IN THE SUPREME COURT
STATE OF FLORIDA

GREGORY ALAN KOKAL,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Supreme Court No. 66,

BRIEF OF APPELLANT

APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
DUVAL COUNTY, FLORIDA

Wayne E. Flowers
Flowers, Hould, Jensen & Westling
220 E. Forsyth Street
Jacksonville, Florida 32202
(904) 356-2341
Attorney for Appellant

TABLE OF CONTENTS

CITATION OF AUTHORITIES

PRELIMINARY STATEMENT

References to the transcript of testimony at trial and the testimony at the Motion to Suppress hearing will be designated by the letter "T" followed by the appropriate page number.

References to the Record on Appeal will be designated by the letter "R" followed by the appropriate page number.

The Defendant below, Gregory Kokal, will be referred to as Appellant.

STATEMENT OF THE CASE

This case commenced with the issuance of an arrest warrant for the arrest of Appellant on the charge of murder on October 5, 1983. Said warrant was executed and the Appellant taken into custody on October 5, 1983.

The Grand Jury for the Fourth Judicial Circuit of Florida indicted Appellant and a co-defendant by the name of William Robert O'Kelly, Jr., on the charge of murder in the first degree on October 20, 1983, said murder having been alleged to have been committed between the 29th of September, 1983 and the 30th of September, 1983. Appellant entered a plea of not guilty to the indictment.

A series of pre-trial motions was filed on behalf of Appellant asking for discovery items, challenging the constitution of the grand jury and also challenging the constitutionality of the death penalty. These motions were denied.

On April 30, 1984 a Motion to Suppress Physical Evidence was filed on Appellant's behalf seeking to have evidence seized from Appellant in an unconnected arrest which occurred on September 30, 1983 suppressed. Testimony and argument were heard by the trial court on this Motion on May 9, 1984. The trial judge announced his ruling denying the motion on May 25, 1984. Apparently no written order was ever entered on the motion.

Prior to the commencement of the trial, the co-defendant, William Robert O'Kelley, Jr. was allowed by the State to enter a plea of guilty to the offense of Second Degree Murder.

Jury selection began in the case on October 1, 1984. Jury selection continued through the next day, October 2, 1984 when a jury was sworn. The State began presenting its testimony on October 2, 1984 and concluded its case on October 3, 1984. The Appellant presented his case to the jury on October 4, 1984 and the case was submitted to the jury on that same day. On October 4, 1984 the jury returned a verdict as to Appellant of guilty of murder in the first degree.

The jury was re-convened on October 12, 1984 for the purpose of hearing arguments and testimony on the penalty phrase of the proceeding. The State presented one witness, Dr. Bonifacio Floro from the medical examiner's office and the defense presented one witness, Mrs. D. S. Kokal, Appellant's mother. After deliberation on October 14, 1984, the jury returned a recommendation that the death penalty be imposed upon Appellant. The jury further found that Appellant did actually kill the victim, Jeffrey Russell (R - 236).

A Motion for New Trial was filed by Appellant on October 15, 1984 which was denied by the trial court on November 14, 1984 (R - 239). On that same day the trial judge sentenced Appellant to death by electrocution, pursuant to a written sentencing order (R - 244).

A timely Notice of Appeal was filed on December 12, 1984 and this appeal ensued.

STATEMENT OF THE FACTS

The events which gave rise to this case first unfolded on the morning of September 30, 1983. At approximately 7:15 A.M. that day Robert Garon was jogging down the beach in Jacksonville, Florida when he discovered a body in an area known as Hanna Park (T - 455). The body was later identified as that of Jeffrey Russell.

The scene at which the body was found was processed by agents of the Florida Department of Law Enforcement, who recovered plaster casts of tire tracks, shoe prints and also recovered the remnants of a pool cue stick broken into three pieces. Photographs of the scene, which were later introduced at the trial were also taken.

