IN THE SUPREME COURT OF FLORIDA

MAURICE L. FLOYD,	)	
	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NUMBER SC95-824
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PUTNAM COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0294632
CHIEF, CAPITAL APPEALS
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
(904) 252-3367
ATTORNEY FOR APPELLANT

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OTHER AUTHORITIES CITED:

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PRELIMINARY STATEMENT

The record consists of twelve consecutively numbered volumes of pleadings and transcripts. The pages therein are numbered consecutively 1 through 2262. Counsel will refer to the record using roman numerals to designate the volume along with the corresponding page numbers.

STATEMENT OF THE CASE

On August 5, 1998, the spring term grand jury in and for Putnam County, Florida, returned an indictment charging Maurice Lamar Floyd, the appellant, with one count of first-degree murder, one count of armed burglary of dwelling, and one count of aggravated assault. (I 11-12)

Prior to trial, the court denied appellant's motion in limine to strike portions of the Florida Standard Jury Instructions on the authority of Johnson v. State, 660 So.2d 637 (Fla. 1995) (I 62-64, 117, VII 1449-55) The trial court also denied appellant's motion for statement of particulars regarding the aggravating circumstances. (I 109-10, 117, VII 1457-58) The court also denied appellant's motion to allow victim impact evidence before the judge alone. (I 78-84, 118, VII 1450, 1458-60)

This case was tried before a jury beginning on April 5, 1999. (VI 1016) During jury selection, the trial judge overruled appellant's objections and allowed the state to peremptorily excuse perspective juror Rios, a Hispanic. (VI 1102-9)

At trial, the trial court overruled appellant's objections which were based on chain of custody and allowed the state to introduce two projectiles removed from the victim's body. (IX 1742-61)

Prior to trial, appellant asked the trial judge for an instruction on

circumstantial evidence. (VII 1367-68) Appellant renewed his request at the charge conference, but the trial court subsequently denied it. (X 1895-98) The trial court denied appellant's motion for judgment of acquittal made at the conclusion of the evidence and testimony. (X 1862-63)

Following deliberations, the jury returned with verdicts of guilty as charged on all three counts. (III 497-98)

The case proceeded to a penalty phase on April 8, 1999. (XI 2009) At the penalty phase, the state presented four victim-impact witnesses over appellant's renewed objections. (XI 2022-24, 2102-3) The state rested and appellant called no witnesses and presented no evidence. (XI 2102-6)

The trial court denied appellant's request to read his proposed instruction on nonstatutory mitigators that were supported by the evidence. (IV 785, XI 2018-21, 2130-34) The trial court also refused to grant appellant's special jury instruction regarding the rare circumstances that the trial court could impose a sentence other than the one the jury recommended. (IV 760-61, XI 2134-37) Appellant also objected to the language in the standard jury instructions that tended to diminish the jury's responsibility. (XI 2137-38) Appellant also strongly objected to the trial court instructing the jury on the heinousness aggravating factor, where the evidence did not support it. The trial court overruled the objection and so

instructed the jury. (XI 2107-21, 2138-46, 2170-71) Following deliberations, the jury returned with a recommendation (11-1) that Maurice Floyd should die. (III 504, XI 2179)

The trial court held a Spencer[1] hearing on April 16, 1999. (XII 2214-53) At the hearing, the trial court denied appellant's previously filed motion for new trial. (IV 783-84, 799, XII 2238) Appellant also renewed all prior objections. (XII 2238-47) On May 15, 1999, the trial court held a hearing on appellant's pending violation of probation. (XI 2186-2203) The trial court found appellant in violation.

The state prepared a sentencing guideline scoresheet. (V 972-74) The trial court sentenced appellant to death. The trial court rendered a written order finding four aggravating factors and four nonstatutory mitigating factors. (V 975-83) The trial court sentenced appellant to thirty years on the armed burglary and a concurrent five year term on the aggravated assault. (V 988-89) The trial court sentenced appellant to three terms of five years each on the violation of probation, all counts to run concurrent to the other sentences. (V 990-93)

Appellant filed a notice of appeal on June 4, 1999. (V 1002) This brief follows.

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[1] Spencer v. State, 615 So.2d 688 (Fla. 1993).

STATEMENT OF THE FACTS

At the time of Mary Goss' murder, Maurice Floyd, the appellant, was married to Trelane, the victim's daughter. (VIII 1514-16) By all accounts, appellant's relationship with Trelane was a tumultuous one. Trelane first met Maurice in the spring of 1997. Their relationship became serious during the late summer months of that same year. Trelane and Maurice married on March 23, 1998.

In the beginning, the relationship was a happy one. Trelane maintained that Maurice eventually became overly possessive. Maurice resented the fact that Trelane drank and socialized with others who drank and smoked. (VIII 1518-19) The appellant kept close tabs on Trelane. Shortly after they married, he bought her a pager. When this proved less than satisfactory, he provided her with a cell phone so that she had "no excuse" for not calling him. (VIII 1519-21) He tried to keep her close to home and occasionally disabled her car so that she could not drive it. (VIII 1522) When she disappeared from the house, Appellant would search for her at friends' homes until he found her. (VIII 1522)

On July 11, 1998, Trelane's birthday, she wanted to do something special. Trelane went with some friends to a party where she drank and danced. She then went to a local Palatka night spot, Vic's Supper Club, where the party continued.

At Vic's, Trelane encountered the appellant who informed her that he was taking her car home. Much later (about 4:00 a.m.), Trelane had some friends drive her home where she found her disabled car. She then returned to Vic's with her friends before finally coming home at approximately 5:00 a.m. (VIII 1526-28) When Trelane returned home, she and Maurice argued. Appellant warned Trelane that if she went out drinking again, he would kill her. He also warned Trelane that if she ever tried to get away from him, he would kill her. He warned her that if he was not able to get to her he would kill someone she loved like her mother, father, or children.[2] (VIII 1529)

When Trelane woke up the next morning, the appellant had a gun pointed at her head. Trelane told him to go ahead, pull the trigger, kill her. Maurice pulled the trigger three times, but the gun was empty. (VIII 1529) Trelane announced that the marriage was over and that she would divorce him. The appellant repeated his prior threats. While he was taking a shower, Trelane hid the gun. (VIII 1530)

The next morning, Monday, Trelane left the house to pick up her three-year-old goddaughter for a shopping trip. She left her three small children with the appellant. Later that day, Trelane returned to her apartment with her goddaughter to see if appellant was still there. As she drove up to her house, Appellant drove

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[2] Trelane had three young children from prior relationships. (VIII 1515-16)

up to her car and asked why she had not taken the goddaughter home yet. (VIII 1531-32) Trelane ignored him and drove away, but stopped to talk to a friend. The appellant drove up next to her and called her a whore. Trelane drove away and headed for the sheriff's office. Along the way, the appellant rammed the back of her car and a wild chase ensued. (VIII 1533-35)

Deputy Sheriff Dean Kelly was working the complaint desk in Palatka that evening. Shortly after 7:30 Trelane Floyd drove her car up to the front door with the appellant in hot pursuit. (VIII 1536, 1553-54) Both jumped out of their respective cars and the appellant chased his wife as she ran up to the front door of the sheriff's office. Trelane was crying, screaming, and was visibly upset. (VIII 1555) She claimed that the appellant had rammed her car and was trying to hurt her. (VIII 1553-54) Deputy Kelly then spied the appellant walking quickly up the sidewalk towards them. Appellant attempted to walk by Deputy Kelly towards his wife, but Kelly stopped him. (VIII 1553-54)

Deputy Kelly concluded that he was witnessing a domestic violence incident and called for backup. (VIII 1555) Kelly attempted to take the appellant into custody. He ordered appellant to turn around and put his hands behind his back. The appellant thrust his hands into the air and began backing away. He said he had done nothing wrong and ignored Deputy Kelly's orders. (VIII 1555) The

appellant then turned, jumped a ditch, and ran through a field leaving his car behind. (VIII 1555-58) Unable to locate the appellant that night, Deputy Kelly made plans to arrest him the next morning at his place of employment. (VIII 1558)

Trelane called her mother, Mary Goss, from the sheriff's office. She learned that earlier that day appellant had dropped her children off at her mother's house where they remained with her. (VIII 1538-39) Goss thanked her daughter for calling and promised that she would protect the children. (VIII 1539) That was the last time that Trelane spoke to her mother. (VIII 1540-41)

That night was a very hot one in Palatka. John Brown, Mary Goss' neighbor directly across the street, was sitting on his porch that evening. His next-door neighbor, Jeanette Figuero, was also trying to escape the heat by sitting outside on her front porch. (IX 1652-53, 1670-71) Brown noticed two young men, one tall and one short, walk by his house. From the snippet of conversation that Brown heard, he concluded that the two men had been involved in an altercation down the street. (IX 1653) The pair walked down to the next street, where the short one disappeared. The taller man, dressed in black, came back up the sidewalk and walked back and forth in front of Brown's house eight or nine times. (IX 1654-55) Brown commented to Figuero about the man, but she noticed nothing out of

the ordinary. (IX 1654-55, 1671) Ultimately the tall young black male walked up the front porch steps of Mrs. Goss' house across the street. Both Brown and Figuero saw him standing on the porch talking to someone inside. The screen door was open. (IX 1654, 1671-72) The man ultimately entered the Goss home and a significant period of time passed. Brown estimated an hour passed before shooting erupted, while Figuero's testimony was somewhere in the same vicinity. (IX 1654-55, 1671-75)

In the interim, both neighbors heard loud voices coming from the Goss home. (IX 1657, 1672-74) Figuero watched part of the argument from her window. She heard a loud angry male voice using profanity. The man was apparently asking Goss why she (Trelane) had to "involve the goddamned crackers." (IX 1672-74)[3] Figuero watched as the man in the Goss home walked towards someone seated on the couch. The man walked forward but not in a physically threatening manner. However, he seemed insistent on obtaining answers to his questions. (IX 1674) The man looked out the window and saw Figuero watching. The man then stepped back away from the couch.

