IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,814

JOHN PATRICK MASTERSON, aka
JACK MASTERSON, aka JACK ROTH,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee,

* *

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

* *

BRIEF OF APPELLEE

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INTRODUCTION

The Appellant, John Masterson, was the Defendant in the trial court below. The Appellee, the State of Florida, was the prosecution. In this brief, the parties will be referred to as they stand before this Court.

The symbol "R" will be used to designate the Record on Appeal. The symbol 'SR" will be used to designate the supplemental record consisting of the transcript of the hearing held on March 24, 1986.

All emphases are supplied unless otherwise indicated.

STATEMENT OF THE CASE

The Appellant's Statement of the Case is a generally true and correct account of the proceedings below and is accepted by the Appellee subject to the following additions, corrections and clarifications:

On January 25, 1985, an Affidavit of Probable Cause and a Warrant for the arrest of the Defendant were filed in connection with two murders and an armed burglary which occurred between June 26, 1982 and June 27, 1982 (R. 16-23). On March

19, 1985, a three count Grand Jury indictment was filed charging the Defendant with:

Count One:	the First Degree murder of Joseph Parisi with a firearm;
Count Two:	the First Degree Murder of Patricia Savino with a firearm; and,
Count Three:	Armed Burglary.

(R. 1-2).

On March 24, 1986, the Appellant's motion to preclude the "death qualification" of prospective jurors was heard (R. 138-149; SR. 66-68). The trial court, in reliance upon Witherspoon v. Illinois, 391 U.S. 510 (1968) and its progeny, denied the Appellant's motion (R. 67-68).

Following a jury trial in this case, the following verdicts were rendered:

Count One:	Guilty as to Second Degree Murder with a firearm, a lesser included offense of Count One of the Indictment;
Count Two:	Guilty as to First Degree Murder as as charged in the Indictment; and,

COUNT THREE: Guilty as to Burglary with a firearm as charged in the Indictment.

(R. 336-338). The Defendant was adjudicated guilty as to Counts One and Three and sentenced to a term of imprisonment of one hundred and thirty-four (134) years (with a three year minimum mandatory sentence) as to both counts, to be served consecutively (Rl. 339-343). With respect to Count Two, the Defendant was adjudicated guilty and sentenced to death by electrocution by the trial court which rejected the jury's recommendation of a sentence of life imprisonment without the possibility of parole for twenty five (25) years (R. 351-360, 1426).

STATEMENT OF THE FACTS

The Appellant's Statement of the Facts is a generally correct account of the facts in this case. However, there are certain material omissions and errors contained therein. Therefore, in the interest of continuity and clarity, the Appellee accepts the Appellant's Statement of the Facts subject to the following additions, corrections and clarifications.

On June 27, 1982, at approximately 2:00 a.m., Joseph Parisi and his girlfriend, Patricia Savino, were found dead in Mr. Parisi's apartment by Mr. Parisi's son, Glenn (R. 717-720, 745). As Glenn Parisi testified at trial, he was living with his father at the time and had gone out earlier on the evening of June 26, 1982 to Sportrooms with a friend, Xavier Vitari (R. 711-12).

After going to Sportrooms, Glenn had returned home sometime after 8:15 p.m. and advised his father that he would be going out again between 9:45 p.m. and 10:00 p.m. that evening (R. 715). At that time, Glenn recalled that Patricia Savino was in bed at his father's apartment and that his father was wearing a bathrobe (R. 712). Between 9:00 p.m. and 9:30 p.m. that evening, Glenn testified that a tall blonde visitor came to the apartment briefly (R. 716). Glenn recalled that the visitor's eyes met his and that the visitor left immediately,

but he said that he would be back later (R. 716-17). Glenn left his father's apartment between 9:45 p.m. and 10:00 p.m. that evening and went to Xavier Vitari's house and stayed there until 1:00 a.m. or 1:15 a.m. on June 27, 1982 (R. 715, 717). On his way home, Glenn stopped at a U-Totem, but it was closed so he proceeded to a Seven-Eleven store which was open and bought bread and cheese (R. 717-18). When Glenn arrived at his father's apartment, he noted that the front door was unlocked and after he entered the apartment, he saw his father lying on the living room floor and found Ms. Savino on the bed in the bedroom (R. 718-720).

Glenn Parisi then used the kitchen telephone to call his friend Xavier, the police, and his mother (R. 720). Glenn explained that he called his closest friend first because he was in shock (R. 735). While he was on the telephone speaking to his mother, the police arrived (R. 721). At first, Glenn thought the killer was at the door so he asked them to show themselves through the peephole (R. 722). As Detective Michael Fiston testified, the officers did not comply with Glenn's request for safety reasons (R. 746). When the men would not comply with his request, Glenn went onto the apartment balcony and saw that the men were police officers and that they had their guns drawn (R. 722-23, 750). Glenn immediately froze and explained that his father and his father's girlfriend were dead (R. 747).

As Glenn Parisi further testified, he knew that his father dealt in drugs and was a drug user and heavy drinker (R. 728, 730, 733). He knew that his father kept drugs in a drawer in the bedroom nightstand and that this drawer was missing when he discovered the victims (R. 734, 738). Glenn also testified that there was no indication of a break-in and that over sixteen hundred dollars ($1,600) was in his father's wallet after the murder (R. 739).

