IN THE SUPREME COURT OF FLORIDA

MAURICE LAMAR FLOYD,
Appellant,

v.

CASE NO. SC95824

STATE OF FLORIDA,
Appellee.
_____/

ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Jury selection began on April 5, 1999. (R 1016). During the selection process, the State moved to strike prospective juror Noel Rios peremptorily. (R 1102). There were two Black women seated on the jury at the time the State struck Mr. Rios, a Hispanic. (R 1106). Floyd is a black man. (R 1106). No allegation of a "systematic exclusion of a class" was made. (R 1106).

The prosecutor stated his race-neutral reason for the strike as:

> Mr. Withee asked Mr. Rios about his feelings about the death penalty, he, by body language and by answer, expressed what I perceived to be a negative response with regard to imposition of the death penalty. I saw that response and noted . . . what I perceived to be a dislike for or non-agreement with the death penalty.
>
> I determined peremptorily that he could [be] excused because his answers had been conjured earlier.

(R 1107). The court concluded that the reason was race neutral.(R 1108).

The State's first witness was Floyd's ex-wife, Trelane Jackson.(R 1514-15). Trelane was married to Floyd from March 23, 1998 until November 20, 1998.(R 1515). She had begun to see Floyd "seriously in August of '97."(R 1516).

Although Trelane had three children, she had none with Floyd. (R 1516). Trelane's children, eight year old Jerrits, six year old LaJade, and five year old Alexander, lived with her and Floyd. (R 1516, 1517).

Floyd's victim, Mary Goss, was Trelane's mother.(R 1516). Trelane had a "real good" relationship with her mother.(R 1523). Mrs. Goss was always available to her "whenever I needed her for anything" and she often babysat Trelane's children.[1](R 1517). Ms. Goss was babysitting those children on the night that she was murdered.(R 1539).

During her marriage to Floyd, Trelane worked at the Ponce DeLeon Health Care Center.(R 1517). She also held a second job at Burger King in East Palatka.(R 1517). Trelane was still employed at the health care center, as a certified nursing assistant, at the time of trial.(R 1518).

The marriage relationship between Floyd and Trelane was "pretty good" in the beginning.(R 1518). However, Floyd "started getting this attitude about me drinking, didn't want me to socialize with anybody who drank or smoked, and basically just wanted me all to himself."(R 1518-19). For example: Trelane related that when she drove her own car to her job, Floyd would bring his brother to her job. He'd have the brother "take my car and leave and I ride home with Maurice."(R 1519). Floyd also got her a beeper, shortly after they married, so he could have her call him.(R 1519, 1520). A couple of months later, when she told him

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1 "I could rely on her for anything, babysitting, her car, money." (R 1523). "We . . . used to say we was almost like twins." (R 1524).

that she "didn't want to stop and make a call" because it was "late at night," he got her a cell phone "[s]o that I would have no excuse for not calling him."(R 1519, 1521, 1546). Then, when he picked her up at work, he would give her car, her cell phone, and her kids over to his brother and "beep him when he was ready for him to bring them back."(R 1519).

Additionally, when Floyd "didn't want me to go anywhere, he would do something to the hood [of her car] so I couldn't crank it up."(R 1522). If she "walked, he would go around to all my friends' house until he found me."(R 1522). He called her friend a liar and "wanted to come in and check" to see if Trelane was there, "but she wouldn't let him."(R 1522). This occurred "[s]everal times."(R 1522).

Trelane

> had been pulling a lot of doubles to make the extra money because I wanted him to do something special for my birthday; and he did nothing.
>
> So I went out with two of my cousins and we went to a party and drank some . . ..
>
> . . . I bought a drink, went on the stage to dance; and another friend of mine said, backup, you're up under surveillance.
>
> . . . [H]e was telling me Maurice was in the place. . . .. So I got off the stage and walked back over to where my cousins were. And he came up to me and tapped me on my shoulder and he said find a way home because I'm taking your car.
>
> . . .. So, around 3 o'clock that night, I was getting tired, and . . . my car . . . wasn't there. . . . I found somebody to take me home. It was around 4 then.

(R 1526-27). Trelane tried her car which "was pushed in the bushes," and it "wouldn't crank." (R 1528). . . . [S]o I just closed it back and he took me back up to Vick's. And I told my cousins what was going on." (R 1528). She returned to her house "around five o'clock that morning."(R 1528). Floyd "told me he wasn't going to let me go to sleep, so he cut on all the TVs, cut the music up real loud, cut on every light in the house, and just started fussing at me about me drinking and stuff and told me if I ever did that again what he was going to do to me."(R 1527-28). He told her that he was going to "[k]ill me."(R 1529). She added:

> He told me if I ever tried to get away from him or run or hide or if he caught me drinking again that he would kill me; and if he couldn't get to me, he would kill somebody that I love, whether it be my manna, my daddy, or even my children.

(R 1529). At that point, she "felt the gun to my head," and she turned and saw it.(R 1529). Floyd pulled the trigger "three times, nothing came out."(R 1529).

Trelane told Floyd that she was "going to get a divorce because it's over."(R 1530). Floyd "started cursing me out and just starting (sic) repeating what he would do to me if I tried to run or hide."(R 1530). Later, Trelane noticed that Floyd had "a .357" on "the back of the toilet," and she took it and hid it "[b]ehind the bar in the front room."(R 1530). She never saw the gun again after her mother was killed.(R 1531).

Later that morning, Trelane picked up her Goddaughter,

Yvontee, for a visit.(R 1531). When she arrived home with the young child, Floyd ordered Trelane to return her.(R 1531, 1532). Trelane's children remained in the home when she left to return Yvontee.(R 1531). As she was leaving, Floyd told Trelane: "Don't bring your fat ass back, either."(R 1532).

Trelane drove "around for a little bit," and then returned to her apartment "on the back street" so she could see "if he was going to be there I wasn't going back there."(R 1532). Floyd saw her and ordered her to return Yvontee and return home.(R 1533). Trelane agreed.(R 1533).

Trelane traveled "about half a block," saw a friend, and stopped "to tell her that I was going to call her later . . .." (R 1533). Floyd pulled up beside her.(R 1533). The friend commented that she would let Trelane "go because he looks like he wants to beat your ass."(R 1533). Floyd called Trelane "a whore," and she retorted that she was "not going no where."(R 1534).

Trelane pulled away, and Floyd followed and "hit the back of my car."(R 1534). Yvontee was still in the car with her.(R 1534). When Floyd hit her car, Trelane threw her hands "on top of" the child and took off.(R 1534). She was scared and headed for the Sheriff's Department.(R 1534).

Floyd kept "trying to pass me," and she "kept swerving my car back and forth to try to throw him off."(R 1535). Trelane was scared and "went straight to the Sheriff's Department."(R 1535).

As she arrived there, she "was screaming: Help, help."(R 1536). She "had to jump on my car because he was coming so close to me he almost hit me . . .."[2] (R 1536). Trelane "rolled off and ran into the Sheriff's Department" as "one of the officers came out." (R 1536).

Floyd "hopped out" and came after Trelane. (R 1537). The deputy "told me to go inside and stay . . .." (R 1537). The deputy "went out to try to control Maurice." (R 1537). Floyd "was trying to get past the officer . . ." who "was calling for backup . . .." (R 1537). Trelane "told them to catch him because he would run, and that's exactly what he did." (R 1537). Trelane was "[v]ery" scared.(R 1538).

Trelane later learned that Floyd had taken her three children "to my mom's house."(R 1538). Trelane called her mother "from the pay phone" at "the Sheriff's Department." (R 1539). She told her Mom "what was going on." (R 1539). Her Mom said she would keep the children and would not "let him get my grandchildren." (R 1539). This was the last time Trelane talked to her mother. (R 1541).

After Floyd escaped the deputy, Trelane "rode around for a while . . . thinking where could I go." (R 1541). She talked with some friends at "the Suwannee Swifty," and during that time, she

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[2] Floyd came in so close to her car that "he would have hit me" had she not jumped "on the back of my car." (R 1536).

saw "the ambulance and stuff" - "the ambulance and polices and everything flying by." (R 1541). Trelane hoped that they had found Floyd, and she "hopped in" her car to go and see. (R 1541-42). As she traveled, she saw that the vehicles were "too close to my mamma's house." (R 1542). As she exited her car "out front and . . . went down there," she "heard my son say: There's my mom right there . . .." (R 1542). She confirmed who she was, and one of the officers told her that "my mamma had passed away." (R 1542). Her three children "were standing on the porch, crying." (R 1543).

The State's next witness was long-time Putnam County Deputy Sheriff Dean Kelly. (R 1551, 1552). He was doing paperwork at the Sheriff's Office when "about 7:36 p.m., I heard tires squealing on pavement, which got my attention." (R 1554). Deputy Kelly

> I looked out the front window and I saw two cars had stopped next to each other right at the end of the sidewalk in front of the Sheriff's Office.
>
> I saw Ms. Floyd get out of the vehicle and she was running around the back of the vehicle towards the front door of the Sheriff's Office.
>
> It was obvious that something was wrong.
>
> So, I got up, ran to the front door . . . as I came out . . . she had made it to the front door and she was screaming that he rammed me, he tried to hurt me . . ..[3]
>
> And I said: Who?

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[3] The woman "was crying" and "screaming, absolutely very visibly upset . . .." (R 1555).

> And she said: My husband.
>
> At that time I looked up, and I saw the Defendant coming up the sidewalk toward me, walking very fast, saying he wanted to see her.
>
> And I told him: No, you need to stop. What's going on? . . . And he acted as through he was going to come past me, toward her.
>
> So I stepped out on the sidewalk further to meet him, and actually stuck my hand out to touch his chest to stop him and he did stop at that time.
>
> . . . [I]t was my impression that . . . I did have domestic violence, and to get the situation calmed down, I . . . called for a backup.
>
> . . . I told him that until we figured out what was going on, I was going to take him into custody, and turn around and put his hands behind his back, at which time he started backing up with his hands in the air, saying he had done nothing wrong.
>
> I again ordered him to turn around and put his hands behind his back.
>
> He then refused, continuing to back up, at which time he turned and started to run.

(R 1554-55). Under all the circumstances, the deputy "felt like it was necessary, from the severity of it, for me to go ahead and take him into investigative custody . . .." (R 1556). To that end, "I actually touched his chest with my hand, very lightly." (R 1556).

Deputy Kelly "began a brief pursuit," but Floyd "had already jumped the ditch, was running through a field." (R 1557). Since the deputy "was the only armed officer there," he was uncomfortable leaving Trelane "in case he did double back," so he terminated his pursuit of Floyd. (R 1557).

Other officers were called in to try to find Floyd. (R 1558). Even a K-9 unit came to the scene. However, "it started raining lightly," and "we were not able to locate him." (R 1558). The deputy took a written statement from Trelane. (R 1558).

The next witness was Palatka Police Department Detective Mike Lassiter. (R 1563). He reported to the crime scene, but was not able to recover any bullets from the scene. (R 1569). He testified regarding photos taken of the victim, Mary Goss, "over at the medical examiner's office," as well as crime scene photos. (R 1570, 1586-90). He also identified the "copper jacket that came off the bullet that was taken from the victim . . . [and] the actual lead part of it." (R 1572). The bullets "were taken out of her head." (R 1574).[4] He also identified the videotape of the statement given by Floyd. (R 1584).

The State next presented Lawrence Clifford Goss, the long-time

[4] The defense objected to the chain of custody, complaining: "I've heard nothing about when they were sealed, how they were sealed, who sealed them, or whether they were left in the same, the situation." (R 1574). The detective testified that he "didn't see him place the bullet in the baggy; but I did see Dr. Steiner give the item to the FDLE agent, yes, sir." (R 1578). Defense Counsel continued to object, stating that "[t]he test is reasonable probability of tampering and he has not eliminated that by any stretch of the imagination." (R 1578). The objection was sustained "at this time unless it's shown that the items are in the same condition as when he last saw them." (R 1583).

husband of the victim, Mary Goss.[5] (R 1591-92). Mr. Goss testified that there was no one in his home when he left for work on the morning of his wife's murder as his "wife was at work." (R 1597). Mr. Goss identified the photos of his home and surrounding area. (R 1690-92). He said that when he got home from work the night of his wife's murder the "lock was busted . . . kicked or busted . . . it was badly damaged." (R 1692). It was not in that condition when he left for work earlier that day. (R 1692).

Mr. Goss testified that during the twenty plus years he was married to Mary, "[s]he never invited nobody in until she was fully dressed." (R 1693-94). She certainly did not let people in when she was not wearing any underwear. (R 1693).

Corporal Scott Stokes of the Palatka Police Department was one of the first officers to arrive at the murder scene. (R 1695). They arrived at approximately "11:35" - about "3 minutes" after receiving the call that shots were being fired at a residence. (R 1605-06). The officers were met by a black male, "Mr. Melendez," who said he had heard two shots "from the house" (Mrs. Goss's house) and a third one "right next to his residence." (R 1607-08,

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[5] Defense Counsel objected to further testimony of Mr. Goss because he was "concerned that this may get into emotional situations and go into perhaps the impermissible victim impact statements. (R 1592-93). The prosecutor proffered the questions and answers anticipated during direct exam of Mr. Goss, and the defense conceded that Mr. Goss could testify to those things "as long as we don't get into sympathy." (R 1594-96).

1612). Corporal Stokes walked around the side of the residence and "located Ms. Goss laying on her . . . back lying on the ground." (R 1608).

The corporal identified photos showing blood "where Mrs. Goss' head was lying." (R 1608). He said that the photos accurately reflect the crime scene. (R 1609). They were admitted into evidence and published to the jury. (R 1611-12).

The corporal testified that Mrs. Goss did not have any underwear on. "Her nightgown was kind of waist-high and she didn't have any undergarments on besides that." (R 1613). He "couldn't tell where she had been shot due [to] the large amount of blood that was on Mr. (sic) Goss' face." Photos of Mrs. Goss as found at the murder scene were admitted into evidence by stipulation and published to the jury. (R 1613, 1614).

Corporal Stokes saw "two children" who "were very excited when I observed them on the porch while speaking to Mr. Melendez about the shots that he had heard." (R 1615). The children were "Jerrits Jones and a LaJade Evans." (R 1616). The two children "stated that Maurice Floyd had came (sic) to the residence and chased their grandmother across the street." (R 1618). The male child described "the last shot" that which occurred "between the two houses" and said "that Mr. Floyd had indeed shot their grandmother."[6] (R 1618).

