicle. (V 90, T 1017-18) Steffey was aware of the media reports concerning the Rogers homicides. When she saw the composite drawing, and the potential connection between the rape and the homicide, she thought Chandler might be the person. (V 90, T 1018-19)

Defense counsel objected and moved for a mistrial based on the introduction of the rape. The court allowed the defense to have a standing objection, motion for mistrial, and motion to strike all references to the Williams rule testimony. (V 90, T 1019-20)

Steffey cut out the composite and put it on her refrigerator in November, 1989. (V 90, T 1021) At that time, she tried to

locate Chandler's vehicle, but it was gone for about a month. (V 90, T 1024) In May, 1992, she saw an article with a picture of handwriting on a brochure. She compared it with Chandler's writing on her next door neighbor's copy of Chandler's estimate for a screened porch and thought the writing on the brochure was his. (V 90, T 1021-23) Steffey called the police task force in St. Petersburg, and her neighbor faxed the estimate to the police. (V 90, T 1024)

On cross-examination, Steffey said Chandler's boat had a white hull and a blue top cover. (V 90, T 1025) Chandler would have gone past her house to take his boat out the channel. She heard boats going out and coming in at night. She frequently saw Chandler in his yard playing with his child, talking to neighbors, or doing yard work. (V 90, T 1026) She was gone in May, 1989, and returned around the end of May or first day of June. She saw Chandler, but she did not notice anything unusual. She had inquired about the $25,000 reward for the conviction of Chandler, but she had not received any response. (V 90, T 1027)

Mozelle Smith was Steffey's neighbor. When Steffey approached her with the newspaper article about the handwriting, Smith located her contract with Chandler, state's exhibit 71, and her check paying Chandler for the work, state's exhibit 72. Chandler filled out and signed the contract in her presence. He also filled out the amount of the check. (V 90, T 1028-31) Her daughter faxed the contract to the St. Petersburg Police twice. The police subpoenaed the original contract. (V 90, T 1032-33)

Michael Murray lived at 6004 Tampa Shores Boulevard, a couple of houses down from Dalton Avenue. In 1990, he hired Chandler to do some work on his porch. He identified state's exhibit 79 as the contract for this work. (V 90, T 1034-35) Murray's house was at the end of the canal that went behind Chandler's house. Murray had a boat and had no difficulty using the canal to access Tampa Bay and the causeway area. (V 90, T 1035-36) Chandler had a boat hanging from davits. It had a blue hull and a white top. (V 90, T 1036)

Raymond Vohdin of Tampa hired Chandler in October, 1989, to repair a pool enclosure. State's exhibit 80 was the contract filled out by Chandler. (V 90, T 1037-38) Sara Christopher of Tampa hired Chandler in February, 1990, to panel her living room and replace doors and windows. (V 90, T 1040) State exhibit 83 was the contract filled out by Chandler. (V 90, T 1041) Nancy Newsted of Oldsmar hired Chandler to build a porch in April, 1989. State's exhibit 84 was the contract filled out by Chandler. (V 90, T 1059-60)

Frances Edwards, a real estate broker in Fort Lauderdale, testified that in September, 1990, Chandler rented a house from her, paying $2,250 in cash for the first month's rent and security deposit. State's exhibit 82 was the rental agreement filled out by Chandler. (V 90, T 1052-53, 1056-57) Chandler failed to pay the rent in November, and she found that he had moved out around the end of October. (V 90, T 1057-58)

James Slaughter of Lakeland worked at Goldsmith's Fine Jewelry. He identified state's exhibit 81 as a document he executed showing the sale of a diamond ring. The person selling the ring presented identification, signed the form, and placed his thumbprint at the bottom of the form. (V 90, T 1064-65)

Theresa Stubbs, an FDLE questioneddocument examiner, compared the Clearwater Beach brochure found in the Rogers' car with known samples of Chandler's handwriting and determined that he wrote some of the notes on the brochure, i.e., the upper notation, "Days Inn, Route 60, Courtney Causeway," and the lower notation, "Courtney Campbell Causeway, Route 60, Days Inn." (V 90, T 1066-78) She also determined that the upper notation was in pencil except for the "y" in Causeway, which was in ink. The lower notation was all in ink. Under infrared light, the "y," the lower notation, the "X" on the map, and the drawn line on the map all reflected with the same luminescence, so they may have been written with the same type ink. The "Boy scout, Columbus" notation was in a different, blue ink. (V 90, T 1077-78) She compared the "Boy scout, Columbus" notation with known samples of the writing of Joan, Michelle, and Christe Rogers, and determined that it may have been written by Joan. (V 90, T 1078-82) She compared the signature on a motel registration card with known samples of Chandler's signature and determined that he signed the registration card. (V 90, T 1082-86)

Samuel McMullin, a fingerprint expert for the Hillsborough County Sheriff's Department, found 12 latent fingerprints and one latent palm print on the Clearwater Beach brochure. He compared

them with Chandler's known prints and the Rogers' known prints. He found that the palm print was made by Chandler. Nine[4] of the fingerprints were made by Christe. Three fingerprints were not made by Chandler and may or may not have been made by the Rogers. (V 90, T 1087-93) On the Hampton Inn coupon, McMullin found three fingerprints , one each from Joan, Michelle, and Christe Rogers. (V 90, T 1094) None of the fingerprints and palm prints found in the Rogers' hotel room or car were made by Chandler, several were made by the Rogers, one was made by the hotel manager, and several remained unidentified. (V 90, T 1094-1110)

Kristal Maya was Chandler's 31 year-old daughter from Cincinnati, Ohio. Chandler did not marry her mother, never lived in the same house as Mays, and never had a close relationship with her. As a child, Mays' last contact with Chandler was when she was seven. (V 91, T 1131-32) In the spring of 1986 she learned that Chandler was in prison in Zephyrhills, Florida. She went to visit him with her sister, Valerie Troxell, also Chandler's daughter. (V 91, T 1133-34) She returned to visit her father when he got out of prison. Chandler visited her and Valerie in 1987. Mays attended his wedding in May, 1988. She stayed at Chandler's Dalton Ave. house while on vacation in July and August, 1989. (V 91, T 1134) She saw pieces of aluminum and concrete blocks in the side yard. Her father had a blue and white boat. (V 91, 1135)

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[4] The transcript states, "There are none related fingerprints marked in blue that are the fingerprints of Christe Rogers." (V 90, T 1093) In context, the "none" appears to be a typographical error which should state "nine." There are numerous typographical errors scattered throughout the transcript.

In November, 1989, while Mays was in nursing school, Chandler came to Cincinnati and stayed at a motel. When she spoke to him on the phone, he sounded anxious and wanted her and her husband to come to the motel. (V 91, T 1135-37) His Jeep was backed into a parking space in front of another building at the motel. Chandler appeared to be very nervous. (V 91, T 1137-38) There were numerous ashtrays and coffee cups in the room. Chandler said he could not return to Florida because they were looking for him for the rape of a woman. (V 91, T 1141, 1161) Mays went into the bathroom and did not hear the rest of the conversation. She and her husband went home. Chandler called and apologized. (V 91, T 1141-42) The next day, Mays invited him to dinner. She took him to the store and bought him some clothes because he had no luggage and no cold weather clothing. (V 91, T 1142-43) They stopped for coffee. Chandler told her something about picking a woman up on a pier or dock, but she got away. (V 91, T 1143-44, 1162) In her deposition, Mays did not say that he said the woman got away. (V 91, T 1162-69)

After dinner at home, Chandler talked about having money in El Salvador. (V 91, T 1144) He said he could not return to Florida because the police were looking for him because he killed some women. (V 91, T 1144, 1169, 1171, 1182-83) In Mays' deposition, she said he said, "They were looking for him for killing some women," and, "He stated he could not go back to Florida because the police were looking for him for the killings." (V 91, T 1169-72, 1180) In the deposition she said, "I was in the kitchen, and he

was talking to Rick about murdering some women and talking about some money in El Salvador or something like that." (V 91, T 1178) Also, "He was telling Rick something about murdering women. He didn't specify a number, but I do remember him specifically saying -- . . . . That he killed some women." (V 91, T 1180) Also, "Stated he could not go back to Florida because the police were looking for him for the killing. . . . The killing of some women." (V 91, T 1181) Mays testified at trial that Chandler never indicated that he was innocent or that the police had the wrong man. (V 91, T 1145, 1182) But, "He never said he was the one who murdered the women. He did not say that." (V 91, T 1182)

Chandler also told Mays not to tell anyone where he was, including his wife Debbie. He wanted to trade his Jeep for her car, but she did not agree. (V 91, T 1146) He sold her some jewelry, then left town without telling her. (V 91, T 1147) On November 10, 1989, Chandler called Mays and had her call Debbie to tell her to go to a phone booth and call back with the number. Chandler then told Mays to have Debbie go to another phone booth because someone might be following her. (V 91, T 1148-50)

In October, 1990, Chandler returned to Cincinnati and stayed with Mays. He had her husband set up a drug deal, then he took the drug dealers' money and left. Her husband was badly beaten and almost killed by the dealers. Their home was attacked by the dealers, so Mays dropped out of nursing school to move her family out of the house. (V 91, T 1185-87) She was upset and told Rick to call the police and report that her father "put a gun on him."

(V 91, T 1189) When she spoke to Chandler after his arrest on September 24, 1992, she talked about how badly Rick was hurt and said she could not understand why Chandler had done this to her. (V 91, 1190-92)

Mays cooperated with the police to tape her conversations with Chandler after his arrest to try to obtain his admission that he had committed the crimes. (V 91, T 1192-94) Mays had been convicted of a crime involving dishonesty. (V 91, T 1194) She was paid $1,000 to appear on the television program Hard Copy on January 26, 1994. (V 91, T 1194) She had been contacted by the Maury Povitch Show, but she declined their offer. (V 91, T 1194-95)

On re-direct examination, the prosecutor asked Mays about a sworn statement she made to the State Attorney's Office on October 6, 1992. (V 91, T 1197) Defense counsel objected to the admission of the prior consistent statement. The prosecutor argued that it was admissible because defense counsel tried to impeach her by showing she had accepted money in 1994, so the state should be allowed to show that she said the same thing two years earlier. Defense counsel argued that Mays' motivation to fabricate was the drug deal which occurred prior to the consistent statement, so the statement was not admissible. The court overruled the objection. (V 91, T 1197-1200) Mays then testified that on October 6, 1992, she made a sworn statement to the State Attorney's Office that Chandler said he could not come back to Florida, the police were looking for him, that he had killed the women. (V 91, T 1201) She

also said Chandler told her another woman got away, he had her in his grasp or with him some place, and she got away from him. He did not tell her that the woman was on his boat. (V 91, T 1201-02)

Arminder Bahmra, the manager of an Econo Lodge Motel in a suburb of Cincinnati, identified a registration card showing Chandler stayed there on November 7, 1989. (V 92, T 1258-59) Telephone company records established that calls were made between Mays' home and phone booths at two convenience stores in Tampa on November 10, 1989. (V 93, T 1378-88) The records also showed four calls between Mays' home and Chandler's home on that date. (V 94, T 1667)

Valerie Troxell learned that her father was in Cincinnati in the fall of 1989 when her sister, Kristal Maya, called. He came to Troxell's apartment. He was very anxious and upset, chain-smoking cigarettes. (V 91, T 1218-20) He did not bring any luggage or clothing. He wanted to trade or sell his vehicle. He told her to say she had not seen him if anyone tried to find him. (V 91, T 1222) Chandler told her that he had to get rid of a woman in Florida and that she was trying to say that he raped her. He did not say he was innocent. (V 91, T 1221) He did not say he did it, either. (V 91, T 1225) Troxell was paid $1,000 to appear on Hard Copy. (V 91, T 1225-26) At trial, she was upset with her father because he had put her job in jeopardy by sending a letter to her employer telling her the things Troxell had disclosed to the FBI. (V 91, T 1226)

James Rick Mays was Kristal's husband. (V 91, T 1227-28) When they visited Chandler in late July and early August, 1989, Mays saw aluminum and cement blocks at the side of the house. (V 91, T 1228-29) Chandler took him to John's Pass. (V 91, T 1229-31) Chandler said he picked up a lot of women there, and had forcible sex with one of them. (V 91, T 1231-33) Chandler also said the he raped somebody and one of them got away. (V 91, T 1233)

When Chandler came to Cincinnati in November, 1989, he was very nervous. He was smoking heavily, and there were numerous ashtrays and coffee cups in his motel room. He said the police in Florida were looking for him for the "[r]apes of these women." (V 91, T 1233-34) Mays was not sure about what Chandler said. He may have said that he was accused of the rapes. (V 91, T 1244-45) The next day, Chandler rode with Mays to Dayton. He said he could not go home because of the murders of the women in Florida, and talked as though he actually did it. (V 91, T 1235-36) On cross-examination, Mays said Chandler said only that they were looking for him for the murders of three women in Florida. (V 91, 1245) At Mays' house, Chandler said something about the murders. (V 91, T 1236) In his deposition, Mays said Chandler said they were looking for him for the murders of the women. (V 91, T 1247) Chandler never indicated that he was innocent or that the police were looking for the wrong man. (V 91, T 1248) He told Mays and his wife to say they had not seen him if anyone called looking for him. (V 91, T 1236)

In 1990, Chandler returned to Ohio. He told Mays he had ripped off some marijuana from the Coast Guard and offered Mays $6,000 to help him sell it. Mays introduced him to a buyer. (V 91, T 1237-38) Maya was supposed to pick up the money, $29,000, and take it to his house to give to Chandler. (V 91, T 1238-39) Chandler was waiting in his truck. When the buyer put the money in the truck, Chandler pointed his gun at Mays' forehead and said, "Family don't mean shit to me." (V 91, 1239) Mays tried to grab the gun. Chandler hit him and drove away with the money. (V 91, 1239-40) The buyers took Mays to their place, put a shotgun in his mouth, and threatened to shoot him. Chandler called, told them they had been ripped off, and repeated his remark about family. He wanted to trade the money back for cocaine. The buyers let Mays go. (V 91, T 1240)

Arthur Stephenson, a state prison inmate with ten or eleven felony convictions, was in the same four person cell pod in the Pinellas County Jail as Chandler from October 23, 1992, to November 3, 1992. (V 92, T 1262-63, 1280) The cell pod had two cells with two bunks each and a shared day room with a table, telephone, and television. (V 92, T 1263-65) There was a television program concerning three women found in the bay which mentioned a note found in their car and a fingerprint and handwriting on the note. (V 92, T 1266-67) Chandler remarked that he met the women at a mall near the stadium on Dale Mabry and gave them directions to meet him at a boat ramp on the causeway. He said he lived in the area and had a boat. (V 92, T 1267-69, 1276-77) He did not talk

about being with them after the meeting. (V 92, T 1274) He also said that during the meeting, something was said about them being from the same state, and he took control of the situation and had them from that point. (V 92, T 1272) He said one of the girls was very attractive, and that turned him on. He said he could handle the mother with no problem. (V 92, T 1273) When a picture of the recovery of the bodies was on television, Chandler said that was something they could not get him for, that dead people can't tell on you or can't talk. He said it did not have to be that way. (V 92, T 1273-74) After being questioned by the police, Chandler said he had a boat, got rid of it, and got another boat. He wondered why the detectives asked him about the boat. He said a man did not have to have a reason to change boats; he just wanted a better boat. He also said there was nothing on the boat that would do them any good. (V 92, T 1270-71) Another time, Chandler became upset because the police questioned him about duct tape. He said that he wasn't the only one who ever used duct tape. It was easy to use to tie someone up and keep them from talking. (V 92, T 1271) When a rape case was mentioned on television, Chandler said they were trying to implicate him in a case where he supposedly raped a woman on a boat and then had to swim to shore, but he could not swim that distance. (V 92, T 1271-72)

William Katzer, another state prison inmate with fourteen felony convictions, was in the same cell pod with Chandler from January 16 to February 25, 1993. (V 92, T 1287) After a television program about the murder case, Chandler said he would not be

there "if the bitch didn't resist." (V 92, T 1288-89, 1301-02) Chandler said he had an alibi, a videotape for which he and his wife would falsify the date. (V 92, T 1290) Katzer was not offered or promised anything for his testimony. (V 92, T 1291-92)

Blake Leslie had nine felony convictions and had been in the same cell pod with Chandler in the fall of 1992. (V 92, T 1306, 1311-12) Chandler talked to him about the Madeira Beach rape. He said he took a young lady from another country for a ride on his boat, although her friend did not want her to go. He went out 20 or 30 miles and "told them fuck or swim." He said the only reason the lady was still around was that her friend was waiting at the boat dock. (V 92, T 1307-08) Another time Chandler said he had a camera and threw it in the water because it got wet. (V 92, 1308) Leslie was first approached by the police while he was still in jail. He lied to them about what he knew because he was afraid. (V 92, T 1308-09) He lied again in his deposition on August 22, 1994. On September 16, 1994, he went to the State Attorney's Office and told the truth. (V 92, T 1309-10)

Leo Myers was the original owner of Chandler's 21 foot Bayliner boat. He sold it to Wolfgang Roessel in 1981 or 1982. (V 92, T 1316-17) The steering wheel was not deteriorating when he sold it. (V 92, T 1218) The boat had a blue hull. The top part was white with a white canvas top. (V 92, T 1319)

Wolfgang Roessel purchased the boat from Myers in February, 1982. He replaced the engine with a Volvo V-6. He named the boat "Cigeuner" which means "Gypsy." (V 92, T 1320-22) He sold his

house at 10709 Dalton Avenue and the boat to Mr. Galpin in December, 1986. (V 92, T 1322-23) The steering wheel was metal with a rubber coating. The rubber was melting, rotting, and cracking, and rust was coming out of the cracks. (V 92, T 1324) He kept the boat on a lift in a boathouse behind his house. (V 92, T 1325) He sold a trailer with the boat. (V 92, T 1326-27) He never painted the boat. (V 92, T 1327) It had a fiberglass deck with no rug. (V 92, T 1328) It is common for people to have duct tape on their boats. (V 92, T 1328-29)

Derek Galpin sold the boat and house at 10709 Dalton Avenue to Chandler in September or October, 1988. (V 94, T 1647-48) Galpin used the boat very little and made no changes to it. The steering wheel was in bad shape. (V 94, T 1648-50, 1652) There were six to eight concrete blocks at the side of the house. (V 94, T 1650-51)

Robert Carlton bought the boat and trailer from Chandler in August, 1989, for $5,000, paying $2,500 as a down payment. Chandler said he had taken it into the Gulf and that it handled rough water well. He also said he used the boat for fishing at night. Carlton noticed building blocks near the trailer at the side of the house. (V 92, T 1330-36, 1350-53, 1355, 1359-65) When he bought the boat, the hull was light blue, the deck was white, and the top was blue. He repainted the hull a darker blue and removed the name. He replaced the marine radio. There was nothing wrapped around the steering wheel. (V 92, T 1343-47, 1355) He sometimes kept electrical tape on the boat. (V 92, T 1358) Law enforcement officers bought the boat from him for $7,600 in

September, 1992. (V 92, T 1348) He had taken it out about 35 times and usually washed it after using it. The boat was spotless when he bought it. (V 92, T 1349-50, 1366)

Rollins Cooper was an aluminum subcontractor who worked for Chandler in 1989. (V 93, T 1391-92) On May 15, 1989, Rollins installed a roof over ice and Coke machines at the MacDill Motel. He picked up the materials at Ashley Aluminum, then did the work. The motel personnel were reluctant to pay Cooper, so he tried to contact Chandler without success. (V 93, T 1393-95)

On May 31, 1989, Cooper began work on a screened porch for Betancur after picking up the materials at Ashley Aluminum. He could not remember if he saw Chandler that day. (V 93, T 1396-97) He returned to finish the job on June 1, but he had no screen. He called Chandler, who delivered the screen between 11:00 and 12:O0. Chandler was in a hurry. He told Cooper to call Debra to get paid when he finished. He also told Cooper that he had a date with three women. (V 93, T 1397-99, 1411-12) Cooper spoke to detectives and the State Attorney's Office between 13 and 18 times in 1992, 1993, and 1994 without telling them that Chandler said he had a date with three women. He first mentioned the statement on the day of his deposition, June 27, 1994. He said that about two months earlier, he woke up in a sweat one night and remembered the statement. (V 93, T 1412-19, 1430-32)