Figuero then went into her house. She had a glass of water in her kitchen

[3] Figuero explained that the term "cracker" was slang referring to white people. (IX 1674)

before trying to fall asleep in the stifling heat on her sofa in the living room. (IX 1674-75) Approximately thirty minutes later she heard a shot. She opened her eyes and, a moment or two later, she heard a second, louder shot. The sound seemed to come from between her house and her neighbor's home. (IX 1675) Brown also heard the shots which he also estimated came approximately one hour after the man first entered the Goss house. (IX 1654-55)

Trelane's children were in the house when the trouble first began. Appellant had dropped off his stepchildren at Mary Goss' house earlier that day. (VIII 1538, IX 1655-56, 1706, 1726-28) After they were put to bed that fateful night, Goss, their grandmother, woke them up. (IX 1707-8, 1726-28) When the children woke up, the appellant was already in the house arguing with Goss. (IX 1707) Goss told her grandchildren to run across the street to Jeanette Figuero's house. She told J.J. Jones, the oldest child, to call the police once he got there. (IX 1708, 1732-33) J.J. saw Maurice standing in the dining room of the home. Maurice appeared to be angry. J.J. approached his stepfather, but Maurice told him that he did not want to talk. (IX 1728-32)

The children did as they were told and headed across the street to the neighbor's home. Once they were outside, J.J., the oldest child saw his grandmother trying to exit through the front door of the house. However, appellant

was still inside the house using the door to squeeze Mary Goss who was half in and half out. (IX 1733-35) Goss eventually got out of the house using the back door. (IX 1709-11)

LaJade Evans, the middle child who was approximately five years old at the time of the murder, saw the appellant standing on the front porch shooting at her grandmother as she ran from the house. (IX 1709-11) J.J. also saw appellant on the front porch shooting in the direction of Mrs. Goss. (IX 1709-11, 1735-37) Although J.J. never saw appellant leave the porch, LaJade saw the appellant follow her grandmother around the side of Jeanette Figuero's house. (IX 1709-12, 1715, 1737) The children found refuge in Figuero's house. They heard one final shot that seemed to come from the side of the house. (IX 171-12, 1739-40) With Figuero's help, the children reported what they saw to the 911 operator. (IX 1676-78, 1713-15, 1739-40)

Corporal Scott Stokes of the Palatka Police Department received the call at 11:35 that evening. He arrived at the scene three minutes later with Officer Zike. The front door was damaged. (VIII 1602) They found the front door to the Goss residence wide open but no one inside. (VIII 1605-6) They found Mary Goss in Figuero's side yard lying on her back. (VIII 1608) Goss was wearing a night gown with no underwear. (VIII 1613)

A subsequent autopsy indicated that Goss died from a gunshot wound that began on her left cheek and went through her facial bones and into her brain. (X 1851-54) This single gunshot wound caused such trauma to the brain that Goss died instantaneously. (X 1858-59) The path of the bullet went from left to right at about a forty-five degree angle and also from down to up at approximately the same angle. (X 1854) Dr. Steiner opined within a reasonable degree of medical certainty that Mrs. Goss was standing up when she was shot. (X 1858)

After the shooting, appellant went to Tashoni Lamb's home. He arrived around midnight. He pulled his gun out of his pants and put it on the bedroom dresser. He told Lamb that he had "just shot Miss Mary, the grandmother." (IX 1783-86) When Lamb asked why, appellant said that she had threatened to call the police on him. (IX 1787) Appellant left Lamb's apartment sometime after 6:00 the next morning. (IX 1788-89) He called her a day later prior to his apprehension. (IX 1789-90) Lamb claimed that appellant asked her to lie for him. When she refused, appellant asked if she wanted to see him die. (IX 1793-95)

Aggravating and Mitigating Evidence

At the penalty phase, the state presented evidence that in March of 1992, when Maurice Floyd was only fifteen, he shot his brother once with a .22 rifle. The pair had been arguing when Phillip, Appellant's brother, struck him.

Appellant's brother died as a result of the single gunshot wound. (XI 2048-53) Appellant was convicted of manslaughter and sentenced to a four year prison term. (XI 2054; State's penalty phase exhibits # 1 & 2)

Floyd had been placed on probation on September 17, 1996, for two counts of accessory after the fact and one count of burglary of a structure. On the date of the murder, appellant was still on probation. (XI 2060-61, 2096-97) Prior to the shooting of Mary Goss, appellant had abided by the probationary rules and appeared to be successfully completing his term of probation. (XI 2063)

Although Appellant did not put on any testimony or evidence at the penalty phase, defense counsel did propose at least two nonstatutory mitigating circumstances and unsuccessfully urged the trial judge to instruct the jury on them. Defense counsel contended that appellant displayed exemplary courtroom demeanor in the face of much adversity. Appellant also assisted counsel throughout the proceedings by taking notes and communicating with his lawyer. (IV 785, III 495-96, XI 2018-21, 2130-34)

At the subsequent Spencer[4] hearing, appellant reiterated his two proposed nonstatutory mitigating factors. Additionally, appellant proposed more mitigating circumstances pointing out that Floyd had successfully completed his probation for

[4] Spencer v. State, 615 So.2d 688 (Fla. 1993).

his 1995 cases until that fateful night. Additionally, defense counsel pointed out the mitigating factor that Floyd was clearly and justifiably concerned about Trelane's drinking and its effects on the family situation. (XII 2224-27)

SUMMARY OF THE ARGUMENTS

Based on this Court's recent decision in Delgado v. State, 25 Fla. L. Weekly S631 (Fla. August 24, 2000), appellant contends that the evidence is insufficient to prove the armed burglary. The evidence of the burglary is completely circumstantial. The circumstances are more consistent with the conclusion that appellant was invited into the house where a heated argument ensued. Where the state failed to prove the burglary, appellant cannot be convicted under the felony murder theory. Since there were no eyewitnesses to the actual killing, the evidence is also insufficient to prove premeditated murder. The shooting was the result of a heated domestic dispute. The evidence proves, at most, second-degree murder.

Appellant contends that reversible error occurred during jury selection when the state exercised a peremptory challenge against juror Noel Rios, a Hispanic. The state's purported race-neutral reason was that, in response to defense counsel's question about the death penalty Rios' exhibited "body language" that the prosecutor perceived as negative about the death penalty in general. There was not substantial, competent evidence to support the trial court's finding that the reason was genuine. Additionally, the trial court based his ruling, at least in part, on the mistaken impression that the presence of African-Americans on the seated jury was evidence that the reason was race-neutral.

Appellant contends that fundamental error occurred when the jury was never instructed that they could consider in mitigation aspects of the defendant's character, record, or background. Instead they were mistakenly told that they could only consider in mitigation any other circumstances of the offense. The trial court compounded the error by refusing to specifically instruct the jury on appellant's proposed nonstatutory mitigating factors. Additionally, the trial court should have instructed the jury that they could consider appellant's young age in mitigation.

Mary Goss died almost instantaneously from a single gunshot wound to the head. She did not suffer nor did her assailant intend to torture her. The caselaw from this Court clearly indicated that the heinous, atrocious, or cruel aggravating factor does not apply to murders like this. Over strenuous defense objection, the trial court instructed the jury that they could consider this aggravating factor. The trial court subsequently agreed with defense counsel that the factor did not apply. However, the damage was already done. The jury, a group of laymen, undoubtedly believed that all first-degree murders are extremely heinous. The prosecutor emphasized this factor in his closing argument at the penalty phase by speculating that the victim "begged for her life" with her eyes. Under the circumstances, the jury used an impermissible consideration in deciding that death was the appropriate

penalty. A new penalty phase is required.

Additionally, the trial court erroneously concluded that the evidence supported the finding that the murder was committed to avoid or prevent a lawful arrest. Nothing could be further from the truth. Appellant killed Mary Goss because he was angry and jealous of his wife. Even under the state's theory, appellant killed his mother-in-law because he could not "get at" his wife, the true object of his ire.

For the reasons set forth in the first point on appeal, appellant contends that the trial court erred in concluding that the murder was committed during the commission of a burglary. The circumstantial evidence indicated otherwise. The neighbors across the street were watching much of the confrontation between appellant and his mother-in-law. Neither one saw or heard a forced entry. Appellant remained in the Goss household arguing with his mother-in-law for approximately one hour before the shooting occurred. It is clear from the evidence was invited into the home by Goss. Therefore, no burglary occurred and this aggravator cannot stand.

The prosecutor concluded his closing argument at the penalty phase by telling the jury that the law required them to impose the death penalty in this case. The prosecutor's argument was erroneous. The jury was misled. A jury is neither

compelled nor required to recommend death even where the aggravating factors outweigh the mitigating factors. A jury can constitutionally dispense mercy in any capital case. This fundamental error tainted the jury's recommendation for the ultimate sanction.

The jury's recommendation was also tainted by victim impact evidence that should not have been presented to the jury. Appellant recognizes this Court's holding in Windom v. State, 656 So.2d 432 (Fla. 1995), but points out the unfair results that Windom has generated. Juries are deciding issues of life or death based on emotion rather than evidence and the law.

The trial court repeatedly allowed the state to improperly bolster the testimony of the grandchildren the only eye witnesses to the actual shooting. The court allowed testimony that a neighbor believed the child when he said that Maurice shot the child's grandmother. This was clearly error requiring a new trial.

Under the circumstances of this case, the trial court should have granted appellant's requested instruction on circumstantial evidence. This is especially true in light of the circumstantial nature of the proof regarding whether or not a burglary occurred. Since the felony murder theory rested on the commission of the burglary, this instruction was necessary. Additionally, the circumstantial evidence instruction was necessary for the jury to determine whether or not the killing of

Mary Goss was accomplished with the requisite premeditation. This is especially true in light of the fact that no one saw the actual murder.

The death penalty is disproportionate in this case. Only two valid aggravating factors exist weighed against some mitigation. The two aggravating factors are not weighty ones. The facts surrounding diminish their weight. This was a killing that was accomplished in a jealous rage. Life in prison without possibility of parole is the appropriate sanction.

Appellant contests the admission of two projectiles removed from the victim's body. The state could not account for the whereabouts of the evidence for a period of fourteen months. Under the circumstances, it was impossible for appellant to show probable tampering.

Finally, appellant contends that the cumulative effect of the numerous errors throughout the proceedings resulted in a denial of his due process right to a fair trial.

ARGUMENTS

Maurice Lamar Floyd discusses below the reasons which, he respectfully submits, compel the reversal of his convictions and death sentence. Each issue is predicated on the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 9, 16, 17, 22 of the Florida Constitution, and such other authority as is set forth.

POINT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHERE THE STATE FAILED TO PROVE PREMEDITATION AND ALSO FAILED TO PROVE THE UNDERLYING FELONY OF BURGLARY.

At the conclusion of the evidence, defense counsel moved for a judgement of acquittal contending that the state had failed to establish a prima facie case. More specifically, defense counsel argued that the State's case rested primarily on child testimony and that Mr. Brown, a state witness who lived across the street from the victim, contradicted the state's theory by testifying that the assailant ran in the other direction away from the victim. Appellant therefore could not have fired the fatal shot. (X 1862) Appellant argued that a reasonable doubt existed and that the case should not go to the jury. The trial court denied the motion without any argument from the prosecutor. (X 1863) Following the verdict, appellant

moved for a new trial arguing in part that the verdict is "contrary to the law." (IV 783) The trial court also denied this motion. (IV 799)

On appeal, appellant contends that the evidence does not support the jury's verdicts in this case, neither under the premeditated murder theory nor under the felony murder theory. While this particular argument was not specifically made below, appellant did generally contest the sufficiency of the evidence in both his motion for judgment of acquittal and his motion for new trial.[5] Additionally, this Court has a statutory and constitutional duty to examine the entire record to determine that appellant's conviction is founded upon sufficient evidence and that he was justly tried and convicted. Barlow v. State, 238 So.2d 602 (Fla. 1970). This Court must make an independent determination that the evidence is adequate even where appellate counsel fails to contest the issue. Brown v. State, 721 So.2d 274 (Fla. 1998); §921.141(4) Fla. Stat. (1999); Fla.R.App.Pro. 9.140(h); see also Reese v. State, 694 So.2d 678, 684 (Fla. 1997).