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[6] On cross, the witness said that he could not recall specifically whether the children were "actually stating that they saw him shoot her," but "they stated that Maurice had shot their grandmother." (R

The children said that they "were in the house with the grandmother at the time" she was chased from the house by Floyd. (R 1618-19).

The afternoon session of the guilt phase began with a discussion regarding a videotape taken of Floyd "at the police station denying the allegations and asserting he was, that he had an alibi." (R 1625). The defense conceded that it is a voluntary statement made by Floyd, but contended that "[i]t is irrelevant as we are offering no alibi." (R 1625). Defense Counsel further asserted that "[t]here are no admissions in it," and claimed that "it may create the impression to the Jury that he has a duty to speak and perhaps a duty to confess." (R 1626). The prosecutor observed that the chain of custody of the tape had been established and that the State expected to offer it into evidence at some point later in the day. (R 1626, 1627). Defense Counsel reiterated: "[W]e are offering no alibi . . .." (R 1628).

Another matter was brought up, this one by the trial judge. One of the bailiffs had reported "that a member of our viewing audience has made a comment to the Jury to the effect that I hope you send him to the electric chair." (R 1628). The judge took sworn testimony regarding the matter from the officers who heard the comment. (R 1629-31). Officer Harrell could tell that "four or five" jurors "in front" heard the comment. (R 1630).

1619).

Defense Counsel asked that the speaker be excluded from the courthouse and the jury be admonished to "pay no attention to comments or something of that nature . . .." (R 1632). The judge suggested: "Something to the effect if, if extraneous comments are made in your presence, you're to disregard them?" (R 1632). Defense Counsel responded: "Yes," and the State had no objection. (R 1632, 1633).

The speaker, Mr. McCoy, was escorted in and placed under oath. (R 1633-34). After stating that he "[j]ust got out of jail myself February the 10th," he admitted that he had commented that Floyd "should get the chair . . .." (R 1634). Mr. McCoy agreed that the comment was loud enough for some members of the jury to have overheard it. (R 1634). The trial judge admonished him that such "is inappropriate conduct" and asked him "not to be present during the rest of the case . . .." (R 1635-36). Mr. McCoy agreed. (R 1636).

Officer Michael Zike reported to the scene of the gunshots with Corporal Stokes. (R 1639-40). They went inside the open door of the Goss home and found no one inside. (R 1640). Officer Zike "pointed out to Corporal Stokes that the door had been kicked in." (R 1641). The law enforcement officers began "searching the area around the houses in the area," and Corporal "Stokes advised . . . he had found a body." (R 1641). Officer Zike went to the scene and saw Mrs. Goss's body; there were three young children at the house

next to where Mrs. Goss's body lay. (R 1642). The children "were pretty upset" and "advised that they had witnessed the murder." (R 1642). Following the defense's objection to the characterization of the children's demeanor as "upset," the officer testified: "They advised me their stepfather had shot their grandmother."[7] (R 1643).

The State's next witness was veteran officer, Lieutenant Ricardo Wright of the Putnam County Sheriff's Office. (R 1646). On July 15, 1998, Lt. Wright "received information that Mr. Floyd was in the apartment on Emmett Street." (R 1646). When the officers reported to the apartment, a "male subject in the house . . . motioned that Mr. Floyd was in the apartment, in the attic." (R 1646-47). At this point, Defense Counsel offered to "stipulate to the fact that my client was arrested." (R 1647). Floyd "came out of the attic," and was taken into custody. (R 1649). He identified the defendant as the person who exited the attic and was arrested. (R 1649).

Lt. Wright was asked how long it took to arrest Floyd from the point where the officer first made contact with him. (R 1649-50). Defense Counsel objected on the basis of "relevance." (R 1650). The

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[7] The officer continued: "When I asked them who their stepfather was, they advised Maurice Floyd." (R 1643). At this point, the trial judge invited the defense to make an objection, and after the defense counsel conceded that his objection was too late, the court said he would "treat your objection as a motion to strike" and proceeded to "strike the last statement the officer made." (R 1644). He then instructed the jury to disregard same. (R 1644).

prosecutor explained: "Well, Judge, the relevance is the Defendant was holed up in an attic. And the next set of questions was how hot was it up in the attic, to show consciousness of guilt." (R 1650). The objection was overruled. (R 1650). Lt. Wright said that it took approximately "30, 35 minutes" to "talking the Defendant out of the attic." (R 1650). However, he did not know the temperature of the attic. (R 1650).

The next witness was John Brown. (R 1652). He was "right across the street," a neighbor of Mary Goss and her husband. (R 1653). Mr. Brown was "sitting on the porch" as"[i]t was hot back . . .. " (R 1653). Two men passed, "young men walking by, one was tall, one was short." (R 1653). The men were talking about having been in a fight. (R 1653). They passed Mr. Brown and "the short one disappeared; but the one with the black . . . outfit on, he came back . . .. He walked about 8 or 9 times, you know, . . . he just kept walking." (R 1654, 1665). Mr. Brown drew his neighbor's attention to the young man and added that "after a while the suspect went up on the steps and started talking to her."[8] (R 1654). Mr. Brown and his neighbor, Janette Figuero, "heard a commotion, loud talking over there." (R 1655, 1656). Mr. Brown sat

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8 Defense Counsel objected to the witness's characterization of the person he saw as "the suspect." (R 1654). The trial judge overruled the objection, stating: "I think that's what he considered him to be, as I understand." (R 1654).

there for a while and then went inside his home. (R 1655). From inside, he "heard two big shots." (R 1655). The second shot came as he "was almost to the door coming out," and he "heard kids running." (R 1655). Mr. Brown heard a voice from Mrs. Goss's house; "a male voice." (R 1657). It sounded like the man "was in a rage." (R 1657).

Mr. Brown heard the kids running by as he reached his door. (R 1656-57). As he exited, he heard Ms. Figuero's door shut, and the kids were not in sight. (R 1657). He saw "somebody come off Miss Goss', stood on Ms. Goss' step, with black on, and after a while he . . . went around that corner running, around the next block there." (R 1655). "He had a black outfit on" and was "a black man." (R 1655, 1662). The children emerged from the house onto "Miss Jeanette's porch." (R 1658).

Mr. Brown testified that earlier in the day, he had seen a man arrive at Mrs. Goss's home in a red Honda with kids which he left at the house. (R 1655-56). The person he saw later that night "[f]it the description of how tall he (the man in the Honda) was and everything." (R 1656).

Jeanette Figuero was the next witness who lived "across the street" from Mrs. Goss. (R 1670-71). On the evening Mrs. Goss was shot, July 13th, she was talking to her neighbor Mr. Brown. (R 1671). She "noticed a young fellow . . . talking to someone at the screen door . . ." of Mrs. Goss's house. (R 1671-72). It was "a

young black male." (R 1678). She "heard a loud angry voice . . . coming from Ms. Goss' house." (R 1672). The voice sounded like a male's which asked Mrs. Goss "why did she have to involve the GD crackers." (R 1673). She identified "cracker" as "slang words for whites." (R 1674). The deputy Trelane sought help from was white. (R 1941). The black man approached Mrs. Goss, but when he saw Mrs. Figeroa on her porch, he "stepped back." (R 1674). This made her "curious," and she "really wanted to know who that is." (R 1674). However, because it was so hot outside, she went inside and lay on one of her sofas. (R 1674-75). "[A]bout 25 or 30 minutes" later, she "heard a shot." (R 1675). That was followed by "another shot." (R 1675). She "opened my eyes. And then a moment or two later I heard the louder shot between my house and my neighbor's house." (R 1675). She "became angry" and as she reached for her doorknob, she "heard the children knocking on the door, say open the door, open the door, please open the door." (R 1675). Her son "opened the door and told the children, "Jay and Jade and Alex," to get in and get on the floor." (R 1675, 1676). When she asked "what was the matter," the children "said their grandmother was shot." (R 1676).

The oldest boy, Jay or JJ, told Ms. Figeroa that Maurice Floyd had shot his grandmamma. (R 1676-77). She called the police and told them that her "neighbor's grandchildren are over here and the oldest one told me his grandmother was shot." (R 1678). The child

talked to the dispatcher, and Ms. Figeroa heard him say "Maurice Floyd." (R 1678).

The officers went into Mrs. Goss's house, and then came across the street to hers. (R 1679). They found no one in the Goss home, and JJ came out and talked to the officer. He repeated that Maurice Floyd shot his grandmother. (R 1679). JJ proceeded to tell the officer which "way your grandmother run." (R 1680). He pointed between Ms. Figeroa's house and her neighbor's house. (R 1680). Mrs. Goss's body was found there. (R 1680).

JJ told Ms. Figeroa that they came to her house because Mrs. Goss "told us to run over here and be safe and call the police." (R 1680). Ms. Figeroa had known the children "ever since they were babies." (R 1681). They "sometimes" came over and played "with my little grands." (R 1682).

The next witness was Gary Melendez, a Wal-Mart parking lot security patrol employee. (R 1683). He was at home when the murder occurred. (R 1684). He identified Ms. Figeroa as his mother. (R 1684). Around 10:20 on that evening "in the middle of July," he "was awakened by a loud blast." (R 1685). "[A] few seconds later" he "heard [an]other one." (R 1685). Then he heard "the third one" which "was louder than the first two." (R 1686). At that point, he "got up immediately and I rushed to the living room" because he "felt like somebody was outside shooting." (R 1686).

The shots had also awakened his mother who was asleep on the

sofa in the living room. (R 1686). He "told her to get down on the floor," because he did not know "which direction it's coming from." (R 1686). At that time, he "heard a loud knocking on the front door," and "some kids screaming, and hollering, saying, Let us in." (R 1686). Gary kneeled on the floor to open the door - he did not know if the shooting was in his direction - and he did not want to get shot. (R 1687). "[T]hree kids rushed inside," and he "shut the door immediately . . . and locked" it. (R 1687). This happened within "a few seconds" after he heard the last shot. (R 1687-88). Without being asked, the kids said "their grandmother was just shot." (R 1688). His mother asked who shot her, and the older boy replied, "A guy named Maurice Floyd shot her." (R 1688).

The children "was frightened . . . panicked . . . crying. . . [and] real nervous." (R 1688). "[I]t was the sense of urgency, please help us, our grandmother has been shot, we're scared, you know, we don't know what to do . . . that kind of attitude or excitement." (R 1689).

After calling 911, Ms. Figeroa wanted to go outside. (R 1689). Gary cautioned her not to, but she went anyway, "because she wanted to find Ms. Mary." (R 1689). Gary followed her, and they "cautioned the kids to stay inside . . .." (R 1689).

Gary was present when the oldest boy, J.J., came outside in response to Ms. Figeroa's call. (R 1690). The child pointed between the houses, and Mrs. Goss's body was found by police there.

(R 1690).

The State and Defense stipulated that Mary Goss was the victim and the one on whom Dr. Steiner performed an autopsy in connection with this case. (R 1691). The Defendant was moved temporarily while the child was escorted into the courtroom. (R 1693-94). The court inquired of the children outside the presence of the jury. (R 1695). After *voir dire* testimony, the court concluded that LaJade and J.J. were "properly qualified" for their ages to give testimony. (R 1701, 1726).

Six year old LaJade was the first child witness. (R 1704). She lives with Trelane, her father, Amos Evans, and her brothers, J.J., who is older than she, and Alex, who is younger. (R 1704-05). LaJade identified Floyd as having been previously married to her mother. (R 1706).

LaJade said that "Maurice" took her and her brothers to her grandma's house on the day when something happened to her grandmother. (R 1706). Later that night, Floyd came to the grandmother's house. LaJade was asleep, and awoke to find Floyd and her grandmother "fighting." (R 1707, 1708). LaJade was still in bed when her "grandma came and woke us up," and "told us to go outside." (R 1708). Grandma "told us to run over to . . . Ms. Jeanette . . . [s]o she could call the police." (R 1708). She and her brothers went outside. (R 1708). LaJade, J.J., and Alex went across the street. (R 1709).

LaJade "saw a gun" in Floyd's hand. (R 1709). She saw him "[s]hooting it." (R 1709). Floyd was shooting the gun "[a]t my grandma . . . [f]rom the porch." (R 1710). LaJade saw that the gun "was black," and she saw "[b]ullets" come out of it. (R 1710). Grandma, who had exited the house "from out the back door" "were running" while Floyd shot at her. (R 1710). She was running "to get away" from "Maurice." (R 1711).

LaJade saw "[t]wo" shots, and saw her grandmother run past her beside Ms. Jeanette's house. (R 1711). Floyd "ran after her." (R 1712). The child saw "Maurice" chasing her grandmother as "[h]e shot one last one." (R 1711). He "slowed up then he shot . . .." (R 1712-13).

As she reached the safety of Ms. Jeanette's house, the child saw Floyd go back to Mrs. Goss's house after chasing the woman down. (R 1713). Then she and her brothers entered Ms. Jeanette's house. (R 1714). J.J. told Ms. Jeanette what had happened. (R 1714). She was present when J.J. talked to the police on the phone. (R 1714). When the police arrived, she told them what happened. (R 1715). Her grandmother was found "on the side of the house" where she had run to. (R 1715). LaJade identified Floyd as the person who chased and shot her grandmother, Mrs. Goss. (R 1715-16).

Eight year old Jerrits Jones, called J.J. for short, testified next. (R 1721-22). "Maurice" took J.J. and his brother and sister

to his grandmother's house on July 13th. (R 1726-27). Later that evening, he and Alex went to bed in one room at Mrs. Goss's house, and LaJade went to bed in Mrs. Goss's room. (R 1728). That night, J.J.'s "grandma told us to get up." (R 1728). He saw Floyd "[b]y the dining room," and his grandma was acting "[m]ad." (R 1727-28).

J.J. heard Floyd say to Mrs. Goss that "[h]e didn't want to talk." (R 1732). Mrs. Goss told them "to go to Ms. Jeanette's house to call the police." (R 1732). His siblings went with him. (R 1733).

From outside, J.J. saw Floyd "[s]queezing my grandma behind the door;" Floyd was inside and Mrs. Goss was partly inside and partly outside the door. (R 1733, 1734). Mrs. Goss could not get out that way, but later J.J. saw her exit "[t]he left side" of the house from "[t]he back." (R 1735). Mrs. Goss "was running" away from the house "[t]owards the road." (R 1736). She ran "[b]etween Ms. Tony and Ms. Jeanette house." (R 1736).

