IN THE SUPREME COURT OF FLORIDA

TODD MICHAEL MENDYK,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 71,507

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HERNANDO COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

On April 16, 1987, the grand jury returned an indictment charging Appellant with first degree murder in violation of Section 782.04(1)(a)1, Florida Statutes (1985). (R1325) On May 4, 1987, the state filed an information charging Appellant with one count of kidnapping in violation of Section 787.01(1), Florida Statutes (1985) and two counts of sexual battery in violation of Section 794.011(3), Florida Statutes (1985). (R1692-1693) On May 12, 1987, Appellant filed a motion to quash the information. (R1704-1705) Thereafter on May 29, 1987, the state filed a motion to consolidate the information and indictment. (R1338-1339,1704-1705) Both sides filed memoranda of law. (R1347-1348,1349-1351,1713-1714,1715-1717) The trial court denied the motion to quash and granted the state's motion to consolidate. (R1365,1726,1727) Appellant filed numerous pretrial motions including a motion for additional peremptory challenges

(R1393-1394), motion for change of venue (R1753-1756) and a motion to suppress statements. (R1759-1762) The motion for additional peremptories was denied. (R444) The motion for change of venue was granted. (R1546) The motion to suppress was granted in part and denied in part. (R1970-1971) Appellant proceeded to jury trial on the charges on October 8-20, 1987, with the Honorable L.R. Huffstetler, Jr., Circuit Judge, presiding. (R1-1297) Following deliberations, the jury returned verdicts finding Appellant guilty as charged on all counts. (R1192-1193,1508,1854-1856) Following presentation of evidence at the penalty phase, the jury returned a unanimous recommendation that Appellant be sentenced to death. (R1291,1509) Appellant filed a motion for new trial. (R1544-1545) This motion was denied. (R1578) On November 10, 1987, Appellant appeared before Judge Huffstetler who adjudicated him guilty of all four offenses and sentenced Appellant to death for the murder charge. (R1575-1576,1553-1557) As to the remaining charges, Appellant's presumptive guidelines sentence was 17-22 years. (R1869) However, Judge Huffstetler sentenced Appellant to three consecutive life sentences. (R1576-1577,1863-1868) Reasons for departure were typed at the bottom of the scoresheet. (R1869) Written findings of fact in support of the death sentence were filed. (R1558-1561) Appellant filed a timely notice of appeal on November 23, 1987. (R1563,1871) Appellant was adjudged insolvent and the Office of the Public Defender was appointed to represent him on appeal. (R1552,1861, 1877,1568)

STATEMENT OF THE FACTS

On April 8-9, 1987, Lee Ann Larmon was working as a clerk at the Presto Store in Brooksville, Florida. (R495,660) James Duncan stopped by the store between 2:45 a.m. and 3:00 a.m. at which time Lee Ann was working. (R495) Corporal Carlos Douglas of the Hernando County Sheriff's Department had seen Lee Ann at 11:00 p.m. but when he returned to the Presto Store at 2:55 a.m. Lee Ann was not at the store. (R499-500) Douglas noticed that the floor was partially wet, a still warm hamburger was on the counter and Lee Ann's purse was behind the counter. (R501) There was no evidence of a struggle in the store. (R508) Douglas called for a back-up unit. (R501) Gary Kimble, a civilian crime scene technician with the Hernando County Sheriff's Department responded to the Presto Store, took photographs of the area, gathered the clerk's belongings, and processed the scene for fingerprints. (R512) Three latent prints were lifted from the interior of the front door and from the timer button on the microwave oven. (R517-518) On the morning of April 9, 1987, Lieutenant Gerald Calhoun conducted an aerial search for Lee Ann Larmon. (R530) Approximately 5.6 miles south of the Presto Store on the west side of U.S. 19, Calhoun observed a blue pick-up truck and a light blue mid-sized car parked about 100 yards apart in the woods approximately one-half mile west of U.S. 19. (R531) There was a white male standing to the rear of the truck and a white female standing next to the car. (R531-532) Calhoun radioed to have someone investigate. (R532) Deputy Joseph Testa responded to the area and observed a blue Buick

occupied by Norma Jean Frantz. (R543-544) About 100 yards south of the Frantz vehicle, Testa located a blue 1974 Ford pick-up truck. (R544) Two white males identified as Philip Frantz and Appellant, Todd Mendyk, were near the pick-up. (R545) Appellant told Testa they had been mudslinging the night before when the pick-up got stuck in the mud. (R545) Appellant further stated they would get the truck out of the mud without assistance. (R546) When Testa advised Calhoun of his findings, Calhoun observed that the truck was not properly equipped for mudslinging and instructed Testa to fill out field investigation cards on the individuals. (R534,546) Calhoun resumed his search and followed tire tracks from the pick-up some 100 yards away to a cul-de-sac where he located a body lying in a fetal position with electrical wires around the neck, wrists and feet. (R535,538) Calhoun instructed Testa to arrest the individuals at the pick-up truck. (R546-547) Frantz was arrested, given his Miranda rights, frisked, handcuffed and transported to the Sheriff's office. (R547) Appellant was also arrested, advised of his rights, frisked, handcuffed and taken to the Sheriff's office. (R551-552) The truck was sealed and taken to a garage for storing. (R555-556) A latent print lifted from the inside rear-view mirror matched the right thumb print of Frantz. (R570-571) The latent print lifted from the timer button on the microwave oven in the store matched the left index fingerprint of Appellant. (R577)

Doctor John Sass, the associate medical examiner, determined that Lee Ann died between 3:00 a.m. and 5:00 a.m. (R721) The immediate cause of death was strangulation. (R723)

The victim suffered an insignificant knife wound to the throat. (R715) There was no evidence of trauma to the vaginal area. (R724) However, a stick could have been inserted into the vagina without necessarily causing trauma. (R732) There was no positive test for semen in either the vaginal swabbings or the mouth swabbings. (R725) Although the victim may have taken several minutes to die she probably lost consciousness instantaneously when the wires were wrapped around her throat. (R726)

John Smith who lived with Philip Frantz testified that on April 8, 1987, Frantz and Appellant were at the house with several others. (R778) Although they were drinking and smoking marijuana, neither Frantz nor Appellant were intoxicated. (R775,778) Frantz and Appellant left the house at 11:00 p.m. (R74) Approximately two to three weeks earlier Appellant mentioned grabbing a girl and tying her up. (R775) The remark was made off-the-cuff and Appellant did not seem serious. (R776)

An analysis of the vacuum sweepings from the pick-up truck revealed head hair and pubic hair matching those of the victim. (R819-820) The head hair had been forcibly removed. (R819) Hairs removed from a stick found in the area were compared with the victim's pubic hair and, although similar, there were insufficient characteristics to make a conclusive match. (R828-830)