Dr. Bonifacio Floro, an expert in the field of forensic pathology, employed in the medical examiner's office was called by the State. Dr. Floro testified both in the State's case in chief and during the penalty phase of the trial. He testified that death resulted from a gunshot wound to the head (T - 517). The bullet was recovered from the victim's clothing (T - 520). Dr. Floro also noted two impacts on the back of the head (T - 122). During the penalty phase of the trial Dr. Floro testified that the two blows to the head would have rendered the victim unconscious (T - 864). Further, Dr. Floro testified that the victim would have been unconscious at the time the fatal shot was fired (T -870), and as a result would have experienced no pain or agony at the time he was shot (T - 871). The victim never regained consciousness after being shot and thus experienced no pain after the shooting (T - 872).

Detective Hugh Eason of the Jacksonville Sheriff's Office testified that he received information that an individual by the name of Eugene Mosely had knowledge concerning a homicide at the beach. Detective Eason interviewed Mosely and as a result of the information he received from Mosely, obtained a warrant for Appellant's arrest (T - 548). Mosely was called as a witness by the State and he related a statement that Appellant made to him late on September 30, 1983 or early

on October 1, 1983. Mosely had dropped by the place where Appellant was residing and Appellant appeared to be packing to leave (T - 551). Appellant then said, according to Mosely, that he had picked a sailor up who was hitchhiking, had driven him to Hanna Park and then took a pool stick and started beating the sailor (T - 552). Appellant then told him he held a gun to the victim's head and shot him (T - 552). He said Appellant told him that the sailor was on his knees at one point and begged Appellant not to kill him (T - 553). When asked why he had to kill the man Appellant allegedly replied: "Dead men can't tell lies." (T - 554). On cross-examination Mosely admitted that Appellant was intoxicated at the time the statements were made. (T - 558).

The arrest warrant was executed by Detective Eason and Detective Frank Japour of the Jacksonville Sheriff's Office. Over the objections of Appellant's counsel (T - 578, 579), Detective Japour was allowed to testify that Appellant was apprehended hiding in a closet in an upstairs bedroom of the house in which he was residing and that after he ordered Appellant out of the closet, he observed a ten inch fillet knife on the floor at his feet (T - 593). The Detective testified on cross-examination that he never saw Appellant touch the knife (T - 594) nor was any evidence offered by the State to connect the knife in any way to the murder.

Several expert witnesses were offered by the State to connect the truck Appellant was driving and the tennis shoes he wore to the crime scene. A firearms examiner testified that the bullet recovered by Dr. Floro had been fired from a .357 magnum Reuger pistol, which had earlier been seized from Appellant prior to his arrest for murder (T - 648). Appellants fingerprint was lifted from the barrel of the gun as well as from the end flap of a box of shells for the gun (T - 619).

Appellant testified in his own behalf and while he admitted being present when the crime was committed, he denied robbing the victim, beating the victim or shooting the victim. Appellant testified that his co-defendant, O'Kelly had committed these acts without his prior knowledge, agreement, consent or approval. Appellant testified

that on the evening the events in question occurred both he and O'Kelly had consumed a considerable amount of alcohol and smoked a considerable amount of marijuana (T - 722).

Counsel for Appellant called co-defendant O'Kelly to the stand and elicited from him the admission that he had written a letter in November, 1983 to Appellant in which he (O'Kelly) had taken responsibility for the shooting and absolved Appellant of any responsibility (T - 692, 695). O'Kelly repudiated the statements in the letter while on the stand and testified that Appellant was in fact responsible for the murder. O'Kelly admitted that the parties had smoked marijuana with the victim enroute to Hanna Park (T - 701). O'Kelly stated that Appellant told the victim to walk down the beach and in fact they walked approximately 100 feet (T - 704). At that point Appellant allegedly struck the victim with the pool stick and then shot him (T - 705).