[5] Appellant did seek a pretrial ruling forcing the State to reveal their theory of prosecution and the aggravating circumstances on which they would rely. (I 75-77)

The Evidence Is Insufficient To Support The Underlying Felony of Armed Burglary.

The indictment charged Floyd with the premeditated murder of Mary Goss or, in the alternative, murder while engaged in the offense of burglary. Specifically, Appellant's indictment charged felony-murder by specifying that Floyd "did then and there unlawfully enter **or remain** in a certain dwelling... without the consent of Mary Goss... while harboring the intent to commit the offense of murder...". (I 11) The indictment also charged appellant with the armed burglary of Mary Goss' dwelling. (I 11) The jury returned with verdicts finding Appellant guilty of first-degree premeditated murder and first-degree felony murder as charged in the indictment as well as a verdict of guilty on the armed burglary of a dwelling. (III 497-98) There is not substantial, competent evidence to support the conviction for armed burglary and therefore the felony murder conviction must also fall.

Section 810.02(1), Florida Statutes (1999), states:

> Burglary means entering or remaining in a structure or a conveyance with intent to commit an offense therein, **unless** the premises are at the time open to the public or **the defendant is licensed or invited to enter or remain**.

(Emphasis added.)

Until recently, Florida courts held the opinion that even when an entry is

consensual, the owner's consent is implicitly withdrawn when the defendant "remains in" for the purpose of committing a crime. See, e.g., Ray v. State, 522 So.2d 963, 965 (Fla. 3rd DCA 1988) This Court addressed this very issue in Delgado v. State, 25 Fla. L.Weekly S631, 633 (Fla. August 24, 2000):

> [I]f we make the assumption that "a person would not ordinarily tolerate another person remaining in the premises and committing a crime," and assuming that this withdrawn consent can be established at trial, a number of crimes that would normally not qualify as felonies would suddenly be elevated to burglary. In other words, any crime, including misdemeanors, committed on another person's premises would become a burglary if the owner of the premises becomes aware that the suspect is committing the crime. Obviously, this leads to an absurd result. For example, if a person hosts a party and catches an invitee smoking marijuana on the premises, the invitee is not only guilty of a misdemeanor marijuana charge but also a burglary, a second-degree felony. The same can be said of the invitee who writes a bad check for pizza in front of an aware host. The other extreme is also true. An invitee who commits second-degree murder on another person's premises and in the presence of an aware hosts could be charged with first-degree felony murder, with the underlying felony being burglary. The possibility exists that many homicides could be elevated to first-degree murder, merely because the killing was committed indoors.

This Court went on to conclude:

> Applying this principle to the present case, the most favorable interpretation of Florida's burglary statute is to hold that the "remaining in" language applies only in situations where the remaining in was done surreptitiously . This interpretation is consistent with the original intention of the burglary statute. In the context of an occupied dwelling, burglary was not intended to cover the situation where an invited guest turns criminal or violent. Rather, burglary was intended to criminalize the conduct of a suspect who terrorizes, shocks, or surprises the unknowing occupant. ...As stated earlier, 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. [citation omitted] Evidence presented by the State can also establish a defendant's affirmative defense. [citation omitted] In the present case, there exists sufficient evidence in the record that appellant met his burden of establishing consensual entry. We are cognizant that after appellant entered the victims' home, he is accused of committing two heinous murders. Regardless of whether these accusations are true, appellant's actions are not the type of conduct which the crime of burglary is intended to punish. Our decision in no way prevents the State from prosecuting the appellant for whatever crimes he may have committed once inside the victims' home. But considering both the record in this case and the state's theory of the crime, appellant's conduct does not amount to burglary.

Id. (Footnote omitted.) If the defendant enters consensually and subsequently forms the intent to commit an offense therein, no burglary has occurred.

In the instant case, the circumstantial evidence fails to prove that appellant entered his mother-in-law's home without consent. Indeed, the evidence points to the opposite conclusion that appellant was an invitee or licensee at his mother-in-law's home where he had dropped off his stepchildren earlier that day. (IX 1706, 1726-28) Both neighbors across the street saw the appellant on Goss' porch talking to someone inside the home. The screen door was open. (IX 1654, 1671-72) Later, both neighbors heard loud voices coming from the Goss home. (IX 1657, 1672-74) One of the neighbors even watched appellant and Mary Goss argue in Mary's living room. The appellant was standing and Goss was seated on the couch. (IX 1672-74)

It is therefore clear that appellant was inside the Goss home apparently with Mary's consent. While it is true that the pair argued, neither neighbor heard nor noticed that the front door had been kicked in. They had seen appellant at Goss' front door talking to someone inside. Neither neighbor called the police at that point. Appellant was apparently in the Goss home for close to one hour before the verbal argument escalated to gunplay. (IX 1654-55, 1671-75)

The state relied on two circumstantial factors to prove the burglary. The victim's husband explained that Mary would never invite anyone into the home if she were not completely dressed. (VIII 1603-4) When police found Mary's body,

she was dressed in a nightgown without underwear. (VIII 1613) Secondly, the front door of the Goss residence was damaged. The lock on the front door had been broken at some point during the evening. (VIII 1602)

These two circumstances alone are insufficient to prove that Mary Goss did not invite appellant into the home. Appellant was the victim's son-in-law who had dropped his stepchildren off at the house earlier that day. He showed up at the Goss household visibly upset. Under the circumstances, it is very likely that Mary invited her son-in-law into the home in an attempt to placate him. She had already been warned by Trelane that appellant might come to the house. The evidence is consistent with the hypothesis Goss allowed appellant to enter her home.

The damaged lock on the front door proves nothing. The two neighbors across the street were watching the Goss home much of the evening. They saw appellant approach the front door where he talked to someone inside. Neither neighbor heard any commotion other than the verbal argument between the two. The front door played a prominent role in the subsequent physical altercation as they fled the home, the grandchildren saw appellant and Goss fighting at the front door. Appellant was using the front door to trap Goss where she was half-way inside and half-way outside. (IX 1733-35) The lock on the front door could easily have been damaged during the fight at the front door. The evidence fails to

exclude the reasonable hypothesis that Mary Goss allowed her son-in-law to enter the home with her consent.

The Evidence Is Insufficient to Prove the Requisite Premeditation.

This Court has the responsibility in this case to determine whether "there is substantial, competent evidence to support the judgment." Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981). See also Troedel v. State, 462 So.2d 392, 399 (Fla. 1984). "Premeditation," a necessary element of first-degree murder, is a fully-formed conscious purpose to kill. Appellant recognizes that premeditation may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of the act. Assay v. State, 580 So.2d 610 (Fla. 1991). Whether a premeditated design to kill was formed prior to the killing is a question of fact for the jury that may be established by circumstantial evidence. Wilson v. State, 493 So.2d 1019, 1021 (Fla. 1986). Evidence from which premeditation may be inferred 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. Jackson v. State, 575 So.2d 181, 186 (Fla. 1991).

Maurice Floyd was the victim's son-in-law. His marriage to Trelane Floyd,

the victim's daughter, had dramatically deteriorated. Floyd was clearly angry that night. He spent approximately one hour in the victim's home prior to the eruption of gun fire. Both neighbors heard loud voices engaged in argument. They heard Floyd yelling at Goss.

When Floyd arrived at Goss' home, he undoubtedly intended to confront her. This he did for the next hour. Words were exchanged, until Goss eventually sent her grandchildren running to the neighbor's house. She then tried to leave the home but Floyd would not let her. As she ran, one of the children saw Floyd and Goss in a physical altercation at the front door. Appellant was squeezing Goss between the screen door and the door frame as she attempted to get out. Goss eventually got out the back door and ran across the street. Appellant stood on the front porch firing two shots in Goss' direction. He then ran from the porch in the direction of Goss. One more shot was fired which killed Goss.

The evidence in this case fails to exclude a "heat of passion" killing and therefore would support, at most, a conviction of second-degree murder. See, Forehand v. State, 126 Fla. 464, 171 So. 241 (1936). In order to prove a fact by circumstantial evidence, the evidence must be inconsistent with any reasonable hypothesis of innocence. Ross v. State, 474 So.2d 1170, 1173 (Fla. 1985). If the State seeks to prove premeditation by circumstantial evidence, the evidence relied

upon by the State must be inconsistent with every other reasonable inference. See, Tien Wang v. State, 426 So.2d 1004, 1006 (Fla. 3d DCA 1983).

Tien Wang demonstrates the heavy burden that the State must carry on the matter of premeditation. Even though witnesses saw Tien Wang chase the victim down the street, strike him repeatedly, and the victim died, the appellate court held the evidence as to premeditation to be insufficient. The court acknowledged that although the testimony was "not inconsistent with a premeditated design to kill," the evidence was "equally consistent with the hypothesis that the intent of the defendant was no more than an intent to kill **without** any premeditated design." 426 So.2d at 1006. (Emphasis added). In Appellant's case, the State also failed to exclude the reasonable hypothesis that appellant intended to kill Mary Goss without the requisite premeditation. The facts in appellant's case are indistinguishable from those in Tien Wang, other than the difference in weapons.

Florida law is filled with similar cases where appellate courts have found the evidence of premeditation to be insufficient. See, e.g., Rogers v. State, 660 So.2d 237, 241 (Fla. 1995) [victim grabbed defendant's gun which fired during the struggle]; Jackson v. State, 575 So.2d 181 (Fla. 1991) [evidence was consistent with theory that store owner resisted robbery, inducing gunman to fire single shot reflexively]; Clay v. State, 424 So.2d 139 (Fla. 3d DCA 1982) [defendant stated

her intent to procure firearm in order to shoot victim, but she was under a dominating passion and fear of victim]; and Smith v. State, 568 So.2d 965 (Fla. 1st DCA 1990) [killing may have occurred in the heat of passion or without premeditation where unfaithful husband killed unfaithful wife]. This Court must examine the evidence presented and also conclude that the State failed to prove beyond a reasonable doubt and to the exclusion of every reasonable hypothesis that the Appellant premeditated the murder of Mary Goss.