Detective Michael Fiston and his partner, Sammy Israel, responded to the Parisi apartment after receiving a call at approximately 2:00 a.m. on June 27, 1982 (R. 745). Officer Fiston testified that when he went into the apartment, he discovered the dead victims and noted that the victims had sustained head wounds (R. 747). The apartment was searched, secured and the homicide unit was notified (R. 748).

Sergeant Thomas Ross, a crime scene technician, subsequently arrived on the scene to document, gather and record evidence (R. 766-69). Sergeant Ross testified that there was no evidence of forcible entry or ransacking (R. 788-89). He noted that two bullets were found in the living room rug near the vicinity of Joseph Parisi's head (R. 793-95). Also, two bullet holes were in a pillow found on the lower portion of Mr. Parisi's body (R. 801). A chair cushion was also discovered next to Mr. Parisi with a bullet hole in it (R. 818-19). Sergeant Ross testified that powder burns

were found on the pillow which were consistent with it being used as a muffling device (R. 828-29).

In addition, a bullet was found in the pillow that was underneath Ms. Savino's head and a second bullet was retrieved from her brain (R. 826, 882). A bullet hole was also discovered in another pillow on the bed near Ms. Savino (R. 802). Sergeant Ross testified that the firearm used to effectuate the murders was probably a .38 or a .357 (R. 822, 826).

Sergeant Ross also lifted fingerprints from the telephone receiver in the bedroom (R. 807-809, 831-32). He noted that while some fingerprints may last a while, he would not expect fingerprints to last on a telephone receiver because new prints would destroy the prior prints every time the phone was picked up (R. 831).

Bernard Brewer, a latent fingerprint expert for the Metro Dade Police Department, testified at trial that a latent print lifted from the telephone receiver in the bedroom of Mr. Parisi's apartment was made by the Appellant's left index finger (R. 1028, 1037). Mr. Brewer stated positively that this particular print was made by the Appellant (R. 1037). He also explained that hard, smooth surfaces are more conducive to latent fingerprints than rough surfaces, but that he would not expect latent fingerprints to

last very long on the surface of a telephone receiver since other people picking up the phone would destroy the print that was there (R. 1042-43).

Dr. Valerie Rao, an Associate Medical Examiner for Dade County, observed the victims' bodies at the scene at approximately 5:15 a.m. on June 27, 1982 and later performed autopsies on the bodies at her office (R. 858-60, 861-62). Mr. Parisi's body was observed lying face down in a pool of blood in the living room (R. 860). Dr. Rao noted that Mr. Parisi had sustained two gunshot wounds to his head and that a pillow next to the victim had a through and through hole (R. 861).

Dr. Rao also testified that Mr. Parisi had bruises on his right knee and on the right side of his neck (R. 864-65). One entrance wound was noted at Mr. Parisi's right temple, with foam fragments similar to the foam found in the pillow next to his body (R. 865). Dr. Rao's findings were consistent with a pillow being placed between the murder weapon and this entrance wound (R. 866). The exit wound was in Mr. Parisi's left eyebrow region (R. 866). A second entrance wound was found in the right rear portion of Mr. Parisi's head and the exit wound was located in the left temple area (R. 873-74). In addition, a graze wound was found on Mr. Parisi's third finger of his left hand (R. 874). Dr. Rao testified that this wound would be consistent with Mr. Parisi

having his hand placed up against his head at the time of the shooting (R. 875).

Dr. Rao concluded that Mr. Parisi died from perforating gunshot wounds to his head which caused multiple fractures, brain laceration, subarachnoid homorrhage and the complete collapse of his right eyeball (R. 878-79). She also testified that the bruises on Mr. Parisi's neck are consistent with a large person, the size of the Appellant, grabbing the victim by the neck and pushing him down to the ground on his knees (R. 903). Dr. Rao also noted that Mr. Parisi's lungs showed aspirated blood which would be consistent with blood being mixed in his breathing to produce a gurgling sound before death (R. 903-904).

Regarding Ms. Savino, Dr. Rao noted that the victim sustained two gunshot wounds to her head (R. 881). One bullet entered the nape of her neck and exited in front of her right ear lobe (R. 881). The other bullet entered through her left ear, did not exit, and was recovered along with its copper jacket from her brain (R. 882). Dr. Rao did not find any strippling (burned and unburned particles of gunpowder which would be embedded in the skin from gunfire) on the body of Ms. Savino which would be consistent with an object, such as a pillow, being placed between Ms. Savino's body and the gun (R. 883-84). Dr. Rao concluded that Ms.

Savino's death was caused by the gunshot wound to her head, but that she did not die instantaneously (R. 888, 900-901).

A criminalist expert in firearms, Robert Hart, testified at trial that he performed microscopic analyses of the four bullets retrieved from the murder scene in this case and concluded that the bullets were all fired from the same gun, either a .38 Special or .357 Magnum (R. 1011, 1013-15, 1023-27). Although one of the four bullets was in two parts, a copper jacket and a lead core portion which could not be identifiable to a particular gun, the copper jacket portion could be identified as being fired from the same gun as the other bullets. (R. 1024). In response to a hypothetical question posed to him at trial, Mr. Brewer stated that if the two-part bullet had been retrieved from one particular entrance wound to a victim's head, without there being a corresponding exit wound, his findings would be consistent with both bullet parts coming from the same gun (R. 1027).

