IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

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RICHARD M. COOPER,

APPELLANT,

VS.

CASE NO.: 65,133

STATE OF FLORIDA,

APPELLEE.

APPELLANT'S INITIAL BRIEF

JOHN E. SWISHER
ROBERT H. DILLINGER
DILLINGER & SWISHER, P.A.
5511 Central Avenue
St. Petersburg, Florida 33710
(813) 343-0132

TABLE OF CONTENTS

	Page Number
Citation of Authorities	iii
Statement of Case	1
Statement of the Facts	2
Summary of Argument	8
Questions on Appeal	10
ARGUMENT: POINT I	10
WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS THE SKI MASK RECOVERED FROM A CLOSED BOX LOCATED IN A CLOSET IN THE BEDROOM OF THE DEFENDANT'S MOTHER'S HOME WHERE HE RESIDED	
ARGUMENT: POINT II	13
WHETHER THE TRIAL COURT ERRED IN FINDING, AS AN AGGRAVATING CIRCUMSTANCE, THAT THE CAPITAL FELONY WAS COMMITTED IN THE COURSE OF A KIDNAPPING	
ARGUMENT: POINT III	16
WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AND FINDING, AS AN AGGRAVATING CIRCUMSTANCE, THAT THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING ARREST	

Page Number

ARGUMENT: POINT IV 18

WHETHER THE TRIAL COURT ERRED IN FINDING, AS AN AGGRAVATING CIRCUMSTANCE, THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL

ARGUMENT: POINT V 20

WHETHER THE COURT ERRED IN INSTRUCING THE JURY AND FINDING, AS AN AGGRAVATING CIRCUMSTANCE, THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER

ARGUMENT: POINT VI 22

WHETHER THE COURT ERRED BY REJECTING THE REQUESTED MITIGATION INSTRUCTION AND BY NOT CONSIDERING THAT THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED

ARGUMENT: POINT VII 24

WHETHER THE COURT ERRED IN ADMITTING OVER OBJECTION ANTICIPATORY REBUTTAL TESTIMONY THAT THE DEFENDANT WOULD CALL A PSYCHIATRIST TO TESTIFY WHEN THE DEFENSE DID NOT CALL A PSYCHIATRIST TO TESTIFY CONCERNING WHETHER THE DEFENDANT ACTED UNDER EXTREME DURESS OR UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON

ARGUMENT: POINT VIII 25

WHETHER THE COURT ERRED IN NOT FINDING THAT THE DEFENDANT'S AGE AT THE TIME OF THE OFFENSE WAS A MITIGATING FACTOR

Conclusion 26

Certificate of Service 27

Appendix A1

TABLE OF CITATIONS

	Page Number
Alford v. State, 307 So.2d 433 (Fla. 1975)	22
Bates v. State, 10 F.L.W. 97 (Fla. 1975, decided December 31, 1985)	26
Cannady v. State, 427 So.2d 723 (Fla. 1983)	21
Caruther v. State, 10 F.L.W. 114 (Fla. 1985, decided February 7, 1985)	17,20
Elson v. State, 337 So.2d 959 (Fla. 1976)	12
Hardwick v. State, 9 F.L.W. 484 (Fla. 1984, decided November 21, 1984)	20,21
Heathcoat v. State, 430 So.2d 945 (Fla. 2nd D.C.A. 1983)	23
Hitchcock v. State, 413 So.2d 741 (Fla. 1982)	22
Katz v. U.S., 389 U.S. 347; 88 S.Ct. 507; 19 L.Ed. 2d 576 (1976)	11
Maggard v. State, 399 So.2d 973 (Fla. 1981)	18
Meeks v. State, 339 So.2d 186 (Fla. 1976)	25
Palmes v. State, 397 So.2d 648 (Fla. 1981)	22
Peek v. State, 395 So.2d 492 (Fla. 1981)	25
Province v. State, 337 So.2d 783 (Fla. 1976)	19
Rakas v. Illinois, 439 U.S. 128; 99 S.Ct. 507; 19 L.Ed. 2d 387 (1978)	11

Rembert v. State, 17
445 So.2d 337 (Fla. 1984)