POINT II

THE TRIAL COURT ERRED IN FINDING THAT THE STATE HAD A RACE NEUTRAL REASON FOR EXERCISING A PEREMPTORY CHALLENGE ON PROSPECTIVE JUROR RIOS, A VIOLATION OF APPELLANT'S FOURTEENTH AMENDMENT RIGHTS.

The trial court first broached the subject of the death penalty in his general questioning of the jury panel. The judge asked if anyone on the panel had any religious, moral, or conscientious objections to the imposition of the death penalty. He asked those who did to raise their hands. (VI 1042) Only two potential jurors (Young and Hardyman) raised their hands. They explained their beliefs on the subject in some detail under the questioning of the trial court. (VI 1043-45)

Subsequently, the trial court asked specific questions of individual jurors, including Rios. The court asked Rios questions concerning his occupation, marital status, prior jury service, and hobbies. (VI 1064)

The prosecutor was the first lawyer to question the jurors individually. (VI 1068) He immediately asked Young and Hardyman about their reluctance to consider a vote for death. (VI 1069-72) The prosecutor then asked if anyone else had qualms regarding the death penalty. (VI 1072-73) **The state never questioned Rios individually**. (VI 1068-77)

Defense counsel was the first lawyer to question juror Rios individually.

Rios explained that he was in charge of a twenty-four man crew for L&M Farm in east Palatka. (VI 1083) When asked specifically how he felt about the death penalty, Rios replied:

> [Rios]: I don't know.
>
> [Defense counsel]: Don't know at this point?
>
> [Rios]: No.

(VI 1083)

Prior to the first round of challenges, both peremptory and cause, the prosecutor ended his questioning of the panel by asking if there was anyone other than Young and Hardyman who would not seriously consider recommending the death sentence. Apparently, no one indicated any difficulty whatsoever. (VI 1090)

During the exercise of challenges, the state challenged Noel Rios in seat number 12. (VI 1102) Appellant raised a Neil[6] objection. Ultimately, the prosecutor and the trial judge agreed with defense counsel that Rios was a member of a minority, specifically that he was Hispanic. (VI 1102-3) At first, the novice[7] trial judge mistakenly believed that defense counsel needed to demonstrate a strong likelihood that the challenge was exercised in a racially discriminatory manner.

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[6] State v. Neil, 457 So.2d 481 (Fla. 1984).

[7] This was the trial judge's first capital case. (XI 2211)

After double checking the case law, the trial court conceded that defense counsel was correct and asked the prosecutor for a race-neutral reason. (VI 1103-6) The prosecutor ultimately responded:

> [The Prosecutor:] Mr. Withee [defense counsel] 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 his apparent - - what I perceived to be a dislike for or non-agreement with the death penalty.
>
> I determined peremptorily that he could excused (sic) because his answers had been conjured earlier. But when Mr. Withee asked the question, he left me with a definite question that he would not vote for the death penalty, or was at least equivocal at best.

(VI 1107) Defense counsel immediately contested the genuineness of the purported race-neutral reason.

> Mr. Withee [defense counsel]: I would contest that that's far from a legitimate reason, Your Honor. Few movements of body language,...And I didn't see any - - anything even coming close to cause or rising to the Neil race neutral reason. They may have another reason, but I don't - - I didn't see anything in my questioning that indicated he was offended by the death penalty in any matter.
>
> He's a working man. He's a farm boss. He's the boss man. He not (sic) an intellectual who can express things, and he didn't express things. He simply indicated where he worked.

> The Court: Well, I am going to conclude that the reason expressed by the State is a race neutral reason. I'm not sure I'm in a position to read body language. But certainly people express themselves by their movement of their bodies, their eyes, and those things are things that are regularly evaluated in jury selection.
>
> And in light of the fact that he's of a different minority than the Defendant, I'm going to conclude that that is a race neutral exercise of a peremptory challenge, and I will allow it.
>
> Mr. Withee: Sir, we would - - there is a continuing objection. I know that the law now is that I have to object every time the lawn mower goes by, I suppose.
>
> The Court: You feel free to object anytime.
>
> Mr. Withee: All right. I would object - -
>
> The Court: And I recognize this is done over your objection.
>
> Mr. Withee: Yes, our continuing objections...this not being a sufficient race neutral reason for his - - their use of a peremptory.

(VI 1107-9) Immediately prior to later swearing of the jury, the trial court stated that, "[s]ince there had been some issues during this process come up about Neil and challenges...", the judge asked the state to identify the minority jurors in the fourteen person (including alternates) jury group. Juror number one Mrs. Green, Juror number five, Ms. Demps, and Juror number nine, Mr. McCall, were all

African-Americans. (VI 1268)

Curtis v. State, 685 So.2d 1234, 1236-37 (Fla. 1996), provided a summary of the law in this area:

> This Court recently updated Florida law governing racially motivated peremptory challenges in Melbourne v. State, 679 So.2d 759 (Fla. 1996), setting forth the following guidelines:
>
> A party objecting to the other side's use of a peremptory challenge on racial grounds must: a) make a timely objection on that basis, b) that the venire person is a member of a distinct racial group, and c) request that the court ask the striking party its reason for the strike. If these initial requirements are not met (step 1), the court must ask the proponent of the strike to explain the reason for the strike.
>
> At this point, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If the explanation is facially race-neutral and the court believes that, given all the circumstances surrounding the strike, the explanation is not a pretext, the strike will be sustained (step 3). The court's focus in step 3 is not on the reasonableness of the explanation but rather its genuineness. Throughout this process, the burden of persuasion never leaves the opponent of the strike to prove purposeful racial discrimination.
>
> Id. at 764 (footnotes omitted).
>
> We noted that reviewing courts should enforce the above guidelines in a non-rigid

> manner, giving due weight to the trial court's ruling:
>
> > Voir dire proceedings are extraordinarily rich in diversity and no rigid set of rules will work in every case. Accordingly, reviewing courts should keep in mind [the following principle] when enforcing the above guidelines[:] ... [T]he trial court's decision turns primarily on an assessment of credibility and will be affirmed on appeal unless clearly erroneous.
>
> Id. at 764-65 (footnotes omitted).

The issue here focuses on the third step: the genuineness of the State's asserted race neutral reason for excluding Noel Rios.

In Melbourne, this Court overruled[8] State v. Slappy, 522 So.2d 18 (Fla. 1988) to the extent that Slappy, required a "reasonable" explanation rather than a "genuine" non-racial basis for the strike. That the trial judge found no pattern of improper use of peremptory challenges (nor did defense counsel allege such) is not a factor in evaluating the genuineness of the State's use of those challenges. State v. Slappy, 522 So.2d 18, 23-24 (Fla. 1988) [Even though some African-Americans may sit on the jury, reversal is still required if one member of venire is excused for

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[8] Although Melbourne refined the procedure for examining peremptory challenges, the five factors set out in Slappy used to guide the court into determining whether a proffered reason for a strike is pretextual still apply. Brown v. State, 733 So.2d 1128 (Fla. 4th DCA 1999)

improper racially motivated reasons.] See also State v. Johans, 613 So.2d 1319 (Fla. 1993) [A race-neutral justification for a strike cannot be inferred merely from circumstances such as the composition of the venire or the racial makeup of the jury ultimately seated. Where a Neil objection is improperly refused, the fact that a black juror ultimately is seated does not fix the earlier error.]

Appellant submits that the trial court's finding that the state's race-neutral reason was genuine is clearly erroneous. Rios did not raise his hand to indicate any problem with the death penalty, despite several opportunities to do so. When asked by defense counsel, the only person to ask Rios specifically and directly, Rios indicated that he did not know how he felt about the death penalty. The prosecutor never asked Rios any individual questions about the death penalty. Under these circumstances, the prosecutor's purported race-neutral reason was obviously a pretext and was not genuine. Fernandez v. State, 746 So.2d 516 (Fla. 3rd DCA 1999) held that the prosecutor's claim of lack of information about a juror could not serve as a lawful basis to exercise a strike. The fact that a prosecutor fails to question a jury or engages in a perfunctory examination is indicative of a disingenuous or pretextual explanation for a challenge. Id. See also State v. Slappy, 522 So.2d 18 (Fla. 1988).

The State Attorney cited Rios' "body language" which, in his subjective

interpretation, indicated that Rios harbored a "dislike for or non-agreement with the death penalty." (VI 1107) Defense counsel, whose question it was, proclaimed that he saw nothing that indicated Rios "was offended by the death penalty in any manner." (VI 1108) The trial court stated that it was in no position to "read body language", but did recognize the fact that people do express themselves through body language. (VI 1108) The trial court concluded that the state had expressed a race-neutral reason specifically "in light of the fact that he's of a different minority than the Defendant...". (VI 1108) Appellant repeatedly renewed his objection throughout the proceedings.

Appellant submits that reversible error occurred based on two separate and distinct contentions. First, there is not sufficient competent evidence to support the trial court's finding that the State's reason was genuine. The state's perception and conclusion regarding juror Rios' "body language" was immediately challenged by defense counsel, who was in a much better position to observe Rios. Defense counsel was questioning Rios at the time of the alleged "body language." The prosecutor never got any more specific than that. Defense counsel's act of refuting the state's perceptions without any further response from the state reveals that the reason was not genuine.

One case very much on point is Bernard v. State, 659 So.2d 1346 (Fla. 5th

DCA 1995), which held that peremptories based on looks or gestures are not acceptable bases for strikes unless observed by the judge and affirmed on the record. The Bernard prosecutor did not ask any questions of a Hispanic juror. The prosecutor's strike of that juror was based on her alleged facial expression expressing disapproval of a remark made by another juror. As in appellant's case, the record reflected no support for the state's reason and the conviction was reversed. Appellant's trial judge explicitly stated, "I'm not sure I'm in a position to read body language." (VI 1108) Although the trial court recognized "body language" as a legitimate concept, the court did not **confirm** the prosecutor's observations. Defense counsel expressly **refuted** to them. The reason stated by the prosecutor was so nebulous, it defies confirmation through objective means.

In Daniel v. State, 697 So.2d 959 (Fla. 2nd DCA 1997), the state struck the only Hispanic member of the jury panel. Regarding one juror, the prosecutor stated that he felt the juror "had an amicable relation with defense counsel" and he "did not feel comfortable" with the juror's response to the prosecutor's questions. Daniel's conviction was reversed. A prosecutor's "feeling" about a juror is not a valid reason where there is no support contained in the record on appeal.

Every juror exhibits body language. This was not a situation where the details of the juror's body language was specifically noted for the record. See e.g.

United States v. Cordoba-Mosquera, 2000 WL 669659 (11th Cir. Fla. 2000)[juror was casually dressed and answered the judge with a shrug of his shoulders, did not answer audibly, and appeared to be inattentive] and United States v. James, 113 F.3rd 721, 729 (7th Cir. 1997)[concluding that striking a juror who looked mad about being there was race-neutral].