Philip Frantz had pled guilty to first degree murder, kidnapping. and sexual battery and received three concurrent life sentences in return for which he agreed to testify truthfully against Appellant. (R973) Frantz knew Appellant for nearly 8

months and saw him nearly every day during which they drank beer and smoked marijuana. (R974) They did so on the evening of April 8, 1987. (R974) At about 11:00 p.m., they picked up a six-pack of beer and went to Brooksville in Appellant's 1974 blue Ford pick-up. (R975) They were looking for a girl named Karen but could not find her house so they went to a friend's house. (R975-976) No one answered their knocks at Eddie Craven's house. (R976) When they tried to leave, the truck battery was dead. (R976) They tried cleaning the terminals without success, so they decided to steal a battery. (R977) While they were putting in the new battery, Eddie Craven and Kenny Landry jumped out of the bushes and scared them. (R977) They all went inside Eddie's house and smoked some marijuana. (R977) They left after ½ hour and Frantz drove to the Presto Store because Appellant was hungry for a hamburger. (R978-979) As they got out of the truck, Appellant said "Let's get the bitch" but Frantz did not take him seriously. (R979) Appellant got a hamburger and put it in the microwave. (R980) A man came in, got some coffee and left. (R980) Appellant asked the clerk for some onions and relish. (R980-981) As the clerk came around the counter to show Appellant where the relish was, Appellant stepped behind her, grabbed her around the neck and led her outside to the truck. (R981) The girl asked what they were doing but did not put up a fight. (R982) Appellant ordered her to get on the floor which she also did. (R982) Appellant told Frantz to drive to Shady Hills and as they drove Appellant unbuttoned the girl's shirt. (R982) The girl asked what they were doing and Appellant replied that they

were taking her away. (R983) The girl asked to be taken back to the store but Appellant told her to shut up. (R983) The girl seemed very scared (R983) Appellant unbuttoned the girl's shirt and unhooked her bra. (R983) Appellant cut some speaker wire from the truck's stereo and tied the girl's hands together in front of her. (R984) Appellant started fondling the girl's breasts. (R984) Frantz reached over and touched the girl's left breast. (R984) When the girl asked if she was going to be killed, Appellant said "No, just be a good girl and everything will be all right." (R984) The girl then said if they planned on raping her that she was on her period. (R984) When they got to the Shady Hills area on the Pasco/Hernando County line, Appellant directed Frantz to an area on a dirt road. (R985) However, the area was enclosed with a fence which was chained and locked and posted with "No trespassing" signs. (R985) They headed back and drove to Suzanne Lane about ½ mile off U.S. 19. (R986) Both Frantz and Appellant were familiar with the area. (R987) They went about a ½ mile until the trail got pretty muddy. (R987) At Appellant's instructions, Frantz backed the truck into a small area among the trees and parked. (R988) Because of the battery problem, Frantz left the truck running but only left the running lights on. (R989) They got out of the truck and Appellant led the girl to the back of the truck. (R989) Appellant got a sawhorse out of the back of the truck. (R989) Frantz had a knuckle knife in the truck which Appellant picked up. (R989-990) Appellant removed all of the girl's clothes except her panties and socks. (R990) The girl was

crying and asking to be taken back to the store. (R990-991) Appellant told the girl to step over the sawhorse and spread her legs after which Appellant tied each leg to the legs of the sawhorse and the girl's hands to the crossbar using wire he got from the truck. (R991-992) Appellant cut the girl's panties off with the knife and then went to the truck where he retrieved a billy club. (R992) Appellant confirmed that the girl was indeed having her menstrual period. (R992) Appellant tried to insert the billy club into the girl's vagina but it would not fit. (R993) Appellant went to the truck, got a broom handle and inserted it into the girl's vagina. (R993) Appellant went to the truck and got a cigarette. (R994) Appellant then untied the girl's hands and ordered her to perform oral sex on him. (R994) This lasted fifteen minutes during which the broom handle remained inserted in the girl's vagina. (R994) After apparently ejaculating, Appellant ordered the girl to swallow and walked back to the truck and smoked another cigarette. (R995) Appellant asked Frantz if he was going to have oral sex but since he was feeling sick, Frantz declined. (R995) As Appellant smoked the cigarette, he and Frantz discussed leaving. (R995) Appellant untied the girl and led her to a tree. (R995) The girl was tied between two trees with her back arched. (R996-997) Frantz went to the girl and kissed her breasts. (R997) He thought about raping her but felt ill so he turned and walked away. (R997) Appellant picked up the girl's panties and stuffed them into her mouth. (R998) She spit them out and asked if they were going to leave her like that. (R998) Appellant said yes and

stuffed the panties back into her mouth. (R998) Appellant got a bandana from the truck and used it to gag the girl. (R998) Appellant wanted to drive so Frantz got in the passenger side and Appellant got in the driver's seat and they drove away. (R998) Before leaving, they picked up the sawhorse and the girl's clothes and put them in the truck except for the girl's shirt which Frantz draped over her shoulders. (R999) As they drove down the road, Appellant went too far to the right and the truck dropped off the side of the road and got stuck. (R999) They got out and tried to push the truck without success. (R999) Appellant tried stuffing pieces of wood under the tires but again was unsuccessful. (R999-1000) Appellant said he was going back to check on the girl and was gone for about five minutes. (R1000) When he returned, they broke up some sawhorses and tried to put the wood under the tires. (R1001) After working for about 45 minutes, Appellant walked toward the girl and said "I'm going to have to kill her." (R1003) Frantz asked why but Appellant did not answer. (R1003) Frantz tried without success to jack up the truck. (R1003) Appellant returned and said "She's done" and when Frantz asked how, Appellant told him he had strangled the girl, cut her down and dragged her into the bushes. (R1004) Frantz took all of the girl's clothes, the billy club and the broomstick and threw them into the swamp. (R1005) They locked up the truck and walked about one mile to the UHL Plaza where they made some phone calls in an effort to get the truck towed. (R1005) Appellant asked Frantz if there was blood on him since as he strangled the girl she spit up blood. (R1006)

Frantz saw no blood. (R1006) They made three phone calls but were unsuccessful in getting anyone to help them. (R1007) They decided to walk to Frantz's mother's house where he had a come-along which is a tool to lift heavy objects. (R1007) When they got there, Frantz's mother woke up and agreed to take them back to the truck. (R1008) They got the come-along and returned to the truck. (R1008) Appellant and Frantz got out and tried to hook up the come along but were unable because it was not long enough to reach the nearest tree. (R1008) They asked Frantz's mother to pull her car down so they could hook up the come-along to it but she refused since she was afraid it would damage the car. (R1009) They returned home where Frantz got two heavy-duty orange extension cords after which they returned to the truck. (R1009) As Frantz tied the electrical cord around the tree, Appellant went back to check on the girl's body. (R1009) After five minutes, Appellant returned and said the body was rigid and turning gray. (R1009) The extension cord broke. (R1010) A Sheriff's helicopter was flying overhead and five minutes later a deputy drove up and asked them what they were doing. (R1010) Forty-five minutes later they were arrested. (R1011)

