IN THE SUPREME COURT OF FLORIDA

TODD MICHAEL MENDYK,

Appellant,

v.

CASE NO. 71,507

STATE OF FLORIDA,

Appellee.

_______________________________/

FILED
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STATEMENT OF THE CASE AND FACTS

Appellee makes the following additions and corrections to appellant's statement of the facts:

1. Although the medical examiner could not make a firm judgment of semen in the victim's mouth, as cited by appellant, he did find some evidence of enzyme activity (R 725). In addition, a body fluid specialist testified the victim's mouth tested positive for the presence of semen (R 791-792).

2. Consistent with Frantz' report of Mendyk forcing the victim to perform oral sex upon him, stains inside Mendyk's athletic supporter were consistent with a mixture of the victim's saliva and Mendyk's semen (R 890-891; 900). Mendyk is a type "O" secretor; the victim was a type "A" (R 877). Blood, semen, and Larmon's saliva were also found on Mendyk's shirt (R 885-889); blood and semen were on the victim's socks, and blood and saliva were on the bandana apparently used as a gag (R 880; 884).

3. Although Mendyk wrapped wires around the victim's throat afterward, he first stangled her by wrapping a bandana around her neck and using his knife to twist it as a tourniquet until Larmon's body slumped, shook, and spit up blood (R 1071). Mendyk described killing the victim as "an incredible high" (R 1071).

4. Although, as noted by appellant, the expert found too few characteristics to make a conclusive match between Larmon's pubic hair and the hair found on the piece of broomstick, every characteristic he could identify did match (R 827-830). There was blood on the stick (R 800).

5. Another bandana similar to the victim's gag was found in

Mendyk's truck (R 833-835).

6. The coaxial cable binding the victim's ankles was at one time connected to cable in Mendyk's truck as a single continuous piece. Likewise, the wire binding the victim's hands and the wire wrapped around her neck were each cut from wire in Mendyk's truck, as identified by fracture matches at the end of the wires (R 910-924). The plastic insulation on the wire also matched (R 933-942).

7. There were copper deposits on the knife used by Mendyk consistent with cutting wire (R 932).

8. Soil on Mendyk's shoes matched soil at the drag marks from the tree where the victim was strung up to the location of the body in the brush (R 956-959). Soil on Frantz' shoes did not match the location at the body (R 968-969).

9. Larmon was strung by her hands from a tree, then her feet pushed out from under her so that her weight rested on the wire bindings, and tied to another tree behind her so her back was arched (R 996-997).

SUMMARY OF ARGUMENT

POINT I: Mendyk confessed numerous times, and the evidence against him was utterly conclusive even without his April 9 confession. In addition, the April 9 confession was properly admitted even though Mendyk requested an attorney. Mendyk himself began discussing his crime in the middle of a rambling soliloquy, without any interrogation by any officers. Decker, in fact, interrupted Mendyk as soon as Decker realized Menyk had initiated discourse about the crime, to assure Mendyk wanted to waive the presence of counsel.

POINT II: The state attorney can prosecute a crime by information even if the grand jury declines to file an indictment. Related crimes charged by indictment and information are properly consolidated.

POINT III: Appellant was accorded the appropriate number of peremptory challenges under Florida law. He alleged no prejudice or other sufficient reason to the trial court to support his request for additional challenges. Consequently, the trial court did not abuse its discretion in denying additional challenges.

POINT IV: **A.** The list of books seized from Mendyk's bedroom was relevant to his prior contemplation of the crime and premeditated state of mind. **B.** Of Mendyk's 20 requested jury instructions, the six discussed in this appeal did not accurately state the law, did not apply to the facts of this case, or were simply improper. The standard jury instructions adequately informed the jury of the law in this case.

POINT V: There was ample evidence that this crime was

heinous, atrocious, and cruel where Mendyk tortured, abused, then strangled the victim to death. The cold, calculated and premeditated nature of this crime was substantiated by Mendyk's statements of intent weeks before the crime, the books he read, his statements to co-defendant Frantz at the scene, and his own numerous confessions including a discussion of how he would have committed the crimes had Frantz not been present.

POINT VI: The trial court provided adequate reasons for departing from the recommened guideline range for Mendyk's kidnapping and sexual batteries.

POINT VII: Florida's death penalty statute is constitutional. All of appellant's summary challenges have been repeatedly rejected previously.

ARGUMENT

POINT I

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS VARIOUS CONFESSIONS.