The prosecutor's stated reason was no better than the one rejected in Franqui v. State, 699 So.2d 1332, 1334 (Fla. 1997) where counsel, when asked, said, " I don't like him." See also, Suggs v. State, 624 So.2d 833(Fla. 5th DCA 1993) ["bad feelings" which stemmed from jurors' response to defense counsel's voir dire question concerning defendant's prior criminal record is not sufficient to withstand a Neil inquiry because it would be to easy to mask a racially motivated (or other improper) basis for exercising a peremptory challenge.]

Secondly, reversible error occurred because the trial court obviously based his ruling, at least in part, on the fact that the stricken juror Rios was Hispanic while the defendant in this case was black. (VI 1108) The trial court was under the mistaken impression that the difference in ethnicity was a factor in assessing the validity of the strike. The trial judge was wrong. A defendant need not even be a member of any minority in order to avail himself of the Neil decision. Powers v. Ohio, 499 U.S. 400 (1991).

The trial judge also erroneously believed that the fact that three black jurors were seated for the trial was evidence that the state's strike of Rios was not racially motivated. (VI 1106, 1268-69) Almost all of the cases hold that the racial composition of the seated jury is irrelevant to a determination of whether an individual strike has an improper racial motive. See, e.g., State v. Johans, 613 So.2d 1319 (Fla. 1993). Heggan v. State, 745 So.2d 1066(Fla. 3rd DCA 1999) is the only case holding otherwise. However, Heggan is limited to seated jurors who are members of the same minority as the stricken juror. Therefore, Heggan would not apply to appellant's case where Rios was Hispanic and three seated jurors were black. The trial court erroneously concluded that the racial composition of the jury was significant. His ruling was based on a misapprehension of the law. If the trial judge had understood the state of the law on this issue, he might have ruled differently. For these reasons, a new trial is required.

POINT III

THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR IN FAILING TO INSTRUCT THE JURY THAT THEY COULD CONSIDER IN MITIGATION ANY OTHER ASPECT OF THE DEFENDANT'S CHARACTER, RECORD, OR BACKGROUND. THE ERROR WAS COMPOUNDED BY THE TRIAL COURT'S REFUSAL TO SPECIFICALLY INSTRUCT THE JURY ON APPELLANT'S PROPOSED NON-STATUTORY MITIGATING FACTORS AS WELL AS THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON THE STATUTORY MITIGATING FACTOR RELATING TO APPELLANT'S YOUNG AGE.

The standard jury instruction relating to mitigating circumstances requires the jury to consider:

> 8. Any of the following circumstances that would mitigate against the imposition of the death penalty:
> a. Any [other] aspect of the defendant's character, record, or background.
> b. Any other circumstance of the offense.

Fla. Std. Jury Instr. (Crim.)p. 113. The accompanying note to the judge states:

> Both 8a and 8b must be given unless the defendant requests otherwise.

Id. At appellant's trial, the court instructed the jury as follows:

> Should you find sufficient aggravating circumstances do exist, it will be - - it will then be

> your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.
>
> Among the mitigating circumstances you may consider if established by the evidence are:
>
> One, any of the following circumstances that would mitigate against the imposition of the death penalty;
>
> **Sub Section a, any other circumstance of the <u>offense</u>.**

(XI 2171-72**)** **(**Emphasis supplied.) This was the sum total and substance that the jury received as far as instruction on mitigating factors that they could consider in deciding whether Maurice Floyd should be executed or should spend the rest of his life in prison. Although the transcript of trial indicates that written instructions were provided to the jury at the penalty phase (XI 2177), the record on appeal does not contain them.[9]

Regardless of whether the jury received written instructions or not, they certainly did not have time to read them. The transcript reflects that the jury retired from the courtroom to begin deliberations at 1:45 p.m. (XI 970) The record does not reflect the precise time that they returned with their verdict of death. However, once the jury returned and their verdict was published, the trial court read the

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[9] Undersigned counsel contacted the clerk of the lower court who searched the file without success for the missing written instructions. Defense counsel was also unable to provide a copy. Undoubtedly, they were destroyed or a juror has a trial souvenir.

standard jury instruction thanking them for their service and informing them of their rights as former jurors. The jury was then excused from the courtroom at 2:20 p.m., literally thirty-five minutes after they **first** retired to deliberate whether Maurice Floyd should live or die. Therefore, appellant submits that even if the written jury instructions had been accurate, the jury had no time to read them.

It is clear from the record that the jury was erroneously instructed that they could consider any other circumstance of the **offense** and that they were never told that they could consider any other aspect of Floyd's **character, record, or background**.

There is further evidence that the written instructions were also incorrect. In the trial court's written findings of fact in support of the death penalty, the judge writes:

> B. MITIGATING FACTORS.
>
> 1. Statutory Mitigating Factors.
>
> The instructions that were given to the jury indicated that any of the following circumstances would mitigate the imposition of the death penalty to include **any other circumstance of the offense**. There is no **circumstance of the offense** that the court finds to be mitigating and therefore the defendant has failed to establish by the greater weight of the evidence any statutory mitigating factors.

(V 981) (Emphasis supplied.) The trial court then writes to address the four non-

statutory mitigating factors which defense counsel proposed. (V 981-82)

The novice trial judge obviously was confused about the definition of both statutory and nonstatutory factors. If the trial court was confused, the jury, a group of layman, was probably completely baffled. They were presented with evidence and argument that Maurice Floyd killed his mother-in-law in order to exact revenge on his wife. They were given a laundry list of aggravating factors which they could consider, many of which were completely inapplicable according to the large body of jurisprudence from this Court. See Points IV, V, and VI. Balanced against this, the jury was told that they could consider in mitigation "any other aspect of the **offense**." (XI 2172)(Emphasis supplied.) That would seem to encompass only the aggravating circumstances on which they were already instructed, several of them clearly inapplicable.

The jury undoubtedly considered circumstances of the murder that they had already considered as aggravating in deciding mitigation. That was their instruction from the court. The unfortunate result was that they undoubtedly gave **double weight** to the aggravating circumstances of the murder, several of which they should not even have been considering. The result is a constitutionally tainted jury recommendation for the ultimate sanction. A new penalty phase is required. Amends. V, VI, VIII, and XIV, U.S. Const.; Art. I, §§ 9, and 16, Fla. Const.

Additionally, Floyd filed a motion requesting the trial court to instruct the jury on two nonstatutory mitigating circumstances that he proposed. (III 495-96) After hearing argument, the trial court denied appellant's request. (XI 2130-34) If the trial judge had specifically instructed the jury on appellant's proposed nonstatutory circumstances, the error could have been lessened. Unfortunately, the trial court denied appellant's request.

Additionally, appellant's young age (21) should have been considered in mitigation. This is especially true in light of appellant's obvious immaturity which is revealed by his irrational and obsessive jealously. See Campbell v. State, 679 So.2d 720 (Fla. 1996)[trial court abused discretion in not instructing jury on age or 21 year old defendant who also presented evidence of significant, emotional immaturity].

The trial court also committed reversible error by denying appellant's request to modify the penalty phase instructions. Specifically, the trial court refused to tell the jury that only in rare circumstances can he impose a sentence different than the one they recommend. (XI 2134-37, 2169) This ruling tended to denigrate the jury's responsibility in deciding the appropriate sentence. Caldwell v. Mississippi, 472 U.S. 320 (1985). For the same reason, the trial court should have eliminated any language that referred to the jury's advisory verdict or

recommendation. (I 111-12, VII 1449, 1455) A new penalty phase is mandated.

POINT IV

THE TRIAL COURT ERRONEOUSLY OVERRULED APPELLANT'S VEHEMENT AND REPEATED OBJECTIONS AND INSTRUCTING THE JURY THAT THEY COULD CONSIDER HEINOUS, ATROCIOUS, OR CRUEL WHERE THERE WAS ABSOLUTELY NO EVIDENCE TO SUPPORT THE INSTRUCTION, WHICH THE TRIAL COURT SUBSEQUENTLY ALSO CONCLUDED.

Defense counsel was adamant that the evidence presented by the state was insufficient to warrant an instruction to the jury that they could consider that the homicide was especially heinous, atrocious, or cruel. A major point of contention at the penalty phase charge conference was the state's request that the trial court instruct the jury regarding this particular aggravating factor. (XI 2107-21, 2138-46)

Viewing the evidence in the light most favorable to the state, the testimony established that appellant went to the victim's home. An argument ensued between appellant and his mother-in-law, the eventual victim. The verbal portion of the argument ended when Mrs. Goss ran out the back door of her home. Appellant stood on the front porch and fired two shots in the direction of Mrs. Goss as she ran away. Neither bullet hit her. Appellant left the front porch and ran after Mrs. Goss where he encountered her between two neighbors' homes. Goss was then

shot once in the head. Death was instantaneous.

Defense counsel appropriately informed the novice trial judge[10] of the large body of law from this Court that, as a general rule, gun shot deaths are not heinous, atrocious or cruel. See, e.g., Burns v. State, 609 So.2d 600 (Fla. 1992). The trial court appeared to be concerned about a single phrase in the medical examiner's testimony that seemed to indicate that the victim might have been in the process of dropping to her knees when she was shot. Further review revealed that, the medical examiner concluded that the victim was standing when she was shot. Specifically, the medical examiner testified:

> Q. In your medical opinion within a reasonable degree of medical certainty, do you have an opinion as to whether Ms. Goss was in a laying, flat position or standing up at the time she was shot?
>
> A. Yes, I have an opinion.
>
> Q. What is that opinion, sir?
>
> A. **That she was standing up.**
>
> Q. And, for what - - what are you relying on for that opinion? Would it be the blood splatter [sic]?
>
> A. The blood splatter [sic], the blood soaking on

[10]Early on in the proceedings, the trial judge revealed that this was his first exposure to death penalty law in a trial setting. (XI 2211)

> clothes, you got blood coming down her arms and her legs, not necessarily on her lower legs and feet, **perhaps she was almost maybe kneeling, but she was upright** to the injury to the brain, severed the brainstem, which is instantaneous, if you will, death.

(X 1858) (Emphasis supplied.)

In Stewart v. State, 549 So.2d 171 (Fla. 1989), this Court held that a trial judge in a capital case is to instruct the jury only on those aggravating circumstances for which evidence has been presented in the penalty phase. This Court has not hesitated to reverse death sentences and remand for a new penalty phases where the jury was erroneously instructed on an inapplicable aggravating factor which was emphasized by the prosecution. See, e.g., Omelus v. State, 584 So.2d 563 (Fla. 1991); Bonifay v. State, 626 So.2d 1310 (Fla. 1993); Padilla v. State, 618 So.2d 165 (Fla. 1993).