Angela Heller, a staff manager and records custodian for Southern Bell testified that telephone records show that a collect call was made at 9:39 p.m. on June 26, 1982 from a payphone located at a Food Spot at 14801 West Dixie Highway in North Dade County, Florida (R. 835, 837). Mr. Parisi's apartment, where the murders occurred, was located at 14850 West Dixie Highway, North Dade County, Florida (R. 745). The telephone call was made to the residence of John Gdowick in

Hollywood, Florida where the Defendant's sister, Mary Arth, lived (R. 844). The phone call lasted three minutes (R. 836).

Patricia Savino's sister, Debra Smith, also testified at the trial herein (R. 839). She noted that Joseph Parisi's nickname was "Miami Joe" and that he was her sister's boyfriend at the time of the murders (R. 839-40). Ms. Smith testified that either the morning she found out from the police that her sister had been murdered or the next morning she wanted to talk to someone, so she went to see her friend, Mary Arth, who lived in a house owned by a Dr. Gdowick (R. 844, 853).

Ms. Smith knew Mary Arth and her brother, the Appellant, for approximately a year before the murders (R. 840-41). When Ms. Smith arrived at Mary's residence, the Appellant was there (R. 844). When Ms. Smith told Mary and the Appellant about her sister's murder, the Appellant got very nervous, was very upset and began to cry (R. 845) Ms. Smith also noted that the Appellant and her sister did not have a particularly close relationship and that the Appellant said things that made her think that he knew more about the murder (R. 845, 847, 854). Ms. Smith admitted that she knew that her sister had a drug problem and that she herself was under the influence of narcotics when she visited Mary Arth and the Appellant on the morning in question (R. 848, 850).

Wanda Davis, a friend of Mary Arth's and the Appellant's, testified at trial (R. 921). She indicated at trial that due to their friendship, she did not want to testify against the Appellant or get involved in this case, but was doing so because the police came to her (R. 921). Ms. Davis stated that she had known the Appellant for approximately three years prior to the murders (R. 906).

On the morning of June 27, 1982, at approximately 7:00 a.m., Ms. Davis was awakened by a phone call from Mary Arth (R. 907, 919). At Mary's request, Ms. Davis went to Mary's residence that morning (R. 907). Ms. Davis explained that the Appellant was also at Mary's when she arrived and that the three of them were in the kitchen of the house when a discussion was had about the instant murders (R. 908-909, 929).

Ms. Davis testified that Mary told her that her brother, the Appellant, had killed "Miami Joe" and Patricia Savino (R. 909). Mary also told Ms. Davis that when the Appellant came home on the night of the murders, he had blood on his shirt and his sneakers (R. 914). The Appellant admitted to Ms. Davis that he felt bad about killing Ms. Savino, but that he didn't want Ms. Savino as a witness (R. 915). The Appellant told Ms. Davis that Mr. Parisi was murdered in the living room and that Ms. Savino was murdered in the bedroom of the Parisi apartment (R. 915). The Appellant told Ms. Davis

something about an argument he had at the Parisi apartment with Mr. Parisi earlier in the evening (R. 916). The Appellant also said that he shot the victims in the head (R. 917). The Appellant told Ms. Davis that he shot Mr. Parisi more than once because he was gurgling blood, so he shot him again to make sure he was dead (R. 916). The Appellant told Ms. Davis that he then went into the bedroom, saw Ms. Savino who was holding out her hand and said to himself "Oh, f _ _ _", now I have to kill her" (R. 916). The Appellant told Ms. Savino to roll over and he put a pillow over her head and shot her (R. 916). The Appellant also stated that he took six Dilaudid pills from the nightstand drawer (R. 917).

Ms. Davis testified that the Appellant did not seem to be under the influence of drugs or alcohol when he told her about the murders that morning (R. 920). The Appellant did, however, seem scared and upset (R. 918, 932). Although she admitted that she used Dilaudids at the time, Ms. Davis stated that she was not on drugs that morning (R. 919). Ms. Davis stayed at Mary's residence that morning for approximately forty-five (45) minutes (R. 918). She was then asked if she would take the Appellant out of the house, so she took him to the beach and they spent the day there (R. 918). Ms. Davis said that she was shocked by what she heard from Mary and the Appellant and was scared for them (R. 943).

Ms. Davis did not think that Mary and the Appellant were lying (R. 943).

Kathy Eckersall also testified at the Appellant's trial (R. 948). She stated that, at the time of the murders, she was living in California (R. 949). A couple of days after the murders, she came to Miami where she previously had resided to pick up her car and to drive it back West. (R. 951). Ms. Eckersall had known the Appellant for about a year and a half prior to the murders (R. 950).

While visiting in Miami, Ms. Eckersall was staying at a friend's house (R. 952). The Appellant got in touch with Ms. Eckersall during her stay in Miami and they went to Mary Arth's residence together (R. 952). During the car ride to Mary's, the Appellant blurted out that he had just killed "Miami Joe" and Patty Savino (R. 953).