Riley v. State, 17
366 So.2d 19 (Fla. 1979)

Silva v. State, 17
344 So.2d 599 (Fla. 1977)

State v. Dixon, 13,17,18

State v. Preston, 12
387 So.2d 495 (Fla. 5th D.C.A. 1980)

Washington v. State, 20
432 So.2d 44 (Fla. 1983)

White v. State, 18
403 So.2d 331 (Fla. 1981)

Williams v. State, 18
386 So.2d 538 (Fla. 1980)

Other Authorities

Section 921.141(5)(b), Florida Statutes 19

Subsection (1)(a)(3) of 787.1, Florida Statutes 14

STATEMENT OF THE CASE

On March 2, 1983, a three court indictment was filed in Pinellas County Circuit Court charging RICHARD M. COOPER with the the first degree murders of Steven Fridella, Bobby Martindale, and Garry Peterson (R 34-35). The indictment was later amended but the charges remained the same. (R 54-55).

Following a jury trial on January 10-13, 1984, Mr. Cooper was found guilty of the offenses charged. (R 214-216). The jury reconvened the next day for an advisory sentencing hearing and subsequently recommended the penalty of death. (R 226-228).

On March 14, 1984, after receiving testimony and arguments from counsel, the court imposed the death penalty. (R 236-241). The findings of fact, filed on May 30, 1984, listed six (6) aggravating factors. (R 243-248). No statutory mitigating factors were found by the court.

A timely notice of appeal was filed March 20, 1984. (R 249).

STATEMENT OF THE FACTS

A. Trial

At the Appellant's jury trial, the prosecution's evidence tended to establish that on the early morning of June 18, 1982, the Pinellas County Sheriff's Department received a telephone call from Chris Fridella. (R 789). Chris, an eight-year old boy, related an incident which had occurred at his residence. Pursuant to this telephone call, several oficers were dispatched to the residence located in the High Point area of Pinellas County. (R 803).

Upon arriving at the residence, the officers observed three men on the living room floor. (R 804,876). The men, who were later identified as Steven Fridella, Bobby Martindale, and Garry Peterson, appeared to have expired from gunshot wounds and their wrists were bound behind their backs with duct tape. (R 804,2030,2047). Chris Fridella, Steven Fridella's son, was found at the scene by the deputies and removed from the area. (R 779,780,805).

The officers further observed that the house had been ransacked, the victims' wallets had been emptied, and the volume on the television set was turned up all the way. (R 809). Five shotgun shells were recovered from outside the doorway, and an additional shell was recovered from just inside the doorway. (R 945-946).

Dr. Joan Wood, The Pinellas County Medical Examiner, arrived on the scene at 4:30 a.m. (R 840), and determined the time of death of the three victims to have occurred within the preceding three hours. (R 845). Dr. Wood opined that the deaths had resulted from shotgun wounds in the range of three to six feet. (R 846,849). Dr. Wood's opinion was consistent with the shotgun wounds having been inflicted from the doorway of the residence. (R 853).

Dr Wood noted that there were six shotgun wounds to the three victims. Peterson had been shot once (R 849) and lived for a "minute or two". (R 50). Martindale had been shot twice (R 854) with the wound to the head being instantly fatal. (R 857). Fridella had been shot three times with all wounds being fatal, and he lived for only a "minute or two". (R 860).

On January 15, 1983, approximately six months after the incident, the police received a telephone call from Robin Fridella. (R 889). Following the telephone conversation, the police contacted Terry Royal and later J. D. Walton. (R 890). Based on their two interviews, the police contacted Richard Cooper on January 20, 1983. (R 890,891).