J.J. saw Floyd "[o]n the porch," and he was "[s]hooting a gun." (R 1736). The child saw "[s]parks" come out of it. (R 1737). He ran for Ms. Jeanette's house with LaJade and Alex behind him. (R 1737). LaJade was watching what Floyd was doing as they ran. (R 1737).

They reached Ms. Jeanette's house, and J.J. "banged on the door." (R 1738). He saw Floyd "[s]till on the porch," and his "grandma was on her back . . . behind the house." (R 1738). J.J.

heard "one shot" as he got to Ms. Jeanette's house; it sounded from "between the houses." (R 1739, 1740). He told Ms. Jeanette what had happened, and he told someone over the phone, and later, the police in person. (R 1739). This child, also, identified Floyd. (R 1740).

The State's next witness was FDLE Crime Laboratory Analyst Steve Leary. (R 1742). The trial judge read the stipulation regarding the identification of the victim as Mary Goss and the identification of the person on whom Dr. Steiner performed the autopsy as Mary Goss. (R 1743-44). Mr. Leary was present during the autopsy on Mrs. Goss. (R 1744). He received "a copper jacket and a lead core from a bullet" from Dr. Steiner at that time and placed it in the packages those items were in at trial. (R 1744, 1745, 1746-47). He had seen them taken from the body of Mrs. Goss. (R 1744, 1745). Those items appeared to be in the same condition as they were when he received them at the autopsy. (R 1746). He sealed the envelopes with red evidence tape and placed his initials thereon. (R 1747). He placed those items in a paper bag which he stapled shut and sealed with red evidence tape, which he initialed. (R 1747). This is the normal manner of business in regard to the collection of evidence in his 21 years of handling such. (R 1747).

After collecting the items from Dr. Steiner, placing them inside a folded evidence bag and taking them with him inside his crime lab truck, Detective Leary took them to a firearms examiner,

David Warniment. (R 1748-49). Detective Leary was present while Mr. Warniment examined the items. (R 1749). After that inspection, Detective Leary took the items, placed them inside the two envelopes and sealed them with the red, initialed tape. (R 1749). He then put both envelopes in the brown paper bag, sealed and initialed it and "turned them into the evidence in-take section" on July 14th. The evidence in-take section's employee to whom he turned over the evidence "is Allison Arms." (R 1749). That was the end of the tracking log. (R 1750).

Defense Counsel objected to introduction of the evidence based on an inadequate showing of the chain of custody. (R 1751). He said that Detective Leary left the items with the lab custodian on July 14th, and Mr. Lassiter "doesn't even know when he picked them up," so a 14 month period is unaccounted for. (R 1752). Defense Counsel clarified his position:

> We haven't even reached the probability of tampering yet. That's not the issue. And Taplis is not the issue. The issue is Mr. Leary followed proper procedure up to a point to the 14th and that's where the custody ended. They haven't established a chain of custody.

(R 1756).

The trial judge ruled that the standard is whether the defendant has shown a reasonable probability of tampering under *Taplis*, but in any event, Floyd had not shown "either the probability or possibility of tampering." (R 1757). While the court acknowledged "a part in the time line where we can't connect

the dots. . . nonetheless they have come back to the Police Department who has delivered it to us." (R 1758). Most importantly, there is no evidence of tampering, "not either a probably (sic) nor a possibility and without such a showing . . . there's an adquate basis for me to determine that there is information that makes that evidence reliable . . .." (R 1758). While "it appears that there is at least a time when it was in the custody of the Department of Law Enforcement . . .," it was "picked up by someone . . . [and] it is here today . . .."[9] (R 1758). Moreover, "a reliable witness," Mr. Leary, testified that the item in evidence was the same as "when it came from her brain." (R 1759). Finding "that the chain is not necessary because this evidence is readily identifiable and not susceptible to tampering," and that the evidence "has not been tampered with," the court admitted the evidence. (R 1760). He added: "[A]n absolute portal-to-portal tracing of this evidence is not necessary for me to conclude that it is reliable . . .." (R 1761).

Captain Larry Beaton, a Putnam County Sheriff's Office Communications Supervisor, took the 911 call from Ms. Figeroa; he took several calls relevant to the instant case. (R 1763-64, 1767). In accordance with standard procedure, the calls were taped. (R

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[9] "From the time it was delivered to . . . the . . . lab custodian until it's delivered to the Police Department, we don't know where it was." (R 1760).

1765). The first call received was taken at "11:36 p.m. on July 13th, 1998." (R 1765).

Kimberly Greenwood, a dispatcher with the Putnam County Sheriff's Office, testified next. (R 1773). She received the first call in this case on July 13, 1998. (R 1774). The 911 dispatcher tape was played for the jury and reported on the record. (R 1775-1780). J.J. told the dispatcher that "Maurice Floyd" was shooting at his grandma's house. (R 1779-80).

Tashoni Lamb testified that Floyd came to her house to talk with her on the night Mary Goss was killed. (R 1784-86). He asked to speak with Ms. Lamb "privately," and when she sent the children out of the room, "he pulled his gun out his pants and sat it on the dresser. And he said, you don't believe what I just did. . . . I just shot Miss Mary, the grandmother." (R 1786). Ms. Lamb asked him "why he did it," and Floyd replied "that she had threatened to call the police on him." (R 1787).

Floyd stayed at Ms. Lamb's house from around midnight on the 13th until after six the next morning. (R 1788-89). The day after he left her house, Floyd called Ms. Lamb. (R 1789). Floyd asked her to lie to the police and claim that he had been with her earlier in the evening so he would have an alibi for the shooting. (R 1793-94). She refused because she "wasn't fixing to lie." (R 1794). Floyd asked her "Do you want to see me die?" referring to the possibility that he would go "to the electric chair because he

shot Miss Mary." (R 1795).

Corporal Robert Sandberg of the Palatka Police Department testified next. (R 1805-06). He received information that Floyd "was hiding in the attic of a residence on Emmett Street" on July 15th. (R 1806). He and some deputies went to the house and "were able to talk Mr. Floyd out of the attic." (R 1806). Floyd was taken to the police department and interviewed by Corp. Sandberg.[10] (R 1806).

On the tape, Floyd related that he and Trelane married on March 23, 1999. (R 1817). He said that Mrs. Goss was not fighting with him on the night she was killed, and he repeatedly denied knowing anything about it. (R 1819, 1821, 1832). He claimed to have been "[i]n College Arms" with "Tashoni Lamb . . . [p]robably about between 9 and 10." (R 1819). However, he admitted that he was not at his own house "[b]ecause the cops were looking for me." (R 1826). He left "[a]bout 6 something" the next morning. (R 1830).

The next witness was the Medical Examiner, Dr. Terrance Steiner, who was accepted as an expert by the trial court. (R 1851, 1853). He conducted the autopsy on Mary Goss's body on July 15, 1998. (R 1853). Mrs. Goss was killed with a bullet which entered

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10 The interview occurred at "15th of July, approximately 25 minutes after midnight." (R 1812).

"through her cheekbone" traveled through her skull "and severed the brainstem . . .." (R 1854). The doctor "recovered the spent bullet, the lead fragment and also . . . the copper jacket . . ." from "under her scalp . . .." (R 1855). Dr. Steiner concluded that Mrs. Goss "was standing up" when shot, although she may have been "almost maybe kneeling." (R 1858). When the brainstem was severed, she died instantaneously from the "[t]rauma to the brain due to a single gunshot wound." (R 1858, 1859).

The State rested. (R 1859).

The Defense objected "to the introduction of the . . . projectiles, pieces . . . removed from the body, based upon . . . there has not been a chain of custody established, let alone that the threshold issue." (R 1860). Counsel said the State "did not reach the threshold that they even established any custody over a several month period of time." (R 1861). The judge stood on his previous ruling, admitting them. (R 1863). The court also denied the motion for judgment of acquittal based "primarily on the basis that this was child testimony . . .." (R 1862-63).

The Defense rested. (R 1868). The jury retired to deliberate its verdict at 2:31 p.m. (R 1989). The jury indicated that it had a question at 4:32 p.m., but resolved it without presenting the question to the court. (R 1995-96). At 4:55 p.m., the jury returned its verdict finding Floyd guilty as charged of first degree premeditated and felony murder, burglary of a dwelling and

aggravated assault as charged. (R 1996-99). In rendering its verdict, the jury found he used a firearm during the commission of the murder and the burglary. (R 1998).

The penalty phase proceeding was held on April 8, 1999. (R 2069). The jail informed the court that Floyd "has been demonstrating . . . conduct . . . [causing] a great deal of concern on the part of the jailers that he might act out either in the holding cell or in the courtroom sometime today." (R 2011). The matter was resolved without additional restraints, although the number of security personnel and their positioning was changed. (R 2016-17).

The State presented the proffer, and then the testimony, of five victim impact witnesses - none of whom were family members. (R 2030-2101). The State entered the judgments and sentences into evidence in accordance with a stipulation reached with the Defense. (R 2161). The State rested, and the Defense rested without putting on any evidence in mitigation. (R 2103). A charge conference proceeded, with the Defense objecting to the jury being instructed on the HAC aggravator. (R 2103-30, 2140-46). After hearing, the trial court decided to give the HAC instruction. (R 2107-30).

The State agreed to submission of the proposed mitigating factors to the jury. (R 2131). The two proposed mitigators were "exemplary behavior in this courtroom and demeanor in the face of great adversity," and "he has assisted me through note taking

throughout this proceeding and communication and behaving himself." (R 2165).

The jury recommended the death penalty by a vote of 11 to 1. (R 2179). The trial court ordered a PSI. (R 2182).

A *Spencer* hearing was held on April 16, 1999. (R 2214). Trelane testified and said that she told her mother of Floyd's threat to kill her, i.e., "to be careful because he said if he couldn't get me he'd get somebody that I love." (R 2220). She also told Mrs. Goss "everything Maurice had did up to that moment, and then I told her that he had ran, they couldn't catch him and he was on the lose." (R 2220). Mrs. Goss responded: "I won't let him get my grandchildren." (R 2220). Upon Defense objection, the judge permitted the statements Trelane made to Mrs. Goss to stand, but struck the report of the statements Mrs. Goss made.[11] (R 2222).

At the *Spencer* hearing, Floyd asked that two additional nonstatutory mitigators be considered, to-wit: That he "successfully completed probation" and "is apparently opposed to drinking." (R 2225-56). The trial judge found both in his sentencing order, but assigned little weight thereto. (R 981-82). He also found both proposed mitigators from the penalty phase and assigned them little weight. (R 981).

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[11] Trelane had also talked to her mother earlier in the day and had told her she "was going to file for a divorce Monday morning." (R 2223).

The Honorable William A. Parsons, Circuit Judge, sentenced Floyd to death for the murder of Mary Goss on May 26, 1999. (R 832-83). Floyd filed his notice of appeal on June 4, 1999. (R 1002).

SUMMARY OF THE ARGUMENTS

Point I:

The trial court did not err in denying the motion for judgment of acquittal. The evidence and reasonable inferences therefrom, taken in the light most favorable to upholding the trial court's decision clearly establish premeditation. Moreover, there was no meaningful inconsistency between the testimony of the State witnesses. The threat to kill the victim, occurring hours before the murder, distinguishes this killing from the heat of passion murders which have sometimes been held to justify a life sentence. Likewise, the evidence of burglary was overwhelming. There is no question that Appellant's entry into the victim's home was not consensual.

Point II:

The trial court did not err in finding the State's peremptory challenge of a prospective juror to be race neutral. The body language of the prospective juror convinced the prosecutor that he had a dislike for or non-agreement with the death penalty. At a

minimum, the verbal response was equivocal and justified a peremptory challenge.

Point III:

The trial judge did not fundamentally err in not instructing the jury on specific items of proposed nonstatutory mitigation. Neither did he so err in not instructing on the statutory mitigator of age. Any error in such instruction was harmless beyond a reasonable doubt.

Point IV:

The trial court did not err in instructing the jury on the heinous, atrocious, or cruel aggravator. There was some evidence to support a finding of that aggravator; indeed, the State submits that the trial judge erred in not finding it. Moreover, any error was harmless beyond a reasonable doubt.

Point V:

The trial court did not err in instructing the jury on, and finding that, the murder was committed to avoid arrest. Competent substantial evidence, including the statement of the appellant, established that same was a motive for the murder. Moreover, any error was harmless in light of the other three strong aggravators and the scant mitigation.

Point VI:

The trial court did not err in instructing the jury on the committed during a felony aggravator. The evidence clearly

established that the murder was committed in connection with the burglary of the victim's home. The jury having convicted the appellant of burglary, there was no error in instructing, or finding, this aggravator.

Point VII:

The trial court did not commit fundamental error in connection with the penalty phase closing argument of the prosecutor. At worst, the comment implied that the prosecutor had reached a decision on the ultimate determination to be made by the jury. Any error in this regard was cured by the trial court's subsequent instruction to the jury. Moreover, due to the overwhelming evidence of aggravation and scant mitigation, there is no reasonable probability that the jury's recommendation would have been different absent the comment. Thus, any error was harmless.

Point VIII:

The trial court did not err in permitting the victim impact evidence presented to the jury during the penalty phase. The evidence was first proffered, and after the proffer, the Defense made no further objection, thereby waiving the claim. That the witnesses presented their testimony in a very articulate and unintimidated manner does not render their testimony inadmissible. Moreover, any error in the presentation of this evidence was harmless due to the overwhelming evidence of aggravation compared to the dirth of mitigation.

Point IX:

The trial court did not err in overruling an objection to the testimony of a witness regarding the report of the murder by the victim's grandchildren. The objection below was hearsay, and was not based, as is the claim in this Court, on improper bolstering. Thus, it is not preserved for review. In any event, the trial judge properly admitted the evidence. Moreover, any error in its admission was harmless.

Point X:

The trial court did not err in denying the requested Defense instruction on circumstantial evidence. The standard reasonable doubt instruction was given, and there was no claim that it was inadequate. There are no special circumstances in this case which would render inapplicable the well-established rule which permits the trial judge to refuse to give the instruction.

Point XI:

Appellant's death sentence is proportionate. Four strong aggravators were weighed against scant nonstatutory mitigation. The circumstances of the crime did not merit anything less than the death penalty. The trial court's sentence, following the eleven to one recommendation of the jury, should be upheld as proportionate.

Point XII:

The trial court did not err in admitting the projectiles taken from

the head of the victim. The chain of custody was sufficiently established. Moreover, the appellant did not carry his burden to show a probability of tampering. Thus, there was no error in admission of the evidence. Moreover, any error was harmless beyond a reasonable doubt.

Point XIII:

The cumulative error claim was not preserved for appellate review. Moreover, there were no cumulative errors committed at trial. Certainly, there were no errors sufficient to reach the fundamental error standard.

Appellant is entitled to no relief.

POINT I

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL; PREMEDITATION AND BURGLARY WERE PROVED.

JOA - Murder:

Floyd complains that the trial court erred in denying his motion for judgment of acquittal because "the State failed to prove premeditation and . . . burglary." (IB 20). On appeal, Floyd claims that the evidence did not support either premeditated murder or felony murder. (IB 20). He admits that "this particular argument was not specifically made below," but claims that a general contest to the sufficiency of the evidence was made in the trial court acquittal motion and a new trial motion, and that is sufficient to preserve the issue for appeal.[12] (IB 20).

Although the standard of appellate review of the denial of a motion for judgement of acquittal is not clear, it most likely is *de novo*. Regardless, whether it is abuse of discretion or *de novo*, Floyd has not met the standard for relief.

As trial counsel did in the lower court, appellate counsel complains that the child testimony was "rebutted by . . . Mr. Brown . . .." (*See* R 1862 and IB 20). According to Floyd, Mr. Brown testified "than an individual fired two shots from the porch and

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12 The State disagrees and submits that the barebones, conclusory claim made for the first time on appeal contending that neither premeditated murder nor felony murder was proved is both legally insufficient and procedurally barred. It is also without merit.

ran north" and did not "go across the street" where the victim was shot between two houses. (R 1862). He says this conflicts with the child eye witness testimony, but does not bother to explain what the conflict is.

In pertinent part, Mr. Brown testified:

> . . . I heard two big shots. . . . [T]he second one I was almost to the door coming out, I heard kids running. . . . I seen my neighbor's door shut. . . . I seen somebody come off Miss Goss', stood on Ms. Goss' step, with black on, and . . . went around that corner running, around the next block there.

(R 1655). On cross, he said that he heard "the two shots rung out" and "seen him" as he "stood on the step." (R 1663-64). Mr. Brown only heard two shots and did not see the man shoot Mrs. Goss because he "was inside when the shot rung out." (R 1668, 1669).

Mr. Brown said that the black man with the angry male voice was the same height as the man who dropped off the kids with Mrs. Goss earlier in the day. (R 1656-57, 1662). He had paced back and forth in front of Mrs. Goss's home "about 8 or 9 times" before approaching the victim. (R 1654). This man then "went up the steps and started talking to her." (R 1654).

Mrs. Figeroa testified that she saw the man talking at Mrs. Goss's screen door which was open. (R 1671). She went inside for a glass of water, and when she returned, the man "was no longer on the porch." (R 1672). She "heard a loud angry voice . . . coming from Ms. Goss' house." (R 1672). It was a male's voice. (R 1673).

He was saying "why did she have to involve the GD crackers."[13] (R 1673). Mrs. Figeroa went inside and thereafter heard the shots. (R 1673-75).

LaJade testified that Floyd took her and her brothers to Mrs. Goss's earlier on the day when Mrs. Goss was killed. She awoke at her grandmother's house to find Floyd "fighting" with Mrs. Goss inside the home. (R 1707, 1708). Mrs. Goss woke her up and told her to go across the street and have Ms. Jeanette "call the police." (R 1708). Fleeing across the street, LaJade saw Floyd on Mrs. Goss's porch, shooting at the woman as she ran from her home "to get away" from Floyd. (R 1709-10, 1711). She saw Floyd leave the porch in the direction Mrs. Goss had taken, but he never got close to the fleeing woman. LaJade saw Floyd return to Mrs. Goss's house after he chased her. (R 1713). She heard, but did not see, the third and final shot. (R 1712).

There is no inconsistency with Mr. Brown's testimony. LaJade testified that she saw Floyd, as he fired at Mrs. Goss, leave the porch and begin chasing after the woman. However, after firing, he returned to Mrs. Goss's house. LaJade heard, but did not see, a third shot. Mr. Brown heard two of the three shots, and he saw Floyd leave Mrs. Goss's house after the final shot. He was still

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[13] "Crackers" was slang "for whites." (R 1674). The deputy Trelane went to for protection was white. (R 1941).

inside his house when the final shot rang out. Thus, there is no inconsistency between Mr. Brown's account of the events and that testified to by LaJade.

J.J. also testified that Floyd took him, his sister, and his brother to Mrs. Goss' house earlier in the day. (R 1727). Mrs. Goss woke the kids, told them to get up, and to go to Mrs. Figeroa's house. (R 1728). Floyd was inside the house, and Mrs. Goss was "[m]ad." (R 1728-29). Floyd told Mrs. Goss that he "didn't want to talk" to her. (R 1732). Mrs. Goss told J.J. to go to Mrs. Figeroa's house "to call the police." (R 1732).

J.J. saw Floyd "[s]queezing my grandma behind the door" as he and his siblings ran across the street to call the police. (R 1732-33). Later, he saw Floyd on Mrs. Goss's porch shooting a gun at the woman as she ran from the house. (R 1735-36). He heard three shots in all. (R 1736). J.J. did not see Floyd leave the porch. (R 1737). However, as the children fled to Ms. Figeroa's safe house, he could tell that LaJade, who was behind him, was watching what Floyd was doing. (R 1737). J.J. believed that Floyd was on the porch when he banged on Ms. Figeroa's door. (R 1738). J.J. "only heard one shot" as he reached the door, and the last thing he saw before entering the house was "[m]y grandma was on her back." (R 1738, 1739).

J.J.'s testimony is likewise consistent with that of Mr. Brown. J.J. believed that Floyd was on the Goss's porch when he

fired the final shot. He saw his grandmother on the ground after hearing that shot and before he entered Ms. Figeroa's home. Although he did not see Floyd leave the porch, J.J.'s back was to the man for the run across the street, and Floyd may well have come off the porch and started after Mrs. Goss, then returned to the vantage point of the porch step to take his final shot at the fleeing woman.[14] In any event, Mr. Brown saw Floyd leave in a direction away from the fallen victim after these events; Mr. Brown was very clear that he was inside his own home when the fatal shot rang out. Thus, that he saw Floyd leave Mrs. Goss's porch in a direction away from the fallen victim is in no manner inconsistent with the testimony of either LaJade or J.J.

Floyd has utterly failed to establish that the trial court erred in denying the motion for judgment of acquittal on the murder charge. Moreover, competent, substantial evidence supports the verdict and is more than sufficient to sustain the conviction.

It is well-settled law that "premeditation may occur a matter of moments before the murderous act, even after a battery has begin. *Larry v. State*, 104 So. 2d 352, 354 (Fla. 1958). Evidence

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14 On the otherhand, he may have approached Mrs. Goss and shot her as she began to go to a kneeling position (as argued and demonstrated by the prosecutor below) (R 2157-58) and still returned to the porch steps in time for the children to see him there after Mrs. Goss fell to the ground.

of premeditation "may be inferred" and

> includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it . . ..

Id. Clearly, Floyd, who had previously killed his own brother with a gun, well knew that firing a bullet into the head of Mrs. Goss would kill her. Competent, substantial evidence establishing premeditation includes that Floyd had very recently told Trelane that he would kill someone she loved and mentioned her mother as a potential target, (R 1529), paced back and forth several times in front of Mrs. Goss's home before approaching the victim, (R 1654), once inside the home, he refused to talk with Mrs. Goss, (R 1732), he caught and held Mrs. Goss in the door to prevent her escape behind the children, (R 1733), and he fired at her twice as she fled before firing the fatal shot into her head as she faced him. Thus, the evidence of premeditation was overwhelming.

Moreover, Floyd's claim that premeditation was not proved based on the rationale of *Tien Wang v. State*, 426 So. 2d 1004 (Fla. 3d DCA 1983) is without merit. Contrary to his appellate claim, the only distinguishing factor between *Tien Wang* and the instant case is not "the difference in weapons." (*See* IB 29). *Tien Wang* did not include a specific threat to kill the victim made well prior to the allegedly heat-of-passion murder. Neither did the killer pace

back and forth in front of the victim's house some 8 or 9 times before undertaking the acts which resulted in the murder. In this case, even if the murder could be said to have been done in the heat of passion -- which it was not -- the previously made threat to kill and the time the killer had to contemplate his future actions would compel a different disposition than that in *Tien Wang*.

Of course, that Floyd used a gun had special significance in the instant case and itself distinguishes Floyd's case from *Tien Wang.* It was a gun that Floyd had placed to the head of Trelane the day before the murder, pulled the trigger three times, and told her that if she tried to get away from him, he would kill her or "somebody that I love, whether it be my mamma, my daddy, or even my children." (R 1529). The next day he fired two unsuccessful shots at Trelane's fleeing mamma, who had just sent Trelane's children to safety, and then fired a third killing her.

In *Lusk v. State*, 498 So. 2d 902, 905 (Fla. 1986), *cert. denied*, 481 U.S. 1024 (1987), this Court determined that a heat-of-passion defense was wholly unsupported by the evidence where the defendant had a "four hour period to reflect" on his future course of action. The four hour period and defendant's statement that he was not "gonna take it no more" was sufficient to establish premeditation so conclusively that this Court said there was "no evidence . . . which would have even warranted a jury

instruction on this defense." *Id.* In the instant case, Floyd threatened the life of Trelane's mother the night before the murder - which occurred late the following day.[15] Floyd had many more than 4 hours to reflect on his future course of action. Thus, not even a jury instruction -- had one been requested -- on this defense would have been appropriate. Certainly, he has utterly failed to carry his burden to allege, and prove, such a defense.

Moreover, this claim was not raised below, and so, it is procedurally barred on appeal. *Steinhorst v. State*, 412 So. 2d 332 (Fla. 1982), *cert. denied*, 522 U.S. 1022 (1997).

Finally, any failure to establish premeditation is harmless because the jury also found Floyd guilty of felony murder. That ground is an independent basis supporting the first degree murder conviction and death sentence.

Floyd is entitled to no relief.

Burglary:

Floyd also complains that "[t]here is not substantial, competent evidence to support the conviction for armed burglary and

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15 In his appellate brief, Floyd claims he was inside talking to the victim for an hour before the shooting. (IB 58). Thus, by his own admission, he had ample time to premeditate. *See Wilson v. State*, 493 So. 2d 1019, 1022 (Fla. 1986)[where attack "continued throughout the house . . . [t]here was more than adequate time for . . . him to have realized the probable consequences of his actions."]

therefore the felony murder conviction must also fall." (IB 22). Quoting extensively from *Delgado v. State*, 25 Fla. L. Weekly S631, S633 (Fla. Aug. 24, 2000), he claims that he entered Mrs. Goss's home "consensually and subsequently forms the intent to commit an offense therein . . .." (IB 23-24). He says that the State's evidence did not prove that he entered without consent, and absurdly concludes that "the evidence points to the opposite conclusion . . .." (IB 25). He claims that because some neighbors saw him talking to Mrs. Goss through the open screen door and later one saw him arguing with Mrs. Goss inside the home, "[i]t is therefore clear that appellant was inside the Goss home apparently with Mary's consent." (IB 25). Such analysis is wholly devoid of any merit and should be outright rejected.

Moreover, the evidence supporting the nonconsensual entry for the burglary charge is overwhelming. It includes:

1. Trelane told her mother, Mrs. Goss, that Floyd had assaulted her, had escaped, and was likely to try to get the children from her. Mrs. Goss told Trelane that she "won't let him get my grandchildren." (R 1539).

2. Floyd had told Trelane that he would hurt her loved ones, specifically mentioning her mother, "if she ever tried to get away from him or run or hide." (R 1529).

3. Neighbor Brown saw Floyd walking back and forth 8 or 9 times in front of Mrs. Goss's home before going up the steps and

making contact with the woman. The neighbors saw Floyd talking to Mrs. Goss through the open screen door. Later, they heard loud, angry voices, and one neighbor saw Floyd towering over Mrs. Goss who was seated in her living room.

4. The children heard Floyd fighting with Mrs. Goss inside the home, and he refused to talk with their grandmother. Mrs. Goss told them to run and call the police. (R 1732).

5. The front door and lock was severely damaged and had not been that way when Mr. Goss left for work that morning. (R 1602).

6. Mrs. Goss was dressed in a gown and was wearing no undergarments. She would not have consented to Floyd's entry into her home under those conditions. (R 1603).

Clearly, the above provides substantial, competent evidence to support the conviction for burglary.

Finally, the case on which Floyd relies, and from which he quotes extensively, *Delgado v. State*, does not support his claim that he is entitled to relief where the state failed to prove that he was inside without Mrs. Goss's consent. Rather, *Delgado* emphasized that "consensual entry is an affirmative defense to the charge of burglary, and therefore the burden is on the defendant to establish that there was consent to enter." (IB 24). *See Delgado*, 25 Fla. L. Weekly at S1147. Floyd has not met and cannot meet his burden in this case.

Finally, any failure to establish felony murder is harmless

because the jury also found Floyd guilty of premeditated murder. That ground is an independent basis supporting the first degree murder conviction and death sentence.

Floyd is entitled to no relief.

POINT II

THE TRIAL JUDGE DID NOT ERR IN FINDING THE STATE'S PEREMPTORY CHALLENGE OF A JUROR WAS RACE NEUTRAL.

Floyd complains that the prosecutor exercised a peremptory challenge against Hispanic prospective Juror Rios for a racially discriminatory reason. Floyd acknowledges that there is a three step inquiry to be made by the trial court when a *Neil* challenge is made. (IB 35). As raised on appeal, "[t]he issue here focuses on the third step: the genuineness of the State's asserted race neutral reason for excluding Noel Rios." (IB 36). Floyd "submits that the trial court's finding that the state's race-neutral reason was genuine is clearly erroneous." (IB 37). He is incorrect.

The standard of appellate review is set forth in *Melbourne v. State*, 679 So. 2d 759 (Fla. 1996). There this Court said that once the proponent of a strike gives "a facially race-neutral" reason for the strike, "and the court believes that, given all the circumstances surrounding the strike, the explanation is not a pretext, the strike will be sustained." 679 So. 2d at 764. In making this determination, the trial "court's focus . . . is not on the reasonableness of the explanation but rather its genuineness." *Id.* Moreover, "[t]hroughout this process, the burden of persuasion never leaves the opponent of the strike to prove purposeful racial discrimination." *Id. See Smith v. State*, 699 So. 2d 629, 636-37 (Fla. 1997). In reviewing the trial court's actions, this Court

"should keep in mind two principles . . .," to-wit: "First, peremptories are presumed to be exercised in a nondiscriminatory manner. Second, the trial court's decision turns primarily on an assessment of credibility and will be affirmed on appeal unless clearly erroneous." *Id.* at 764-65.