The Capo house was near Chandler's house. (V 93, T 1433-34) When Cooper called Debra on June 1, she told him she would leave his check in an envelope taped to their front door, so Cooper went

by to get it. Chandler had signed the check. (V 93, T 1400, 1419-21) On June 2, Cooper met Chandler at Ashley Aluminum a few minutes after 7:00 a.m. They picked up materials, then Chandler had Cooper follow him to the Capo house and showed him what needed to be done to repair a porch. Chandler appeared grubby. He said he spent the night on his boat. (V 93, T 1399-1402, 1422-28) One time Chandler had Cooper pick up scrap aluminum from the yard by his house to recycle it. Cooper tripped over a construction block and noticed that there were others. (V 93, T 1402-05, 1428-29) The last time Cooper worked for Chandler, the job took five days, but Chandler refused to pay for more than three days labor. Cooper felt that Chandler owed him for the two extra days. (V 93, T 1409-10) Cooper denied that he was drinking in 1989, but in his deposition about two months before trial, he had admitted that he was drinking both in 1989 and 1994. (V 93, T 1437)

Bank records for Chandler's business account included check 102 for $104.69 payable to Ashley Aluminum on May 15, 1989, for the MacDill Motel job; check 110 for $495.64 payable to Ashley on May 31, 1989, for the Betancur job; check 111 for $170 payable to Rollins Cooper on June 1, 1989, for the Betancur job; check 112 for $153.51 payable to Ashley on June 2, 1989, for the Capo job. (V 93, T 1440-43) Defense exhibit 9 was a check dated June 2, 1989, for the Capo job. (V 93, T 1444-45)

Detective Robert Engelke of the St. Petersburg police determined that the drive from Ashley Aluminum to the Capo residence was 5.6 miles and took eight minutes. Taking a short

cut, the drive from the Capo house to Chandler's house was 1.3 miles and took three minutes. Without the short cut, it was 3.4 miles and took eight minutes. (V 93, T 1446-53)

FDLE Agent John Halliday identified aerial photos of the area where the bodies were found in Tampa Bay and of the intersection of Dale Mabry and Columbus Drive. On the other side of the intersection, the street is called Boy Scout Boulevard, which turns into Spruce Street, and eventually connects with Eisenhower Boulevard and Route 60. A Dodge dealership, a Burger King, a Days Inn, and a K-mart are located near the intersection. (V 93, T 1454-60) He interviewed Judy Blair in September, 1992, and obtained her description of Chandler's shirt, hat, and shoes. When he searched Chandler's house in Port Orange later that month he found a shirt, hat, and shoes matching her description. (V 93, T 1460-63, 1473) Halliday arrested Chandler on September 24, 1992, pursuant to a warrant for the Madeira Beach case. The search was conducted the next day, also pursuant to a warrant. They did not find any evidence relating to the Rogers homicide case. (V 93, T 1465, 1469-73) Halliday also determined that the distance from Chandler's house to a Circle K store with a pay phone at 10111 Hillsborough Avenue was 0.7 mile, and from there to a Seven Eleven store at 13919 Hillsborough Avenue was 3.5 miles. (V 94, T 1657-59)

GTE records for Debra Chandler's telephone and for the marine operators showed a two minute collect marine call from Gypsy One at 5:49 p.m. on May 15, 1989. (V 94, T 1660-66, 1686, 1700-02) The records showed calls from Chandler's boat to his house on June 2,

1989, at 1:12 a.m. for five minutes, 1:30 a.m. for one minute, 1:38 a.m. for one minute, 8:11 a.m. for four minutes, 9:52 a.m. for one minute. (V 94, T 1687-90, 1704-06, 1709-12) The only other calls between the house and the boat were on December 31, 1988, January 7, 1989, March 17, 1989, and July 5, 1989. (V 94, T 1690-92, 1706-07)

Defense counsel renewed his motion to exclude the state's evidence of the alleged sexual battery of Judy Blair, arguing that the state had no evidence of sexual battery of the Rogers. The court again denied the motion. (V 94, T 1535-37) The court instructed the jury to consider evidence of the alleged rape only for the purpose of proving motive, intent, plan, or "idea"[5] of the defendant in the charged crimes of murder. (V 94, T 1538)

Barbara Mottram and Judy Blair testified that they were Canadians who came to Madeira Beach in May, 1989, for a vacation after they finished college. (V 94, T 1539-40, 1590-91) They stayed in a relative's condominium on the beach with Blair's mother, aunt, and uncle. (V 94, T 1540-41, 1591-92) After dinner on Sunday, May 14, Mottram and Blair walked to a convenience store to buy soft drinks, gum, and a six-pack of beer in preparation for going fishing with friends, John and Scott, at John's Pass. (V 94, T 1541-42, 1567-71, 1592-93) As they were leaving the store, they met Chandler in the parking lot. (V 94, T 1542-43, 1553, 1593-94, 1601-02) He had a black or dark blue Jeep Cherokee. (V 94, T

[5] Counsel for appellant assumes that the court actually said "identity" and that "idea" is another typographical error.

1543, 1594) He told them he had once lived in upstate New York, his name was Dave Posno or Posnaver, he was 33, he had once been a nurse, and now he was in the aluminum siding or roofing business. He was very friendly, jovial, warm, and gentlemanly. (V 94, T 1544, 1595-96) Chandler gave them a ride to John's Pass, offered them a ride in his boat, and said they could see the sunset and fish. (V 94, T 1545-46, 1596-97) Mottram went into a restaurant to find her friends, while Blair remained in the car and agreed to meet Chandler at Don's Dock to go on the boat the next day. When Mottram returned for Blair, Chandler warned them to be careful because they were not in a good area and because they did not want to be caught with the beer. (V 94, T 1547, 1571-75, 1578, 1595, 1597-98) Mottram and her friends walked towards the pier and bridge, with Blair and Chandler following. (V 94, T 1548, 1582) Blair and Chandler went to the other side of the bridge while Mottram was fishing with John and Scott. (V 94, T 1584, 1629) When Blair rejoined Mottram, she suggested going for a boat ride with Chandler the next day, but Mottram declined. (V 94, T 1549-50, 1599) The following morning, May 15, Blair packed sandwiches and sodas for the boat trip and tried to convince Mottram to join her. Mottram again refused and urged Blair to go without her. (V 94, T 1551-52, 1599, 1602)

Blair testified that she walked to Don's Dock. She wore tennis shoes and a t-shirt and shorts over a bathing suit. Chandler was there in his boat. (V 94, T 1602) He was disappointed that Mottram did not come. Chandler drove the boat under the

bridge and into the Gulf. He expressed concern about the rough water and went back under the bridge to tour the waterway. (V 94, T 1603, 1632-33) He again said he was from New York, had been a nurse, was in the aluminum siding business, and lived with his little old mother. He was very nice, friendly, and warm. He did not make any advances. (V 94, T 1604)

Chandler's boat had a light, faded blue hull. The interior was white. Their were two swivel chairs towards the front. The windshield was split for access to the bow. It had a radio, a storage area under the bow with blue cushions, and a blue canvas top. The boat was about 19 feet long. It had a yellow, inboard Volvo motor. Blair identified photos of Chandler's boat and car. (V 94, T 1604-09) Chandler pulled some duct tape from the storage area and taped the steering wheel because it was broken or deteriorating. (V 94, T 1609, 1634) Blair asked him about boats lifted out of the water. He said he kept his own boat that way. (V 94, T 1609) When Chandler dropped Blair off around 4:30 p.m., he said he was having some difficulty with his boat and needed to attend to it. He suggested that she go home for dinner, get her camera, and bring Mottram back so they could go fishing and take photos of the sunset. (V 94, T 1610, 1634-35)

Blair returned to the condo for dinner around 5:00 p.m. She asked Mottram to join her for a sunset cruise. Mottram declined. Blair took a camera when she left. (V 94, T 1554-55, 1586-87, 1611-12, 1635) Blair testified that she returned to the dock, where Chandler was waiting. He expressed concern about Mottram not

coming and seemed perturbed. He went under the bridge to the Gulf. (V 94, T 1612, 1635-36) Chandler gave Blair an opportunity to drive the boat. They stopped to take pictures of the sunset and fish for awhile. Blair expressed concern that it was becoming dark and she needed to return because people were waiting for her. Chandler began complimenting her appearance and suggested that she hug him. (V 94, T 1613, 1636-40) She thanked him for the compliments and refused the hug. He pulled her towards him and forced her to hug him. He touched her arms and body and said he was going to have sex with her. She said no and asked him to take her back. He persisted, so she moved away and threatened to charge him with rape. She began screaming. He asked if she thought somebody would hear her. (V 94, T 1614) Blair could see lights, buildings, and people on shore, but they were not close enough for anyone to see or hear her. She pleaded with Chandler to take her back. He started the boat and went further out. It was dark. (V 94, T 1615, 1640)

Chandler stopped the boat and said, "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?" Blair screamed and tried to get away from him. He held her wrists. He sat on the passenger seat, pulled down his pants, and forced her to engage in oral sex. He put a towel on the deck and forced her down. She was screaming and crying. He told her to shut up and threatened to tape her mouth. At this point in Blair's testimony, the prosecutor asked if she was okay and defense counsel asked to approach the bench. (V 94, T

1616) Defense counsel moved for a mistrial because Blair was crying and it was prejudicial. The court denied the motion, noting that Blair was not crying out loud and barely had tears in her eyes. (V 94, T 1617)

Blair testified that Chandler pulled down the bottom half of her clothing and told her she was going to have sex with him. She was kicking, screaming, and crying. He again threatened to tape her mouth. When she became quiet, he asked, "Is sex really something to lose your life over?" He fondled her vagina and removed her tampon. The court then directed the bailiff to remove the jury. (V 94, T 1618) After a short recess, defense counsel moved for a mistrial because of the prejudicial effect of Blair breaking down for the second time. The court denied the motion, stating that Blair did not break down, she dropped her head and had some tears in her eyes. (V 94, T 1619)

Blair said Chandler attempted anal penetration. She pleaded with him not to do that and told him she had rectal cancer. Chandler penetrated her vaginally, ejaculated, and pulled his pants up. He told her to wash herself with a thermos of water. (V 94, T 1620, 1640-41) During the assault, Chandler repeatedly made an obscene remark, (V 94, T 1621) but he did not hit her or threaten to throw her out of the boat. (V 94, T 1041) He removed the film from her camera, threw it overboard, and wiped down the camera. (V 94, T 1620-21) He said he knew she would report this and asked her to give him a chance to go home to his mother because it would kill her to have a police officer arrive at her door. (V 94, T 1621)

Chandler took her back to shore, letting her off across the channel from Don's dock. He said he was sorry. (V 94, T 1621-22, 1642)

Blair walked home. She told her mother her day was fine, and did not tell her what happened. She was in shock and just wanted to bathe and go to bed. (V 94, T 1622) The next day, Blair waited for her mother, aunt, and uncle to leave, then she told Mottram what happened. Later that evening, she reported it to the police. (V 94, T 1557-58, 1564-65, 1622-23) She told the police Chandler wore a green shirt, which she identified in court. She also identified a hat and a pair of deck shoes as similar to the ones Chandler wore. (V 94, T 1623-24)

Defense counsel moved to strike Blair's testimony and for a mistrial because of the admission of the testimony and because of the prejudicial effect of Blair breaking down twice. Counsel agreed that she did not sob out loud, but she was crying and put her hands to her face. The court responded that Blair's display of emotion was minimal and denied the motions. (V 94, T 1645-46) Defense counsel again renewed his motion for mistrial because of the admission of the collateral crime evidence at the close of the state's case, and the court denied it. (V 94, T 1714)

On February 2, 1995, after Chandler had been sentenced (V 68, R 11510-30; V 75, 12599-623) and filed his notice of appeal (V 68, R 11541), the court entered an amended order allowing the state to introduce evidence of the alleged sexual battery of Judy Blair at trial. This order listed the specific similarities and dissimilar-

ities between the crimes as found by the court. (V 68, R 11579-84)

B. Defense Evidence

Sergeant Glenn Moore was the supervisor of the St. Petersburg Police major crime squad since its formation in 1991. One of the squad's functions was the investigation of the Rogers homicide. (V 95, T 1743-45) That investigation also involved the Tampa Police, the FBI, the State Attorney's Office, and FDLE. (V 95, T 1745-46) As many as 40 detectives had been assigned to the investigation. The major crime squad had eight detectives working full time on this case. (V 95, T 1748) Moore noticed the Clear-water Beach brochure and its possible importance when he reviewed the evidence in July, 1990. (V 95, T 1749) The detectives believed that the "x" on the brochure map was near the Dale Mabry, Columbus, Boy Scout intersection and represented the location of the person writing the directions. (V 95, T 1750-54) In the Tampa area, Chandler was the only person they could connect with the Rogers other than hotel employees and guests. (V 95, T 1760) They conducted an extensive investigation of Chandler, including business records, phone bills, and interviews with people who knew him. (V 95, T 1761-64)

Detective Rodney Frankland went to the Gateway Inn in Orlando in June, 1989, and obtained registration cards and guest lists for guests who were there when the Rogers were there. He never contacted the other guests and had no knowledge of whether other officers did. He was only involved in the investigation for about a week. (V 95, T 1775-80)

FDLE Agent Terry Rhodes located Chandler's dark blue 1985 Jeep Cherokee. It had been repossessed and purchased by someone else. The owner allowed him to search it in November, 1992. He found some items under the back seat which did not belong to the owner. (V 95, T 1781-85)

Rose Upton and Dorothy Lewis worked in the junior department at the Mass Brothers store at Westshore Plaza on June 1, 1989. (V 95, T 1788, 1800) Around 10:20 a.m., Lewis saw Mrs. Rogers and her daughters shopping in the department. Mrs. Rogers and Michelle gave their names when Michelle put a swimsuit on hold. (V 95, T 1800-01, 1805) The Rogers returned to the department around 45 minutes to an hour later. (V 95, T 1801, 1805-06) Michelle had found another swimsuit, but they purchased a top. (V 95, T 1801, 1807) Around 11:20 a.m., Upton was coming out of a stock room when she almost collided with Mrs. Rogers. (V 95, 1789) Upton sold a bracelet to Christe, but it was not one of the bracelets recovered by the police. (V 95, T 1790-91, 1793-94, 1798-99, 1806-07) Both Upton and Lewis saw a man with a young boy come into the department, join the Rogers, and leave with them. (V 95, T 1789, 1791-92, 1801-04) Lewis was surprised by this, because the girls said they were travelling alone. (V 95, T 1804) Lewis said the man spoke to Mrs. Rogers, who then asked Lewis where the children's department was. Lewis told her it was on the second floor. They went upstairs when they left the junior department. (V 95, T 1802-04) Lewis also overheard part of a conversation in which the Rogers wanted to know where Clearwater was. (V 95, T 1808)

Neither woman could say whether Chandler was the man they saw. (V 95, T 1791, 1796-97, 1803-05) Upton described the man as about six feet tall, with a medium build, and light brown hair. (V 95, T 1796) Lewis described the man as a little taller than Mrs. Rogers, in his early forties, wearing a baseball cap, and having lighter gray hair. (V 95, T 1805, 1808)

Dave Connelly purchased Chandler's former house at 10709 Dalton in 1992. He found junk and trash both inside and outside the house, but he did not see any concrete blocks. (V 96, T 1827-29) State's exhibit 11 was a photo of Connelly's blue and white boat in front of the house. (V 95, T 1829-30)

Carlton and Mildred Worsham cashed their Social Security check and paid their electric bill on June 1, 1989, then drove to the boat ramp parking lot on Courtney Campbell Causeway to check the trash barrels for cans. (V 96, T 1831-34, 1837, 1851-52) They saw a blue car with Ohio tags parked near the boat ramp. (V 96, T 1834, 1837-38, 1852, 1854) They drove across the parking lot and saw a black car parked near a wooded area. (V 96, T 1835, 1852-54) Mrs. Worsham saw a girl's face smiling at her from the open window of the black car. She heard people laughing and talking inside the car. She identified the girl as Christe Rogers when she saw her picture in the newspaper on June 18, 1989. (V 96, T 1835-36, 1841-42, 1846-47, 1849) The newspaper also had a photo of the blue car. (V 96, T 1840)

Mrs. Worsham called the tips line and spoke to Officer Storch[6] about this incident on June 9, 1989, but she did not tell him that she saw Christe. (V 96, T 1841-43) On June 10, Mrs. Worsham called the St. Petersburg Police and told Officer Sanders there were several people in the car, and they seemed to be having a good time. She did not remember whether she told him she saw Christe. (V 96, T 1843-44) Around 1:00 p.m. on June 10, the Worshams met Detective McLaughlin on the causeway. Mrs. Worsham told him she saw the girl's face. She was shown some photos, but she could not make a positive identification. (V 96, T 1844-46) After seeing the June 18 newspaper photo of Christe, Mrs. Worsham called Officer Storch and told him that the face she saw was Christe. (V 96, T 1848-49) On August 8, 1990, the Worshams went to the St. Petersburg Police Department and spoke to Detective Cummings. Mrs. Worshamtold her that the face she saw was Christe. (V 96, T 1849-50)

James Jackson was a maintenance worker at the Days Inn on the causeway in June, 1989. Around 2:00 or 2:30 p.m. on June 1, he crossed the pool deck on his way to the kitchen and saw Christe walking towards the rooms. (V 96, T 1856-57, 1860) The boat ramp is about a mile from the hotel. (V 96, T 1861) Jackson did not see a boat at the hotel the next morning. (V 96, T 1857-58)

Frank Perez was the real estate broker for the bank that foreclosed on Chandler's house at 10709 Dalton Avenue. When he

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[6] The prosecutor supplied the names of the officers to whom Mrs. Worsham spoke. She did not remember their names. (V 96, T 1840, 1843, 1844, 1849)

inspected the house in December, 1991, he found only five items inside, a soft drink container, three women's hats, and a box of unused invoices for an aluminum company. In the garage he found a little debris, a sawhorse, and a couple of empty boxes. Outside the house he found some construction debris from remodeling the house consisting of some plaster and pieces of wood. He did not find any concrete blocks. He took photographs of the house and identified them in court. (V 96, T 1861-69)

Wayne Eatman worked for an engineering firm involved in a road widening project on Courtney Campbell Causeway in June, 1989. He was certain he saw the blue Oldsmobile parked at the boat ramp on the day the police found it, Thursday, June 8. He was 75% sure he saw it there on Wednesday, June 7. He was "pretty certain" that it was not there before that Wednesday. He did not see it on Thursday, June 1, or Friday, June 2. He did not work on Saturday or Sunday. (V 96, T 1870-74)

Tampa Police Officer Richard Pemberton was assigned to traffic enforcement on the Courtney Campbell Causeway in early June, 1989. He pulled people over at the boat ramp and conducted license checks on vehicles left at the boat ramp. The detectives found the Rogers' vehicle there on June 8. He had stopped a car at that exact spot the day before, and the Rogers' vehicle was not there. He constantly saw blue and white boats being launched from the ramp. (V 96, T 1876-81)

Tampa Police Sergeant Kenneth Brogdon was working with Pemberton. He was certain that the Rogers vehicle was not in the

same parking space at the boat ramp on the day before the detectives found it, because he stopped a car that pulled into that same parking space. He could not say whether the Rogers' vehicle may have been somewhere else in the parking lot that day. (V 96, T 1883-89)

Paige Fernandez and her husband David purchased a boat on May 31, 1989, and launched it from the causeway boat ramp around 1:00 p.m. on June 1. When they returned to the ramp around 2:00 or 3:00 p.m., Mrs. Fernandez noticed a mid-sized blue car close to the trash can. (V 96, T 1889-93) On June 15, they were at the boat ramp again and spoke to a police officer. She told the officer the vehicle was there on June 1. (V 96, T 1894)

Daniel Miko was the front desk supervisor and a night auditor at the Days Inn in June, 1989. (V 96, T 1895-96) He provided the police with the hotel restaurant checks for June 1. (V 96, T 1897-98) When he went through the checks, there appeared to be five or six missing, but he had not audited the checks and had not determined why those checks were not there. (V 96, T 1898-99, 1910-13, 1915-16) Only one of the checks indicated that it was for three people. That check was paid by credit card at 6:00 p.m., but there was no indication who the check was for. (V 96, T 1913-15)