In his statement to the police on January 20, 1983 at the DeSoto Correctional Institution, Richard Cooper stated that he, Jeff McCoy, Terry Royal, and J. D. Walton left J.D.`s house around 11:30 p.m. He stated that on the way to Clearwater, while J.D. Walton was driving, they were stopped by the Clearwater

police for a broken tail light. After receiving a warning, the four continued on to their destination. The four parked the car and walked to the house. J.D. Walton went in first, followed by Terry Royal and Richard Cooper. After J.D. Walton told the other two where everything was in the house, they proceeded to place the three adults on the floor with their hands taped and then put the eight-year old boy, Chris Fridella, in the bathroom. They ransacked the house, and J.D. Walton told the others to shoot the adults because one of them recognized him. J.D. Walton first tried to shoot with his hand gun, but said it wouldn`t go off so he told the others to shoot. After Richard Cooper and Terry Royal fired their shotguns at the victims they all ran out the door, but J.D. Walton told Cooper that one wasn't dead and told Cooper to run back in and shoot one last time. They all then got in their car and drove off. Cooper did admit to being high when he went to the house because he had been drinking beer and smoking pot. Richard Cooper also admitted taking two dollars from the victims' wallets which he later gave to J.D.

During his taped confession, Cooper said he didn't know the victims names, and he shot only after Walton told him to shoot. He said he shot twice. Cooper said they all wore masks on their heads and gloves (or socks) on their hands. Cooper also said that J.D. threw the masks and gloves into a dumpster. Neither the guns nor the ammunition belonged to Richard Cooper. Finally, Cooper stated that J.D. Walton could control him, that he was like Charles Manson. (R 915-924).

Cooper later made another statement to the police on January 24, 1984. During that interview, he indicated that while in the back bedroom with J.D. Walton, while Terry Royal was guarding the three adults, that J.D. said he wasn't going to "waste" them. Richard Cooper said he didn't want to kill anybody, and Cooper then went out and told Terry Royal that he wasn't going to shoot anybody. (R 924). Also, during the second interview, Richard Cooper admitted that Jeff McCoy was also armed with a .22 caliber rifle, and that McCoy taped up the little boy. (R 927)

During the trial, the State introduced into evidence, a ski mask purportedly worn by Richar Cooper on the night of the incident. (R 1122). Richard Cooper moved to suppress the introduction of the ski mask into evidence on the grounds that it was seized without a search warrant from a closed box in a closed closet in the bedroom in which he had resided in his mother's house. (R 999). The Appellant's stepfather testified that Cooper moved into the single family house in January 1982. (R 1006). The bedroom in which Cooper lived was considered his private area (R 1009), and occupied only by him until the detectives arrived to get the ski mask in June 1983. (R 1007-1009). The mask was found in a cardboard box with a closed lid in a closed closet located in the bedroom occupied by Richard Cooper. (R 1010-1011). Even though Cooper had been arrested in the summer of 1982, and had not returned to the house, it was

still considered by his mother and stepfather to be his room. (R 1015-1016). The only person to use the bedroom during the entire eighteen (18) months was Richard Cooper's mother's cousin for two weeks. (R 1018). Only Cooper's hanging clothes had been removed to a trailer at that point in time. (R 1026). The room occupied by Richard was not cleaned out and considered vacated until October or November 1983. (R 1021). Cooper's stepfather got the ski mask only after being led to believe by the police that Cooper had told them where the ski mask was located and to get it for them. (R 1022). The police never produced a search warrant. (R 1022-1023).

B. PENALTY PHASE

During the penalty phase, the State called Paul Skalnik to testify against Richard Cooper. (R 1431). Cooper, while housed in the same cell with Paul Skalnik, made several statements. (R 1435). The Appellant indicated that the killings were not "gangland Mafia type killings" as the police thought. (R 1435). Cooper said the reason that he went along with the other three was because J.D. Walton told him that he had been "ripped off for cocaine and twenty dollars cash". (R 1436).

On the night of the incident, Cooper said they wore ski masks with the eyes sewn closed and the mouth area altered on Terry Royal's mask so his braces would not show. (R 1438,1439).

Cooper said that before they left Walton stood over one of the men lying on the floor, and Walton attempted to fire his handgun. When Walton's handgun misfired several times, he began hollering "shoot 'em, shoot 'em". Walton was apparently angry because they had only found a couple of ounces of cocaine and little or no money. (R 1443). Cooper then told Skalnik that after Walton hollered, Terry Royal fired first, and Cooper said he fired twice. (R 1444). Cooper also said that the shots were fired so fast it only sounded like two shots. (R 1444). Skalnik also testified that the defense lawyers were going to have a psychiatrist testify that they were going to use, as a defense, that Cooper was "nuts", and they were also going to bring in people from his home town to testify that he was unstable. (R 1449).