The record shows that there were two Black women seated on the jury at the time the State struck Mr. Rios, a Hispanic. (R 1106). Defense Counsel made it clear that there was no allegation of a "systematic exclusion of a class." (R 1106).

The prosecutor stated his race-neutral reason for the strike as:

> Mr. Withee asked Mr. Rios about his feelings about the death penalty, he, by body language and by answer, expressed what I perceived to be a negative response with regard to imposition of the death penalty. I saw that response and noted . . . what I perceived to be a dislike for or non-agreement with the death penalty.
>
> I determined peremptorily that he could [be] excused because his answers had been conjured earlier.

(R 1107). Clearly, there is no discriminatory intent inherent in this explanation, and therefore, the trial court properly deemed the reason race neutral. *See Purkett v. Elem*, 515 U.S. 765 (1995), *reh'g denied*, 115 S.Ct. 2635 (1995). It is clear that the trial judge resolved the issue of the credibility of the prosecutor's race-neutral explanation against Floyd's position herein.

Floyd failed to sustain his burden to persuade the trial court that the facially neutral reason was pretextual and that purposeful

racial discrimination motivated the strike. He never identified a single specific instance where a juror whose answers to the subject questions had been equivocal (as were Mr. Rios's) had been seated by the State. He cannot do so.

As appellate counsel admits, at least two potential jurors had indicated by raised hands that they opposed the death penalty. (IB 31). These two explained their beliefs on the subject "in some detail" before the remainder of the panel. Later, the trial defense counsel questioned both of these two potential jurors further on that subject. (R 1077-78). He proceeded to question several other prospective jurors, but did not mention the subject of the death penalty to any of them until he got to Mr. Rios. (R 1078-83). Neither did he question any other prospective jurors about their beliefs on the death penalty after he so questioned Mr. Rios. (R 1078-1090). The State submits that the fact that Defense Counsel asked Mr. Rios, and only Mr. Rios,[16] questions about his view on the death penalty corroborates the prosecutors assessment that Mr. Rios, indicated by body language, if not verbally, that he opposed the death penalty.[17]

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16 Of course, he also questioned Young and Hardyman, who were clearly identified on the record as being opposed to the death penalty. Of the remainder, he questioned only Mr. Rios on the subject.

17 Perhaps this indication came when Mr. Young and Mr. Hardyman were explaining their objections to the death penalty.

Moreover, when asked how he felt about the death penalty, Mr. Rios responded: "I don't know." (R 1083). Clearly, that is an equivocal response at the very least. If a prospective juror can be challenged for cause when a venireman states an opposition to the death penalty, one surely can be challenged peremptorily when he does not yet know how he feels about it. To require otherwise would be forcing a "pig in a poke" on the party disadvantaged by a subsequently formed position on the issue.[18]

The prosecutor stated his race-neutral reason to be Mr. Rios's body language and his answer. He interpreted both as being "a negative response with regard to imposition of the death penalty." (R 1107). The trial judge evaluated the circumstances, noting that although he might not have himself been in the best position to read Mr. Rios's body language for some unexpressed reason, he was certainly well aware that "people express themselves by their movement of their bodies, their eyes, and those things are things that are regularly evaluated in jury selection."[19] (R 1108). Thus,

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Certainly, many citizens may not have decided how they feel about the death penalty until forced to contemplate that question. To require the State to risk a decision opposing the death penalty made after the trial had begun would be most unfair.

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Floyd never objected on the ground that the judge needed to make his own determination of the body language of the prospective juror. Thus, that claim, raised for the first time on appeal, (IB 39), is procedurally barred. Moreover, the judge did not indicate that he saw no body language which would support the prosecutor's assessment, he merely indicated that he was not the one best

he clearly accepted the prosecutor's explanation as a genuine one. Floyd has utterly failed to carry **his** burden to prove otherwise.[20] Having failed to demonstrate that the trial judge's credibility-based decision regarding the genuineness of the prosecutor's race-neutral reason was clearly erroneous, the presumption of a nondiscriminatory exercise of a peremptory challenge has not been overcome. Floyd is entitled to no relief.

Neither is he entitled to any relief on the claim that the trial court's ruling was improperly based "in part, on the fact that the stricken juror Rios was Hispanic while the defendant in this case was black." (IB 40). In *Rodriguez v. State*, 753 So. 2d 29, 39 (Fla. 2000), the defendant wanted to peremptorily excuse a Hispanic prospective juror, "stating that the venireperson had been

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positioned to judge the body language, if any, that was present. (R 1108). Thus, the 5th District's *Bernard* decision is distinguishable. Further, it appears that Defense Counsel saw some body language which he acknowledged on the record, although he trivialized its importance. (R 1107). The State submits, however, that the fact that the only prospective juror - other than the two who are identified as raising their hands in objection to the death penalty - who was questioned on the subject was Mr. Rios, whom Defense Counsel inquired of on this subject.

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There is no record support for the appellate claim that "Rios did not raise his hand to indicate any problem with the death penalty . . .." (IB 37). In fact, the record might indicate that he did do so since he was the only person, other than Young and Hardyman, who are identified as having raised their hands, who was questioned on the issue. At the very least, this indicates that Mr. Rios most likely gave some indication that he shared a concern about the death penalty with young and Hardyman.

charged and arrested for carrying a concealed firearm and that the charges were eventually dropped." He claimed to believe that this would cause the prospective juror to be partial to the State because he "would feel a debt of gratitude to the State." 753 So. 2d at 39. In affirming the trial judge's determination that the explanation was not genuine because others similarly situated were not challenged, this Court said: "[W]hether the explanation is pretextual include such factors as the racial makeup of the venire; prior strikes exercised against the same racial group; a strike based on a reason equally applicable to an unchallenged venireperson; or singling out the venireperson for special treatment." *Id.* at 40.

The record reflects that there were two Black women and one Black man seated on the 14 member panel. (R 1268). Floyd is black. (R 1106). Thus, the racial makeup of the selected jury militates against a finding that the explanation was pretextual for a race based challenge. Floyd is entitled to no relief.

Finally, the State points out that although the defense counsel said he wanted a continuing objection to this matter, the trial judge told him that he should "feel free to object anytime." (R 1108). When the jury was sworn quite some time later, Defense Counsel did not object to the panel based on the *Neil* challenge to the State's use of the peremptory on Mr. Rios. (R 1268-1272). Moreover, when the judge specifically asked if there was any other

business to bring before the court immediately after the jury was sworn, Defense Counsel mentioned the video tape but made no reference to any jurors or the *Neil* issue. Neither, was the issue mentioned when court reconvened and opening statements were made. (R 1263-1264 and 1475-1492).[21] Under these circumstances, the instant issue is not preserved for appellate review because Floyd did not renew his objection before the jury was sworn. *Melbourne v. State*, 679 So. 2d at 765.

[21] Appellee notes there is a discrepancy in the pagination of the record on appeal. Some pre-trial hearings were placed between the transcripts of the trial. The pre-trial hearings appear at R 1281-1472.

POINT III

THE TRIAL JUDGE DID NOT FUNDAMENTALLY ERR WHEN HE DID NOT INSTRUCT THE JURY THAT IT COULD CONSIDER ANY OTHER ASPECT OF THE DEFENDANT'S CHARACTER, RECORD, OR BACKGROUND IN MITIGATION OR WHEN THE COURT REFUSED TO INSTRUCT ON PROPOSED NONSTATUTORY MITIGATION AND DID NOT INSTRUCT ON THE STATUTORY MITIGATING FACTOR RELATING TO AGE.

The standard of review of claims of fundamental error is well-established. Fundamental error is that "which goes to the foundation of the case." *Sanford v. Rubin*, 237 So. 2d 134, 137 (Fla. 1970). It is "error which reaches down into the validity of the trial itself to the extent that a verdict . . . could not have been obtained without the . . . error." *Archer v. State*, 673 So. 2d 17, 20 (Fla. 1996),[22] *cert. denied*, 519 U.S. 876 (1996). "[J]ury instructions are subject to the contemporaneous objection rule, and absent an objection at trial, can be raised on appeal only if fundamental error occurred." *Id.*

In *State v. Wilson,* 686 So. 2d 569, 570 (Fla. 1996), the trial judge's "instruction on reasonable doubt was not incorrect," but it was ambiguous because "it might have been construed as either minimizing the importance of reasonable doubt or shifting the burden to the defendant . . .." This Court noted that even if this was error, it was not fundamental error because "[a]ny perceived ambiguity could have been clarified by the simple expedient of

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22 *Quoting Brown v. State*, 124 So. 2d 481, 484 (Fla. 1960).

calling it to the judge's attention through a proper objection." *State v. Wilson*, 686 So. 2d at 570.

In *Archer v. State*, this Court said that even unconstitutionally vague jury instructions on aggravating factors do not provide a basis for relief on appeal unless the defendant made "a specific objection or propose[d] an alternative instruction at trial . . .." 673 So. 2d at 19. Floyd's counsel did not make an objection of any kind to the general instruction which the trial judge gave on nonstatutory mitigation. After the instruction was given to the jury, Defense Counsel specifically acknowledged that the instruction as given was that which the judge had previously indicated would be given. (R 2177). Floyd had made no objection to that instruction at the charge conference,[23] when it was given, or at the post instruction comment phase.[24] (R 2106-2148, 2172,

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Indeed, although he requested that the court instruct on two specific nonstatutory mitigators, he made no complaint about the general instruction on nonstatutory mitigation and when asked by the court if the part of the proposed instruction containing the general instruction on nonstatutory mitigation was appropriate, trial Defense Counsel affirmed that it "appears to be intact." (R 2137).

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Moreover, the record indicates that written instructions were given to the jury, (R 2134), and despite Floyd's claim that 35 minutes was not an adequate time for the jury to read them, there is nothing in the record that indicates that the written instructions were not, in fact, given or that 35 minutes was not an adequate time for the reading of same. Further, it is Floyd's obligation as Appellant to make sure that the record on appeal is complete. He does not claim that the jury was not given written instructions, but speculates instead that "they were destroyed or a juror has a

2178-79). Thus, the instant claim is not preserved for appellate review.

Further, any ambiguity in giving only the second part of the general instruction on nonstatutory mitigation could have been clarified by the simple expedient of calling it to the judge's attention through a proper objection at the proper time. Having utterly failed to make any complaint whatsoever about this matter in the trial court, Floyd's instant issue is procedurally barred. *State v. Wilson,* 686 So. 2d at 570.

Moreover, during closing argument, Defense Counsel advised the jury that the Defense felt they had "established two interesting mitigating circumstances." (R 2164-65). They were identified as "exemplary behavior in this courtroom and demeanor in the face of great adversity," and "he has assisted me through note taking throughout this proceeding and communication and behaving himself." (R 2165). At no time did the defense suggest that age was a mitigating factor or circumstance. Further, the Defense specifically excluded other potential mitigation which might have been grounded in "a troubled childhood." (R 2163). Without asking the jury to specifically find it as mitigation, Defense Counsel did advise the jury that Floyd had been "successfully completing

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trial souvenir." (IB 43 n.9). In the absence of even an allegation that no written instructions were given, this Court must conclude that the written instructions referenced in the record were given to the jury.

probation" "until this occurred." (R 2164). Thus, the Defense presented to the jury all of the matters relevant to mitigation which it wanted the jury to consider. Later, at the *Spencer* hearing, Floyd asked that two other nonstatutory mitigators be considered, to-wit: That Floyd "successfully completed probation" and "is apparently opposed to drinking." (R 2225-56).

Moreover, repeatedly, the trial judge made it clear to the defense that it was his "purpose . . . to make sure . . . that I consider every single mitigating circumstance." (R 2227, 2233). He asked both sides to present written sentencing memorandums. (R 2232, 2233). Both did. (R 785, 800-970).

Although the trial court's general instruction on nonstatutory mitigation may have been ambiguous, vague, or incomplete, it was not fundamental error. Moreover, any error is harmless because there is no reasonable possibility, much less probability, that the four strong aggravators could have been deemed outweighed by the scant mitigation, even were every bit of that proposed by the Defense fully accepted and weighed. As the trial judge specified in his sentencing order, each one of the aggravating factors outweighs the sum total of the mitigation. (R 1398-99).

Finally, on appeal, Floyd raises for the first time a claim that his "young age (21) should have been considered in

mitigation."[25] (IB 46). This issue is procedurally barred for failure to raise it below. *Archer*, 673 So. 2d at 20. It is also without merit. As this Court said in *Mungin v. State*, 689 So. 2d 1026, 1031 (Fla. 1995), *cert. denied*, 522 U.S. 833 (1997), "'age is simply a fact, every murderer has one.'" (*Quoting Echols v. State*, 484 So. 2d 568, 575 (Fla. 1985), *cert. denied*, 479 U.S. 871 (1986)). As in *Mungin*, nothing about Floyd's age constitutes mitigation for this crime. As Floyd proudly informed the trial court, he did not even drink alcohol, and so, his mental facilities were not impaired at the time of the crime. Moreover, he had successfully completed probation for a period of almost two years, (R 1396), another factor indicating maturity. Appellate Defense Counsel has not cited (and Undersigned Counsel is unaware of) any authority for the proposition that having a bad case of the "green-eyed monster" (jealousy) renders an individual immature, qualifying him for the statutory age mitigator. The State submits that it does not.

In *Archer*, this Court approved the trial court's rejection of a **request** to consider age in mitigation because the lower "court found that there was no evidence reflecting that Archer's age at the time of the homicide did not accurately reflect his mental or

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25 Floyd's date of birth is 11/29/76, making him four months short of 22 at the time of the murder (July 13, 1998). (R 001).

physical age . . ..." *Id.* at 21. Even had Floyd contended that age was an appropriate mitigator in this case and requested that it be found, the trial judge would have been compelled to find it inapplicable in view of the dearth of evidence reflecting that Floyd's mental age was less than that ordinarily attendant to one of his physical age of almost 22 years.

Floyd is entitled to no relief.[26]

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At trial, Floyd proposed to add to the instruction advising the jury that the court will give great weight to its recommendation that "[i]t is only under rare circumstances that this Court could impose a sentence other than what you recommend." (R 2135). The State opposed the giving of that sentence, and the trial judge did not give it. (R 2135, 2136). The *Caldwell* issue is without merit. *See Alston v. State*, 723 So. 2d 148, 159 (Fla. 1998).