When Appellant was initially questioned after he was arrested, he said he and Frantz had dinner at his parents' house after which they went to the swampy area where they went mud bogging. (R1049) The truck got stuck in the mud and after trying unsuccessfully for about one hour to pull the truck out of the mud, Appellant and Frantz walked to UHL Plaza and made several phone calls. (R1049) They eventually got Frantz's

mother to help them. (R1049) Appellant denied having been to any convenience store and did not mention the girl's death. (R1050) Later, however, Appellant gave a statement admitting to the murder. (R1053) Appellant had known Frantz for several months and was trying to indoctrinate him into the theories of domination of women, bondage, and the Satanic Bible. (R1055) As they drove around that night, the idea of abducting a woman came up so they stopped at the Presto store where the clerk appeared to be a good target. (R1056) When the clerk came from behind the counter, Appellant grabbed her and hit her. (R1056) Appellant described what had occurred which coincided with Frantz's testimony. (R1057-1066) After the truck got stuck, Appellant returned to where the girl was and had a conversation with her. (R1067) When he returned to the truck, Appellant was 50-50 toward letting the girl live. (R1069) Appellant and Frantz discussed taking the girl somewhere and keeping her for a few days. (R1069) However, they realized there was nowhere to keep the girl so they went back with the idea of killing the girl. (R1070) Appellant then strangled the girl with a bandana and wire. (R1070-1071) Appellant cut her down and dragged her into the bushes. (R1072) To be sure that she was dead, Appellant stabbed the girl in the neck. (R1072) Subsequently Appellant indicated that he had no regrets about the murder because it was something that had to be done. (R1085,1093)

SUMMARY OF ARGUMENT

POINT I: During a custodial interrogation, once an accused invokes his right to an attorney all interrogation must cease. The police are prohibited from interrogating the suspect unless it is shown that the accused initiated the contact. In the instant case Appellant clearly invoked his right to counsel. Despite this clear implication Detective Decker reinitiated contact with Appellant and questioned him in a manner designed to elicit incriminating statements. These statements should be suppressed.

POINT II: When a grand jury considers a case and subsequently returns an indictment, the state is thereafter precluded from filing additional charges arrising out of the same subject matter previously considered by the grand jury.

POINT III: Where an accused faces trial on improperly consolidated charges he is entitled to additional peremptory challenges up to the maximum allowed as if the charges were tried separately. Further a trial court retains discretion to grant additional peremptory challenges should the need arise.

POINT IV: In the penalty phase of a capital trial, the state is precluded from presenting irrelevant and highly prejudicial evidence which has no probative value with regard to statutory aggravating circumstances or rebutting expressly relied-upon mitigating circumstances. Additionally although use of the

standard jury instructions is encouraged, where such instructions do not adequately inform the jury of their duties during deliberation, it is error to deny special requested instructions which correctly state the law and are particularly applicable to the facts of a particular case.

POINT V: A capital felony is not especially heinous, atrocious or cruel unless it is accompanied by such additional acts so as to set the crime apart from the norm of capital felonies. Actions which occur after the murder is complete are not to be considered in determining whether the murder was heinous, atrocious or cruel.

In order to sustain a finding that a capital murder was cold, calculated and premeditated the state is required to prove beyond a reasonable doubt something more than mere premeditation. It is insufficient to prove merely that an underlying felony was planned.

Where the only valid aggravating circumstance present is that the capital murder was committed during the commission of a felony and where a valid mitigating factor exists, proportionality requires that a death sentence be vacated and the cause remanded for imposition of a life sentence.

POINT VI: To sustain a departure from the recommended guideline sentence a trial court must supply clear and convincing reasons. Such reasons cannot include inherent components of the crimes for which an accused is being sentenced nor may it include factors

which are already scored. The fact that the defendant constitutes a danger to society is not a clear and convincing reason for departure. Where all the reasons for departure are invalid the trial court must resentence the defendant within the recommended guidelines range.

POINT VII: Although this Court has previously rejected numerous attacks to the constitutionality of the death penalty in Florida Appellant urges reconsideration particularly in light of the evolving body of case law which in some cases has served to invalidate the very basic cases on which the death penalty was upheld in the State of Florida.

POINT I

IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS CONFESSIONS WHICH WERE OBTAINED FOLLOWING HIS UNEQUIVOCAL REQUEST FOR COUNSEL

Appellant filed a pre-trial motion to suppress his statements made to Hernando and Pasco County deputies. (R1403-1406) On October 6, 1987, an evidentiary hearing on the motion to suppress was held. (R1891-1971)

On April 9, 1987, Appellant was arrested at the scene and given his Miranda rights at approximately 10:00 a.m. (R1404) After he was transported to the Hernando County Sheriff's Office he was again advised of his Miranda rights and at 1:40 p.m. executed a written waiver of those rights. (R1896,1910) Detective Ralph Decker spoke with Appellant for approximately 20-30 minutes during which no mention of the murder was made. (R1911,1050) Decker then spoke to co-defendant Frantz and returned to Appellant and had another conversation with him this time focussing only on what forensic science could do with the collected evidence. (R1912,1052-1053) Decker told Appellant he was going to take his clothes at which point Appellant said "I ought to have an attorney." (R1912,1053) Decker asked if he had a specific attorney in mind but Appellant said no. (R1913,1053) Decker told Appellant he would honor his request and if Appellant wanted to talk he (Appellant) would have to reinitiate the conversation. (R1912,1053) Prior to invoking his right to an

attorney, Appellant had indicated that he had previously been arrested for a homicide in South Carolina but the charge had been dropped (R1913-1914) Appellant indicated that he did not believe he could handle jail and was thinking of harming himself if he was incarcerated. (R1914) Decker left the room for a short time and returned to gather Appellant's clothing. (R1915) While collecting the evidence, Decker began talking to Appellant about being in jail and not harming himself. (R1916) Decker told Appellant not to think about the future but to just take things one day at a time and to remember that there will be people at the jail with whom he can discuss his problems. (R1916) Appellant told Decker he wasn't like other people and when Decker asked him what he meant, Appellant started telling Decker about this childhood and how he got involved in sadism and bondage. (R1916-1917) No questions concerning the case were asked. (R1917) During the statement, Appellant indicated that he isolated himself from the outside world and never let his thoughts out "and that's why we had to get the girl." (R1918) Decker asked what girl and Appellant said the girl from the Pick Quick Store. (R1918) At that point, Decker stopped Appellant and asked him if he wanted to continue since he had already requested an attorney. (R1918) Appellant said yes because during the break he had heard through the door that Frantz had already confessed so he wanted to tell his side of the story. (R1919) Appellant was not readvised of his rights but he proceeded to give complete confession. (R1919) After Appellant asked for an attorney, he did not ask to talk to Decker. (R1923)