The Appellant told Ms. Eckersall that he and an individual named Shelli had bought some bad drugs from "Miami Joe" and that he and Shelli agreed that they were going to get revenge by killing "Miami Joe" (R. 955, 958, 966). The Appellant had gone to "Miami Joe's" apartment earlier in the evening of the murders, but because "Miami Joe's" son was there, he left (R. 957). While the Appellant went up to "Miami Joe's" apartment, Shelli waited outside (R. 957). Once "Miami Joe's" son left, the Appellant and Shelli went

back up to the apartment (R. 957). They knocked on the door and entered the apartment, pushed "Miami Joe" down and, according to the Appellant, Shelli shot "Miami Joe" (R. 958). The Appellant, however, admitted that he went to the bedroom in the apartment and was startled to find Patty Savino (R. 954, 958). The Appellant then got the gun from Shelli, told Patty to roll over and shot her in the bed because he didn't want to leave a witness (R. 958-59).

During part of her visit in Miami, Ms. Eckersall stayed with Mary Arth for two weeks and was intimate with the Appellant during that time (R. 961, 978). During those two weeks, Ms. Eckersall noted that the Appellant was awfully skinny, used drugs frequently and, at times, appeared to be desperate for drugs (R. 972, 977). She knew that the Appellant was using Dilaudids at the time (R. 966). Ms. Eckersall did not go to the police right away because she did not believe the Appellant, however, she stated at trial that she now believes what the Appellant told her (R. 979). She stated that, in fact, the police had to seek her out and that she really didn't want to testify in this case (R. 974, 979).

Debra Detig, a friend of the Appellant's and his sister, also testified in this case (R. 981, 984, 993). Ms. Detig was another individual to whom the Appellant confessed regarding his participation in the murders of Joseph Parisi and Patricia Savino (R. 983-84). Ms. Detig testified that

she had known the Appellant since August of 1981 and that she saw him frequently (R. 981). On an evening in the fall of 1982, Ms. Detig and the Appellant went to several bars together (R. 981, 997). That night, the Appellant told Ms. Detig that he killed Joe Parisi and Patty Savino (R. 983).

The Appellant told Ms. Detig that he had gone to Joe's apartment, but left because Joe's son was there (R. 983). The Appellant then went to a convenience store across the street (R. 983). When Joe's son left the apartment, the Appellant returned, and shot Joe after telling him to kneel (R. 983). The Appellant used a pillow to muffle the gunshot sounds (R. 983). The Appellant then shot Joe Parisi a second time since he was not dead from the first shot (R. 983). Patty Savino came out from the bedroom and the Appellant said that he told her to go back into the bedroom and lay down (R. 983). The Appellant then shot Patty Savino because, as he told Ms. Detig, she would have been a witness to what happened to Joe Parisi (R. 984).

The Appellant thought that his sister had already told Ms. Detig about the murders since the two women were good friends (R. 984). However, when Ms. Detig told the Appellant that she had not already heard about the homicides from his sister, the Appellant said that he guessed he'd have to be her friend forever (R. 984). Ms. Detig did not go to the police with this information because she was scared and did

not want to get involved (R. 984-85). Ms. Detig also noted that after this particular conversation with the Appellant, they became intimate and have remained good friends (R. 997).

The lead investigator in this case, Detective Greg Smith, also testified at trial (R. 1046). He arrived on the crime scene at approximately 4:30 a.m. on June 27, 1982 (R. 1046). The victims' bodies were found in the living room and bedroom of the apartment consistent with the testimony offered by the other police officers and witnesses in this case (R. 1049).

On the morning or afternoon following the homicides, Detective Smith advised Ms. Savino's next of kin of her murder (R. 1049). However, in order to preserve the integrity of his investigation, he did not advise Ms. Savino or the media of certain details of the crimes (R. 1049-52). Detective Smith did not divulge information pertaining to the number of times each victim was shot or where the wounds were found on the victims' bodies (R. 1051). He also specifically told the media that both bodies were fully clothed when, in actuality, Mr. Parisi was in a bathrobe and Ms. Savino was only wearing panties (R. 860-62, 1051).

As part of his investigation of this case, Detective Smith submitted the fingerprints of the victim's known associates for comparison value with the latents taken from

the murder scene (R. 1052-53). However, the only suspect's prints found on the scene were those belonging to the Appellant (R. 1055). Detective Smith also conducted a canvas of the apartment complex where the homicides occurred and interviewed Karen Cashion relative to this investigation (R. 1071). He received the name of Tom Meeks as a possible suspect, but after the Cashion interview and his investigation was complete, Detective Smith concluded that Mr. Meeks was not a suspect since there was nothing to indicate his involvement (R. 1090-91). Detective Smith also interviewed Wanda Davis, Debra Detig and Kathy Eckersall (R. 1053, 1056-57). He did not locate Ms. Detig or Ms. Davis until late 1984, over two years after the homicides (R. 1056). He located Ms. Eckersall in California in 1985 (R. 1057). Detective Smith noted that Ms. Eckersall was afraid that she would be prosecuted for this crime for not coming forward with information earlier and requested immunity before she gave any statements (R. 1087).

