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 REPLY BRIEF

HAROLD MENDELOW, ESQ.
Special Asst. Public Defender
2020 N.E. 163rd St., Suite 300
North Miami Beach, Fla. 33162
305/ 944-9100

TABLE OF CONTENTS

TABLE OF CITATIONS

INTRODUCTION

In this reply brief, Appellant will refer to arguements presented by Appellee.

ARGUEMENT

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.

The Appellant would submit the arguements presented by both parties in their briefs.

ARGUEMENT II & III

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".

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

On page 32 of Appellee's brief, the Appellee's statement that the trial court did consider the Appellant's testimony at trial is clearly not reflected in the record. The trial court stated in its order,

> "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."

There is no other referance in this record which provides insight that the trial court considered Appellant's testimony, and rejected same. Where occurrences during the proceedings below are not reflected or indicated by the record, bare statements in the brief as to such occurrences will not be considered by this Court Hastings v. Hastings, 45 So.2d 115 (Fla. 1950); Allen v. Town of Largo, 39 So. 2d 549 (Fla. 1949).

It is clear from this record that the Appellant did testify and established an accomplice. Shelli Townsand, who

shot Mrs. Savino. The testimony of two of the ladies who testified for the Appellee corroberated the fact that Appellant told them about Shelli. This evidence was before the jury to consider. The record is silent as to whether the trial court considered Appellant's testimony and approved or rejected same. Thus, it is respectfully submitted that this Court should consider the omission of the Appellant's testimony by the trial court as arbitrary. There was and is a reasonable basis for the jury's recommendation of life imprisonment and the trial court should have followed the jury's recommendation. Walsh v. State, 418 So.2d 1000 (Fla. 1982). Clearly there was evidence of an accomplice, there was evidence of a history of drug and alcoholic abuse, and there was evidence of Post Vietnam Stress Syndrome which controlled Appellant's actions. That the trial court unreasonably discarded these mitigating circumstances in determining whether the Appellant should live or die. All of the above were statutory mitigating circumstances which the advisory jury considered. The trial court did not. Huddleston v. State, 475 So. 2d 204 (Fla 1985); Holmes v. State, 429 So.2d 297 (Fla. 1983). Consideration of all mitigating circumstances is required in determining whether to impose the death penalty, however its weight is to be determined by the trial court is overturning an advisory juries verdict of a statutory term of years. In the case at bar, the record reflects the trial court failed to consider Appellant's testimony. See, White v. State, 446 So.2d 1031 (Fla. 1983). Where Appellant introduced

evidence as to both statutory and non statutory mitigating circumstance and the jury returned a verdict of life imprisonment, the death penalty was inappropriate. Welby v. State, 402 So.2d 1159 (Fla 1981). This Court should base its opinion on Tedder v. State, 322 So.2d 908 (Fla. 1975).

ARGUEMENT IV

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

It is clear that Appellant's "Miranda rights" were explained to him after a background interview in which the Metro Dade Police elecited that Appellant knew something about the murders of "Miami Joe" and Patty Savino. The surreptitious, unconstitutional backgrond interview occured a day after the Metro Dade detectives convinced a Circuit Judge in Dade County to sign an arrest warrant for Appellant because they had probable cause to arrest Appellant for these murders. After the detectives determined, without "Miranda Warnings" that Appellant had information about the case, the warnings were to late. The unwarned statement was incriminating and should not have been asked in a background questioning situation. The "fruit of the poisonous tree" had already been eaten by the Appellee. In addition, it is submitted tha Appellant should have been advised that an arrest warrant had already been issued and was in the possession of the detectives.

It is this conduct that is constitutionally prohibited by "Miranda" and its progeny. The surreptitious activity by the police officer's to get evidence by unconstitutional means, without warning the accused of his right to counsel and his right to remain silent is what this Court should be concerned with. Any question concerning what Appellant knew of the

activities of this case without proper warnings should be suppressed, whether the questionings is about the case or is disguised as background questions.

CONCLUSION

It is respectfully submitted that the statements made by the Appellant concerning the case should be suppressed. Further, the trial court clearly erred in assessing the death penalty.

Respectfully Submitted,

HAROLD MENDELOW
Special Asst. Public Defender
2020 N.E. 163rd St., Suite 300
North Miami Beach, Fla. 33162
305/ 944-9100

BY: Harold Mendelow
HAROLD MENDELOW

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 15th day of January, 1987 to: Attorney General Office, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128.

Respectfully Submitted,

HAROLD MENDELOW
Special Asst. Public Defender
2020 N.E. 163rd St., Suite 300
North Miami Beach, Fla. 33162
305/ 944-9100

BY: Harold Mendelow
HAROLD MENDELOW