Jeffrey Gaines worked at the restaurant at the Gateway Inn in Orlando in June, 1989, busing tables and delivering pizzas for room service. (V 96, T 1918-19) He remembered seeing a woman in her forties with two teenage daughters in the restaurant a couple of times. The older daughter asked him about amusement parks. (V 96,

T 1919-21) The last time he saw the mother, her daughters were not there. She was sitting at a table talking with a man. (V 96, T 1921-23) He thought this was on a Saturday. (V 96, T 1923-24) Gaines identified the three women when an investigator showed him pictures. (V 96, T 1922) He did not recall telling Detective Rivers in June, 1994, that he never saw the mother with anyone else. He told him he never saw the girls with any male. (V 96, T 1924-26)

Ronald Bell, the chief toxicologist for the medical examiner's office, performed drug screening tests and an analysis of the stomach contents for each of the Rogers women. No controlled or other substances were detected. (V 96, T 1927-30)

David Kidd, a crime scene technician for the St. Petersburg Police, was involved in the execution of the search warrant for Chandler's home on Dillon Drive in Port Orange. Defense exhibit 16 consisted of fishing rods and equipment found during the search. (V 96, T 1935-36) In September, 1993, Kidd participated in the dive search of the canal behind Chandler's Tampa house at 10709 Dalton Avenue. From the canal, they took a horn button and a couple of small pieces of concrete block into evidence. From the boathouse and dock, they recovered cables for lifting a boat out of the water and some duct tape used to hold segments of the cable together and to hold the cable to the overhead beams. The duct tape and pieces of concrete block were sent to the FBI. (V 96, T 1936-42) In June, 1994, Kidd obtained wood chips from the trim of Chandler's boat stored in the FDLE warehouse and sent them to the

FBI. (V 96, T 1942-43) In August, 1994, Kidd took some paint and fiberglass chips from the hull, the engine compartment, and the deck of the boat and sent them to the FBI. (V 96, T 1944-46)

Otto Albuschat, a crime scene technician for the St. Petersburg Police, received hair samples from each of the Rogers from the medical examiner and sent them to the FBI. (V 96, T 1967-69) He also sent duct tape from Christe and Michelle and the concrete block from Michelle. (V 96, T 1971-72)

James Gili and Chandler became acquainted because their wives were friends. Gili had been to Chandler's house at 10709 Dalton. He did not see any concrete blocks around the property. (V 96, T 1973-74) Chandler kept his boat in the water or on the lift behind his house. (V 96, T 1975) The Chandlers came to Gili's house for his son's birthday party on June 10 or 11, 1989. The Gilis went on Chandler's boat to see the fireworks on July 4, 1989. Gili did not notice any change in Chandler's behavior. (V 96, T 1975-76) Gili did not see any scratches on Chandler's boat. (V 96, T 1976-77) Gili did not know Chandler well enough to see his mood changes or distinguish between his conversations. (V 96, T 1977)

Bill Conway, the manager of Ashley Aluminum in Tampa, knew Chandler as an aluminum contractor who came in once or twice a week. Chandler usually phoned in his orders. Sometimes Chandler sent other people to pick up the materials, but Chandler always paid for them. (V 96, T 1979-80) Defense exhibit 20 consisted of packing slips for materials sold by Ashley. (V 96, T 1981-82) One of the packing slips showed that Chandler ordered materials for a

screen room on May 30, 1989, and the materials were picked up on either May 30 or 31. The order did not include a roll of screen. (V 96, T 1983-85, 1988) Another invoice showed the purchase of a roll of screen and a processing date of June 2, but the screen may have been picked up on June 1. (V 96, T 1989-93) Contractors usually picked up their materials in the morning. Ashley opened at 7:00 a.m., and it usually took about an hour to pick up an order. (V 96, T 1985-86) If the order was called in the day before, it took less time. (V 96, T 1986-87) Chandler was a COD customer and usually had to pay for his orders when he picked them up. However, he incurred $531.00 in bills he never paid. (V 96, T 1987)

Don Fulton lived across the canal from Chandler's house at 10709 Dalton. (V 96, T 1994, 1998) Chandler had a blue boat with white trim. It was a very quiet Bayliner. Fulton liked to fish in the canal at night during the summer and saw Chandler take his boat out after dark, between 10:00 p.m. and 1:00 a.m., between one and three times a week. (V 96, T 1995-99)

Robert Margotta sold the house at 10709 Dalton to Chandler. Margotta went to the house between two and four times around January and February, 1989. He did not see any concrete blocks or pieces of aluminum. (V 96, T 2000-03)

Wayne Oakes, an FBI hair and fiber expert, compared hairs vacuumed from Chandler's boat with known samples of head hair from each of the Rogers and Judy Blair. None of the vacuumed hairs matched the known hairs. (V 97, T 2040-42, 2047) Because the boat was not processed until almost three years after the crime, and it

had been used and cleaned repeatedly, Oakes would not expect to find hairs or fibers associated with the Rogers. (V 97, T 2046-48) He also examined the Rogers' swimsuits from the hotel room and found both fiberglass and paint particles, which were submitted to other experts for analysis. The particles could have come from other items packaged with the swimsuits. (V 97, T 2042-45, 2048-50) He found hairs on duct tape from two of the Rogers, but these hairs either matched the Rogers or were not suitable for comparison. (V 97, T 2045)

James Corby, an FBI expert on coatings, paints, tapes, polymers, and adhesives, examined the duct tape from two of the Rogers' and determined the brand, Nashua. (V 97, T 2052-53, 2062-63) He also found end matches on the pieces of tape indicating that whoever taped the victims alternated between them while applying the tape. (V 97, T 2054, 2063) The duct tape from the boathouse did not match the duct tape from the Rogers. (V 97, T 2055, 2064-65) Corby examined the bathing suit debris found by Oakes and found two extremely small paint particles consisting of a thin clear coat top layer, a thin dark blue middle layer, and a third layer of gray primer. He compared those chips with samples removed from Chandler's boat and found that they did not match. (V 97, T 2056-57) It was unlikely that the paint particles came from a saltwater environment. (V 97, T 2059-60) He also found some fiberglass particles with a blue resin coating. The resin coating did not match the samples from Chandler's boat. (V 97, T 2058-61)

Bruce Hall, an FBI glass and building materials expert, compared the concrete block recovered with Michelle Rogers' body with the pieces of concrete block recovered from the canal and found no association between them. They were different in color and texture. (V 97, T 2066-68) He examined the suspected fiberglass particles found by Oakes and Corby and determined that they were fiberglass. He did not compare them with the known samples from Chandler's boat. The particles could have originated virtually anywhere and were likely from some sort of air filter. (V 97, T 2068-72)

David Rittenhouse, an inmate at Sumter Correctional Institution, had been in the Pinellas County Jail in the same cell with Chandler from November, 1992, through April, 1993. (V 97, T 2081-83) Chandler did not discuss the facts of his cases, although he sometimes made a comment in response to a television show about his cases. (V 97, T 2088)

Ronnie Lawrence, an inmate at Polk Correctional Institution, was in the same cell pod with Chandler at the county jail from April to July, 1993. (V 97, T 2092-95) During that time, he never heard Chandler discuss the facts of his sexual battery and murder charges, not even in response to television programs about them. (V 97, T 2094)

Garland Stidham, an inmate at DeSoto Correctional Institute, spoke with Chandler several times in the recreation yard at the county jail. (V 97, T 2097-99, 2103) Chandler never discussed the facts of his sexual battery and murder charges. (V 97, T 2099)

Buddy Granger, an inmate serving a 25 year minimum mandatory life sentence, was in the same county jail cell pod with Chandler on several different occasions beginning in 1993. (V 97, T 2107, 2111, 2113) Chandler never discussed the facts of the sexual battery and murder cases in Granger's presence. (V 97, T 2107-08) The jail inmates, including Chandler, were entitled to go to the recreation area for an hour each day. Chandler never went unless everyone in the cell block went at the same time. (V 97, T 2108-09) Several times Granger saw Chandler bring back legal papers after meetings with his attorneys. Chandler read them, then he usually tore them up and flushed them down the toilet. He never shared them with anyone and did not want anyone going through his stuff. (V 97, T 2110)

Robert Foley lived in Deltona, Florida, in June, 1989. (V 97, T 2115-16) Foley knew Chandler and went to his house about five times. Foley did some yard work for Chandler. He and his wife and family visited Chandler and his wife and baby on Memorial Day, May 27 or 28, 1989. They went on a ride to John's Pass in Chandler's boat, Foley did not see any yellow ropes or concrete blocks on the boat or at the house. He did not notice anything unusual about Chandler. (V 97, T 2116-19, 2126) Foley first met Chandler in 1978, Chandler used a different name and said he was from upstate New York. (V 97, T 2119) Foley was aware that Chandler went to prison. He lost contact with him for about four years. Chandler called in 1988. He was living in Tarpon Springs, and Foley went there ta visit. (V 97, T 2120) Chandler showed up unexpectedly at

Foley's house on Thanksgiving Day. He was with a woman he had lived with in 1978. He did not say anything about going to Cincinnati, being afraid, or that the police suspected him of a rape or murder. (V 97, T 2121-22) Foley's last contact with Chandler while he was living on Dalton Avenue was in April, 1990. He did not hear from Chandler for about 18 months afterwards, then Chandler showed up in Ormond Beach, and Foley helped him move in. (V 97, T 2123-24) Chandler disappeared again. Foley never knew that he was living in Port Orange. He read about Chandler's arrest in the paper. (V 97, T 2124-25)

Ileana Capo hired Chandler on May 17, 1989, to replace the screens on her porch. On June 2, he came to her house around 7:15 to 7:30 a.m. and introduced the two workers who did the job. He looked the same as before except that his hair was messed up. She did not notice any scratches, bruises, or nervous behavior. The workers finished around 2:00 or 3:00 p.m. Chandler did not return to her house until 5:00 or 6:00 p.m. when Mrs. Capo paid him. (V 97, T 2128-37)

Gayle Downey stayed at the Days Inn on the causeway to attend a sales seminar from May 31 to June 2, 1989. Around noon on May 31, she saw a good looking young man carry a cooler from the second floor, down the stairs, to a boat in the parking lot. He was about 25 to 30 years old, five feet ten inches to six feet tall, with a nice build, and sun-bleached brown hair. The boat was white with a bluish stripe on the side. It was on a trailer pulled by a black or dark blue Bronco or Blazer. She did not see the man, boat, or

car again. (V 97, T 2138-41, 2145-46) She reported this to the police, and St. Petersburg Police Detective Paula Zitzelberger prepared a composite drawing based on her description. (V 97, T 2142-43, 2147-49; V 98, T 2155-59) Chandler was not the man she saw. (V 97, T 2144)

Just before Chandler testified, defense counsel informed the court that Chandler wanted to invoke his Fifth Amendment privilege regarding the Madeira Beach sexual battery case and did not want to do so before the jury. Defense counsel asserted that Chandler was being placed in a position of having to give up one Fifth Amendment right to protect another. He renewed his motion for mistrial based on the admission of the collateral crime evidence, and the court again denied it. (V 98, T 2160-61) The court ruled that Chandler retained his Fifth Amendment privilege regarding the sexual battery because it was a pending case, but the court would allow the state to cross-examine Chandler about it because it was relevant, and he could answer or invoke his privilege. (V 98, T 2161-64) Defense counsel asserted that he would limit direct examination and not talk about the sexual battery case. The court refused to rule in advance whether the state's cross-examination would be beyond the scope of direct. (V 98, T 2163)

Chandler testified that at the end of May and beginning of June, 1989, he lived at 10709 Dalton Avenue in Tampa with his wife Debra and daughter Whitney. He was an aluminum contractor building screen rooms and pool enclosures. (V 98, T 2165-66) After Whitney was born on February 6, 1989, Debra stayed home to care for her and

helped Chandler with his business. (V 98, T 2170-71) There were never any concrete blocks at their house. (V 98, T 2191-92)

On Memorial Day, Foley came over, did some yard work, and bought a couch. At that time, Chandler had a 21 foot Bayliner with a blue hull, white interior, and blue canvas top. He had other boats while living on Dalton -- a 26 foot Pacemaker, a 21 foot Galaxy, and a canoe. (V 98, T 2167) He bought boats, repaired them, used them for awhile, then sold them. He bought the Bayliner from Galpin for $2,100, repaired it, replaced the steering wheel, and sold it to Carlton for $5,000. (V 98, T 2168-69, 2191-93)

Defense exhibit 20, invoices dated May 30 and May 31, indicated that he ordered materials on May 30. He usually ordered the materials, his workers picked them up, then he paid for them. (V 98, T 2171-72) Check number 110 from state's exhibit 63 was signed by Debra. It corresponded with the invoice for the Betancur job. (V 98, T 2173) Chandler could not remember exactly what he did on May 31. It was a typical day. (V 98, 2175)

On June 1, 1989, Chandler was returning from giving someone an estimate when he stopped at a gas station on Fiftieth near 1-4. Michelle Rogers was there and asked him where the Days Inn on Highway 60 was. Highway 60 was just a couple of blocks away, and the hotel could be seen from the gas station, so he pointed out the sign. Christe stuck her head out of their car and hollered, "Rocky Point." Chandler told Michelle they wanted the Days Inn on Courtney Campbell Causeway and gave them directions to go to Columbus Drive to get back on the expressway. (V 98, T 2175-82)

They had a brochure on which he wrote, "Route Sixty, Courtney Campbell Causeway, Days Inn." (V 98, T 2180-82) He did not meet Joan Rogers during this encounter. (V 98, T 2176) He never saw the Rogers again. He did not take them out on his boat, and he did not kill them. (V 98, T 2182, 2194)

An invoice from defense exhibit 20 showed that Chandler paid for a roll of screen on June 2. He probably picked it up on June 1 and took it to Rollins Cooper. (V 98, T 2182-83) A check from state's exhibit 63 was signed by Chandler and showed that he paid Cooper for the Betancur job on June 1. Chandler did not tell Cooper that he had a date with three women. (V 98, T 2184) An invoice from defense exhibit 20 indicated that Chandler had ordered materials for the Capo job on June 1, and they were picked up on June 2. (V 98, T 2190) She paid him that evening, as shown by the check, defense exhibit 21. (V 98, T 2191)

On the night of June 1, Chandler went fishing on his boat at the Gandy Bridge around 9:30 or 10:OO. (V 98, T 2186-87) When he started to go home, his engine died. When he removed the hatch for the engine compartment, he smelled gas in the bilge, and the bilge pump was operating. He found that he had a broken hose and was out of gas. (V 98, T 2187-88) He called home about three times to try to get help without success. He needed someone to tow him. He spent the night on the boat. (V 98, T 2188) The next morning he taped the leaking gas hose. He flagged down a Coast Guard boat, but they were unable to help him. He flagged down another boat

which towed him to the Gandy Bridge Marina. He bought some gas, called home again, then went home. (V 98, T 2188-89)

On cross-examination, Chandler admitted six prior felony convictions. (V 98, T 2197) When the prosecutor asked whether he had contradicted the testimony of Barbara Mottram, the court overruled defense counsel's privilege objection. The prosecutor then asked whether Chandler had contradicted Judy Blair's testimony. Chandler responded that he would not discuss the pending rape trial. (V 98, T 2199) When the prosecutor asked on what grounds, defense counsel again asserted a privilege objection, which the court overruled. The prosecutor asked if Chandler was taking the Fifth Amendment. Chandler answered yes. The prosecutor asked if he was afraid his answers would incriminate him. Defense counsel objected, "Asked and answered. He's invoking the privilege." The court responded, "He is to invoke it, counselor. Overruled." Chandler then said, "I have invoked my Fifth Amendment from the rape case from Madeira Beach. I will answer no questions, sir, that relates to that case." The prosecutor asked if he was afraid his answers might incriminate him. Chandler answered no. The prosecutor asserted that he could not take the Fifth Amendment. The court interjected that was correct. (V 98, T 2200) The court instructed Chandler to answer the question or invoke the Fifth Amendment privilege against self-incrimination. Chandler invoked the Fifth Amendment. (V 98, T 2201)

The prosecutor then asked when Chandler met the Rogers women on June 1. Chandler could not remember. (V 98, T 2201) Chandler

could not remember what he was doing in that area. It was not a "spectacular" day for him, nothing happened. (V 98, T 2202) He stopped at the gas station for cigarettes and saw Michelle and Christe, but not Joan Rogers. He thought Michelle was the driver because she was standing on the driver's side of the car. Christe stuck her head out of a window on the passenger side of the car. She hollered, "Rocky Point, Rocky Point, Days Inn." He gave them directions back to 1-4, to 1-275, to the Clearwater exit, and to follow Highway 60 to Rocky Point. He wrote directions on a brochure handed to him by Michelle. He did not pay any attention when they left. (V 98, T 2203-04, 2266-70) He did not mention Boy Scout or Columbus. He wrote with whatever they handed him, and did not remember switching from pencil to pen. He denied drawing the line, making the circle, and making the "X". (V 98, T 2270-72) They did not ask him about Busch Gardens. There was no conversation about where they were from. He did not notice their Ohio tags. Michelle was pretty and appeared to be 17 to 19 years old. He did not give them directions to Westshore Mall. (V 98, T 2272-74)

Chandler saw the newspaper articles about the bodies found in the bay four days later and the photos of the girls, but he did not realize they were the same people until November, 1989, when he saw a composite drawing in the paper. The paper linked the Madeira Beach case with the Rogers homicide. (V 98, T 2204-10) Until April or May, 1994, when he saw the records of the marine phone calls, he did not realize that the night his boat broke down while

he was fishing was the night of June 1. (V 98, T 2210-12) His boat had broken down three or four times, but it had not been broken down all night before. He was out all night fishing numerous times. (V 98, T 2212-14) On July 4, he was stuck on a sandbar for four hours. He had thought the night of the break down was the weekend before that. (V 98, T 2214-15)

On the night of June 1, Chandler first called home about fifteen minutes after the motor died and he could not restart it. (V 98, T 2216-17) He used a bright light to examine the engine, but did not find that the gas line was actually broken until morning. He knew that he had a leak someplace because he was out of gas. (V 98, T 2216-19) He called the Coast Guard. They told him to call a commercial towing service at John's Pass, and it would cost $100 per hour. He decided that was too expensive. (V 98, T 2220-21)

Chandler could not remember what work he may have done on June 1 and June 2 other than what he testified about on direct. It was five years before trial, and he no longer had business records except for those supplied by the state in discovery. (V 98, T 2221-24) He fled the state because he was afraid of the Madeira Beach case, He was not that concerned about the homicide because he thought law enforcement would find out who did it. (V 98, T 2224-25) Chandler went to Deltona for three days and visited Leslie Hicks before he went to Cincinnati. He lied to Hicks about where his wife and baby were. (V 98, T 2226-27)

Chandler went to Ohio because he needed money for an attorney. He checked into the motel and called Rristal. They came to the motel. He told Rick he needed money. Rick offered to front him two ounces of cocaine. Chandler also obtained a thousand dollars. (V 98, T 2227-28, 2231) Chandler told Rristal he was a suspect in the rape case and they were trying to link the Rogers homicide to the rape case. (V 98, T 2230-31) He told Kristal he was innocent. (V 98, T 2231) He was nervous, but he always chain-smokes cigarettes and drinks a lot of coffee. He did not back his car up to the building to conceal the tag. (V 98, T 2232) He did not tell Rick and Kristal to lie if anyone called looking for him. (V 98, T 2232-33) He arranged for Kristal to call his wife to find out if the police had been to his house about the Madeira Beach case. He wanted Debra to go to a pay phone because he thought their home phone might be tapped. (V 98, T 2228-29, 2233) He did not use the money to hire an attorney. Nor did he go home. He returned to Deltona. (V 98, T 2228)

The prosecutor asked if Chandler was on Madeira Beach on the evening of May 14, 1989. Chandler said he would not discuss the rape case and refused to answer. (V 98, T 2233-34) The court instructed Chandler that he could not refuse to answer unless he invoked his Fifth Amendment right not to incriminate himself. The prosecutor repeated the question, and Chandler pleaded the Fifth. (V 98, T 2234) Chandler was familiar with the John's Pass area and had been there prior to May, 1989, although he did not have jobs or

friends there. (V 98, T 2234-35) The following exchange occurred between the prosecutor and Chandler:

> 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 Did 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.

(V 98, T 2235-36)

In response to further questions, Chandler answered that he replaced the steering wheel on his boat because it was broken. He kept duct tape on his boat and taped the broken steering wheel. (V 98, T 2236) Then the following exchange occurred:

> 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, 19891
> 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.

