IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JUL 17 1985
CLERK, SUPREME COURT
By Chief Deputy Clerk

GREGORY ALAN KOKAL,

Appellant,

vs. CASE NO. 66,305

STATE OF FLORIDA,

Appellee.

______________________________/

ANSWER BRIEF OF APPELLEE

JIM SMITH
ATTORNEY GENERAL

HENRI C. CAWTHON
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32301
(904) 488-0600

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

| | PAGE |
|---|---|
| TABLE OF CITATIONS | ii |
| PRELIMINARY STATEMENT | 1 |
| STATEMENT OF THE CASE AND FACTS | 2 |
| SUMMARY OF ARGUMENT | 3 |
| ARGUMENT - ISSUE I | 4 |
| THE TRIAL COURT PROPERLY IMPOSED THE DEATH PENALTY BASED UPON FOUR AGGRAVATING CIRCUMSTANCES WHICH HAD BEEN PROVEN BEYOND A REASONABLE DOUBT. | |
| - ISSUE II | 12 |
| THE TRIAL COURT PROPERLY ADMITTED TESTIMONY CONCERNING THE KNIFE FOUND AT THE TIME APPELLANT WAS ARRESTED. | |
| - ISSUE III | 14 |
| APPELLANT'S CLAIM THAT THE TRIAL COURT ERRED IN DENYING HIS PRE-TRIAL MOTION TO SUPPRESS THE MURDER WEAPON IS NOT PROPERLY BEFORE THIS COURT. IN THE ALTERNATIVE, THE TRIAL COURT PROPERLY DENIED THE MOTION. | |
| CONCLUSION | 19 |
| CERTIFICATE OF SERVICE | 19 |

## TABLE OF CITATIONS

| CASES | PAGE(S) |
|---|---|
| Caster v. State, 365 So.2d 701 (Fla. 1978) | 14 |
| Chambers v. Maroney, 399 U.S. 42, 26 L.Ed.2d 419, 90 S.Ct. 1975 (1970) | 15 |
| Clark v. State, 443 So.2d 973 (Fla.), cert. den., 104 S.Ct. 2400 (1984) | 5,7 |
| Combs v. State, 403 So.2d 418 (Fla. 1981), cert. den., 102 S.Ct. 2258 (1982) | 6,7 |
| Cooper v. State, 336 So.2d 1133 (Fla. 1976) | 5 |
| D.J.C. v. State, 400 So.2d 830 (Fla. 3d DCA 1981) | 14 |
| Daugherty v. State, 419 So.2d 1067, 1071 (Fla. 1982), cert. den., 103 S.Ct. 1236 (1983) | 9 |
| Eutzey v. State, 458 So.2d 755 (Fla. 1984) | 5 |
| Florida v. Meyers, ___ U.S. ___, 80 L.Ed.2d 381, 104 S.Ct. ___ (April 23, 1984) | 15 |
| Hall v. State, 403 So.2d 1321 (Fla. 1981) | 10 |
| Herring v. State, 446 So.2d 1049 (Fla.), cert. den., 105 S.Ct. 396 (1984) | 5,8,11 |
| Johnson v. State, 442 So.2d 185 (Fla. 1983), cert. den., 104 S.Ct. 2182 (1984) | 5 |
| Kampff v. State, 371 So.2d 1007 (Fla. 1979) | 5 |

## TABLE OF CITATIONS
(CONT'D)


| CASES | PAGE(S) |
|---|---|
| Mason v. State, 438 So.2d 374 (Fla. 1983), *cert. den.*, 104 S.Ct. 1330 (1984) | 9 |
| Maxwell v. State, 443 So.2d 967 (Fla. 1983) | 10 |
| Menedez v. State, 368 So.2d 1278 (Fla. 1979) | 4 |
| Nix v. Williams, ___ U.S. ___, 81 L.Ed.2d 377, 104 S.Ct. ___ (1984) | 16 |
| Oats v. State, 446 So.2d 90 (Fla. 1984) | 4 |
| Odom v. State, 403 So.2d 936 (Fla. 1981) | 5 |
| Parker v. State, 458 So.2d 750 (Fla. 1984) | 5 |
| Peek v. State, 395 So.2d 492 (Fla.), *cert. den.*, 101 S.Ct. 2036 (1981) | 9 |
| Pope v. State, 441 So.2d 1073 (Fla. 1983) | 9,10 |
| Riley v. State, 366 So.2d 19 (Fla. 1978) | 4 |
| Rivers v. State, 458 So.2d 762 (Fla. 1984) | 4 |
| Simmons v. State, 419 So.2d 316 (Fla. 1982) | 10 |
| Sims v. State, 402 So.2d 459 (Fla. 4th DCA 1981) | 14 |

TABLE OF CITATIONS
(CONT'D)


| CASES | PAGE(S) |
|---|---|
| South Dakota v. Opperman, 428 U.S. 364, 49 L.Ed.2d 1000, 96 S.Ct. 3092 (1976) | 15 |
| Squires v. State, 450 So.2d 208 (Fla.), cert. den., 104 S.Ct. 268 (1984) | 8 |
| State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. den., 94 S.Ct. 1950 (1974) | 6,11 |
| Straight v. State, 397 So.2d 903 (Fla. 1981), cert. den., 102 S.Ct. 556 (1982) | 13 |
| Sullivan v. State, 303 So.2d 632 (Fla. 1974), cert. den., 96 S.Ct. 3226 (1976) | 11 |
| Tafero v. State, 403 So.2d 355 (Fla. 1981) | 5 |
| Teffetells v. State, 439 So.2d 840 (Fla. 1983) | 5 |
| Texas v. White, 423 U.S. 67, 46 L.Ed.2d 209, 96 S.Ct. 304 (1975) | 15 |
| United States v. Ross, 456 U.S. 798, 72 L.Ed.2d 372, 102 S.Ct. 2157 (1982) | 15 |
| White v. State, 403 So.2d 331 (Fla. 1981), cert. den., 103 S.Ct. 3571 (1983) | 7,9 |

TABLE OF CITATIONS
(CONT'D)


| OTHER AUTHORITIES | PAGE(S) |
|---|---|
| § 59.041, Fla.Stat. | 13 |
| §932.703, Fla.Stat. | 18 |

IN THE SUPREME COURT OF FLORIDA

GREGORY ALAN KOKAL,

Appellant,

vs. CASE NO. 66,305

STATE OF FLORIDA,

Appellee.

_______________________________/

## PRELIMINARY STATEMENT

Gregory Alan Kokal, the criminal defendant below, will be referred to as "Appellant." The State of Florida, the prosecuting authority below, will be referred to as "Appellee."

References to the record on appeal containing the legal documents filed in this cause will be designated "(R )." References to the transcript of testimony and proceedings at the suppression hearing and at trial will be designated "(T )."

All emphasis is supplied by Appellee.

STATEMENT OF THE CASE AND FACTS

Appellee accepts Appellant's Statement of the Case and Facts as being supported by the record. Additional facts deemed relevant and necessary to a disposition of the legal issues raised will be included in the argument portion of Appellee's brief.

## SUMMARY OF ARGUMENT

It was reasonable for the trial judge to find that the murder was committed for the purpose of avoiding or preventing a lawful arrest based upon Appellant's statement that he killed his robbery victim because "dead men don't tell lies." It was also proved beyond a reasonable doubt that the crime was especially heinous, atrocious or cruel because the evidence revealed the victim begged Appellant not to kill him while being struck repeatedly with a broken pool cue. Furthermore, the judge properly found the murder was committed with premeditation in that the victim was lying unconscious when Appellant shot him through the head at point-blank range.

The trial court properly admitted testimony concerning a ten-inch fillet knife found at Appellant's feet while he was hiding in an upstairs bedroom closet. For purposes of showing guilt through Appellant's attempt to escape or conceal himself from law enforcement officers, it was reasonable to assume he had armed himself with the kitchen knife, in the absence of a reasonable explanation for its presence in the clothes closet.

Finally, Appellant's claim that the trial court improperly suppressed physical evidence has not been preserved for appellate review in that he did not object when the evidence was introduced at trial. In the alternative, it is submitted the evidence was discovered as the result of a legal search or seizure incident to a lawful arrest.

## ARGUMENT - ISSUE I

THE TRIAL COURT PROPERLY IMPOSED THE DEATH PENALTY BASED UPON FOUR AGGRAVATING CIRCUMSTANCES WHICH HAD BEEN PROVEN BEYOND A REASONABLE DOUBT.

Appellant argues the trial court erred in imposing the death penalty in that three of the four aggravating circumstances were not proven beyond a reasonable doubt. He also argues the trial court should have found that two mitigating circumstances existed. Appellee disagrees.

Appellant first argues there was insufficient evidence that the capital felony was committed for the purpose of avoiding a lawful arrest in that the prosecution could not prove that the dominant or only motive for the murder was the elimination of a witness. Appellee submits the cases cited in support of this proposition are inapplicable because none involved an _admission_ by the defendant that the murder was committed to avoid arrest. _Oats v. State_, 446 So.2d 90 (Fla. 1984); _Riley v. State_, 366 So. 2d 19 (Fla. 1978); _Menedez v. State_, 368 So.2d 1278 (Fla. 1979); _Rivers v. State_, 458 So.2d 762 (Fla. 1984). In the case at bar, Appellant told Eugene James Mosley, Jr. that he killed the victim because, "dead men can't tell lies." (T 549-554). This evidence, when considered in conjunction with the manner in which the victim was killed, to-wit: shot through the head from

point-blank range while lying unconscious on the beach (T 863-64, 869-70), establishes beyond a reasonable doubt that Appellant performed the execution to avoid identification and arrest. See Johnson v. State, 442 So.2d 185 (Fla. 1983), cert. den., 104 S.Ct. 2182 (1984) (defendant's statement that, "dead witnesses don't talk," proper basis for aggravating circumstance that murder was committed to avoid arrest); and Clark v. State, 443 So. 2d 973 (Fla.), cert. den., 104 S.Ct. 2400 (1984) (defendant's statement to a cell mate that "one of them could identify him," sufficient to prove dominant motive for killing); Herring v. State, 446 So.2d 1049 (Fla.), cert. den., 105 S.Ct. 396 (1984) (statement made to detective).

Appellee submits this claim is meritless in light of the fact that Appellant offered a singular, and thus dominant, reason for killing the unconscious victim. Clark, supra.

Appellant further argues the trial court improperly found the murder to be especially heinous, atrocious or cruel. Appellee submits that none of the cases cited to support this argument involve facts even remotely similar to those of the instant case. In Teffetells v. State, 439 So.2d 840 (Fla. 1983), Kampff v. State, 371 So.2d 1007 (Fla. 1979), Parker v. State, 458 So.2d 750 (Fla. 1984), Cooper v. State, 336 So.2d 1133 (Fla. 1976), Tafero v. State, 403 So.2d 355 (Fla. 1981), and Odom v. State, 403 So.2d 936 (Fla. 1981), the victims were shot with little or no warning. Here, Appellant shot Jeffrey Russell after first hitting him on the head with a pool cue, walking

him down to the beach with a gun in his hand, and beating him about the arms and head with the broken pool stick while ignoring his pleas for mercy (T 703-705, 552-553). The evidence also reveals the robbery took place before the victim was taken to the beach and bludgeoned into unconsciousness. (T 703-04).

Eugene Mosley testified as follows:

> Q. After they picked the sailor up, what did they do, what was the next thing that happened? What did Mr. Kokal tell you the next thing was?
>
> A. Well, he told me that they drove up to Hanna Park and that they all got out of the truck and, you know, they commenced - he said he took a pool stick and hit him and he said that then his partner started helping him beat him and he said the guy wouldn't, you know, wouldn't hardly go down. He said they just kept beating him and they finally got him on the ground and they continued to kick him and beat on him.
>
> * * * *
>
> Q. Did he tell you whether or not the sailor said anything while they were beating him?
>
> A. Well, he did say that the guy was on his knees at one point and he held his hand in the air saying please don't kill me, don't kill me.
>
> (T 552-53).

It is submitted these additional facts accompanying the murder "set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. den., 94 S.Ct. 1950 (1974). See Combs v. State, 403 So.

2d 418 (Fla. 1981), cert. den., 102 S.Ct. 2258 (1982) (victim begins to cry when told of her impending death); White v. State, 403 So.2d 331 (Fla. 1981), cert. den., 103 S.Ct. 3571 (1983) (victim begged for mercy before being shot in the back of the head); and Clark v. State, 443 So.2d at 977 where it was held that "the helpless anticipation of impending death may serve as the basis for this aggravating factor."

Appellee contends the trial court properly found this factor to be proven beyond a reasonable doubt. (R 255).

Appellant also claims the trial court should not have found that the homicide was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. A review of the judge's written findings shows this claim to be frivolous:

> 4. The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
>
> FACT: Russell was assaulted and battered after he alighted from the truck upon arrival from the beach.
>
> FACT: Russell was forced by the defendant to move farther down the beach away from the truck.
>
> FACT: Upon arrival of the scene of death, Russell was completely subdued and presented no threat to the defendant.
>
> FACT: Russell was struck repeatedly by the defendant until he fell to the ground.
>
> FACT: Russell offered no threat to the defendant and, to the contrary, begged for his own life.
>
> CONCLUSION: The murder of Russell was in the nature of an assassination. He was forced into the

> 'death march' and, at its conclusion, was assassinated as he begged for his life. He constituted no threat to the defendant nor bar to his escape.
> (R 255).

As stated by this Court in Herring, supra:

> This aggravating circumstance applies in those murders which are characterized as execution or contract murders or witness elimination murders.
>
> * * * *
>
> In the instant case, the evidence does reflect that appellant first shot the store clerk in response to what appellant believed was a threatening movement by the clerk and then shot him a second time after the clerk had fallen to the floor. The facts of this case are sufficient to show the heightened premeditation required for the application of this aggravating circumstance as it has been defined in [McCrae v. State, 416 So.2d 804 (Fla. 1982)]; Jent v. State, 408 So.2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111, 1102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982); and Combs.
> 446 So.2d at 1057.

Inasmuch as it was proven Appellant committed a witness-elimination murder well after the original crime had taken place, this Court should dismiss Appellant's claim. See also Squires v. State, 450 So.2d 208 (Fla.), cert. den., 104 S.Ct. 268 (1984); and Eutzey v. State, 458 So.2d 755 (Fla. 1984) (there was no evidence a struggle had occurred at the time of the shooting thus supporting the cold, calculated and premeditated factor).

Appellant's assertion that the trial court should have found certain mitigating factors is also meritless. It is within the trial court's discretion to determine whether evidence

exists of a particular mitigating circumstance, and, if so, the weight to be given it. So long as all the evidence is considered, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion. Pope v. State, 441 So.2d 1073 (Fla. 1983). Daugherty v. State, 419 So.2d 1067, 1071 (Fla. 1982), cert. den., 103 S.Ct. 1236 (1983); White, supra. In the case sub judice, the court found that appellant's capacity to appreciate the criminality of his conduct was not substantially impaired and that his age at the time of the crime was not a mitigating factor.

As stated by the trial court: "The defendant's demeanor while testifying demonstrated a shrewdness and other abilities that are consistent with the age of a person of his years or of even more advanced maturity." (R 253). Of course, such a finding is clearly within the trial judge's discretion in that he is uniquely qualified through his ability to communicate with and observe a defendant. Moreover, this Court has consistently upheld trial court decisions not to apply as a mitigating factor a defendant's age of twenty years. Mason v. State, 438 So.2d 374 (Fla. 1983), cert. den., 104 S.Ct. 1330 (1984); Peek v. State, 395 So.2d 492 (Fla.), cert. den., 101 S.Ct. 2036 (1981).

Appellant has also failed to demonstrate an abuse of the trial court's discretion in not finding that Appellant's alleged use of alcohol and marijuana on the night in question affected his ability to appreciate the criminality of his act. The trial

judge made the following observations:

> FACT: The defendant's statement to his friend, Eugene James Mosley, Jr., contained no evidence of intoxication.
>
> FACT: The defendant's statement to Eugene James Mosley, Jr., was in great detail including his thought processes at the time of the killing of Russell.
>
> FACT: The testimony of the co-participant, William Robert O'Kelly, Jr., does not support intoxication of the defendant by either alcohol or drugs.
>
> FACT: The testimony of the co-participant William Robert O'Kelly, Jr., was one of deliberate, calculated acts and conduct by the defendant during the course of the robbery and murder of Russell.
>
> CONCLUSION: The evidence at trial and sentencing hearing is insufficient to support this circumstance. To the contrary, the defendant proved to this Court, by his statements and his acts, as well as his demeanor on the witness stand, that he is an individual of above average intelligence, knowledge, and well oriented as to time, space and relationships and well able but unwilling to conform his conduct to the requirements of law and with an ability to appreciate the criminality of his conduct. There is no mitigating circumstance under this paragraph.
>
> (R 252-53).

Appellee submits that where the only evidence of Appellant's intoxication was presented through his own self-serving testimony, he has failed to demonstrate an abuse of discretion. See also Hall v. State, 403 So.2d 1321 (Fla. 1981); Simmons v. State, 419 So.2d 316 (Fla. 1982) and Pope, supra.

Alternatively, Appellee notes that where an intentional murder is committed in the course of a robbery and there are no mitigating circumstances, a sentence of death is nonetheless appropriate. Maxwell v. State, 443 So.2d 967 (Fla. 1983);

Sullivan v. State, 303 So.2d 632 (Fla. 1974), cert. den., 96 S. Ct. 3226 (1976). Furthermore, even if the mitigating factors were proven, the aggravating factors greatly outweigh them and thus mandate the death penalty. Herring, supra; Dixon, supra.

## ISSUE II

THE TRIAL COURT PROPERLY ADMITTED TESTIMONY CONCERNING THE KNIFE FOUND AT THE TIME APPELLANT WAS ARRESTED.

It is Appellant's contention he was unduly prejudiced by testimony that a ten-inch fillet knife was found at his feet when he was captured by police in a bedroom clothes closet.

Appellee submits this argument is frivolous in light of the testimony from Frank Japour, investigator for the Jacksonville Sheriff's Office:

> Q. Will you please describe whether a search was successful or not?
>
> A. Yes, sir, it was. I apprehended Mr. Kokal in the upstairs bedroom closet of the residence.
>
> Q. Will you please describe where he was, and particularly where you found him?
>
> A. He was crouched down on the floor behind the hanging clothes in the closet.
>
> Q. And was he armed?
>
> A. Yes, he was.
>
> Q. What was he armed with?
>
> A. A fillet knife of approximately ten inches in length.
>
> Q. Where was that knife?
>
> A. It was on the floor right beside him.

Q. But on the floor?

A. Yes, sir.

*     *     *     *

[BY MR. WESTLING:] Officer Japour, how do you know he was armed?

A. When I stuck my pistol through the clothes that were hanging in the closet into his face he crouched down and as I told him to put his hands out in front of him I observed the knife on the floor right beside his right foot.

(R 576-77).

Appellant concedes that testimony concerning his presence in the bedroom closet during the police search was relevant as being an indication of guilt. (Appellant's brief, pg. 17). However, he must also concede that <u>all</u> evidence of guilt is prejudicial and harmful to an accused and cannot be challenged on this basis alone. This Court has ruled that when a suspect attempts to evade prosecution by concealment, resistence to lawful arrest, <u>or other indications after the fact of a desire to evade prosecution</u>, such fact is admissible as an inference of guilt. <u>Straight v. State</u>, 397 So.2d 903 (Fla. 1981), <u>cert</u>. <u>den</u>., 102 S.Ct. 556 (1982). The unexplained presence of the knife at Appellant's feet clearly indicated to Officer Mahn a desire to resist arrest.

Not only has Appellant failed to present a viable argument on this issue, he has not demonstrated how the suppression of the evidence would have resulted in a different outcome favorable to his cause. §59.041, Fla.Stat.

## ISSUE III

APPELLANT'S CLAIM THAT THE TRIAL COURT ERRED IN DENYING HIS PRE-TRIAL MOTION TO SUPPRESS THE MURDER WEAPON IS NOT PROPERLY BEFORE THIS COURT. IN THE ALTERN-ATIVE, THE TRIAL COURT PROPERLY DENIED THE MOTION.

Appellant aruges that the trial court erred in denying his pretrial motion to suppress a .357 magnum Reuger pistol found in his truck as the result of a search/inventory of his truck incident to his lawful arrest. Appellee submits this issue is not properly before this Court and must be dismissed with prejudice.

A defendant who unsuccessfully moves to suppress evidence in a pretrial hearing must object when the evidence is introduced at trial to preserve the right of appellate review over the propriety of such action. Sims v. State, 402 So.2d 459 (Fla. 4th DCA 1981); D.J.C. v. State, 400 So.2d 830 (Fla. 3d DCA 1981). During the trial the trial judge asked Appellant's counsel whether he had any objection to the introduction of the Reuger pistol. Defense counsel stated that he had none. (T 529). Thus, the issue has not been preserved for review. Caster v. State, 365 So.2d 701 (Fla. 1978).

Assuming arguendo that this Court elects to reach the merits of this claim, Appellee submits the evidence was legally

seized as the result of an inventory search of the impounded truck incident to Appellant's arrest.

It is standard procedure for a law enforcement agency to inventory an arrestee's vehicle which must be impounded, and the United States Supreme Court has consistently held that such warrantless inventory searches are legal. Chambers v. Maroney, 399 U.S. 42, 26 L.Ed.2d 419, 90 S.Ct. 1975 (1970); Texas v. White, 423 U.S. 67, 46 L.Ed.2d 209, 96 S.Ct. 304 (1975); United States v. Ross, 456 U.S. 798, 72 L.Ed.2d 372, 102 S.Ct. 2157 (1982); South Dakota v. Opperman, 428 U.S. 364, 49 L.Ed.2d 1000, 96 S.Ct. 3092 (1976). See also Florida v. Meyers, ___ U.S. ___, 80 L.Ed.2d 381, 104 S.Ct. ____ (April 23, 1984). In the instant case, Officer David Mahn had two reasons to inventory the contents of Appellant's truck: (1) he had just arrested Appellant for stealing gas on a road with no designated parking areas, and (2) he had reason to believe the truck was stolen. (T 34, 36-41). Officer Mahn testified as follows:

> Q. Did you ask Mr. Kokal after he told you that Mr. O'Kelly owned the vehicle, did you ask him where he was?
>
> A. Yes, I did.
>
> Q. What was his response to that?
>
> A. That he didn't know.
>
> Q. Now, did you make a search of the vehicle and the recovery of the gun or whatever items were recovered from inside of the vehicle that was made before or after Mr. Kokal was placed under arrest?
>
> A. It was made after he was under arrest.

Q. Did you then call the towing company?

A. Yes, sir, I did.

Q. What were your reasons for towing the truck?

A. Many fold. I wasn't happy with the location we were in, I didn't want to leave the truck there, I'm not sure about the parking, I have never seen anything parked there, it's too much of a traffic lane for me to leave the truck where it was, I couldn't in all good conscience leave that man or whoever's personal property in that truck in a residential area, I've got to assume some responsibility for it. I was not happy with the ownership of the truck or the circumstances. We had three different names from three different states and then we had an Arizona plate, you know, bringing in a fourth jurisdiction. I wasn't satisfied with that.

(T 40-41).

Clearly, Officer Mahn's only alternative was the impoundment and standard inventory search of Appellant's truck.

Even if this Court viewed the recovery of the murder weapon as being incident to a search as opposed to an inventory, the legality of that search would be irrelevant in light of the U.S. Supreme Court's adoption of the inevitable discovery doctrine. Nix v. Williams, ___ U.S. ___, 81 L.Ed.2d 377, 104 S.Ct. ___ (1984).

In Nix, information as to the whereabouts of a murder victim's body was elicited from the defendant through an illegal interrogation in the police car. Once the defendant led police to the body, a search of the area using a two hundred man search team was terminated. The court reversed the United States Court of Appeal, Eighth Circuit, in deciding that law enforcement

should not be put in a worse position than they would have been in if no unlawful conduct has transpired:

> The core rationale consistently advanced by this Court for extending the Exclusionary Rule to evidence that is the fruit of unlawful police conduct has been that this admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections. This Court has accepted the argument that the way to insure such protections is to exclude evidence seized as a result of such violations notwithstanding the high social cost of letting persons obviously guilty go unpunished for their crimes. On this rationale, the prosecution is not to be put in a better position than it would have been in if no illegality had transpired.
>
> By contrast, the derivative evidence analysis insures that the prosecution is not put in a <u>worse</u> position simply because of some earlier police error or misconduct. The independant source allows admission of evidence that has been discovered by means wholly independent of any constitutional violations. The doctrine, although closely related to the inevitable discovery doctrine, does not apply here; William's statements to Leaming indeed led police to the child's body, but that is not the whose story. The independent source doctrine teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a <u>worse</u>, position than they would have been in if no police error or misconduct had occurred. <u>See Murphy v. Waterfront Commission of New York Harbor</u>, 378 U.S. 52, 79 (1964); <u>Kastigar v. United States</u>, 406 U.S. 441, 457, 458-459 (1972).

81 L.Ed.2d 387. The court went on to say that, "If the prosecution can establish by a preponderence of the evidence that the information ultimately or inevitably would have been discovered by lawful means - here the volunteers' search - then the deterrence rationale has so little basis that the evidence should be

received." 81 L.Ed.2d 387-88. In the instant case, there is no doubt the gun found in Appellant's truck would have inevitably been discovered through an inventory search after impoundment. When a vehicle has been seized by law enforcement under §932.703, Fla.Stat., it becomes contraband subject to forfeiture. It is standard procedure for the police to inventory the contents for their own liability protection. It would have been done in the instant case, thus, the evidence would have been discovered despite any alleged constitutional violation by law enforcement. Suppression of that evidence by the trial court would have placed Appellee in a worse position than they would have been in if the perceived unlawful conduct had not transpired.

In summary, Appellee asserts that the issue raised here is not properly before this Court, and, in the alternative, the trial judge properly denied the motion to suppress the murder weapon found in Appellant's truck incident to his arrest and the truck's impoundment.

## CONCLUSION

WHEREFORE, Appellee submits that the sentence appealed from must be affirmed.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

HENRI C. CAWTHON
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32301
(904) 488-0600

COUNSEL FOR APPELLEE

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee has been forwarded by U.S. Mail to Counsel for Appellant, WAYNE E. FLOWERS, Flowers, Hould, Jensen & Westling, 220 East Forsyth Street, Jacksonville, Florida 32202, this 17th day of July, 1985.

HENRI C. CAWTHON
ASSISTANT ATTORNEY GENERAL