At appellant's trial, the court erroneously instructed the jury and the prosecutor exacerbated the error by emphasizing the inappropriate heinousness factor. In fact, the state focused on the heinousness of the homicide more than any other aggravating factor. (XI 2148-59) [specifically (XI 2154-58)] Despite the medical examiner's conclusion to the contrary, the prosecutor told the jury that the circumstantial evidence (specifically the contrasting heights of the assailant and the victim combined with the trajectory of the bullet through the victim's head)

supported the conclusion that the victim was on her knees with her face raised using her eyes to "plead for her life." "That's the only way that [the trajectory] could have happened." (XI 2158) The prosecutor followed up this unlikely scenario with a plea of his own to the jury that Maurice Floyd deserves and the law **requires** that he receive the death penalty. (XI 2159)

The prosecutor should have known better. This Court has held that even execution-style murders involving multiple gunshots, or where the victim begged for their life, do not qualify for the HAC factor absent evidence that the defendant intended to inflict a high degree of pain. In Porter v. State, 564 So.2d 1060 (Fla. 1990), this Court rejected HAC where the murders were crimes of passion rather than designed to be painful. See also, Santos v. State, 591 So.2d 160 (Fla. 1991) Porter sounds very similar to the theme of Mary Goss' murder.

The prosecutor's inflammatory and inappropriate argument combined with the inapplicable and erroneous instruction from the trial court resulted in a death recommendation. Subsequently, the trial judge concluded that the evidence did not support a finding that the murder was especially heinous, atrocious or cruel after all. (V 979-80) However, the damage was done. The jury's decision on the appropriate sentence was unconstitutionally skewed by the trial court's instruction and the prosecutor's argument on a clearly inapplicable aggravating factor.

The jury knew no better. To a layman, every murder, especially first-degree murders, is especially heinous, atrocious, or cruel. When the trial court instructed them on the law, he told the jury that this was a valid aggravating factor on which they could base their decision. Under the clear case law rendered by this Court, the factor was completely inappropriate to the circumstances of the murder. A new penalty phase is required.

POINT V

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AND FINDING THAT THE EVIDENCE SUPPORTED THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.

The trial court instructed the jury on the aggravating circumstance that "the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." (XI 2170) The trial court also found that the evidence supported this particular aggravating factor. (V 978-79) In concluding that the evidence supported the factor, the trial court wrote:

> At the time of the murder Maurice Lamar Floyd was an active probationer who was in the process of serving two probationary sentences. He was fully aware that any new law violation could and would likely subject him to arrest and incarceration. Earlier on the evening of the murder, Mr. Floyd had committed an aggravated assault on his wife, who is now known as Trelane Floyd Jackson. That assault involved the ramming of her car by a car driven by Mr. Floyd after which Mrs. Jackson drove to the Sheriff's Department where Mr. Floyd was confronted by an armed deputy who attempted to restrain him. Mr. Floyd ran from the deputy who was not in a position to pursue Mr. Floyd and therefore was subject to arrest at any time on or after that incident. Mrs. Floyd communicated the facts concerning the

> assault of her mother and advised Mrs. Goss that Mr. Floyd had fled and might be headed for the Goss residence. Mr. Floyd, a day earlier, had indicated that if his wife was not compliant with his wishes concerning her conduct, he would hurt her or someone that she cared about including her mother. Following the murder, Mr. Floyd escaped and went to his girlfriend's home, that of Mrs. Lamb. Mrs. Lamb reported that upon his arrival he placed a handgun on the dresser in her home and announced that he had shot Miss Mary, referring to Mrs. Goss, because she had threatened to turn him over to law enforcement authorities.
>
> The court finds that the evidence presented clearly indicated that the murder committed by the defendant was for the purpose of avoiding or preventing his lawful arrest and that has been shown to the exclusion of a reasonable doubt. The court attaches substantial weight to this aggravating factor.

(V 978-79)

It is clear from the language of the trial court's own findings that the evidence does not support the conclusion that Maurice Floyd killed Mary Goss to avoid arrest. The state's theory of the case was as follows:

> Maurice Floyd was insanely jealous of his wife, Trelane, spending any time with anyone other than him. As their marriage deteriorated, Floyd told Trelane that if he could not have her, no one else would. If he could not get at her, he would hurt someone she loved; her children, her father, or her mother.

Appellant's flight from the sheriff's office may have been to avoid arrest, but the killing of Mary Goss was definitely not. How does the murder of Mary Goss prevent appellant's arrest? He was wanted for investigation of the domestic violence incident involving Trelane on the way to the sheriff's office. The murder of Mary Goss accomplished nothing more than causing grief for Trelane and her family.

"Typically, this aggravator is applied to the murder of law enforcement personnel." Consalvo v. State, 697 So.2d 805 (Fla. 1996). In order to establish the aggravating circumstance in question where, as here, the victim was not a law enforcement officer, proof of the requisite intent to avoid arrest and detection must be very strong. See, e.g., Urbin v. State, 714 So.2d 411 (Fla. 1998). In fact, the state must clearly show that the dominant or only motive for the killing was the elimination of the witness. See, e.g., Mahn v. State, 714 So.2d 391 (Fla. 1998).

The state failed to present substantial and competent evidence to support a finding of this aggravating factor. Indeed, the evidence presented by the state supports an entirely different motive, i.e., that appellant wanted Trelane to experience the pain of having a loved one hurt. That is why the appellant went to Mary Goss' house in the first place. If he wanted to avoid arrest, he would have fled the area or at least gone to someone else's house. Appellant's statement to his

girlfriend that he shot Mrs. Goss because she had threatened to turn him over to law enforcement was simply false bravado. Even if Goss had threatened to call the police that night, that was not the **dominant** reason the shooting occurred. He shot her as a result of the anger he felt over his deteriorating relationship with Trelane.

Under these circumstances, the state has failed to prove the applicability of this aggravating circumstance. Because an inapplicable factor was not only found by the trial court, but considered by the sentencing jury, appellant must be granted a new penalty trial. Mahn v. State, 714 So.2d 391 (Fla. 1998); Bonifay v. State, 626 So.2d 1310 (Fla. 1993); and Omelus v. State, 584 So.2d 563 (Fla. 1991).

POINT VI

THE TRIAL COURT ERRED IN FINDING AND INSTRUCTING THE JURY ON THE AGGRAVATING FACTOR THAT THE HOMICIDE WAS COMMITTED DURING THE COMMISSION OF A BURGLARY WHERE THERE WAS NOT SUFFICIENT COMPETENT EVIDENCE.

In finding this particular aggravating circumstance, the trial court wrote:

> In the verdict returned in this case the jury found the defendant was guilty of first degree murder as well as armed burglary of Mrs. Goss' dwelling which is part of the transaction that led to her death. There is no question that Mr. Floyd came to the Goss residence with an evil intent. He entered the premises by force causing damage to a door frame in the process of entry and awakened Mrs. Goss who had disrobed and was sleeping in her nightwear. A verbal confrontation occurred on the premises between Mr. Floyd and Mrs. Goss during which she did what she could to usher her three young grandchildren our of her home and across the street to the safety of the neighbor's house. There she turned and may have kneeled to fact her pursuer and she was killed with a single shot to the center of her left cheek which passed through her brain and caused instant death. The state has established beyond a reasonable doubt that the confrontation between Mr. Floyd and the deceased, Mary Goss, occurred in a single transaction which involved the burglary of her home and eventually her own death. The court assigns great weight to this aggravating factor.

(V 978) The trial court committed reversible error and finding that the state had

proven this factor beyond a reasonable doubt. There is not sufficient, competent to support a finding of this circumstance. See Point I. The evidence that appellant burglarized the victim's home is completely circumstantial. As such, the evidence must exclude every reasonable hypothesis of innocence. Here, the state failed to meet their burden. The neighbors across the street watched the Goss home for much of that evening. They observed appellant talking peacefully at the front door. They never heard nor saw any forcible entry. Once appellant entered the home, he talked to Mary Goss for approximately one hour before the shooting began. There was insufficient evidence for the jury to be instructed on the circumstance. As such, the jury's verdict was unconstitutionally tainted by the consideration of an impermissible factor. Amends. V, VI, VIII, and XIV, U.S. Const.; Art. I, §§ 9, 16, and 17.

POINT VII

FUNDAMENTAL ERROR OCCURRED WHEN THE PROSECUTOR CONCLUDED HIS FINAL SUMMATION AT THE PENALTY PHASE BY IMPROPERLY STATING THAT THE JURY WAS REQUIRED TO IMPOSE A DEATH PENALTY IN THIS PARTICULAR CASE.

The prosecutor concluded his closing argument at the penalty phase as follows:

> We could have brought in family members. We could have brought in people that would cry. But we don't need crying children and grieving husbands to prove these aggravating factors. And we don't need an emotional decision. We need a decision based upon the law and what is right.
>
> You'll never meet Mary Goss this side of Heaven.
>
> You grew to know her today. She was a wonderful legacy to those young'ns, and they're precious and they're going to be fine.
>
> **Let the final chapter be justice was done. This man not only deserves but the law requires that he receive the death penalty.**

(XI 2159)(Emphasis supplied.) After making a strong emotional appeal based on the victim impact evidence presented, see Point VIII, the prosecutor's last words to the jury was clearly a misstatement of Florida law. The death penalty is never "required" regardless of the aggravating circumstances proven nor the lack of

mitigating circumstances offered. Henyard v. State, 689 So.2d 239, 249 (Fla. 1996)[a jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors]. See also, Gregg v. Georgia, 428 U.S. 153, 203 (1976)(stating that jury can constitutionally dispense mercy in a case deserving of death penalty); and Alvord v. State, 322 So.2d 533, 540 (Fla. 1975).

Appellant concedes that the argument was made without objection. However, in this particular case, fundamental error has occurred. The prosecutor's misstatement of the law goes to the very heart of the jury's decision as to the appropriate penalty in this case. This is especially true in light of the jury's inappropriate consideration of several aggravating factors which should not have been before them, see Points IV, V, and VI, the erroneous instruction on mitigating evidence, see Point III, and the inflammatory victim impact evidence presented. See Point VIII.

POINT VIII

THE JURY'S RECOMMENDATION AT THE PENALTY PHASE WAS TAINTED BY HIGHLY INFLAMMATORY AND IMPROPER VICTIM IMPACT EVIDENCE.