Prior to the trial on May 9, 1984 a hearing was held on Appellant's Motion to Suppress at which Officer David R. Mahn of the Jacksonville Sheriff's Office testified concerning the seizure of the .357 Reuger pistol which later was identified as the murder weapon. At approximately 11:30 A.M. on September 30, 1983, before Appellant was a suspect in the murder of Jeffrey Russell, a truck driven by Appellant was stopped by Officer Mahn. Officer Mahn stopped the truck because he was flagged down by a gas station attendant who told him that the occupant of the truck had driven away from the gas station without paying for his gasoline (T - 32, 33). Appellant was pulled over on Spring Park Road in Jacksonville. Officer Mahn testified that he did not know whether parking was allowed at the particular point where Appellant was pulled over, and in fact there were no signs prohibiting parking (T - 44).

According to the Officer, Appellant attempted to pay for the gasoline but did not have enough money to do so (T - 35). Officer Mahn then arrested Appellant for petit theft.

While searching Appellant, after Appellant had shown him a valid driver's license, Officer Mahn found a second wallet containing two other identifications (T - 37), one of which belonged to William Robert O'Kelly, Jr. Appellant told the Officer that the truck belonged to O'Kelly, which it in fact did.

After arresting Appellant, the Officer decided to seize the vehicle, and pursuant to that seizure proceeded to inventory the truck. The officer testified that he had no reason to believe any weapon or contraband of any kind was located in the truck (T - 42). The officer stated that his decision to impound the truck was based on his dissatisfaction with the location of the truck and that he was "not happy" with the ownership of the truck (T - 40, 41). A check through the National Crime Information Computer (NCIC) did not reveal the truck to be stolen.

In inventorying the truck Officer Mahn found and seized the Reuger pistol which was later identified as the murder weapon.

POINT I

THE TRIAL COURT ERRED IN THE IMPOSITION OF THE DEATH PENALTY IN THAT THREE OF THE FOUR AGGRAVATING CIRCUMSTANCES FOUND BY THE TRIAL JUDGE WERE NOT PROVEN BEYOND A REASONABLE DOUBT, AND TWO MITIGATING CIRCUMSTANCES WERE IMPROPERLY NOT FOUND TO EXIST BY THE COURT

In its sentencing order, the trial judge found that four statutorily outlined aggravating circumstances had been proven beyond a reasonable doubt, namely:

> 1. The capital felony was committed while the defendant was engaged or was an accomplice in the commission of or an attempt to commit or flight after committing or attempting to commit a robbery (R - 254).
>
> 2. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody (R - 254).
>
> 3. The capital felony was especially heinous, atrocious or cruel (R - 255).
>
> 4. The capital felony was a homicide committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

For purposes of this argument, Appellant will concede that factor number one, that is that the homicide was committed during the commission of a robbery, was in fact proven. However, Appellant contends that the other three aggravating circumstances were not proven beyond a reasonable doubt and further that the trial judge improperly did not find two statutory mitigating circumstances as well as some non-statutory mitigating circumstances to have been proven beyond a reasonable doubt. The result was that Appellant was wrongly sentenced to the death penalty, and that sentence should be vacated.

Appellant would first examine the aggravating circumstances which the Court found to have been proven:

A. The Capital Felony Was Committed For The Purpose Of Avoiding a Lawful Arrest or Effecting An Escape from Custody.

The only facts which were produced before the trial court which could in any way be relied upon to support the Court's finding as to this circumstance would be the statement allegedly made by Appellant to Eugene Mosley, the day after the crime was committed, to the effect that "dead men don't tell lies." It must be born in mind that even Mosley testified that Appellant was intoxicated when he made this statement, and therefore its veracity must be questioned, but more importantly, the objective facts don't support the trial judge's conclusion.

To establish the existence of this aggravating factor, the mere fact of death when the victim is not a law enforcement officer is insufficient. Oats v. State 446 So. 2d. 90 (Fla. 1984); Riley v. State 366 So. 2d. 19 (Fla. 1978). Proof of the requisite intent to avoid arrest and detection must be very strong in these cases. Id at 95. Also it must be shown that the dominant or only motive for the murder was the elimination of witnesses. Menedez v. State 368 So. 2d. 1278 (Fla. 1979); Clark v. State 443 So. 2d. 973 (Fla. 1983).