On January 26, 1985, Detective Smith, along with Detective Le Claire located and interviewed the Appellant at the Pompano Detention Center (R. 1058, 1456). Detective Smith explained to the Appellant that he was investigating a homicide and the Appellant agreed to talk to the officers, was read Miranda rights and signed a constitutional rights wavier form (R. 1059-1063). The Appellant stated that he had been to Mr. Parisi's apartment on the night in question to

buy Dilaudids as he had done in the past (R 1064-65). However, he stated that he didn't have enough money to make the deal so he said he would return (R. 1065). The Appellant saw Mr. Parisi's son in the apartment during this visit (R. 1065). The Appellant claimed that he had never been beyond the front door area of the apartment, had never been in the bedroom or used the telephone there (R. 1068, 1079-80). [1]

In support of the Appellant's case, criminalist George Borghi was called as a witness (R. 1104). A forensic serologist, Mr. Borghi analyzed bloodstains, nail scrapings and blood samples relative to this case (R. 1105). He testified that Ms. Savino's blood group was Type A and that traces of Type A blood were found on some toilet tissue and toothpaste found in the bathroom of the apartment and in the nail scrapings from Mr. Parisi's left hand (R. 1106-1107, 1110). Mr. Borghi also indicated his familiarity with the manner in which drugs are injected and noted that blood sometimes gets mixed into the syringe (R. 1109). He noted that blood splatter found in the bathroom of the apartment would be consistent with the cleaning of a syringe (R.

[1]During a hearing on the Appellant's motion to suppress statements held on March 21, 1986, Detective Smith testified that during his interview of the Appellant at the Pompano Detention Center, he had a warrant for the Appellant's arrest, however, he had no authority to serve it in Broward County (R. 1456, 1505). When the Appellant invoked his right to counsel during the interview, questioning ceased (R. 1476). Detective Le Claire testified at the hearing that at some point during the interview, the Appellant was advised that he may have been involved in the homicides (R. 1549).

1110). He also stated that the possibility that Mr. Parisi had injected Ms. Savino on the evening of the murders, thereby getting some blood on his fingers, would be consistent with his findings (R. 1110). Mr. Parisi's blood group was analyzed and determined to be Type O, as was the Appellant's (R. 1106-1107). No blood was found under Ms. Savino's fingernails (R. 1107).

Finally, the Appellant testified in his behalf at trial (R. 1113-1166). He stated that he was a licensed journeyman plumber and that he had served in the military between May, 1967 and April, 1969 (R. 1113-14). He served in Viet Nam for nine months (R. 1114). After his honorable discharge from the military, he resumed plumbing work in Cleveland, Ohio and got married (R. 1115-17). He was married for six and a half years and has two teenaged sons (R. 1117).

In 1970, the Appellant began to travel to various states for job purposes (R. 1118). In 1981, the Appellant began living with his sister, Mary, in Florida (R. 1120). Mary, and all of her friends used drugs (R. 1121).

The Appellant testified that he was present during the homicides herein, but that a man named Shelli Townsend shot both of the victims (R. 1129-34). The Appellant claimed that he went to Joe Parisi's apartment alone on the night in question to buy drugs (R. 1127, 1141). Mr. Parisi offered to

sell the Appellant more drugs at a lower price, so he said he would get more money and return (R. 1127, 1141). The Appellant saw Mr. Parisi's son during this visit (R. 1128, 1141). The Appellant then made a phone call to his sister from a store across the street from Mr. Parisi's apartment complex (R. 1128, 1141-42). Shelli Townsend was at his sister's residence at that time (R. 1129) The Appellant allegedly got the money and returned to Mr. Parisi's apartment with Shelli (R. 1129). Mr. Parisi let the Appellant into the apartment, but upon seeing Shelli remarked "what the hell is he doing here?" (R. 1131).

Thereafter, the Appellant claims that "all hell broke loose" and Shelli shot Mr. Parisi who fell onto the Appellant's feet (R. 1131, 1156). The Appellant admitted that he did not run out of the apartment at that time, but rather, ran down the hall to the back of the apartment and saw Ms. Savino who called out his name (R. 1132, 1157). The Appellant stated that Shelli shot Patty and that Shelli shot Mr. Parisi a second time on their way out of the apartment since he was still breathing and gurgling blood (R. 1132-33, 1152). The Appellant also acknowledged that pillows were put to the heads of the victim's before they were shot (R. 1152).

At trial, the Appellant claimed that he lied about the versions of the incident that he told to Ms. Davis, Ms. Detig, Ms. Eckersall and Detective Smith (R. 1127, 1134,

1142-45). He stated that he told people about his involvement in the murders because he was afraid of Shelli (R. 1134-36, 1142-43, 1147-50, 1155, 1162-64). The Appellant, however, testified that he has previously been convicted for uttering forged prescriptions for Dilaudid and that he had his sister lie to protect him in this case regarding his whereabouts because he knew of an outstanding warrant for his arrest in Ohio for the violation of his probation (R. 1137-38, 1158-60). The Appellant testified that he still socialized with Shelli after this incident (R. 1164). The Appellant also testified that he felt bad about killing Ms. Savino, but was indifferent about Mr. Parisi's death (R. 1145-46). He admitted that Mr. Parisi and Ms. Savino were totally innocent victims (R. 1147).

