served 1 day late

IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,814

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

Defendant/Appellant,

vs.

THE STATE OF FLORIDA,

Plaintiff/Appellee.

* *

AN APPEAL IN CASE NO. 85-2310 IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNT

* *

APPELLANT'S INITIAL BRIEF

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INTRODUCTION

In this brief the parties shall be referred to as they appear before the Court. All references to the Record on Appeal shall be referred to by the symbol "R". The Supplemental Record of the hearing on March 24, 1986 will be referred to as it exists in the Record. All emphasis has been supplied.

STATEMENT OF THE CASE

The Appellant was indicted by the 1984 Fall Term Grand Jury for two (2) counts of First Degree Murder and one count of Armed Burglary. The two (2) First Degree Murder charges were based upon premeditated design and/or felony murder of Joseph Parisi and Patricia Savino respectively (R 1-20). The murders and the burglary were alleged to have occurred between June 25 and June 28, 1982 (R 1-20).

An affidavit of probable cause for Appellant's arrest warrant was filed January 25, 1985 (R 1b-23). A Motion to Seal the Arrest Warrant was filed January 28, 1985 and granted by the trial court the same day for a period of two (2) weeks (R 24-26).

Numerous motions were filed by the Appellant, including but not limited to, several motions to declare SS 921.141 Fla. Stat. unconstitutional, Motion to Appoint Psychiatrists, a Motion to Suppress Statements, and an Amended Motion to Suppress Statements. (R 84-86, 87-88, 89-90, 93-94; 129-130, 131, 198-199; 150-160, 196-197).

The Appellant filed a Motion to Withdraw the previously filed moiton to rely upon the defense of insanity (R 216-218).

A Motion to Suppress Appellant's statements to police officers was heard on March 21 and March 24, 1986 and was denied on March 24, 1986 (R 1447-1559; Supplemental Record P. 74).

A jury trial resulted in the following verdicts:

Count One: Guilty as to First Degree Murder with a

firearm.

Count Two: Guilty as to First Degree Murder as charged.

Count Three: Guilty as to Burglary with a firearm (R 336-338).

The Appellant was adjudicated guilty as to Counts One (1) and Three (3) (R 339). He was sentenced as to Count One to a term of one hundred and thirty four (134) years with a three (3) year minimum sentence. As to Count Three (3), the Appellant was sentenced to one hundred and thirty four (134) years to be served consecutive to Count One (R 341-344).

A motion for a new trial was made (R 346-350).

The trial court entered a judgment of guilt to First Degree Murder with a firearm (R 351-352) and sentenced the Appellant to death by electrocution dispite the jury's recommendation to the trial court of life imprisonment with a minimum sentence of twenty five (25) years (R 351-360, 1424). This appeal follows.

STATEMENT OF THE FACTS

At the motion to suppress hearing the Appellant, confirmed to the trial court, that despite contrary advice from trial counsel, that Appellant would proceed to trial without invoking the insanity defense (R 1456).

Gregory Smith, homocide detective with the Metro Dade Police Department was the lead investigator in the instant cause (R 1458). On January 26, 1985, one day after he received an arrest warrant for Appellant's arrest, he and John LeClaire, his partner went to the Pompano Detention Center to visit Appellant (R 1458). They went there as part of the investigation into the deaths of Particia Savino and Joseph Parisi (R 1448). They interviewed Appellant at 5:45 p.m. Certain preliminary background questions were asked of the Appellant by Detective Smith after they introducted themselves. At this point he never advised Appellant that he had a warrant for Appellant's arrest for the murder of Patricia Savino and Joe Parisi (R 1460-1461).

Smith noticed that Appellant had a cold or something. After determining that Appellant knew something about the murders, Smith read Appellant his Miranda rights by reading the rights from a standard form (R 1465). The Appellant read the standard form to the Detectives (R 1468). The Detective indicated to Appellant that he was a suspect in the murders but he did not tell Appellant that he was the only suspect and that a warrant had been issued for his arrest (R 1469). The Appellant signed the right's form at 5:55 p.m. (R 1473).

After the Appellant executed the "right's" form, he was asked about the homocide of Joe Parisi and Patricia Saviero (R 1474). At this point Appellant did not ask for a lawyer. Detective Smith questioned Appellant for about an hour. He presented Appellant with the previously issued warrant for his arrest for the murder of Savino and Parisi and for the first degree armed burglary (R 1476).

When he presented Appellant with the warrant, Appellant advised Detective Smith that he did not want to talk with him without an attorney (R 1477). At that point the questioning stopped (R 1477). At one point when the Appellee asked the detective whether he coerced the Appellant to make a statement an objection was made and overuled (R 1481).

On cross-examination, Detective Smith admitted to having the warrant for Appellant's arrest in this cause on his person (R 1507). He could have served the warrant, however, he didn't serve it (R 1508) because the individual cannot be served with the warrant until he is in the jurisdiction where the warrant was obtained. In this case the Appellant was officially served sometime after and passed over to the Dade County Jail (R 1508).

Detective Smith stated,

> "As far as being a suspect, he was advised he was the suspect, however, I don't believe I said that he was the only suspect, and as far as the warrant, I did not inform his as to the warrant when I presented him with that form." (R 1511).

Detective Smith's purpose for interviewing Appellant was to gain an admission from Appellant that he was present in area of

Joseph Parisi's apartment where Patricia Savino's body was found, a bedroom. One of the questions Smith asked Appellant was whether he had ever been in that bedroom (R 1512-1514). Appellant's fingerprint had been previously identified as being on a telephone receiver in that bedroom. Detective Smith's purpose was to obtain the answer to whether the Appellant was in that room (R 1516).