In this case, it is undisputed that the victim was not a law enforcement officer. Thus, it must be shown through the evidence that Appellant's dominant, or only motive in killing the victim was to avoid arrest, and such proof must be strong. The evidence demonstrated that the victim did not know and had never met Appellant or co-defendant O'Kelly before he stepped into their truck on September 29, 1983. It would be apparent then that the victim would not have been a person who could automatically have identified the persons who robbed him.

The physical evidence at the scene and the testimony of O'Kelly established that there was a struggle before the victim was shot. The circumstances are certainly consistent with the conclusion that perhaps the victim was tougher than the Appellant had anticipated and the murder took place to subdue the victim, rather than to

eliminate him as a witness. A statement made after the fact by someone who is intoxicated at the time he makes it should not be relied upon as proof beyond a reasonable doubt, particularly when we consider the death penalty. The statement cannot be taken out of context, nor can the statement be divorced from the realities of the physical evidence at the scene. The State simply did not prove that the dominant or only motive for the murder was the elimination of Jeffrey Russell as a witness to his own robbery. If this were the case, why would Appellant have struck the victim several times before shooting him. If his only motice had been elimination of a witness, then surely the victim would have been shot in the head right away and not beaten and then shot. This case differs very little from the shooting of a waitress who was attempting to run for help and alert authorities as outlined in Rivers v. State 458 So. 2d. 762 (Fla. 1984).

B. The Capital Felony Was Especially Heinous, Atrocious or Cruel

In its finding that the murder of Jeffrey Russell was especially heinous, atrocious or cruel, the trial court relied on the fact that the victim was beaten, was subjected to what the trial judge colorfully characterized as a "death march" and then was beaten again and murdered. What the trial court describes as a "death march" was a walk of approximately 100 fee from the truck down the beach. There were only two blows struck to the victim's head according to the medical examiner and death came as a result of a single shot to the head at close range.

The courts have recognized the fact that all murders are heinous, atrocious and cruel. Thus, to establish this as an aggravating circumstance, something more must be shown. This Court has held that to establish this factor the crime involved must be conscienceless, pitiless or unnecessarily torturous and be accompanied by such additional acts as to set it apart from the norm of capital felonies. State v. Dixon 283 So. 2d. 1 (Fla. 1973); Cooper v. State 336 So. 2d. 1133 (Fla. 1976); White

v. State 403 So. 2d. 331 (Fla. 1981). The very definition of the three terms as they appear in the Standard Jury Instructions announce the fact that this factor is to apply only to those homicides which civilized people would find to be extremely or outrageously wicked.

Where death is quick or instantaneous, this Court has uniformly held that this factor ils inappropriately applied. In Cooper v. State supra where a law enforcement officer was killed by two shots fired into his head, the factor was not found to exist. In Odom v. State 403 So. 2d. 936 (Fla. 1981), where the victim was shot several times in the head, this factor was not found to exist, the Court noting that "an instantaneous death caused by gunfire is not ordinarily a heinous killing." In Parker v. State 458 So. 2d. 750 (Fla. 1984) where the victim was shot and killed execution style, this factor was not found to exist. Uniformly where as here, the victim was killed by a shot to the head, this Court has found that such murders are not heinous, atrocious and cruel within the definition of the Florida Statutes. See also Oats v. State supra; Kampff v. State 371 So. 2d. 1007 (Fla. 1979), Tafero v. State 403 So. 2d. 355 (Fla. 1981).

The trial court also emphasized the pain suffered by the victim in support of its finding on this circumstance. However, there is authority for the proposition that the pain alone suffered by the victim does not necessarily warrant a finding of the existence of this circumstance. In Teffetelles v. State 439 So. 2d. 840 (Fla. 1983) the victim was shot by the defendant, but did not die instantaneously, but rather lived for a couple of hours before dying. This Court found that the fact that the victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm of capital felonies.

In this case the victim was unconscious at the time he was killed. The medical examiner testified that the victim would have felt no pain either before or after the single shot that killed him. The fact that the victim suffered two blows to the

head which rendered him unconscious, but were not the cause of death does not "set this murder apart from the norm of capital felonies."