Appellant confessed or admitted murdering Lee Ann Larmon on at least six occasions:

1. On April 9, 1987, Mendyk confessed and gave a full account of the crime to Detective Ralph Decker, at approximately 3:00 p.m. (R 1055-1075);

2. On April 9, 1987, Mendyk was questioned by Pasco authorities about a murder in Pasco County, during which he made admissions relevant to his Hernando crimes (R 1215);

3. On April 10, 1987, Mendyk reconfirmed his guilt to Decker and Detective Corlew, indicating he would do it again if he had to (R 1093);

4. Mendyk again made incriminating remarks to Pasco deputies inquiring about the Pasco murder on April 11, 1987;

5. On April 20, Mendyk reconfirmed he had no regrets about the murder, but thought "it had to be done" (R 1085);

6. On April 21, 1987, Mendyk inquired of Decker why Frantz had been charged with first degree murder; he agreed he and Frantz had discussed killing the girl from the start, but insisted he would have killed her even without Frantz. Mendyk discussed, in detail, how he would have done things differently had Frantz not been with him (R 1202-1205).

Mendyk's remarks to Pasco officials on April 11 were suppressed, and are not at issue here (R 1662).

Three of Mendyk's statements were presented to the jury during the guilt phase of the trial: April 9; April 10; and April 20. Of these, only one, the April 9 confession, is challenged in this appeal.

The murder of Lee Ann Larmon occurred on April 9, 1987; appellant and his co-defendant, Philip Frantz, were caught at the scene, an isolated swamp, about 100 yards from the dead body. Appellant was advised of his Miranda rights at the site of the murder, (R 1592), and again at the Sheriff's office, where he signed a waiver form at 1:40 p.m. (R 1586). Appellant then talked to Detective Decker, advising Decker that he had experienced jail as a pre-trial detainee before; Mendyk "did not think he could handle jail," and indicated he would harm or kill himself (R 1605). After about twenty minutes, Mendyk said he ought to talk to an attorney, (R 1603); Decker ceased the interview and left the room (R 1604).

Decker took Mendyk's suicide threat seriously, and advised corrections officials that Mendyk might try to injure himself (R 1606-1607). Decker then returned to finish processing Mendyk for jail, taking his clothes for evidence. In general conversation, Decker tried to reassure Mendyk that people at the jail could help him, and he "didn't have to go back and do something that would do harm to himself." (R 1607). Mendyk, however, informed Decker he was not like other people; when Decker asked what he meant, Mendyk expounded for 20-30 minutes about his childhood inclinations toward sadism, bondage, and the like.

Up to that point, Decker did not "initiate" conversation

with Mendyk in any constitutional sense. Decker's comments, directions, or other statements involved nothing except necessary concerns of processing Mendyk for jail custody.

> Such inquiries or statements, by either an accused or a police officer, relating to routine incidents of the custodial relationship, will not generally "intiate" a conversation in the sense which that word is used in Edwards [v. Arizona, 451 U.S. 477 (1981)].

Oregon v. Bradshaw, 462 U.S. 1039, 1045; 103 S.Ct. 2830, 2835; 77 L.Ed.2d 405 (1983). When Decker notifies jail authorities and takes measures to reassure a suspect against suicide, he is acting reasonably under his obligation as custodian.[1]

> Custodial officials cannot be placed in the position of guaranteeing that inmates will not commit suicide. On the other hand, if such officials know or should know of the particular vulnerability to suicide of an inmate, then the Fourteenth Amendment imposes on them an obligation not to act with reckless indifference to that vulnerability.

Colburn v. Upper Darby Township, 838 F.2d 663, 339 (3rd Cir.

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[1] Prison custodians are constitutionally prohibited from displaying deliberate indifference to a prisoner's serious medical needs. Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). The medical rights of pre-trial detainees under the federal due process clause are at least as great as those accorded convicted prisoners. City of Revere v. Massachusetts General Hospital, 463 U.S. 239, 103 S.Ct. 2979, 2983, 77 L.Ed.2d 605 (1983). Once officers are actually informed of an arrestee's serious medical need, they are constitutionaly required to concern themselves with his condition. Cooper v. Dyke, 814 F.2d 941 (4th Cir. 1987).

1988); Partridge v. Two Unknown Police Officers, 791 F.2d 1182, 1187 (5th Cir. 1986). Decker, therefore, engaged in no conversation with Mendyk other than that which reasonably related to his custodial duties; nor did he initiate any topic having to do with Mendyk's crime. Under these circumstances, Decker did not "initiate" conversation with Mendyk for purposes of Edwards v. Arizona. Cf., generally, Christopher v. State of Florida, 824 F.2d 836, 845 (11th Cir. 1987) ["...police may make routine inquiries of a suspect after he requests that they terminate questioning such as whether he would like a drink of water. (cite omitted). They may not ask questions or make statements which 'open up a more generalized discussion relating directly or indirectly to the investigation'... (cite omitted).]