Defense counsel attempted to convince the trial court that he alone should hear the testimony at the Spencer hearing thus precluding the jury from getting bogged down in the emotional quagmire that has become "victim impact evidence". The trial court rebuffed this attempt by appellant to eliminate the devastating impact that victim impact evidence has on juries. (VII 1458-60)[11] The jury then heard in considerable and emotional detail what a wonderful human being that Mary Goss obviously was. Appellant's argument on this issue is not intended to take anything away from Mary Goss' value as a human being and the obvious loss to her family and the community. Indeed, Mrs. Goss was apparently one of a kind.[12]

Mary Goss worked as a social worker for the Department of Children and Family's in Palatka. Bill Dollar, the operations program administrator explained

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[11] The state did agree to proffer the victim impact witnesses prior to presenting the testimony to the jury. (VII 1458-60) Appellant maintained his objection at trial. (XI 2024)

[12] As evidenced by the fact that in the small town of Palatka over 1,000 people attended her funeral. (VI 1297)

that some people look at social work as a job, but to Mary Goss, it was a calling. Her ability to relate to people, especially children, was legendary. She had dedicated her life to working with Palatka's children. Although Goss did not have a college degree, she was given more responsibility than most workers because the department trusted her judgement so much. Following her death, her position had been filled, but no one would ever replace Mary Goss. She was unique. (XI 2072-74)

Clyde Witherspoon, a co-worker at the department, described what a loss to the community Mary's death was. She led a noon Bible study group at work every day. She had given her life over to the Lord. (XI 2086-90) Witherspoon concluded, "Why, you can't possibly replace an angel; you can't replace someone that's like, like Mary." (XI 2092) The prosecutor asked Greg Walker, another co-worker, what made Mary unique as an individual and asked Walker to explain the loss to the community. Walker replied, "I could be here all day telling you that." (XI 2094) Walker explained that Mary's trust, rapport, and bond with the community had taken years to establish. She simply could not be replaced. (XI 2093-96) Reverend Carl Flag from the Mount Tabor First Baptist Church in Palatka explained that Mary Goss was a central figure to many families in town. Words were simply inadequate to describe this lady and the love that she had. (XI

2098-2101)

Prior to the aforementioned witnesses' testimony, the prosecutor proudly announced that he had eliminated all victim impact witnesses who were related by blood to the victim. The prosecutor's implication was that his witnesses would not come across as too emotional and would not cry in front of the jury. (XI 2025-29) The prosecutor called them "professional witnesses." Indeed, the victim impact witnesses presented at appellant's trial were even more devastating than that of a victim's family. The witnesses were "professional" witnesses who undoubtedly appeared in court on a regular basis. As such, they were not intimidated nor uncomfortable. They were also **very** articulate in expressing the devastating loss to the small community of Palatka when Mary Goss was gunned down by Maurice Floyd.

Defense counsel obviously recognized the devastating effect of the testimony. He began his closing argument by addressing the victim impact evidence. (XI 2160-61) Defense counsel even renewed his objection at the Spencer hearing. He pointed out that victim impact evidence improperly injected socio-economic considerations into the deliberations on the proper penalty. If appellant had killed a "cabbage slinger", he would not have been sentenced to death. (XII 2241-46)

Maurice Floyd's jury heard the testimony of these witnesses and almost unanimously urged his execution. It is not surprising considering the highly emotional and inflammatory testimony that the jury heard. This is exactly the type of evidence that prosecutors are presenting to juries throughout this state after this Court's holding in Windom v. State, 656 So.2d 432 (Fla. 1995) and the enactment of Section 921.141 (7), Florida Statutes (1995). In Windom, this Court concluded:

> ...We do not believe that the procedure for addressing victim impact evidence, as set forth in the statute, impermissibly affects the weighing of the aggravators and mitigators...or otherwise interferes with the constitutional rights of the defendant. Therefore, we reject the argument which classifies victim impact evidence as a nonstatutory aggravator in an attempt to exclude it during the sentencing phase of a capital case....The evidence is not admitted as an aggravator but, instead,...allows the jury to consider "the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death."

Windom, 656 So.2d at 438.

Prior to Payne v. Tennessee, 501 U.S. 808 (1991), the Eighth Amendment to the United States Constitution prohibited the introduction of victim impact evidence at the sentencing phase of a capital murder trial. Booth v. Maryland, 482 U.S. 496 (1987). Booth correctly pointed out that the admission of such evidence creates a constitutionally unacceptable risk that the jury may impose the death

penalty in an arbitrary and capricious manner. The focus is not on the defendant, but on the character and reputation of the victim and the effect on her family, factors which may be wholly unrelated to the blame-worthiness of a particular defendant. Booth pointed out that the presentation of this type of information can serve no other purpose then to inflame the jury and to divert it from deciding the case on relevant evidence concerning the crime and the defendant. Of course, Payne overruled Booth. This Court settled the question in this state by its holding in Windom. Appellant respectfully submits that this Court's holding in Windom was erroneous and urges this Court to recede from Windom.

POINT IX

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S TIMELY OBJECTION AND ALLOWING A STATE WITNESS TO IMPROPERLY BOLSTER THE TESTIMONY OF A SUBSEQUENT CHILD WITNESS.

Jeanette Figuero lived across the street from the victim. When the trouble at the Goss house escalated, the victim told her grandchildren to run over to Figuero's house. Figuero testified that she heard two shots immediately prior to hearing the young children knocking at her door. Figuero's son let the children into the house. (IX 1670-71, 1675) Once the children were in the house, they told Figuero what was happening. Over appellant's objection that the state had laid no foundation and that the testimony was hearsay, the children told Figuero that Maurice Floyd had shot their grandmother. Figuero asked J.J., the oldest child, if he was sure [that appellant shot Goss]. When he replied affirmatively, Figuero called the police. (IX 1676-77)

The prosecutor then asked Figuero if J.J. was a smart child who understood the situation. He also asked Figuero if she believed the child (when he told her that Maurice Floyd had shot his grandmother). Figuero assured the prosecutor and the jury that she did believe the child. The testimony elicited by the prosecutor was clearly improper bolstering. See, e.g., Szuba v. State, 749 So.2d 551 (Fla. 2nd DCA

2000); Paige v. State, 733 So.2d 1079 (Fla. 4th DCA 1999) [reversible error where police officer testified that informant was "trustworthy and reliable"]; Hudson v. State, 652 So.2d 1241 (Fla. 1st DCA 1995) [deputy sheriff testified over objection that the informant was an honest person; reversible error where the informant was the only eye witness to the transaction]; and Weatherford v. State, 561So.2d 629 (Fla. 1st DCA 1990)[holding witnesses' testimony offered to vouch for credibility of another is inadmissible]. See also Moton v. State, 697 So.2d 1271 (Fla. 4th DCA 1997)[state improperly elicited character evidence regarding key state witness' honesty from witnesses' employer after defendant attacked credibility of witness]. Appellant contends that the testimony resulted in reversible error, despite the fact that there was no contemporaneous objection. Fundamental error occurred.

POINT X

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED INSTRUCTION REGARDING CIRCUMSTANTIAL EVIDENCE, A VIOLATION OF FLOYD'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

Even prior to trial, appellant requested a jury instruction on circumstantial evidence. (VII 1367-68) At the charge conference, the trial court initially agreed that such an instruction was appropriate. When the state objected, pointing out that the instruction was no longer standard, the trial court decided not to give the instruction. (X 1895-98) Under the special circumstances of this case, the trial court's ruling was error.

The law in this area begins with this Court's decision In re Standard Jury Instructions in Criminal Cases, 431 So.2d 594 (Fla. 1981). Until that case, the standard jury instructions in criminal cases included an instruction on circumstantial evidence. That is, if the evidence supported giving the jury that extensive guidance on this special form of evidence, the court had to give it as a matter of law.

In In re Standard Jury Instructions in Criminal Cases, this Court left to the trial court's discretion whether to instruct the jury on circumstantial evidence. It never disapproved the guidance given the jury, it merely said the court had the

choice of whether to give it to the fact finder or not.

> The elimination of the current standard instruction on circumstantial evidence does not totally prohibit such an instruction if a trial judge in his or her discretion, feels that such is necessary under the peculiar facts of a specific case. However, the giving of proposed instructions on reasonable doubt and burden of proof, in our opinion, renders an instructional circumstantial evidence unnecessary.

In re Standard Jury Instructions in Criminal Cases, 431 So.2d at 595.

Since then courts have consistently rejected, usually summarily, attacks on trial courts' refusal to specifically instruct the jury on circumstantial evidence. See Petri v. State, 644 So.2d 1346, 1355 (Fla. 1994); Trepal v. State, 621 So.2d 1361, 1366 (Fla 1993); Kelly v. State, 543 So.2d 286, 288 (Fla. 1st DCA 1989); and Rivers v. State, 526 So.2d 983, 984(Fla. 4th DCA 1988). As far as undersigned counsel can determine, no Florida court has reversed a trial court's decision refusing to give this instruction. Nevertheless, appellant contends that the trial judge abused its discretion in denying Darling's requested guidance on circumstantial evidence.

What makes this case so special that the circumstantial evidence instruction should have been given? Several factors combine to compel the conclusion that the trial court should have instructed the jury on circumstantial evidence.

First, the state's circumstantial case has a deceptively compelling quality. The state argued that Floyd, the victim's son-in-law went to her house with a plan to kill her to exact revenge against his wife, the victim's daughter. From that, the state hoped to prove premeditated murder. Appellant's intent at the time of the murder, is by it's very nature, subject only to circumstantial evidence to prove the requisite intent. Absent premeditation, the state's theory was that appellant killed Mary Goss during the course of the burglary of her home. The evidence of the burglary was completely circumstantial. See Point I. The broken door and the victim's clothing were the circumstances that the state relied on to prove the burglary. As such, the requested instruction was critical in this case. Additionally, appellant's intent at the time of the entry into the home, even if it were non-consensual, is subject to proof by circumstantial evidence.

Circumstantial evidence is a subtle legal concept. The jury here could be excused for not fully understanding that the presumption of innocence requires (not permits) the jury to accept a reasonable hypothesis of innocence. Davis v. State, 90 So. 2d 629, 631 (Fla. 1956); McArthur v. State, 351 So. 2d 972 (Fla. 1977). Guidance, as provided in the old standard instruction that "The circumstances must be consistent with guilt and inconsistent with innocence" was essential. It articulated and emphasized that point with greater clarity than either the reasonable

doubt or burden instructions do and with more authority than counsel's argument could have commanded. Such special, specific guidance was needed here considering the apparently strong circumstantial case the state presented.

In short, if this court has recognized that special rules of appellate review apply to issues involving circumstantial evidence, State v. Law, 559 So. 2d 187, 188 (Fla. 1989), the court in this case should have given the jury particular guidance on how to consider this evidence. This is particularly true here where the state's case was strongly, though exclusively circumstantial that Floyd premeditated the murder of Goss or, at least killed her during the commission of a burglary. Because of the strong emotional undercurrent running through this trial, the jury needed particular guidance and a reminder that "If the circumstances are susceptible of two reasonable constructions, one indicating guilt and the other innocence, you must accept that construction indicating innocence." After all, if the defendant is entitled to an instruction on his theory of defense, Hooper v. State, 476 So. 2d 1253 (Fla. 1985), the jury in this particularly treacherous case should have been given specific guidance so they could have avoided the emotional bogs the facts of this case produced.