During the penalty phase of the trial, testimony was offered by clinical psychologist Dr. Michael Rappaport (R. 1328-1363). Dr. Rappaport saw the Appellant on two occasions and stated that, based upon his "best guess", the Appellant suffers from Post-Traumatic Stress Disorder (R. 1349, 1351). However, Dr. Rappaport could not say that the Appellant suffered from this disorder in June of 1982 (R. 1338). Dr. Rappaport noted that the instant murders occurred thirteen (13) years after the Appellant's release from the Army and that the version of the murder of Ms. Savino that the Appellant told to Ms. Davis, and other witnesses, would <u>not</u> be consistent with a killer suffering from Post-

Traumatic Stress Syndrome (R. 1357). The Appellant told Dr. Rappaport that he had told Mr. Parisi not to sell drugs to his sister and that only two people, the Appellant and Mr. Parisi, were present when the latter was shot (R. 1362-63).

Dr. Merry Haber another clinical psychologist, testified in the penalty phase of this trial (R. 1366-77). She concluded that it was her provisional diagnosis that the Appellant had Post-Traumatic Stress Syndrome, but that she would like to do more testing on him (R. 1377).

ISSUES PRESENTED FOR REVIEW

I

WHETHER THE TRIAL COURT ERRED IN PERMITTING A DEATH QUALIFIED JURY TO BE SEATED BY PERMITTING CHALLENGE FOR CAUSE BY THE APPELLEE AGAINST JURY PANEL MEMBERS WHO COULD NOT OR POSSIBLY MIGHT NOT BE ABLE TO IMPOSE THE DEATH PENALTY?

II

WHETHER THE TRIAL COURT PALPABLY ABUSED HIS DISCRETION IN CONCLUDING THAT THE ADVISORY JURY'S RECOMMENDATION OF LIFE WAS BASED UPON "SOME MATTER NOT REASONABLY RELATED TO A VALID GROUND OF MITIGATION WHICH, IN THIS COURT'S OPINION, HAS SWAYED THE JURY TO RECOMMEND LIFE"?

III

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE AGGRAVATING CIRCUMSTANCES WERE SO CLEAR AND CONVINCING THAT VIRTUALLY NO PERSON COULD DIFFER?

IV

WHETHER THE TRIAL COURT ERRED IN NOT SUPPRESSING APPELLANT'S STATEMENT THAT HE NEVER ENTERED "MIAMI JOE'S" BEDROOM?

SUMMARY OF THE ARGUMENT

In view of current federal and state caselaw, the trial court did not err in permitting a death qualified jury to be seated in this case.

Further, the trial court below did not err in concluding that the advisory jury's recommendation of life was not reasonably related to any valid ground of mitigation. In this case, there were no reasonable bases to support any mitigating circumstances and the aggravating circumstances were so clear and convincing that no reasonable persons could differ.

The death penalty is the appropriate sanction in this case where several aggravating circumstances are supported by the record and no mitigating factors exsist. The facts herein established beyond a reasonable doubt that: the murder of Patricia Savino was committed in a cold, calculated, and premeditated manner while the Appellant was engaged in an armed burglary; the felony was committed for the purpose of avoiding arrest; and, the Appellant stood convicted of the crime of Second Degree Murder of Joseph Parisi.

Finally, the trial court's findings relative to the Appellant's statements to police officers regarding his

presence in "Miami Joe's" bedroom established that said statements were not obtained in violation of the Appellant's Miranda rights.

ARGUMENT

I

THE TRIAL COURT DID NOT ERR IN PERMITTING A DEATH QUALIFIED JURY TO BE SEATED BY PRECLUDING CHALLENGE FOR CAUSE BY THE APPELLEE AGAINST JURY PANEL MEMBERS WHO COULD NOT OR POSSIBLY MIGHT NOT BE ABLE TO IMPOSE THE DEATH PENALTY IN VIEW OF CURRENT FEDERAL AND STATE CASELAW.

In Lockhart v. McCree, 476 U.S. ____, 90 L.Ed.2d 137, 106 S.Ct. 1758 (1986), the United States Supreme Court recently held that the United States Constitution does not prohibit the removal for cause of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performances of their duties as jurors. In so holding, the Supreme Court expanded the law regarding the death qualification of jurors which had previously been addressed in Witherspoon v. Illinois, 391 U.S. 510 (1968) [1] and its progeny. In Lockhart, 476 U.S. at ____, 90 L.Ed.2d at 147, the Supreme Court specifically determined that the death qualification of a jury does not violate the fair cross-section requirement of the Sixth Amendment nor the constitutional right to an impartial jury. Thus, the Appellant's argument that the trial court

[1] In Witherspoon, the United States Supreme Court held that prospective jurors could be excluded from the jury panel who could not under any circumstances vote for the imposition of the death penalty. See also Dougan v. State, 470 So.2d 697 (Fla. 1985), cert. denied, ___ U.S. ___, 106 S.Ct. 1499 (1986).

erred in permitting a death qualified jury to be seated in this case is without merit.

II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT THE ADVISORY JURY'S RECOMMENDATION OF LIFE WAS BASED UPON SOME MATTERS NOT REASONABLY RELATED TO VALID GROUNDS OF MITIGATION WHERE THE EVIDENCE WAS SO CLEAR AND CONVINCING THAT REASONABLE PERSONS COULD NOT DIFFER IN THE ASSESSMENT OF THE DEATH PENALTY.