While Decker never initiated any discussion relating to Mendyk's crime, Mendyk did, although Decker, his attention elsewhere, did not realize this. After about 20-30 minutes of Mendyk's unprompted monologue, while talking about his isolation, the "wall" he built around himself, and the "Pink Floyd" rock group, Mendyk stated, "That's why we had to get the girl." Decker, thinking he was talking about rock groups with which he is not familiar, asked "What girl?" (R 1609). Mendyk clarified that he was talking about the victim (R 1609). It was Mendyk, therefore, who initiated conversation about his crime, after about a half hour of rambling soliloquy. Nothing in Decker's previous non-inquisatory reassurances against suicide was designed or likely to elicit an incriminating response. Consequently, there is no Edwards violation in admitting Mendyk's

statement. Kight v. State, 512 So.2d 922 (Fla. 1987); State v. Hale, 505 So.2d 1109 (Fla. 5th DCA 1987).

As recognized in Kight, the fact that Mendyk independently embarked upon an incriminating line of discourse does not necessarily end the inquiry. Once Mendyk initiates the conversation, he must also waive his previously invoked right to counsel before police may interrogate him. Oregon v. Bradshaw, 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983). In this case, however, there was no reason for the trial court to suppress Mendyk's statement, since there was no evidence presented that his statement was elicited by interrogation:

> Had Edwards initiated the meeting on January 20, nothing in the Fifth and Fourteenth Amendments would prohibit the police from merely listening to his voluntary, volunteered statements and using them against him at the trial. The Fifth Amendment right identified in Miranda is the right to have counsel present at any custodial interrogation. Absent such interrogation, there would have been no infringement of the right that Edwards invoked and there would be no occasion to determine whether there had been a valid waiver.

Edwards v. Arizona, 451 U.S. 477, 486; 101 S.Ct. 1880, 1885, 68 L.Ed.2d 378 (1981). The only question asked by Decker was, "What girl?", to which appellant responded "The girl from the Pick Quick Store." (R 1609). This question and answer were suppressed by the court (R 1661). After this, the only questions evidenced in this record relate to whether appellant was now waiving his right to counsel; appellant said he wanted to "Tell his side of

it" and proceeded to make a "statement" (R 1610). Apparently, Mendyk, while changing his clothes, just talked about the crime in his continuing soliloquy.[2] Without evidence of interrogation, there was no basis for the court to suppress appellant's voluntary statement. Arizona v. Mauro, ___ U.S. ___, 107 S.Ct. 1931, 95 L.Ed.2d 458 (1987).

Even assuming arguendo some "interrogation" had taken place, appellant's responses are admissible because he specifically waived his right to counsel once again. The facts here are virtually identical to the situation in Kight v. State, (assuming appellant was interrogated). In Kight, the defendant made the statement that he was "not afraid of the chair." When an officer asked what chair he was talking about, Kight answered, "The electric chair because Hutto stabbed the [cab driver] and cut his throat and he's still got the man's watch." 512 So.2d at 925. While this court ruled that the question and answer should be suppressed, the subsequent interrogation in Kight was proper, because "Detective Weeks promptly interrupted Kight and advised him of his Miranda rights," which Kight waived. Id. Likewise, Decker here immediately interrupted Mendyk to remind him of his right to counsel; Mendyk specifically waived his right to remain silent (R 1609), and specifically waived the presence of an attorney (R 1610-1611). Any subsequent interrogation is

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[2] There is some evidence in the trial itself of an occasional question interjected by Decker to clarify some point or other e.g., (R 1063). These were not before the court at the suppression hearing, nor was particular objection raised at trial.

therefore admissible. Oregon v. Bradshaw; Kight v. State.

With respect to the guilt phase of the trial, appellee also suggests that introduction of Mendyk's April 9 confession would be harmless error, if it were error. The evidence against Mendyk, even excluding the April 9 statement, was conclusive and indisputable:

1. Mendyk was found at the scene.

2. Wire from Mendyk's truck matched wire binding the victim's hands, feet, and neck.

3. The soil on Mendyk's shoes matched that where the victim's body was dragged from the tree to the underbrush;

4. A hot hamburger was still on the counter of the convenience store, and Mendyk's fingerprint was on the microwave button;

5. The victim's hairs were found in Mendyk's truck;

6. A bandana similar to the victim's was in Mendyk's truck;

7. Tire tracks from Mendyk's truck ran from the place were it was stuck in the mud to a location adjacent to the body about 100 yards away;

8. Mendyk's co-defendant, Phillip Frantz, testified to the same facts and specifics as presented in Mendyk's confession, including Mendyk's hamburger in the microwave; seizing the victim; driving her to the swamp; binding her with wire to a saw horse; Mendyk's forcing the victim to perform oral sex upon him while bound to the sawhorse with a stick thrust in her vagina; hanging the victim from a tree (at the location where the drag marks were found); and Mendyk's description to

him (Frantz) of how he strangled the victim.