The Defendant's mother testified that Richard was born on September 28, 1963 (R 1464), which made him eighteen at the time of the incident. She testified that Richard's father was violent and at times abusive. (R 1469). She also testified that Richard did not complete school. (R 1478). This fact was substantiated when Paul Skalnik testified he and Cooper did not even complete the eighth grade. (R 1449).

SUMMARY OF ARGUMENT

POINT I

The trial court improperly admitted into evidence a ski mask that was found in the Defendant's bedroom in the Defendant's mother's home. The ski mask was obtained by an illegal search without a search warrant several months following the incident.

POINT II

While not addressing the issue of kidnapping during the guilt phase, the trial court improperly instructed the jury that they could consider kidnapping in determining the aggravating factor that the murder was committed during the commission of the enumerated felonies. This was done solely to avoid stacking. The evidence that kidnapping was committed that was presented to the jury failed to estabish kidnapping beyond a reasonable doubt.

POINT III

The court found the murders were committed to avoid arrest after one of the perpetrators was identified by one of the victims, but this is totally contrary to the finding that the crime of murder was cold, calculated, and premeditated.

POINT IV

The relatively quick and immediate death of all victims following extreme panic exhibited by the perpetrators, does not raise the level of the crime to being heinous, atrocious, or cruel.

POINT V

Even though the perpetrators went to the trouble of trying to conceal their identity to avoid being recognized, the court still found that not only were the murders premeditated, but they were cold and calculated. The evidence only supports the fact that the robbery was planned but not the murders.

POINT VI

The court failed to instruct the jury or consider that the murders were committed while the Defendant did not have the capacity to appreciate the criminality of his conduct. This was in error because the State presented the evidence that the Defendant was drinking beer, smoking pot, and "high". An instruction taking into account his intoxication was warranted.

POINT VII

The State improperly presented over objection testimony concerning the mitigation that was going to be presented when, in fact, the Defendant did not put on the anticipated testimony.

POINT VIII

The court failed to find that the Defendant's age (eighteen), and level of education (less than the eighth grade), was a mitigating factor.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS THE SKI MASK RECOVERED FROM A CLOSED BOX LOCATED IN A CLOSET IN THE BEDROOM OF THE DEFENDANT'S MOTHER'S HOME WHERE HE RESIDED.

Prior to the introduction into evidence of the ski mask purportedly worn by the Appellant the night of the incident, the Appellant moved to suppress the evidence based on an unlawful search and seizure. (R 999). The basis of the motion to suppress was the violation of the Appellant's constitutional rights guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution.

Robert Kokx, the Appellant's stepfather, testified that he was married to Richard Cooper's mother and together they resided in a single family home located in Hernando, Florida. Richard Cooper moved into the residence in January 1982. (R 1006). In June of 1983, while Richard Cooper was incarcerated, Mr Kokx was visited by Detectives Halliday and Simpson, and they requested that he get the ski mask for them. (R 1007). Detective Halliday had received information about the location of the ski mask from Paul Skalnik, the cellmate of Richard Cooper. (R 1461).

Believing that Richard had given the detectives permission to get the mask, Mr. Kokx located the ski mask in a cardboard box on the bottom of the closet in the bedroom that had

been occupied by Richard. (R 1008). Only Richard's personal property was located in the room (R 1009), and it had not been occupied by anyone else after Richard was arrested. (R 1008). The bedroom was considered Richared's private area (R 1009-1010). Neither Mr Kokx nor his wife, Richard's mother, cleaned the bedroom. (R 1010).

The cardboard box had a lid which was closed, and the ski mask was only found after removing other items located in the box. (R 1010). Only Richard's property was inside the closed box which was located in the closed closet. (R 1011).

While Mrs. Kokx`s cousin stayed a week or two in the bedroom as a guest, nobody else had moved into the bedroom and it was still considered Richard's bedroom. (R 1011,1012).