After talking to Appellant for over an hour, at approximately 7:00 p.m., Detective Smith advised Appellant that he had a warrant for his arrest. At that point Appellant invoked his rights to an attorney. Detective Smith, at that point, stopped his questioning (R 1517). At the time of the questioning Appellant was not under arrest for murder (R 1521-1523). The detective never told Appellant that he was the only suspect in the case (R 1520).

John LeClaire, a Miami Homocide Detective testified on the Motion to Suppress (R 1531). LeClaire was with Detective Smith when he went to interview Appellant at Pompano Detention Center when Appellant was a prisoner under a different charge. Prior to going there, Smith obtained a warrant for Appellant's arrest (R 1534).

When Smith saw Appellant, he did not advise Appellant that he was the singular suspect in a murder case and that Smith had a warrant for his arrest (R 1535). At the end of the interview, Appellant was advised that he was <u>the</u> suspect (R 1437). Smith told Appellant he was investigating a homocide, not that he had

solved the murder and that Appellant was the suspect (R 1538).

The prime motive for Detective Smith was to establish vel non, whether Appellant went back to the bedroom in the deceased's apartment. His fingerprint had been lifted from the telephone in the bedroom (R 1540). He never told Appellant that he was the subject of the investigation until he was done with the questioning and advised him there was a warrant for his arrest (R 1551).

The trial court at the conclusion of the Motion to Suppress, ordered that the Motion to Suppress be denied on the grounds that the withholding of existance of an arrest warrant is not error where the Appellant was given "Miranda" warnings the same as any suspect (Supplemental Record p. 65-66).

Glen Parisi, the son of Joseph Parisi, also known as "Miami Joe," lived with his father and his girlfriend, Patty Savino at the time of the homocides in June of 1982. "Miami Joe" was in the illegal drug business. He sold Methadone and pills for a living (R 712-714). "Miami Joe" was almost always under the influence of drugs (R 715). His son, Glen aided him with the sale of the drugs when his father was under its influence (R 715). On the 26th of June 1982 between 9 and 9:30 a tall blonde man visited the apartment. The visitor stayed a short while and left saying that he would be back. Glen lift the apartment and returned somewhere around midnight. When he entered the apartment he saw a light in his father's bedroom. His father was laying on the rug in the living room, dead. He then went

into the bedroom. He saw Patty sitting on the bed with her back to the headboard, dead (R 717-721). Glen called the police from the kitchen phone. There was another phone in the bedroom (R 722). His father kept some drugs in the nightstand in the bedroom (R 725).

Objection was made to a photograph of Patty Savino, States Exhibit I, which was admitted into evidence after objection (R 726-729).

On cross-examination, Glen admitted his father was a drug dealer and that he helped his father deal drugs on occassion. His father had kept a gun (R 731). His father kept drugs in a draw in a nightstand in the bedroom, but he did not see any there on the night in question, on June 26, 1982 (R 735), or on June 25, 1982, or June 24, 1982 (R 736). He couldn't identify the tall blonde man who said he would return (R 738). The only thing missing from the apartment was the nightstand drawer (R 737).

An objection was made to the introduction of a photograph showing blood of te victim "Miami Joe" as being crimulative and inflamitory, where a sketch of the apartment showing the position was already introduced into evidence as States Exhibit 2 (R 769). The photograph was admitted over objection as States Exhibit 10. A second photograph showing blood and taken from a different was offerred over objection and was not admitted (R 776). A fingerprint latent was introduced and identified (R 807). The latent was recovered from a telephone receiver in the

bedroom (R 809).

Debra Ann Smith, Patty Savino's sister, testified that her sister and "Miami Joe" were boyfriend and girlfriend (R 842). She knew the Appellant for about a year as of June 1982 (R 843). She identified the male deceased as Joseph Parisi (R 843).

The day after the homocide, Debra went to see Mary Arth, Appellant's sister. The Appellant was there when told of Patty's demise, Appellant got upset and cried (R 846). The Appellant never indicated he committed the crime (R 848). She went to Mary Arth's house because they were friends (R 854). Debra was an addict. She was an active member of a detox clinic and was under the influence of narcotics at the time whe visited Mary Arth's house (R 851).

The medical examiner, Dr. Rao, testified she examined the same. She observed the female victim in the bedroom, lying on the bed. She had two (2) gunshot wounds to the head (R 763).

The male victim, "Miami Joe" had two (2) gunshot wounds to his head and a bruise on the right knee. At the entrance wound there appeared to be some foam. This would be consistent with a pillow being between the gun and entrance wound. Photographs of the wounds were admitted into evidence as States Exhibit 20 over objection (R 868, 872). "Miami Joe" also was injured in the third finger, left hand. The State speculated that its theory of that finger injury was due to the finger being hit by the projectile which exited the victim's head (R 873-875). States

Exhibit 21 was admitted over objection. The cause of "Miami Joe's" death was the gunshot wounds (R 877).

Dr. Rao testified that the female victim had two (2) gunshot wounds to her head (R 879) which was the cause of her death (R 887).

The pathologist, Dr. Rao, also testified that the victim "Miami Joe" had .10 blood alcohol level, Methedone .45 milligram per liter, valium of .33 per liter and could have been intoxicated (R 892). He also had cirrhosis of the liver. The possibility that the victim, "Miami Joe" died instantaneously was also present (R 893). The bruises and abrasions were also consistent many other placement of the hand (R 894).

As far as the antop of Patricia Savino, she had had a combination of blood alcohol, valium, trunal and other drugs of various perportion in her blood. Further, she had needle track marks on the backs of both hands (R 898-900).

The next three witnesses, Wanda Davis, Kathy Ekersall, and Debra Detig, talked to the Appellant at various times after the homocide.