9. Stains on Mendyk's athletic supporter were consistent with a mixture of the victim's saliva and Mendyk's semen; evidence of semen remained in the victim's mouth.

10. Mendyk's admission that he intentionally murdered the victim made to Decker and Detective Corlew on April 10 was presented to the jury, which confession is not challenged in this appeal;

11. Mendyk's April 20 admission of guilt was presented to the jury, and not the subject of appeal[3]

In sum, Frantz related all the same information as Mendyk; overwhelming physical evidence corroborated Frantz in every detail; other confessions of Mendyk admitted guilt and expressed Mendyk's feelings that he had no problem about the murder, and would do it again. Exclusion of Mendyk's April 9 confession could have had no effect at all on the guilt phase of the trial.

With respect to the sentencing phase, two additional admissions were introduced. The first was a statement to Pasco Deputy Vaughn that Mendyk knew, before he walked in the door of the convenience store, that he and Frantz were going to kill the girl (R 1215). The second confession was when Mendyk asked Decker to come to the jail on April 21, 1987, to ask why Frantz

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[3] After Mendyk was in jail, he periodically asked to see Detective Decker, who then read Mendyk his rights, and spoke with him. Mendyk, in fact, personally sought in open court to exclude Decker from his blanket invocation of right to counsel, but the Public Defender insisted that Decker be included (R 1657). There was no motion or argument below regarding these later confessions, and Mendyk apparently does not challenge them in this appeal.

had been charged with first degree murder. After waiving his Miranda rights, (R 1201), Mendyk again admitted he and Frantz had talked about killing the girl right from the start, then discussed how he, Mendyk, would have accomplished his aim of abducting, abusing, and murdering the victim even without Frantz (R 1202-1205). This second highly incriminating confession of intent and premeditation was not challenged below on grounds discussed in this appeal[4], and is not at issue here. Clearly, in view of Mendyk's similar and more extensive confessions not being challenged, the single statement to Vaughn was cumulative.

Appellant's April 9 confession to Decker was part of the evidence adopted in the penalty phase by both Mendyk and the state (R 1247-1248). Mendyk should not be heard to complain of use of his confession in the penalty phase, therefore, even assuming it should have been suppressed in the guilt phase. In addition, as noted above, the April 9 confession was proper, and, furthermore, was duplicated by other evidence in the cause.[5]

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[4] Appellant's objection to the April 21 confession was: "We would be objecting to the statements because Miranda warnings were not given at a proper time." (R 1203). This objection appears not well taken and was overruled without argument; no such objection is raised in this appeal.

[5] Mendyk's description of how he got an "incredible high" from strangling the victim after she begged for mercy is not duplicated, but was not necessary to the findings of aggravating factors, as discussed at pp. 24-26, infra.

POINT II

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO QUASH THE INFORMATION AND IN GRANTING THE MOTION TO CONSOLIDATE.

Section 905.16, Florida Statutes (1987) provides:

> **905.16 Duties of grand jury.** - The grand jury shall inquire into every offense triable within the county for which any person has been held to answer, if an indictment has not been found or an information or affidavit filed for the offense, and all other indictable offenses triable within the county that are presented to it by the state attorney or his designated assistant or otherwise come to its knowledge.

Contrary to appellant's bare allegation, nothing in this section requires the grand jury to indict or even consider every possible offense within its power to investigate. "Shall", in statutory construction, sometimes means "shall have power to ", and is discretionary rather than mandatory. See, e.g., Johnson v. State, 308 So.2d 38 (Fla. 1974). It has always been the rule in Florida that "a grand jury may investigate" various offenses against the general welfare, State v. Interim Report of Grand Jury, 93 So.2d 99, 101 (Fla. 1957) (emphasis added); the grand jury would have an impossible task if it were required to do so.