(V 98, T 2236-37) Defense counsel then requested a side-bar at which he requested a standing objection to the prosecutor continuing to ask questions about the rape case because Chandler would be pleading the Fifth each time. The court overruled the objection. (V 98, T 2237-38)

Cross-examination resumed. Chandler kept a knife on his boat, but he did not have any weapons on the boat. (V 98, T 2338) The knife was not a weapon; it was used for fishing, cutting line, and cutting rope. He had anchor line on the boat. He had two anchors. He also kept tie-off line on the boat. The boat had no carpet. (V 98, T 2239) It had a Volvo engine. (V 98, T 2240)

On the morning of June 2, Chandler discovered that he had a broken fuel line and put tape over it. The gas had completely leaked out, and the bilge pump pumped it out. Chandler did not know when it happened. He had only enough gas to get to the Gandy Bridge. The rest of the gas could have leaked out at the dock. (V 98, T 2240) The gas line came from the tank under the deck. He could see where it was broken and repaired it, but all the gas had

leaked from the tank. (V 98, T 2261-63) He was not aware of any antisiphon valve to stop the gas from leaking from the tank. (V 98, T 2263)

When he was unable to start the boat during the night, Chandler slept on it. In the morning, he flagged down three Coast Guard personnel on a Zodiac, two men and a woman. He asked if they could tow him. They said there was a body on a rock, but they would return to tow him. (V 98, T 2241) Ten to twenty minutes later, two men on a boat towed him to the Gandy Bridge Marina. It took about an hour. He put some gas in the boat and went home. That took another 20 to 30 minutes. (V 98, T 2241-46) Then Chandler went to work. He could not remember exactly where he went that day. He did not recall being at Ms. Capo's house at 7:30 a.m. The phone records showed calls at 8:15 and 9:52. Those calls were made while Chandler was still on the boat, before he came in. He could have signed the documents at Ashley Aluminum at any time during the day. (V 98, T 2246-48) Cooper knew where the job was before June 2, and he could have picked up the materials for it. (V 98, T 2249)

In November, 1989, Chandler left Cincinnati and went to Deltona, then he went home and returned to work. In July, 1990, he and his wife tried to move to California. He did not tell his friends, daughter, or sister where they were going. He never confided with anyone. He was not close to anyone in his family. California was too expensive so they came back, but not to Dalton Avenue. (V 98, T 2251-53) His business was failing. The bank

foreclosed on his house. He obtained twenty to thirty thousand dollars in the drug rip-off with Rick, but did not use the money to hire a lawyer. (V 98, T 2254) They moved to Sunrise, then to Ormond Beach for about a year, then to Port Orange. He did not contact Foley. His family did not know where they were. (V 98, T 2255) Their phone was in their daughter's name because they had bad credit. (V 98, T 2255-56) He remained concerned about being arrested, but still hoped law enforcement would solve the Rogers homicide. (V 98, T 2256)

Chandler was familiar with the location of the Days Inn, but he had not taken his boat to the hotel's back dock. He had taken his boat to the area behind the hotel once or twice. There were a lot of homes. Boats had to be driven at idle speed in most of the area. (V 98, T 2256-57)

Chandler had contact with Customs agents in 1991, but he did not discuss the status of the Rogers homicide investigation with them. He did not discuss the Madeira Beach rape case with them. (V 98, T 2274-75)

The prosecutor resumed his questions about the collateral crime. The court overruled defense counsel's privilege objections, and Chandler invoked his Fifth Amendment privilege.(V 98, T 2275) The court then overruled defense counsel's motion for mistrial. (V 98, T 2276) The prosecutor continued to ask questions about the sexual battery. The court overruled defense counsel's privilege and outside the scope of direct objections, and Chandler invoked the Fifth Amendment. (V 98, T 2276-79) Defense counsel again

moved for mistrial based upon the disclosure of the collateral crime evidence and the prosecutor's questions which caused Chandler to invoke the Fifth in front of the jury. The court denied the motion. (V 98, T 2279)

On redirect, Chandler disputed what Rick and Kristal Mays said in court. It never happened. He also disputed what the State's inmate witnesses said about his statements. (V 98, T 2281-82) On recross-examination, Chandler agreed that he fled the state because his picture was in the paper and he was a suspect in the two cases. He went to the motel in Cincinnati, invited Rick and Kristal to meet him there, and told them he was a suspect in the murder and rape. He also had a call to his wife through pay phones because his home line might be tapped. (V 98, T 2283-84)

Defense counsel renewed all his prior motions for mistrial. The court again denied the motions. (V 98, T 2285)

C. THE STATE'S REBUTTAL

Deputy James Storch received two anonymous calls on the Crime Stoppers lines on June 9, 1989, from a woman who said she saw the Rogers' car at the boat ramp on June 1. In the second call, she said she also saw a dark-colored vehicle with several people inside who appeared to be having a party. She did not say she saw a girl's smiling face in the car window nor that she saw Christe Rogers. (V 99, T 2303-06)

Detective Daniel McLaughlin went to the boat ramp on June 10, 1989, and spoke to Mr. and Mrs. Worsham. Mrs. Worsham said she saw a head in a partly open window in the black car, but she could not

give any more specific description. He showed her a photo of Christe, but she did not recognize it. (V 99, T 2307-11)

Detective Steve Corbet went to the boat ramp on June 15, 1989, and spoke to Wayne Eatman. Eatman said he was off work on the weekend of June 3 and 4, and returned to work on the 5th. He did not remember seeing the Roger's car on Monday, but he thought he saw it on Tuesday, and was sure he saw it on Wednesday and Thursday. (V 99, T 2312-13)

Detective Donald Rivers interviewed Jeffrey Gaines in Orlando. Gaines said he had seen Mrs. Rogers and her daughters at the Gateway Inn, but he had not seen them with anyone else. (V 99, T 2313-14)

Detective Ralph Pflieger reviewed all the evidence from the Rogers' hotel room and car. He did not find any Maas Brothers receipts, bags, or merchandise tags. He did not find a black and orange bracelet. Three bathing suits and one bathing suit top were found on the vanity in the hotel room. They were packaged together in the same bag with numerous other items found on the vanity. He sent the bathing suits to the FBI. (V 99, T 2315-20)

Joan Rogers' credit card account records showed that she made a $51 purchase from guest services at the Gateway Inn in Orlando on June 1, 1989, at 10:02 a.m. (V 99, T 2321-39)

Paul Michael of Tampa hired Chandler to build a screen room on May 17, 1989. When Chandler came to give him an estimate about a week earlier he was accompanied by a small, 8 to 10 year-old boy. (V 99, T 2340-42)

Prison inmate Edwin Ojeda was in the same county jail cell pod as Chandler and Daniel Toby in February, 1993. Chandler told Toby his biggest mistake was leaving the note in the car. (V 99, T 2344-46)

Robert Shidner was the Coast Guard coxswain, the person who drives and is in charge of a boat, who recovered the Rogers' bodies on June 4, 1989. There were four boat crews at the St. Petersburg Coast Guard Station. The standard boat crew had four people, but normally only two at a time go out on the boat. On June 4 they had more people on the boat to handle the load of the bodies. The only female crew member, Lori Brandon, was on his crew. They used inflatable boats sometimes called Zodiacs. The other area Coast Guard stations in Clearwater, Bradenton, and Fort Myers Beach do not patrol or operate in Tampa Bay except when directed to act as backup. On June 2, Schidner's boat was the only one on duty and did not go out into Tampa Bay at all. (V 99, T 2347-51)

James Hensley was a certified boat engine mechanic with 20 years experience in private industry and the Florida Marine Patrol. (V 99, T 2352-57) Hensley examined Chandler's boat the day before he testified. He saw no signs of repair or damage to the fuel line. Gasoline dissolves tape so it will not hold. The boat had an antisiphon valve in operating order. This valve limits the loss of fuel from the tank into the bilge, so a hole in the fuel line should not cause all the fuel to leak out. The valve opens when the fuel pump is operating. Even if the valve failed, the gas should not leak out of the tank because the fuel line came out of

the top of the tank and all the connections were above the top of the tank. If there was a break in the fuel line while the engine was on, the engine would run out of gas and stop, but the remaining gas would stay in the tank. The boat had a steel fuel line from the gas pump to the carburetor. If that line leaked while the engine was on, the engine would run at a lower speed, and gas would spray out on top of the engine, creating a fire hazard. (V 99, T 2357-75)

Customs officer Whitney Azure knew Chandler as an informant from May to November, 1991. In late May, Azure was reading a newspaper with an article about the Rogers homicide. Chandler asked if there was any new information about the perpetrator and when he thought they would catch him. Azure responded that he only knew what was in the paper. Chandler asked again on two or three other occasions. He never said he met the Rogers or gave them directions. (V 99, T 2378-84)

Because there was an undated receipt in evidence showing that Chandler had paid $649 to have the hoses on his boat engine repaired, the state asked the court to admit a bank statement showing a check for that amount on January 25, 1989. The court admitted it over defense counsel's objection that it was not rebuttal. (V 99, T 2384-88)

Defense counsel renewed all his motions, adding that the collateral crime evidence had been a feature of the trial. The court again denied them. (V 99, T 2413-14)

D. CLOSING ARGUMENTS

During closing argument, the prosecutor stated that he found the defense "hard to believe." (V 100, T 2471) The prosecutor relied upon the evidence of the sexual battery of Judy Blair to fill in the gaps in the evidence of the homicides, arguing that it showed what must have happened when the homicides were committed. (V 100, T 2480-83)

The prosecutor responded to defense counsel's argument by telling the jury he found it "frustrating" to "listen to the defense's desperation, distortion, and half-truths[.]" (V 101, T 2614) The prosecutor commented on Chandler's assertion of his Fifth Amendment privilege, "think about all the things he wouldn't talk about and didn't say[.]" (V 101, T 2618) Regarding the alleged sexual battery of Judy Blair, the prosecutor accused defense counsel of being "completely dishonest to you," and asked, "But what kind of charade have we been going through . . . . Do we have direct, honest answers about any of these circumstances? No." (V 101, T 2629) The prosecutor accused defense counsel of "cowardly" and "despicable" conduct. (V 101, T 2630)

The prosecutor used the sexual battery evidence to argue that Chandler was "malevolent," "chameleon-like," "a brutal rapist or conscienceless murderer." (V 101, T 2630) The prosecutor commented upon Chandler never telling his daughters and son-in-law that he was innocent. (V 101, T 2645) Defense counsel then objected and moved for a mistrial because this was the second time the prosecutor commented on Chandler's right to remain silent. The

court overruled the objection on the ground that Chandler took the stand. (V 101, T 2645-46) The prosecutor characterized the defense as "totally irrational" and said, "It's just throw out some confusion, and maybe there will be enough smoke that you can't see through the compelling evidence to Oba Chandler." (V 101, T 2654-55) At the conclusion of the argument, defense counsel moved for a mistrial because the state made the Madeira Beach rape case a feature of the trial and closing argument and because the prosecutor made a reference to a smokescreen effect of the defense witnesses. The court denied the motion. (V 101, T 2668-69)

Following the jury instructions, defense counsel renewed all his prior motions. The court responded that he had not waived any motion or objection. (V 101, T 2693)

E. Penalty Phase

The court overruled defense counsel's objection that the heinous, atrocious, or cruel aggravating circumstance instruction was unconstitutional. (V 102, T 2735-37)

Defense counsel had Chandler examined by a mental health expert, but he would not call the expert because he objected to the Dillbeck procedure requiring a capital defendant who presents mental health expert mitigating evidence to submit to an examination by a state expert. The court noted that it would not have allowed such a state examination prior to a determination of Chandler's guilt, but it would have allowed it after the verdict. (V 102, T 2741-42)

Defense counsel would have called as mitigation witnesses members of Chandler's family, including his mother, his wife, his daughter Whitney, his sisters, his son Jeff, Jeff's mother, and her other son. Chandler decided to call no one. He understood that the testimony might persuade the jury to recommend a life sentence. (V 102, T 2741-45, 2748-49)

The state introduced judgments and sentences for prior armed robberies committed by Chandler, one in 1976 and the other in 1992. (V 102, T 2765-66) Peggy Harrington, a sales designer for a jewelry manufacturer, testified that Chandler robbed her and her partner at gunpoint in a Clearwater hotel parking lot of $750,000 in jewelry on September 11, 1992. (V 102, T 2767-78) She said state's exhibit 3 was exactly like to the gun used by Chandler. (V 102, T 2775) FDLE Agent John Halliday testified that this gun was recovered during the search of Chandler's house on September 25, 1992, along with some jewelry. (V 102, T 2781)

Robert Plemmons testified that on September 7, 1976, Chandler and another man kicked in the front door of his home in Holly Hill. Chandler hit him in the head with a pistol. They tied his hands and feet behind him. Chandler kicked him while asking for money and guns. Chandler took Plemmons' girlfriend into the bedroom. They took over $1200, two guns, and a Doberman puppy. When they left, Plemmons found his girlfriend tied up on the bed, stripped from the waist down. (V 102, T 2786-94)

The defense did not present any witnesses. (V 102, T 2795) The court admitted defense exhibit 1 A and B, records of courses

Chandler completed when he was in prison before. The state and the defense stipulated that the Pinellas County jail telephone records for the month of Navember, 1992, showed 85 calls to Chandler's mother's phone number. (V 102, T 2796) The court admitted defense exhibit 2, a photo of Chandler with his daughter Whitney when she was a toddler, and defense exhibit 3, a more recent photo of Whitney. (V 102, T 2798)

Defense counsel argued that the jury should consider the following mitigating circumstances: 1) Chandler would spend the rest of his life in prison, whether sentenced to life or death. 2) Chandler was productive and contributed to society through his aluminum siding business. 3) While previously incarcerated he obtained his GED and took some college courses, showing that he can adapt to prison and work to improve himself. 4) Chandler assisted law enforcement in an undercover capacity, based on Customs Agent Azure's testimony. 5) He is capable of forming loving relationships. (V 102, T 2806-14)

The court instructed the jury on four aggravating circumstances: 1) prior conviction for another capital offense or a violent felony; 2) committed during the course of a kidnapping; 3) committed for the purpose of avoiding arrest; and 4) heinous, atrocious, or cruel. (V 102, T 2816-17) The court instructed the jury they could consider any aspect of Chandler's character, record, or background and any other circumstances of the offense in mitigation. (V 102, T 2818)

The court conducted a presentencing hearing on October 6, 1994" (V 74, R 12504-40) The state filed memoranda in support of the avoid arrest aggravating factor and in opposition to the mitigating circumstances proposed by the defense. (V 66, R 11183-92; V 74, R 12508) The state also filed a transcript of Debra Chandler's statement, including that Chandler took Whitney and her with him when he went to Pinellas Park to commit the jewelry robbery. (V 66, R 11197-219; V 74, R 12511) Defense counsel filed a memorandum concerning mitigating circumstances, including those argued to the jury and adding that Chandler had a good prison record except for a prior escape, he suffered childhood trauma from his father's suicide when he was 10 years old, he was honorably discharged from the U.S. Army, and he still maintained his innocence. (V 66, R 11193-95; V 74, R 12508-09) The court admitted defense exhibit 1, copies of Chandler's prison record. (V 67, R 11221-314; V 74, R 12509-11) The exhibit included a presentence investigation report stating that Chandler's father committed suicide in 1957 (V 67, R 11226, 11244); a document dated August 13, 1986, which showed that Chandler's last disciplinary action was on September 25, 1978, for a theft committed on September 5 (V 67, R 11301); and a document dated July 16, 1984, which showed that Chandler obtained his GED while in federal prison, reported some college credits, had no disciplinary reports, was not a management problem, but was still considered an escape risk. (V 67, R 11308) Defense counsel argued that the HAC jury instruction was unconstitutionally vague, there was insufficient

evidence to support the HAC, felony murder, and avoid arrest aggravating factors. He objected to the consideration of the contemporaneous murders to support the prior conviction aggravator. (V 74, R 12514-25) The state conceded the mitigator of childhood trauma based on the death of Chandler's father because the state's own investigation showed it to exist. (V 74, R 12535)

SUMMARY OF ARGUMENT

I. The trial court erred by admitting irrelevant evidence that Chandler sexually battered Judy Blair. The evidence of the sexual battery was not sufficiently similar to the murder of the Rogers, and the crimes did not share any sufficiently unique or unusual characteristic, so the evidence of the sexual battery was not relevant to establish Chandler's identity or any other material fact in issue at trial. The improper admission of this evidence was prejudicial to the defense and violated Chandler's right to a fair trial.

II. Although the trial court ruled that Chandler retained his Fifth Amendment privilege to remain silent about the sexual battery, and Chandler did not testify about the sexual battery on direct examination, the trial court permitted the prosecutor to cross-examine Chandler about the sexual battery. This procedure required Chandler to expressly invoke his Fifth Amendment privilege before the jury numerous times and violated his constitutional right against self-incrimination.

III. The trial court erred by allowing the state to introduce a prior consistent statement by Krystal Mays. Mays testified for the state that Chandler admitted committing the murders to her and her husband. Defense counsel impeached Mays on cross-examination by showing that she had two motives to fabricate. First, Chandler involved her husband in taking money from drug dealers, which resulted in her husband being hurt and almost killed and in her having to leave nursing school to move her family. Second, she was

paid to appear on a television program about Chandler's case. The prior consistent statement was made after Mays had a motive to fabricate because of the episode with the drug dealers, so it was not admissible. Because Mays' credibility was an important issue in the case, the improper admission of her prior consistent statement was prejudicial to the defense.

IV. The prosecutor violated Chandler's right to a fair trial by making numerous improper remarks during closing argument. The prosecutor commented on Chandler's assertion of his Fifth Amendment privilege, attacked defense counsel and his credibility, stated his personal opinion that the defense was not believable and that Chandler was guilty, and made derogatory remarks about Chandler. Although defense counsel failed to make timely objections, the cumulative affect of the improper remarks resulted in fundamental error.

V. The court erred by accepting Chandler's waiver of his right to present testimony in mitigation because defense counsel did not inform the court of the content of the testimony which could have been offered by prospective defense witnesses.

VI. The court violated the Eighth Amendment by rejecting the nonstatutory mitigating circumstance of childhood trauma caused by the suicide of Chandler's father when Chandler was ten. The circumstance was established by record evidence submitted by the defense, and the state conceded its existence.

VII. The court violated the Eighth Amendment by giving an unconstitutionally vague jury instruction on the heinous, atro-

cious, or cruel aggravating circumstance over defense counsel's objection.

ARGUMENT

ISSUE I

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

A. Introduction.

Similar fact evidence of a collateral crime is admissible when it is relevant to prove a material fact in issue, such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but such evidence is not admissible when it is relevant only to the defendant's bad character or propensity. Williams v. State, 110 So. 2d 654, 662-663 (Fla.), cert. denied, 361 U.S. 847, 80 S. Ct. 102, 4 L. Ed. 2d 86 (1959); § 90.404(2)(a), Fla. Stat. (1991).

When the primary purpose of the collateral crime evidence is to prove identity, the evidence "must meet a strict standard of relevance." Heuring v. State, 513 So. 2d 122, 124 (Fla. 1987). This Court has required "a close similarity of facts, a unique or 'fingerprint' type of information, for the evidence to be relevant." State v. Savino, 567 So. 2d 892, 894 (Fla. 1990). In Drake v. State, 400 So. 2d 1217, 1219 (Fla. 1981), this Court explained:

> The mode of operating theory of proving identity is based on both the similarity of and the unusual nature of the factual situa-

> tions being compared. A mere general similarity will not render the similar facts legally relevant to show identity. There must be identifiable points of similarity which pervade the compared factual situations. Given sufficient similarity, in order for the similar facts to be relevant the points of similarity must have some special character or be so unusual as to point to the defendant.

Accord Haves v. State, 660 So. 2d 257, 261 (Fla. 1995).

Even relevant evidence of a collateral crime must be excluded when the danger of unfair prejudice substantially outweighs its probative value. Henry v. State, 574 So. 2d 73, 75 (Fla. 1991); § 90.403, Fla. Stat. (1991).