The subsequent conversation was in fact initiated by Decker. (R1923) After Appellant invoked his right to counsel, he was never given an opportunity to use the phone nor did Decker try to contact an attorney or the Public Defender's Office on Appellant's behalf. (R1925)

Subsequently Detective Clinton Vaughn of the Pasco County Sheriff's Department spoke with Detective Decker who gave him the details of the Larmon murder investigation. (R1934) Decker never told Vaughn that Appellant had asked for an attorney. (R1935) Vaughn then met with Appellant and read him his rights after which Appellant agreed to talk to him and made statements concerning his participation in the Larmon Murder. (R1937) Appellant had never requested to speak with Vaughn. (R1938) Although Vaughn was investigating a similar murder in Pasco County, he knew that he would be discussing the details of the Larmon murder with Appellant before he began his interview. (R1939) Vaughn subsequently interviewed Appellant again a few days later despite the fact he knew that Appellant had been told not to talk to the police without his attorney present. (R1941)

At the conclusion of the hearing, Judge Huffstetler made the following ruling:

> THE COURT: All right. With regard to this motion, the Court finds that the initial statement given to Deputy Decker with the exception of the what girl question and answer is admissible. The Court feels that the inquiry, you want to waive your right to an attorney that had earlier been invoked, was sufficient and that the direction of the conversation was initiated by the defendant.
>
> I find that the first interview by the Pasco County deputy is admissible

> since that was an interview on a different crime. However, I find the second interview that occurred after the appointment of counsel and after the written document that was introduced at the first appearance hearing is inadmissible and should be suppressed. (R1970-1971)

Appellant maintains that the denial of the motion to suppress was error.

In Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the United States Supreme Court held that where a defendant is undergoing custodial interrogation and he indicates his desire to exercise his right to consult with an attorney, interrogation must cease. The Court prohibited any further elicitation of information without the benefit of counsel:

> If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. . . If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent. Miranda v. Arizona, 384 U.S. at 474.

Later cases have not abandoned that view. In Michigan v. Mosely, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975) the Court noted that Miranda had distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and had required that interrogation cease until an attorney was present only if the individual stated that he wanted counsel. Id. 423 U.S. at 104, n.10. In Fare v. Michael C., 442 U.S. 707, 719 99 S.Ct. 2560, 61 L.Ed.2d 197, 209 (1979), the

Court referred to Miranda's "rigid rule that an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease." And, in Rhode Island v. Innis, 446 U.S. 291, 298, 100 S.Ct. 1682, 64 L.Ed.2d 297, 306 (1980), a case where a suspect in custody had invoked his Miranda right to counsel, the United States Supreme Court again referred to the "undisputed right under Miranda to remain silent" and to be free of interrogation "until he had consulted with a lawyer." Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) amplifies these views:

> Second, although we have held that after initially being advised of his Miranda rights, the accused may himself validly waive his rights and respond to interrogation, . . . the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. [footnote omitted] We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police.

In the instant case, it is undisputed that Appellant invoked his right to counsel. Yet Detective Decker did absolutely nothing to comply with this. Decker did not provide Appellant an opportunity to use the telephone nor did he make an effort to

contact the Public Defender's office despite the fact that the interrogation of Appellant occurred during normal business hours. 1/ Detective Decker admitted that after Appellant requested an attorney, he, not Appellant, reinitiated conversation albeit not in an inquisitorial posture. Even the trial court recognized that Decker engaged in some interrogation when he asked Appellant "what girl?" (R1970) This question and response were suppressed. At this point, then, Decker had already violated Appellant's rights. That Appellant subsequently agreed to talk to Decker in no way alters or renders invalid the previous unequivocal request for counsel. See Smith v. Illinois, 469 U.S. 91, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984).

The trial court's conclusion that the statements given to Vaughn were admissible because they concerned a separate crime is error. In U.S. ex. rel. Espinoza v. Fairman, 813 F.2d 117, 125 (7th Cir. 1987) the Court held:

> Because the Fifth Amendment right extends to any interrogation conducted in police custody, if an individual invokes the right to counsel during a proceeding that concerns one crime, the invocation continues to apply if he or she is later interrogated about a second crime. If it were otherwise, the police would be obligated to administer new Miranda warnings each time they questioned a suspect in continuous custody about a different crime. The Supreme Court has made clear that the police are not constrained to do so. See Colorado v. Spring, __U.S.__, 107

1/ The interrogation occurred at 1:40 p.m. on April 9, 1987, which was a Thursday.

> S.Ct. 851, 93 L.Ed.2d 954 (1987)(No Fifth Amendment violation where a suspect was arrested on a weapons charge, waived his right to counsel, answered questions regarding that offense, and later in the interrogation was questioned about a murder).

Courts in this state have also adopted this holding. See Luman v. State, 447 So.2d 428 (Fla. 5th DCA 1984); Harris v. State, 396 So.2d 1180 (Fla. 4th DCA 1981); State v. Padron, 425 So.2d 644 (Fla. 3d DCA 1983). Additionally, Vaughn testified that he knew prior to conducting his interview of Appellant that he was going to be inquiring about the Larmon murder. Therefore, the second interrogation was not solely directed toward a different crime.

In summary, Appellant clearly invoked his Fifth Amendment right to counsel. Despite this clear invocation, the police reinitiated contact and conversed with Appellant in a manner designed to elicit incriminating information. Because of this violation, Appellant's subsequent confession and statements should have been suppressed. Appellant is entitled to a new trial.

POINT II

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

The grand jury returned an indictment on April 16, 1987, charging Appellant with one count of first degree murder. (R1325) Thereafter, the state filed an information on May 4, 1987, charging Appellant with two counts of sexual battery and one count of kidnapping. (R1692-1693) On May 12, 1987, Appellant filed a motion to quash the charges in the information on the grounds that the state was without authority to file charges related to a matter which the grand jury had already considered. (R1695) The state subsequently filed a motion to consolidate the indictment and information for purposes of trial. (R1704-1705) On August 7, 1987, the trial court denied the motion to quash and granted the motion to consolidate. (R1727,1726)

Section 905.16, Florida Statutes (1985) 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.

When the state submits a case to a grand jury, it is required to inquire into each and every offense for which a particular accused has been held to answer. Once the grand jury has decided to indict, the state is precluded from later filing separate

charges arising from the very matter into which the grand jury has inquired. In fact, if while inquiring into a matter, the grand jury finds sufficient evidence to warrant charging a person with a criminal offense, it has a duty to bring charges. See State ex rel. Brautigam v. Interim Report of Grand Jury, 93 So.2d 99, 103 (Fla. 1957). The state is not, however, precluded from resubmitting the matter to the grand jury a second time. State v. Mayo, 60 So.2d 170 (Fla. 1952). In short, there is simply no authority by which the state may charge a person by information for crimes arising out of a matter which has already been submitted to a grand jury.