In addition to this general investigatory power, the grand jury considers "all other indictable offenses triable within the county presented to it by the state attorney..." § 905.16, Fla. Stat. (1987). Here the state attorney only presented the murder offense. Moreover, even had the grand jury specifically

considered the kidnapping and sexual battery and specifically declined to indict on these offenses, this action is not an acquittal of any sort; a subsequent grand jury could still indict, State v. Mayo, 60 So.2d 170 (Fla. 1952), or the state attorney could still file an information for those crimes. State ex rel. Latour v. Stone, 185 So.2d 729 (Fla. 1939). Actually, the kidnapping and sexual battery were never presented to the grand jury by the state attorney in this case. Prosecution for those two crimes was at all times by information. Since the kidnapping and sexual battery are related to the murder (although taking place some hours earlier in the morning), it was proper to consolidate the offense. Rule 3.151, Fla. R. Crim. P. (1987). Related offenses charged by information may be consolidated with a murder prosecuted by indictment. Livingston v. State, 13 F.L.W. 187 (Fla. March 10, 1988); King v. State, 390 So.2d 315 (Fla. 1980).

POINT III

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR ADDITIONAL PEREMPTORY CHALLENGES.

As noted by appellant, Mendyk was accorded the appropriate number of peremptory challenges as provided by Florida Statutes. See, § 913.08, Fla. Stat. (1987). Although the Rules of Criminal Procedure allow the trial judge discretion to permit additional peremptories upon a showing of prejudice, appellant, in the trial court, made not the slightest suggestion of prejudice. Appellant's dissatisfaction with particular jurors discussed in his brief on appeal was never brought to the attention of the court below; from all indications in this record, Mendyk's objection below was strictly pro forma, made without any argument (R 444). A number of jurors were backstruck by appellant, after already being accepted (R 419). In the trial court, Mendyk asked for more peremptories based strictly on his "previous arguments", (R 444), not upon any dissatisfaction with the jurors as chosen. After inquiry of juror Defoe by the court, Mendyk apparently abandoned his challenge, and agreed that the twelve jurors be sworn as they sat (R 445-446).

As noted above, Mendyk's only grounds for moving for additional peremptories was his motion and argument heard prior to any particular juror being chosen, which relied solely on the nature of the charges (R 1392). Appellant attempts to distinguish well-established caselaw by suggesting this case is unlike Jacobs v. State, 396 So.2d 713 (Fla. 1981), where request for an excessive number of peremptories was properly rejected.

However, this case is exactly like Parker v. State, 456 So.2d 436 (Fla. 1984), where a defendant was charged with capital murder, sexual battery, and robbery. There is no error in failing to grant a defendant more challenges than those to which he is legally entitled based solely on these facts.

Although not necessary to deciding the issue, appellee notes a somewhat unusual aspect of this case is the fact that appellant had benefit of what could be considered a large number of peremptories prior to the actual jury being called. Nearly fifty jurors were questioned individually prior to the jury selection, because they had "personal excuses" (R 15-131). In this preliminary process, appellant and the state questioned jurors, discussed their excuses, and decided whether they wanted the juror on the panel. By this early "stipulated excusal" process, Mendyk relieved from jury service such persons as Mr. Ladd, who at one time was a jailer with the Polk County Sheriff's Office, (R 21-24), and Mr. Geiger, who had sat through a trial where a defendant had murdered Geiger's son (R 39-40). Not one juror was excused over Mendyk's objection; many were excused with his stipulation. It is clear that a fair and impartial jury was properly seated, and Mendyk can have no complaint.

POINT IV

WHETHER APPELLANT WAS DENIED DUE PROCESS AT HIS SENTENCING PROCEEDING BECAUSE CERTAIN EVIDENCE WAS ADMITTED, AND BECAUSE THE TRIAL COURT DENIED CERTAIN JURY INSTRUCTIONS.

A. Introduction of a List of Titles of Books Seized from Appellant's Residence.

The motive for Mendyk's crimes was gratification of his desire for power over a woman. His satisfaction was achieved through her bondage, her rape and sexual abuse, and, finally, by the "incredible high" Mendyk achieved by strangling the victim to death. There are some instances where a sexual battery (and eventual murder) may be the result of an unplanned sexual impulse, see, e.g., Robinson v. State, 520 So.2d 1, 3 (Fla. 1988); thus evidence was presented on this case to demonstrate the calculated nature of Mendyk's plan. Accord, Rogers v. State, 511 So.2d 526, 533 (Fla. 1987).

Frantz, appellant's co-defendant, testified appellant stated "let's grab this bitch" when they stopped at the convenience store (R 979). Two or three weeks prior, Mendyk similarly mentioned grabbing a girl and tying her up (R 775-776). Appellant, apparently, had read up on his subject of interest, i.e., bondage and subjugation of women, as evidenced by a variety of pornographic books located in his home and bedroom. A list of titles of a few of these books was submitted to the jury.[6] One

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[6] The list of about twelve books, (R 1540), is far from all-inclusive of the materials found in Mr. Mendyk's home. Officers seized a bag containing 39

of the books even included a description of tying a victim to a sawhorse, presumably the source of Mendyk's inspiration here.