Wanda Davis knew Appellant abouth three (3) years through Appellant's sister, Mary Arth. Mary Arth called Wanda. After the call Wanda went to Mary's house at 7:30 p.m.. Mary and Appellant were present. Mary Arth told Wendy that Appellant had killed someone, to wit: "Miami Joe" and Patty. At the time of this conversation Wendy and Mary were in the kitchen. The Appellant was in the hall and he was walking in and out of the

kitchen and the living room. When asked whether Appellant could hear the conversation, Appellant's objection was sustained. When the witness was asked whether Appellant was within earshot of the conversation, Wanda answered yes (R 907-908). After objection of hearsay, the trial court overruled the objection (R 912).

Mary told Wanda that when she saw Appellant, he had on a bloody shirt and bloody sneakers. Wanda stated that Appellant said at that point that he felt bad that he had to kill "Miami Joe" and Patty (R 914). Appellant told Wanda that he killed "Miami Joe" in the living room and Patty in the bedroom. Appellant said there was an arguement when he had been there earlier that night (R 914). Wanda said Appellant told her that he shot "Miami Joe" more than one time. After that,

> "He went into the bedroom and Patty was in the bedroom in the bed and she held out her hand and Jackie and Jackie said, 'Oh, fuck, he said, 'now I have to kill her.'" (R 915).

Wanda said Appellant said for Patty to roll over and she rolled over and he put a pillow over her head and shot her. Patty was naked at the time (R 915). Appellant told her he took six (6) Dilaudids from a night stand draw (R 916). This conversation was only hours after the event occurred (R 916). After this conversation, Wanda took the Appellant to the beach. Wanda observed that Appellant was nervous, coherent, understandable, and alert (R 918-920).

Wanda didn't tell the police because Appellant was a

friend. Appellant would talk about the incident on occassions. He also talked about a friend by the name of "Shelli". Appellant would say about "Shelli",

> "'You son of a bitch, you were black. You were in the bushes, they couldn't see you, you were black. You son of a bitch, you werein the bushes, they couldn't see you.'"

Wanda identified the Appellant as the one with which she had this conversation (R 921-922).

On cross-examination, Wanda admitted lying to police officer for a traffic violation by giving false information. She didn't appear in court and a warrant was issued for her arrest (R 924-925). These cases were pending when she saw and gave information to Detective Smith (R 925). Whe didn't know why Mary Arth called her to come over that morning. She also didn't know what his reason was for the homocides. Wanda admitted she was a drug abuser (R 936).

Kathy Eckersall, who at the time of the trial was living in Oregon. At the time of the homocides she was living in California, however she was visiting in Miami during the last few days of June, 1982 and the first couple of days in July. She had previously lived in Florida for almost two (2) years. At that time she knew the Appellant for approximately a year and one half (1 1/2). He was a good friend (R 949). She came to Miami in June of 1982 to pick up a car. At that time Appellant contacted her (R 951). He picked Kathy up and drove her to Mary Arth's house (R 951). During the drive, which took about fourty

(40) minutes, the Appellant told Kathy that he killed two people, "Miami Joe" and Patty. He killed them in "Miami Joe's" apartment. At the time Appellant told Kathy he was with a man named Shelli. Appellant told her 'Miami Joe' was killed in the living room of the apartment and Patty was killed in the bedroom (R 951). He also told Kathy that the murders occurred a couple of days before she got here (R 953). The reason Appellant stated to Kathy as to why the killing took place was that "Miami Joe" sold Appellant some bad drugs (R 953-954). He and Mary Arth and Shelli tried the drugs and they didn't get high (R 954). When the Appellant and Shelli arrived at "Miami Joe's" apartment, Shelli waited downstairs. Appellant went to the apartment and spoke to "Miami Joe's" son. Appellant told "Miami Joe's" son that he would be back later with the money. Both Appellant and Shelli waited until the son left. Then both of them went back upstairs.

"Miami Joe" opened the door and they both went in and pushed "Miami Joe" down on the floor. Appellant told Kathy that Shelli was the one who shot "Miami Joe" (R 956-958). Shelli and Appellant had discussed previously what they were going to do.

After "Miami Joe" was shot, Appellant went into the bedroom to get some drugs, he saw Patty on the bed. Appellant then went back to the living room, got the gun from Shelli, went back in the bedroom and shot Patty (R 957). The reason Appellant shot Patty was because she recognized him by name and Appellant didn't want to leave a witness (R 958).

When they got to Mary Arth's place, Shelli and Mary were there. They discussed the events that Appellant told Kathy about with Mary and Shelli on and off all day (R 958-959).

Kathy, the next day, moved in with Mary Arth for a couple of weeks (R 960). After that Kathy went to Cleveland with Appellant (R 961). Kathy identified the Appellant (R 962).

On cross-examination, it was learned that Appellant had a beer with him when he picked up Kathy and he was drinking and he drank all day. She knew from the past that Appellant drank a lot and during the visit she described, Appellant was doing dilaudids frequently (R 964-965). Appellant and Shelli had a mutual agreement to kill "Miami Joe". However Appellant was remorseful about Patty (R 965). Kathy was doing drugs, to wit: cocaine during this period (R 968). Appellant was also doing a lot of drugs and was always looking for them (R 971).

Kathy, with all this information, didn't go to the police, but rather went with Appellant to Cleveland (R 973).

The reason she didn't go to the police was that she really didn't believe Appellant (R 977).

Debra Detig testified she met Appellant in August of 1981. She saw him frequently through June of 1982. During the fall of 1982 she had a conversation with Appellant (R 979). They were drinking beer in a bar. Both of them used drugs, cocaine, Dilaudids and others. Debra was told by Appellant that he went to "Miami Joe's" apartment. He had to leave because "Miami Joe's" son was there. He waited by a convenience store until

the son left. Appellant wernt back to the apartment. He asked "Miami Joe" to kneel down. He took a pillow to muffle the sound and shot him once. He had to shoot him again because he wasn't dead (R 982).