Neither does the fact that the vicitim was forced to walk a distance of 100 feet before he was rendered unconscious and then killed take this case out of the norm of capital felonies. This case is not at all factually similar to those cases in which victims were abducted and transported over great distances before they were killed, or those cases where the victim was taunted or tortured (see for example White v. State supra, Combs v. State 403 So. 2d. 418 (Fla. 1981), Copeland v. State 457 So. 2d. 1012 (Fla. 1984). It is illogical to assert that the victim in this case spent any extended period of time anguishing over his impending death, when in fact he was unconscious and incapable of feeling pain when he was rendered dead.

C. The Capital Felony Was Committed In a Cold, Calculated and Premeditated Manner Without Any Pretense of Moral or Legal Justification

Proof of first degree murder (other than felony murder) necessarily requires proof of premeditation. It is obvious then that proof of the premeditation necessary to prove first degree murder, does not necessarily entail proof of the additional factors which must be shown to prove this factor beyond a reasonable doubt. This aggravating circumstance has been found when the facts show a particularly, lengthy, methodic or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator Preston v. State 444 So. 2d. 939 at 946 (Fla. 1984). Proof of this aggravating circumstance requires a showing of a state of mind beyond that of the ordinary premeditation required for a first degree murder conviction. Maxwell v. State 443 So. 2d. 967 (Fla. 1983).

The cases in which this factor has been found to have been proven speak in terms of a "heightened" sense of premeditation. A finding of this factor has been unheld where a defendant confessed that he sat with a shotgun in his hands for an

hour looking at the victim and thinking about killing her. Middleton v. State 426 So. 2d. 548 (Fla. 1982) The factor was found and upheld where a defendant held his victims at gunpoint, forced them to strip, then beat and tortured them over the evening before killing them. Bolender v. State 422 So. 2d. 833.

The lengthy deliberation and consideration before committing the act of murder illustrated by Middleton and Bolender contrasts starkley with the degree of premeditation in the case sub judice. The case sub judice more closely resembles the facts shown in Maxwell v. State supra where this factor was not found to be proven. In Maxwell the accused along with a co-defendant acosted four men on a golf course. When the victim protested the accused's demand for his ring, the accused shot him in the chest, killing him within minutes. While it could obviously be said that in the case sub judice that the killing was without moral or legal justification, the same could also be said of the killing in Maxwell. What separates this case and Maxwell from the other cases in which this factor has been upheld, is the lack of a showing of "a state of mind beyond that of the ordinary premeditation required for a first degree murder conviction." The fact that the killing was intentional and deliberate is not enough alone to prove this circumstance. Maxwell v. State supra at 971.

The trial court charaterized the killing as an "assassination" (R - 255) presumably because the victim was shot in the head. However, the place where the victim was shot is less important than the circumstances surrounding the shooting. There was no evidence presented to show or even indicate that Appellant had any intention of killing the victim prior to their arrival at the beach. It was only after the victim put up a struggle that he was shot. Although the facts would indicate, as in Maxwell that the killing was "intentional" and "deliberate", this alone does not prove the circumstance.

Appellant further contends that the trial court erred in failing to find that certain statuatory mitigating circumstances as specified in Florida Statutes Section

921.141(6) were not proven, specifically:

> (f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, and
>
> (g) The age of the defendant at the time of the crime.

In addition the trial judge failed to give due weight and consideration to the non-statuatory mitigating factors as required by Lockett v. Ohio 438 U.S. 586. 98 5 S. Ct. 2945, 57 L.Ed. 2d. 975 (1978), particularly as they related to the above two factors.

In order to support Appellant's contention in regard to the above mitigating circumstances, one must look to the testimony of Mrs. D. S. Kokal, during the penalty phase of the trial in concert with the other testimony at the trial. First and foremost is the undisputed fact that the Appellant was only twenty years of age at the time this crime was committed. The picture painted of the Appellant in her testimony was that of a very immature twenty year old.