B. Preservation.

Chandler was charged with three counts of first-degree, premeditated murder for the asphyxiation of Joan Rogers, Michelle Rogers, and Christe Rogers. (V 1, R 1-2) Defense counsel filed a pre-trial motion in limine to exclude evidence of a collateral crime, the alleged sexual battery of Judy Blair in the Gulf of Mexico near Madeira Beach, Florida, on the grounds that it was irrelevant to any issue other than bad character and propensity, that the probative value of such evidence was outweighed by its prejudicial effect, and that the collateral crime evidence was not sufficiently similar to the charged offenses to be admissible. (V 44, R 7338-39) Defense counsel filed a memorandum of law in support of the motion. (V 51, R 8523-8562)

The state filed a notice of intent to use evidence of the alleged sexual battery and kidnapping of Judy Blair. (V 53, R 8873-75) The state filed a written proffer of the collateral crime

evidence. (V 54, R 9045-9113) The state also filed a memorandum of law in support of its proposed introduction of collateral crime evidence. (V 54, R 9131-47)

The court conducted a pretrial hearing to determine the admissibility of the collateral crime evidence. (V 56, R 9457; V 73, R 12220-387) The court found the state's evidence that Chandler convinced Ms. Blair to go out on his boat was both relevant and essential to the state's case. (V 73, R 12298-305) The court entered a pretrial order permitting the introduction of the evidence. (V 56, R 9457-58; V 74, R 12424-25) The court found that the evidence was relevant to prove motive, opportunity, intent, plan, or identity, and why Joan Rogers allowed herself and her daughters to accompany Chandler on his boat. (V 56, R 9457) The court found that the alleged homicides and the alleged rape were not only sufficiently similar, but also shared a unique or unusual characteristic. (V 56, R 9457-58) However, the court did not specify what the similarities or unique characteristic were. Instead, the court reserved the right to amend the order

> to specifically note all unusual or unique similarities between the two alleged crimes after the trial. To do so at this time may result in speculation since some of the similarities proffered may not be presented to the jury based on the state and defense tactics in presenting the respective cases.

(V 56, R 9458)

In his opening statement, the prosecutor relied upon the evidence of the sexual battery of Judy Blair and told the jurors that it provided the connection between Chandler and the murders.

(V 87, T 509, 514-28) Defense counsel moved for a mistrial because of the state's reliance on the collateral crime evidence and because the state was making that evidence a feature of the trial. The court denied the motion. (V 87, T 529)

During the presentation of the state's case, Chandler's neighbor Joann Steffey testified that she was aware of the media reports concerning the Rogers homicides. When she saw the composite drawing, and the potential connection between the rape and the homicide, she thought Chandler might be the person. (V 90, T 1018-19) Defense counsel objected and moved for a mistrial based on the introduction of the rape. The court allowed the defense to have a standing objection, motion for mistrial, and motion to strike all references to the Williams rule testimony. The court said it would give a Williams rule jury instruction on request when MS" Blair testified. (V 90, T 1019-20)

Just before Barbara Mottram (V 94, T 1539) and Judy Blair (V 94, 1590) were called to testify about the sexual battery, defense counsel renewed his motion to exclude the state's evidence of the alleged sexual battery of Judy Blair, arguing that the state had no evidence of sexual battery of the Rogers. The court again denied the motion. (V 94, T 1535-37) The court instructed the jury to consider evidence of the alleged rape only for the purpose of proving motive, intent, plan, or identity of the defendant in the charged crimes of murder. (V 94, T 1538)

During Blair's testimony about the sexual battery, the prosecutor asked if she was okay and defense counsel asked to

approach the bench. (V 94, T 1616) Defense counsel moved for a mistrial because Blair was crying and it was prejudicial. The court denied the motion, noting that Blair was not crying out loud and barely had tears in her eyes. (V 94, T 1617) Shortly after Blair resumed her testimony, the court directed the bailiff to remove the jury. (V 94, T 1618) After a brief recess, defense counsel moved for a mistrial because of the prejudicial effect of Blair breaking down for the second time. The court denied the motion, stating that Blair did not break down, she dropped her head and had some tears in her eyes. (V 94, T 1619)

At the conclusion of Blair's testimony, defense counsel moved to strike. He moved for a mistrial because of the admission of the testimony and because of the prejudicial effect of Blair breaking down twice. Counsel agreed that she did not sob out loud, but she was crying and put her hands to her face. The court responded that Blair's display of emotion was minimal and denied the motions. (V 94, T 1645-46) Defense counsel again renewed his motion for mistrial because of the admission of the collateral crime evidence at the close of the state's case, and the court denied it. (V 94, T 1714)

At the conclusion of the state's closing argument, defense counsel moved for a mistrial because the state made the Madeira Beach rape case a feature of the trial and closing argument. The court denied the motion. (V 101, T 2668-69)

Following the jury instructions, defense counsel renewed all his prior motions. The court responded that he had not waived any motion or objection. (V 101, T 2693)

C. Analysis.

On February 2, 1995, after Chandler had been sentenced (V 68, R 11510-30; V 75, 12599-623) and filed his notice of appeal (V 68, R 11541), the court entered an amended order allowing the state to introduce evidence of the alleged sexual battery of Judy Blair at trial. (V 68, R 11579-84) The court found the following similarities between the murders and the alleged sexual battery: 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. 3) All the female victims were similar in height and weight. 4) All the victims met Chandler, a stranger, by a chance encounter where he rendered assistance to the victims. 5) Within 24 hours of this chance encounter with Chandler, all the victims agreed to go for a sunset cruise with him. 6) Chandler was non-threatening and convincing that he was safe to be with alone. 7) A blue and white boat was used for both crimes. 8) A camera was taken to record the sunset in both crimes. 9) Duct tape was used or threatened to be used. 10) There was a sexual motive for both crimes. 11) The crimes occurred in large bodies of water in the Tampa Bay area on a boat under the cover of darkness. 12) Homicidal violence occurred or was threatened. 13) The two crimes occurred within 17 or 18 days of each other. 14) Telephone calls were made to Chand-

ler's home from his boat either before or after both of the crimes. (V 68, R 11579-82)

Appellant respectfully disagrees with nine of the court's fourteen findings of similarities. Regarding finding 2), while it is true that all the victims were white females, Judy Blair was a 25 year-old recent college graduate, (V 94, T 1591, 1626) while Joan Rogers was a 36 year-old wife and mother accompanied by her daughters, 17 year-old Michelle and 14 year-old Christe. (V 89, T 876) This was a significant difference between the sexual battery and the murders, not a similarity.

Regarding finding 4) there was a significant difference in the nature of the assistance provided and the extent of the contact involved. Chandler not only provided a ride to Blair and her friend from the convenience store where they met to John's Pass, he engaged in an extended and friendly conversation with -Blair. (V 94, T 1542-48, 1571-75, 1578, 1593-97) The state's evidence of Chandler's assistance to the Rogers showed only that he gave them directions from someplace in Tampa to their hotel on the causeway. (V 88, T 764; V 89, T 815-17; V 90, T 1066-78; V 92, T 1267-69, 1276-77) There is no evidence that he provided the Rogers with transportation to the hotel, nor that he engaged in any extended conversation with them.

Regarding finding 5), there is no evidence that the Rogers agreed to go on a sunset cruise with Chandler. Regarding finding 6), the state presented no evidence that Chandler was non-threatening in his behavior with the Rogers, nor that he convinced them

that he was safe to be with. The state's only evidence of Chandler's conduct with the Rogers is that he gave them directions to their hotel, (V 88, T 764; V 89, T 815-17; V 90, T 1066-78; V 92, T 1267-69, 1276-77) and that he made statements implicitly admitting that he was the one who killed them. (V 91, T 1144, 1169, 1171, 1178, 1180, 1182-83, 1235-36, 1248; V 92, T 1273-74, 1288-89, 1301-02) Regarding finding 8), the state's evidence showed that the Rogers had a camera which was never recovered, (V 89, T 806-07, 828-30, 837, 879) and that Chandler told a cellmate he had a camera and threw it in the water because it got wet. (V 92, 1308) But there was no evidence that the Rogers took their camera on Chandler's boat to record the sunset. Each of these findings by the court can only be based upon the court's speculation that the events leading up to the murders must have paralelled the events leading up to the sexual battery, despite the complete absence of any evidence of what, if anything, occurred between Chandler and the Rogers during the time between him giving them directions to the hotel and the time they were murdered.

Finding 9) represents another significant difference between the sexual battery and the murders, not a similarity. The mouths of each of the Rogers were covered with duct tape. (V 87, T 591-94, 610, 626-27, 633, 635) Chandler did not place any duct tape on Blair's mouth, he threatened to tape her mouth when she was screaming and crying during the course of the sexual battery. (V 94, T 1616, 1618, 1641)

Finding 10) is another instance of speculation by the court. Other than the evidence of the sexual battery of Blair, the only evidence even suggesting a sexual motive for the murders is that the bodies of the Rogers were nude below the waist when they were recovered from the bay, (V 87, T 578, 584, 591, 593, 610, 627, 629, 632), and Chandler told a cellmate that one of the girls was very attractive and that turned him on. (V 92, T 1273) The medical examiner looked for, but did not find any genital injuries. He did not look for semen because it would have been decomposed or washed away by the water. (V 87, T 628, 631) There was no evidence of sexual intercourse with any of the three women, but he would not have expected to find such evidence because of the decomposition. (V 87, T 642-43) This evidence established another significant difference between the crimes. Judy Blair was sexually battered, but there was no evidence that the Rogers were sexually battered.

Finding 11) leads to a significant difference between the crimes. The sexual battery of Blair occurred aboard Chandler's boat in the Gulf of Mexico. (V 94, T 1612-13, 1615-16, 1635-36, 1640) But the Rogers' bodies were placed in the waters of Tampa Bay about three miles east of the St. Petersburg Pier. (V 87, T 576-88, 590, 593; V 89, T 852-58) The Gulf of Mexico and Tampa Bay are very distinct and separate bodies of water.

Finding 12) leads to the most significant difference between the crimes, the amount and type of force used on the victims. Chandler implicitly threatened to kill Blair when he asked, "Is sex really something to lose your life over?" (V 94, T 1618) However,

he did not threaten to throw her out of the boat. (V 94, T 1641) He did not use any life-threatening force to accomplish the sexual battery. He held her wrists, he held the back of her head during oral sex, he forced her down onto a towel on the boat deck, and he held her arms over her head. (V 94, 1616, 1618, 1641-42) He did not slap, hit, or beat her. He did not threaten her with a weapon. He did not tie her up or put a rope around her neck. (V 94, T 1641-42) Chandler took Blair back to shore, across the channel from the dock where he had picked her up, and he told her he was sorry. (V 94, T 1621-22, 1642) In contrast, the Rogers' wrists and legs were bound with rope. (V 87, T 578, 584, 587, 591-93, 611, 627, 629, 632-33) Ropes were tied around their necks and attached to concrete blocks. (V 87, T 578, 591, 593-96, 610-11, 627, 629, 633-35) They were placed in the water and died of asphyxiation, either from drowning or from strangulation by the neck ropes. (V 87, T 606-09, 641)

The court found the following significant dissimilarities between the murders and the alleged sexual battery: a) Ropes were used to bind the hands and feet of the murder victims, while Ms. Blair was not bound. b) The Rogers were killed, and it is not known whether they were raped, while Ms. Blair was raped and only threatened to be killed. c) Concrete blocks were tied to the necks of the murder victims, while no concrete blocks were involved in the rape of Ms. Blair. (V 68, R 1182-83)

In summary, the sexual battery of Blair was similar to the murders of the Rogers only on five of the grounds found by the

court: 1) The victims were tourists on vacation in the Tampa Bay Area. 2) The victims were white females similar in height and weight, but not in age. 3) A blue and white boat was used in both crimes. 4) The crimes occurred about 17 to 18 days apart. 5) Telephone calls were made from Chandler's boat to his house before or after each crime occurred.

These similarities do not establish a unique mode of operation leading to the conclusion that Chandler, and Chandler alone, must have committed both crimes. It has become common for criminals in Florida to target tourists as their victims. It is also common for criminals to target women as their victims. Blue and white boats are commonplace. Surely many other crimes occurred in the Tampa Bay area in the 17 to 18 day interval between the sexual battery and the murders. Surely many other people made marine telephone calls on the dates of the crimes.

The differences between the crimes are far more significant than the similarities. Most important is the nature of the crimes. Judy Blair was sexually battered with the use of only slight force and a vague threat that she would lose her life if she resisted. The Rogers were brutally murdered with no evidence that they were sexually battered and only slight evidence of any sexual motive.

This case is very similar to Drake v. State, 400 So. 2d 1217 (Fla. 1981). Drake was tried and convicted for the murder of Odette Reeder, a woman he met by chance in a bar. After several drinks, they left the bar together. Reeder told her friends she would return shortly, and her friends thought she was going outside

with Drake to smoke marijuana. Six weeks later, Reeder's body was found in a wooded area, lying on her back, with a skirt covering her face and neck, a blouse beneath her body, and her hands bound behind her back with a bra. Her death was caused by eight stab wounds in the lower chest and upper abdomen. The medical examiner could not determine whether she had been raped because of the decomposition of the body.

The trial court admitted collateral crime evidence that Drake had sexually assaulted two other women and had bound their hands behind their backs. Drake met the first of these women, K.T., in a bar, took her to his apartment, and provided her with morphine. When she said she would pay him later, he removed her clothes, bound her hands behind her back, sexually assaulted her with a broomstick and a bottle, and choked her until she passed out. She escaped after Drake fell asleep. The second woman, P.B., whom Drake had been dating, returned to his apartment with his roommate after they had been drinking. She undressed and went into the bathroom. When she returned to the bedroom, Drake threw her on the bed, tied her hands behind her, struck her several times in the abdomen, and attempted intercourse.

This Court held that the trial court committed reversible error by admitting the collateral crime evidence to prove Drake's identity in the murder because the sexual assaults were not sufficiently similar to the murder. Id., at 1219-20. The only similarities found by this Court were the binding of the victim's hands behind their backs, and leaving a bar with Drake. The crimes

were significantly different because "the collateral incidents involved only sexual assaults while the instant case involved murder with little, if any, evidence of sexual abuse." Id. Further, the similar facts were not sufficiently unusual because binding of the victim's hands occurs in many crimes and did not point to Drake as the perpetrator. Id.

Chandler's case is also comparable to Haves v. State, 660 So. 2d 257 (Fla. 1995), Thompson v. State, 494 So. 2d 203 (Fla. 1986), and Peek v. State, 488 So. 2d 52 (Fla. 1986). In Peek, the defendant was tried and convicted for the murder and sexual battery of an elderly woman, who was severely beaten and strangled to death. The trial court admitted collateral crime evidence that Peek had sexually battered another, younger woman. This Court followed Drake in holding that the admission of the collateral crime evidence was reversible error. Peek, at 55-56. This Court found that the principal similarities between the crimes were that they both occurred in Winter Haven within two months of each other, both victims were white females, and both were raped. Id., at 55. However, this Court found numerous differences between the crimes. The murder victim was elderly, and her assailant strangled and beat her, tied her to a bed post, gained entry to her home by cutting a screen door, cut the telephone wires, and committed the crime at night. The collateral crime victim was young, and Peek did not strangle or beat her, did not bind her, did not force entry to her home, did not cut her telephone lines, and committed the crime during the day. Id. This Court found that the similarities

between the crimes were not so unusual as to establish a unique pattern of criminal activity to justify admission of the collateral crime evidence. Id.

In Thompson, the defendant was tried and convicted for the murder of a woman whose body was found, beaten and stabbed, in a box in a dumpster behind a bar. Her car was found stuck in sand near the St. Helen's church parking lot. The court admitted collateral crime evidence of a prior kidnapping and sexual battery of another woman by Thompson in the St. Helen's church parking lot. Following Drake and Peek, this Court held that the admission of the collateral crime evidence was reversible error because it was not sufficiently similar to the murder. Thompson, at 204-05. This Court found that the primary similarities were 1) the victims were women of about the same age and build, 2) both crimes occurred near the church parking lot, and 3) Thompson was having domestic difficulties at the time of each crime. Id., at 204. However, there were substantial differences between the crimes because the murder victim was badly beaten, but there was no substantial evidence of sexual abuse, while the sexual battery occurred without beating or bodily harm. Id., at 204-05.

In Haves, the defendant was tried and convicted for the strangulation murder of a female groom in her race track dorm room. Seminal fluid was found on a vaginal swab taken from the victim and on her tank top. Testing indicated that DNA from a sample of Hayes' blood matched that of the seminal fluid. A co-worker testified that she saw Hayes at the victim's door at 8:45 p.m. on

the night of the murder, and she heard the victim refuse to allow Hayes to enter. The trial court admitted evidence of a collateral incident at a race track in New Jersey. Hayes had taken another female groom out to dinner, then to a bar for drinks. They returned to her dorm room, where he attacked her and choked her, but there was no evidence of a sexual assault. This Court quoted the Drake rule requiring both pervasive points of similarity and the unusual nature of the fact situations being compared pointing to the defendant, and concluded that there were insufficient points of similarity between the offenses to warrant admitting evidence of the collateral attack in the murder trial. Haves, at 261. This Court further held that any marginal relevance the prior attack may have had to the murder was substantially outweighed by its prejudicial effect. Id.

In Chandler's case, as in Drake, Peek, Thomsson, and Haves, the similarities between the sexual battery of Blair and the murder of the Rogers were not sufficiently unusual to point to Chandler, while there were numerous, substantial differences between the charged crimes and the collateral crime. Because the crimes were so different, the state failed to establish a unique mode of operation, and the collateral crime evidence was not relevant to establish Chandler's identity as the perpetrator of the murders. Identity of the perpetrator is an essential element of proof, and it was the primary issue in Chandler's trial. While the trial court said that the collateral crime evidence was also relevant to prove motive, opportunity, intent, plan, and why Mrs. Rogers

allowed herself and her daughters to go on Chandler's boat, those matters were a part of and subsidiary to the state's efforts to prove identity. This Court should conclude, as in the prior cases cited, that the trial court erred by admitting the collateral crime evidence. This error violated Chandler's constitutional right to a fair trial. Thompson v. State, 494 So. 2d at 204; Peek v. State, 488 So. 2d at 54; U.S. Const. amend. XIV; Art. I, § 9, Fla. Const.

D. Prejudicial Effects.

The improper admission of collateral crime evidence is subject to the harmless error test of State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). State v. Lee, 531 So. 2d 133 (Fla. 1988). This test places the burden on the state to demonstrate beyond a reasonable doubt that there is no reasonable possibility the error affected the jury verdict. Lee, at 134, 136; DiGuilio, at 1135.

The state's burden of demonstrating that the erroneous admission of collateral crimes evidence did not affect the verdict is especially difficult to satisfy because the error is presumed to be harmful. See Czubak v. State, 570 So. 2d 925, 928 (Fla. 1990). In Peek v. State, 488 So. 2d at 56, quoting, Straight v. State, 397 So. 2d 903, 908 (Fla. 1981), this Court ruled:

> Our justice system requires that in every criminal case the elements of the offense must be established beyond a reasonable doubt without resorting to the character of the defendant or to the fact that the defendant may have a propensity to commit the particular type of offense. The admission of improper collateral crime evidence is "presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged."

In Peek, the presumption of harmful error led this Court to conclude that the admission of the irrelevant collateral crime evidence in that case was prejudicial and required reversal for a new trial. Id., at 56. Similarly, this Court found that the potential impact on the jury of hearing the details of the improper collateral crimes evidence required reversal for a new trial in Drake v. State, 400 So. 2d at 1219-20. This Court followed Drake and Peek in holding that the improper admission of collateral crime evidence was prejudicial and required reversal for a new trial in Thompson v. State, 494 So. 2d at 205. Therefore, this Court should presume that the improper admission of the collateral crime evidence in this case was harmful to Chandler.