In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a death sentence should be so clear and convincing that virtually no reasonable person could differ. Gorham v. State, 454 So.2d 556 (Fla. 1984); Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). As provided in Section 921.141(3), Florida Statutes:

> Nothwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:
>
> (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
>
> (b) That there is insufficient mitigating circumstances to outweigh the aggravating circumstances.

In the instant case, the trial court overruled the jury's recommendation based upon four aggravating circumstances, which were proved beyond and to the exclusion of every reasonable doubt (See Argument III, ante), and upon the absence of mitigating circumstances (R. 357-59).

The Appellant, however, submits that the jurors based their recommendation upon the statutory mitigating circumstances set forth in Section 921.141 (6)(b) and (d). However, an examination of the record reveals that there is no reasonable basis to support the jury's recommendation as it would relate to either of these mitigating factors.

The mitigating circumstance set forth in Section 921.141 (6)(b) is that the felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. However, the trial court specifically rejected this mitigating circumstance noting that, despite the psychologists' reports indicating the Appellant's emotional or mental disturbance, there was no evidence that would indicate a reduction of the Defendant's criminal capacity. In fact, the trial court concluded that:

> the victim, Patricia Savino, recognizing the defendant, and, his instantaneous judgment that he had to kill her, plus the cold, calculated manner in which he effectuated the killing, using a pillow to muffle the sound so that

> it would not be heard and further requiring her to roll over so that he could shoot her in the temple and in the side of the head, clearly indicates to this Court that he had possession of his faculties to effectuate his criminality and that he was not under an extreme emotional or mental circumstance that would ameliorate the enormity of his guilt. Mitigating circumstances must in some way ameliorate the enormity of the defendant's guilt, therefore, the evidence offered by the defendant as to his reduced mental capacity and his emotional instability and his ability to take responsibilities for his acts are just not supported by the record. See Eutzey v. State, 458 So.2d 755 (Fla. 1984). There is just no evidence in this case that would ameliorate the killing of a lady in her bed, in her bedroom, that would indicate a reduction of criminal capacity.

(R 357). Moreover, there could be no reasonable support for this mitigating circumstance in view of the admitted inconclusive nature of the findings of Dr. Rappaport and Dr. Haber (R. 1338, 1349, 1351, 1357, 1377). Thus, it would appear that the jury's life recommendation may have been improperly based upon sympathy and emotion generated by the testimony relative to the Appellant's honorable military service in Vietnam where he was wounded in action in a heavy combat zone, and defense counsel's unsupported appeal that the Defendant was a good father and provider (R. 1114-15, 1413, 1417). See Francis v. State, 473 So.2d 672, 676 (Fla. 1985); Thomas v. State, 456 So.2d 454, 460 (Fla. 1984).

The Appellant further suggests that the mitigating circumstance set forth in Section 921.141 (6)(d)(ie that the Appellant was an accomplice in a capital felony commited by another person and that his participation was relatively minor) is applicable in this case. In addressing this mitigating circumstance, the trial court concluded that:

> [t]here is absolutely no evidence in this record to support anything other than the statements of the defendant, made both to witnesses and to his psychologists, (introduced only during the penalty phase), that would indicate that there was anyone present at the time of the capital felony other than the defendant.

(R. 358) Contrary to the Appellant's assertion, the trial court did consider the Appellant's statements at trial, but given that the Defendant was an admitted liar in prior criminal actions and in this case (R. 1127, 1134, 1137-38, 1142-45, 1158-60) and that other witneses with no reason to lie, testified consistently to the same horrible details regarding Ms. Savino's murder as told to them by the Appellant prior to his being apprehended (R. 916-17, 958-59, 983-84), the trial court refused to give the Appellant's self serving testimony before the jury any credence. Therefore, it would have been totally unreasonable for the jury to have based its recommendation of a life sentence on this mitigating circumstance and the trial judge was justified in

overriding the jury's recommendation See Stevens v. State, 419 So.2d 1058 (Fla. 1982), cert. denied, 459 U.S. 1228 (1983); Hoy v. State, 353 So.2d 826 (Fla. 1977), cert.denied, 439 U.S. 920 (1978).

III

THE TRIAL COURT PROPERLY CONCLUDED THAT NO MITIGATING CIRCUMSTANCES WERE FOUND TO BALANCE AGAINST THE AGGRAVATING CIRCUMSTANCES HEREIN WHICH WERE SO CLEAR AND CONVINCING THAT VIRTUALLY NO REASONABLE PERSON COULD DIFFER.

It is well established that when aggravating circumstances are supported by the record and the jurors' recommendation is not based on a valid mitigating factor (statutory or non-statutory) which can be supported by the record, the trial judge has the authority to overrule the jury's recommendation and sentence a defendant to death. Brown v. State, 473 So.2d 1260 (Fla. 1985); McCrae v. State, 395 So.2d 1145 (Fla. 1980), cert. denied, 454 U.S. 1041 (1981); Porter v. State, 429 So.2d 293 (Fla.), cert. denied, 464 U.S. 865 (1983); Bolender v. State, 422 So.2d 833 (Fla. 1982), cert. denied, 461 U.S. 939 (1983); Miller v. State, 415 So.2d 1262 (Fla. 1983), cert. denied, 459 U.S. 1158 (1983). Moreover, when one or more aggravating circumstances are found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in Section 921.141 (6), Florida Statutes. Parker v. State, 458 So.2d 750 (Fla. 1984); Groover v. State, 458 So.23d 226 (Fla. 1984); Middleton v. State, 426 So.2d 548 (Fla. 1982); State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). In the

case sub judice, there were no mitigating circumstances supported by the record (See Argument II, supra). However, there were four aggravating circumstances that were proved beyond a reasonable doubt.