> "The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks as private, even in an area accessible to the public, may be constitutionally protected."

Katz v. U.S., 389 U.S. 347; 88 S.Ct. 507; 19 L.Ed. 2d 576 (1976). The Supreme Court in Rakas v. Illinois, 439 U.S.128; 99 S.Ct. 421; 58 L.Ed. 2d 387 (1978), elaborated on this principal and said:

> "capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place."

In the instant case, Richard Cooper's mother did not even have any right of access for housecleaning. In general, search and seizure cases are "decided on the basis of the individual's reasonable expectation of privacy in the area, whether others generally had access to the area, and/or whether the objects searched were the personal effects of the individual unable to consent." Silva v. State, 344 So.2d 559 (Fla. 1977). It cannot be reasonably argued that the items within the box inside the closet were not Richard Cooper's personal effects. Also, the bedroom was, at all times material hereto, considered the bedroom of Richard Cooper and his right to privacy in that bedroom certainly extends to the closet and the contents of a closed box. State v. Preston, 387 So.2d 495 (Fla. 5th D.C.A. 1980).

The fact that Richard Cooper was in jail at the time of the search does not negate his right of privacy. See; Elson v. State, 337 So.2d 959 (Fla. 1976).

Since it is impossible to determine the weight given to the illegally seized evidence, a new trial must be granted.

ARGUMENT

POINT II

THE TRIAL COURT ERRED IN FINDING, AS AN AGGRAVATING CIRCUMSTANCE, THAT THE CAPITAL FELONY WAS COMMITTED IN THE COURSE OF A KIDNAPPING.

It is well settled that aggravating circumstances must be proved beyond a reasonable doubt before being considered in sentencing. State v. Dixon, 283 So.2d 1 (Fla. 1973). In the instant case, the trial court found, as an aggravating factor, that the capital felony was committed in the course of a kidnapping. Because the offense of kidnapping was not proven beyond a reasonable doubt, the trial court's consideration of this aggravating circumstance was error.

Richard Cooper was not charged with kidnapping, and the jury was not instructed upon this offense during the guilt phase of the trial. However, at the penalty phase, the prosecution rquested that the advisory jury be instructed that they could consider, as an aggravating circumstance, that the capital felony was committed in the course of a kidnapping. The prosecutor explained that he was requesting a kidnapping instruction, rather than the underlying felony murder charge of robbery, so that there would be "no stacking problem." (R 1505,1506). The instruction was given over defense objection (R 1508). It should be noted that the jury was also instructed upon, and the trial

court found, the aggravating circumstance of commission of the capital felony for pecuniary gain. (R 1606,246).

The jury was specifically instructed with repsect to kidnapping with intent to inflict bodily harm or terrorize, pursuant to subsection (1)(a)(3) of 787.1, Florida Statutes (1983). This is also the specific intent which was found by the trial court:

(indent) Specifically, Chris Fridella, ... was forcibly confined ... with the intent to terrorize his father, Steven Fridella. (R 245). (end indent)

The court reasoned that "confinement and segregation when he was moved from the bathroom to the bedroom (sic) was in part done to terrorize his father and reduce or make it less likely that the father would resist during the course of the particular events." (R 245).

The foregoing finding is not supported by the evidence. There was absolutly no evidence that Chris Fridella was threatened, nor was there any evidence that Steven Fridella was threatened with harm to his son. To the contrary, the only evidence relating to this issue indicated that Chris Fridella was confined in the bathroom so that no harm would come to him. During the testimony of Detective Halliday, the prosecutor asked the following:

> Q. Did you ever ask Richard Cooper why he didn't shoot the little boy?
>
> A. Yes, he stated that J.D. Walton did not want any harm to come to the young boy. (R 929).

Equally significant is the fact that this evidence was incorporated in the court's findings:

> As part of the plan, no harm was to come to Chris. (R 244).

For this reason, the court finding that Chris Fridella was kidnapped, premised upon the intent to terrorize, constituted error. Since it is impossible to determine how much weight either the judge or the advisory jury may have given to this improper aggravating circumstance, Richard Cooper's sentence must be vacated and this cause remanded for resentencing with directions to impanel a new advisory jury.