The aggravating factor of a cold, calculated, and premeditated murder focuses upon the mental state of the perpetrator. Johnson v. State, 465 So.2d 499 (Fla. 1985). Evidence of defendant's sexual motivations and state of mind is proper relevant evidence in a case of rape and murder. Alford v. State, 307 So.2d 433 (Fla. 1975). Appellant claims that the materials seized from his home do not provide evidence of Mendyk's motivation and plan in the absence of a showing that he actually read the books. However, the jury was read only a list of titles, not the contents of the books. Appellant certainly saw the titles of books in his own bedroom. Whether he read them or not, the titles alone demonstrate appellant's state of mind and area of interest. Furthermore, the presence of the books allows an inference appellant read them; the fact that the state could not "prove" appellant read all the books goes to the weight of this evidence, not admissibility. In Irazarry v. State, 496 So.2d 822 (Fla. 1986), for example, two machetes were admissible evidence where they were connected to the defendant, even though neither was the actual murder weapon, where the victim was killed with a machete. Irizarry's interest and connection to machetes was sufficient for the machetes to be admissible. The state

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pornographic magazines; another bag with 11 books, 27 pornographic magazines, and folder of cut-out nudes; and a third bag with 29 pornographic magazines, pink cord, and a plastic tube (R 1719).

could offer proof of appellant's sexual motivation, and his previously established interest in bondage, etc., to establish the calculated and premeditated nature of this crime. See, Duest v. State, 462 So.2d 446 (Fla. 1985) (evidence of defendant's method of "rolling" homosexuals to get money); Alford v. State.

Lastly, assuming evidence of Mendyk's sexual motivation was improper, any impact a list of book titles could have had is clearly inconsequential in view of appellant's acts. It is inconceivable that a jury could be so influenced by a list of book titles that they would sentence a man to death when they otherwise would not.[7] It is likewise inconceivable that any rational jury would not recommend death for a crime as premeditated and palpably evil as this. This jury convicted Mendyk in record time, (R 1191), and recommended death 12-0. Evidence of a non-statutory aggravating nature can be harmless. Rogers v. State, 511 So.2d 526, 533 (Fla. 1987).

B. Denial of Requested Jury Instructions

In addition to his objection to the book title evidence, appellant includes under this point on appeal his claim of error in denying six of his twenty special requested jury instructions.

1. Defense Instruction # 6.

This requested instruction[8] does not correctly state the

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[7] The nature of the evidence distinguishes Dougan v. State, 470 So.2d 697 (Fla. 1985), relied upon by appellant. In Dougan, evidence of another murder by the defendant was improperly introduced, which could hardly be harmless.

[8] "The state may not rely upon a single aspect of the offense to establish more than a single aggravating circumstance. Therefore, if you find that two or more of the aggravating circumstances are supported by a single aspect of

law. The same "aspect" of a crime can be evidence of more than one aggravating circumstance, e.g., "Evidence or comments intended to show a calculated plan to execute all witnesses can also support the aggravating factors of heinous, atrocious and cruel and cold, calculated and premeditated." Garcia v. State, 492 So.2d 360, 366 (Fla. 1986); Jackson v. State, 13 F.L.W. 305 (Fla. May 13, 1988) (cold, calculated, premeditated and heinous, atrocious and cruel not improper doubling); Mohammad v. State, 494 So.2d 969, 976 (Fla. 1986).

The particular conditions where "impermissibly doubling" occurs are for the court to correct in its sentencing order, do not occur in this case, and are not addressed in this requested instruction.

2. Defense Instruction # 8.

Appellant asked that the jury be instructed not to consider acts committed after the death of the victim in considering whether the homicide was heinous, atrocious and cruel. See, Halliwell v. State, 323 So.2d 557 (1975). As applied in all of appellant's cited cases, this rule of law is "for the trial court... in determining whether or not the aggravating factor was shown by the evidence." Blair v. State, 406 So.2d 1103, 1109 (Fla. 1981). (emphasis added).[9]

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the offense, you may only consider that as supporting a single aggravating circumstance."