The following aggravating circumstances were set forth by the trial court below:

> 1. The murder was committed in a cold, calculated premeditated manner without pretense of a moral or legal justification. 921.141 (5)(i).
>
> 2. The capital felony was committed while the defendant was engaged in an armed burglary. 921.141 (5)(e).
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> 3. That the felony was committed for the purpose of avoiding or preventing a lawful arrest. 921.141 (5)(e).
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> 4. The defendant stood convicted of the crime of Second Degree Murder in the death of Joseph Parisi and, therefore, had previously been convicted of a felony involving the use or threat of violence to a person. 921.141 (5)(b). See also: Brown v. State, 473 So.2d 1260 (Fla. 1985).

(R. 357).

Regarding, the first aggravating circumstance, the thoughtful execution-style murder of Ms. Savino to eliminate her as a witness clearly indicated that it was committed in a

cold, calculated, and premeditated manner (R. 356-57, 916, 958-59, 983-84). See Eutzy v. State, 458 So.2d 755, 757-58 (Fla. 1984); McCray v. State, 416 So.2d 804 (1982). With respect to the second stated circumstance, that the capital felony was committed while the Appellant was engaged in an armed robbery, the evidence, though primarily circumstantial, is inconsistent with any reasonable hypothesis that would negate this factor. See Eutzey, supra, at 758. All of the credible testimony in this case indicates that the Appellant, if not entering the Parisi apartment with the intent to commit an offense therein, certainly remained in the Parisi apartment with such intent when he shot Ms. Savino in cold blood and stole the drugs in the nightstand drawer (R. 916-17, 958-59, 984). Section 810.02, Florida Statutes (1982).

As regards the circumstance that a felony was committed for the purpose of avoiding or preventing arrest, not only do the facts show that Ms. Savino knew her assailant, but the facts also show that the Appellant told others that he committed the murder specifically to eliminate Ms. Savino as a witness (R. 916, 958-59, 984). Cf. Caruthers v. State, 465 So.2d 496, 499 (Fla. 1985).

Finally, the Appellant conceed that his conviction for the Second Degree Murder of Joseph Paris is a valid aggravating circumstance, but his argument that he suffered from Post-Traumatic Stress Disorder does not qualify as a

mitigating circumstance as previously addressed in Argument II, supra.

The evidence in this case, consisting of a series of credible and interlocking evidentiary consistencies as well as the physical evidence of the Defendant's fingerprints at the murder scene, leads to the inescapable conclusion that the facts were so clear and convincing that no reasonable person could differ. Tedder supra. Thus, the death penalty was the appropriate sanction imposed in this case.

IV

THE TRIAL COURT DID NOT ERR IN DENYING THE APPELLANT'S MOTION TO SUPPRESS STATEMENTS THAT HE NEVER ENTERED "MIAMI JOE'S " BEDROOM.

The law is well settled that a trial court's ruling on a motion to suppress comes to the reviewing court with a presumption of correctness, and in testing the accuracy of the trial court's conclusion, the reviewing court should interpret the evidence and all reasonable inferences and deductions derived therefrom in a light most favorable to sustain the trial court's conclusions. McNamara v. State, 357 So.2d 410, 412 (Fla. 1978); Wigfall v. State, 323 So.2d 587, 589 (Fla. 3d DCA 1976); Ponder v. State, 323 So.2d 296, 297 (Fla. 3d DCA 1975). Further, the reviewing court is not at liberty to substitute its views of the credibility or weight of conflicting evidence for that of the trial judge and his ruling should not lightly be set aside. Stone v. State, 378 So.2d 765, 769-70 (Fla. 1979), cert. denied, 449 U.S. 986 (1980); State v. Nova, 361 So.2d 411 (Fla. 1978).

In the instant case, the trial court concluded that a valid Miranda warning was given to the Defendant prior to his statements to Detectives Smith and Le Claire (SR. 65). The trial court also concluded that the Appellant

> validly and knowledgable gave forth with that statement and the withholding of the knowledge of the existence of the warrant is not dispositive of this matter as a valid warning was given prior to the knowledge of this and the defendant [was] in fact told he was a suspect.

(SR. 66).

Thus, given these factual findings, the questioning of the Appellant was not violative of the principles set forth in Miranda v. Arizona, 384 U.S. 436 (1966).

CONCLUSION

Based upon the foregoing facts, authorities and reasons, the State of Florida urges this Honorable Court to affirm the judgment and sentence in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by mail to **HAROLD MENDELOW, ESQ.**, Special Assistant Public Defender, 2020 N.E. 163rd Street, Suite 300, North Miami Beach, Florida 33162 on this 2nd day of January, 1987.

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