ARGUMENT

POINT III

THE COURT ERRED IN INSTRUCTING THE JURY AND FINDING, AS AN AGGRAVATING CIRCUMSTANCE, THAT THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING ARREST.

The trial court concluded that the murders were motivated "in part" by the risk of arrest. The court stated:

> It is clear from the evidence that one of the victims recognized Jason D. Walton in spite of his disguise and that the leave any of the victims would certainly have resulted in the arrest for the robbery and burglary they were committing, and that risk of arrest, in part, added to the motivation for the victims' murder. (R 245).

However, the reasoning underying the court's conclusion that the capital felony was committed for the purpose of avoiding arrest is expressly contradicted by the court's subsequent findings:

> The Defendant traveled a substantial distance armed and prepard to do violence and murder; the only reasonable inference being that a minimum part of the overall plan was it might become necessary to kill. (R 246).

From the foregoing comments, it is clear that the trial court used contradictory findings to stack as many different aggravating factors as possible. It is not logical to reason that while the murders were committed to eliminate a witness that recognized a co-perpetrator, they were also cold and calculated, and planned from the beginning.

This court has always held that aggravating circumstances must be proved beyond a reasonable doubt. State v. Dixon, 238 So.2d 1 (Fla. 1973). Proof of the requisite intent to avoid arrest and detection must be very strong where the victim is not a law enforcement officer. Rembert v. State, 445 So.2d 337 (Fla. 1984); Riley v. State, 366 So.2d 19 (Fla. 1979). See also Caruther v. State, 9 F.L.W. 114 (Fla. 1985, decided February 7, 1985), where even the victim's recognition of her assailant as a customer who she knew for a number of years was not sufficient to meet the burden required to establish this particular aggravating circumstance.

In light of the trial court's contradictory findings in this case, it is apparent that the proof of the requisite intent to avoid arrest was not sufficiently clear to establish this aggravating circumstance beyond a reasonable doubt.

ARGUMENT

POINT IV

THE TRIAL COURT ERRED IN FINDING, AS AN AGGRAVATING CIRCUMSTANCE, THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

In State v. Dixon, 283 So.2d 1 (Fla. 1973), this court defined heinous to mean "extremely wicked or shockingly evil"; atrocious to mean "wicked and vile"; and cruel to mean "infliction of a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others." In the instant case, the victims all died within one to two mintues, (R 860). In fact, the shots were so rapid that all six shots sounded like just two shots. (R 1444). Where death is almost instantaneous the murder itself does not rise to the level required by this court to find that the act was heinous, atrocious, or cruel. See Williams v. State, 386 So.2d 538 (Fla. 1980), and Maggard v. State, 399 So.2d 973 (Fla. 1981). Also, the victims were neither tortured nor taunted prior to the murders, and the whole incident was spontaneous and brief. Compare White v. State, 403 So.2d 331 (Fla. 1981).

In finding that the murder was heinous, atrocious, or cruel the court stated:

> Further, there was not one person executed, but three persons mercilessly slaughtered in which butchery the Defendant substantially participated. (R 246).

The court used this same finding when it considered the aggravating circumstance set forth in Section 921.141 (5)(b), Florida Statutes. This constituted an improper doubling of aggravating circumstances based upon the same facts. See Province v. State, 337 So.2d 783 (Fla. 1976).

ARGUMENT

POINT V

THE COURT ERRED IN INSTRUCTING THE JURY AND FINDING, AS AN AGGRAVATING CIRCUMSTANCE, THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER.

It is well settled that "the cold, calculated and premeditated factor applies to a manner of killing characterized by a heightened premeditation beyond that required to establish premeditated murder." Hardwick v. State, 9 F.L.W. 484 (Fla. 1984, decided November 21, 1984); Washington v. State, 432 So.2d 44 (Fla. 1983); Caruther v. State, 10 F.L.W. 114 (Fla. 1985, decided February 7, 1985). In that case as in the instant case, "the trial court erred in finding as alternative aggravating circumstances, that the murder was committed for the purpose of avoiding or preventing a lawful arrest and that the capital felony was cold, calculated and premeditated." There, as here, the victim recognized one of the co-perpetrators and the court reasoned that the defendant killed her to avoid identification.