Mrs. Kokal painted a picture of Appellant as a child being the victim of repeated physical abuse from his father, to the point that she and the child (Appellant) had to seek professional counseling. Mrs. Kokal related that during the period before the murder when Appellant and William O'Kelly were residing in her home, Appellant frequently abused alcohol. The abuse of alcohol and marijuana was spelled out in detail by both Appellant and O'Kelly during the trial, and in no way was refuted by the State. This abuse is of particular importance in that it occurred right up until the moment the victim was murdered. Although much of Mrs. Kokal's testimony would fall into the non-statuatory mitigating factors contemplated by Locket, it is important also insofar as it supports the two statuatory mitigating circumstances which Appellant argued.

Appellant would submit that his capacity to appreciate the criminality of his acts or to conform to the requirements of the law was substantially impaired. Again, the testimony regarding the use of alcohol and marijuana on the evening of the murder

has not been disputed. The testimony of O'Kelly, who was certainly not a friendly witness to Appellant was that they had even smoked several marijuana cigarettes with the victim, which is in direct contrast to the trial court's finding in its order that the testimony of O'Kelly did not support the intoxication argument (R - 253). The trial judge also found that his conduct on the witness stand did not support the argument. Appellant can only question what his abilities and demeanor as a witness, one year after the crime was committed has to do with his intoxication or lack of same one year earlier when the crime was committed.

In addition the trial court erred in not finding the Appellant's age at the time the crime was committed as a mitigating factor. The trial court, again relying on Appellant's demeanor on the stand rejected this factor, saying that Appellant's demeanor while testifying "demonstrated a shrewdness and other abilities" inconsistent with his age. Again, Appellant feels compelled to remind this Court that Appellant's testimony took place one year after the murder was committed. This was a year during which Appellant was incarcerated in the Duval County Jail continuously. It could certainly be proposed that whatever maturity or "shrewdness" the Appellant showed on the stand was the result of a year spent in the County Jail, away from alcohol and away from marijuana. A year in a county jail would tend to mature anyone.

The Appellant clearly showed all the immaturity of his twenty years both prior to and on the evening of the commission of the murder. As his mother described, it was a period of continuous alcohol abuse. As he and O'Kelly described, it also involved drug abuse. Appellant was even intoxicated at the time he made his incriminating statement to Eugene Mosley. None of these activities is consistent with the "shrewd" person the trial judge portrayed on the witness stand one year later. The very way in which the murder weapon was seized - the Appellant driving away from a gas station without paying for gasoline - shows Appellant's lack of

maturity and lack of shrewdness.

Appellant contends that the two mitigating circumstances discussed herein were proven beyond a reasonable doubt. Since only one aggravating circumstance was proven (murder during the commission of a robbery), this Court is obligated to vacate the Appellant's death sentence. McKennon v. State 403 So. 2d. 389 (Fla. 1981). In the alternative, the case should be remanded to the trial court for reconsideration and resentencing in line with this Court's findings. Oats v. State supra.

POINT II

THE TRIAL COURT ERRED IN ADMITTING TESTIMONY CONCERNING A KNIFE FOUND AT THE TIME APPELLANT WAS ARRESTED

As outlined in the Statement of Facts, Detective Frank Jarpour was allowed to testify, over Appellant's objection that when he removed Appellant from the closet where he was arrested, there was a ten inch fillet knife next to him. The knife had absolutely no connection to the murder, and there was no testimony that Appellant ever touched it. Appellant submits that the State's sole motivation in presenting the testimony was to inflame and prejudice the jury against Appellant, to show voilent character, or to picture him as a threat to police officers.

The knife had no relvancy to proof of the allegations in the indictment, and therefore should not have been admitted by the trial court. Relevant evidence is evidence tending to prove or disprove a material fact. Section 90.401 Florida Statutes (1983). Relevant evidence is inadmissible if its probative value is substantially outweighed by the damages of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. Section 90.403 Florida Statutes (1983). The presence of the knife did not prove or disprove any material fact. Its probative value surely did not outweigh its prejudice to the Appellant.