POINT IV

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATOR.

In the trial court, Floyd contended that the evidence was insufficient on which to base a jury instruction on the heinous, atrocious, or cruel aggravating factor. (IB 48). On appeal, he contends that there was no evidence "presented in the penalty phase" to support such an instruction. (IB 50). However, evidence from trial is appropriate for consideration of this issue.

It is well-established that "a trial court has wide discretion in instructing the jury," and its determination in that regard "is reviewed with a presumption of correctness on appeal." *James v. State*, 695 So. 2d 1229, 1235 (Fla. 1997), *cert. denied*, 522 U.S. 1000 (1997). "Although . . . the HAC aggravator does not apply to most instantaneous deaths or to deaths that occur fairly quickly, fear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel." *Id.* at 1235. *See Walker v. State*, 707 So. 2d 300, 315 (Fla. 1997), *cert. denied*, 507 U.S. 999 (1993); *Preston v. State*, 607 So. 2d 404, 409-10 (Fla. 1992). "[T]he victim's mental state may be evaluated for purposes of this determination in accordance with a common-sense inference from the circumstances." *Pooler v. State*, 704 So. 2d 1375, 1378 (Fla. 1997), *cert. denied*, 525 U.S. 848 (1998). Thus, the appellate

standard of the review is whether the trial judge abused his discretion in determining that there was enough evidence of HAC to support the giving of the instruction for consideration of the issue by the jury.

In *Pooler v. State*, the victim learned that Pooler had threatened to kill her two days before the murder. *Id.* The sincerity of that threat became evident when Pooler forced his way into her apartment with a gun. *Id.* Her fear was so great that she vomited. *Id.* Moreover, after she managed to lock Pooler out of her apartment, Pooler got back in. *Id.* The victim ran from the apartment "in an effort to escape." *Id.* Pooler caught up with her, struck her, dragged her back to his car and shot her, including once in the head, killing her. *Id.* This Court upheld the **finding** of HAC. *Id.*

In the instant case, Floyd threatened the life of the victim the night before - a fact which was communicated to the victim several hours before her deadly encounter with Floyd. (R 1539, 2220). He earlier assaulted the victim's daughter, evading law enforcement's attempt to take him into custody - all of which the victim was well aware. (R 1539, 2220). He claims that he spent about an hour with the victim (IB 58) after forcing his way into her home. During the time he was with her, he spoke angrily to her and approached her in a threatening manner. Moreover, he refused to speak rationally with her, and she was so frightened by him that

she awoke her grandchildren late at night and sent them from her home instructing them to run to the safety of the neighbor's house and call the police. The terrified victim, clad in nothing but her nightgown, attempted to run from the house, only to be caught by Floyd and squeezed between the screen door and the wall of her home. She then managed to run from a back door and fled across the street away from her home and Floyd. As she ran for her life, Floyd fired two shots at her, missing both times. Floyd chased after her (IB 48) before firing the third shot into her face as she dropped to her knees before him.

Where competent, substantial evidence of HAC exists, there is no error in instructing the jury on that aggravator. *Brown v. State*, 721 So. 2d 274, 283 n.7 (Fla. 1998), *cert. denied*, 526 U.S. 1102 (1999). The State submits that the above evidence overwhelmingly establishes HAC in the instant case; certainly, the substantial competent evidence standard is well met. Although in an abundance of caution, the trial judge declined to find the aggravator because he was unclear whether the evidence met the tortuous element, there was more than enough evidence of the aggravator to support the giving of the instruction.[27] Floyd is

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[27] Indeed, the State submits that the standard for determining whether a jury instruction on an aggravator should be given is whether there is "some evidence" to support the finding of that aggravator. *See Standard Jury Instructions in Criminal Cases*, 678 So. 2d 1224, 1225 (Fla. 1996)[Note to Judge indicates jury should be instructed on aggravating circumstances "for which evidence has been presented"]. *See also Middleton v. State*, 426 So. 2d 548, 552

entitled to no relief.

(Fla. 1982), *cert. denied*, 463 U.S. 1230 (1983) [where "some evidence" of robbery, proper to instruct on felony murder]. Certainly, where competent, substantial evidence supporting the finding of that aggravator is present, the giving of the instruction cannot be error.

POINT V

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON AND FINDING THAT THE MURDER WAS COMMITTED TO AVOID OR PREVENT A LAWFUL ARREST OR TO EFFECT AN ESCAPE.

On appeal, Floyd complains that the trial court should not have instructed the jury on the avoid/prevent arrest or effect an escape aggravator. (IB 53). However, he does not claim that this issue was raised below, and it was not so raised. In fact, Defense Counsel never argued the facts or law regarding this aggravator to the jury; rather, he said: "The avoid arrest aggravator has been explained." (R 2162). Neither did he object at the time the instructions were read, or thereafter. Thus, this claim is procedurally barred on appeal. *Lukehart v. State,* 25 Fla. L. Weekly S489, S495 (Fla. June 22, 2000). *See Downs v. State*, 740 So. 2d 506, 517 (Fla. 1999)[procedurally barred in part because no objection to instructions at trial]. Moreover, it is without merit.

The standard of appellate review of a trial court's decision to give (or not to give) a jury instruction in the penalty phase is abuse of discretion. *James v. State*, 695 So. 2d 1229, 1235 (Fla. 1997), *cert. denied*, 522 U.S. 1000 (1997). This standard applies to both aggravating and mitigating factors. *Id.* at 1236.

Florida law makes the avoid arrest aggravator applicable where the murder "was committed for the purpose of avoiding or preventing

a lawful arrest . . ..” Fla. Stat. Sec. 921.145(5)(e) (1999).

> The evidence must prove that the sole or dominant motive for killing was to eliminate a witness. [A] motive to eliminate a potential witness to an antecedent crime can provide the basis for this aggravating circumstance. . . . And, it is not necessary that an arrest be imminent at the time of the murder.

(citations omitted) *Consalvo v. State*, 697 So. 2d 805, 819 (Fla. 1996), *cert. denied*, 523 U.S. 1109 (1996).

> Additionally, a motive to eliminate a potential witness to an antecedent crime can provide the basis for this aggravating circumstance. And, it is not necessary that an arrest be imminent at the time of the murder. Finally, the avoid arrest aggravator can be supported by circumstantial evidence through inference from the facts shown.

Foster v. State, 25 Fla. L. Weekly S667, S671 (Fla. September 7, 2000). Even where “the evidence could ‘be contested,’” circumstantial evidence will support this aggravator. *Jones v. State*, 748 So. 2d 1012, 1027 (Fla. 1999), *cert. denied*, 120 S.Ct. 2666 (1999). Thus, the standard on appeal becomes whether there was some evidence from which a reasonable trial judge could have concluded that a dominate motive for the killing of Mrs. Goss was to avoid arrest.

Factors which justify the finding of the avoid arrest aggravator include that the defendant stated that the “victim had to be killed because he could identify them” and that the victim and the murderer “were acquaintances.” *Trease v. State*, 25 Fla. L. Weekly S622, S623 (Fla. 2000). In *Foster v. State*, the aggravator was properly found where the victim had indicated that he would

report the crimes to the police the next morning. In *Fotopoulos v. State*, 608 So. 2d 784, 792 (Fla. 1992), *cert. denied*, 508 U.S. 924 (1992), the evidence supporting the avoid arrest aggravator was sufficient where the victim knew of the defendants "involvement in counterfeiting activities." Finally, in *Rodriguez v. State*, 753 So. 2d 29, 48 (Fla. 2000), *cert. denied*, 148 L.Ed.2d 96 (2000), the defendant and victim knew each other, there was an outstanding warrant for the defendant's arrest, the defendant knew that if he was caught he would "likely go to jail," and after the murders, he said "that he 'made sure they were all dead.'" The evidence in Floyd's case meets or exceeds that found sufficient in these cases.

Floyd was on probation at the time of the instant murder for two separate crimes. (R 978-79). He had previously killed his brother with a shot to the heart and had been convicted of voluntary manslaughter for that offense. (R 977, 2052. See (R 1056). He had also committed, and been convicted of, burglary and robbery. (R 977). Thus, as the trial court found, Floyd "was fully aware that any new law violation could and would likely subject him to arrest and incarceration." (R 978).

Moreover, earlier in the day, he had "committed an aggravated assault on his wife" and had run from law enforcement in connection with that event. Enough time had passed that Floyd well knew that his wife would have contacted her mother, Mrs. Goss, who had Trelane's children, and have told her of the assault. Thus, at the

time Floyd accosted Mrs. Goss in her home, he knew that she would be aware of the violation and could report him to law enforcement.

Moreover, she had witnessed his burglary of her home. Certainly, had she lived, she could have pressed such a charge against him and would have been the prime witness. Such a charge would certainly result in a revocation of his probation - a probation which he had successfully completed for approximately two years to that point.

Finally, Floyd confessed to Mrs. Lamb that he shot Mrs. Goss **because** "she had threatened to call the police on him." (R 1787). Moreover, when Floyd was at Mrs. Goss's home, Mrs. Figeroa "heard a loud angry voice . . . coming from Ms. Goss' house." (R 1672). The voice sounded like a male's which asked Mrs. Goss "why did she have to involve the GD crackers." (R 1673). It appears that this reference was to the white law enforcement officer who had earlier protected Trelane from him and who tried to take him into custody. Thus, he well knew that law enforcement was then looking to arrest him. As he spoke, the man approached Mrs. Goss, but when he saw Mrs. Figeroa on her porch, he "stepped back." (R 1674). Mrs. Figeroa went inside and thereafter heard the shots that killed Mrs. Goss.

The foregoing evidence clearly established that Floyd murdered Mrs. Goss to avoid a lawful arrest. In addition to the direct evidence in the form of his confession to Mrs. Lamb, there is ample

circumstantial evidence through inference from the facts shown to support this aggravator. However, were this not the case, Floyd would still be entitled to no relief because any error was harmless beyond a reasonable doubt. *See Zack v. State*, 753 So. 2d 9, 20 (Fla. 2000), *cert. denied*, 148 L.Ed.2d 94 (2000)[several remaining aggravators supported death penalty after avoid arrest stricken and rendered error harmless]; *Jones v. State*, 748 So. 2d at 1027[three remaining aggravators, including a prior murder, rendered error in finding avoid arrest aggravator harmless].

Assuming *arguendo* that the finding of the avoid arrest aggravator in Floyd's case was error, the error was harmless beyond a reasonable doubt. Without the avoid arrest aggravator, there remains three strong aggravators to be weighed against scant mitigation. Moreover, this is the second time in a few short years in which Floyd has voluntarily killed a family member. Indeed, the trial judge said that had there been only one valid aggravator - any one of those found - he would still have found the aggravator outweighed all of the mitigation and would have imposed the death sentence. (R 982). Thus, any error in finding the avoid arrest aggravator was clearly harmless, and Floyd is entitled to no relief.

POINT VI

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON AND FINDING THE COMMITTED DURING A BURGLARY AGGRAVATOR.

Floyd complains that the evidence of a burglary was insufficient, and therefore, the aggravating factor based thereon should not have been found. (IB 58). As set out hereinabove at Point I, the evidence that Floyd burglarized Mary Goss's home before, and in connection with, murdering her is overwhelming. *See* Point I, at 43-46, *supra*. Moreover, that the jury convicted Floyd of the underlying felony of burglary compelled the finding of this factor in aggravation. There was no error in instructing, or finding, the committed during a burglary aggravator. Floyd is entitled to no relief.

POINT VII

THE TRIAL COURT DID NOT FUNDAMENTALLY ERR IN CONNECTION WITH THE PROSECUTOR'S PENALTY PHASE SUMMATION DURING WHICH HE STATED "THE LAW REQUIRES THAT HE RECEIVE THE DEATH PENALTY."

On appeal, Floyd complains that the prosecutor ended his penalty phase argument with the following: "Let the final chapter be justice was done. This man not only deserves but the law requires that he receive the death penalty." (emphasis in original) (IB 59). Floyd "concedes that the argument was made without objection." (IB 60). However, he claims that it constituted "fundamental error." (IB 60).

It has long been the law that the failure to make a contemporaneous objection and request a mistrial procedurally bars an appellate claim based on prosecutorial comment or argument. *Lukehart v. State*, 25 Fla. L. Weekly S735a (Fla. Sept. 28, 2000); *McDonald v. State*, 743 So. 2d 501, 505 (Fla. 1999). "The only exception . . . is where the prosecutor's comments constitute fundamental error." 743 So. 2d at 505. Prosecutorial comments made during argument are fundamental only where it "'reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.'" *Id.* (citations to cases quoted omitted). The comment at issue in Floyd's case does not reach down into the validity of the death recommendation, and therefore, does not

constitute fundamental error.

The standard of review is abuse of the trial court's discretion. *Esty v. State*, 624 So. 2d 1074 (Fla. 1994); *Durocher v. State*, 596 So. 2d 997 (Fla. 1992); *Robinson v. State*, 520 So. 2d 1 (Fla. 1988). The presiding judge has broad discretion regarding the propriety of comments made by the attorneys during closing argument. *Id.* Floyd has utterly failed to carry his burden to establish an abuse of discretion in regard to the complained-of comment.

In *Kearse v. State*, 25 Fla. L. Weekly S507, S510 (Fla. June 29, 2000), this Court held that a "single erroneous comment," made by the prosecutor during opening argument, though properly preserved for appellate review, "was not so egregious as to require reversal" of the death sentence. There the prosecutor had urged the jury to "show this Defendant the same mercy he showed Officer Parrish.'" 25 Fla. L. Weekly at S515. In Floyd's case, there is also a single comment at issue (although it is one which is **not** preserved for review), and like that in *Kearse*, it is not so egregious as to merit relief.