In the instant case, the co-perpetrators went to the trouble of obtaining ski masks and gloves (R 920). They even sewed the eye holes closed and altered the mouth area to avoid being identified by the victims. (R 1438,1439). If murder, rather than robbery had been planned, why go to the trouble of wearing a disguise? The evidence presented supported the position that robbery was intended, but that once J.D. Walton shouted "shoot 'em, shoot 'em" (R 925), then everyone lost

control. The premeditation to commit robbery cannot be transferred to a murder which occurs in the course of that robbery for purposes of this aggravating factor. Hardwick v. State, 9 F.L.W. 484 (Fla. 1984, decided November 21, 1984). Even the fact that the victims were shot more than once does not support the finding that the murder was cold, calculated and premeditated. See Cannady v. State, 427 So.2d 723 (Fla. 1983).

ARGUMENT

POINT VI

THE COURT ERRED BY REJECTING THE REQUESTED MITIGATING INSTRUCTION AND BY NOT CONSIDERING THAT THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR, TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED.

"All evidence of mitigating circumstances may be considered by the judge or jury." Alford v. State, 307 So.2d 433 (Fla. 1975). Further, "it is axiomatic that a defendant is entitled to a jury instruction on the theory of his defense." Palmes v. State, 397 So.2d 648 (Fla. 1981). This court has stated that reversal is required where juries were not instructed on the defense alibi, entrapment, justifiable homicide, and withdrawl. Is not a defendant entitled to a jury instruction on mitigating factors during a penalty phase of a first-degree murder case following the guilt phase?

In the instant case, evidence was presented by the State during a taped confession that the Defendant "was just getting high on pot" and that he was high when he went to the house. These statements are reliable as admissions against interest in that the Defendant was only eighteen (below the legal drinking age) and he was smoking a controlled substance. Further, this evidence was presented by the State during the guilt phase.

In Hitchcock v. State, 413 So.2d 741 (Fla. 1982), this court found that the trial court did not err when neither the

jury nor the judge found the defendant's "capacity to appreciate the criminality of his conduct was substantially impaired." However, at least the jury was given the appropriate instruction on this mitigating factor. In the instant case, the court refused to give the requested instruction. (R 1536).

The failure to give an instruction that takes into account the defendant's intoxication is reversible error, just as a trial court's failure to give such an instruction in a case where the State must prove specific intent. See Heathcoat v. State, 430 So.2d 945 (Fla. 2nd D.C.A. 1983).

ARGUMENT

POINT VII

THE COURT ERRED IN ADMITTING OVER OBJECTION ANTICIPATORY REBUTTAL TESTIMONY THAT THE DEFENDANT WOULD CALL A PSYCHIATRIST TO TESTIFY, WHEN THE DEFENSE DID NOT CALL AS A WITNESS A PSYCHIATRIST TO TESTIFY CONCERNING WHETHER THE DEFENDANT ACTED UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON.

The defense chose to only call as a witness, the mother of the Appellaent. (R 1463). However, in anticipation that the defense would call a psychiatrist to testify that the Defendant was acting under the dominant influence of another or some other mitigating factor, the State elicited from Paul Skalnik that the Defendants were going to have a couple of doctors testify. (R 1449). This testimony was presented over objection.

The Defendant is entitled to present any mitigating factors that he desires following the State's presentation of the aggravating factors. The mitigating factors are for the Defendant's benefit. Maggard v. State, 399 So.2d 973 (Fla. 1981). The Defendant should not be placed in the position of having to rebut testimony presented by the State; or, as in the instant case, not presenting the anticipated mitigating testimony with the hope that the jury does not hold that against him. The State would have had an opportunity to rebut any mitigating testimony presented by the Defendant.

ARGUMENT

POINT VIII

THE COURT ERRED IN NOT FINDING THAT THE DEFENDANT'S AGE AT THE TIME OF THE OFFENSE WAS A MITIGATING FACTOR.