Patty came out of the bedroom Appellant askeded to go back into the bedroom and lie down on the bed. Appellant then shot Patty (R 982). Appellant told Debra because he thought his sister had already told her (R 983). Debra pointed Appellant out to the jury (R 984).

Robert Hart, a specialist in firearms examination was of the opinion that three recovered projectiles were fired from the same gun and a upper jacket found was also fired from the same gun (R 1024). The lead core found could have possiblity been fired from a second gun (R 1024).

A latent fingerprint expert employed by Metro Dade for eighteen (18) years examined the latent print lifted from the phone in the bedroom with Appellant's standard print card and it was his opinion the latent print lifted from the phone was left index finger of the Appellant (R 1030).

Gregory Smith, the lead detective on the case, stated that he submitted fingerprints standards of other suspects as well as Wanda Davis and Debra Detig, however their fingerprints were not found on the scene (R 1053). He took the statements of Wanda, Debra, and Kathy. Kathy's statement was taken in late 1984 (R 1054). He finally located the Appellant January 26, 1986 in

Broward County. Appellant made his objection in accordance with the motion to suppress (R 1061). Appellant, upon interview, told Smith he ahd been at "Miami Joe's" apartment the night he was killed (R 1064). "Miami Joe's" son was in the apartment. Routinely Appellant would enter the front door, remain there until "Miami Joe" or someone would deliver the product. When asked if he had been in other rooms of the apartment, Appellant said he had never been past the front door and that he never used the telephone in the apartment (R 1072).

The Appellant asked whether this conversation at the Broward County jail was taped or transcribed. Smith answered no. Smith continued.

> "A. I do not go into an interview with anybody with a tape recorder and turn the tape recorder on and start talking to him. It just does not make for a good interview when that tape recorder is sitting there going while they're talking to you. Ultimately, I would have liked to have a formal statement but Mr. Masterson declined to give me a formal statement. That is, with a stenographer."

The Appellant called George Borghi, a Metro Dade lab Criminologist, and expert in the field of serological examination. He received blood samples from the victims and the Appellant. He also received nail scrapings from the victims. Under "Miami Joe's" nails he found blood, Group A classification, Appellant had Group O blood. "Miami Joe" had group O blood. Patty had Group A blood. The expert concluded that the blood found under "Miami Joe's" nails was inconsistent with Appellant's blood (R 1115-1120).

The Appellant took the stand (R 1120). He was born in 1947 and was trained as a plumber and reached the status of journeyman plumber. He was born in Cleveland, Ohio (R 1120).

He served in the armed services. He was in Vietnam for nine (9) months. He saw action and participated in combat. He got hurt and was subsequently taken to an evacuation hospital in Japan and then back to the United States. He received an Honorable discharge. He first started to use narcotics in Vietnam. He smoked Marijuana in Vietnam. Prior to Vietnam, he used alcohol. He was discharged April of 1969.

He resumed his plumbing apprenticeship and got married, after his discharge. He was married for six and one half (6 1/2) years.

In 1970 he came to Florida. He also worked as a plumber in numerous locations. He came back to Miami because he liked the weather. Around 1981, he resided with his sister in Florida. Prior to 1981, the only narcotics he used was alcohol and marijuana. His sister introduced him to dilaudids and percodan. His sister's friends used them, Wanda Davis, Debra Detig, Debbie Smith, Patricia Savino and "Miami Joe". They were paying from twenty five ($25.00) to fourty ($40.00) dollars for a Dilaudid pill.

With regard to Wanda Davis' testimony, Appellant remembered her coming to the house that morning. Appellant was high. He sometimes heard what they were saying, and sometimes not. He was drinking and using Dilaudids. He told Wanda what his

involvment was with the homicides. He went to "Miami Joe's" to buy drugs. He was offered a greater quantity at a lower price. he didn't have the money but would get it. He called his sister. Shelli Townsand was there. Appellant got the money and went back to "Miami Joe's" with Shelli. "Miami Joe" let them in. Appellant wasn't armed. He was there to buy drugs. When he and Shelli got into the apartment all hell broke loose. "Miami Joe" wanted to know what Shelli was doing there. Shelli shot "Miami Joe" and he fell forward. Appellant did not shoot "Miami Joe". Appellant was out of it. He had a dozen beers and some Dilaudids that day.

Patty was in bed. She said "Jack" or something like that. Appellant was walking all around. Shelli shot Patty. Appellant had no intent to kill anybody. He was not sure whether he made a telephone call or not. He was scared to death. On the way out of the apartment Shelli shot "Miami Joe" again. When they left the apartment, Shelli told Appellant that Appellant was a part of it and he better remember it (R 1129-2235).

A few days later he told Kathy Eckersoll. However, he told her he was part of it. After the incident he stayed high for a month straight. He didn't want to get straight and face it (R 1136). He didn't know that Shelli Townsand had a gun. He had no intent to rob anybody.

The Appellant had been convicted of Receiving Stolen property (he had bought a stolen car), possession of cocaine, and for uttering a false perscription for Dilaudids. However,

he had not been convicted of a violent crime. He did not carry a gun (R 1136-1138).

In cross-examination, Appellant said "Miami Joe" offered ten (10) pills for two hundred ($200.00) dollars. Appellant stated that he had been hoping for the last fifteen (15) months for the truth to come out. He lied to Detective Smith because the guy (Shelli) knew where his sister and niece lived and knows where they live now.

He told Wanda, Debra and Kathy he killed them but he was scared. He was heavily using drugs, stoned for a month, and he was not himself (R 1145). He was high when he talked to all three ladies. Appellant got the facts of the case because he was present when the murders took place. He was pretty surprised and shocked when he saw Shelli pull out a gun.