King v. State, 390 So.2d 315 (Fla. 1980) offers no support for the state. King was an inmate at a work-release facility when he stabbed a guard and escaped. King then entered a home near the facility, murdered the woman occupant, robbed her and set fire to her house. The grand jury returned an indictment charging King with first degree murder of the woman, robbery and arson. Additionally, the state filed an information charging King with the attempted murder of the guard and escape. Over objection, the information and indictment were consolidated and King was found guilty as charged. On appeal, this Court found no error in allowing consolidation since the offenses were related and the offenses charged in the information would clearly be admissible in the trial of the indictment offenses. King, supra, is easily distinguishable from the instant case since the information offenses and indictment offenses, though related, were nevertheless separate, discrete matters involving separate

victims. There was no question of the propriety of the charges and thus Section 905.16, Florida Statutes (1975) did not come into play. In the instant case, consolidation is proper only if the state had the authority to file the information. As the statute clearly contemplates, the information was improper and should have been quashed. This Court must reverse Appellant's convictions and remand for a new trial on the murder charge.

POINT III

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

Prior to trial, Appellant filed a motion for additional peremptory challenges. (R1392-1393) This motion was denied but Judge Huffstetler agreed to reconsider it during voir dire. (R1976) During voir dire, defense counsel exhausted his peremptory challenges and renewed his request for additional challenges which was denied by the trial court. (R444)

Section 913.08, Florida Statutes (1985) sets the number of peremptory challenges for each side in a capital case at ten. This statute is implemented by Rule 3.350, Florida Rules of Criminal Procedure which provides in part:

> (e) If an indictment or information contains two or more counts or if two or more indictments or informations are consolidated for trial, the defendant shall be allowed the number of peremptory challenges which would be permissible in a single case, but in the interest of justice the judge may use his judicial discretion in extenuating circumstances to grant additional challenges to the accumulate maximum based on the number of charges or cases included when it appears that there is a possibility that the State or the defendant may be prejudiced. The State and the defendant shall be allowed an equal number of challenges.

Initially it must be noted that the instant case involved the consolidation of the capital murder charged with the three life felonies charged in the information. The above-quoted rule which provides that in such cases the defendant is allowed the number of peremptory challenges which he would be allowed in

a single case, is based on the premise that the cases are properly consolidated. See Johnson v. State, 222 So.2d 191 (Fla. 1969). As Appellant argued in Point II, supra, the consolidation of the indictment and information was improper. Consequently, the limitation of peremptory challenges to ten was error. Notwithstanding this point, the trial court abused its discretion in denying Appellant's request for additional peremptories made during voir dire after he had exhausted his ten challenges. Defense counsel clearly wanted to excuse Juror Defoe whom he felt expressed reservations about his ability to be able to follow the law. (R445) Although he moved to challenge Juror Defoe for cause, this was denied. (R446) In this same final group of veniremen, defense counsel was forced to also accept Juror Whitman who had lived for a few years in Saudi Arabia and who felt that that country's policy of punishing adultery with capital punishment was not extreme. (R436) This was not a situation like Jacobs v. State, 396 So.2d 713 (Fla. 1981) wherein the defendant was requesting a large number (40) of additional peremptories. There is nothing in the record to indicate any attempt by Appellant to unnecessarily delay the proceedings or otherwise thwart the orderly procedures. There was no objection by the state to Appellant's request. Given the seriousness of the offenses that Appellant faced, Judge Huffstetler abused his discretion in denying Appellant's request for additional peremptory challenges. Therefore, this Court must reverse his judgments and sentences and remand the cause for a new trial.

POINT IV

IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 9, 16 AND 17 OF THE FLORIDA CONSTITUTION APPELLANT WAS DENIED DUE PROCESS BECAUSE OF THE ADMISSION OF IRRELEVANT EVIDENCE DURING THE PENALTY PHASE AND THE REFUSAL OF THE TRIAL COURT TO GIVE PROPER REQUESTED JURY INSTRUCTIONS.

During the penalty phase, the state was permitted to introduce over defense objection a list of book and magazine titles which were seized from Appellant's residence. (R1218-1220) The trial court also denied several specially requested jury instructions. (R1250-1265) Appellant asserts that the combination of these errors deprived Appellant of his constitutional right to due process and thus entitles him to a new penalty proceeding.

A. Admission of Irrelevant and Highly Prejudicial Materials

Over objection, the state was permitted to introduce a list of books and magazines which were seized from Appellant's residence. (R1218-1221) These books and magazines concerned such topics as lesbianism, bondage, sadomasochism, anal and oral sex, and other forms of deviant sexual behavior. The state argued that these titles were relevant to prove that the murder was cold, calculated and premeditated. (R1218) Defense counsel objected especially since there was no showing that Appellant had read any of the books or magazines. (R1219)

This Court has previously held that in the penalty phase of a capital trial, the state is limited to presenting evidence which proves only the enumerated aggravating factors or rebuts mitigating factors argued by the defense. Fitzpatrick v. Wainwright, 490 So.2d 938 (Fla. 1986); Trawick v. State, 473 So.2d 1235 (Fla. 1985); Dougan v. State, 470 So.2d 697 (Fla. 1985). The magazines and books certainly do not prove that the murder of Lee Ann Larmon was cold, calculated and premeditated especially since there was no proof that Appellant had even read the books. Moreover the books dealt with a variety of sexual activities that have nothing whatsoever to do with the facts of the Larmon murder such as lesbianism, anal sex, enemas, and telephone sex. The only possible result of the admission of these titles is to portray Appellant as a sexual deviant which is clearly improper. As this Court noted in Dougan, supra, at 701:

> We cannot tell how this improper evidence and argument may have affected the jury. We therefore vacate Dougan's sentence and remand for another complete sentencing hearing before a new jury.

B. Denial of Appellant's Requested Jury Instructions

Defense counsel requested twenty special jury instructions, seven of which were denied. (R1250-1265,1516-1536) Appellant contends that the trial court erred in refusing to give the requested instructions which will be discussed below:

Defense Requested Instruction #6

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

This instruction correctly states the law as established by Provence v. State, 337 So.2d 738 (Fla. 1976) and its progeny. In the instant case some of the same facts could arguably be used to support a finding of heinous, atrocious and cruel and cold, calculated and premeditated. The jury should have been instructed about impermissible doubling.

Defense Requested Instruction #8

> Acts committed after the death of the victim are not relevant in considering whether the homicide was "especially heinous, atrocious or cruel."

In Halliwell v. State, 323 So.2d 557 (Fla. 1975) this Court held that acts committed after a victim dies, however grotesque, are not to be considered in deciding whether the actual murder was heinous, atrocious or cruel. Such actions include dismembering the body, Id; burying the body and pouring concrete over the grave, Blair v. State, 406 So.2d 1103 (Fla. 1981); and putting the body into a car and setting it on fire, Simmons v. State, 419 So.2d 316 (Fla. 1982). In the instant case, defense counsel requested this instruction because the evidence showed the victim's neck was stabbed after death and the body was dragged to an area and hidden among the brush. The applicability of the requested instruction is apparent.