Moreover, the prejudicial impact of the collateral crime evidence on Chandler's jury was increased by Judy Blair's inability to control her emotions while she was testifying about the most painful details of the sexual battery. Her testimony was interrupted twice when she began crying on the witness stand. (V 94, T 1616-19)

In State v. Lee, 531 So. 2d at 137-38, this Court found that the improper admission of collateral crime evidence was harmful error requiring reversal for a new trial because it was given undue emphasis by the state during opening and closing argument. Similarly, the prosecutor gave undue emphasis to the collateral crime evidence in this case in his opening statement and closing argument. In the opening statement, the prosecutor relied upon the evidence of the sexual battery of Judy Blair and told the jurors

that it provided the connection between Chandler and the murders. (V 87, T 509, 514-28) In the closing argument, the prosecutor relied upon the evidence of the sexual battery of Judy Blair to fill in the gaps in the evidence of the homicides, arguing that it showed what must have happened when the homicides were committed. (V 100, T 2480-83) Further, the prosecutor accused defense counsel of being "completely dishonest to you," regarding the sexual battery and asked, "But what kind of charade have we been going through . . . . Do we have direct, honest answers about any of these circumstances? No." (V 101, T 2629) The prosecutor accused defense counsel of "cowardly" and "despicable" conduct. (V 101, T 2630) The prosecutor used the sexual battery evidence to argue that Chandler was "malevolent," "chameleon-like," and, "a brutal rapist or conscienceless murderer." (V 101, T 2630) These remarks went beyond the bounds of proper argument even if the collateral crime evidence had been properly admitted. See Issue IV, infra.

Therefore, the presumption of harmful error because of the potential impact of improper collateral crime evidence upon the jury, Judy Blair's crying episodes while testifying about the sexual battery, and the prosecutor's undue emphasis upon the sexual battery in opening statement and closing argument combine to establish that the trial court's error was not harmless. The improper admission of the irrelevant collateral crime evidence was extremely prejudicial to Chandler's defense and requires reversal for a new trial.

ISSUE II

HAVING FOUND THAT APPELLANT HAD THE RIGHT TO REMAIN SILENT REGARDING THE FACTS OF THE PENDING SEXUAL BATTERY CASE, THE TRIAL COURT VIOLATED THAT RIGHT BY REQUIRING HIM TO REPEATEDLY INVOKE HIS FIFTH AMENDMENT PRIVILEGE BEFORE THE JURY IN RESPONSE TO THE STATE'S QUESTIONS ABOUT THE SEXUAL BATTERY.

Both the United States and the Florida Constitutions provide that no person shall be compelled in a criminal case to be a witness against himself. U.S. Const. amend. V; Art. I, § 9, Fla. Const. The Fifth Amendment privilege against self-incrimination is protected by the Fourteenth Amendment from abridgement by the states. Mallov v. Hogan, 378 U.S. 1, 6, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964). The Fifth Amendment privilege is the "essential mainstay" of the American system of criminal justice and protects "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." Id., at 7-8.

In Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965), the defendant did not testify during the guilt phase of his murder trial. The court instructed the jury that the defendant had the constitutional right not to testify, but the jury could consider his failure to deny or explain evidence or facts within his knowledge. The prosecutor commented on the defendant's failure to testify in closing argument. The Supreme Court held that the Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such

silence is evidence of guilt." Id., at 615 (footnote omitted). In reaching this conclusion, the Court explained that

> comment on the refusal to testify is a remnant of the "inquisitorial system of criminal justice," . . . which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly.

Id., at 614 (footnote and citation omitted).

Similarly, this Court has ruled, "Any comment on, or which is fairly susceptible of being interpreted as referring to, a defendant's failure to testify is error and is strongly discouraged." State v. Marshall, 476 So. 2d 150, 153 (Fla. 1985). Moreover, this Court has declared its intent to provide even more protection of the defendant's right to remain silent at trial than is provided by the federal courts:

> The right to stand mute at trial is protected by both our state and federal constitutions. Commenting on a defendant's failure to testify is a serious error. The fairly susceptible test offers more protection to defendants than the federal test, and we decline the state's invitation to adopt the latter.

State v. Kinchen, 490 So. 2d 21, 22 (Fla. 1985).

The Fifth Amendment privilege is further protected by the rule that neither party may call a witness who will invoke his privilege and refuse to testify. Carter v. State, 481 So. 2d 1252, 1253 (Fla. 3d DCA), rev. denied, 492 So. 2d 1330 (Fla. 1986); Apfel v. State, 429 So. 2d 85, 86 (Fla. 5th DCA 1983); Faver v. State, 393 So. 2d 49, 50 (Fla. 4th DCA 1981). In Apfel, at 86, the Fifth District ruled, "Where the court and the prosecution are aware that

a witness will invoke the privilege, it is improper for the court to permit the jury to hear the witness invoke his privilege." In Faver, at 50, the Fourth District explained the rationale for this rule by quoting a passage from Bowles v. United States, 439 F. 2d 536, 541-42 (D.C. Cir. 1970)(en banc), cert. denied, 401 U.S. 995, 91 S. Ct. 1240, 28 L. Ed. 2d 533 (1971):

> The rule is grounded not only in the constitutional notion that guilt may not be inferred from the exercise of the Fifth Amendment privilege but also in the danger that a witness's invoking the Fifth Amendment in the presence of the jury will have a disproportionate impact on their deliberations.

In the present case, just before Chandler testified, defense counsel informed the court that Chandler wanted to invoke his Fifth Amendment privilege regarding the Madeira Beach sexual battery case and did not want to do so before the jury. Defense counsel asserted that Chandler was being placed in a position of having to give up one Fifth Amendment right to protect another. He renewed his motion for mistrial based on the admission of the collateral crime evidence, and the court again denied it. (V 98, T 2160-61) The court ruled that Chandler retained his Fifth Amendment privilege regarding the sexual battery because it was a pending case, but the court would allow the state to cross-examine Chandler about it because it was relevant, and he could answer or invoke his privilege. (V 98, T 2161-64) Defense counsel asserted that he would limit direct examination and not talk about the sexual battery case. The court refused to rule in advance whether the

state's cross-examination would be beyond the scope of direct. (V 98, T 2163)

Having determined that Chandler was entitled to invoke his Fifth Amendment privilege regarding the sexual battery, the trial court erred by ruling that the state could cross-examine him about the sexual battery and Chandler could either answer the questions or invoke his privilege. This placed Chandler in the position of having to invoke his privilege before the jury. This procedure improperly penalized Chandler for invoking his privilege. Since a prosecutor is forbidden from even commenting upon a defendant's failure to testify at trial, he should also be forbidden from cross-examining a testifying defendant about any subject matter for which the defendant will properly invoke his Fifth Amendment privilege. Being required to expressly invoke his privilege before the jury is far more prejudicial to the defendant than having the prosecutor comment on his failure to testify because it is even more likely that the jury will misconstrue the defendant's exercise of his right to silence as evidence of his guilt.

The court also erred by refusing to determine whether the state's questions about the sexual battery would be beyond the scope of cross-examination when defense counsel asserted that he would limit the scope of direct examination and not talk about the sexual battery. The federal test for determining the breadth of the defendant's waiver of his Fifth Amendment privilege when he testifies depends upon the proper scope of cross-examination by the prosecution.

In Brown v. United States, 356 U.S. 148, 154-55, 78 S. Ct. 622, 2 L. Ed. 2d 589 (1958), the Supreme Court stated that if a criminal defendant testifies in his own defense, "his credibility may be impeached and his testimony assailed like that of any other witness, and the breadth of his waiver [of his Fifth Amendment privilege] is determined by the scope of relevant cross-examination." [Emphasis added.] In McGautha v. California, 402 U.S. 183, 215, 91 S. Ct. 1454, 28 L. Ed. 2d 711 (1971), the Court said,

> It has long been held that a defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonablv related to the subject matter of his direct examination. [Emphasis added.]

Therefore, when the defendant in a criminal case chooses to testify in his own defense, his testimony waives his privilege against self-incrimination and subjects him to cross-examination only on matters reasonably related to the subject matter presented on direct and his credibility. See also, Fountain v. United States, 384 F. 2d 624 (5th Cir. 1967) (government witness properly invoked Fifth Amendment when defense sought to cross-examine on matters not covered in direct). Chandler did not testify about the sexual battery on direct examination, (V 98, 2165-94) and the sexual battery was not reasonably related to the subject matter of his testimony on direct, nor to the credibility of his testimony on direct, so he did not waive his Fifth Amendment privilege regarding the sexual battery.

The court's errors were extraordinarily prejudicial to Chandler because they resulted in the court allowing the state to

extensively cross-examine him about the sexual battery, compelling Chandler to repeatedly invoke his Fifth Amendment privilege before the jury. The prosecutor began his assault on Chandler's constitutional right against self-incrimination by asking whether Chandler had contradicted the testimony of Barbara Mottram. The court overruled defense counsel's privilege objection. The prosecutor then asked whether Chandler had contradicted Judy Blair's testimony, Chandler responded that he would not answer questions about the pending rape trial. (V 98, T 2199) When the prosecutor asked on what grounds, defense counsel again asserted a privilege objection, which the court overruled. The prosecutor asked if Chandler was taking the Fifth Amendment. Chandler answered yes. The prosecutor asked if he was afraid his answers would incriminate him. Defense counsel objected, "Asked and answered. He's invoking the privilege." The court responded, "He is to invoke it, counselor. Overruled." Chandler then said,, "I have invoked my Fifth Amendment from the rape case from Madeira Beach. I will answer no questions, sir, that relates to that case." The prosecutor asked if he was afraid his answers might incriminate him. Chandler answered no. The prosecutor asserted that he could not take the Fifth Amendment. The court interjected that was correct. (V 98, T 2200) The court instructed Chandler to answer the question or invoke the Fifth Amendment privilege against self-incrimination. Chandler invoked the Fifth Amendment. (V 98, T 2201)

The prosecutor asked if Chandler was on Madeira Beach on the evening of May 14, 1989. Chandler said he would not discuss the rape case and refused to answer. (V 98, T 2233-34) The court instructed Chandler that he could not refuse to answer unless he invoked his Fifth Amendment right not to incriminate himself. The prosecutor repeated the question, and Chandler invoked the Fifth. (V 98, T 2234) Chandler was familiar with the John's Pass area and had been there prior to May, 1989, although he did not have jobs or friends there. (V 98, T 2234-35) The following exchange occurred between the prosecutor and Chandler:

> 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 Did 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.

(V 98, T 2235-36)

In response to further questions, Chandler answered that he replaced the steering wheel on his boat because it was broken. He

kept duct tape on his boat and taped the broken steering wheel. (V 98, T 2236) Then the following exchange occurred:

> Q Did you do that when Judy Blair was on the boat with you?
> A I am pleading the Fifth, sir.
> a 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, 19891
> 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.

(V 98, T 2236-37) Defense counsel then requested a side-bar at which he requested a standing objection to the prosecutor continuing to ask questions about the rape case because Chandler would be pleading the Fifth each time. The court overruled the objection. (V 98, T 2237-38)

Later during the cross-examination, the prosecutor resumed his questions about the collateral crime:

> Q I'll ask you a couple 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. 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.

(V 98, T 2275) The court then overruled defense counsel's motion for mistrial. (V 98, T 2276)

The prosecutor resumed his cross-examination:

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 was 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 as 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.

(V 98, T 2276-79) Defense counsel again moved for mistrial based upon the disclosure of the collateral crime evidence and the prosecutor's questions which caused Chandler to invoke the Fifth in front of the jury. The court denied the motion. (V 98, T 2279)

The court's denial of the motion for mistrial was reversible error requiring remand for a new trial. The court's errors in allowing the state to cross-examine Chandler about the sexual battery after determining that he retained his Fifth Amendment privilege not to testify about it resulted in Chandler having to expressly invoke his privilege before the jury twenty-one times. The danger that the jury would draw adverse inferences of guilt from Chandler's exercise of an essential constitutional right became far too great for this Court to find the errors harmless beyond a reasonable doubt under the standard of State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986).

ISSUE III

THE TRIAL COURT ERRED BY ALLOWING THE STATE TO PRESENT A PRIOR CONSISTENT STATEMENT BY KRISTAL MAYS WHEN HER MOTIVE TO FABRICATE EXISTED BEFORE THE STATEMENT WAS MADE.

"It is well settled that a witness's prior consistent statements are generally inadmissible to corroborate that witness's testimony." Jackson v. State, 498 So. 2d 906, 909 (Fla, 1986); accord Dawson v. State, 585 So. 2d 443, 444-45 (Fla. 4th DCA 1991). Section 90.801(2)(b), Florida Statutes (1993), sets forth an exception to the general rule when the prior consistent statement is offered to rebut an express or implied charge of improper influence, motive, or recent fabrication. State v. Jones, 625 So. 2d 821, 826 (Fla. 1993); Cortes v. State, 670 So. 2d 119, 121 (Fla. 3d DCA 1996); Columtino v. State, 620 So. 2d 244, 245 (Fla. 3d DCA

1993). However, the exception applies only when the prior consistent statement was made before the existence of the fact which gave rise to the improper influence or motive to falsify. Jackson, at 910; Cortes, at 121; Colunting, at 245; Dawson, at 445; Bianchi v. State, 528 So. 2d 1309, 1311 (Fla. 2d DCA 1988).

The principal issue in the guilt phase of trial was whether Oba Chandler was the person who murdered Joan, Michelle, and Christe Rogers. Viewed in the light most favorable to the state and the jury's verdict of guilt, Chandler's daughter Kristal Mays testified that when Chandler went to Cincinnati in November, 1989, he admitted that he committed the murders.' (V 91, T 1131-32, 1144-45)

On cross-examination, defense counsel showed that Mays had two distinct motives to testify falsely against her father. First, in October, 1990, Chandler returned to Cincinnati and persuaded Mays' husband, Rick Mays, to set up a drug deal. Chandler took the drug dealers' money and left. In retaliation, the drug dealers beat and almost killed Rick. The dealers also attacked the Mays' home, causing Kristal to drop out of nursing school so she could move her family to another house. (V 91, T 1185-87) Kristal was very upset about this and told Rick to call the police and report that Chandler "put a gun on him." (V 91, T 1189) She remained very angry with her father over this incident at the time of his arrest on September 24, 1992. (V 91, T 1190-92) Kristal Mays' second

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[7] On cross-examination, defense counsel sought to establish that Chandler said that the police were looking for him for the murders, not that he had committed the murders. (V 91, T 1169-83)

motive to testify falsely arose in 1994 when she was paid $1,000 to appear on the television program Hard Copy to discuss her father's case. (V 91, T 1194, 1197)

On redirect examination, the state sought to rehabilitate Mays by introducing a prior consistent statement, a sworn statement made to the State Attorney's Office in 1992, before she was paid to appear on television in 1994. (V 91, T 1197-98) Defense counsel objected that the statement was not admissible because her motive to fabricate arose with the drug deal which occurred prior to the sworn statement. (V 91, T 1198-1200) The court overruled the objection and admitted the statement. (V 91, T 1200) On October 6, 1992, Mays stated under oath, "He said that he could not come back to Florida, the police were looking for him, that he had murdered the women." She clarified that he used the word "killed" instead of "murdered." (V 91, T 1200-01)

Thus, this case presents the question whether a trial witness, whose credibility is challenged through cross-examination showing two distinct motives to testify falsely, can be rehabilitated by introducing the witness's prior consistent statement made before the fact giving rise to the second motive, but after the facts giving rise to the first motive. The existing case law requires that the prior consistent statement be made before the existence of a fact giving rise to a motive to testify to be admissible. Jackson, 498 So. 2d at 910; Cortes, 670 So. 2d at 121; Columtino, 620 So. 2d at 245; Dawson, 585 So. 2d at 445; and Bianchi, 528 So. 2d at 1311. The reason for this requirement is that a prior

consistent statement made after the existence of a fact giving rise to a motive to testify falsely cannot properly rehabilitate the impeached witness, because the same improper influence which could motivate the witness to testify falsely at trial could have motivated the witness to testify falsely in the prior consistent statement. Thus, the prior consistent statement would be no more reliable than the testimony impeached at trial.

In the present case, the prior consistent statement to the State Attorney's Office on October 6, 1992, could not have been tainted by the payment to appear on television in 1994, but it certainly could have been tainted by Kristal Mays' anger at her father for the results of the drug deal in October, 1990. In fact, she admitted at trial that she was still angry and upset about the results of the drug deal when she spoke to Chandler on September, 26, 1992. Because facts giving rise to a motive to fabricate existed before the prior consistent statement was made, that statement was not reliable and should not have been admitted to corroborate Mays' trial testimony.

The trial court's error in admitting the prior consistent statement was prejudicial to the defense because Kristal Mays' credibility was important to the state's case against Chandler. Most of the state's evidence that Chandler was the killer of the Rogers was circumstantial. Kristal Mays testified that Chandler admitted that he committed the murders, (V 91, T 1144-45) while Chandler denied that he was the killer, (V 98, T 2182, 2194) and testified that he told Kristal he was innocent. (V 98, T 2231)

When the credibility of the state's witness is an important issue, the erroneous admission of a prior consistent statement by that witness is not harmless and requires reversal for a new trial. Coluntino, 620 So. 2d at 245; Bianchi, 528 So. 2d at 1311. This Court found that the combined prejudicial effects of the improper admission of a prior consistent statement and other trial errors required reversal for a new trial in Jackson, 498 So. 2d at 910. Because of the prejudicial effect of the improper admission of the prior consistent statement in this case where witness credibility was important, or when this error is considered in combination with the other trial errors argued in this brief, this Court should reverse Chandler's convictions and remand this case for a new trial.

ISSUE IV

THE PROSECUTOR'S IMPROPER REMARKS IN CLOSINGARGUMENTVIOLATED CHANDLER'S DUE PROCESS RIGHT TO A FAIR TRIAL.

In Stewart v. State, 51 So. 2d 494 (Fla. 1951), this Court stated the duties of counsel and the trial court concerning closing arguments:

> We have not only held that it is the duty of counsel to refrain from inflammatory and abusive argument but that it is the duty of the trial court on its own motion to restrain and rebuke counsel from indulging in such argument.

This Court further explained the special duty owed by a prosecutor:

> Under our system of jurisprudence, prosecuting officers are clothed with quasi judicial

> powers and it is consonant with the oath they take to conduct a fair and impartial trial. The trial of one charged with crime is the last place to parade prejudicial emotions or exhibit punitive or vindictive exhibitions of temperament.

Id., at 495.

In Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985), this Court again condemned improper arguments by prosecutors, stating, "It ill becomes those who represent the state in the application of its lawful penalties to themselves ignore the precepts of their profession and their office." This Court explained,

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

Id., at 134.

In the present case, the prosecutor made four types of remarks in his closing argument which were improper. First, he commented upon Chandler's exercise of his Fifth Amendment privilege regarding the sexual battery of Judy Blair: "think about all the things he wouldn't talk about and didn't say[.]" (V 101, T 2618)

Defense counsel did not object to the prosecutor's comments on Chandler's exercise of his Fifth Amendment privilege until the prosecutor commented upon Chandler never telling his daughters and son-in-law that he was innocent. (V 101, T 2645) Defense counsel then objected and moved for a mistrial because this was the second time the prosecutor commented on Chandler's right to remain silent.

The court overruled the objection on the ground that Chandler took the stand. (V 101, T 2645-46) However, the court had ruled that Chandler was entitled to invoke his Fifth Amendment privilege regarding the sexual battery, (V 98, T 2161-64) so the remark about what Chandler did not say or talk about when he testified was fairly susceptible of being interpreted by the jury as comment upon Chandler's exercise of his Fifth Amendment privilege. See State v. Marshall, 476 So. 2d 150, 153 (Fla. 1985); State v. Kinchen, 490 So. 2d 21, 22 (Fla. 1985). Prosecutors are forbidden from commenting upon the defendant's exercise of his Fifth Amendment right to remain silent. Griffin v. California, 380 U.S. 609, 615, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965); State v. Marshall, at 153.

The second category of improper remarks by the prosecutor consisted of attacks on defense counsel and his theory of defense. The prosecutor responded to defense counsel's closing argument by saying, "Sometimes it's frustrating to sit there for an hour and a half and listen and not be able to talk and listen to the defense's desperation, distortion, and half-truths . . . ." (V 101, T 2614) The prosecutor accused defense counsel of being "completely dishonest to you," and asked, "But what kind of charade have we been going through . . . . Do we have direct, honest answers about any of these circumstances? No." (V 101, T 2629) The prosecutor accused defense counsel of "cowardly" and "despicable" conduct. (V 101, T 2630) The prosecutor characterized the defense as "totally irrational" and said, "It's just throw out some confusion, and maybe there will be enough smoke that you can't see through the

compelling evidence to Oba Chandler." (V 101, T 2654-55) At the conclusion of the argument, defense counsel moved for a mistrial because the prosecutor made a reference to a smokescreen effect of the defense witnesses. The court denied the motion. (V 101, T 2668-69)

In Adams v. State, 192 So. 2d 762, 764 (Fla. 1966), this Court found reversible error when the prosecutor described defense counsel's closing argument as "twisted" and "perverted and distorted," and suggested that defense counsel violated his oath as a lawyer. Similarly, the District Courts of Appeal have found reversible error when prosecutors resorted to personal attacks on defense counsel and his credibility. Knight v. State, 672 So. 2d 590, 591 (Fla. 4th DCA 1996); Jenkins v. State, 563 So. 2d 791 (Fla. 1st DCA 1990); Redish v. State, 525 So. 2d 928, 931 (Fla. 1st DCA 1988); Ryan v. State, 457 So. 2d 1084, 1089 (Fla. 4th DCA 1984); Jackson v. State, 421 So. 2d 15 (Fla. 3d DCA 1982).