When Appellant usually bought drugs from "Miami Joe" he would stay in the area of the front door either standing or sitting in a chair. However the night Shelli shot "Miami Joe" he didn't run out of the apartment. He was scared. He never said, "Oh fuck, now we have to kill her." (R 1156-1157). He may have told Wanda that but he did not know why (R 1159).

He had his sister lie for him about being in Miami because if he was picked up there was a Cleveland Ohio warrant open for his arrest because he had violated his probation in Ohio (R 1159).

When Detective Smith came to see him, he told Appellant that he had talked to numerous people about the case and that he

wanted to talk to him. Appellant was never told he was a suspect (R 1161). Appellant didn't know how he got his fingerprint on the telephone. The trial court denied the Appellant's Motion for Judgment of Acquittal at the end of all the evidence (R 1170).

Prior to the charge conference, the trial court announced he was going into the penalty phase as soon as jury reached a verdict (R 1132).

The Appellant requested a standard instruction on fingerprint evidence (R 1331). The trial court rejected the instruction on the grounds that the Appellant had already testified he was in the apartment (R 1262).

Appellant through his attorney, requested the trial court for a continuance to allow two psychologists to further examine the Appellant. Further, two psychiatrist, Dr. Lustig, and Dr. Stillman as of 2:00 p.m. the 28th day of March, 1986 had failed to honor their subpoenas (R 1316).

The trial court indicated he was going to proceed with the penalty proceeding (R 1316).

The jury reached a verdict and found the Appellant guilty, as to Count I, Second Degree Murder, with a firearm, a lesser included offense, as to guilty of First Degree Murder, as charged, as to Count III, guilty of Burglary, with a firearm, as charged (R 1313).

The Appellant again requested a continuance as to the penalty phase. The trial court again denied the request (R

1317). The trial court than adjudicated the Appellant as to Count I, II, and III.

The trial court, due to the absence of the subpoened doctors, stated he would accept their written reports at the time of sentencing (R 1318). The trial court listed the following as aggravating circumstances:

1. The Appellant had been convicted of another capital offense or of a felony involving the use of threat or violence to some person (R 312).

2. The crime for which Appellant is to be sentenced was committed while he was engaged in the commission of or the attempt to cimmit the crime of burglary.

3. The crime for which the Appellant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or enforcement of law.

4. The crime for which the defendant is to be sentenced was especially wicked evil atrerous or crull.

5. The crime for which the defendant is to be sentenced was committed in a cold, calculated and preruedited manner without any pretence of moral or legal justification (R 312-316). The Court gave all mitigating instructions (R 1323-1326).

Dr. Rappaport, a clinical psychologist, qualified as an expert in his field. He was a psychologist for the military in Vietnam for seven (7) years. He was a chief psychologist for a large military hospital. He saw quite a few people with similar

background to the Appellant, that is to say post-traumatic stress disorder. There are two (2) types. One, you respond to stress right after it happens, and two, the response is the delyed type. Drug abuse and or alcoholic abuse go hand in hand with Post Traumatic stress disorder.

Appellant told him that he would sleep on a couch by the window with a gun because of recurrant dreams about vietnam experiences that he feared would happen again.

Rappaport saw Appellant twice. He was told that Appellant came back wounded from Vietnam and that he saw many of his friends killed. Appellant first started using drugs in Vietnam. Dr. Rappaport was of the opinion that Appellant has suffered from post-traumatic stress disorder, however the Doctor did not have enough information of the events that surrounded the crime.

The Doctor was of the opinion that the Appellant was the most serious drug abuser in his experience. Appellant told Doctor Rappaport that he drank a case of beer a day. This was related to June of 1982. Appellant was on a viscous cycle of alcohol and dilaudids and cocaine, which was being both snorted and smoked. What he was doing was medicating his problems. On June 22, 1982 and 24 hours prior thereto Appellant probably consumed a case of beer, smoked marijuana, smoked and snorted cocaine and also had shot some dilaudid.

The Doctor was of the opinion that Appellant's judgment was impaired. Apppellant also had a tremendous tolorance for these

drugs so that he probably worked and walked all right, but they were definatly affecting his thinking. If Appellant, under these drugs, was confronted with a stress situation, which would include violance and guns, Appellant's response would be vietnam related. He would become violent. Appellant does suffer from delayed post-traumatic stress syndrome (R 1330-1348). Appellant would not be responsible for his actions.

When Doctor Rappaport interviewed Appellant, he was told by Appellant that he did not want to use an insanity defense or the post-traumatic stress disorder as an excuse.

During the years after Vietnam, Appellant had symptoms of post-traumatic stress disorder. He used to sleep on the couch looking out the window with a gun. He had nightmares. He went to the V.A. Hospital.

Dr. Merry Haber, a qualified clinical psychologist testified similarly to Dr. Rappaport. She determined that Appellant was using huge amounts of alcohol, cocaine, marijuana and dilandids. Appellant was intoxicated most of the time and would act as a person who was impaired.

The jury came to an advisory verdict of a sentence of life imprisonment without the possibility of parole for twenty five years.

The trial court then sentenced the Appellant as to Count I, to one hundred and thirty four (134) years in the State penitentiary. As to Count II the trial court took the sentence recommended by the jury under advisement. As to Count III, the

Appellant was sentenced to one hundred and thirty four (134) years consecutive to count I.

On April 10, 1986, the trial court sentenced the Appellant to death (R 1432-1446). This appeal follows.

ISSUES PRESENTED

I

WHETHER THE TRIAL COURT ERRED IN PERMITTING A DEATH QUALIFIED JURY TO BE SEATED BY PERMITTING CHALLANGE FOR CAUSE BY THE APPELLEE AGAINST JURY PANAL 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 RESONABLY RELATED TO A VALID GROUND OF MITIGATION, 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 SUPRESSING APPELLANT'S STATEMENT THAT HE NEVER ENTERED "MIAMI JOE'S" BEDROOM?

