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

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT 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.

Contrary to Appellee's assertion, the only statements ruled admissible by Judge Huffstetler were the initial statement given to Detective Decker (with the exception of the "what girl" question and answer) and the initial statement given to Deputy Vaughn of the Pasco County Sheriff's Department. (R1970-1971) Hence, it is the admissibility of these statements which Appellant attacks.

There is no question and certainly Appellee does not dispute that Appellant clearly and unequivocally invoked his right to counsel. It is equally undisputed that Detective Decker reinitiated the next contact with Appellant and began talking to

him about being in jail and not harming himself. (R1916) Appellee characterizes this conversation as being "necessary concerns of processing Mendyk for custody." (Brief of Appellee page 7). Appellee then continues that such conversation was a requirement if Decker was to reasonably fulfill his obligation of custodian. (Id) However, this "obligation" should not and does not require Decker to play amateur psychiatrist. If, indeed Decker was concerned about Appellant's suicidal ideations the reasonable thing to do would be to summon medical personnel to examine Appellant. This was never done. The conversation initiated by Decker went far beyond the "routine inquiries . . . such as whether [Appellant] would like a drink of water". Rather, as was noted in Christopher v. Florida, 824 F.2d 836 (11th Cir. 1987), Decker's reinitiated conversation "open[ed] up a more generalized discussion relating directly or indirectly to the investigation" and therefore constituted impermissible interrogation. Id at 845. Even the trial court realized this, since he suppressed Decker's question "what girl" and Appellant's response to it. (R1970-1971). In Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689-90, 64 L.Ed.2d 297 (1980) the Court held:

> [T]he term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

Therefore, the fact that Decker did not engage in a classic question and answer interrogation, it was nevertheless an

interrogation for Miranda purposes. The fact that Appellant subsequently agreed to talk with Decker in no way renders invalid his previous unequivocal request for counsel. Smith v. Illinois, 469 U.S. 91, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984).

Appellee does not discuss the issue of the admissibility of Appellant's statement to Detective Vaughn of the Pasco County Sheriff's Department. However, in light of Appellee's position with regard to Appellant's statement to Detective Decker, it can reasonably be assumed that Appellee maintains that the trial court's ruling was correct when it ruled the statement admissible since it was an interview on another crime. (R1970-1971). However, in Arizona v. Roberson, 43 Cr.L. 3085 (U.S.S.Ct. June 15, 1988) the Court ruled that if an accused invokes his right to counsel this invocation applies to all interrogations whether or not the interrogation concerns a matter related to subject of the initial interrogation. Thus Appellant's invocation of his right to counsel to Detective Decker applies with equal force to Detective Vaughn and the Pasco County investigation.

Appellee next argues that even if Appellant's statements were improperly admitted, it constituted harmless error in light of the overwhelming evidence of guilt. In particular, Appellee places great emphasis on the testimony of Philip Frantz, the co-defendant. However, Frantz was simply unable to relate the details since he was not present when much of the activity occurred. In particular, Frantz was not present when Appellant allegedly killed the victim. Additionally, Appellant's statements contained expressions of his own thought processes which Frantz

could not know. These were quite pivotal in Judge Huffstetler's findings of fact in support of the death penalty. Hence, the erroneous admission of Appellant's statement can in no way be deemed harmless. Appellant is entitled to a new trial.

POINT IV

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT 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.

A. Admission of a Highly Inflammatory and Irrelevant List of Book Titles Seized From Appellant's Residence

As Appellee correctly notes the focus of the cold calculated and premeditated aggravating factor is on the defendant's state of mind. The books seized from Appellant's residence are irrelevant to any aggravating circumstance concerning the murder of Lee Ann Larmon. Since absolutely no connection between the books and the murder is either alleged or proven, the admission was erroneous. The sole purpose of such evidence was to portray Appellant as a sexual deviant. Despite Appellee's assertion that such error is harmless, on the clear authority of Dougan v. State, 470 So.2d 697 (Fla. 1985), Appellant is entitled to a new penalty phase before a newly-empaneled jury.

B. Denial of Appellant's Requested Jury Instructions

Appellee's basic arguments in regard to these requested instructions is that they were either covered by the standard jury instructions (Special Requested Instructions #17, 18, 19), improper statements of the law (Special Requested Instruction #6) or unwarranted under the facts (Special Requested Instruction

#8). Appellant reiterates that all of the requested instructions correctly state the law of this state. This is especially true of Special Requested Instruction #16 which allows the jury to consider the sentence received by a co-defendant. Appellee does not even discuss the requested instruction and with good reason - the trial court's denial of the instruction is inexplicable and indefensible.

Appellee further argues that the subject matter of the instructions are proper considerations only for the court who is the ultimate sentencer. However, the importance of the advisory role of the jury cannot be denigrated in this fashion. See Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

POINT VI

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT 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.

Appellee suggests that the departure sentence can be upheld on the basis of the unscored capital murder which was approved as a reason for departure in Livingston v. State, 13 FLW 187 (Fla. March 10, 1988). Appellee argues that since Livingston was decided after sentencing in the instant case, the trial judge "could not know exactly what to say to support his departure". (Brief of Appellee at page 27). However, Livingston relied upon Hansbrough v. State, 509 So.2d 1081 (Fla. 1987) for the proposition that the unscored capital murder can be used as a reason for departure. Hansbrough was decided on June 18, 1987, more than 5 months before sentencing in the instant case and thus was certainly available to the trial court if he chose to utilize it. Shull v. Dugger, 515 So.2d 748 (Fla. 1987) prohibits consideration of this reason. As argued in the initial brief, the reasons cited by the trial court to support the departure are improper. Appellant should be resentenced within the recommended guideline sentence.

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 sentence for kidnapping and sexual battery and remand for resentencing within the recommended guidelines range.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Avenue, Suite A, Daytona Beach, Fla. 32014 in his basket at the Fifth District Court of Appeal and mailed to Mr. Todd Michael Mendyk, #109550, P.O. Box 747, Starke, Fla. 32091 on this 29th day of July 1988.

Michael S Becker
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