In *Shellito v. State*, 701 So. 2d 837, 842 (Fla. 1997), cert. denied, 523 U.S. 1084 (1998), during penalty phase closing argument, the prosecutor "improperly made a lack-of-remorse argument, undermined the jury's discretion by implying that he had already made the decision required," argued one aggravator should

have been considered as two, "denigrated the evidence in mitigation, and asked the jury to show Shellito no mercy." Only the lack-of-remorse comment was objected to, and it was clearly error. *Id.* This Court held that even though one of the complained-of comments was error, when considered in light of the entire record, "the brief reference to lack of remorse was of minor consequence and constituted harmless error." *Id.*

In the instant case, the prosecutor's comment at worst might be deemed one undermining the jury's discretion by implying that the prosecutor had already reached a conclusion on the matter on which a decision was required of the jury at penalty phase. If so deemed, such was not fundamental error by itself or considered with any other improper comment(s). *See id.*

Moreover, if the comment is "a misstatement of Florida law" as Floyd contends, (IB 59), it was cured by the trial court's instruction to the jury. (R 2169). Defense Counsel's closing argument, which followed the prosecutor's, also reminded the jury that its "advisory recommendation . . . must be given great weight by the Judge" and "what you're doing here is very, very serious." (R 2163, 2164). Thus, the jury was well aware that its recommendation was a very serious matter which would likely be followed by the trial judge and that the appropriate sentence was not a foregone conclusion. On this record, the prosecutor's statement, if error, certainly was not harmful. There is no

reasonable possibility, much less probability, that the eleven to one recommendation for a death sentence (R 2179) would have been a recommendation for a life sentence absent the prosecutor's comment. Having utterly failed to establish fundamental error, Floyd is entitled to no relief.

POINT VIII

THE TRIAL COURT DID NOT ERR IN PERMITTING THE PENALTY PHASE JURY TO HEAR THE VICTIM IMPACT EVIDENCE PRESENTED.

In the trial court, Floyd asked the judge to require the State to first proffer the intended victim impact evidence before it was placed before the jury. (R 2024). The court agreed and held the State to that ruling even though the judge felt that the proffer was not necessary after all since the State was presenting that evidence through persons not related to the victim and who were professionals and familiar with court room proceedings. (R 2024-29). Wade Preister was the first witness, and upon completion of his proffer, Floyd announced that he was "satisfied" that the testimony could proceed before the jury. (R 2034). The State proceeded to present his testimony without objection. (R 2037-47).

When the second victim impact witness, Bill Dollar, was called, the jury was removed and a proffer was made. (R 2064, 2066). After the summary proffer which was stipulated to by Floyd, (R 2067, 2069), Defense Counsel announced "[n]o objection" to Mr. Dollar's testimony. (R 2070). Neither was an objection made to the testimony of Mr. Witherspoon after proffer or before the jury testimony. (R 2079-2080, 2086-92). After proffer of Mr. Walker's testimony, Defense Counsel announced "[n]o objection," and he made no objection during, or upon conclusion of, Mr. Walker's testimony before the jury. (R 2082, 2093-96). Counsel did not object to the

testimony of Rev. Flagg after proffer of his testimony was made. (R 2083-84, 2098-2101).

Having failed to make a proper objection to the subject victim impact evidence, Floyd's instant complaint is procedurally barred. *See Sexton v. State,* 25 Fla. L. Weekly, S818, S821 (Fla. Oct. 12, 2000). *See Lawrence v. State*, 691 So. 2d 1068, 1072 n.6 (Fla. 1997). Moreover, any victim impact issue considered on appeal must have been raised in the trial court on the specific basis asserted on appeal. *Sexton,* 25 Fla. L. Weekly at S821.

Appellate Counsel's claim that the jury heard "emotional detail" about Mrs. Goss should not be considered as it was not made below. *Id. See Lawrence*, 691 So 2d at 1072. Moreover, Floyd cites to nothing on the cold record which demonstrates that the testimony was emotional. Indeed, it indicates to the contrary. Prosecutor Tanner announced that the family members were not going to be called and that those who would testify had shown no inappropriate emotion in the pre-testimony interviews with them. (R 2024). Neither did trial counsel make any objection to any emotional detail of the testimony. Thus, the State submits that the claim that the victim impact evidence should have been precluded because it was related in emotional detail is wholly unsupported and frivolous.

However, assuming *arguendo* that the issue was properly preserved and contained some emotional detail on the subject of

"what a wonderful human being that Mary Goss obviously was," (IB 61), the instant claim for relief is without merit. The standard for review of a trial judge's decision to admit victim impact evidence is abuse of discretion. *See Sexton*, 25 Fla. L. Weekly at S821; Holland v. State, 25 Fla. L. Weekly S796, S801 (Fla. Oct. 5, 2000).

In *Payne v. Tennessee*, 501 U.S. 808, 825 (1991), the Court held that evidence and argument pertaining to the personal characteristics of the murder victim and the impact of the victim's death on his family members are valid means of advising the sentence of the specific harm caused by the defendant's unlawful conduct. Florida's constitutional provisions and legislative enactments make it clear that "victim impact evidence is to be heard in considering capital felony sentences." *Windom v. State*, 656 So. 2d 432, 438 (Fla. 1995), *cert. denied*, 116 S.Ct. 571 (1995). Victim impact evidence "should be limited to that which is relevant . . .." *Bonifay v. State*, 680 So. 2d 413, 419 (Fla. 1996).

There is no exception to the *Windom* rule that such evidence is permitted where the witnesses present their testimony in a "very articulate" (IB 63) manner which expresses the loss to the community. Certainly, none should be created. Neither is Floyd's appellate complaint about the professional character of the witnesses and that they were allegedly "not intimidated nor

uncomfortable" when testifying one which is appropriately before this Court since that claim was not made below. *Sexton*, 25 Fla. L. Weekly at S821. Moreover, had it been preserved, it is without merit.[28]

In *Cole v. State*, 701 So. 2d 845, 851 (Fla. 1997), *cert. denied*, 523 U.S. 1051 (1998), this Court rejected the defense request to recede from the *Windom* holding. As in the instant case, the victim impact evidence in *Cole* was presented through a professional (high school school teacher) who was not related to the victim and who related his testimony in an articulate and unintimidated manner. 701 So. 2d at 851. There was no error in presenting the subject testimony through the HRS employees and the minister.

Neither is there merit in Floyd's appellate complaint that the evidence should not have been presented until the *Spencer* hearing. In *State v. Johnston*, 743 So. 2d 22 (Fla. 2d DCA 1999), the court specifically held that "appropriate victim impact evidence is to be presented to the jury during the penalty phase of a capital prosecution." In reaching that conclusion, the District Court of Appeal relied on this Court's *Windom* decision, as well as the

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The claim that had Floyd "killed a 'cabbage slinger', he would not have been sentenced to death" (IB 63) is wholly unsupported by the record and inappropriately argued to this Honorable Court.

Florida Constitution and Florida Statute §921.141(7). *Id.* Thus, the court entered a writ of certiorari quashing the circuit court's order granting the defense motion to preclude the presentation of victim impact evidence during the penalty phase of the capital prosecution. *Id.* Floyd has not established, and can not establish, an abuse of discretion in the trial court's admission of the victim impact evidence.

Finally, assuming *arguendo* that the testimony was improper victim impact evidence, or that it should have been reserved until the *Spencer* hearing, any error was harmless beyond a reasonable doubt. *See Windom*, 656 So. 2d at 438-39. Given the strong case in aggravation and the relatively weak case for mitigation, there is no reasonable possibility that the jurors advised imposition of the death penalty based on the complained-of comments.[29] *See Alston v. State*, 723 So. 2d 148, 160 (Fla. 1998). Neither did the judge impose the death penalty because of the complained-of victim impact testimony. Rather, he imposed it because Floyd met the statutory criteria. Floyd is entitled to no relief.

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There were four strong aggravators, including a prior voluntary manslaughter, and miniscule nonstatutory mitigation. (*See* R 977-82). The aggravators "far outweigh the paucity of mitigation," and "[i]t is completely understandable that the jury, by a vote of 11 to 1, decided that . . . Floyd should die for his crime." (R 982). The court agreed and added that "any one of the aggravating factors outweighs the mitigating factors . . .." (R 982).

POINT IX

THE TRIAL COURT DID NOT ERR IN OVERRULING THE DEFENSE OBJECTION TO A WITNESS'S REPORT OF THE EXCITED UTTERANCES OF THE VICTIM'S GRANDCHILDREN; NEITHER DID IT FUNDAMENTALLY ERR IN CONNECTION WITH TESTIMONY INDICATING THAT THE WITNESS BELIEVED THE CHILD[REN]'S REPORT[S].

Appellate Counsel claims that Defense Counsel made a timely objection in the trial court to testimony of a state witness which would "improperly bolster the testimony of a subsequent child witness." (IB 66). The record reveals that this is not true. No objection was made to the testimony of Mrs. Figeroa until after she stated "the children just told me what happened, said their grandmother was shot, when I asked them what was the matter." (R 1676). The tardy objection was "hearsay . . . foundation is necessary." (R 1676). That objection was overruled, and no other objection was ever made throughout Mrs. Figeroa's testimony. (R 1670-1682). Thus, this issue is not preserved for appellate review and is procedurally barred. *Steinhorst v. State*, 412 So. 2d 332 (Fla. 1982).

In any event, it is without merit. Both LaJade and J.J. testified that J.J. told Mrs. Figeroa and the police dispatcher what had happened to their grandmother. (R 1714, 1739). Moreover, the tape of J.J.'s report to the dispatcher, in which he identified Floyd as his grandmother's killer, was played for the jury. (R 1773-80). Thus, the complained-of testimony was merely cumulative

to properly admitted testimony, and any error was harmless. *Torres-Arboledo v. State*, 524 So. 2d 403, 408 (Fla. 1988), *cert. denied*, 488 U.S. 901 (1988)[the admission of hearsay is cumulative and harmless error where a witness later testifies to the same matter].

Finally, Floyd complains that Mrs. Figuero testified that J.J. was "a smart child who understood the situation" and she "did believe the child." (IB 66). This testimony was not objected to in any fashion, and therefore, the issue is not preserved for appellate review. *Steinhorst v. State*, 412 So. 2d 332 (Fla. 1982). Moreover, Floyd's claim that such testimony was "[f]undamental error" is conclusory and not supported by citation to statutes, rules, or precedent of this Honorable Court. Such a barebones, conclusory claim is improperly presented and provides no basis on which relief can be granted on appeal. *See Freeman v. State*, 761 So. 2d 1055, 1061 (Fla. 2000)[conclusory claim in 3.850 insufficient].

Whether evidence should be admitted at trial is a matter addressed to the sound discretion of the trial judge. *Ray v. State*, 755 So. 2d 604, 610 (Fla. 2000); *Jent v. State*, 408 So. 2d 1024, 1039 (Fla. 1981). A ruling on the admission of evidence will not be disturbed unless the appellant demonstrates a clear abuse of judicial discretion. *Id.* Floyd has not met that standard.

Moreover, any error in admission of the subject testimony is

harmless beyond a reasonable doubt. The trial judge determined that the children were reliable, trustworthy witnesses before permitting them to testify. It was obvious to the jury that Mrs. Figeroa was a lay witness and neighbor who had no special training in determining whether someone was being truthful. The expression of her opinion was primarily to explain her subsequent actions, calling the police, going out to call to Mrs. Goss, etc., rather than to bolster the testimony of the child[ren]. Moreover, the circumstantial evidence well supported the version of events related by J.J. and LaJade. Thus, any error in admission of the subject opinions of Mrs. Figeroa was harmless. *See Capehart v. State*, 583 So. 2d 1009, 1013 (Fla. 1991), *cert. denied*, 502 U.S. 1065 (1992)[where witness opined that another witness had lied, "both the question and the editorial response were improper," however, "in view of the entire record in this case . . . the error was harmless . . .."].

Floyd has failed to carry his burden to establish that any error was fundamental. He is entitled to no relief.

POINT X

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S REQUESTED INSTRUCTION ON CIRCUMSTANTIAL EVIDENCE.

In the trial court, Floyd asked the judge to give a special jury instruction on circumstantial evidence. It included: "The State has offered no witnesses or witness -- witness or witnesses who claim to have seen Maurice Floyd shoot Mary Goss." (R 1897). The trial court deemed this part of the proposed instruction "to be a comment on the evidence" and refused to give it. (R 1897).

The State opposed the proposed instruction, stating "[i]t's not a circumstantial evidence case." (R 1895). A second reason for the State's objection was that "the Supreme Court . . . made a studied decision to take that out, even though it had been there for a long time, ..."[30] (R 1896). After reviewing the remainder of the proposed instruction, the trial judge concluded that he would not give it. (R 1897).

The remainder of the proposed instruction was:

> Circumstantial evidence is governed by the following rules. The circumstances must be proved beyond a reasonable doubt. The circumstances must be consistent

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30 The prosecutor suggested that the court was "treading on potential error by giving it in view of that precedence." (R 1897). Defense Counsel responded: "Defer to the court's decision, Your Honor." (R 1897). The State submits that in light of concern that the giving of the instruction might result in error, the defense withdrew the proposal.

> with guilt and inconsistent with innocence. If the circumstances are susceptible of two reasonable constructions, one indicating guilt and the other indicating innocence, you must accept that construction indicating innocence.

(R 397). Trial counsel offered no reasons special to the instant case to justify giving of the instruction. Neither did he renew his objection to the denial of the proposed instruction at the appropriate time. Rather, when the judge inquired whether there were "any objections to the instructions as they were given orrally," Defense Counsel replied: "No, Your Honor." (R 1991). The failure to renew the request at the time the jury was instructed procedurally bars the issue on appeal. *See generally Knight v. State*, 746 So. 2d 423, 429 (Fla. 1998)[appellate challenge to denial of peremptory challenge procedurally barred by failure to renew objection to juror before jury sworn]; *Pomeranz v. State*, 703 So. 2d 465, 469 (Fla. 1997)[appellate challenge to denial of motion *in limine* seeking to preclude admission of collateral crimes evidence is procedurally barred by failure to renew objection during trial or at closing argument].

Assuming *arguendo* that the issue is properly before this Honorable Court, it is without merit. The standard of review is abuse of the trial court's discretion. *James v. State*, 695 So. 2d 1229, 1236 (Fla. 1997). To prevail, Floyd must demonstrate that the lower court's refusal to give the requested instruction fell outside the judge's wide discretion. *Id.*

The requirement of a circumstantial evidence instruction was eliminated by this Court in 1981. *Pietri v. State*, 644 So. 2d 1347, 1355 n.9 (Fla. 1994), *cert. denied*, 515 U.S. 1147 (1995). Where the jury was "adequately instructed on reasonable doubt and burden of proof," the refusal to give a requested instruction on circumstantial evidence was not error. *Id. See Walker v. State*, 707 So.2d 300, 316-17 (Fla. 1997). Floyd has not claimed that the reasonable doubt and burden of proof jury instructions in his case were inadequate, and the State contends that they were not. The "special" circumstances he alleges compelled the giving of the instruction are that premeditation and burglary were proved by "completely circumstantial" evidence. (IB 70). That the elements of these offenses are proved by circumstantial evidence is always the case in circumstantial evidence cases and was surely considered by this Court in deciding that the instruction need not be given. Floyd has established no abuse of discretion and is entitled to no relief on this meritless claim. *Monlyn v. State*, 705 So. 2d 1, 5 (Fla. 1997), *cert. denied*, 524 U.S. 957 (1998); *Branch v. State*, 685 So. 2d 1250, 1252 (Fla. 1996), *cert. denied*, 520 U.S. 1218 (1997).