Defense Requested Instruction #16

> In determining the appropriate sentence for the defendant, you are

instructed to consider the sentence of the co-defendant.

In denying this requested instruction, the trial court apparently agreed with the prosecutor's clearly erroneous argument. The prosecutor stated that the jury was not permitted to consider the sentence given a co-defendant. In Bassett v. State, 449 So.2d 803 (Fla. 1984) this Court clearly held that what happens to a co-defendant "is relevant and may be considered by a judge and jury in determining the appropriate sentence." The prosecutor's ignorance of the law in the regard is inexplicable but the prejudice to Appellant is clear, since his co-defendant was permitted to plead to a life sentence. The standard jury instructions do not cover this mitigating factor.

Defense Requested Instruction #17

> The death penalty is warranted only for the most aggravated and unmitigated of crimes. The law does not require that death be imposed in every conviction in which a particular set of facts occur. Thus, even though the factual circumstances may justify the sentence of death by electrocution, this does not prevent you from exercising your reasoned judgment and recommending life imprisonment without eligibility for parole.

Defense Requested Instruction #18

> With regard to your decision to recommend life or death, the court hereby instructs that there is nothing which would suggest that the decision to afford an individual defendant mercy violates our constitution. You are empowered to decline to recommend the penalty of death even if you find one or more aggravating circumstances and no mitigating circumstance.

Defense Requested Instruction #19

> You are never under a duty to impose death unless you conclude as a matter of your independent moral judgement that death is the appropriate penalty. This decision is solely in your discretion and not controlled by any rule of law. Each juror may decide to grant mercy to Todd Mendyk with or without a reason.

The above-requested jury instructions are all designed to inform the jury that despite the existence of aggravating factors and the total absence of mitigating factors, they are still permitted to show mercy and recommend life imprisonment instead of death. This Court in Alvord v. State, 322 So.2d 533 (Fla. 1975) recognized the inherent authority of a jury to recommend life imprisonment for no reason other than its desire to show mercy. This Court stated:

> The law does not require that capital punishment be imposed in every conviction in which a particular state of facts occur. The statute properly allows some discretion, but requires that this discretion be reasonable and controlled. No defendant can be sentenced to capital punishment unless the aggravating factors outweigh the mitigating factors. However, this does not mean that in every instance under a set state of facts the defendant must suffer capital punishment.
>
> The statute contemplates that the trial jury, the trial judge and this Court will exercise reasoned judgment as to what factual situations require the imposition of death and which factual situations can be satisfied by life imprisonment in light of the totality of the circumstances present in the evidence. Certain factual situations may warrant the infliction of capital punishment, but, nevertheless, would not prevent either the trial jury, the trial judge, or this Court from exercising reasoned judgment in reducing the

> sentence to life imprisonment. Such an exercise of mercy on behalf of the defendant in one case does not prevent the imposition of death by capital punishment in the other case.

Id. at 540. Accord Downs v. State, 386 So.2d 788, 795 (Fla. 1980); Chenault v. Stynchcombe, 581 F.2d 444, 448 (5th Cir. 1978).

The need for adequate instructions to be given to a jury to guide its recommendation in capital cases was expressly noted by the Court in Gregg v. Georgia, 428 U.S. 153, 192-193, 96 S.Ct 2909, 49 L.Ed.2d 859, 885-886 (1976):

> The idea that a jury should be given guidance in its decision making is also hardly a novel proposition. Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law. See Gasoline Products Co. v. Camplin Refining Co., 283 U.S. 494, 498, 75 L.Ed. 1188, 51 S.Ct. 513 (1931); Fed.Rul.Civ.Proc. 51. When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations.

The information received by Appellant's jury in the form of instructions on the law to be followed in making a penalty recommendation was far from adequate to avoid the infirmities in this death sentence that inhered in death sentence imposed under the pre-Furman statute. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Appellant's death sentence rests in part on the jury's recommendation to the

trial judge that the death penalty be imposed. (R1509) LeDuc v. State, 365 So.2d 149 (Fla. 1978).

The requested jury instructions were correct statements of the law and were not otherwise covered by the standard jury instructions. The instructions were particularly applicable to the facts of the instant case. Coupled with the admission of irrelevant evidence which the jury was permitted to consider, the failure of the trial court to give the requested instructions denied Appellant his constitutional right to due process of law. Appellant is entitled to have his death sentence either reduced to life or to have a new penalty phase before a newly empaneled jury.

POINT V

THE IMPOSITION OF THE DEATH PENALTY IN THE INSTANT CASE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION BECAUSE IT IS BASED ON AGGRAVATING CIRCUMSTANCES WHICH WERE NOT PROVEN BEYOND A REASONABLE DOUBT.

Following the jury recommendation for death, Judge Huffstetler adjudicated Appellant guilty and sentenced him to death. In his findings of facts to support the death sentence, Judge Huffstetler found three aggravating factors: that the capital felony was committed while Appellant was engaged in the commission of kidnapping and sexual battery; that the capital felony was especially wicked, evil, atrocious, or cruel; and that the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (R1559-1560) Judge Huffstetler found one mitigating factor, the age of Appellant. (R1561) Appellant asserts that two of the aggravating factors were not proven beyond a reasonable doubt and consequently the death sentence cannot be sustained.

A. That the Capital Felony was Especially Wicked, Evil, Atrocious, or Cruel

This Court has defined "heinous, atrocious, and cruel in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973) as such:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means

> designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

Recognizing that all murders are heinous, in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), this Court further refined its interpretation of the legislature's intent that this aggravating circumstance only apply to crimes especially heinous, atrocious and cruel. In light of this, the facts enumerated by the trial court do not support the finding of this factor.

In Herzog v. State, 439 So.2d 1372 (Fla. 1983), this Court held the evidence insufficient to prove beyond a reasonable doubt an especially heinous, atrocious, or cruel killing in a situation where the female victim had been induced by the defendant to take drugs, then gagged, placed on a bed and smothered with a pillow, and ultimately dragged into a living room where she was successfully strangled to death with a telephone cord. This Court stated:

> As to the manner by which death was imposed, we find that in this factual context the evidence is insufficient, standing alone, to justify th application of the section (5)(h) aggravating factor. We have previously stated that this factor is applicable "where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim." Tedder v. State, 322 So.2d 908, n. 3 (Fla. 1975) (quoting State v. Dixon, 382 So.2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

Id. at 1380 (emphasis added).