SUMMARY OF ARGUEMENT I

The Appellant wished to preserve the arguements advanced in Dougan v. State, 470 So.2d 697 (Fla. 1985) with regard to a death qualified jury.

ARGUEMENT

I

THE TRIAL COURT ERRED IN PERMITTING A DEATH QUALIFIED JURY TO BE SEATED BY PRECLUDING CHALLANGE FOR CAUSE BY THE APPELLEE AGAINST JURY PANAL MEMBERS WHO COULD NOT OR POSSIBLY MIGHT NOT BE ABLE TO IMPOSE THE DEATH PENALTY.

The Appellant adopts and incorporates by referance in this brief the arguements advanced by the Appellant in Dougan v. State, 470 So.2d 697 (Fla. 1985) and seeks to preserve those constitutional principals in this appeal Grigsby v. Mabry, 758 F.2d 226 (1985) See Jones v. Smith, 786 F. 2d 1011 (11th Cir. 1986 for Florida view).

SUMMARY OF ARGUEMENT II

The trial court erred in stating that the advisory jury was swayed in recommending life by matters not related to a valid ground of mitigation. The trial court palpably overlooked the Appellant's testimony of an accomplice who actually murdered "Miami Joe" and Patty Savino.

The trial court considered and gave no weight to the psychologists testimony of delayed post traumatic stress syndrome. However, it is clear that the advisory jury could and did find statutory mitigating reasons for returning the life imprisonment advisory verdict.

ARGUEMENT

II

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, IN THIS COURT'S OPINION, HAS SWAYED THE JURY TO RECOMMEND LIFE".

The trial court stated in its order on sentencing that the advisory jury, in the trial court's opinion, was swayed to recommend life by some matters not reasonably related to a valid ground of mitigation. The trial court failed in its sentencing order to speculate what the matters were. It certainly was not a highly emotional closing arguement by Appellant or that the recommendation was based on religious standards that coersed the advisory jury to return a verdict of life imprisonment, Francis v. State, 473 So.2d 672 (Fla. 1985). The advisory verdict of life imprisonment was clearly within the statutory reasons provided by section 921.141 (6) Fla. Stat. It must be noted that Appellant failed to poll the advisory jury as to how they voted for life imprisonment. It must be assumed they voted twelve (12) for life imprisonment and zero (0) for death.

First, the advisory jury may have given consideration to Appellant's testimony. The murder of Patty Savino was a "closed door" murder. The Appellant was the only live witness. Mayo v. State, 71 So.2d 899 (Fla. 1954). In Appellant's version, he went to the apartment of drug dealor, "Miami Joe" to purchase

drugs. He went there with a black male named Shelli. There was no evidence presented that Appellant and Shelli used forcible entrance to enter "Miami Joe's" apartment. Appellant had been there many times before.

Appellant testified that Shelli shot "Miami Joe" because "Miami Joe" argued with Shelli. Further, Appellant testified that Shelli also killed Patty Savino.

The jury verdict of First Degree Murder was consistent with Appellant's version. The jury could have concluded that Appellant was an aider and abetter and thus a principal in First Degree Murder. Further, the advisory jury could have come to the same conclusion. Hence the recommendation of life imprisonment. In accord, Enmand v. Florida, 458 U.S. 782, 102 S.Ct. 3368.72 LEd 2d 1140 (1982). Enmand, supra, held that the imposition of the death penalty on a person who aids and abets and is a principal in the course of a felony murder, but who himself does not kill, or intend to kill or attempt to kill, violates the Eight and Fourteenth amendment to the United States Constitution. See, Section 921.141 (b)(d) Fla. Stat. which provides for mitigation when an accomplice in a capital felony, committed by another, whose participation is relatively minor is entitled to a mitigating circumstance to be considered by the advisory jury.

The trial court's comment on the mitigating circumstance in his sentencing orders,

> "1). The defendant was an accomplice in a capital felony comitted by another person and his participation was relatively minor."
>
> There is absolutely no evidence in this record to support anything other then the statements of the defendant, made both to witnesses and to his psychologists, (introduced only in the penalty phase) that would indicate that there was anyone present at the time of the capital felony other then the defendant."

is in error. The Appellant took the stand and explained that Shelli killed "Miami Joe" and Patty Savino. Thus the trial judge omitted from his consideration the Appellant's sworn testimony that clearly set forth the fact of an accomplice who Appellant said committed the murder in question. Clearly the trial court did not consider all the evidence before writing his sentencing order.

The advisory jury also considered the testimony of Drs. Rappaport and Haber. It is not clear from the Record whether the advisory jury was sent the report of Dr. David Lustig, a psychologist, however the trial court considered it.

In Amazon v. State, 487 So.2d 8 (Fla. 1986), a case similar to the case at bar, the trial judge found no mitigating circumstances. This court, however was persuaded that the jury could have found and weighed mitigating factors and reached a valid recommendation of life imprisonment.

In the case sub judice, the Appellant was known as a heavy drinker, sometimes a case of beer a day. He used marijuana, cocaine and dilaudid when ever he could get some. Three

psychologists who were qualified as experts testified that Appellant was suffering from delayed post traumatic stress syndrome. The Appellee did not introduce any evidence to contradict the expert's opinion.

In Thompson v. State, 456 So.2d 444 (Fla. 1984) is a case where the accused killed a gas station attendant as opposed to fleeing the scene when he discovered no money. No evidence was produced to set the murder apart from the usual hold up murder.

In the case at bar, there was no evidence to set this case apart from a case where the victim discovers the assailant and the assailant becomes frieghtened or for some unknown reason shoots the victim either before or during an attempt to make his escape Appellant didn't contemplate Patty Savino's murder when he entered "Miami Joe's" apartment. This court in Thompson, supra, rejected a spur of the moment homicide as not being a cold, calculated and premeditated homocide.