POINT XI

APPELLANT'S DEATH SENTENCE IS NOT DISPROPORTIONATE.

Floyd complains that the death penalty is disproportionate in his case, apparently because the "killing arose out of a domestic dispute that escalated into tragedy."[31] (IB 74). He concedes the validity of two aggravators, to-wit: "probationary status and prior violent felony," but argues that their weight "is diminished by several surrounding circumstances." (IB 75). He claims the manslaughter resulted from "children playing with guns in the house" and says he "was only fifteen years old at the time . . .." (IB 75). He also complains that had he killed Mrs. Goss "several years ago," the probationary "factor would not even exist," and argues that, therefore, its weight is diminished. (IB 75).

It appears that the standard of review of proportionality of the death sentence is *de novo*. "This court performs proportionality review to prevent the imposition of 'unusual' punishment . . .." *Sexton*, 25 Fla. L. Weekly S818, S822 (Fla. Oct. 12, 2000). Its purpose "is to foster uniformity in death - penalty law." *Tillman v. State*, 591 So. 2d 167, 169 (Fla. 1991). Such a review is performed by this court, even where the defendant does

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[31] He acknowledges that this Court has not "approved a 'domestic dispute' exception [to] the imposition of the death penalty," but suggests that his case should be compared to those domestic cases where the death penalty was invalidated. (IB 76).

not specifically raise the issue. Jennings v. State, 718 So. 2d 144, 154 (Fla. 1998), *cert. denied*, 527 U.S. 1042 (1998).

The prior violent felony was based on the voluntary manslaughter of his brother - who he shot in the heart for slapping him on the arm (R 977). That he was "only fifteen years old at the time" (IB 75) is hardly mitigating when it is considered that less than 6 years later, he broke into the home of his wife's mother, chased her down as she fled from him and shot her in the face, killing her. Neither is the fact that the Legislature did not earlier make clear its intention to include probationary status as an aggravator relevant to the proportionality issue herein.

"This Court's proportionality review focuses on the totality of the circumstances in a case and compares it with other capital cases to ensure uniformity in application." *Mansfield v. State*, 758 So. 2d 636, 646 (Fla. 2000). *See Robinson v. State*, 761 So. 2d 269, 277 (Fla. 1999). Assuming *arguendo* that only the two aggravators conceded by Floyd should be considered, and further assuming that all of the mitigation he proposed should have been found and weighed, Floyd's instant death sentence is still proportional.

In *Spencer v. State*, 691 So. 2d 1062, 1065 (Fla. 1996), *cert. denied*, 522 U.S. 884 (1996), the defendant killed his wife and claimed that the death penalty was disproportionately applied to him because his murder involved a domestic dispute. Spencer's two

aggravators were HAC and prior violent felony, and there were two statutory mental mitigators found as well as numerous nonstatutory mitigators. 691 So. 2d at 1065. Like Floyd, Spencer had a prior violent felony.[32] This Court upheld the death sentence as proportionate. *Id.* at 1065-66.

Beginning with *Spencer*, this Court has repeatedly pointed out that in the domestic dispute cases where the death penalty was stricken based on proportionality, "substantial mental mitigation is present." *Way v. State*, 760 So. 2d 903, 921 (Fla. 2000). In *Way*, there were three aggravators, prior violent felony, committed during commission of a felony, and HAC, two statutory mitigators, and several nonstatutory mitigators. *Id.* Noting that there was no "significant mental mitigation presented" in *Way*,[33] this Court upheld the death sentence imposed for Way's murder of his daughter against a proportionality challenge based on domestic dispute. *Id.* There were four strong aggravators and no evidence of mental mitigation in Floyd's case. Thus, the death sentence imposed for the murder of his mother-in-law is proportional.

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Spencer's prior violent felony was directed against his murder victim, and this Court found that distinction irrelevant to the proportionality review. *Id.*

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There was some mental mitigation presented as the trial judge found that the defendant "'possibly had a mental impairment.'" 760 So. 2d at 921.

Finally, most recently, in *Sexton v. State*, 25 Fla. L. Weekly S818 (Fla. Oct. 12, 2000), the death penalty was held proportional where the defendant murdered his son-in-law. There were three aggravators, CCP, committed-during-a-felony, and avoid arrest, weighed against both statutory and nonstatutory mitigation. *Id.* at S822. The defendant killed the victim because he feared that the victim would report the defendant to law enforcement in connection with circumstances resulting in the death of the victim's son and the defendant's grandson. *Id.* There was considerable evidence of mental impairment, and the trial court "gave great weight to the statutory mitigator of 'under the influence of extreme mental or emotional disturbance.'" *Id.* at 12. Nonetheless, this Court upheld the death sentence as proportionate. *Id.*

In his initial brief, Floyd relies on *Farnias v. State*, 569 So. 2d 425 (Fla. 1990) and *White v. State*, 616 So. 2d 21 (Fla. 1993) as support for his claim that his death sentence is disproportionate because it arose out of a domestic dispute. (IB 76-77). In *Pooler v. State*, 704 So. 2d 1375, 1381 (Fla. 1997), cert. denied, 525 U.S. 848 (1997), this Court explained that the basis for its decision to strike the death penalty in *Farinas* and *White* was that

> we struck the cold, calculated, and premeditated (CCP) aggravator on the basis that the heated passions involved negated the "cold" element of CCP. However, our reason for reversing the death penalty in those cases was that the striking of that aggravator rendered the death sentence disproportionate in light of the overall

circumstances.

(footnote omitted). This Court made it clear that it has "never approved a per se "domestic dispute" exception to the imposition of the death penalty." 704 So. 2d at 1381.

In *Pooler*, the jury recommended a death sentence "by a vote of nine to three" for Pooler's "shooting death of his ex-girlfriend." *Id.* at 1377. The court found three aggravators, to-wit: Prior violent felony (contemporaneous murder), committed during a burglary, and HAC. *Id.* The court found one statutory mitigator - extreme mental or emotional disturbance - but assigned it "little weight." *Id.* In addition, the court found several nonstatutory mitigators, including one which it assigned "great weight." *Id.* The trial court concluded "that each of the three aggravators standing alone would outweigh the mitigating evidence," and "sentenced Pooler to death." *Id.* This Court upheld that sentence as proportionate. *Id.*

In the instant case, the jury recommended the death penalty by a vote of 11 to 1. (R 2179). The trial court found four strong aggravators, to-wit: He was on felony probation, had a prior violent felony (voluntary manslaughter), murder was committed during a burglary, and it was committed to avoid arrest. (R 977-79). The court found no statutory mitigation, but found four factors considered as nonstatutory mitigation, to-wit: Good courtroom behavior, assisted his counsel during the proceedings,

completed probation for almost two years, and expressed concern for his wife's conduct including her use of alcohol. (R 981-82). Each mitigating factor was given "little weight." (R 981-82). In his sentencing order, the judge wrote:

> The aggravating circumstances in this case far outweigh the paucity of mitigation that has been shown to exist in Maurice Lamar Floyd's 22 years on this earth. It is completely understandable that the jury, by a vote of 11 to 1, decided that the law required them to recommend to this court that Maurice Lamar Floyd should die for his crime. This court agrees with the jury that . . . the scales of justice tilt unquestionably on the side of death.
>
> The first four aggravating circumstances are so substantial when contrasted to the mitigating circumstances that with the weight given them by this court any one of the aggravating factors outweighs the mitigating factors and therefore when coupled the aggravating factors outweigh the aggregate of all the mitigating factors.

(R 982). There was no evidence of significant mental impairment.[34] The imposition of the death penalty in the instant case is proportionate. *See Sexton; Pooler*; *Spencer.* Floyd is entitled to no relief.

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Floyd attempts to minimize the magnitude of his murder of Mrs. Goss, claiming that his insane jealousy is to blame. That Floyd was jealous of how his wife spent her time does nothing to explain, much less excuse, the murder of his mother-in-law in this case. Moreover, there is nothing to indicate that this jealousy was the result of any kind of mental impairment, muchless one that would mitigate the instant murder.

POINT XII

THE TRIAL COURT DID NOT ERR IN ADMITTING THE BULLET TAKEN FROM THE VICTIM'S HEAD; CHAIN OF CUSTODY WAS ADEQUATELY ESTABLISHED.

Floyd complains that the bullet taken from Mrs. Goss's head at the autopsy should not have been admitted into evidence because the chain of custody was defective. (IB 79). He says that "law enforcement could not account for the whereabouts of the evidence for a fourteen month period." (IB 80). He disagrees with the *Taplis* rule which requires that probable tampering be shown to exclude evidence on a chain of custody objection and asserts that a mere possibility of tampering should be sufficient. (IB 81). Of course, there is no legal support for his position.

Appellate review of this issue begins with the abuse of discretion standard. Admissibility of evidence - whether it is testimonial or physical - falls within the broad discretion of the trial judge. *Ray v. State*, 755 So. 2d 604, 610 (Fla. 2000); *Jent v. State*, 408 So. 2d 1024, 1039 (Fla. 1981). To prevail on appellate review, the defendant must show a clear abuse of judicial discretion. *Id.* Floyd has not met that standard.

In *Taplis v. State*, 703 So. 2d 453, 454 (Fla. 1997), this Court dismissed jurisdiction of a case in which the Fifth District Court of Appeal had held that to exclude evidence based on a chain

of custody objection, the party opposing its admission must show that there is a reasonable probability of tampering. In *State v. Taplis*, 684 So. 2d 214, 216 (Fla. 5th DCA 1996), the evidence was a vehicle left unattended for three days. "[T]he public had access to the vehicle" during that time. *Id.* At the hearing, the testimony indicated "that no material changes occurred to the vehicle" before the samples were taken, despite the fact that water had been sprayed on it, it had been towed twice, and "the interior had been exposed to the weather for some time." *Id.* The court rejected the claim that "a possibility that tampering might have occurred" was sufficient to exclude the evidence based on a chain of custody objection. *Id.* Rather, the evidence indicating a possibility of tampering went to "the weight that the jury should give this evidence . . .," and not to its admissibility. *Id.*

Subsequently, in *Jordan v. State*, 707 So. 2d 816, 818 (Fla. 5th DCA 1998), aff'd, 720 So. 2d 1077 (1999), the court reiterated that a probability of tampering, as opposed to a mere possibility of tampering, is required to prohibit admission of relevant evidence over a chain of custody objection. In *Jordan*,

> [t]he nurse who obtained the blood sample from Jordan testified that she could not remember whether there was anything in the blood sample tubes when she took the blood sample from Jordan. However, she did state that the tubes had a gray stopper. The state's toxicologist testified that kits that have gray stopper tubes contain an anti-coagulant. The state trooper who supplied the blood sample kit, the nurse who obtained the sample and the state's toxicologist all testified that the kit did not appear to have been tampered with. According to the

> state trooper, the kit had not expired (perhaps being only a month old) and the kit contained ingredients to preserve blood and did not need to be refrigerated. According to the toxicologist, there was no indication of clotting in the blood. It appeared to be in good condition, and did not appear to have been exposed to heat. Since this evidence failed to show a probability (as opposed to a mere possibility) that the evidence had been tampered with while in the custody of the trooper or in the U.S. mail, the trial court properly admitted this evidence.

707 So. 2d at 818-19.

In the instant case, Floyd claims that the whereabouts of the projectiles during a fourteen month period were not accounted for. However, the trial court determined that the evidence was "in the custody of the Department of Law Enforcement" during that time. (R 1759, 1760). Moreover, the evidence was identified "as being the same and (sic) when it came from her brain" at trial. (R 1759). Further, the projectiles were "readily identifiable and not susceptible to tampering . . .." (R 1760). The trial court concluded that "the evidence . . . has not been tampered with." (R 1760).

Clearly, Floyd failed to carry his burden to establish a probability of tampering.[35] He has shown no clear abuse of judicial discretion. Thus, he is entitled to no relief.

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35 Indeed, as the trial court said, he did not even demonstrate a possibility of tampering. (R 1757).

POINT XIII

THERE WERE NO CUMULATIVE ERRORS WHICH DEPRIVED APPELLANT OF A FAIR TRIAL.

On appeal, Floyd claims that "he was denied his right to a fair trial based on the cumulative effect of the numerous errors previously set forth in this brief." (IB 82). This claim was not raised below, and therefore, it is procedurally barred on appeal. *Steinhorst v. State*, 412 So. 2d 332 (Fla. 1982), *cert. denied*, 522 U.S. 1022 (1997).

It is also procedurally barred because Floyd does not specifically identify the claims he contends show that he was deprived of a fair trial. "Mere conclusory allegations do not warrant relief." *Freeman v. State*, 761 So. 2d 1055, 1069 (Fla. 2000). A general, conclusory statement that numerous errors previously set forth in an 82 page brief does not meet the specificity requirement.

The state submits that had this issue been preserved for appellate review by presentation to the trial court, the standard of review would be abuse of discretion. However, even if this is regarded a legal question to which a *de novo* standard of review applies, Floyd has not shown any entitlement to relief.

Finally, the claim is without merit because Floyd has failed to demonstrate any error, much less cumulative errors, in his

brief. *Asay v. State*, 25 Fla. L. Weekly S959, S964 (Fla. Oct. 26, 2000). Since all of his claims are "either meritless or procedurally barred," there is "no cumulative effect to consider." *Mann v. State*, 25 Fla. L. Weekly S727, S729 (Fla. Sept. 28, 2000). *See Johnson v. State*, 25 Fla. L. Weekly S578, S583 (Fla. July 13, 2000); *Bryan v. State*, 748 So. 2d 1003, 1008 (Fla. 1999); *Downs v. State*, 740 So. 2d 506, 518 (Fla. 1999). Moreover, the State submits that even were some minor errors committed in this case, they are not of such a nature as to rise to the level of fundamental error so infecting the conviction and/or sentence as to support relief herein.

CONCLUSION

For the reasons set out above, Floyd's conviction and sentence of death should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: Christopher S. Quarles, Assistant Public Defender, 112 Orange Ave., Suite A, Daytona Beach, FL 32114, on this _____ day of January, 2001.

_____
Of Counsel