[9] Appellee notes incidently that under the Florida death penalty scheme, it is proper to instruct the jury only as to the terms "heinous, atrocious and cruel" without further definition. Lemon v. State, 456 So.2d 885 (Fla. 1984). In Florida, the sentencer is the trial judge, who is knowledgable and best qualified to consider the appropriate application of the rule of law

This instruction, furthermore, is not appropriate for the facts of this case. Appellant abused the victim and strung her up from a tree with electrical wire for hours before strangling her to death. Mendyk additionally administered an admittedly inconsequential knife nick to the victim's neck at or about the time of death. See, (R 715-718). A jury instruction relating to mutilation of the body after death would have no purpose; it only serves to confuse the jury, since there were no acts to consider. Even in Halliwell, the court noted that mutilation of the body might be relevant to the death penalty had it occurred contemporaneously with the death of the victim. 323 So.2d at 561. In any event, the findings of fact supporting the death penalty in this case rely entirely upon Mendyk's particularly wicked conduct in torturing and abusing the victim for three hours and then strangling her (R 1558-1561). There is no possibility that either the judge or the jury were swayed by improperly considering an inconsequential knife nick in determining this outrageous crime was heinous, atrocious or cruel.

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appellant cites. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed. 1913 (1976); Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154; 82 L.Ed.2d 340 (1984); Barclay v. Florida, 463 U.S. 933, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983). The definition, rules, and approriateness of the HAC factor are, in addition, reviewed by this court. Wainwright v. Goode, 464 U.S. 78, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983); Cf., Maynard v. Cartwright, 43 Cr.L. 3053 (U.S.S.C. June 6, 1988).

3. Defense Instructions # 17, 18 and 19

Mendyk challenges denial of three instructions urging the jury to grant him mercy despite his acts, the statutory framework, and their legal duty. While juries may certainly grant mercy on their whim and caprice if they choose, there is no legal reason to instruct them to do so. The standard jury instructions are adequate on the subject of mitigation. Jackson v. State; Dufour v. State, 495 So.2d 154, 163 (Fla. 1986).

POINT V

WHETHER THE AGGRAVATING FACTORS WERE PROVED BEYOND A REASONABLE DOUBT.

In his sentencing findings of fact, the trial judge, as sentencer, listed three factors in aggravation:

> (A) The capital felony was committed while the defendant was engaged in the commission of a kidnapping and sexual battery.
>
> (B) The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel;
>
> (C) The crime was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(R 1558-1561).

A. HEINOUS, ATROCIOUS OR CRUEL

Evidence that a victim was strangled to death, without more, is in and of itself sufficient to support this aggravating factor. Tompkins v. State, 502 So.2d 415 (Fla. 1986) (skeleton with ligature tightly around neck sufficient to infer death was heinous, atrocious, cruel). In addition, the sentencer may consider the surrounding circumstances and unnecessarily torturous acts upon a victim leading up to the particular act which causes death. Scott v. State, 494 So.2d 1134 (Fla. 1986). Mendyk's abuse of this victim features binding her with wire to a sawhorse while sexually attacking her with a broom handle, etc; suspending her with wire by her hands from a tree, naked; then tying her feet to another tree so that her back was arched, and her weight rested on the wire binding her hands.

Then, after leaving her to hang suspended in an isolated swamp for a significant time, stangling the victim to death. (R 996-997). Mendyk's cruelty in this case is palpable.

Appellant argues that the victim's murder was not evil or cruel because Mendyk told her "no" when she asked if she was going to be killed. (emphasis appellant's). It is hardly reasonable to infer the victim was reassured by this when she was left hanging naked from a tree in the middle of a desolate swamp. The only thing left for her to contemplate was the exact nature of her death: thirst? exposure? perhaps wild animals? Philip Frantz testified that the victim was sobbing and scared to the point of a nervous breakdown, begging to be taken back to the store (R 990-991). The victim's fear that she would be killed right from the start is evidenced by the fact she asked the question. Lee Ann Larmon's fears were realized as appellant wrapped a bandana around her neck and applied a tourniquet until she died.

B. COLD, CALCULATED, PREMEDITATED

Appellant admitted in his April 21 confession that he discussed killing the victim with Frantz even prior to entering the store. Frantz testified Mendyk stated, "Let's grab the bitch" when they stopped their truck (R 979). As discussed above, Mendyk read books on the subject of bondage and subjugating women, and had mentioned grabbing a girl at least two or three weeks before the crime. The utterly cold, calculated nature of this crime is particularly clear in Mendyk's April 21 dissertation on how he would have effected his plans even without