An example of the valid finding of the existence of this aggravating factor can be found in Gardner v. State, 313 So.2d 675 (Fla. 1975), where the female suffered at least one hundred bruises on her body, numerous cuts and lacerations, and severe injury to her genitals and internal organs due to a sexual battery performed with a "broom stick, bat or bottle" Id. at 676. This aggravating circumstance should be reserved for murders such as the one in Gardner, which was "accompanied by such additional acts as to set the crime apart from the norm", Herzog, supra at 1380. It ill serves the continued viability of the death penalty in Florida if the aggravating circumstance can be upheld under the facts of the instant case; the facts do not comport with a finding of an especially heinous, atrocious, or cruel murder.

The findings of fact in support of this aggravating factor contain some material inaccuracies. While it is true that the victim asked Appellant and Frantz to take her back to the store, she did not "continually [beg] the defendant not to kill her." (R1560) Rather, the record reflects that during the truck ride, the victim asked once if she was going to be killed and Appellant told her no. (R984) After the victim was tied to the tree, she asked not if she was going to killed but if she was going to be left in that position to which Appellant said yes. (R998) The only time that the record supports that the victim begged for her life was immediately before she was killed. (R1071) While it is clear that the victim was bound and gagged and raped, there is no evidence that she was physically tortured

as was present in Gardner, supra. There was no evidence of internal injuries, and the knife wound to the neck was "very superficial" and was inflicted near death or after death. (R724-725) The actual strangulation was swift, causing the victim to immediately lose consciousness and die within a few minutes. (R726) While the instant murder was indeed senseless and horrible, it does not meet the test for being especially heinous, atrocious or cruel. This factor must be stricken.

B. The Capital Felony was a Homicide and was Committed in a Cold, Calculated and Premeditated Manner Without any Pretense of Moral or Legal Justification.

In Combs v. State, 403 So.2d 418 (Fla. 1981), this Court declared that Section 921.141(5)(i), Florida Statutes (1981) authorizes a factor in aggravating for premeditated murder where the premeditation is "cold, calculated and . . . without any pretense of moral or legal justification." Id. at 421. This Court further stated that "Paragraph (i) in effect adds nothing new to the elements" of premeditated murder, but does add "limitations to those elements for use in aggravation." Id. (emphasis added). Subsequently, in Jent v. State, 408 So.2d 1024, 1032 (Fla. 1982), this Court held:

> The level of premeditation needed to convict in the [guilt] phase of a first degree murder trial does not necessarily rise to the level of premeditation in subsection (5)(i). Thus, In the sentencing hearing the state will have to prove beyond a reasonable doubt the elements of the premeditation aggravating factor - "cold, calculated . . . and

> without any pretense of moral or legal justification." (emphasis supplied).

The aggravating circumstance of murder committed in a cold calculated manner without any pretense of moral or legal justification applies only to crimes which exhibit heightened premeditation greater than is required to establish premeditated murder, and it must be proven beyond a reasonable doubt. Gorham v. State, 454 So.2d 556 (Fla. 1984). "This aggravating factor 'is not to be utilized in every premeditated murder prosecution,' and is reserved primarily for 'those murders which are characterized as execution or contract murders or witness elimination murders.' (citation omitted)." Bates v. State, 465 So.2d 490, 493 (Fla. 1985).

In Middleton v. State, 426 So.2d 548, 553 (Fla. 1982), this Court approved the finding of (5)(i) where according to the defendant's own confession, he sat with the shotgun in his hands for an hour, looking at th victim as she slept and thinking about killing her. In light of these facts, the Court stated:

> This is clearly the kind of intentional killing this aggravating circumstance was intended to apply to. The cold-blooded calculation of the murder went beyond mere premeditation. (emphasis supplied).

In Harris v. State, 438 So.2d 787 (Fla. 1983), this Court struck down a finding of (5)(i) where the defendant killed a seventy-three year old woman by repeatedly stabbing her and beating her with a blunt instrument. The evidence also showed that the victim tried to escape and suffered numerous defensive wounds. This Court stated:

> We must, however, agree that the state failed to establish beyond a reasonable doubt that this murder met the requirements of having been committed in a cold, calculated, and premeditated manner, as we have defined this aggravating circumstance. This aggravating circumstance was not, in our view, intended by the legislature to apply to all premeditated-murder cases. [citations omitted]. In this instance the state presented no evidence that this murder was planned and, in fact, the instruments of the death were all from the victim's premises.

In the findings of fact in support of this factor, once again the trial court has misstated some of the facts. The record does not support the "fact" that Appellant had planned for days in advance to kidnap, rape and murder someone. Rather according to Appellant's statement, it was while he and Frantz were riding around that the thought of abducting someone came to mind. (R1056) The "thought" did not include a plan to kill. In fact Appellant continually told the victim she would not be killed. (R1057,984,998) In fact, the record shows that it is entirely possible that if the truck had not gotten stuck in th mud, the victim might not have been killed at all, at least according to co-defendant Frantz' testimony (R1003). There is no evidence that Appellant "discussed his options" with the victim. Rather Appellant and Frantz discussed the possible options of what to do with the victim. (R1070) Even at this time, Appellant had not made the decision to kill the victim. The evidence may indeed support a finding of premeditation but is woefully insufficient to support the "heightened" premeditation necessary

to sustain this aggravating factor. Consequently, this factor must be stricken.

C. Summary

Two of the three aggravating circumstances must be stricken. The remaining valid aggravating factor cannot justify the imposition of the death penalty especially in light of the mitigating factor found by the trial court. This Court must vacate the death sentence and remand for imposition of a life sentence with a mandatory minimum of twenty-five years.

POINT VI

THE TRIAL COURT ERRED IN SENTENCING APPELLANT IN EXCESS OF THE RECOMMENDED GUIDELINES SENTENCE WHERE THE REASONS GIVEN FOR DEPARTURE ARE NOT CLEAR AND CONVINCING.

In departing from the recommended guideline sentence of 17-22 years and imposing three consecutive life sentences Judge Huffstetler gave three reasons for departure:

> [1] Defendant's course of conduct demonstrates he is a danger to others. [2] Premeditation and calculation were exhibited by the defendant and is not an inherent element of Sexual Battery. [and] [3] Defendant committed two separate acts of Sexual Battery during the same course of conduct. (R1869)

Appellant maintains that these reasons are improper.

It appears that Judge Huffstetler was relying on this Court's prior decision in Lerma v. State, 497 So.2d 736 (Fla. 1986) in fashioning his reasons for departure. However, in so doing, Judge Huffstetler has misapplied Lerma, supra, to the facts of the instant case. The first reason, that defendant is a danger to others, was specifically disapproved by this Court in Lerma, supra at 739:

> The trial court abused its discretion in basing its departure on the dangerousness of the defendant and the helplessness of the victim. Everyone convicted of sexual battery is dangerous and, unfortunately, the vast majority of victims of sexual battery are virtually helpless. Departure cannot be based on a factor common to nearly all crimes in the sentencing category. Mischler, Id. at 526.