The third category of improper remarks by the prosecutor were statements of his personal opinions and beliefs. The prosecutor stated his personal opinion that Chandler's defense was not believable:

> The suggestion was made maybe [the gas] didn't leak all out at that time and in that particular trip -- which I find it hard to believe. I find the whole thing hard to believe.

(V 100, T 2471) The prosecutor also stated his personal belief in Chandler's guilt: "You know, I agree with that. There is only one

person who knows whether Oba Chandler is guilty, because Oba Chandler is the murderer, not somebody else." (V 101, T 2618)

It is a violation of the Florida Rules of Professional Conduct, Rule 4-3.4(e) for a lawyer to "state a personal opinion as to the justness of a cause, the credibility of a witness, . . . or the guilt or innocence of an accused." In Pacifico v. State, 642 SO. 2d 1178, 1184 (Fla. 1st DCA 1994), the district court ruled,

> [B]ecause a jury can be expected to attach considerable significance to a prosecutor's expressions of personal beliefs, it is inappropriate for a prosecutor to express his or her personal belief about any matter in issue.

Thus, it is reversible error for the prosector to "express a personal belief in the guilt of the accused." Riley v. State, 560 So. 2d 279, 280-81 (Fla. 3d DCA 1990). It is also reversible error for the prosecutor to make it clear that "in his opinion, the defense was a fabrication." Huff v. State, 544 So. 2d 1143 (Fla. 4th DCA 1989).

The fourth type of improper remarks by the prosecutor consisted of personal attacks on Chandler. The prosecutor argued that Chandler was "malevolent," "chameleon-like," "a brutal rapist or conscienceless murderer." (V 101, T 2630) "It is improper for a prosecutor to refer to the accused in derogatory terms, in such a manner as to place the character of the accused in issue." Pacifico v. State, 642 So. 2d at 1183. In Pacifico, the First District found fundamental error because the prosecutor attacked the character of the defendant by calling him a "sadistic, selfish bully," a "criminal," a "convicted felon," a "rapist," and a

"chronic liar." Id. Similarly, the Fifth District found fundamental error when the prosecutor called the defendant shrewd, cunning, and diabolical, in combination with other improper remarks. Fuller v. State, 540 So. 2d 182, 184 (Fla. 5th DCA 1989).

Appellant acknowledges that ordinarily counsel must contemporaneously object and move for a mistrial to preserve a claim of improper comments in closing argument for appellate review. Nixon v. State, 572 So. 2d 1336, 1340 (Fla. 1990), cert. denied, 502 U.S. 854, 112 S. Ct. 164, 116 L. Ed. 2d 128 (1991). Also, a motion for mistrial made at the end of closing argument has been held insufficient in the absence of a contemporaneous objection. Id., at 1341.

However, this Court has long recognized that there are situations where the prosecutor's remarks in closing argument are so improper that they constitute fundamental error. In Pait v. State, 112 So. 2d 380, 385 (Fla. 1959), this Court ruled,

> when an improper remark to the jury can be said to be so prejudicial to the rights of an accused that neither rebuke nor retraction cold eradicate its evil influence, then it may be considered as ground for reversal despite the absence of an objection below, or even in the presence of a rebuke by the trial judge.

See also, Robinson v. State, 520 So. 2d 1, 7 (Fla. 1988).

Because of the prosecutor's repeated improper remarks during closing argument, this Court should apply the Pait rule to find fundamental error in this case. The district courts have found fundamental, reversible error in cases involving multiple improper remarks by the prosecutor during closing argument similar to the

improper remarks in the present case. Knight v. State, 672 So. 2d at 591 (attacks on defense counsel and his credibility, arguing facts not in evidence, comments on right to silence) ; Pacifico v. State, 642 So. 2d at 1182-85 (telling jury they have duty to convict, attacks on defendant's character, arguing facts not in evidence); Fuller v. State, 540 So. 2d at 184-85 (attacks on defendant and defense counsel). Similarly, this Court should reverse Chandler's conviction and remand for a new trial.

ISSUE V

THE TRIAL COURT ERRED BY ACCEPTING APPELLANT'S WAIVER OF HIS RIGHT TO PRESENT MITIGATING TESTIMONY TO THE PENALTY PHASE JURY BECAUSE DEFENSE COUNSEL DID NOT STATE FOR THE RECORD WHAT THAT TESTIMONY WOULD BE.

In Koon v. Dugger, 619 So. 2d 246, 250 (Fla. 1993), this Court ruled:

> When a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase, counsel must inform the court on the record of the defendant's decision. Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be. The court should then require the defendant to confirm on the record that his counsel has discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence. [Emphasis added.]

In the present case, the trial court erred by accepting Chandler's waiver of his right to present mitigating testimony to the penalty phase jury because defense counsel failed to comply

with the Koon requirement that he inform the court of "what that evidence would be." Id. (V 102, T 2741-45, 2748-49) First, in response to the court's inquiry, defense counsel stated that the confidential expert appointed by the court had examined Chandler, but defense counsel would not call him to testify because counsel objected to the Dillbeck[8] procedure requiring the defendant to submit to an examination by an expert for the state. (V 102, T 2741-42)

Next, the court inquired about the family members defense counsel might have wanted to call as witnesses, noting that "the Court [sic] then is obligated to tell you [Chandler] what you would have -- who you would have called and what they would have said, basically." [Emphasis added.] (V 102, T 2742-43) Defense counsel then listed family members[9] who would say "favorable things" about Chandler, but he did not say what those favorable things were, nor in any other way did he state for the record what the content of their testimony would have been. (V 102, T 2743-44, 2748-49) The court asked defense counsel if he had gone over what "those favorable things" were with Chandler, and counsel responded, "Generally, yes." (V 102, T 2744)

The court then addressed Chandler and stated:

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[8] Dillbeck v. State, 643 So. 2d 1027, 1031 (Fla. 1994), cert. denied, __ U.S.-, __ S.Ct.__, 131 L. Ed. 2d 226 (1995).

[9] Those family members were Chandler's youngest daughter, Whitney; his sisters, Lula Harris, Helen Gonzalez, Elma O'Rourke, and Rosie DeBartoley; his son, Jeff; Jeff's mother, Sonya Gibson; her son, Michael Singleton; and Chandler's mother, Margaret Furr. (V 102, T 2744, 2748)

> 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? [Emphasis added.]

(V 102, T 2745) Chandler responded, "Yes, he has, and I have made a decision, your Honor[,] to call no one." (V 102, T 2746) The court further determined that Chandler understood that he could be making a mistake because the witnesses' favorable testimony could persuade the jury to recommend a life sentence, Chandler had time to talk this over with his lawyer, and it was Chandler's decision to instruct his lawyer not to call the witnesses. (V 102, T 2745) Chandler also agreed that he did not want to call his mother. (V 102, T 2749)

By failing to require defense counsel to specify what the witnesses would have said if called to testify, the trial court overlooked one of the purposes of the Koon rule. This Court's decision states, "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." Koon, 619 So. 2d at 250. In a specially concurring opinion joined by Justice Kogan, Chief Justice Barkett amplified her concern:

> I concur with the majority subject to the views I expressed in Hamblen v. State, 527 So. 2d 800, 806-809 (Fla. 1988) (Barkett, J., dissenting). I continue to believe that, in any case where the defendant waives the right to present mitigation, independent public counsel should be appointed to present whatev-

> er mitigating evidence can be reasonably discovered under the circumstances in order to ensure a reliable and proportionate sentence.

Id., at 251 (Barkett, C.J., concurring).

In Hamblen v. State, 527 So. 2d 800 (Fla. 1988), the defendant chose to represent himself, pleaded guilty, waived his right to have a jury for penalty phase, presented no evidence in mitigation, and asked the court to sentence him to death. On appeal, Hamblen's counsel argued that the trial court should not have allowed him to waive counsel for the penalty phase because the result of the waiver was that there was no adversary proceeding to determine whether life or death was the appropriate penalty. This Court held there was no error in not appointing counsel to seek out and present mitigating evidence and to argue against the death sentence. Id., at 804. In a dissenting opinion, Justice Ehrlich opined that this Court cannot perform its review function "without an adequate record of facts which may tell whether death is the appropriate penalty." Id., at 806 (Ehrlich, J., dissenting). In a second dissent, Justice Barkett urged that the Eighth and Fourteenth Amendments require heightened scrutiny of death sentences, and,

> This heightened scrutiny is meaningless, however, if the defendant "waives" any part of the proceedings critical to determining the proper sentence. Without a presentation of mitigating evidence, we cannot be assured that the death penalty will not be imposed in an arbitrary and capricious manner, since the very facts necessary to that determination will be missing from the record.

Id., at 808 (Barkett, J., dissenting). Thus, the Koon rule was designed, in part, to make a record of what mitigating evidence was being waived by the defendant to facilitate this Court's review of the waiver and the resulting death sentence.

The trial court's failure to require defense counsel to proffer what the witnesses he identified would have said in mitigation violated the Koon rule and rendered Chandler's waiver of his right to present mitigating evidence invalid. The court's error in accepting the invalid waiver contributed to the jury's death recommendation by depriving the jury of the opportunity to consider and weigh the mitigating evidence counsel could have presented in the absence of the waiver. The court's error also resulted in an incomplete record for this Court to review on this appeal and "deprive[d] this Court of the opportunity for meaningful review" of Chandler's death sentences. See Ferrell v. State, 653 So. 2d 367, 371 (Fla. 1995) (failure to comply with Campbell rule). The death sentences must be vacated, and this case must be remanded for a new penalty phase trial before a new jury.

ISSUE VI

THE TRIAL COURT VIOLATED THE EIGHTH AMENDMENT BY FINDING THE MITIGATING CIRCUMSTANCE OF CHILDHOOD TRAUMA WAS NOT PROVEN WHEN THE STATE CONCEDED ITS EXISTENCE,

The United States Supreme Court has repeatedly held that "in capital cases, the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence."

Hitchcock v. Dugger, 481 U.S. 393, 394, 107 S. Ct. 821, 95 L. Ed. 2d 347 (1987); Skipper v. South Carolina, 476 U.S. 1, 2, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986); Eddings v. Oklahoma, 455 U.S. 104, 113-14, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982). This requirement is not satisfied solely by allowing the presentation of mitigating evidence. The sentencer is required to "listen" to the evidence and to give it some weight in determining the appropriate sentence. Eddings, 455 U.S. at 113-14 & n. 10.

Thus, in Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990), this Court ruled:

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. [Footnote omitted.]

In this case, despite Chandler's waiver of the right to present mitigating testimony, see Issue V, supra, defense counsel urged the court to find several nonstatutory mitigating factors, including childhood trauma based on the fact that Chandler's father committed suicide when Chandler was ten years old, as shown by a presentence investigation report contained in his prison records in defense exhibit 1. (V 66, R 11193-94; V 67, R 11221, 11226, 11244; V 74, R 12526-28) The prosecutor conceded the existence of this childhood trauma because the state's own investigation confirmed it. (V 74, R 12535) Yet the court rejected this mitigating factor as unproven because Chandler did not present witness testimony to

show what effect his father's suicide had upon him. (V 68, R 11527-28; A 8-9)

The court's rejection of the mitigating circumstance of childhood trauma resulting from Chandler's father's suicide was error. In Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990), this Court ruled that "when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved." Accord Morgan v. State, 639 So. 2d 6, 13 (Fla. 1994); Knowles v. State, 632 So. 2d 62, 67 (Fla. 1993). The court may reject mitigating circumstances as unproven only when "the record contains competent substantial evidence to support the trial court's rejection of these mitigating circumstances." Nibert, at 1062 (internal quotation marks omitted).

In Farr v. State, 621 So. 2d 1368 (Fla. 1993), the defendant also waived the presentation of mitigating evidence and urged the court to sentence him to death. The trial court failed to consider evidence of mitigating circumstances contained in a presentence report and a psychiatric report. The presentence report contained information about Farr's troubled childhood and the murder of his mother, among other mitigating factors. This Court held,

> [M]itigating evidence must be considered and weighed when contained anywhere in the record, to the extent that it is believable and uncontroverted. . . . That requirement applies with no less force . . . even if the defendant asks the court not to consider mitigating evidence.

Id., at 1369. Moreover, this Court found that the error in not considering all the available mitigating evidence required the

death sentence to be vacated and the case remanded for a new penalty phase hearing. Id., at 1370.

Thus, the trial court could not rely on Chandler's waiver of the presentation of mitigating testimony to reject the mitigating factor of childhood trauma based on his father's suicide. Nor could the court reject this uncontroverted mitigating factor because its only evidentiary support was a presentence investigation report. As in Farr, this Court should vacate Chandler's death sentence and remand for a new sentencing proceeding.

ISSUE VII

THE TRIAL COURT ERRED BY GIVING AN UNCONSTITUTIONAL JURY INSTRUCTION ON THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE.

In Espinosa v. Florida, 505 U.S. 1079, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992), the Supreme Court ruled that the former standard jury instruction on the heinous, atrocious, or cruel (HAC) aggravating circumstance, which simply recited the language of the statute, § 921.141(5)(h), Fla. Stat. (1989), was unconstitutionally vague. The court explained that the weighing of an invalid aggravating circumstance violates the Eighth Amendment. Id., 120 L. Ed. 2d at 858. An aggravating circumstance is invalid if it is so vague that it leaves the sentencer without sufficient guidance for determining the presence or absence of the factor. Id. When the jury is instructed that it may consider such a vague aggravating circumstance, it must be presumed that the jury found and

weighed an invalid circumstance. Id., 120 L. Ed. 2d at 858-59. Because the sentencing judge is required to give great weight to the jury's sentencing recommendation, the court then indirectly weighs an invalid circumstance. Id., 120 L. Ed. 2d at 859. The result of this process is error because it creates the potential for arbitrariness in imposing the death penalty. Id.

In the present case, the state requested the court to instruct the jury on the heinous, atrocious, or cruel aggravating circumstance. Defense counsel objected that the instruction was unconstitutional. (V 102, T 2735) The court recognized that the constitutionality of this aggravating circumstance remained a federal issue, but overruled the objection because this Court approved the language of the new standard instruction after the decision in Espinosa. (V 102, T 2736-37) See Taylor v. State, 630 so. 2d 1038, 1043 (Fla. 1993).

The court instructed the jury:

> A crime for which the defendant is to be sentenced [w]as especially heinous, atrocious, or cruel.
>
> Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others.
>
> The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

(V 102, T 2817) This was the instruction approved in Taylor.

This Court ruled this instruction on the HAC factor is not unconstitutionally vague because it adequately defines the terms of

the factor. Taylor, at 1043. Appellant respectfully disagrees and requests this Court to reconsider the vagueness of the HAC instruction.

The first paragraph of this instruction simply recites the statutory language, "especially heinous, atrocious or cruel," from section 921.141(5)(h), Florida Statutes (1989). In the absence of a sufficient limiting construction, the statutory language is unconstitutionally vague and overbroad and violates the Eighth Amendment. Espinosa; Maynard v. Cartwrisht, 486 U.S. 356, 108 S. ct. 1853, 100 L. Ed. 2d 372 (1988); U.S. Const. amend. VIII. The second paragraph of the instruction purports to define the statutory terms, but it does so in the same language which was held unconstitutionally vague and overbroad in Shell v. Mississippi, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990). Thus, the constitutionality of the instruction depends upon whether the final paragraph provides sufficient guidance to the sentencer.

In Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976), the Supreme Court found that the HAC aggravator provided adequate guidance to the sentencer because this Court's opinion in State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 s. ct. 1950, 40 L. Ed. 2d 295 (1974), construed HAC to apply only to a "conscienceless or pitiless crime which is unnecessarily torturous to the victim." Sochor v. Florida, 504 U.S. 527, 112 S. Ct. 2114, 119 L. Ed. 2d 326, 339 (1992).

In Sochor, the Supreme Court ruled that it had no jurisdiction to decide whether the former standard HAC jury instruction used in

that case violated the Eighth Amendment because this Court had ruled that the issue was procedurally barred by the defendant's failure to object at trial. Id., 119 L. Ed. 2d at 337-38. Sochor also claimed that this Court had failed to adhere to the Dixon limiting construction in subsequent cases and therefore failed to provide sufficient guidance to the sentencing judge. The Supreme Court rejected that argument because it found that this Court had consistently applied the HAC factor to cases where the defendant strangled a conscious victim. Id., 119 L. Ed. 2d at 339-40. The Sochor decision does not hold that a jury instruction using the Dixon limiting construction of WAC would provide sufficient guidance under the Eighth Amendment; that question was not before the Court.

Cases decided after Proffitt call into question the adequacy of the Dixon limiting construction of HAC. The Supreme Court has ruled that a State's capital sentencing scheme must genuinely narrow the class of defendants eligible for the death penalty, and a statutory aggravating circumstance must provide a principled basis for the sentencer to distinguish those who deserve capital punishment from those who do not. Arave v. Creech, 507 U.S. __, 113 S. Ct. 1534, 123 L. Ed. 2d 188, 200 (1993). "If the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm." Id.

Thus, the term "pitiless" is unconstitutionally vague because the jury might conclude that every first-degree murder is pitiless.

Id., at 201. The term "conscienceless" suffers from the same defect; all first-degree murders can be seen as conscienceless. "Unnecessarily torturous" might also be construed by the jury as applying to all first-degree murders because any pain or suffering felt by the victim is plainly unnecessary. Moreover, the phrase "the kind of crime intended to be included" does not limit the jury's consideration of the HAC factor solely to unnecessarily torturous murders, but implies that such murders are merely an example of the type of crime to which HAC applies.

Furthermore, this Court has been applying a narrower construction of HAC than the Dixon construction, requiring proof that the defendant "intended to cause the victim unnecessary and prolonged suffering." Kearse v. State, 662 So. 2d 677, 686 (Fla. 1995); Stein v. State, 632 So. 2d 1361, 1367 (Fla. 1994); Bonifay v. State, 626 So. 2d 1310 (Fla. 1993). This limiting construction has not been incorporated into the HAC jury instruction. The point of Espinosa is that the jury must be informed of the limiting construction of an otherwise vague aggravating circumstance, and failure to do so renders the sentencing process arbitrary and unreliable. For example, in Jackson v. State, 648 So. 2d 85, 88-90 (Fla. 1994), this Court ruled that the standard cold, calculated, and premeditated (CCP) jury instruction, which simply repeated the language of the statute, was unconstitutionally vague because it did not inform the jury of the limiting construction this Court had given the CCP factor.

The court's error in giving a vague instruction on the HAC aggravating circumstance was harmful because of the likelihood that it affected the jury's sentencing recommendation. "[W]hile a jury is likely to disregard an aggravating factor upon which it has been properly instructed but which is unsupported by the evidence, the jury is 'unlikely to disregard a theory flawed in law."' Jackson v. State, 648 So. 2d at 90, quoting, Sochor v. Florida, 112 S. Ct. at 2122, 119 L. Ed. 2d at 340. "[W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale." Stringer v. Black, 503 U.S. 222, 232, 112 S. Ct. 1130, 117 L. Ed. 2d 367 (1992). In Jackson, this Court found that the trial court's error in giving a vague jury instruction on the cold, calculated, and premeditated aggravating circumstance required reversal for a new sentencing proceeding before a newly empaneled jury. 648 So. 2d at 90.

This court has held that the use of an unconstitutionally vague instruction on HAC is harmless error when the facts of the case establish the presence of the factor under any definition of the terms and beyond a reasonable doubt. Thompson v. State, 619 So. 2d 261, 267 (Fla.), cert. denied, ___ U.S. __, 114 S. Ct. 445, 126 L. Ed. 2d 378 (1993). This is not such a case. The sufficiency of the evidence to establish HAC was in dispute during the penalty phase and sentencing hearing. The medical examiner testified that each of the victims died of asphyxiation, but he was not sure whether this was caused by drowning or by strangulation.