Frantz' assistance and in Mendyk's leisurely cigarette breaks to contemplate his next sexual endeavor. Mendyk noted that had he accomplished his purpose in going to get a shovel, the helicopter never would have found the body (R 1207). When the truck got stuck, according to Philip Frantz, Mendyk went back one time to check the victim, then a second time, saying, "I'm going to have to go kill her," (R 1003). After about 20 minutes, Mendyk reported he had strangled her, cut her down, and dragged her into the bushes (R 1004). The only evidence of indecision in this record relates to when the victim would be killed, not the fact that murder was planned as part of the episode. Mendyk's April 9 confession relates his temporary consideraton of the possibility of keeping the victim as a sex slave while she was strung up in the tree. After due calculation, Mendyk concluded this was not feasible, whereupon he used a bandana and his knife as a tourniquet around Larmon's neck until she slumped, her body quivered, and blood poured from her mouth (R 1064-1071). Mendyk felt his power grow as Larmon begged for life, and got "an incredible high" from actually strangling her to death. This was a particularly cold, calculated, and premeditated crime.

POINT VI

WHETHER THE TRIAL COURT ERRED IN DEPARTING FROM THE RECOMMENDED GUIDELINE RANGE.

This court has already recognized that where a defendant commits a capital murder along with his other crimes, the capital murder is alone sufficient reason not to be bound by the recommended guideline range. Livingston v. State, 13 F.L.W. 187 (Fla. March 10, 1988). Livingston was decided after the sentencing order in this case, thus the trial judge could not know exactly what to say to support his departure. However, under the extreme facts of this case, where departure from the guidelines is clearly warranted and intended, appellee respectfully contends that argument over the trial court's exact wording exalts form over substance and reason. The court's reasons are proper when taken in the context of these facts.

1. The Defendant's Course of Conduct Demonstrates he is a Danger to Others.

Appellant correctly points out that in the context of a sexual battery, this reason was generally disapproved in Lerma v. State, 497 So.2d 736 (Fla. 1986). However, appellant fails to note that unlike Lerma, Mr. Mendyk's course of conduct is not limited to sexual battery. It includes torture and capital murder. Lerma concludes that scoring a sexual battery includes a pointscore for the danger inherent in a sexual battery. Lerma does not suggest scoring sexual battery includes a score for the danger to society demonstrated in a capital murder. Mendyk's course of conduct features kidnapping, sexual abuse, torture, and

murder of a random victim, solely for Mendyk's personal enjoyment. Such a course of conduct, amply demonstrating a danger to others, is not contemplated on his guidelines scoresheet, and is a proper reason for specially enhanced punishment. Accord, Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) (defendant's danger to society proper consideration in deciding whether death penalty appropriate).

2. Defendant's Premeditation and Calculation.

Appellant concedes this factor was held a proper reason for departure in a sexual battery case. Lerma. Mendyk claims, however, that premeditation is an element of kidnapping, but cites no authority for this proposition. Furthermore, the type of premeditation and calculation exhibited by Mendyk in this case goes far beyond the usual, even for a murder. See, Rogers v. State, 511 So.2d 526 (Fla. 1987) (defining cold, calculated, premeditated).

3. Defendant Committed Two Acts of Sexual Battery.

Appellant claims that both of his sexual batteries were scored, thus distinguishing Lerma. It appears to appellee, however, that only one life felony is scored (R 1869). Mendyk's two sexual batteries are both life felonies (R 1863). § 794.011(3), Florida Statutes (1987). If the second life felony is added, Mendyk achieves a score of 512, which places him in the 22-27 year range. At the present time, however, both life felonies are not scored.

In summary, at least two of the trial court's reasons allow departure from the guidelines. Given the facts of this case,

appellee suggests remand is unnecessary. Livingston; Albritton v. State, 476 So.2d 158 (Fla. 1985).

POINT VII

WHETHER THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL.

Appellant concedes his boilerplate list of challenges has been repeatedly rejected. This point is repeated virtually word-for-word in every death penalty case in this appellate division, including, e.g., Stano v. State, 460 So.2d 890 (Fla. 1984), where these "grab-bag" claims were rejected. 460 So.2d at 894-895.

Appellee does point out, however, that unlike some other cases, in addition to being meritless, most of appellant's summary claims were never raised in the trial court, thus are not preserved for review. See, e.g., Eutzy v. State, 458 So.2d 755 (Fla. 1984). Appellee would also add that irrespective of any apparent disparities or proportionality adjustments made over time, Mr. Mendyk's crime is one for which the death penalty is now and will always be particularly suitable.

CONCLUSION

Mendyk raises no serious challenge to either his convictions or sentences, all of which are supported by unusually strong and convincing evidence. The state of Florida respectfully urges the convictions, imprisonment, and sentence of death imposed upon Todd Michael Mendyk be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished by delivery to, Michael S. Becker, Assistant Public Defender, at 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, this 24th day of June, 1988.

Ellen D. Phillips

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