The trial court specifically found:

> ...The age of the Defendant at the time of the crime offers no mitigation. The testimony indicates he was mature, understood the distinction between right and wrong and the nature and consequences of his actions. (R 248)

The record contains absolutely no testimony which indicates that Richard Cooper was mature or that he understood right from wrong. The record does indicate that Richard Cooper was eighteen (R 1469), with less than an eighth grade education. (R 1478,1449). There is no per se rule as to when the Defendant's age is a mitigating factor. Peek v. State, 395 So.2d 492 (Fla. 1981). However, the court failed to consider the defendant's intelligence level coupled with his chronological age. Meeks v. State, 339 So.2d 186 (Fla. 1976).

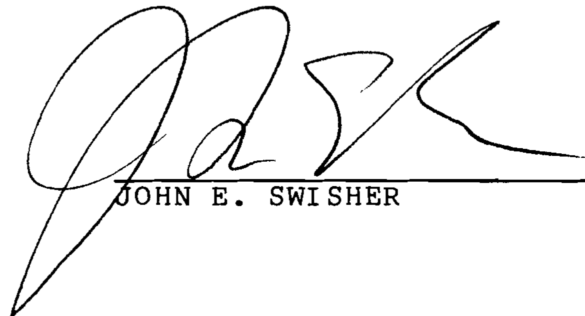
Where the Defendant is eighteen and he has less than an eighth grade eduation, there is certainly some mitigation.

CONCLUSION

Many aggravating factors were presented to the jury and found by the judge to exist which were improperly considered. Additionally, the court failed to find the existence of the mitigating factor of age which was properly presented and failed to consider an essential mitigating factor supported by the evidence. This factor alone requires a new penalty phase. Bates v. State, 10 F.L.W. 97 (Fla. 1985, decided Januay 31, 1985). Further, the court's improper admission into evidence of the ski mask requires a reversal and a new trial.

Respectfully submitted,

ROBERT H. DILLINGER

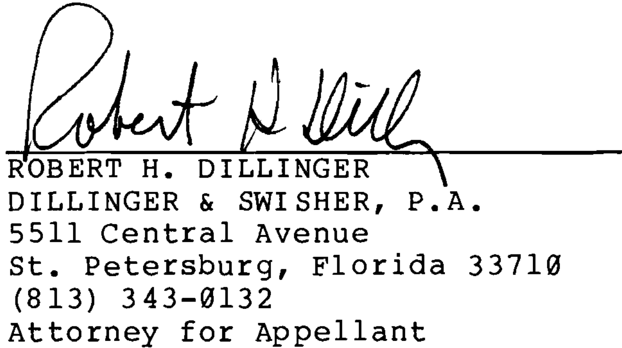


JOHN E. SWISHER

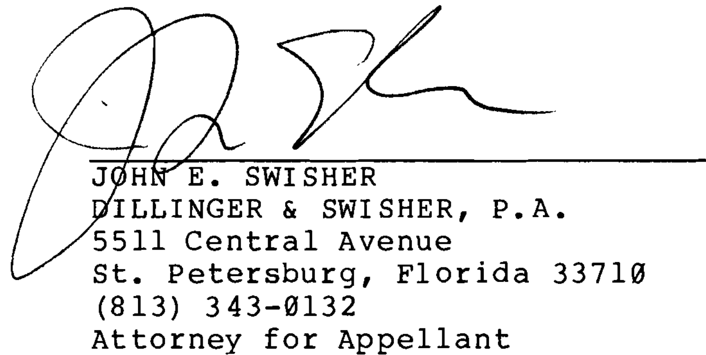
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served upon the Attorney General's Office, Park Trammel Building, Eighth Floor, 1313 Tampa Street, Tampa, Florida, 33602.

This 1st day of March, 1985.



ROBERT H. DILLINGER
DILLINGER & SWISHER, P.A.
5511 Central Avenue
St. Petersburg, Florida 33710
(813) 343-0132
Attorney for Appellant



JOHN E. SWISHER
DILLINGER & SWISHER, P.A.
5511 Central Avenue
St. Petersburg, Florida 33710
(813) 343-0132
Attorney for Appellant