The second reason, the premeditation and calculation exhibited by the defendant, was upheld in Lerma, supra. However, this reason was incorrectly applied to the instant case for two reasons: First, while premeditation and calculation are not inherent components of sexual battery, Appellant was also being sentenced for kidnapping of which Appellant maintains premeditation is an inherent component. This is so because Appellant was charged with kidnapping to facilitate the commission of another felony which necessarily involves some degree of calculation. Second, the trial judge gave absolutely no facts to support this reason. Merely reciting a facially proper reason for departure is insufficient absent a recitation of facts to support it. Lerma, supra.

The third reason for departure, the two separate acts of sexual battery, is an improper reason for departure because unlike Lerma, supra, Appellant was convicted of two counts of sexual battery and both were scored on the scoresheet. It is clearly error to depart based on factors already scored. Hendrix v. State, 475 So.2d 1218 (Fla. 1985).

In summary, then, all of the reasons given by the trial court to support his decision to depart are invalid. This Court must remand the cause for resentencing within the recommended guidelines. Shull v. Dugger, 515 So.2d 748 (Fla. 1987).

POINT VII

THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

The Florida capital sentencing scheme denies due process of law and constitutes cruel and unusual punishment on its face and as applied for the reasons discussed herein. The issues are presented in a summary form in recognition that this Court has specifically or impliedly rejected each of these challenges to the constitutionality of the Florida statute and that detailed briefing would be futile. However, Appellant does urge reconsideration of each of the identified constitutional infirmities.

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 684 (Fla. 1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for the jury's consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980). This leads to arbitrary and capricious imposition of the death penalty.

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. See Godfrey v. Georgia, supra; Witt v. State, 387 So.2d 922, 931-932 (Fla. 1980)(England, J. concurring). Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984)(Ehrlich, J. concurring in part and dissenting in part).

The Florida capital sentencing process at both the trial and appellate level does not provide for individualized sentencing determinations through the application of presumptions, mitigating evidence and factors. See Lockett v. Ohio, 438 U.S. 586 (1978). Compare Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976) with Songer v. State, 365 So.2d 696, 700 (Fla. 1978). See Witt, supra.

The failure to provide the defendant with notice of the aggravating circumstances which make the offense a capital crime and on which the state will seek the death penalty deprives the defendant of due process of law. See Gardner v. Florida, 430 U.S. 349 (1977); Argersinger v. Hamlin, 407 U.S. 25 (1972); Amend. VI and XIV, U.S. Const.; Art. 1, §§9 and 15(a), Fla. Const.

Execution by electrocution imposes physical and psychological torture without commensurate justification and is therefore cruel and unusual punishment. Amend. VIII, U.S. Const.

The Florida capital sentencing statute does not require a sentencing recommendation by a unanimous jury or substantial majority of the jury and thus results in the arbitrary and unreliable application of the death sentence and denies the right to a jury and to due process of law.

The Florida capital sentencing system allows exclusion of jurors for their views on capital punishment which unfairly results in a jury which is prosecution prone and denies the right to a fair cross-section of the community. See Witherspoon v. Illinois, 391 U.S. 510 (1968).

The Elledge Rule [Elledge v. State, 346 So.2d 998 (Fla. 1977)], if interpreted to automatically hold as harmless error any improperly found aggravating factor in the absence of a finding by the trial court of a mitigating factor, violates the Eighth and Fourteenth Amendments to the United States Constitution.

Section 921.141(5)(d), Florida Statutes (1985)(the capital murder was committed during the commission of a felony), renders the statute unconstitutional in violation of the Eighth and Fourteenth Amendments to the United States Constitution, because it results in arbitrary application of this circumstance and in death being automatic in felony murders unless the jury or trial court in their discretion find some mitigating circumstance out of an infinite array of possibilities as to what may be mitigating.

Additionally, a disturbing trend has become apparent in this Court's decisions and its review of capital cases. This Court has stated that its function in capital cases is to ascertain whether or not sufficient evidence exists to uphold the trial court's decision in imposing the ultimate sanction. Quince v. Florida, 459 U.S. 895 (1982)(Brennan and Marshall, J.J., dissenting from denial of cert.); Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). Appellant submits that such an application renders Florida's death penalty unconstitutional.

In rejecting a constitutional challenge to the statute, the United States Supreme Court assumed in Proffitt v. Florida, 428 U.S. 242 (1976), that this Court's obligation to review death

sentences encompasses two functions. First, death sentences must be reviewed "to insure that similar results are reached in similar cases." Proffitt, supra at 258. Secondly, this Court must review and reweigh the evidence of aggravating and mitigating circumstances to determine independently whether the death penalty is warranted. Id. at 253. The United States Supreme Court's understanding of the standard of review was subsequently confirmed by this Court when it stated that its "responsibility [is] to evaluate anew the aggravating and mitigating circumstances of the case to determine whether the punishment is appropriate." Harvard v. State, 375 So.2d 833, 834 (Fla. 1978) cert. denied 414 U.S. 956 (1979)(emphasis added).

In two recent decisions, this Court has recognized previous decisions were improperly decided. In Proffitt v. State, 510 So.2d 896 (Fla. 1987) this Court reduced a death sentence to life despite having previously affirmed it on three prior occasions in Proffitt v. State, 315 So.2d 461 (Fla. 1975) affirmed 428 U.S. 242 (1976); Proffitt v. State, 360 So.2d 771 (Fla. 1978); and Proffitt v. State, 372 So.2d 1111 (Fla. 1979). The basis of the holding was this Court's duty to conduct proportionality review. Similarly in King v. State, 514 So.2d 354 (Fla. 1987) this Court invalidated a finding of the aggravating factor that the defendant caused a great risk of death to many persons despite having approved it in King's direct appeal in King v. State, 390 So.2d 315 (Fla. 1980). In so doing, this Court acknowledged that the factor had not been proven beyond a reasonable doubt. What these two cases clearly

demonstrate is that the death penalty as applied in Florida leads to inconsistent and capricious results.

In view of this Court's abandonment of its duty to make an independent determination of whether or not a death sentence is warranted, the constitutionality of the Florida death penalty statute is in doubt. For this and the previously stated arguments, Appellant contends that the Florida death penalty statute as it exists and as applied is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

Based on the foregoing cases, policies and arguments, the Appellant respectfully requests this Honorable Court as to Points I,II and III, to reverse Appellant's judgments and sentences and remand for a new trial; as to Point IV, to reverse Appellant's death sentence and remand for a new penalty proceeding before a newly empaneled jury, or alternatively to reduce his sentence of death to life; as to Points V and VII, to vacate the death sentence and remand for imposition of a life sentence with a mandatory minimum of twenty-five years; as to Point VI, to reverse the sentences for kidnapping and sexual battery and remand for resentencing within the recommended guidelines range.

Respectfully submitted,

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ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Avenue, Suite A, Daytona Beach, Fla. 32014, and mailed to Mr. Todd Michael Mendyk, #109550, P.O. Box 747, Starke, Fla. 32091 on this 21st day of April 1988.

Michael S Becker

MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER