

1984

The State of Utah v. Ronald Lemoyne Kelly : Brief of Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, :

Plaintiff/Respondent, :

-v- :

RONALD LEMOYNE KELLY, :

Case No. 19253

Defendant/Appellant. :

BRIEF OF APPELLANT

Appeal from a conviction for Murder in the First Degree, a Capital Offense, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Peter F. Leary, Judge, presiding.

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TABLE OF CONTENTS

STATEMENT OF THE NATURE OF THE CASE	1
DISPOSITION IN THE LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF THE FACTS	2
ARGUMENT	
POINT I: AS THERE WAS NO PROBABLE CAUSE TO ARREST THE DEFENDANT WHEN THE POLICE ENTERED HIS RESIDENCE, THERE WAS NO PROBABLE CAUSE TO BELIEVE THAT THE DEFENDANT'S SHOES WERE EVIDENCE OF A CRIME, NO LEGAL RIGHT TO FOLLOW THE DEFENDANT TO HIS BEDROOM AND THE SUBSEQUENT SEIZURE OF THE DEFENDANT'S SHOES AND OTHER CLOTHING WAS ILLEGAL	9
POINT II: WHETHER OR NOT THE POLICE OFFICERS HAD PROBABLE CAUSE TO ARREST RONALD KELLY, THE APPELLANT WAS SUBJECTED TO A CUSTODIAL INTERROGATION FROM THE TIME THE POLICE OBSERVED HIM AND ENTERED HIS RESIDENCE, AND ANY STATEMENTS HE MADE PRIOR TO BEING INFORMED OF HIS <u>MIRANDA</u> RIGHTS MUST BE SUPPRESSED	10
POINT III: STATEMENTS MADE BY THE APPELLANT AFTER HE WAS READ HIS <u>MIRANDA</u> RIGHTS MUST BE SUPPRESSED BECAUSE THE APPELLANT NEVER WAIVED HIS <u>MIRANDA</u> RIGHTS	17
POINT IV: EVEN IF THE POLICE HAD PROBABLE CAUSE TO BELIEVE THAT THE APPELLANT HAD COMMITTED A CRIME AND THAT HIS CLOTHING WAS EVIDENCE OF THAT CRIME, THEY HAD NO RIGHT TO SEIZE THE CLOTHING (SHOES, PANTS, AND GLOVES) WITHOUT A SEARCH WARRANT	18
A. WARRANTLESS SEARCHES	19
POINT V: STATEMENTS MADE AND EVIDENCE SEIZED AS A RESULT OF THE VIOLATION OF THE APPELLANT'S FOURTH AND FIFTH AMENDMENT RIGHTS MUST BE SUPPRESSED UNDER THE FRUITS OF THE POISONOUS TREE DOCTRINE	24

POINT VI:	THERE WERE NO EXIGENT CIRCUMSTANCES TO JUSTIFY THE WARRANTLESS SEARCH AND "IMPOUNTMENT" OF THE APPELLANT'S RESIDENCE AFTER HIS ARREST. AS A RESULT, THE SUBSEQUENTLY OBTAINED SEARCH WARRANT FOR THAT RESIDENCE, EVEN IF FOUND TO BE BASED ON LEGALLY-OBTAINED PROBABLE CAUSE, DID NOT CURE THE ORIGINAL ILLEGAL ENTRY AND IMPOUNDMENT BY "SECURING" OFFICERS WITH VIDEO EQUIPMENT. THEREFORE, ALL EVIDENCE SEIZED PURSUANT TO THOSE SEARCH WARRANTS MUST BE SUPPRESSED	26
POINT VII:	POLICE ACTING PURSUANT TO A SEARCH WARRANT FOR BLOOD AND/OR SEMEN STAINED CLOTHING AND A BLOOD STAINED SHOELACE COULD NOT LEGALLY SEIZE OTHER ITEMS NOT OBVIOUSLY CONTRABAND, INSTRUMENTALITIES, OR EVIDENCE OF ANY SPECIFIC CRIME AND ANY SUCH EVIDENCE SHOULD HAVE BEEN SUPPRESSED	28
POINT VIII:	THE DISTRICT COURT SHOULD HAVE DISMISSED FOR LACK OF JURISDICTION DUE TO THE FAILURE TO HOLD THE PRELIMINARY EXAMINATION WITHIN 10 DAYS AS REQUIRED BY UTAH CODE ANNOTATED §77-35-7(c) (1953 AS AMENDED).	32
POINT IX:	IT WAS ERROR NOT TO GRANT THE APPELLANT'S TIMELY MOTION TO DISMISS THE AGGRAVATING CIRCUMSTANCES ALLEGED AGAINST APPELLANT	35
POINT X:	THERE WAS INSUFFICIENT EVIDENCE TO FIND APPELLANT GUILTY BEYOND A REASONABLE DOUBT OF FIRST DEGREE HOMICIDE, A CAPITAL OFFENSE	38
CONCLUSION		41

CASES CITED

<u>Anderson v. State</u> , 555 P.2d 251 (Alaska 1976)	30
<u>Arkansas v. Saunders</u> , 442 U.S. 753, 759, 61 L.Ed.2d 235, 231, 99 S.Ct. 2586 (1979)	19
<u>Bumper v. North Carolina</u> , 391 U.S. 543, 20 L.Ed.2d 797, 88 S.Ct. 1788 (1968).	11

<u>Carroll v. United States</u> , 267 U.S. 132, 162, 691 L.Ed. 543, 555, 45 S.Ct. 280 (1925)	16
<u>Chimel v. California</u> , 394 U.S. 752, 23 L.Ed.2d 685, 89 S.Ct. 2034 (1969)	19
<u>Commonwealth v. Hawkins</u> , 280 N.E.2d 665 (Mass. 1972)	30
<u>Coulidge v. New Hampshire</u> , 403 U.S. 443, 446, 29 L.Ed.2d 564, 583, 91 S.Ct. 2022 (1971)	9,22,23,28,29
<u>Edwards v. Arizona</u> , 451 U.S. 477, 68 L.Ed.2d 378, 101 S.Ct. 1880 (1981) <u>reh.den.</u> (U.S.) 69 L.Ed.2d 984, 101 S.Ct. 3128	18
<u>Escobedo v. Illinois</u> , 37 U.S. 478, 12 L.Ed.2d 977, 84 S.Ct. 175 (1964)	14,15
<u>Fahy v. Connecticut</u> , 375 U.S. 85, 11 L.Ed.2d 171, 84 S.Ct. 229 (1963)	25
<u>Gagliano v. State</u> , 629 P.2d 781 (Nev. 1981)	21
<u>Harris v. United States</u> , 390 U.S. 234, 236, 19 L.Ed.2d 1067, 1069, 88 S.Ct. 992 (1968)	22
<u>Jaramillo v. State</u> , 517 P.2d 490 (Wyo. 1974)	38
<u>Johnson v. Zerbst</u> , 304 U.S. 458, 464, 82 L.Ed. 1461, 58 S.Ct. 1019 (1938)	17
<u>Katy v. United States</u> , 389 U.S. 347, 357, 19 L.Ed.2d, 576, 585, 88 S.Ct. 507 (1967)	19
<u>Ker v. California</u> , 374 U.S. 23, 42-43, 10 L.Ed.2d 726, 743, 83 S.Ct. 1623 (1963)	22
<u>Mapp v. Ohio</u> , 367 U.S. 643, 654-655, 6 L.Ed.2d 1081, 1089-1090, 81 S.Ct. 1684 (1961)	24
<u>McDonald v. United States</u> , 335 U.S. 451, 456 (1948)	19
<u>Michigan v. DeFillippo</u> , 443 U.S. 31, 61 L.Ed.2d 2, 627 (1979)	19
<u>Miranda v. Arizona</u> , 384 U.S. 436, 444, 16 L.Ed.2d 684, 706, 84 S.Ct. 1602 (1966)	10,14,17,18
<u>Morton v. Supreme Court</u> , 411 P.2d 170 (Ariz. 1966)	34
<u>Myers v. State</u> , 2 Md.App. 534, 240 A.2d. 288 (1968)	11
<u>North Carolina v. Butler</u> , 441 U.S. 369, 60 L.Ed. 286, 99 S.Ct. 1755 (1979)	17

<u>Nunes v. Superior Court</u> , 100 Cal.App.3d 915 (1980)	29
<u>Orozco v. Texas</u> , 394 U.S. 324, 22 L.Ed.2d 311, 89 S.Ct. 1095 (1969)	12,13
<u>People v. Arnold</u> , 66 Cal.2d 438, 58 Cal.Rptr. 115, 426 P.2d 515 (1967)	11
<u>People v. Ellingsen</u> , 258 Cal.App.2d 535, 67 Cal.Rptr. 744 (1968)	11
<u>People v. Glover</u> , 52 Misc.2d 520, 276 N.Y.S.2d 461 (1966)	14
<u>People v. Hazel</u> , 252 Cal.App.2d 412, 60 Cal.Rptr. 437 (1967)	11
<u>People v. Merchant</u> , 260 Cal.App.2d 875, 67 Cal.Rptr. 459 (1968)	11
<u>People v. Murray</u> , 77 Cal.App.3d 305, 143 Cal.Rptr. 502 (1978)	29
<u>People v. P.</u> , 21 N.Y.2d 1, 286 N.Y.S.2d 225, 233 N.E. 2d 255 (1967)	11
<u>People v. Shuey</u> , 120 Cal.Rptr. 83, 533 P.2d 211 (1975) . . .	27
<u>People v. Sirhan</u> , 497 P.2d 1211, 1142 <u>cert.den.</u> 93 S.Ct. 1382 (1972)	19
<u>People v. White</u> , 69 Cal.2d 751, 72 Cal.Rptr. 873, 446 P.2d 993 (1968)	11
<u>People v. Williams</u> , 56 Misc.2d 837, 290 N.Y.S.2d 321 (1968)	11
<u>Reason v. Sheriff of Clark County</u> , 579 P.2d 781 (Nev. 1978)	34
<u>Rosario v. Guam</u> , 391 F.2d 869 (9th Cir. 1968)	13
<u>Shipley v. California</u> , 394 U.S. 818, 23 L.Ed.2d 732, 89 S.Ct. 2053 (1969)	20
<u>Spears v. State</u> , 383 N.Ed.2d 282 (Ind. 1978)	16
<u>State v. Anderson</u> , 102 Ariz. 295, 428 P.2d 672 (1967) . . .	13
<u>State v. Bean</u> , 88 Wash.2d 467, 572 P.2d 1102 (1978)	27
<u>State v. Cole</u> , 674 P.2d 119 (Utah 1983)	11
<u>State v. Dorson</u> , 615 P.2d 740 (Haw. 1980)	20,26

<u>State v. Jackson</u> , 576 F.2d 748 (8th Cir. 1978).	22
<u>State v. Keefe</u> , 537 P.2d 795 (Wash.App. 1975)	30
<u>State v. Kennedy</u> , 166 Ariz. 566, 570 P.2d 508 (1977).	15
<u>State v. Lair</u> , 630 P.2d 427 (Wash. 1981).	23
<u>State v. Lamm</u> , 606 P.2d 299 (1980).	38
<u>State v. Largo</u> , 24 Utah 430, 473 P.2d 895 (1970).	15
<u>State v. Meunier</u> , 137 Vt. 586, 409 A.2d 583 (1979).	16
<u>State v. Moore</u> , 521 P.2d 556 (1974)	33
<u>State v. Petree</u> , 659 P.2d 442 (1983).	38
<u>State v. Ruggeri</u> , 19 Utah 216, 429 P.2d 969 (1967).	10
<u>State v. Shinault</u> , 120 Ariz. 213, 584 P.2d 1204 (Ariz.App. 1978)	30
<u>State v. Spietz</u> , 531 P.2d 521 (Ala. 1975)	24
<u>State v. Trujillo</u> , 624 P.2d 44 (N.M. 1981).	20
<u>State v. Turchik</u> , 632 P.2d 497 (Ore.App. 1981).	20
<u>Steargald v. United States</u> , 451 U.S. 204, 68 L.Ed.2d 38, 101 S.Ct. 1642 (1981).	19
<u>United States v. Jackson</u> , 576 F.2d 749 (8th Cir. 1978).	9,
<u>Warden v. Hayden</u> , 387 U.S. 294, 307, 18 L.Ed.2d 782, 793, 87 S.Ct. 1642 (1967).	9,23,29
<u>Windsor v. United States</u> , 389 F.2d, 530 (5th Cir. 1968)	14
<u>Wong Sun v. United States</u> , 371 U.S. 471, 9 L.Ed.2d 441, 83 S.Ct. 407 (1963).	10,15,25

STATUTES CITED

Utah Code Annotated, §76-5-202(1)(d) (1953 as amended).	1,37
Utah Code Annotated, §77-35-7(c) (1953 as amended).	32,33,34

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Respondent,	:	
-v-	:	
RONALD LEMOYNE KELLY,	:	Case No.
Defendant/Appellant.	:	

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The Appellant, Ronald Lemoyne Kelly, appeals from his conviction for the offense of Criminal Homicide, Murder in the First Degree, a Capital Offense, in violation of Utah Code Annotated §76-5-202(1)(d) (1953 as amended), in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Peter F. Leary, Judge, presiding.

DISPOSITION IN THE LOWER COURT

The Appellant was charged by Information with one count of Criminal Homicide, Murder in the First Degree, a Capital Offense, with certain multiple alleged aggravating circumstances. At the Preliminary Examination held on April 5 and 6 of 1982, all but two aggravating circumstances were dismissed. The two aggravating circumstances not dismissed, but bound over, were that the killing

took place, "while the actor was engaged in the commission of, or attempting to commit rape and/or aggravated sexual assault."

On May 5, 1983, after approximately four weeks of trial, the court found Mr. Kelly guilty of the Criminal Homicide, Murder in the First Degree, and imposed the sentence of life imprisonment due to the court's finding that the death penalty was not appropriate under the circumstances of this case. The Defendant, Mr. Kelly, was sentenced to life imprisonment and committed forthwith.

RELIEF SOUGHT ON APPEAL

The Appellant seeks reversal of the judgment of guilt rendered by the trial court at the guilt phase of the trial to the offense of Criminal Homicide, Murder in the First Degree, a Capital Offense, and a dismissal of the charge.

STATEMENT OF THE FACTS

The Appellant/Defendant, Ronald Lemoyne Kelly, was out in the evening hours of February 9, 1982, with friends at several locations. At approximately 1:30 a.m. of February 10, 1982, Mr. Kelly met up with four individuals outside of the Caladonia Apartments located on the northwest corner of Sixth South and Fifth East, Salt Lake City, Utah. Mr. Kelly requested these friends, among them a native Venezuelan nick-named "Tido," to accompany Mr. Kelly to the apartment house located at 605 South 500 East in order for Mr. Kelly to use the telephone in one of the apartments located there belonging to a Darla Cates, a close personal friend of Mr. Kelly's. All of the friends declined to accompany Mr. Kelly and they parted company with Mr. Kelly at that time.

At approximately 3:30 a.m., February 10, 1982, two people living directly below the deceased, Carla Taylor, heard what they believed to be a scream and some other noises emitting from the apartment of the victim, Carla Taylor. All was quiet when they heard footsteps descending the common area stairs from the apartments upstairs and the door to the outside front porch open and shut. These two people, Elizabeth Langford and Clark Campbell testified that they peeked out of their front room window that was covered with two sets of curtains to see a man, dark in coloration, wearing a dark ski park and gloves. Their vision was somewhat limited due to the nature of their observation and the fact that the light which normally lightens the porch area of the converted old home was not on.

Even though Mr. Campbell did not want to get involved in a believed dispute between a boyfriend and the victim, Ms. Langford finally prevailed on him to put on his tennis shoes and go across the street to call the police, anonymously, from a public pay phone.

Officer Frank Hatton-ward of the Salt Lake Police Department was dispatched to the address of 605 South 500 East, Salt Lake City, Utah, and proceeded into the apartment building, up the common stairway and knocked on the door of the one of two upstairs apartment doors belonging to the victim, Carla Taylor. Receiving no answer to the officer's request for entry he tried the door and found it to be unlocked. As the officer opened the door to the victim's apartment all lights were off inside and so

with the aid of a flashlight, the officer illuminated the inside of the apartment and observed the body of the victim in the front living room portion of the apartment. Officer Hatton-ward determined that the victim was dead and had a 14-inch kitchen-type knife in her chest and a toothbrush inserted in her vagina, which was exposed.

After a quick search of the apartment, the officer found three possible entrances into the apartment; the front door by which he had entered, which was unlocked, a back door leading to a rear parking area that was partially open but secured with a chair, and a doorway leading from the victim's apartment to the apartment of Darla Cates who lived with a black man by the name of Jerome Thornton.

The officer located the two witnesses, Ms. Langford, and Mr. Campbell, and after learning that the man they saw had left on foot, the officer searched only the front portion of the apartment house and found what they believed to be footprints leaving the apartment house. Apparently the officer was never told that in Mr. Campbell's unsuccessful attempt at aiding the victim, he too had left the apartment house and transversed the street wearing tennis shoes to call the police.

The prints the police chose to follow, although intermittent, lead them to the apartment house of the Appellant, Mr. Kelly, (T. 201) and upon demanding entry, Mr. Kelly, clothed only in his underwear was confronted with no less than three uniformed police officers who immediately began to ask his whereabouts on the morning in question.

Detective Farnsworth of the Salt Lake Police Department was the first to enter the Appellant's home with Mr. Kelly still standing in his underwear. Prior to any Miranda warning, Detective Farnsworth demanded to know if Mr. Kelly had "killed anyone tonight," or "knifed anyone tonight." Mr. Kelly responded, "Are you serious?" (T. 209).

Detective Farnsworth, who had followed some intermittent prints in the snow to the Appellant's residence had received two conflicting descriptions of a suspect. The first description was of a black male adult, wearing a black or navy coat with a red stripe. The second description was of a white male adult, wearing the same coat as described above. It was this second description which Detective Farnsworth was working with when he stood on the porch of the Appellant's home and confronted the Appellant, a black man in his undershorts.

As he entered the Appellant's residence, Officer Farnsworth observed a ski parka on the couch, royal blue in color with beige shoulders and a red stripe in a v-shaped pattern (T.198). Officer Farnsworth again told Mr. Kelly that he was investigating a homicide and that he had followed a set of footprints to his house. He asked Mr. Kelly if he had been out during the night and what shoes had he been wearing. The Defendant went to the bedroom, followed by the officer (T.195), and a pair of shoes was seen by the officer. Officer Farnsworth seized the shoes without a warrant (T.199). Officer Bernard entered the Defendant's residence at this time. He did not request permission to enter nor was any permission given by Mr. Kelly. Officer Martin came

into the residence without requesting permission to enter either. Officer Farnsworth then read the Defendant his Miranda rights. Defendant said he was familiar with the Miranda rights. Officer Farnsworth asked him if he wished to answer any questions and the Defendant said, "I don't know." Officer Farnsworth told him that was not the right answer (T. 176) and said "Do you want to answer questions or don't you?" The Defendant replied, "Well, I don't know, it depends" (PHT 115). Officer Farnsworth said, "Well let me ask you again. We are investigating a homicide, a murder. It is a serious offense. We followed some footprints here and you have shown me some shoes and those were the same footprints I have been following. Were you at the house tonight?" The Defendant did not answer that question. Then Officer Farnsworth asked the Defendant what clothes he was wearing. The Defendant indicated a black shirt, black pants, and two pairs of socks. The officer seized all these clothes and informed the Defendant that he would have to come with him to speak to detectives in regards to the homicide (T. 180). Sargent Martin and Captain Bernard then checked the apartment "for other pesons." Sargent Martin found a pair of gloves on the bathroom floor. He asked the Defendant if he had worn them that night and the Defendant said he had. The gloves were seized and the coat in the front room was also seized. At approximately 4:31 a.m. the Defendant was put in the back of a police car. Officer Bernard stayed at Mr. Kelly's residence "securing it and showed the video technician, Mr. Cowley, what needed to

be taped." At 6:50 a.m. the front room was taped, as well as the two purses. Detective Abbot was contacted at 6:50 a.m. also, and assigned to secure a search warrant for 637 Brixten Court. A search warrant was served at 9:30 a.m. The return of that warrant containing a list of what property was seized is attached hereto. (See Appendix A.)

At the trial of this matter, Officer Fransworth testified that the Defendant did not give consent to search his residence or to seize any of his property. Ronald Kelly remained in various police cars from 4:30 a.m. until he was later taken to the Metropolitan Hall of Justice to be interrogated. Before that interrogation the Defendant was asked a number of questions by police officers while in police cars. Upon arriving at the Metropolitan Hall of Justice he was interrogated by Detective Chapman from 5:25 a.m. to 7:55 a.m. This interrogation was recorded and has been transcribed by the police department.

During this interview with Detective Chapman, Appellant stated that he did indeed go over to the apartment complex located at 605 South 500 East. Appellant went on to state that he went upstairs to request of Darla's boyfriend, Jerome Thornton, the use of the phone to call a taxi cab to take him home due to the stormy weather. The Appellant went on to explain that when he got to the front door, and rang the bell, Jerome Thornton never came to the door. He left down the stairs, paused at the front porch area to zip up his coat and put his gloves on and then walked home.

It was later determined that the apartment of Darla Gates was directly across from the victim's apartment and that they were

attached by a common hallway used by all, but also by a passageway that was only accessible by the two apartments of Darla Cates and the victim. It was also determined that on the night of the murder, Darla Cates had left and gone to Idaho and Jerome Thornton was living alone in the adjoining apartment of the victim, Carla Taylor. The only way to lock the connecting door between these two apartments was from inside Jerome Thornton's apartment. The door on the victim's apartment previously had been broken by the victim when she left her keys inside her apartment (T.223, 224).

The victim died of multiple stab wounds to the chest (T.339). Three hairs were found on the right buttocks of the victim, one of which was determined to be negroid pubic hair having characteristic similar to those hairs taken from the pubic region of the Appellant (T.558). Testimony showed that Appellant, prior to February 10, 1982, had been in the victim's apartment. The black man living across the hall had also been in the victim's apartment prior to February 10 (T.151, 152).

The Appellant was arrested at his home in the early morning hours of February 10, 1982, and brought to jail after a lengthy interrogation period. He was charged with First Degree Murder and was subsequently convicted of this offense, and from this conviction he now takes this appeal.

ARGUMENT

POINT I

AS THERE WAS NO PROBABLE CAUSE TO ARREST THE
DEFENDANT WHEN THE POLICE ENTERED HIS RESIDENCE,
THERE WAS NO PROBABLE CAUSE TO BELIEVE THAT THE
DEFENDANT'S SHOES WERE EVIDENCE OF A CRIME,

NO LEGAL RIGHT TO FOLLOW THE DEFENDANT TO HIS BEDROOM AND THE SUBSEQUENT SEIZURE OF THE DEFENDANT'S SHOES AND OTHER CLOTHING WAS ILLEGAL.

Without probable cause to arrest the Appellant, Detective Farnsworth had no legal right to follow the Appellant to his bedroom. The Appellant had consented to Officer Farnsworth's entry into his front room, he did not consent to the officer's following him to his bedroom (T. 195). The U.S. Supreme Court has held that mere acquiescence to perceived police authority will not support a search based on consent regardless of lack of overt coercion. Bumper v. North Carolina, 391 U.S. 543, 20 L.Ed.2d 797, 88 S.Ct. 1788 (1968). Even if Officer Farnsworth had had a right to be in the Appellant's bedroom and therefore had a legal plain view of these shoes, a plain view seizure is limited to items that are clearly incriminating. United States v. Jackson, 576 F.2d 749 (8th Cir. 1978). The law requires a nexus between an item to be seized and criminal behavior and the probable cause necessary to seize a particular item must be examined in terms of "cause to believe that the evidence sought will aid in a particular apprehension or conviction." Warden v. Hayden, 387 U.S. 294, 307, 18 L. Ed.2d.782, 793, 87 S.Ct. 1642 (1967). Coolidge v. New Hampshire, 403 U.S. 443, 446, 29 L.Ed.2d 564, 583, 91 S.Ct. 2022 (1971), required that the incriminating nature of articles seized must be immediately apparent.

The shoes taken from the Appellant's bedroom were not obviously contraband or weapons. Their connection with the homicide Officer Farnsworth was investigating was based solely on the

Appellant's pre-Miranda admission that he had been wearing them that night. Blood was not observed on the shoes until well after they had been seized. The pattern on the bottom was not observed until after they had been seized.

Thus, without probable cause to arrest the Appellant, these shoes were illegally observed and illegally seized. In addition, if the seizure of the shoes is found to be illegal, they cannot become the basis for probable cause necessary to arrest the Appellant and seize other items of his clothing (his pants and gloves) under the fruit of the poisonous tree doctrine. Wong Sun v. United States, 371 U.S. 471, 9 L.Ed.2d 441, 83 S.Ct. 407 (1963).

POINT II

WHETHER OR NOT THE POLICE OFFICERS HAD PROBABLE CAUSE TO ARREST RONALD KELLY, THE APPELLANT WAS SUBJECTED TO A CUSTODIAL INTERROGATION FROM THE TIME THE POLICE OBSERVED HIM AND ENTERED HIS RESIDENCE, AND ANY STATEMENTS HE MADE PRIOR TO BEING INFORMED OF HIS MIRANDA RIGHTS MUST BE SUPPRESSED.

Miranda v. Arizona, 384 U.S. 436, 444 16 L.Ed.2d 684, 706, 84 S.Ct. 1602 (1966), mandated that as a constitutional prerequisite to any questioning, an individual held for interrogation by a law enforcement officer must be warned in clear and unequivocal terms of his right to remain silent. In State v. Ruggeri, 19 Utah 216, 429 P.2d 969 (1967), the Utah Supreme Court carried this farther and held that when an accused is detained in any significant way, he may not be interrogated unless he is advised of the charges against him. The Court defined "an accused" as "the target of an investigation." "To fail to so warn one so being investigated is

to entrap him and to violate his constitutional privilege against self-incrimination. A person cannot determine whether or not he needs counsel unless he was fully advised of the charges being considered against him." 429 P.2d at 973.

Under the Miranda rule, the decisive state of custodial interrogations is reached when there is questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way (T.195,196).

Courts have expanded upon the objective definition of custodial interrogation as cited above, and they have expressly adopted the view that under the Miranda rule, a person is subjected to "custodial interrogation" not only if he is questioned when in custody or when deprived of his freedom of action in any significant way, but also if he is questioned when he reasonably believes that he is so deprived. People v. Arnold, 66 Cal.2d 438, 58 Cal.Rptr. 115, 426 P.2d 515 (1967); State v. Cole, 674 P.2d 119 (Utah 1983); People v. Hazel, 252 Cal.App.2d 412, 60 Cal.Rptr. 437 (1967); People v. White, 69 Cal.2d 751, 72 Cal.Rptr. 873, 446 P.2d 993 (1968); People v. Ellingsen, 258 Cal.App.2d 535, 67 Cal.Rptr. 744 (1968); Myers v. State, 2 Md.App. 534, 240 A.2d 288 (1968); People v. P., 21 N.Y.2d 1, 286 N.Y.S.2d 225, 233 N.E.2d 255 (1967); People v. Williams, 56 Misc.2d 837, 290 N.Y.S.2d 321 (1968).

The court in People v. Arnold, supra, while holding the Miranda rules inapplicable because the trial had taken place prior to the Miranda decision, adopted the Miranda definition of "custodial

interrogation." The Court stated that "custodial interrogation" occurs if the suspect is physically deprived of his freedom of action in any significant way or is led to believe, as a reasonable person that he is so deprived. Applying that definition, the Court held that the defendant might have reasonably believed that she had no alternative but to comply with a deputy district attorney's authoritative summoning for interrogation at his office. Similarly, the defendant may reasonably have believed that if she would have attempted to leave during the interrogation, she would have been detained. The Court, therefore, ruled statements made by the defendant on that occasion to be inadmissible.

In the case at bar, Mr. Kelly was summoned in the middle of the night to his door and informed by the police officer twice that he was investigating a homicide and had followed footprints from the scene of the crime to his house. Knowing that no one else was in his house, the defendant could reasonably conclude that he was a suspect in a homicide investigation and as such was not free to leave. This reasonable belief was compounded by two more officers entering, neither of whom asked permission but simply walked into his house (T. 196).

Interrogations of suspects at their own residences have been held to be "custodial interrogations" requiring Miranda warnings and guidelines in several cases.

In Orozco v. Texas, 394 U.S. 324, 22 L.Ed. 2d 311, 89 S.Ct. 1095 (1969), the Court emphasized the absolute necessity for officers interrogating people in custody to give the Miranda warnings. In

Orozco, supra, the defendant had been interrogated in his own bedroom by police officers. Rejecting the argument that the Miranda warnings were not applicable because the suspect had been interrogated in his own bedroom amidst familiar surroundings, the Court stressed the fact that the suspect was not free to leave, and was interrogated in the middle of the night. The Miranda opinion declared, the Court said, that the warnings were required where the person being interrogated was in custody or otherwise deprived of his freedom of action in any way.

Similarly the Court in Rosario v. Guam, 391 F.2d 869 (9th Cir. 1968), held that questioning by a civil commissioner of a suspect in his own house was "custodial interrogation" and Miranda applied. In Rosario, supra, the Court found that the commissioner had acted in his official capacity as a peace officer. The state contended that the questioning had been merely incidental to a social visit by the commissioner. The Court stated that it is not necessary for one to be handcuffed or even to be told that he is under arrest to be in custody. It is enough, the Court stated, that the suspect's freedom of movement, at the time of questioning, is restricted in a significant way by the presence of civil authority.

In State v. Anderson, 102 Ariz. 295, 428 P.2d 672 (1967) a deputy sheriff's failure to give Miranda warnings before interrogating the defendant in her own home was held to be improper. The Court noted that the suspect would not have been free to leave because "she was obviously the suspect of an apparent murder which the sheriff's office was investigating." The Court found the statements inadmissible and remanded the case for a new trial.

In People v. Glover, 52 Misc. 2d 520, 276 N.Y.S. 2d 461 (1966), the Court applied the test of "custodial interrogation" to a situation where police officers questioned the defendant at an apartment where the defendant was temporarily living with others. The police had reason to believe that the apartment was a base for "illegal narcotic trade." The Court stated that police questioning of a person, wherever detained, upon whom suspicion has already focused, is "custodial interrogation" under Miranda. The question was whether this was really a routine investigation or aimed at eliciting a confession or admission.

Another case is particularly similar to the case at bar. In Windsor v. United States, 389 F.2d 530 (5th Cir. 1968), two FBI agents had obtained from the defendant's accomplice facts as to how a crime had been committed and the defendant's involvement. The agents questioned the defendant in his motel room shortly thereafter. The FBI agents did not tell the defendant he was under arrest or that he was a suspect. At the conclusion of the questioning, the defendant was placed under arrest. The Court found that the focus of the investigation had clearly and unmistakably centered upon the defendant, and that, in effect he had been in custody or deprived of his freedom in a significant way. The statements made by the defendant were suppressed because the principles of Miranda "could not be so easily frustrated" by withholding from the defendant the fact that he was a suspect. There is no doubt that the defendant in this case was the focus of the homicide investigation. The Miranda decision, Miranda v. United States, supra, defined the focus test of Escobedo v. Illinois, 378 U.S. 478.

12 L.Ed.2d 977, 84 S.Ct. 1758 (1964), as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (Emphasis added.)

The question as to whether or not suspicion has focused on a particular suspect can be a critical factor in determining whether an interrogation is custodial. In State v. Largo, 24 Utah 430, 473 P.2d 895 (1970), the Utah Supreme Court found it to be such a factor. In that case, the issue was whether general questioning of students by school officials as to the circumstances of an assault was custodial. Holding that this interrogation was not custodial the Court stated, "There was no evidence as to any specific accusations directed specifically toward one person . . . There was no evidence of focusing the inquiry on any particular suspect, as in the Escobedo sense." 473 P.2d at 896. (Emphasis added).

In the case at bar, Appellant was from the outset asked the highly incriminating question, "Have you killed anyone tonight?" indicating clearly that the focus of this homicide investigation was centered on Appellant.

Another factor in determining whether or not an interrogation is custodial is whether or not the police at the time of the questioning have probable cause to arrest. State v. Kennedy, 166 Ariz. 566, 570 P.2d 508 (1977). The quantum of information which constitutes probable cause to arrest was defined in Wong Sun v. United States, supra, as "the amount of evidence which would warrant

a man of reasonable caution in the belief that a felony has been committed by the person to be arrested" (quoting Carroll v. United States, 267 U.S. 132, 162, 691 L.Ed. 543, 555, 45 S.Ct. 280 (1925).

Several cases have dealt with footprints in the snow as a basis for probable cause. State v. Meunier, 137 Vt. 586, 409 A.2d 583 (1979), concerned a single track of footprints leading from the scene of a crime to a garage. The Court found that this evidence was probable cause that the person responsible for the crime had fled into the garage. (The police, however, did not go into the garage but rather into one of three apartments with access to the garage and their entry was deemed illegal.) See also Spears v. State, 383 N.Ed. 2d 282 (Ind. 1978) (fact that there was only one set of footprints in the snow leading away from the scene of a crime and prints led to house where defendant was residing provided probable cause for the issuance of a search warrant.)

Whether or not this Court finds that the officers in this case had probable cause to arrest the Appellant and irrespective of what point in time this quantum of evidence was present or not present, it is the position of the defense that Mr. Kelly was subject to custodial interrogation from the time Officer Farnsworth first entered his residence, since probable cause to arrest is only one fact in determining whether an interrogation is custodial.

Would Officer Farnsworth have gone away if the Appellant had refused him entrance to the residence or would all the officers have left the premises at any point if the Defendant had asked them to? Certainly not (T. 198-199). These officers had "found their man" and their purpose was to get him to confess his guilt despite his constitutional right not to do so.

The officers' further purpose was to gather evidence from the Appellant necessary to convict him. From the time Officer Farnsworth first entered the apartment until he read the Appellant his Miranda rights, the only information he got from the Appellant was exculpatory. The Appellant, as he had a right to do, simply did not answer some of the questions asked of him (E.G., "Have you killed or assaulted anyone?") (T. 209). The only additional positive evidence the officer obtained after his initial entry and view of the Appellant and the mis-described ski parka on the couch were the Appellant's shoes, and these shoes were not really additional evidence. Even before his entry the officer had probable cause that they would be in the house since the prints from them appeared to enter the apartment by the only door. Any additional "evidence" coming from the Defendant not answering the officer's questions or giving "unsatisfactory" answers was merely cumulative and could not in itself establish probable cause.

POINT III

STATEMENTS MADE BY THE APPELLANT AFTER HE WAS
READ HIS MIRANDA RIGHTS MUST BE SUPPRESSED
BECAUSE THE APPELLANT NEVER WAIVED HIS MIRANDA
RIGHTS.

The waiver of Miranda rights as well as all other constitutional rights must be a knowing, intelligent waiver and the prosecutor has the burden of proving "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, at 464, 82 L.Ed. 1461, 58 S.Ct. 1019 (1933). The waiver, North Carolina v. Butler, 441 U.S. 369, 60 L.Ed. 286, 99 S.Ct. 1755 (1979), cannot be presumed from silence. Miranda v. Arizona, supra, 384 U.S. at 475, 16 L.Ed. 2d at 724. In Edwards v.

Arizona, 451 U.S. 477, 68 L.Ed.2d 378, 101 S.Ct. 1880 (1981) reh. den., (U.S.) 69 L.Ed.2d 984, 101 S.Ct. 3128, the United States Supreme Court repeated the standard of waiver as a "knowing and intelligent relinquishment of a known right," and found that this relinquishment would not be lightly inferred, at 391.

Mr. Kelly was asked if he wanted to relinquish his rights. Specifically he was asked twice if he wanted to answer some questions. Twice he answered, "I don't know." (T. 208, 209). He was told by the police officer that his answer "was not the right answer," (T. 209), whereupon with no further inquiry, the officer proceeded with his questioning ("Were you at the house tonight?" "What were you wearing?" [T. 209]). This did not constitute a valid waiver under any standard. Just as a valid waiver cannot be presumed simply from the silence of the accused after warnings are given, it cannot be presumed simply from the fact that a confession, or in this case statements, were in fact eventually obtained. Miranda v. Arizona, supra, 384 U.S. at 475, 16 L.Ed.2d 724.

POINT IV

EVEN IF THE POLICE HAD PROBABLE CAUSE TO BELIEVE
THAT THE APPELLANT HAD COMMITTED A CRIME AND
THAT HIS CLOTHING WAS EVIDENCE OF THAT CRIME,
THEY HAD NO RIGHT TO SEIZE THE CLOTHING (SHOES,
PANTS, AND GLOVES) WITHOUT A SEARCH WARRANT.

There was nothing about the Defendant's shoes, pants, and gloves at the time they were seized by the police officers to indicate that they were evidence of a crime. Such evidence was discovered only after the items were seized and inspected by the officers.

Warrantless Searches

The Supreme Court of the United States has time and again held that police may not conduct a search unless they first procure a warrant from a neutral magistrate. The Court in Katy v. United States, 389 U.S. 347, 357, 19 L.Ed.2d 576, 585, 88 S.Ct. 507 (1967), held that warrantless searches are per se unreasonable under the Fourth Amendment subject only to a few specifically-established and well-delineated exceptions. The Court places the burden on the party seeking an exemption from the constitutional mandate to prove the circumstances of the situation made the warrantless search imperative. McDonald v. United States, 335 U.S. 451, 456 (1948). (The burden is on prosecution to justify search or seizure without warrant, People v. Sirhan, 497 P.2d 1121, 1142 cert. den. 93 S.Ct. 1382 (1972). The Court has continually stressed that these "exceptions" are few and are jealously and carefully drawn. Steagald v. United States, 451 U.S. 204, 68 L.Ed.2d 38, 101 S.Ct. 1642 (1981); Arkansas v. Saunders, 442 U.S. 753, 759, 61 L.Ed.2d 235, 231, 99 S. Ct. 2586 (1979).

The first of these exceptions is search incident to arrest. This exception was carved out by the court in Chimel v. California, 394 U.S. 752, 23 L.Ed.2d 685, 89 S.Ct. 2034 (1969), and later modified in Michigan v. De Fillippo, 443 U.S. 31, 61 L.Ed.2d 2, 627 (1979). These decisions give an officer authority to search a person legally arrested. The scope of the search extends to the person and the limited area within the control of the person arrested. These cases contemplate a search for weapons or evidentiary items which the arrested person might conceal or destroy. If the officers

in this case did not have probable cause to arrest Ronald Kelly, then arresting him without a warrant was illegal and anything seized in a search incident to an illegal arrest is inadmissible. If the officers did have probable cause to arrest Ronald Kelly and had in fact arrested him, they only had the right to search his person and areas within his immediate control, contemporaneously with the arrest. Shipley v. California, 394 U.S. 818, 23 L.Ed.2d 732, 89 S.Ct. 2053 (1969). Mr. Kelly was in his living room when Officer Farnsworth informed him that he would "have to" (emphasis added) come with him to talk to detectives concerning this homicide. If this was the point and time of the arrest, the officers had no legal authority to search other rooms of his house as incident to his arrest. They only had the right to search his person and the area within his control. Since there were three officers present at this time, there was no reasonable possibility that he could or would conceal or destroy evidence or weapons in other parts of the house before he was placed in the police vehicle outside his residence.

The second exception to the search warrant requirement for searches is the "exigent circumstances" exception. Exigent circumstances are said to exist when immediate police action is required to prevent danger to life or serious damage to property, or to forestall the likely escape of a suspect on the threatened removal or destruction of evidence. State v. Dorson, 614 P.2d 740 (Ha. 1980); State v. Trijillo, 624 P.2d 44 (N.M. 1981); State v. Turchik, 632 P.2d 497 (Ore. App. 1981).

Once Officer Farnsworth had observed Ronald Kelly in his shorts, without a weapon, and had entered his residence, no other exigent circumstances existed for a search. There was no longer any reasonable possibility of danger to life, property, or the destruction of evidence and the exigent circumstances/hot pursuit exception could not be used to justify a search of the Defendant's house for physical evidence of the crime the officers were investigating.

Sometimes the exigent circumstances exception is used to justify a protective sweep of all or part of a residence when officers have a reasonable belief that other persons are present on the premises and that such persons might pose a danger to officers or might destroy evidence. A prerequisite for such a protective sweep is that police have grounds to believe that other potentially dangerous persons are present. If the officers in this case had reasonably believed that other persons might be present they would certainly have looked for such persons when they entered the Appellant's residence rather than waiting until they were about to leave.

In Gagliano v. State, 629 P.2d 781 (Nev. 1981), the Nevada court held that police officers were not justified in a warrantless intrusion into another room of an apartment where a defendant was arrested in order to check for a possible wrongdoer where defendant clad only in underpants was in full view when the officers entered.

Another exception to the warrant requirement is the plain view exception. This exception holds that items which are in plain view or sight at the time of a police interrogation are

subject to seizure and may be introduced into evidence. Harris v. United States, 390 U.S. 234, 236, 19 L.Ed.2d 1067, 1069, 88 S.Ct. 992 (1968); Ker v. California, 374 U.S. 23, 42-43, 10 L.Ed.2d 726, 743, 83 S.Ct. 1623 (1963); Coolidge v. New Hampshire, 403 U.S. 443, 446, 29 L.Ed.2d 564, 583, 91 S.Ct. 2022 (1971). The plain view doctrine however requires more than a prior justification for intrusion into an otherwise protected area. There must also be an immediate connection between the object and criminal activity, to-wit; probable cause. Plain view seizure is limited to items that are clearly incriminating. United States v. Jackson, 576 F.2d 748 (8th Cir. 1978). In addition, the Coolidge, supra case requires that a plain view discovery must also be inadvertent. The defense maintains that the "discovery" of the Defendant's shoes, pants, and gloves does not fall within this plain view exception.

In the case of the shoes, Officer Farnsworth did not have a right to enter the Defendant's bedroom. If the Appellant was not in custody the officer could not legally follow him around his house. If the Appellant was in custody, the officer could not interrogate him about what he was wearing without informing him of his Miranda rights and could not use answers given as a result of an illegal interrogation to gain probable cause and obtain thereby a plain view observation of the Appellant's shoes. The same would hold true for the Appellant's pants. They were not clearly incriminating (they were black and no blood stains on them were observed until after they were seized and sent to the FBI.) They only became incriminating

after the Appellant admitted wearing them that night, an admission made as a result of custodial interrogation but without a valid waiver of Miranda rights. On the other hand, if the officers did not have probable cause to believe Appellant had committed a crime, they had no probable cause to believe his pants were evidence of that crime even if the pants were in plain view in the bedroom. The police officer who seized the Appellant's gloves did so during a search for "other persons" in the Defendant's bathroom. The Appellant maintains that this search for "other persons" was merely a subterfuge for an illegal warrantless search of the Defendant's premises after he had been taken into custody. The discovery of the gloves was not inadvertent as required by Coolidge, supra, but rather the result of a search based on the pretext of a protective sweep which was not reasonably necessary. If a legal search for one item is merely a pretext to search for something else, the search may be invalidated. State v. Lair, 630 P.2d 427 (Wash. 1981). Searching the bathroom and finding gloves while claiming to be looking for a person is not an inadvertent discovery, especially in view of the delay in conducting that search and in view of the fact that the gloves themselves were not obviously contraband, stolen goods, or objects dangerous in themselves. Coolidge, supra, 403 U.S. at 472, 29 L.Ed.2d at 587. The gloves were located on the bathroom floor and the stains on them were not apparent until they were illegally seized by the officer. Thus, none of the items (shoes, gloves, pants) come within the plain view exception.

The last exception to the warrant requirement which might pertain to this case is that of a valid consent to search. Officer Farnsworth was asked at the Preliminary Hearing of this case if the Defendant consented to a search of his house or seizure of anything. Officer Farnsworth testified that he did not (PH 195). The United States Supreme Court has held that the mere acquiescence to the authority of the police is not consent and conduct which indicates only acquiescence of perceived police authority, as in this case, will not support a search based on consent regardless of the lack of overt coercion. Bumper v. North Carolina, 391 U.S. 543, 20 L.Ed.2d 797, 88 S.Ct. 1788 (1968).

Mr. Kelly did not consent to other officers entering his premises after the entry of Officer Farnsworth. He did not consent to having any of his personal property seized. Even if the officers had probable cause to search for evidence in this case, probable cause in itself does not justify a warrantless search. State v. Spietz, 531 P.2d 521 (Alaska 1975). The shoes, pants, and gloves seized in this case do not fall within any of the exceptions to the warrant requirement. They were seized illegally and should not have been admissible at Mr. Kelly's trial under the exclusionary rule of Mapp v. Ohio, 367 U.S. 643, 654-55, 6 L.Ed.2d 1081, 1089-1090, 81 S.Ct. 1684 (1961).

POINT V

STATEMENTS MADE AND EVIDENCE SEIZED AS A
RESULT OF THE VIOLATION OF THE APPELLANT'S
FOURTH AND FIFTH AMENDMENT RIGHTS MUST BE
SUPPRESSED UNDER THE FRUITS OF THE POISONOUS
TREE DOCTRINE.

Without waiving his Miranda rights, the Appellant was asked a number of questions including the questions about what he had been wearing. Without being informed of his right to remain silent he answered many of these questions, and indicated a pair of shoes, a pair of pants, and a pair of gloves, all of which the officers illegally seized. The State sought to use the answers he gave and the clothing he indicated against him. This is specifically what the exclusionary rule says the State may not do.

The fruits of the poisonous tree doctrine prohibits the government from using against the accused information derived from facts learned as a result of the unlawful acts of government agents. Wong Sun v. United States, *supra*, 371 U.S. 471, 9 L.Ed.2d 441, 83 S.Ct. 407 (1963); and Fahy v. Connecticut, 375 U.S. 85, 11 L.Ed.2d 171, 84 S.Ct. 229 (1963). After placing the Defendant under arrest and taking him to the police car the officers continued to ask him questions without any waiver of his Miranda rights.

Even if some of these statements are found to be voluntary and the product of a waiver of his Miranda rights, they were, at their root, induced by the Appellant's being confronted with information learned and evidence seized as a result of the unlawful acts of the police and must be suppressed under the poisonous tree doctrine, *supra*.

Items seized pursuant to the search warrants issued after the Appellant was taken into custody must also be suppressed because the probable cause for issuance of these warrants

was obtained in violation of the Defendant's Miranda rights and his Fourth Amendment rights against illegal searches and seizures. All three search warrants in this case purport to base the probable cause for their issuance on the shoes of the Defendant with soles matching the footprints leading from the scene of the crime, and bearing blood stains, The soles were observed only after the shoes were seized, and at the time of the preparation of the search warrant there had been no analysis of any clothing to determine if blood existed there. The Appellant maintains that under no theory were these shoes legally observed and seized. Thus, the evidence seized pursuant to search warrants which have as their probable cause the shoes, and conclusionary officers' statements, must also be suppressed under the fruit of the poisonous tree doctrine, supra.

POINT VI

THERE WERE NO EXIGENT CIRCUMSTANCES TO JUSTIFY THE WARRANTLESS SEARCH AND "IMPOUNDMENT" OF THE APPELLANT'S RESIDENCE AFTER HIS ARREST. AS A RESULT, THE SUBSEQUENTLY OBTAINED SEARCH WARRANTS FOR THAT RESIDENCE, EVEN IF FOUND TO BE BASED ON LEGALLY-OBTAINED PROBABLE CAUSE, DID NOT CURE THE ORIGINAL ILLEGAL ENTRY AND IMPOUNDMENT BY "SECURING" OFFICERS WITH VIDEO EQUIPMENT. THEREFORE, ALL EVIDENCE SEIZED PURSUANT TO THOSE SEARCH WARRANTS MUST BE SUPPRESSED.

In State v. Dorson, 615 P.2d 740 (Haw. 1980), the Hawaiian Supreme Court held that "the warrantless securing or impounding of a house, where otherwise invalid (not based on exigent circumstances) cannot be validated by the fact that no comprehensive search was made and no evidence seized until a

until a search warrant arrived. The State must show exigent circumstances existing at the time of entry and impoundment if the warrantless securing of premises by the police is to be sustained. Absent such exigent circumstances, the right to search or seize is to be determined by a judicial officer and not by a policeman. The Court found that police officers securing premises while waiting for a search warrant to arrive amounted to a seizure of the house and its contents. Likewise in People v. Shuey, 120 Cal.Rptr. 83, 533 P.2d 211 (1975), the California Supreme Court held that the occupation of a defendant's house by the police while they were waiting for a search warrant amounted to an illegal seizure, that securing of premises is itself a seizure which cannot be validated by a subsequent warrant, because the property has already been seized.

The Washington Supreme Court made a similar finding in State v. Bean, 89 Wash. 2d 467, 572 P.2d 1102 (1978). In that case the defendant was legally arrested for a narcotics violation and his vehicle searched. Based on illegal drugs found in the defendant's vehicle, the police sought a search warrant for his residence. Prior to obtaining the warrant officers who had the residence under surveillance were ordered to secure the house. They entered it and observed marijuana in plain view. The Court held that the "securing of the house" could not be based on exigent circumstances even though other persons were present on the premises and suppressed all evidence obtained from the house whether it was seized before or after the search warrant was served. The Court held that the initial entry into the house was

wrongful and the subsequently obtained search warrant did not cure the original illegal entry. In this case before the Court, the only legal entry into the residence of 637 Brixen Court was made by Officer Farnsworth. There was no consent to the entry of Officers Martin and Bernard and no consent to Officer Bernard remaining to secure the premises and admitting technician Cowley into the premises to video tape the front room and two purses in the closet. Certainly after Ronald Kelly was removed from the premises there was no threat of the destruction of evidence and thus no exigent circumstances for the seizure of his house for five hours until the first search warrant was served.

POINT VII

POLICE ACTING PURSUANT TO A SEARCH WARRANT FOR BLOOD AND/OR SEMEN STAINED CLOTHING AND A BLOOD STAINED SHOELACE COULD NOT LEGALLY SEIZE OTHER ITEMS NOT OBVIOUSLY CONTRABAND, INSTRUMENTALITIES, OR EVIDENCE OF ANY SPECIFIC CRIME AND ANY SUCH EVIDENCE SHOULD HAVE BEEN SUPPRESSED.

The law requires a nexus between an item to be seized, criminal behavior, and a place to be searched. Probable cause necessary to seize a particular item must be examined in terms of "cause to believe that the evidence sought will be at the place to be searched and a particular apprehension or conviction." Warden v. Hayden, 387 U.S. 294, 307, 18 L.Ed.2d 782, 793, 87 S.Ct. 1642 (1967). This nexus requirement fulfills the the Fourth Amendment requirement of particularity. Without such a requirement, police could seize an item on pure speculation. The leading Fourth Amendment case dealing with this issue was Coolidge v. New Hampshire, supra, 403 U.S. 443, 29 L.Ed.2d 564, 91 S.Ct. 2022

(1971). In that case, the Supreme Court recognized two historical reasons for the search warrant's requirement: 1) to eliminate searches not based on probable cause and 2) to avoid the specific evil of the "general warrant"--an exploratory rummaging in a person's belongings by requiring a particular description of things to be seized. 403 U.S. at 467, 29 L.Ed.2d at 583. the Coolidge case also required that the incriminating nature of articles seized must be immediately apparent. 403 U.S. at 466, 29 L.Ed.2d at 583.

The following cases have involved searches pursuant to warrants where evidence not named in the warrant was suppressed because its incriminating nature was not immediately apparent.

In Nunes v. Superior Court, 100 Cal.App. 3d 915 (1980), the California Appeals Court held that officers could not seize articles on the general suspicion that they may coincide with descriptions of stolen property contained in police reports not in their possession, citing Warden v. Hayden, supra. The Court held:

The plain view doctrine does not justify the seizure pursuant to a search warrant of items not named in a search warrant which the police believe matched articles described in police reports. While officers may seize articles not named in a warrant which are reasonably identifiable as contraband, police officers are foreclosed from seizing items indiscriminately. They must demonstrate that a nexus exists between the item to be seized and criminal behavior.

In the case of People v. Murry, 77 Cal.App. 3d 305, 143 Cal.Rptr. 502 (1978), officers entered premises pursuant to a search warrant for narcotics and observed 67 television sets,

twenty of which had their serial numbers removed. They seized two of these sets. The Court rejected the contention that this evidence justified seizure under plain view standards, finding that the television sets were not inherently identifiable as contraband. Other cases have had similar holdings. See Commonwealth v. Hawkins, 280 N.E.2d 665 (Mass. 1972) (government bonds with name other than occupant's were unconnected with narcotic crime and police could not seize them momentarily to ascertain whether or not they had been stolen); Anderson v. State, 555 P.2d 251 (Alaska 1976) (with a search warrant for marijuana, police could not seize slides which when held up to the light depicted nude male children); State v. Keefe, 537 P.2d 795 (Wash.App. 1975) (Officer with search warrant for gun could not take "i" and "e" letters from a typewriter as "possible" evidence in a forgery case.)

State v. Shinault, 120 Ariz. 213, 584 P.2d 1204 (Ariz. App. 1978), held that pursuant to a search warrant for narcotics and illegal firearms, police could not seize from inside a box an outwardly innocuous bound columnar pad containing inside the first names of the defendants and entries referring to "dollars and pounds." The court in that case found that while the officers had a right to look in the box for narcotics, once they looked and recognized it contained nothing but papers, the search was no longer for narcotics and firearms, but rather for written records, not listed in the search warrant.

In the case before this Court, the officers seized many items for which they had no authority. (See Appendix A)

Specifically, the defense questions the seizure of various purses, a toilet token, a red nipple stuffed with cotton, a bed sheet, a bed cover, a blue and white sweater, and "miscellaneous papers" and maintains that the seizure of these items was illegal. Even if the officers had a right to look in the purses for blood and semen-stained clothing, or a blood-stained shoelace, when they saw that these items were not present, they had no right to further examine the purses or to seize them. They had no probable cause that these items were contraband, merely a suspicion that it was unusual for the Defendant to have them in his possession as in the cases cited above.

The defense also questions what nexus a toilet token, a red nipple, a bed cover and sheet, a red scarf with knot, and a blue and while sweater might have to any specific crime. The seizure of the last item mentioned in the search warrant return, "miscellaneous papers," is the final proof that these officers considered themselves to be on a general treasure hunt and not in anyway bound by the confine of the Fourth Amendment. This search took place before May 1, 1982, and, therefore, no inquiry is necessary into whether these officers abrogated the constitution in good faith.

It must also be pointed out that the wrong address appears on one of the three search warrants and the correction had no indication of when or who made such. (See Appendix A). It is clear, therefore, that the three search warrants were based on insufficient, conclusionary language of officers who did not have sufficient foundational facts to make them.

Additionally, these search warrants were based on illegally-seized articles and gave the magistrate the erroneous impression that these illegally-seized articles were still in the place to be searched when they had already been taken out of the house when Appellant was taken to jail.

POINT VIII

THE DISTRICT COURT SHOULD HAVE DISMISSED FOR
LACK OF JURISDICTION DUE TO THE FAILURE TO
HOLD THE PRELIMINARY EXAMINATION WITHIN 10
DAYS AS REQUIRED BY UTAH CODE ANNOTATED
§77-35-7(c) (1953 AS AMENDED)

On February 11, 1982, the Information charging Mr. Kelly was filed and signed by Judge Grant of the Circuit Court. Mr. Kelly had been and was in custody at the time of the issuance of the Information.

On February 12, 1984, the Defendant/Appellant was arraigned and a Preliminary Hearing was set for March 5, 1982, at the hour of 9:30 a.m., in front of the Honorable Judge Gibson, Fifth Circuit Court Judge. There was no waiver of the time limits prescribed in §77-35-7(c) by Mr. Kelly.

On March 5, 1982, at the hour of 9:30 a.m., the Defendant was present, with counsel, prepared to proceed. The prosecution was not prepared and, over the Defendant's objection, the Preliminary Hearing was continued to March 24, 1982, at the hour of 9:30 a.m. in front of Judge Jones, Fifth Circuit Court Judge.

On the afternoon of March 23, 1982, Mr. Kelly's counsel received, over the telephone, the message that the Preliminary Hearing had been re-set for April 5, 1982, without the benefit of any hearing on the matter nor with the consent of either the State or Mr. Kelly.

On April 5, 1982, Mr. Kelly, by and through his attorneys of record, moved to dismiss the Information based upon the violation of Mr. Kelly's rights as expressed in Utah Code Annotated, §77-35-7(c) (1953 as amended).

The violation of §77-35-7(c) deprived Mr. Kelly of a substantial statutory and constitutional right, the remedy for which is dismissal of the Information. Utah Code Annotated, §77-35-7(c) states, in pertinent part:

. . . If the defendant does not waive a preliminary examination, the magistrate shall schedule the preliminary examination. Such examination shall be held within a reasonable time, but in any event not later than 30 days if he is not in custody; provided, however, that these time periods may be extended by the magistrate for good cause shown . . .
(Emphasis added.)

The statute stated above was obviously violated in Mr. Kelly's case and such a violation requires dismissal of the Information. There was no good cause showing by anyone to establish the basis for the original setting being beyond the 10-day limit. Further, there was absolutely no showing for the unacceptable delay between March 24 and April 5, 1982. There was, indeed, no hearing so that such a showing could be attempted.

The Utah Supreme Court, in interpreting a closely aligned statute concerning 90-day disposition requests stated the issue was one of jurisdiction. See State v. Moore, 521 P.2d 556 (1974). The Utah Supreme Court went on to state that an Information, filed too late, deprived the courts of the jurisdictions to hear such a complaint, and that the device, attempted to be used by the prosecution, of dismissing the complaint and filing a new complaint could not be used and was a violation of the 90-day detainer statute.

Mr. Kelly's position is that the time limits expressed in §77-35-7(c) are jurisdictional in nature and if the Circuit Court violates those time limits, absent "good cause" or a showing of good cause and hearing ordered to question such cause, the court loses jurisdiction of the case created by that Information, and the Information must, therefore, be dismissed.

In the case of Morton v. Supreme Court, 411 P.2d 170 (1966 Arizona), the Arizona Supreme Court granted Mr. Morton's request for dismissal based upon the fact that the Defendant's speedy trial rights (i.e., trial within 60 days) were violated. The Arizona Court was viewing their case in light of the delay in trial and the statute which allows only sixty days in which to try a defendant. The language of Rule 236 of the Arizona statute is almost identical to our §77-35-7(c) which applies to preliminary hearings. The Arizona Court stated:

. . . It does not seem that constitutional and statutory rights of a person charged with crime should be made dependent upon the amount of business in the court or the number of jury cases at issue. If so, what would be good cause for delay would mean one thing in those counties with little litigation and another thing in those where the litigation requires the frequent attendance of trial juries. In Hernandez v. State [40 Ariz. 200, 11 P.2d 356] we held that the . . . personal comfort and convenience of the court and jury should not be permitted to nullify the laws passed for the protection of accused persons. If the delay in bringing on the trial is not attributable to some act of accused, the statute is imperative in its provisions, and the court has no alternative but to dismiss the prosecution.
P.2d at 966.

See also Reason v. Sheriff of Clark County, 579 P.2d 781 (1978 Nevada)

The Information filed against Mr. Kelly must be dismissed due to the statutory and constitutional rights violated by the unreasonable and unexplained delay of Mr. Kelly's right to a Preliminary Hearing within 10 days of his arraignment in Circuit Court. Mr. Kelly was in custody on February 10, 1982, and remains so to this day. There was no good cause shown for any of the delays involved in getting Mr. Kelly to Preliminary Hearing and, therefore, based upon the case law and statutory requirements this Information should have been dismissed.

POINT IX

IT WAS ERROR NOT TO GRANT THE APPELLANT'S
TIMELY MOTION TO DISMISS THE AGGRAVATING
CIRCUMSTANCES ALLEGED AGAINST APPELLANT.

On February 10, 1982, Mr. Kelly was arrested for the death of Carla Taylor. At the autopsy, "some hairs from the right buttock," (T. 342) of the victim were located and retrieved by the pathologists assigned to the case. Of the hairs thereon located, the law enforcement agency involved sent all of those hairs for testing to the FBI in Washington D.C. These hairs were analyzed by the FBI, along with one known sample from Mr. Kelly's pubic area obtained by search warrant.

Mr. Malon, of the FBI testified at the Preliminary Hearing that subsequent to his analysis of "one hair" found on the buttocks of the victim and the known sample of pubic hair taken from Mr. Kelly:

This pubic hair microscopically matches the the pubic hair of Mr. Kelly. Therefore, this particular pubic hair either originated from Mr. Kelly . . . to have come from anybody else but Mr. Kelly, it would have to be a person of the negroid race.
(PH. 529)

Mr. Malon went on to state his opinion that one of the hairs collected from the "right buttocks" of the victim was from Mr. Kelly or someone who exhibited the same characteristics of Mr. Kelly's hair (T. 529).

The vaginal area of the victim was described by the medical examiner, Dr. Ryser, as follows:

Q: Dr. Ryser, you say you can't rule out rape?

A: That is right, I can't

Q: Even though there's no semen or seminal fluid found in the vagina?

A: That's right.

Q: Even though there was no bruising around the opening to the vagina? I'm sure there's a medical name for that, but I'm not familiar with it.

A: That's right. There was no such bruising.

Q: You can't, however, rule out the possibility that there was no rape; correct?

A: I can't rule that out either.

Q: You can't say one way or the other, can you?

A: I can't
(T. 348)

There was no evidence of any forced sexual assault, seminal fluid, sperm, or foreign pubic hairs on victim's pubic region (T.351), nor whether the bruised regions happened before or after death (T. 353). Indeed, the prosecutor asked the pathologist whether or not a forced sexual assault could occur but leave no visible marks or injuries on the body (T. 347).

Such a question was asked based upon the absence of factual substantiation for the aggravating circumstances alleged in

this homicide case. After an entire reading of the trial transcript, it is clear that there was insufficient evidence to convict Mr. Kelly of a homicide alleging special circumstances of "rape, and/or aggravated sexual assault."

It is the position of the Appellant that the existence of one pubic hair, described to be similar to Mr. Kelly's on the right buttocks of the victim, along with two other hairs not associated with Mr. Kelly is insufficient as a matter of law and fact, to substantiate the aggravating circumstance of attempted rape, rape, and/or aggravated sexual assault.

There was a toothbrush inserted in the vagina but as this court is well aware, in Utah, there was at the time of this offense no rape by device, nor is the charge of forcible sexual abuse one of the numerated aggravating circumstances under Utah Code Annotated §76-5-202(a)-(h) (1953 as amended).

No Appellant, including Mr. Kelly, should be held to stand trial on a death penalty case, made so by the use of alleged aggravating circumstances, unless those circumstances have relevant evidence that is substantial and of such a convincing quality that it could support a conclusion by reasonable minds that the Defendant is guilty beyond a reasonable doubt.

Mr. Kelly respectfully maintains that the trial court erred as a matter of applicable law and fact in finding him guilty of the First Degree Homicide with the aggravating circumstances of attempted rape, rape, and/or aggravated sexual assault. That the amount and quality of evidence pertaining to the alleged aggravating

circumstances (i.e., one pubic hair on right buttocks) was and is totally insufficient to sustain said aggravating circumstances; and that, therefore, such circumstances should have been dismissed (T. 586, 704). See Jaramillo v. State, 517 P.2d 490 (Wyo. 1974).

POINT X

THERE WAS INSUFFICIENT EVIDENCE TO FIND
APPELLANT GUILTY BEYOND A REASONABLE DOUBT
OF FIRST DEGREE HOMICIDE, A CAPITAL OFFENSE

In State v. Petree, 659 P.2d 442 (1983), this Court stated " . . . notwithstanding the presumptions in favor of the jury's decision this Court still has the right to review the sufficiency of the evidence to support the verdict." Further, the Court noted, "We reverse a jury conviction for insufficient evidence only when the evidence (seen in the light most favorable to the verdict) is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." (citations omitted) Finally, the dissent in State v. Lamm, 606 P.2d 299 (1980) noted, "If the circumstances essential for conviction are ambiguous and consistent with the innocence of the accused, then this Court must hold, as a matter of law, that there is no substantial evidence to support the guilt of the accused." Id. at 234-5.

Viewed against this background, the evidence to support the conviction for First Degree Homicide, a Capital Offense is found to be lacking.

At trial, the evidence indicated that the victim was killed in her apartment while her two children slept in the back bedroom (T. 100). That the victim's apartment had three entrances, two of

which were locked at the time of the homicide (T.223-224). The one entrance leading not into a common hallway but directly into the apartment of Jerome Thorton was locked only from Mr. Thorton's apartment and could not be locked from the victim's apartment (T.223-224, 307). Jerome Thorton, the black neighbor of the victim, was at home the evening of the homicide. The officers talked to him during the early morning hours of February 10, 1982, (T.306). Mr. Thorton had been in the victim's apartment and has also been extremely angry with her due to the fact that she had called the police on him when he had been physically abusing his former live-in roommate, Darla Cates (T.153, 225, 304).

It was further learned that Jerome Thorton had not answered the door when the Appellant had attempted to use his phone to call a taxi in the early morning hours of February 10, 1982. Also, Jerome Thorton was a convicted felon who had been convicted, among other offenses, of aggravated assault on a female with a tire iron (T.310). It was also learned that no request for blood, pubic hair, or fingerprints was ever obtained from Mr. Thorton (T.312).

The only factor which connected the Appellant, Mr. Kelly, with the crime was his presence there that morning. But Jerome Thorton was there as well. Appellant had blood on his pants' cuff that was "consistent" with the victim's blood, but also consistent with twelve million other people's blood (T.473-474). It was never shown that the Appellant had a reason to dislike the victim, but Mr. Thorton was shown to have an extreme dislike for her (T.225).

The pubic hair found on the buttocks of the victim that was found to be consistent with Appellant's was never analyzed against the pubic hair of Mr. Thorton. It was later shown, through defense expert Dr. Birkley, that a person need not even be in the place a hair is found since others can transfer such hair through a process commonly called static electricity or attachment to a foreign host (T.643-646).

Based on consideration of all the facts of this case, and the standards of review expressed above, the Appellant feels there was insufficient evidence to convict him of First Degree Criminal Homicide, a Capital Offense.

There is also an extreme deficiency in proof that even if the Appellant had been proven to knowingly and intentionally have killed the victim, that such was done "while the actor was engaged in the commission of, or attempting to commit rape, and/or aggravated sexual assault."

The prosecution chose to charge Appellant with two acts (killing and raping) which were alleged to have occurred at the same time. There is no evidence within the voluminous records on appeal to which the State can point that has, in any way, proven the concurrent acts alleged in the Information against Appellant. There was, indeed, a killing; and there may have been an attempted rape, and/or aggravated sexual assault, but there is no evidence whatsoever that the killing took place "while," a rape or aggravated sexual assault was taking place. It is highly likely that the toothbrush was inserted after death. Indeed, the prosecutor argued that the death took place

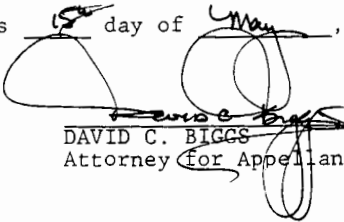
because the Appellant was enraged at being denied sex, which was sheer speculation since no witnesses existed and no physical evidence on, or in, the body in the apartment would, or in fact did, substantiate such a claim.

Due to this single glaring deficiency, the aggravating circumstances should have been dismissed by the trial court. This error, added to the substantial nature of the facts argued above makes the decision inescapable that, at most, the Court could only consider Second Degree Homicide, a First Degree Felony, as a possible verdict against him. There was, we respectfully submit, insufficient evidence to convict Appellant of any offense due to the nature and quantum of evidence presented by the prosecution at trial.

CONCLUSION

The case charged against Appellant, Ronald Lemoyne Kelly, was serious, but the errors described above were substantial. Due to those errors the Appellant respectfully requests that the case against him be dismissed, or in the alternative, that the case be remanded for a new trial as, at most, a Second Degree Homicide, a First Degree Felony.

RESPECTFULLY SUBMITTED this 15th day of May, 1984.



DAVID C. BIGGS
Attorney for Appellant

DELIVERED two copies of the foregoing to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah, 84114, this 5 day of May, 1984.

Lawrence J. ...

A P P E N D I X A

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

SEARCH WARRANT

No. _____

SALT LAKE, STATE OF UTAH

_____ officer in the State of Utah.

My Affidavit under oath having been made this day before me
DEPUTY BILL ABBOTT, I am satisfied that there is
cause to believe

() on the person(s) of _____
() in the vehicle(s) described as _____

(x) on the premises known as 604 Bristen Court

the City of Salt Lake City, County of Salt Lake
State of Utah, there is now being possessed or concealed certain property
evidence described as:

- 1. Blood and/or semen stained clothing
- 2. Blood stained shoelace

property or evidence:

- () was unlawfully acquired or is unlawfully possessed.
 - () has been used to commit or conceal a public offense.
 - () is being possessed with the purpose to use it as a means of committing or concealing a public offense.
 - (x) consists of an item or constitutes evidence of illegal conduct, possessed by a party to the illegal conduct.
 - () is evidence of illegal conduct in possession of a person or entity not a party to the illegal conduct and good cause being shown that the seizure cannot be obtained by subpoena or that the evidence being concealed, destroyed, damaged, or altered.
- (Conditions for service of this warrant are included on attached page(s).)

- () in the daytime
() at any time day or night (good cause having been shown)
() to execute without notice of authority or purpose, (proof under oath being shown that the object of this search was quickly destroyed or disposed of or that had any results and person if notice were given)

to make a search of the above-named or described persons(s), with all
of premises for the hereinabove described property or evidence, and
any of the same or any part thereof, to bring it before the
Court, County of Salt Lake, State of Utah, and
keep it in your custody, subject to the order of this court.

Given under my hand and dated this 10th day of February

Judge, Justice of the Peace, or
Magistrate of the Circuit Court

IN THE _____ CIRCUIT _____ COURT
IN AND FOR THE SALT LAKE COUNTY, STATE OF UTAH

AFFIDAVIT FOR SEARCH WARRANT

Flood Gowan
10034E

ADDRESS _____

Subscribed and sworn to before me this _____ day of _____, 19____, the undersigned affiant being first duly sworn, deposes and says:

That she has reason to believe

() on the person(s) of _____
() in the vehicle(s) described as _____
(x) on the premises known as 637 Brinen Court

At the City of Salt Lake, County of Salt Lake, State of Utah, there is certain property or evidence described as:

11 of and/or semen stained clothing
2 of stained shoelace

that said property or evidence:

- () was unlawfully acquired or is unlawfully possessed;
- () has been used to commit or conceal a public offense;
- () is being possessed with the purpose to use it as a means of committing or concealing a public offense;
- (x) consists of an item or constitutes evidence of illegal conduct possessed by a party to the illegal conduct;
- () consists of an item or constitutes evidence of illegal conduct, possessed by a person or entity not a party to the illegal conduct [Note requirements of Utah Code Annotated, 77-22-3(2)]

fiant believes the property and evidence described above is evidence of the(s) of Criminal Homicide. The facts to establish the existence of a search warrant are:

That on January 10, 1982, at 0330 hours, police officers were called to 604 South 520 East, Salt Lake City, Utah, where they found the body of Larla Taylor. She was being beaten and assaulted and stabbed to death; fellow officers followed fresh footprints in the new snow to the premises she was described; officers contacted the dispatcher, the police report of the parties who called the officer, and the other officers who arrived on the scene about 5:00 AM. The officer who arrived first, and the description given to him by the dispatcher; he examined the body and found fresh blood stains thereon; he also observed a pair of tennis shoes, one of which matched the footprints in the snow and further that the lace was on the left shoe; further that there was a blood smear on the left shoe.

because (if any information is obtained from an unnamed source)

affiant has verified the above information from the confidential informant
and accurate through the following independent investigation:


WHEREFORE, the affiant prays that a Search Warrant be issued for the seizure of

- () in the day time.
- () at any time day or night because there is reason to believe it is
necessary to seize the property prior to it being concealed, destroyed,
damaged, or altered, or for other good reasons, to wit:

Further requested that (if appropriate) the officers executing the requested
not be required to give notice of the officer's authority or purpose

- () physical harm may result to any person if notice were given; or
- () the property sought may be quickly destroyed, disposed of, or concealed

This danger is believed to exist because:


AFFILIANT
DEPUTY SHERIFF

SWORN AND GIVEN TO BEFORE ME this 10th day of February, 1962.

JUDGE
IN THE 1st COURT,
IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH

POLICE DEPARTMENT

EVIDENCE REPORT

PAGE 1

NATURE OF COMPLAINT HOMICIDE

DATE AND TIME REPORTED 02-10-82

CASE NUMBER 0

COMPLAINANT CAMPBELL, CLARK

OWNER ARRESTED PERSON

VICTIM TAYLOR, KARLA

PERSON(S) ARRESTED KELLY, RONALD LEMMON

ADDRESS PROPERTY WAS FOUND OR LOCATED 637 Briken Ct.

PAGE 1

- | | | |
|----|---|--|
| #1 | <input type="checkbox"/> Rel to owner
<input type="checkbox"/> Held for ct.
<input checked="" type="checkbox"/> Other hold Det. <input checked="" type="checkbox"/> | 1-plastic bag cont: 1-bed cover, multi colored. |
| | (HOMICIDE) | |
| #2 | <input type="checkbox"/> Rel to owner
<input type="checkbox"/> Held for ct.
<input checked="" type="checkbox"/> Other hold Det. <input checked="" type="checkbox"/> | 1-plastic bag cont: 1- <u>PEANUTS</u> Bed sheet. |
| | (HOMICIDE) | |
| #3 | <input type="checkbox"/> Rel to owner
<input type="checkbox"/> Held for ct.
<input checked="" type="checkbox"/> Other hold Det. <input checked="" type="checkbox"/> | 1-plastic bag cont: 1-white shoelace. |
| | (HOMICIDE) | |
| #4 | <input type="checkbox"/> Rel to owner
<input type="checkbox"/> Held for ct.
<input checked="" type="checkbox"/> Other hold Det. <input checked="" type="checkbox"/> | 1-plastic bag cont: 1-red scarf with knot. |
| | (HOMICIDE) | |
| #5 | <input type="checkbox"/> Rel to owner
<input type="checkbox"/> Held for ct.
<input checked="" type="checkbox"/> Other hold Det. <input checked="" type="checkbox"/> | 1-plastic bag cont: 1-pair of tan trousers with belt. |
| | (HOMICIDE) | |
| #6 | <input type="checkbox"/> Rel to owner
<input type="checkbox"/> Held for ct.
<input checked="" type="checkbox"/> Other hold Det. <input checked="" type="checkbox"/> | 1-plastic bag cont: 1-ladies purse, tan colored cont: Id from several persons. |
| | (HOMICIDE) | |
| #7 | <input type="checkbox"/> Rel to owner
<input type="checkbox"/> Held for ct.
<input checked="" type="checkbox"/> Other hold Det. <input checked="" type="checkbox"/> | 1-plastic bag cont: purple clutch purse cont: possible |
| | (HOMICIDE) | |

If additional space is needed use additional evidence report

ABBOTT B96D

TYPED BY

POWELL, S. 900

DATE AND TIME

02-10-82 12:00

RELEASE FORM

ALL ARTICLES PLACED IN EVIDENCE AS ITEMIZED ABOVE WERE RELEASED ON DATE

Release authorized by _____ Date _____ By _____ property control

TO _____ TO _____ Signature of Person Receiving Property

COMPANY

ADDRESS

OFFICE OF THE SHERIFF
HOMICIDE

DATE AND TIME REPORTED 02-10-82

CASE NUMBER 82-11315

OWNER NAME RELL, CLARK

OWNER ARRESTED PERSON

ADDRESS 1001 W. 1000 S.

PERSON(S) ARRESTED KELLY, RONALD LENOYNE

WHERE PROPERTY WAS FOUND OR LOCATED

637 Brixen Ct.

PAGE NUMBER

- 1 Ref. to owner ☐
Held for ct. ☐
Other hold Det. xxx (HOMICIDE) 1-plastic bag cont: 1-tan purse cont: (possible owner Patricia Brewer). Misl. items.
- 2 Ref. to owner ☐
Held for ct. ☐
Other hold Det. xxx (HOMICIDE) 1-plastic bag cont: 1-tan wallet cont: miscl. ID possible owner Jane A Yeager. Misl. Items
- 3 Ref. to owner ☐
Held for ct. ☐
Other hold Det. xxx (HOMICIDE) 1-plastic bag cont: 1-blue suede purse cont: ID, Karen L. Jones Ogden, Utah. Misl. items.
- 4 Ref. to owner ☐
Held for ct. ☐
Other hold Det. xxx (HOMICIDE) 1-plastic bag cont: 1-silver purse cont: ID to Meyers, Sperry Univac #19939 ID card.
- 5 Ref. to owner ☐
Held for ct. ☐
Other hold Det. xxx (HOMICIDE) 1-plastic bag cont: blue & white sweater.
- 6 Ref. to owner ☐
Held for ct. ☐
Other hold Det. xxx (HOMICIDE) 1-plastic bag cont: 1-glass tray. With white residue and one paper containing white powder residue. 1-toilet token.
- 7 Ref. to owner ☐
Held for ct. ☐
Other hold Det. xxx 1-plastic bag cont: 1-pair of lt. blue boxer shorts.

If additional space is needed use additional evidence report

AMCIT B06D

TYPED BY:

POWELL, S. 90C

DATE AND TIME

02-10-82 11:40

RELEASE FORM

VEHICLES PLACED IN EVIDENCE AS ITEMIZED ABOVE WERE RELEASED ON DATE

Released by _____ Date _____ By _____

property custodian only

To _____ TO _____
Signature of Person Receiving Property

Address _____ TEL. _____

POLICE DEPARTMENT

EVIDENCE REPORT

SALY

NATURE OF
CRIME: HOMICIDE

DATE AND TIME REPORTED: 2-10-82

CASE NUMBER: 20

COMPLAINANT: CAMPBELL, CLARK

OWNER: ARRESTED PERSON

VICTIM: TAYLOR, KARLA

PERSON(S) ARRESTED: KELLY, RONALD LEMOINE

ADDRESS PROPERTY WAS FOUND OR LOCATED

637 Briken Ct.

PAGE 1

#15
 1 Rel. to owner ☐
 Held for ct. ☐
 Other held Det. ☒ (HOMICIDE)

1-plastic bag cont: 1-red nipple (red) w/cotton inside

#16
 2 Rel. to owner ☐
 Held for ct. ☐
 Other held Det. ☒ (HOMICIDE)

1-plastic bag cont: miscl. papers.

3 Rel. to owner ☐
 Held for ct. ☐
 Other held ☐

4 Rel. to owner ☐
 Held for ct. ☐
 Other held ☐

5 Rel. to owner ☐
 Held for ct. ☐
 Other held ☐

6 Rel. to owner ☐
 Held for ct. ☐
 Other held ☐

7 Rel. to owner ☐
 Held for ct. ☐
 Other held ☐

If additional space is needed, use additional evidence report

REPORTED BY

ABBOTT 0950

TYPED BY

POWELL, S. 900

DATE AND TIME

02-10-82

RELEASE FORM

ALL ARTICLES PLACED IN EVIDENCE AS ITEMIZED ABOVE WERE RELEASED ON DATE

Release authorized by _____ Date _____ By _____

Property of _____

TO _____ TO _____

Signature of Person Receiving Property

COMPANY _____ ADDRESS _____

W/ more
GUCIV

2-10-82

637 Baylen Ct.

- 1 Pr. Shorts w/ e cor of occupied Bedroom
- 1 Statement Mtn West Airline Elwin Steed
Brn Coat Closet.
- 1 Statement Check Mtn West Airline
Elwin Steed
- 1 Red Plas nipple w/ cotton so side
bedroom
- 1 Multi colored Bed Spread Bedroom
- 1 Peanuts sheet
- 1 Pr Slacks
- 1 Sweater
- 1 Glass Tray
- 1 Paper Envelope
- 1 SSN No side Bedroom
- 1 Shoe lace
- misc Papers Bedroom
- 2 empty cig packs Camel light & Selma K.ichen

} 80 side of Matt.
on Floor.

IN THE FIFTH CIRCUIT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

SEARCH WARRANT

No. _____

COUNTY OF SALT LAKE, STATE OF UTAH

_____, a peace officer in the State of Utah.

I, _____, by Affidavit under oath having been made this day before me
by _____ S. Chapman, I am satisfied that there is
probable cause to believe

that _____ on the person(s) of _____
_____ in the vehicle(s) described as _____

(xxx) on the premises known as _____ 637 Brixen Court

In the City of _____ Salt Lake _____, County of _____ Salt Lake
State of Utah, there is now being possessed or concealed certain property
or evidence described as

Witness:

property or evidence:

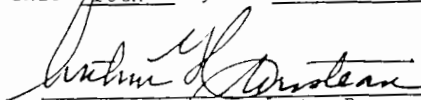
- 1. that unlawfully acquired or is unlawfully possessed.
 - 2. has been used to commit or conceal a public offense.
 - 3. is being possessed with the purpose to use it as a means of committing or concealing a public offense.
 - 4. consists of an item or constitutes evidence of illegal conduct, possessed by a party to the illegal conduct.
 - 5. is evidence of illegal conduct in possession of a person or entity not a party to the illegal conduct and good cause being shown that the seizure cannot be obtained by subpoena without the evidence being concealed, destroyed, damaged, or altered.
- Conditions for service of this warrant are included or attached hereto.)

Therefore commanded:

- 1. in the daytime
- 2. at any time day or night (good cause having been shown)
- 3. to execute without notice of authority or purpose, (proof under oath being shown that the object of this search may be quickly destroyed or disposed of or that harm may result to any person if notice were given)

Make a search of the above-named or described persons(s), vehicle(s), premises for the herein-above described property or evidence and if found the same or any part thereof, to bring it forthwith before me at _____ Court, County of Salt Lake, State of Utah, or retain property in your custody, subject to the order of this court.

Given under my hand and dated this 18th day of February, 1982



Judge, ~~Justice of the Peace~~, or
Magistrate of the Circuit Court

IN THE FIFTH CIRCUIT COURT
IN AND FOR THE SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH)
) ss
County of Salt Lake)

AFFIDAVIT FOR SEARCH WARRANT

OFF: ARTHUR G. CHRISTIAN
JUDGE

FIFTH CIRCUIT COURT BUILDING
ADDRESS

The undersigned affiant being first duly sworn, deposes and says:
That he/she has reason to believe

that () on the person(s) of _____
() in the vehicle(s) described as _____

(xx) on the premises known as 637 Brixen Court

In the City of Salt Lake, County of Salt Lake, State of Utah
is now certain property of evidence described as:

Subscribed:

and real property or evidence:

- 1. is unlawfully acquired or is unlawfully possessed;
 - 2. has been used to commit or conceal a public offense;
 - 3. is being possessed with the purpose to use it as a means of committing or concealing a public offense;
 - 4. consists of an item or constitutes evidence of illegal conduct, possessed by a party to the illegal conduct;
 - 5. consists of an item or constitutes evidence of illegal conduct, possessed by a person or entity not a party to the illegal conduct.
- [These requirements of Utah Code Annotated, 17-23-3(2)]

It follows the property and evidence described above is evidence of the crime of Original Homicide. The facts to establish the grounds for a Search Warrant are:

On January 10, 1982, at 0338 hours, police officers were called to 1000 East, Salt Lake City, Utah, where they found the body of Maria [redacted] who had been beaten and assaulted and stabbed to death; follow [redacted] followed fresh footprints in the new snow to the premises above [redacted] police officers contacted Ronald Kelley, the sole occupant of the [redacted] who invited the officers inside; Officer Farnsworth observed on [redacted] about 5 feet from the door, a coat which matched the description [redacted] by the dispatcher; he examined the coat and observed fresh [redacted] thereon; he also observed a pair of tennis shoes, the soles [redacted] the footprints in the snow and further that the lace was [redacted] the left shoe; further that there was a blood smear on the left [redacted] lace. Ronald Kelley was arrested. A kitchen knife was used [redacted] causing death. A check of victim's home revealed no matching [redacted] A search of the defendant's residence is necessary to ascertain [redacted] knives are present.

EVIDENCE REPORT

POLICE DEPARTMENT

NATURE OF
COMPLAINT

HOMICIDE

DATE AND TIME REPORTED

2/10/62

PAGE NO.

COMPLAINANT

LAUGHERD

OWNER

VICTIM

TAYLOR, MARIA

PERSON(S) ARRESTED: FELLENY, PHILIP

ADDRESS PROPERTY WAS FOUND OR LOCATED

637 Broken Ct

- 1 Rel. to owner ☐
 Held for ct. ☐
 Other hold ☐

DET

One plastic bag containing:
 Two knives; one with lt brown handle, the
 handle

- 2 Rel. to owner ☐
 Held for ct. ☐
 Other hold ☐

- 3 Rel. to owner ☐
 Held for ct. ☐
 Other hold ☐

- 4 Rel. to owner ☐
 Held for ct. ☐
 Other hold ☐

- 5 Rel. to owner ☐
 Held for ct. ☐
 Other hold ☐

- 6 Rel. to owner ☐
 Held for ct. ☐
 Other hold ☐

- 7 Rel. to owner ☐
 Held for ct. ☐
 Other hold ☐

If additional space is needed use additional evidence report

OWNERS:

CHAPMAN

D63D

TYPED BY:

S2F

DATE:

2/11/62

RELEASE FORM

ALL ARTICLES PLACED IN EVIDENCE AS ITEMIZED ABOVE WERE RELEASED ON-DATE

Release authorized by _____ Date _____ By _____

TO: _____ TO: _____

Signature of Person Releasing

COMPANY _____ ADDRESS _____

EVIDENCE REPORT

for the herein-above named or described persons(s), vehicle
 same or any part thereof, to bring it forthwith before
 Court, County of Salt Lake, State of Utah.

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

SEARCH WARRANT

No. _____

OF SALT LAKE, STATE OF UTAH

_____ officer in the State of Utah.

I, _____, a duly sworn officer under oath having been made this day before me
by _____, BILL ABBOTT, I am satisfied that there is
cause to believe

- () on the person(s) of _____
() in the vehicle(s) described as _____
(x) on the premises known as 604 Bristen Court

In the City of Salt Lake City, County of Salt Lake
State of Utah, there is now being possessed or concealed certain property
described as:

1. Blood and/or semen stained clothing
Blood stained shoelace

with property or evidence:

- () was unlawfully acquired or is unlawfully possessed
- () has been used to commit or conceal a public offense
- () is being possessed with the purpose to use it as a means of committing or concealing a public offense.
- () consists of an item or constitutes evidence of illegal conduct, possessed by a party to the illegal conduct.
- () is evidence of illegal conduct in possession of a person or entity not a party to the illegal conduct and could be shown that the evidence cannot be obtained by any other means (conditions for service of this warrant are included and attached hereto.)

() in the daytime

- () at any time day or night (good cause having been shown)
- () to execute without notice of authority or purpose, (proof under oath being shown that the object of this search is not lawfully owned or disposed of or that harm may result to any person if notice were given)

to make a search of the above-named or described persons(s), vehicles, premises for the hereinabove described property or evidence, and to bring the same to my place of abode, to bring at least one copy of the same to the County of Salt Lake, State of Utah, and to keep the same in my custody, subject to the order of this court.

Given under my hand and dated this 10th day of February, 1961

Judge, Justice of the Peace, or
Magistrate of the Circuit