In Cannady v. State, 427 So.2d 723 (Fla. 1983) this court noted that the trial judge in Cannady, supra, did not specifically find that the trial jury based it's life recommendation upon emotional sympathy instead of upon the proven statutory mitigating circumstances. In the case at bar it is clear that the twelve reasonable jurors based it's reccomendation upon two (2) statutory mitigating circumstances. Thus under Tedder v. State, 322 So.2d 908 (Fla. 1975) the facts in the instant cause are not so clear and convincing that virtually no reasonable people can differ. Twelve (12)

reasonable jurors differed with the trial court in the instant cause. Cannady, supra. "Miami Joe" argued with Shelli. Further, Appellant testified that Shelli also killed Patty Savino.

SUMMARY OF ARGUEMENT III

The aggravating circumstances as provided by the trial court are either erroneous or when compared with the mitigating circumstances de-minimus for this court to affirm the Death Penalty. The evidence does not show beyond a reasonable doubt that there was any heightened degree of premeditation. The killing of Patty Savino was a spur of the moment decision.

The evidence failed to show that the killing of Patty Savino was done while the Appellant was contemplating a burglary or was in the midst of commiting a burglary.

The trial court doubled up on the aggravating circumstances arising out of the same aspect of the crime.

While the aggravating circumstance of committing a prior crime of violence, is valid, it is submitted that when compared to the valid mitigating circumstances and the advisory jury's verdict of life imprisonment, the aggravating circumstance are not so clear and convincing that reasonable persons can differ.

ARGUEMENT

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

The trial court based its aggravating circumstances on the following incident,

> "The death of Patricia Savino was effectuated after the defendant had killed Joseph Parisi in his apartment living room, and, while the defendant was burglarizing the bedroom of the apartment. The defendant, upon entering the bedroom, was greeted by Patricia Savino who called his name. The defendant proclaimed, "Ah, F--k, now I've got to kill you.", fully realizing the enormity of his criminal act and the fact that Patricia Savino knew him and would in fact, be witness to the murder and burglary. The defendant then, and in a cold, calculated, premeditated manner, ordered Patricia to roll on her side and took a pillow from the bed, placed it around the revolver that he held in his hand and fired two shots into the head of the deceased. While the decedent was killed instantly, effectuated during her lifetime, to-wit: the order to roll over on her side and the procurement of the pillow to muffle the sound of the revolver."

In determining whether these facts apply to the aggravating circumstance chosen by the trial court, the brief will deal with this in seratium.

I. The murders were committed in a cold calculated premeditated manner without moral or legal justification.

In Bowman v. State, 437 So.2d 1095 (Fla. 1983) the victim discovered Appellant, a person known to him, committing a burglary and that the murder was extemporaneously committed for the purpose of avoiding arrest. Bowman, supra, concluded,

> "The evidence does not show beyond a reasonable doubt that there was any heightened degree of premeditation, calculation or planning."

See Thompson, supra.

Further, this court has held that the aggravating circumstance of cold, calculated, and premeditated ordinarily applies to those murders which are characterized as executions or contract murders, although the description is not intended to be all-inclusive. McCray v. State, 416 So.2d 804 (1982); Cannady, supra. The Appellant in the case at bar had no prior intent to kill the victim. It was clearly not an execution or contract murder. It was a spur of the moment act when the victim covered the Appellant in the bedroom.

II. The capital felony was comitted while the Appellant was engaged in an armed burglary.

In Count III of the indictment, Appellant was charged with committing a burglary by unlawfully entering or remaining in "Miami Joe's" apartment with the intent to commit an offense within. Although Appellant was convicted of Count III, it is clear that there was no evidence that Appellant entered the apartment with the intent to commit a burglary. In the first place there was no illegal entry. The facts establish that Appellant was a customer of "Miami Joe's" drug business and had been in the apartment many times before. There was not a scintilla of evidence of a break in. The Appellant entered the apartment with "Miami Joe's" consent.

Certainly, there was no evidence that the Appellant intended

to do anything else but purchase some drugs from "Miami Joe". He did not enter the apartment or remain therein to kill Patty Savino. There can be no burglary where the Appellant was invited or had a legal right to enter the premises or had no intent at the time of entering or remaining to commit a burglary on the premises, Vasquez v. State, 350 So.2d 1094 (Fla. App. DCA 1977). "Miami Joe's" son said there was only one thing missing from the apartment. A drawer from a night stand. He said there were no drugs in that drawer. Consent to enter a premises is an affirmative defense to burglary. Bundy v. State, 455 So.2d 330 (Fla. 1984); State v. Hicks, 421 So.2d 510 (Fla. 1982). In Routly v. State, 440 So.2d 1257 (1983), the Appellant remained in the house and obviously committed a robbery. In the case at bar, the only offense the Appellant could have committed was second degree murder, not one the enumerated crimes under the statute.

Considering there was not a scintella of evidence that the Appellant intended to commit burglary while remaining in the apartment, the verdict of the jury as to Count III should be rejected.

Further, the evidence was not clear that the shooting of Patty Savino was committed durng the course of a burglary. The shooting was a spur of the moment activity upon the victim who was asleep, awoke and recognized Appellant. There was no evidence that Appellant was burglarizing the apartment at this time. The testimony of the three female witnesses do not

demonstrate that the Appellant told them he was burglarizing the apartment. The Appellant neve testified to a burglary. The totality of the circumstances conclude that there is an absence of evidence with regard to a burglary.

