IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

RICHARD M. COOPER,

APPELLANT,

vs.

STATE OF FLORIDA,

APPELLEE.

_________________________/ CASE NO: 65.133

REPLY BRIEF OF APPELLANT

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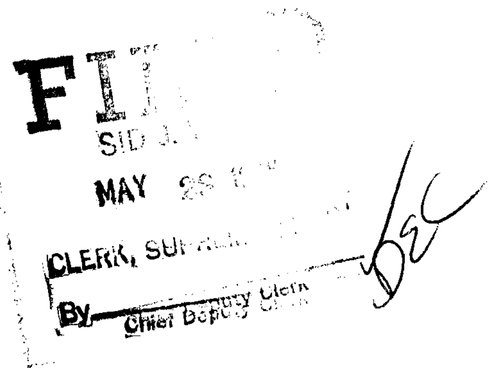

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STATEMENT OF THE CASE

The Appellant would rely upon the Statement of the Case set forth in his Initial Brief in this appeal.

STATEMENT OF THE FACTS

The Appellant would rely upon the Statement of the Facts set forth in his Initial Brief except for the following:

MOTION TO SUPPRESS PHYSICAL EVIDENCE

The Appellee states that the Appellant's step-father "removed all of appellant's personal belongings from the room in preparation for her visit". The visit to which the Appellee refers is a visit by the Appellant's mother's cousin. According to the testimony of the Appellant's stepfather, the box in which the ski mask was kept was never removed from the closet in which it had remained since Richard's arrest in the summer of 1982 until four or five months after the ski mask was turned over to Officer Halliday. In fact, Mr. Kokx said that his wife's cousin put her clothes in the closet where the box was located. (R 1018).

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE OBTAINED FROM STEPFATHER'S HOME.

The premises which was the subject of the illegal search was owned by the stepfather and the mother of the Appellant. (R 1013). Also remember that the Appellant was eighteen-years of age at the time of the offense, having been born September 28, 1963. (R 1464) The Appellant's stepfather, Robert Kokx, testified that at the time the officers' obtained the ski mask he still considered the bedroom to be that of the Appellant's. (R 1012)

It is not unreasonable for parents to consider a bedroom used by a child, even though the child is eighteen-years of age, to be that child's bedroom. Few parents would require an eighteen-year old son to leave home on his eighteenth birthday just because he is legally considered to be an adult.

In light of the testimony that the bedroom was still considered Mr. Cooper's room at the time of the search, and in light of our common experience that many children continue to reside at home or at least maintain a bedroom at their parents' home for a few years after reaching the age of maturity, it is

not unreasonable to conclude that Mr. Kokx, the Appellant's stepfather, was accurately representing the situation as it existed at the time of the search. Therefore, it can not be found that the Appellant had abandoned his parents' home.

The Appellee relies upon the case of Jones v. State, 332 So.2d 615 (Fla. 1976). In that case, the defendant had been residing in a small structure formerly used as a chicken house. The defendant's landlady consented to a search after the defendant had hurriedly left town. There was no parent-child relationship in that case which was clearly established here. The facts are just not the same.

Finally, in Jones there is no indication of how long the defendant resided in the converted chicken house. In the instant case, Appellant moved in with his mother after she requested that he come and live with her. (R 1475) This was not a landlord-tenant relationship; and therefore, it cannot be compared with Jones.

ISSUE II

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

The Appellee correctly points out that most cases under Section 921.141(s)(d) involve situations where the murder victim is the subject of the underlying felony, which in the instant case was robbery. The Appellee argues that the same is true where the underlying felony is kidnapping. See Atkins v. State, 452 So.2d 529 (Fla. 1984); Preston v. State, 444 So.2d 939 (Fla. 1984); and Justus v. State, 438 So.2d 358 (Fla. 1983). The Appellee also correctly argues, however, that it is not always necessary for the victim of the kidnapping to be the victim of the murder for that subsection to apply. Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983).

This case is distinguishable from Fitzpatrick because in that case the defendant was charged with and found guilty of kidnapping. The Appellee then argues that in Stevens v. State, 419 So.2d 1058 (Fla. 1982), the defendant was not charged with kidnapping but that factor was applied in the sentencing phase successfully. It appears in Stevens that the defendant was found guilty of felony-murder and the jury was probably so instructed on all of the underlying felonies. In the instant case, the jury was only instructed on one underlying felony, that being robbery.

ISSUE 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 Appellant would merely rely on his Initial Brief and restate that if a murder is planned from the beginning, it cannot also be for the purpose of avoiding arrest after a co-perpetrator is identified.

ISSUE IV

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

While the Appellee argues that the victims in this case were aware that they were going to be shot, the record does not support that conclusion. From the time that J. D. Walton tried to fire until the last shot in the panic-filled episode, only a few seconds elapsed.

In White v. State, 403 So.2d 331 (Fla. 1981), a case cited by the Appellee, one of the victims was "tied, gagged and blindfolded and she, for many hours was subjected to the taunts of the conspirators". The facts of the instant case are just the opposite.

ISSUE 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.

The Appellee points out that the trial judge made the following finding:

> "...the Defendant fired initially three shotgun blasts and returned to fire a fourth into Fridella who was able to raise up before the last shot"

This finding, as Appellee concedes at page five (5) of the Answer Brief, is incorrect. The testimony showed that Royal fired three or four times, but the Appellant fired once at Steve Fridella. Appellant left, then returned and fired apparently again at Fridella.

According to the testimony of the medical examiner, this second shot by the Appellant would have been into a dead man in that all of Fridella's wounds were fatal. (R 858-860)

The fact that the Appellant may have reloaded his gun, which was merely conjecture, and shot the fatally wounded Fridella in a matter of a few seconds, does not meet the test set forth in <u>Harwick v. State</u>, 461 So.2d 79 (Fla. 1984). In that case, as here, a planned robbery turned into a frenzied killing that had not been planned to the extent that the court could find that the murder was cold, calculated and premeditated.

ISSUE VI

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT AND FIND, AS A MITIGATING CIRCUMSTANCE, THAT APPELLANT COULD NOT APPRECIATE THE CRIMINALITY OF HIS CONDUCT.

The Appellant specifically requested at the jury charge conference that the jury be instructed on "Number Six" (R 1536) which says:

> "...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."

The evidence was presented as previously argued, and the requested jury instruction should have been given on the mitigating circumstance.

ISSUE 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 Appellant relies on the argument presented in his Initial Brief filed in this cause.

ISSUE 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:

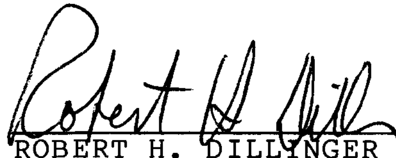
> ...The age of the Defendant at the time of the crime offers no mitigation. The testimony indicates he was mature, understood the distinction between right and wrong and the nature and consequences of his actions. (R 248)

The Appellant relies on the argument presented in his Initial Brief filed in this cause.

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.

DATED this 24th day of May, 1985.



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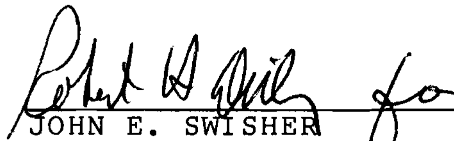

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