The State contended, and the trial judge apparently concurred that hte testimony regarding the knife somehow supported a flight to avoid prosecution instruction. Appellant can hardly see how the presence of the knife, particularly since Appellant never touched it, could support such an instruction. Obviously the evidence regarding Appellant's concealment in the closet would support such an instruction. However, even if we assume that the testimony is relevant, Section 90.403 would prohibit its introduction inasmuch as its admission was certainly outweighed by its prejudice to Appellant. See also Ehrhardt, Florida Evidence 2nd Edition Section 403.1 (1984).

To discover that the evidence was harmful to Appellant, and in fact was mentioned to the jury one need only look at the closing statements made by the State in its opening argument:

> Then, we have Mr. Kokal on October 5. Mr. Kokal gets arrested first of all he's hiding in the closet, he's got a knife beside him miraculously. (T - 776).

If this evidence had not been prejudicial and harmful to Appellant, it would have been ignored by the prosecutor in his closing argument. It was not ignored.

Appellant submits that the admission of the testimony in question was reversible error.

POINT III

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE

Prior to the trial the trial judge denied Appellant's Motion to Suppress Physical Evidence which was primarily directed to the pistol which was identified as the murder weapon at trial. The pistol was taken from underneath the seat of the truck he was driving when he was arrested for petit theft on September 30, 1983. The Officer, D.R. Mahn of the Jacksonville Sheriff's Office found the gun while inventorying the truck.

Officer Mahn admitted in his testimony at the motion to suppress that he had no reason to believe that weapons or other contraband were located in the vehicle. He further admitted that he gave Appellant no alternative to impoundment of the vehicle. The Stated relied on New York v. Belton 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d. 768 (1981) for the validity of the search. Belton held that a policeman who has made a lawful custodial arrest of the occupant of an automobile may as a contemporaneous incident of that arrest, search the passenger compartment of the automobile and may examine the contents of any container found within the passenger compartment.

It is the contention of Appellant that the situation involved in this case was a seizure followed by a search, rather than a search incident to arrest. Inasmuch as it was a seizure and then a search, either the officer required probable cause to search, or he had to comply with the requirements which are prerequisite to a valid inventory search. Appellant contends that Belton has been receded from by the United States Supreme Court by its opinion in Michigan v. Long 103 S. Ct. 3469 (1983). Long held that the search of the passenger compartment of any automobile, limited to those areas in which a weapon may be placed or hidden is permissible if a police officer possesses a reasonable belief based on specific and articulable

facts, which taken together with rational inferences from those facts would reasonably warrant officers in believing that the suspect is dangerous and may gain immediate control of weapons. The search in this case does not meet that standard.

To determine whether the officer's action in inventorying the vehicle was proper, one must look to Miller v. State 403 So. 2d. 1307 (Fla. 1981). Miller holds that if a determination is made that a vehicle must be impounded then the officer must first make a reasonable attempt to contact the owner or possessor of the vehicle and advise him that the vehicle will be impounded if the owner or possessor cannot provide a reasonable alternative to impoundment. No such advise was given to Appellant as the officer admitted in his testimony. An inventory search of a motor vehicle without such advise or consultation to a present owner or possessor upon arrest results in an unreasonable search under the United States and Florida constitutions and must be excluded under the Florida constitutional exclusionary rule.

CONCLUSION

For the foregoing reasons, this Court should enter its opinion reversing the conviction herein and remanding the case to the trial court and:

A. Require a new trial; or

B. Vacate the death sentence imposed herein and substitute a life sentence therefor; or

C. Require a new sentencing proceeding.

Respectfully submitted,

Wayne E. Flowers
Flowers, Hould, Jensen & Westling
220 East Forsyth Street
Jacksonville, Florida 32202
(904) 356-2341
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Appellant has been supplied by U.S. mail to the Office of the Attorney General, State of Florida, Capitol Building, Tallahassee, Florida 32304.

Wayne E. Flowers
Flowers, Hould, Jensen & Westling
220 East Forsyth Street
Jacksonville, Florida 32202
(904) 356-2341
Attorney for Appellant

5-8-85