III. That the felony was committed for the purpose of avoiding or preventing a lawful arrest.

It is submitted that the trial court, impermissably, singularly imposed two (2) aggravating circumstance to one act of killing the victim when she recognized Appellant in her bedroom. This one should not support two aggravating circumstances. Vaught v. State, 410 So.2d 147 (1982) and Provence v. State, 337 So.2d 783 (1976) cert. denied 431 U.S. 969; 97 S.Ct. 2929; 53 LEd 3d 1065 (1975) stand for the principal that the doubling up of aggravating circumstances both having reference to the "same aspect" of the crime is error. See Pembert v. State, 445 So.2d 337 (Fla. 1984); Caruthers v. State, 465 So.2d 496 (1985).

In Caruthers, supra, this court recognized the doubling up of the aggravating circumstances of cold, calculated and premeditated and the avoiding and preventing of a legal arrest and rejected them. In the case at bar, this Court should reject the doubling up of these two aggravating circumstances.

IV. The Appellant stood convicted of the crime of Second Degree Murder of Joseph Parisi and therefore had been previously been convicted of a felony involving the use or threats of violence to a person.

It is submitted that the Second Degree Murder conviction is a valid circumstance, Brown v. State, 273 So.2d 1260 (Fla. 1985). However, when the Appellant's prior history of drugs and drinking combined with a valid delayed Post Traumatic Vietnam Syndrome was before the advisory jury, it is respectfully submitted that Dr. Rappaport's opinion as to the diminished capacity of Appellant is valid and based upon impericle and competent evidence.

Accordingly, the advisory jury made a rational judgment when their verdict was based upon reasonable mitigating circumstances. The jury was reasonable in recommending life imprisonment and therefore the trial court erred in imposing the death sentence, Huddleston v. State, 375 So.2d 204 (1985). The advisory jury clearly disagreed with the trial court and they were reasonable persons. Tedder, supra.

This homocide was committed behind closed doors. The Appellant's version repeated by the lady witnesses differed from Appellant's sworn version at trial. The evidence in its entirety is not so clear and convincing that virtually no one coulod disagree.

SUMMARY OF ARGUEMENT IV

The interrogation of the Appellant in the Broward County jail was improprer. The giving of Miranda warnings, by itself, was not sufficient to remove the taint of the improper tactics to secure an incriminating statement from the Appellant. The statement should have been suppressed.

ARGUEMENT

IV

Although this arguement might be moot, it is urged that the Court reverse the Appellant's convictions and grant him a new trial on the basis that his pre-arrest interview with the Homocide Detectives, in which their only purpose was to trap Appellant into either admitting he was in the bedroom of "Miami Joe's" apartment or denying same, was violative of Fifth, Sixth and Fourteenth Amendment to the United States Constution.

It is submitted that the detectives were in possession of an arrest warrant and the knowledge that the Appellant's fingerprint was on the telephone receiver in "Miami Joe's" bedroom.

The detective visited Appellant at the Broward jail where Appellant was detained on another charge. They spoke to him initially on the pretext that they wanted a background interview. Prior to giving any Miranda Warnings, the detective asked Appellant if he had any knowledge of a double homocide that had occured in North Miami about three (3) years ago. Appellant advised that he did and that Patty and "Miami Joe" were the victims. Appellant was then given Miranda Warning but he was not advised he was the prime suspect or that the detectives had an arrest warrant on their possession. After "Miranda" warnings, they spoke with Appellant for about an hour and elicited from him that he never went into "Miami Joe's" bedroom. They then advised him that they were in possession of

an arrest warrant for him. Appellant then requested an attorney.

The case at bar is different from Oregon v. Elstad, 470 U.S __, 106 S.Ct. 1285, 84 LEd 222, which held that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waving his rights and confessing after he has been given the requsite Miranda warnings. In the case at bar the Appellant was not a suspect he was the accused with an arrest warrant in the possession of the inquring detective. In State v. Madruga-Jiminez, 485 So.2d 462 (1986), the trial suppressed the statements of the Defendant with regard to the background information becase the detectives knew that the authorities already had a warrant for his arrest and that background questions about his trip from Cuba and his past employment would connect him with a co-defendant and a past employer. In the case at bar, and with an arrest warrant in their pocket, the detectives knew that the Appellant would advise them that he knew about the murder. Thus the Appellant was in custodial investigation without benefit of Miranda warnings during the background interrogation.

In Madruga, supra, the trial court suppressed all of the Defendant's statements. The Third District affirmed the trial court relying upon Elstad, supra. It concluded that when the police use deliberately coercive and improper tactics a presumption of coercion is warranted. In the instant case as well as Madruga, the police officer violated section 901.16 Fla.

Stat. by not informing the Appellant that a warrant for his arrest has been issued on a charge of murder. In the case sub judice the detective waited until he had elicited the incriminating evidence before he told Appellant about the warrant. The Madruga, supra, court concluded,

> "The warned statements began immediately after the unwarned ones. Additionally, they were conducted in the same building, by the same officer from the same police agency, over an eight or nine hour period. It is also clear that Madruga-Jiminez spoke to no one besides the police during this period and was not informed that his initial statements could not be used against him. The simple giving of Miranda warnings, by itself, was not sufficient to remove the taint of the improper tactics utilized to secure the initial statement. Accordingly, the order of the trial court is
>
> Affirmed."

It is probable that if the statement concerning the Appellant's whereabouts in "Miami Joe's" apartment had been suppressed Appellant would not have taken the stand.

CONCLUSION

It is urged that the Court grant Appellant a new trial based upon the improper introduction into evidence of Appellant's statement which was given under coercive circumstances.

With regard to the penalty phase is urged that the Court after reviewing the citation of authorities and the logical arguements advanced herein conclude that the mitigtating circumstance preclude the assessment of the death penalty especially where, as here, all reasonable men cannot agree with the trial court's overide.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 13 day of November, 1986 to: Attorney General Office, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128.

BY: Harold Mendelow
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