(V 87, T 606-09, 641) Defense counsel conceded that death by strangulation would qualify as HAC, but he argued to the court that death by drowning did not. (V 102, T 2736; V 74, R 12515-16) The prosecutor argued to both the court and the jury that the evidence established the HAC factor. (V 102, T 2757-61, 2802; V 74, R 12530-31)

Under these circumstances, the failure to adequately inform the jury of what they must find to apply HAC undermined the reliability of the jury's sentencing recommendation, created an unacceptable risk of arbitrariness in imposing the death penalty, and could not have been harmless beyond a reasonable doubt. See Jackson v. State, 648 So. 2d at 90. The death sentence must be vacated, and this case must be remanded to the trial court for a new sentencing proceeding before a new jury.

CONCLUSION

Appellant respectfully requests this Honorable Court to reverse the judgment and sentence and to grant the following relief: as to ISSUES I, II, III, and IV, remand this case for a new trial; as to ISSUES V and VII, remand this case for a new penalty phase trial with a jury; or, as to ISSUE VI, remand this case for resentencing by the court.

APPENDIX

IN THE CIRCUIT COURT IN AND FOR THE SIXTH JUDICIAL CIRCUIT
COUNTY OF PINELLAS, STATE OF FLORIDA

CRIMINAL DIVISION
CASE NO. CRC9217438CFANO

STATE OF FLORIDA

vs. (3CTS) MURDER IN THE FIRST DEGREE

OBA CHANDLER
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SENTENCING ORDER

The Defendant was, tried before this Court on September 12, 1994 - September 29, 1994. The jury found the Defendant guilty of all three counts of Murder in the First Degree -- one for each victim, Joan Rogers (Ct. 1), Michelle Rogers (Ct. 2), and Christe Rogers (Ct. 3). On September 30, 1994, the jury recommended by a unanimous verdict (12-0) that the death sentence be imposed on the Defendant for the murder of each victim, On October 6, 1994, the State and Defendant were permitted to present additional evidence to the Court. The Defendant presented additional evidence he contended showed mitigating evidence and the State presented evidence it suggested rebutted the mitigating evidence. Additional argument was made to the Court. The Defendant was given an opportunity to be heard regarding his sentences, but be declined. Final sentencing was set for this date, November 4, 1994.

This Court has heard the evidence presented in both the guilt phase and penalty phase of the trial. has reviewed the additional evidence presented at the sentencing hearing of October 6, 1994. has had the benefit of a sentencing memoranda from the State in support of finding that the murders were committed for the purpose of avoiding or preventing a lawful arrest. and a memorandum suggesting the absence of evidence of non-statutory mitigation, and has had the benefit of a memorandum from the Defendant relating to non-statutory mitigators for the penalty phase, and has heard arguments of counsel. both in favor of and in opposition to the death penalty. The Court now finds as follows:

A. AGGRAVATING FACTORS

1. The Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

IN THE CIRCUIT COURT IN AND FOR THE SIXTH JUDICIAL CIRCUIT
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On January 12, 1977, the Defendant was convicted of the crime of robbery. The robbery was committed with a firearm.

On July 23, 1993, the Defendant was convicted of the crime of robbery. The robbery was committed with a firearm.

On September 29, 1994, the Defendant was convicted of Three Counts of Murder in the First Degree.

Judgments and sentences were introduced as to each robbery. This Court personally adjudicated the defendant of each first degree murder on September 29, 1994.

The judgments and sentences, coupled with the testimony of the robbery victims, and the testimony in the murder trial proves beyond any doubt that as to each victim, the defendant has two prior convictions for crimes involving the use of violence -- the two previous robbery convictions, and two simultaneous convictions for first degree murder, which are capital felonies.

This aggravating factor has been proven beyond all reasonable doubt.

2. The capital felony was committed while the Defendant was engaged in the commission of, or attempting to commit, or escape after committing the crime of kidnapping.

The facts of this case suggest that each victim originally agreed to accompany the defendant on his boat, At some point the Defendant bound the hands of each victim, bound the feet of each victim, put tape around the mouth of each victim, put a rope around the neck of each victim, and tied the rope to a concrete block or other weighty object. Further the clothes of each victim were removed from the waist down.

Accordingly, while there may originally have been consent to be with the Defendant on his boat. to suggest this consent continued throughout the above acts would be preposterous. Clearly, at some point during the victims' ordeal, each was confined or imprisoned on the Defendant's boat against her will, without lawful authority. Further, the Defendant's acts of confinement or imprisonment were with the intent to either inflict bodily harm upon or to terrorize each victim.

The State has proved this aggravating factor beyond a reasonable doubt. See ***Schwab v. State. 636*** So.2d 3 (Fla. 1994): *Sochor v.* ***Stare,*** 619 So. 2d 285 (Fla. 1993): *Bedford v.* ***State. 589*** So.2d 245 (Fla. 1991).

3. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest.

This Court is well aware of the Florida Supreme Court's admonition that where the victim is not a law enforcement officer, the supporting evidence must be very strong to show that "the sole or dominant motive for the murder was the elimination of the witness." *Preston v. State,* 607 So.2d 404 (Fla. 1992). However, The Supreme Court has upheld this circumstance when either the Defendant said it was his motive or when the circumstances surrounding the crime clearly show it was the motive.

-There are several things in this case which suggest this was indeed the Defendant's motive:

a) The Defendant told a cell mate, when pictures of the murder victims being retrieved from the water were re-played on TV, that they couldn't pin this crime (the three murders) on him because "dead people can't talk." See *Kokal v. State: 492* So.2d 13 17 (Fla. 1986); *Bottoson v. State. 443* So.2d 963 (Fla. 1983); *Johnson v. State, 442* So.2d 185 (Fla. **1983).**

b) These victims got in Chandler's boat at a boat ramp on the Courtney Campbell Causeway before dark, presumably to take pictures of the sunset. They were thrown or placed into the water from the boat a long way (a few miles off the St. Petersburg Pier) from where they got into the boat. There is little doubt that the Defendant's motive in luring these **tourists** aboard his boat was sexual in nature. Whatever **sexual** activity occurred with these three victims was easily accomplished once their hands were tied, their mouths taped, their **clothes** removed, and their feet tied together (then or later). Once the Defendant's sexual motives were realized there was no reason not to take them back to the **Causeway** and drop them off, except for his fear of detection. Instead. he either strangled them with a rope and threw them overboard dead. or threw them over alive. still taped and bound at their hands and feet. and with a concrete block or other heavy object tied to a rope around each neck. There was absoiuteiy no reason to kill any of these women except he knew his sexual activities, his child abuse, and his kidnapping. would be reported, and under the circumstances -- three tourists, a mother and her two daughters -- he would be pursued until caught. If caught and convicted. **he** knew he would probably be sent to prison for life.

c) The Defendant's actions of tying a rope around each victim's neck to a concrete block or other heavy object before he threw her off the boat clearly showed he wanted each victim to sink, perhaps never to be found. This action alone is

sufficient to show his motive was to eliminate these women period. As further proof that he expected them to sink, perhaps never to be found, was his going back out on the water the-following morning. The Defendant denied this when he testified, but the evidence clearly proves the contrary. One can only assume he went back near the scene of his crime in the daylight to see if any bodies had surfaced. All Defendant's actions show he murdered these women to eliminate them as witnesses to whatever sexual acts, child abuse, and kidnapping had taken place.

d) In the "Williams Rule" rape case, the Defendant made various comments to a cell mate, his daughter, and his son-in-law, that suggested if Judy Blaire's roommate had come along, the victim(s) would not have survived to tell about the rape committed against her on the Defendant's boat. Defendant's comment to Blake Leslie that the only reason Judy Blaire was left alive was the fact that someone was waiting for her on the dock is particularly telling.

e) The totality of the matters raised in Paragraphs a - d above shows the Defendant's motive for the murder was to eliminate the witnesses to his kidnappings. his aggravated child abuse, and to whatever sexual conduct took place aboard his boat.

The State has proved this aggravating factor beyond a reasonable doubt.

4. The capital felony was especially heinous, atrocious, or cruel.

Was the murder of each victim a conscienceless or pitiless crime and unnecessarily torturous to the victim? If so, it clearly meets all constitutional standards -- those of the Florida Supreme Court and those of the United States Supreme Court. Both Courts agree that "strangulation when perpetrated upon a conscious victim involves foreknowledge of death. extreme anxiety and fear. and that this method of killing is one to which the factor of heinousness is applicable." *Sochor v. State*, ***580*** So.2d 595. 603 (Fla. 199 1). rev'd on other g-rounds. ***Sochor v. Stare.*** 112 S.Ct. 2114 (1992).

Strangulation with a rope on board the Defendant's boat before each victim was thrown into the dark waters of Tampa Bay is the absolute best we can hope for for each victim. Imagine the fear and anxiety of each victim with her hands and feet tied, her mouth bound by tape and a rope around her neck being pulled tight until blessed unconsciousness takes over. That would be heinous, atrocious or cruel.

The medical examiner says each victim died of asphyxia, either from ligature strangulation or drowning, or a combination of the two. If you consider the concrete

block tied to the rope around two victims) necks, and a concrete block or something heavier tied to a rope around the third victim's neck, consider that each victim was bound with ropes around her hands and feet, consider that each victim had her mouth well covered with duct tape and that each victim was nude from the waist down, the probable scenario is that this mother and her two daughters were lured aboard the Defendant's boat for a sunset cruise and picture-taking. But after sunset, they were taken against their will into the dark night on the then dark water aboard Chandler's boat. He tied their hands behind their backs to gain control. He taped their mouths to quiet their screams of terror. He removed their clothes and some form of sexual assault occurred to one or all of the victims. (It is ludicrous to think any of these women would voluntarily remove her clothes from the waist down.) After the sexual act was over, or perhaps before, he tied each victim's feet together to totally immobilize each victim. Then, Chandler put a rope put around each victim's neck, and tied the rope to a concrete block and then Chandler threw each victim, Joan, Michelle and Christe Rogers, overboard, alive, one by one, into the waters of Tampa Bay where each died from drowning or from the block causing the rope to tighten around her neck, or from a combination of drowning and strangulation. One victim was first; two watched. Imagine the fear. One victim was second; one watched. Imagine the horror. Finally the last victim, who had seen the other two disappear over the side was lifted up and thrown overboard. Imagine the terror. Chandler's torture of these three women was over. Their panic and fear in the water before their merciful deaths is unfathomable.

There can be no doubt that whatever the scenario, the murder of each victim was especially heinous, atrocious, or cruel. Each murder was indeed consciousless. and pitiless, and was undoubtedly unnecessarily torturous to the victim. (NOTE: If anyone believes that no sexual activity occurred, or that it can't be considered, this is simply immaterial- to- the determination that each murder **was** conscienceless **and** pitiless and unnecessarily torturous to the victim. Take all reference to sexual activity out of the above scenario and it makes absolutely no difference to the finding of this factor having been proved beyond all reasonable doubt.)

This aggravating factor has been proved beyond all reasonable doubt.

None of the other aggravating factors enumerated by statute is applicable to this case and none other was considered by this Court.

Nothing except as indicated in Paragraphs 1 - 4 above was considered in aggravation. All letters received regarding the Defendant's sentence were kept by this Court's judicial assistant, and have not been read by this Court.

B. MITIGATING FACTORS

STATUTORY MITIGATING FACTORS

The Defendant did not request that the jury be instructed on any statutory mitigating factor, nor did he present any evidence or argument before this Court at the separate sentencing hearing to suggest any statutory mitigating factor. This Court has reviewed each statutory mitigating factor and now finds that no evidence has been presented to support any statutory mitigating factor, and none is found to exist.

NON-STATUTORY MITIGATING FACTORS

The Court asked the Defendant to prepare a memorandum suggesting all non-statutory mitigation he believed had been presented to either the jury or the Court at the separate sentencing hearing. A memorandum was prepared Each suggestion of non-statutory mitigation will be addressed in the order addressed in Defendant's memorandum, using the terminology of the Defendant.

1. The Defendant assisted law enforcement as a confidential informant.

While cooperation with law enforcement can be a mitigating circumstance, there was very little evidence presented in this case to establish this circumstance. Whidey Azure, a Custom's Agent, was called by the State in the guilt phase of the trial to rebut Defendant's testimony that he never asked him about the Rogers' homicide investigation. This witness said Defendant worked for him for several months as an informant and did indeed inquire on several occasions about the Rogers' investigation. The defense did not pursue whether or not the Defendant had assisted Customs, or whether he had made any cases for them. This witness was not called in the penalty phase. His trial testimony is simply insufficient to establish that the Defendant assisted law enforcement.

This mitigating factor has not been proven and thus will not be considered by this Court.

2. The Defendant has the capacity for hard work and has a good employment history. Having the capacity for hard work is not a mitigating factor. A good employment history is. While there is evidence in the record that the Defendant worked in both his own aluminum business and for others in the aluminum business, this was for a brief period of time. He was unemployed for a much longer period of time.

The record is full of the illega! money-making ventures of the Defendant:

1969 - Receiving stolen goods (sentenced 1 - 7 years)
1976 - Armed Robbery (sentenced 10 years)
1982 - Counterfeiting (sentenced 7 years)
1990 - Drug rip-off (netting over $29,000.00)
1992 - Armed Robbery (sentenced 15 years; netted over $750,000.00 worth of jewels)
Various - Illegal drug transactions; illegal gambling (See 1977 PSI)

Thus, while the Defendant may have had the capacity to be a hard worker, the totality of the record before this Court does not establish that the Defendant has a "good employment history."

3. The Defendant is capable of forming loving relationships.

While loving relationships may be a mitigating factor, the evidence in this case is very much in conflict. This Defendant had several prior wives (5), and several children (6). The testimony established he abandoned two of his children, Kristal Mays and Valerie Troxell. None of his other children testified. Neither did his mother or his present wife. Nor did any of his sisters. The Court suggested they might testify as to mitigating circumstances, but the Defendant insisted his lawyer not call them in the penaity phase. Thus, his relationship with his family was not fully explored There was some evidence presented that he called his mother regularly from jail, and pictures of the Defendant and his daughter, Whitney, were introduced.

It is difficult 'to imagine the Defendant was very fond of his present wife, Debra. and his small daughter, Whitney. It is true he may have taken them on his boat a few times for family outings. but he also took them with him to assist in his armed robbery in 1992. (See transcript of Debra Chandler in evidence at the sentencing hearing before the Court on October 6. 1994). He also abandoned them for over a month in November, 1989. He was out on a boat raping Judy Blaire almost one year to the day he married Debra Chandler, and was out with the Rogers' women sixteen to eighteen days later.

The Defendant testified he did not get along well with his family, and his son-in-law says the Defendant summed up his feelings about his family accordingly: "Family don't mean shit to me."

The totality of the evidence presented in this case does not reasonably convince this Court of the existence of this mitigating circumstance.

4. The Defendant has the ability to be rehabilitated.

This can be a valid mitigating factor. However, to suggest that obtaining a GED and gaining some college credits while in prison in the 80's is proof of rehabilitation when the evidence before the Court suggests that since the time he received his GED and college credits and was released from prison, he participated in an armed drug rip-off of his son-in-law , which could have cost Mr. Mays his life; he committed an armed robbery where he used a firearm to steal $750,000.00 worth of jewels; he raped a Canadian tourist; and he murdered a mother and her two daughters, is nothing short of preposterous.

This Court is not reasonably convinced that this mitigating factor has been proven. To the contrary, this Defendant cannot be rehabilitated.

5. & 6. The Defendant has a good prison record and has shown an ability to adapt to prison life.

Good jail conduct can be a mitigating circumstance. However, the Defendant's prison records are scant with any evidence of this. The Defendant was sent to prison in January, 1977 for ten years for the crime of robbery. He escaped on May 10, 1977, assumed another identify, and wasn't captured until he was arrested in 1982 for Federal counterfeiting charges. He served two years of a seven year Federal sentence and was released back to State prison in 1984. He was convicted of the escape charge, and sentenced to serve six months consecutive to his ten-year robbery sentence. He was sent to Union Correctional and apparently did make an "above satisfactory adjustment' at Union and was transferred to a less secure facility. The report referred to in Defendant's memorandum to support this mitigating factor which says "Since his return to RMC he has remained discipline free and is presently not considered to be a -management problem.- continues "With the facts on file in the subject's institutional file. as well as the PSI Report. the subject should be considered an escape risk. Pre and post-release prognoses are guarded."

The mitigating factor of good jail conduct has not been proven.

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 stepfather, 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.

8. The Defendant was honorably discharged from the military.

A good military record can be a valid mitigating factor. The Defendant told the Probation and Parole Department, doing an investigation into his background that he entered the Marines on December 29, 1965, and received an honorable discharge in February, 1967. (The reports says 1976, but this has to be transposed figures since the Defendant was sentenced to prison in 1969. Also, the Classification and Admission Summary upon his admission to prison in 1977 says date of discharge was 1967). However, he also says he was released because he had not revealed his correct juvenile record to the military. He also admits to spending time in the "brig" for refusing an order and for being AWOL for 118 days. (His prison arrests and conviction record confirms he was arrested on September 16, 1966 for desertion and was turned over to the Marines.) Accordingly, if we assume the Defendant did receive an honorable discharge,. as Defendant says in his PSI of 1977, his brief tenure in the military (14 months) is far from the type military record that would qualify as a mitigating circumstance.

The Court is not reasonably convinced that this mitigating circumstance. a good military record. has been proven. If an honorable discharge, standing alone. is considered mitigating, in light of the rest of Defendant's military record. it is entitled to little weight.

9. The Defendant will be incarcerated for the rest of his life with no danger of committing any other violent act.

The length of a Defendant's mandatory sentence can be considered a mitigating circumstance. *Jones v. State*, 569 So.2d 1234 (Fla. 1990). The fact that this Court can sentence this Defendant to three consecutive sentences, with three consecutive twenty-

five year mandatories may, therefore, be mitigating. The irony of the *Jones* case is that someone who kills one victim and thus can get out of prison in twenty-five years does not have a mitigating factor, while someone like Chandler, who kills three victims, does. So while the Court has considered this as mitigation, because *Jones, supra,* suggests I should, it is given little weight.

10. The Defendant has steadfastly and unwaveringly maintained his innocence in this case.

Lingering or residual doubt is not a mitigating factor in the State of Florida. *King v. State,* 514 So.2d 354 (Fla. 1987). Lest anyone misconstrue this last statement to think this Court has such a doubt, let me make it clear that I do not. The jury had no reasonable doubt about Defendant's guilt. This Court has no doubt that the right person, Mr. Oba Chandler, has been tried, convicted, and is soon to be sentenced for his murderous acts .

The fact that the Defendant still protests his innocence is irrelevant to this procedure. It is neither aggravating nor mitigating.

This Court has now discussed all the aggravating circumstances, and mitigating circumstances. The aggravating circumstances in this case far outweigh the mitigating circumstances. Every one of the aggravating factors in this case, standing alone, would be sufficient to outweigh the paucity of mitigation that can be found in Oba Chandler's forty-eight years of existence on this earth. The unanimous decision of the jury for death was the only lawful decision each of them could have made. This Court agrees with the jury that in weighing the aggravating circumstances against the mitigating circumstances, the scales of life and death tilt unquestionably to the side of death.

OBA CHANDLER. you have not only forfeited your right to live among us, but under the laws of the State of Florida, you have forfeited your right to live at all Accordingly, it is hereby

ORDERED AND ADJUDGED for the murder of JOAN ROGERS. the Defendant is hereby sentenced to death. It is further

ORDERED AND ADJUDGED for the murder of MICHELLE ROGERS. the Defendant is hereby sentenced to death. It is further

ORDERED AND ADJUDGED for the murder of CHRISTE ROGERS. the Defendant is hereby sentenced to death. It is further

ORDERED AND ADJUDGED that the Defendant will be transported to the Department of Corrections to be securely held by them on Death Row until this sentence can be executed as provided for by law.

MAY GOD HAVE MERCY ON YOUR SOUL,.

DONE AND ORDERED at Clearwater, Pinellas County, Florida, this 4th day of November, 1994,

SUSAN F. SCHAEFFER, CIRCUIT JUDGE

Copies furnished to:

The Honorable Bernie McCabe, State Attorney
Fredric S. Zinober, Chief Counsel for Defendant
Mr. Oba Chandler, Defendant.