With the defendant on trial for his life, the court should have given the guidance he requested on the rules for considering this special type of evidence.

This court should reverse the trial court's judgment and sentence and remand for a new trial.

POINT XI

THE DEATH PENALTY IS DISPROPORTIONATE WHEN ONE CONSIDERS THE REMAINING VALID AGGRAVATORS WEIGHED AGAINST THE MITIGATING EVIDENCE.

The law of Florida reserves the death penalty for only the most aggravated and least mitigated of first-degree murders. Urbin v. State, 714 So.2d 411, 416 (Fla. 1998); Cooper v. State, 739 So.2d 82, 85 (Fla. 1999); Almeida v. State, 748 So.2d 922, 933 (Fla. 1999). "Thus, our inquiry when conducting proportionality review is two-pronged: We compare the case under review to others to determine if the crime falls within the category of both (1) the most aggravated and (2) the least mitigated of murders". Cooper, 739 So.2d at 82; Almeida, 748 So.2d at 933 (Emphasis in opinions).[13]

The death penalty is disproportionate to the facts of this case. In Point I, appellant points out the reasons that the shooting of Mary Goss is, at most, second-

[13] Proportionality review is a "unique and highly serious function of this Court", which arises from a variety of sources in the Florida Constitution, and "rests at least in part on the recognition that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties." See Tillman v. State, 591 So.2d 167, 169 (Fla. 1991); Sinclair v. State, 657 So.2d 113, 114 (Fla. 1995); Urbin v. State, 714 So.2d 411, 416 (Fla. 1998); Knight v. State, 721 So.2d 287, 299-300 (Fla. 1998); Woods v. State, 733 So.2d 980, 990 (Fla. 1999).

degree murder. Even if this Court does not accept appellant's argument in Point I, this Court should at least reduce appellant's death sentence to life without the possibility of parole. The argument set forth in Point I leads to this inevitable conclusion.

This was not the most aggravated nor the least mitigated first-degree murders in the state of Florida. The killing arose out of a domestic dispute that escalated into tragedy. Maurice Floyd was insanely jealous of his wife spending time with anyone else, even her own family. He was upset with Trelane's boozing and carousing. He went to his mother-in-law's home in an agitated state. Undoubtedly, he intended to confront his mother-in-law. He was mad at Trelane. This conclusion is supported by the neighbor overhearing appellant yell at Goss, asking why she had to "involve the goddamned crackers." (IX 1672-74) The context of the statement indicates that appellant was talking about Trelane, not Mary Goss. This was the state's theory as expressed in their closing argument at the guilt phase. The prosecutor pointed out to the jury that the deputy who helped Trelane at the sheriff's substation was white. (X 1941) Appellant's anger was directed at Trelane, **not** Mary Goss.

In addition to the domestic aspects of this murder, two of the four aggravating factors relied upon by the trial court are not supported by substantial

competent evidence. See, Points IV, V, and VI. The remaining two aggravating factors relate to appellant's probationary status and his prior violent felony conviction. The weight of these two aggravating factors is diminished by several surrounding circumstances. Appellant's prior violent felony conviction was the manslaughter of his younger brother. The facts surrounding the conviction appear to be the age-old American tragedy of children playing with guns in the house. Additionally, appellant was only fifteen years old at the time of the offense.

The probationary status aggravating factor's weight is also diminished. If appellant's first-degree murder had occurred several years ago, this factor would not even exist. It was only recently passed by the legislature. Additionally, the crimes for which Floyd was on probation were not especially heinous ones. He had been convicted of burglary of a structure and two counts of accessory after the fact involving a robbery. (V 977) There are certainly more aggravated crimes for which one can be placed on probation. Finally, appellant's probation officer testified that he was successfully complying with his probationary conditions for almost two years before the commission of the instant crime. The probation officer believed that he was successfully completing his probationary term. (XI 2060-63)

Although appellant recognizes that this Court has never approved per se a "domestic dispute" exception the imposition of the death penalty, those are the

type of cases that appellant's case is best compared. In Farinas v. State, 569 So.2d 425(Fla. 1990) the death sentence was found to be disproportionate where the defendant was obsessed with the idea of having the victim (his former girlfriend) return to live with him and was intensely jealous. This Court found it significant that the record reflected that the murder was the result of a heated, domestic confrontation. Farinas forced his ex-girlfriend's car off the road and confronted her about reporting to the police that he was harassing her and her family. Farinas then kidnaped her. When the victim jumped out of the car and attempted to escape, Farinas fired a shot that hit the victim in the lower middle back causing instant paralysis from the waist down. He then approached the victim as she lay face down and after unjamming his gun three times, fired two shots into the back of her head. Farinas v. State, 569 So.2d 425, 427 (Fla. 1990). Despite the fact that two valid aggravating factors existed, this Court concluded that the death sentence was not proportionately warranted in this case.

In White v. State, 616 So.2d 21 (Fla. 1993), this Court also found the death sentence disproportionate. White and the victim had dated for some time before the relationship ended badly. Several months later, White physically assaulted the victim's date with a crowbar. While in jail for that incident, White swore that he would kill his former girlfriend when he was released. A day later, White picked

up his shotgun at a pawn shop and drove to the victim's place of employment. He drove rapidly into the parking lot, and stopped a few feet from the victim who was walking to her car. When she screamed and turned to run, White shot her with the shotgun. After she fell face down, he approached her and fired a second shot into her back. After proclaiming, "I told you so," White quickly drove away. White v. State, 616 So.2d 21, 22 (Fla. 1993) Despite the finding of one valid aggravating factor, this Court concluded that the death sentence was disproportionate.

This was a crime of heated passion arising from violent emotions brought on by jealousy. This Court has found the death penalty disproportionate in such cases. See Halliwell v. State, 323 So.2d 557 (Fla. 1975) (death sentence disproportionate where the defendant, who was in love with the victim's wife, became violently enraged at the victim's treatment of her, and beat him to death with a breaker bar); Douglas v. State, 575 So.2d 166, 167 (Fla. 1991) (death sentence disproportionate where the defendant, who had been involved in a relationship with the victim's wife, abducted the victim and his wife, tortured them over a four-hour period by forcing them to perform sexual acts at gun point, hit the victim so forcefully in the head with the rifle that the stock shattered, and then shot him in the head); Ross v.State, 474 So.2d 1170 (Fla. 1985) (death penalty disproportionate for bludgeoning murder of wife; HAC).

POINT XII

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S TIMELY AND SPECIFIC OBJECTION AND ALLOWING THE INTRODUCTION OF THE PROJECTILE PURPORTEDLY TAKEN FROM THE HEAD OF THE VICTIM WHERE THE STATE COULD NOT ESTABLISH THE CHAIN OF CUSTODY RESULTING IN THE INABILITY OF THE APPELLANT TO ESTABLISH THE PROBABILITY OF TAMPERING.

During the guilt phase, the state offered two pieces of a projectile purportedly removed from the victim's body during the autopsy by Dr. Steiner, the medical examiner. The state first presented the testimony of Detective Mike Lassiter who attended the autopsy and observed Dr. Steiner remove the two items from the victim's head. (VIII 1563, 1569-74) Detective Lassiter observed Dr. Steiner hand the bullets to an FDLE agent. The detective could not remember the agent's name. Detective Lassiter thought the bullets were in a plastic baggie, but he did not see the doctor put them there. (VIII 1575-83) The next time that Detective Lassiter saw the two projectiles was at appellant's trial. The trial court sustained appellant's chain of custody objection until the state could establish through other witnesses that the items were in the same condition when they were recovered from the body. (VIII 1575-83)

Subsequently, the state called Steve Leary, the FDLE crime lab analyst who

testified that he picked up the two projectiles from Dr. Steiner after he observed the medical examiner remove them during the autopsy. (IX 1742-45) Leary then took the projectiles to David Warniment, a firearms expert in the Jacksonville FDLE laboratory, who examined them in Leary's presence. Leary then put the projectiles in envelopes and gave the evidence to the intake section on July 14, 1998. After that date, the tracking log showed no other activity other than a notation of "Allisre Arms." (IX 1748) Defense counsel argued that law enforcement could not account for the whereabouts of the evidence for a fourteen month period. (IX 1751-61) The trial court agreed that the items were missing without documentation for some period of time but were apparently in the custody of the FDLE the entire time. (IX 1759) The trial court overruled the objection and admitted the evidence as state's exhibits five and six.

Appellant understands that the objecting party must now show a reasonable **probability** rather that a reasonable **possibility** of tampering to exclude relevant evidence. Taplis v. State, 703 So.2d 453 (Fla. 1997) In Taplis however, the location of the evidence (a burned-out car that was the subject of a possible arson) was known by all parties. It sat on the side of the road for three days before being impounded and towed to a automobile lot before eventually being towed to a secure lot in another city.

In appellant's case, the whereabouts of the two projectiles at issue is a complete mystery. Although the trial court determined that the evidence was in the custody of FDLE during the entire fourteen months, given the "Allisre Arms" notation without a specific date, even that is in question. Appellant submits that under these circumstances, he is prevented from showing the **probability** of tampering. Under these circumstances, the **possibility** of tampering should be sufficient. Since appellant's conviction rests, at least in part, on erroneously admitted evidence, a new trial is mandated.

POINT XIII

APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR JURY TRIAL WAS VIOLATED IN LIGHT OF THE CUMULATIVE ERRORS THAT OCCURRED THROUGHOUT THE PROCEEDINGS.

The Due Process Clauses of the United States and Florida Constitutions provide an accused the right to a fair trial. Although an accused is not entitled to an error-free trial, he must not be subjected to a trial with error compounded upon error. See Perkins v. State, 349 So.2d 776 (Fla. 2nd DCA 1977). See also, State v. DiGuilio, 491 So.2d 1129 (Fla. 1986)[A defendant has a constitutional right to a fair trial free from harmful error.] Appellant submits 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. He is entitled to a new trial. Alvright v. State, 378 So.2d 1234 (Fla. 2nd DCA 1979).

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, Appellant respectfully requests the following relief:

As to Point I, reverse the murder and burglary convictions and remand for discharge on the burglary and a judgment and sentence for second-degree murder;

As to Points II, IX, X, XII, and XIII, reverse and remand for a new trial;

As to Points III, IV, V, VI, VII, and VIII, vacate the death sentence and remand for a new penalty phase or, in the alternative, for imposition of a sentence of life without possibility of parole;

As to Point XI, vacate the death sentence and remand for a sentence of life in prison with possibility of parole.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

_____
CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0294632
112 Orange Avenue, Suite A
Daytona Beach, FL 32114
(904) 252-3367

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. Maurice Floyd DC#V01514, Florida State Prison, P.O. Box 181, Starke, FL 32091, this 19th day of October, 2000.

_____
CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

_____
CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER