DOCKET NO. 18-7822

IN THE SUPREME COURT OF THE UNITED STATES

MERYL MCDONALD,

Petitioner,

vs.

JULIE JONES, as the Secretary of the
Florida Department of Corrections,

Respondent.

APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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APPENDIX A

IN THE SUPREME COURT OF FLORIDA

MERYL MCDONALD,

Appellant,

vs. CASE NO. 87,059

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE JURY VERDICT AND JUDGMENT AND SENTENCE OF SIXTH JUDICIAL CIRCUIT COURT, PINELLAS COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT MERYL MCDONALD

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STATEMENT OF ADOPTION

This appeal and the various issues raised by the Appellant McDonald and Co-Appellant Robert Gordon (Appeal Case No. 87,059) arise from one prosecution, one indictment and one jury trial.

In the interest of brevity and judicial economy, Appellant McDonald hereby adopts by reference, as though set forth in their entirety herein, all portions of the briefs of Co-defendant Robert Gordon which are applicable to Appellant McDonald and are not adverse to his position on appeal.

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PREFACE

In this brief, Appellant Meryl McDonald shall be referred to as "Appellant" or "Appellant McDonald". Appellee, STATE OF FLORIDA, shall be referred to as "State" or "Appellee". References to the Record shall be identified by a parenthetical containing the letter "R", followed by the page number upon which the cited material appears. References to the Trial Transcript shall be identified by a parenthetical containing the letter "T", followed by the page number upon which the cited material appears. References to the penalty phase hearing will be denoted as "Transcript of the Penalty Proceedings" (herinafter referred to as P.P.).

STATEMENT OF THE CASE

This is a death penalty appeal of a black man convicted by an all white jury with circumstantial evidence that did not even place him at the actual scene of the crime.

On or about January 25, 1994, Dr. Louis Davidson was killed at Thunder Bay Apartments in Pinellas County, Florida (T: 325). Subsequently, 5 people were charged with First Degree Murder: Denise Davidson (victim's wife), Leo Cisneros, Appellant McDonald, Co-Defendant Gordon, and Susan Shore (R: 32).

Appellant McDonald and Co- Defendant Gordon were tried first. Ms. Davidson was given a separate trial before a different judge (R: 2489). Cisneros was and still remains a fugitive (T: 913, 1846). Susan Shore cooperated with the State, and testified at Appellant McDonald and Co-Defendant Gordon's trial (T: 1510). Later her charges were reduced to accessory after the fact (T: 1625), she received probation, and was deported to England (T: 2825).

Th trial of Appellant McDonald and Co-Defendant Gordon occurred from June 6 - June 15, 1995. Both were found guilty of Murder in the First Degree on June 15, 1995 (T: 2854).

On June 16, 1995, the same jury reconvened for the penalty phase portion of the trial (T: 2854). They returned an advisory recommendation that Appellant McDonald and Co-Defendant Gordon be sentenced to death by a 9 - 3 vote as to each (T: 2761).

The trial court ordered each side to prepare a Sentencing Memorandum, and held the first Spencer hearing on August 4, 1995 (T: 2758). Subsequently, Co-Defendant Denise Davidson had her trial before another judge (R: 2489). She was

also convicted of First Degree Murder (R: 2489). The judge followed the recommendation of her jury, and sentenced Co-Defendant Davidson to life in prison without the possibility of parole for twenty-five years (R: 2489, 2802).

Appellant McDonald and Co-Defendant Gordon's second Spencer hearing was held on October 9, 1995 (T: 2855). Testimony was taken and arguments made regarding the significance Co-Defendant Davidson's life sentence (T: 2804). On November 16, 1995, the trial court entered a 12 page Order sentencing Appellant McDonald and Co-Defendant Gordon to death (T: 2853).

A timely Notice of Appeal was filed on behalf of Appellant McDonald (R: 2553), and the instant appeal ensued.

STATEMENT OF THE FACTS

The State presented a circumstantial case trying to prove that the victim was actually murdered by Appellant McDonald and Co-Defendant Gordon (T: 274-275) at the request of the victim's estranged wife (Co-Defendant Denise Davidson) and her fiancée (T: 405) fugitive Co-Defendant Leo Cisneros. However, the State did not have an eyewitness to the actual murder.

The State placed Appellant McDonald and others near the murder scene (the victim's apartment) before the time the murder took place, so that the jury could infer that they were guilty of murder. The State relied on two theories, namely that Appellant McDonald and Co-Defendant Gordon committed either (1) premeditated murder, or (2) felony murder during the course of a robbery or burglary (T: 215, 220).

The facts adduced at trial were as follows: Dr. Davidson, the victim, left work at 9 a.m. on January 25, 1994, and drove to his apartment in Thunder Bay

Apartments, in Pinellas County, FL (T: 416). Appellant McDonald, Co-Defendant Gordon, and Co-Defendant Susan Shore had previously arrived together near the apartment building in the same car (T: 1559). Upon arrival, Appellant McDonald went jogging in the general direction of the apartments (T: 1563). In the meantime Co-Defendant's Gordon and Shore walked around the vicinity of the lake that was adjacent to the apartment complex (T: 1564). They were playing catch with a cricket ball (T: 1564). While tossing the ball they noticed apartment residents going about their business (T: 1565). Also about this same time, Co-defendant Shore testified that she saw what appeared to be a shadow of a black man, over by the stairwell of one of the apartment buildings (T: 1566).

Shortly thereafter, the victim pulled up in the parking lot and stepped out of his car. The victim was met by Co-Defendant Gordon, who spoke with him (T: 1568-1569). The two men went back to the victim's car, and then proceeded in the general direction of the apartment building, disappearing out of sight (T: 1628).

Co-Defendant Shore stayed behind in the car in which the group had arrived (T: 1569). While waiting for Gordon and McDonald to return, Shore met an older couple their daughter, and her infant child (T:1569). Shore spoke with these passersby, and observed their tiny infant (T: 1570). These people left about ten minutes later (T: 1570).

About 5 minutes later, Co-Defendant Gordon came back to the car where Shore was (T: 1569). A few moments after that, Appellant McDonald came back to the car, and said "I got the documents", and patted his stomach area which caused a crinkling sound (T: 1571). The three then drove away to a motel (T: 1576).

When the body of the victim was discovered that day at about 3 p.m., the police began their investigation. Although the victim's apartment was in disarray

and looked like it had been ransacked, with documents and other personal effects strewn all over the rooms, the apartment showed no signs of forced entry (T: 449, 1028-1035). The victim was found in a bathtub full of bloody water (T: 449). He had been tied up with a vacuum cleaner cord and a belt that had been taken from a cashmere coat (T: 448-57, 463-66). According to the medical examiner, the cause of Dr. Davidsons death was homicidal violence, including drowning, binding, and blunt trauma to the head and torso (T: 570).

The police then began to collect evidence from the scene, among which was the cashmere coat and matching belt that belonged to the victim's fiancée. Carpet samples were also collected (T: 465). There was $400.00 in the victims' wallet, and $19,300.00 in cash stashed away in his closet (T: 470-471).

The police began to follow Co-Defendant Denise Davidson over the next several days, and watched her go to several Western Union offices (T: 660). She sent several of these wire transfers to Co-Defendant Gordon, and he became a suspect (T: 661).

The police then got telephone records from Dooley Groves, in Tampa, where Denise Davidson was working (T: 662-669). The phone records led police to a beeper which was called by Co-Defendant Cisneros on January 25, 1994, (the day of the murder) 50 time during a 2 1/2 hour period (T: 1853, 1946). This beeper was registered to Patricia Vega, a girlfriend/business associate of Appellant McDonald, who received the beeper from her as a present (T: 662, 1430).

Co-Defendant Davidson had purchased a cellular phone and activated it on December 17, 1993 (T: 1805). This phone was allegedly used by Appellant McDonald (T: 1572). The State, by use of cellular phone records, traced the movement of the phone at certain times before and after the murder (T: 1900).

The police then used these cellular phone records to check out some of the

different places that were called, including hotels. For example, a Days Inn Hotel had been called on or about January 18, 1994 (T: 1052). The police went there and were told that 2 black men (Appellant McDonald and Co-Defendant Gordon) with a blond female (Shore), had been at the hotel on January 25, 1994, (T: 1073, 1128), and that they had left behind some clothes (T: 1112-1114, 1132). Specifically, after they checked out on January 26, 1994, a sweatshirt and a pair tennis shoes were found in the room (T: 1091, 1115-20, 1133-36). Both the sweatshirt and tennis shoes were alleged to have been worn by Appellant McDonald (T: 1166, 1227). None of the three used the shower in the hotel room during their stay (T: 1132, 1137, 1633).

These items were turned over to the FBI for analysis (T: 1256). Flecks of human blood were found on the tennis shoes, but the sample was too small to make a DNA profile (T: 1221-23). The bottom of the tennis shoes matched shoe prints found in the victim's apartment (T: 492-4, 1183-1202). Also, hair similar to the Appellant's was found on the sweatshirt, as were (1) fibers similar to those in the coat belt that was used to tie the victim's hands and (2) fibers similar to those found in the victim's carpet (T: 468-69, 840-43, 1256-77).

One blood stain matching the victims' DNA was found on the sweatshirt (T: 1166, 1227). In addition, a second sample of the victims' DNA was found on a second stain on the sweatshirt. However, this second sample of the victims' DNA, also contained within it, some other unknown DNA sample. (T: 1229, 1231). No blood samples from Appellant McDonald or any of the other Co-defendants was ever taken for comparison (T: 1936).

Through receipts, the State showed that on January 24th (the day before the homicide) Co-Defendant Davidson had purchased three items with a credit card, , namely a pair of sneakers, a gray sweatshirt, and a purple sweatshirt (T: 1925). However, none of the items were directly linked to Appellant McDonald or Co-

Defendant Gordon.

The state also showed that Appellant McDonald and Co-Defendant Gordon had made 3 trips to the Tampa area from Miami prior to Dr. Davidson's murder (T: 1345). They would typically be driven by a third person, and would stay in hotels and visit Co-Defendants Davidson and Leo Cisneros at Ms. Davidson's place of work in Tampa, Dooley Groves (T: 1356, 1379).

One of the third persons hired to accompany the Co-Defendant's on one of these trips to the Tampa area testified that following a meeting with Co-Defendant Davidson and Cisneros at Dooley Groves, the three men drove over to the hospital where Dr. Davidson worked (T: 1372). While he waited in the car, McDonald and Gordon, went into the hospital (T: 1373-4). They claimed they had to go to the emergency room and didn't return for approximately 30 minutes (T: 1373). When they returned the three men went back to Miami (T: 1373-1374).

The following week The Co-Defendant's returned to the Tampa area with this same witness (T: 1375). They went to Dooley Groves (T: 1379).. However, on this occasion after leaving Dooley Groves the three men went to the apartment complex where Dr. Davidson lived (T: 1382). At the complex they met with leasing agent and inquired about renting a couple units (T: 1382). McDonald and Gordon were posing as father and son who along with an imaginary wife needed the largest 2 bedroom unit possible (this would be the same type of unit a that leased by Dr. Davidson) (T: 1383, 1384). The witness who was paid to accompany the Co-defendant's to the Tampa area, was instructed to pretend to be a cousin needing a single bedroom unit (T: 1384). The three men were escorted by the leasing agent and shown the floor plans of both types of units (T: 1384). They were also given a brochure containing diagrams of the floor plans. After this meeting, the men drove around the area of the complex (T: 1385). Later on this same trip the three men

drove back over to the apartment complex from Tampa (T: 1395). The witness testified that Co-Defendant Gordon and Appellant McDonald appeared to have been trying to determine if there was another, second exit out of the apartment complex (T: 1395-1396).

The State's main witness against Appellant McDonald and Co-Defendant Gordon who detailed the events of the day of the murder was Co-Defendant Susan Shore. She drove with Appellant McDonald and Co-Defendant Gordon from Miami to Tampa (T: 1526), and was at the victim's apartment complex on the morning of the murder (T: 1559). She witnessed the interaction between Co-Defendant Gordon and the victim when he pulled up in his car near his apartment. The two spoke briefly and then they both walked away in the direction of the apartment building. (T: 1566). Shore never saw anyone go into the victim's apartment (T: 1653). No other witnesses testified to observing the alleged exchange between Gordon and the victim.

Shore testified that neither Appellant McDonald nor Co-Defendant Gordon took anything with them (e.g. murder weapons or gloves (T: 1629)) from the car on the morning when they were at the victim's apartment complex, or brought anything back to the car before they left (T: 1643). The murder weapon was never found or identified (T: 2114). Further, Shore testified that the men returned to the car within 10-20 minutes.

The State's scientific evidence was not consistent with Appellant McDonald ever being inside the victim's apartment [e.g. no fingerprints nor trace evidence linking McDonald to the crime were found inside apartment; after the alleged murder, he was not wet, had no cuts or bruises or apparent blood stains on him, no parts of his clothes were torn, and nothing was unusual about his shoes (T: 843-4, 1629)].. Nor was there any indication he had been involved in the physical acts

necessary to commit this murder.

SUMMARY OF THE ARGUMENT

This Court should reverse the trial court's decision and either, enter an Order of Acquittal, or grant a new trial, or vacate the death sentence and remand with instructions to impose a life sentence, or grant a new penalty phase hearing.

In support of this assertion, Appellant McDonald principally submits that the law and record illustrate that the trial court committed reversible error as follows:

I. APPELLANT MCDONALD ASSERTS THAT HE SHOULD BE GIVEN A NEW TRIAL BECAUSE HE WAS CONVICTED BY A JURY SELECTED FROM AN ALL-WHITE JURY VENIRE OF 50 PEOPLE.

Appellant McDonald and his Co-Defendant are both black. When the defense attorneys objected the trial judge said that it could not do anything, because the venire was randomly selected by computer. The trial court later commented that, "I wish we did have blacks on the panel, but that's the best we can do".

Appellant McDonald asserts that the trial court erred by making no effort to get some blacks on the venire. This violates the "fair cross-section" rule, where a defendant is entitled to a jury of his peers drawn from a fair cross-section of the community. In Pinellas County in 1995, about 7.9% of the population was black. With very little effort, the trial court could have ensured that the jury pool was fairly representative of the community.

Appellant McDonald asserts that the "affirmative duty rule" forces courts to utilize selection procedures that, regardless of their intention, produces non-discriminatory results. Here, a discriminatory result occurred.

Because Appellant McDonald's life was at stake here, the slight additional effort required by the trial court to give blacks access to the venire was not too large a

rice to pay. Because the trial court did not take these protective measures, Appellant McDonald should be given a new trial.

II. APPELLANT MCDONALD ASSERTS THAT THE EVIDENCE WAS INSUFFICIENT TO SHOW THAT HE WAS INVOLVED IN THE MURDER.

without an eyewitness or other direct evidence, the State's case as to the homicide is circumstancial. No one ever saw Appellant McDonald (1) enter the victim's apartment building, or (2) specific apartment unit where the murder occurred, or (3) commit the murder. No one testified that Appellant McDonald was involved in, spoke about, or even knew of an actual murder.

The evidence proffered by the state falls short of the necessary standard of being inconsistent with any reasonable hypothesis of innocence.

Even if the Appellant was involved in a robbery, this act should not rise to the level of premeditated felony murder. While the State may have offered sufficient evidence which challenges the Appellant's reasonable contention that he may have been involved in a robbery, the evidence fails to rebut the hypothesis that he knew nothing about a killing which he contends must have occurred at some point after the robbery and was committed by an assailant unknownto him.

Various scientific and circumstantial evidence did not show that Appellant McDonald was ever inside the apartment building or apartment unit where the murder occurred. The State's key witness Co-Defendant Shore, simply testified that McDonald had gone on a morning jog upon their arrival to the apartment complex. In any event, the commode in the apartment unit had been broken, which caused water to flood the bathroom area and spill out into most of the rest of the apartment. Moreover, blood was spattered on the bathroom walls and the victim

was lying face down in a bathtub full of bloody water when he was discovered. This evidence indicates that a fierce struggle must have taken place between the victim and his attacker(s).

However, Co-Defendant Shore testified that when Appellant McDonald returned after leaving Co-Defendant's Shore and Gordon, he had no water stains on his clothes or shoes, he had no blood stains on him, there were no cuts, bruises, or lacerations on him, no parts of his clothing were torn, and there was nothing unusual about his shoes that would draw attention to him. Further, no fingerprints of either Appellant McDonald or Co-Defendant Gordon were ever found inside the victim's apartment.

While the state alleges to have found a pair of blood stained tennis shoes and a sweatshirt left behind by the Co-Defendants, with the sweatshirt containing, (1) fibers similar to those in the victims' carpet, (2) fibers similar to those in a cashmere coat discovered in the victim's apartment, (3) head hairs similar to the Appellant's, and (4) traces of the victim's DNA, this evidence fails to establish beyond a reasonable doubt that Appellant McDonald was in the victim's apartment and committed the murder.

This evidence was not found on the Appellant at the time of arrest, but was discovered to have been left behind at the Days Inn hotel where Appellant McDonald and Co-Defendant's Gordon and Shore allegedly stayed on January 25, 1994, the day of the murder. It was not collected by the police from the hotel until February 22, 1994, and up until that point had been stored in an unsecured fashion in the hotels' lost and found box. Because of this, the sweatshirt, the hair and carpet fibers found on the sweatshirt, the victim's DNA found allegedly found on the sweatshirt (along with some unknown other DNA), as well as the sneakers, fail to establish beyond a reasonable doubt that Appellant McDonald is responsible for the

killing.

In fact, the State's circumstantial case only showed Appellant McDonald and others coming from Miami to the Tampa area on 3 occasions, staying in the Tampa area monitoring the victim, visiting with Leo Cisneros and Co-Defendant Davidson, and then returning to Miami. All of this evidence is entirely consistent with the fact that they were, at most, only helping Cisneros and Co-Defendant Davidson to plan a burglary or robbery, which unbeknownst to them was a smaller part of the much larger murder scheme, to be executed by Cisneros but resulting in their arrests .

For example, this Honorable Court need only look to the open and obvious nature of Appellant McDonald and Co-Defendant Gordons conduct during the two months prior to the victims murder. On each occasion that they visited the Tampa area they felt compelled to hire third parties to escort them. They would then parade about Pinellas county in an open and notorious fashion monitoring Dr. Davidson. They would visit the Doctor's place of employment and go so far as to meet with the leasing agent of the apartment complex, touring the layout of the units therein. While doing this they would dress up and play roles, pretending to be in positions that they weren't. They would make those persons escorting them assume roles that they did not hold.

III. APPELLANT MCDONALD ASSERTS THAT HE SHOULD BE GIVEN A NEW PENALTY PHASE HEARING

Defense counsel for both Appellant McDonald and his Co-Defendant requested a special verdict form be given to the jury, in which they would indicate their basis for a conviction for first degree murder (premeditated murder or felony murder during course of a robbery or burglary). This request was denied. Defense counsel also requested a separate jury for the penalty phase as well as separate juries

for each Co-Defendant. These requests were also denied. The result of this was that the Co-Defendant's went into the penalty phase unaware of which theory their conviction was based on (premeditated murder or felony murder in the course of a burglary/robbery), or which roles had been assigned to them (e.g. principal and/or accomplice).

The Appellant contends that a separate jury in the penalty phase can more objectively weigh aggravating and mitigating factors. Furthermore, Appellant McDonald contends that a separate jury would have shifted the focus of the penalty phase towards his own culpability. Had this been the case, both Appellant McDonald and Co-Defendant Gordon would not have been in the awkward position of having to point a finger at the other while vigorously defending themselves.

IV. APPELLANT MCDONALD ASSERTS THE TRIAL COURT ERRED IN SENTENCING HIM TO DEATH BASED ON THE DOCTRINE OF PROPORTIONALITY.

Co-Defendant Denise Davidson (the victim's wife) received a severance, was tried after the instant trial, was convicted of first degree murder, and sentenced to life. Because this happened after the instant trial, the penalty phase jury for Appellant McDonald was not aware of his co-defendant's life sentence.

It is critical that Appellant McDonald's penalty phase jury (and not just his sentencing judge) know that his co-defendant received a life sentence. The appellant got an advisory recommendation for death from the jury with a 9 - 3 vote. The fact that a co-defendant received a life sentence is a mitigating circumstance that could very well sway the other 3 jurors necessary to make a "life" recommendation.

IV. APPELLANT MCDONALD ASSERTS THAT THE TRIAL COURT ERRED BY FINDING THAT APPELLANT ACTED IN A "COLD, CALCULATED, AND PREMEDITATED" MANNER.

All of the Appellant's actions were just as consistent with a burglary or a robbery, as with murder. The fact that the State's star witness said that Appellant McDonald had left the car at the victim's apartment complex on the morning of the murder with nothing in his hands, along with the fact that the victim was bound, gagged, and struck over the head, with items that were found in his apartment (e.g. electrical cord, towels, and a belt from a cashmere coat) is contrary to any notions of premeditation. Certainly this did not encompass a heightened degree of premeditation. Nor did the evidence support a calculated plan to kill.

Finally, the Appellant argues that since there is not direct evidence which supports a finding that he directly participated in the actual killing he should not be held vicariously responsible for the manner which it was carried out.

V. APPELLANT MCDONALD ASSERTS THAT THE TRIAL COURT ERRED BY FINDING THAT THE APPELLANT ACTED IN A HEINOUS, ATROCIOUS, AND CRUEL MANNER, AND THAT THE INSTRUCTIONS GIVEN TO THE JURY REGARDING THIS FACTOR WERE UNCONSTITUTIONALLY VAGUE

The Appellant argues that there is no evidence to support a finding that this murder was done with such extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to, or enjoyment of, the suffering of another so as to be heinous, atrocious, and cruel (H.A.C.)

At the trial, the medical examiner entered unrefutted testimony that the victim may have been rendered unconscious immediately after the first blow that was struck. This Court has established that crimes against dead or unconscious persons do not fall within the definition of H.A.C. because unconscious persons are incapable of comprehending fear or pain.

The Appellant asserts that the instructions given to the jury regarding the H.A.C. aggravator were unconstitutionally vague because they did not adequately define the terms of H.A.C. in a manner which enabled the jury to narrow those crimes that are eligible for the death penalty.

VI. APPELLANT MCDONALD ASSERTS THAT HE SHOULD BE GIVEN A NEW PENALTY PHASE HEARING BASED ON CERTAIN INAPPROPRIATE STATEMENTS MADE BY THE PROSECUTION DURING THE CLOSING ARGUMENTS OF HIS PENALTY PHASE.

Comments designed to appeal to any xenophobic emotions and fears of the individual jurors, comments which may reasonably be construed as appeals to racial tendencies, and variations upon the Golden Rule argument, utterly destroyed the Appellants right to the essential fairness of a criminal trial.

III. APPELLANT MCDONALD ASERTS THE TRIAL COURTS' FAILURE TO CONDUCT A NECESSARY INQUIRY TO DETERMINE WHETHER THE EXPERTS DNA TEST RESULTS AND THE BASIS OF HIS STATISTICAL CONCLUSIONS COULD BE ADMITTED IS CLEARLY ERROR AND A NEW TRIAL IS REQUIRED.

This court has determined that DNA testing involves two distinct steps both of which must satisfy the requirements of *Frye*. This is a determination that the trial Judge alone must make. In the instant case the record does not indicate that a determination was made. Thus, a new trial is required.

ARGUMENT

I. JURY COMPOSITION

Appellant McDonald reaffirms the Summary of Argument as stated previously herein.

II. THE TRIAL COURT ERRED IN DENYING APPELLANT MCDONALD' S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF ALL OF THE EVIDENCE

At the close of the State's case (there was no defense case), Appellant McDonald made a Motion for Judgment of Acquittal (T: 1974, R: 2463-4), which was denied by the trial court (T: 1981).

"In circumstantial evidence cases a trial judge must determine if there is competent evidence from which the jury could infer guilt to the exclusion of all other reasonable interferences." Barwick v. State, 660 So.2d 685 (Fla 1995) at 694. Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. McArthur v. State, 351 So.2d 972 (Fla 1977).

In the instant case, the Appellant asserts that his conviction lies solely on insufficient circumstantial evidence. While the Appellant may have been involved in a robbery, he reasonably states that he knew nothing about a murder or plan to commit murder. The Appellant further asserts that the murder must have taken place after the robbery by an unknown assailant.

The Appellant's reasonable hypothesises that if he was hired to commit a robbery it was to obtain papers that would be used to affect a domestic situation that the victim was involved in at the time of the murder. The evidence shows Appellant was casing the victim's residence, but states they needed the doctor to show the location of the paper and that the victim was tricked into revealing the whereabouts of the documents which were then stolen without any violence. Furthermore, circumstantial evidence suggests that Appellant was hired to commit the robbery by the very same person who murdered the victim at some point after the simple robbery.

The verdict must be overturned since the State has offered no evidence to support a finding that the murder actually took place during the robbery attempt and not, as the Appellant argues, after the robbery.

Appellant McDonald asserts that even when this court looks at the evidence in the light most favorable to the jury verdict (including the testimony of a co-defendant and other evidence), it does not show that he was involved in the actual murder. He would like to remind this Court that evidence that creates nothing more than a strong suspicion that a defendant committed the crime is not sufficient to support a conviction. Cox v. State, 555 So.2d 52 (Fla. 1989).

A careful examination of the State's circumstantial evidence shows at best, the State places Appellant McDonald near the murder scene around the time the murder occurs (T: 1556-1573). Scientific evidence does not show that Appellant McDonald was ever in the apartment where the murder took place. Moreover, there were no eyewitnesses to the actual murder, and the victim's body was not found until about 3 P.M. (T: 422), nearly 6 hours later. As a result, the Appellant asserts that his conviction should be reversed, or this matter remanded for a new trial.

A. The Testimony of the State's Key Witness Does Not Show That Appellant McDonald Murdered the Victim

Co-Defendant Shore was the State's only witness that put Appellant McDonald near the scene on the morning of the murder. She testified that she was asked by a mutual friend on January 22, 1994, to go on a trip with Co-Defendant Gordon and a friend (Appellant McDonald) (T: 1522). When Shore, Co-Defendant Gordon and Appellant McDonald arrived in Tampa, Shore and McDonald went to the Dooley Grove store, while Gordon went to another store (T: 1534). Appellant McDonald talked to a man and a woman later identified as Co-Defendant's Denise

Davidson and Leo Cisneros (T: 1534). Co-Defendant Gordon never went into the store, and later joined the other two back at the car (T: 1539). Appellant McDonald told Shore that he and Co-Defendant Gordon had to see a friend, that he would not be home until the next morning, and that they had to get a piece of paper from him (T: 1542). The 3 then checked into a hotel, paid for by cash given to her by Appellant McDonald (T: 1543-5).

Shore testified that the next morning (January 25), when arriving at Thunder Bay Apartments, Appellant McDonald told Shore where to park the car (T: 1559), and he then left the two in the car and went jogging near the apartment complex (T: 1562-3). Appellant McDonald had tennis shoes on, but Shore was not sure what kind of shoes Co-Defendant Gordon had. Gordon and Shore then played catch with a cricket ball, waiting for the friend to arrive from work (T: 1565-6). About this time, Shore saw an unidentified black male in the shadows under the stairwell (T: 1566). A few minutes later, the victim pulled up in his car, and Co-Defendant Gordon went over to talk to him, but Shore could not hear the conversation (T: 1566, 1568). Co-Defendant Gordon and the victim then left the area (T: 1628).

Shore waited in the car for a few minutes, and spoke with passers-by. About 5 minutes later, Co-Defendant Gordon came back to her car (T: 1569). Thereafter, Appellant McDonald followed (T: 1574). Shore testified that when McDonald returned, she did not notice any blood on his clothes, or anything else unusual about his appearance (T: 1629). No part of his clothing appeared to have been torn (T: 1629). He had no cuts, bruises, or lacerations, and he wasn't wearing gloves (T: 1628-9). He did not appear to have water on his clothes or shoes (T: 1629). Moreover, Appellant McDonald was not perspiring at all, and didn't appear to be acting nervously, but in fact, directed Shore in a calm manner to start the car and leave the complex (T: 1630-1).

Shore Further testified that she did not see either Co-Defendant Gordon or Appellant McDonald take anything with them when they left the car after pulling up to the apartment complex that morning (e.g. murder weapons) (T: 1644). She also testified she did not see them bring anything back with them, when they returned to the car (T: 1643). However, when Appellant McDonald returned, he said, as he got into the car, "I got the piece of paper" and patted his stomach. She then heard what she believed to be paper making a crinkling sound (T: 1571).

Shore did not see either Appellant McDonald or Co-Defendant Gordon with a beeper on either January 24th or 25th, 1994 (T: 1546) [so the 50 calls to the beeper, and other calls on that day (T: 970), have little evidentiary value]. After he got back into the car, McDonald did however, use a cellular phone and called someone and said "I have it", and then in an irate voice repeated "Yes, I have it" (T: 1572). The two men then directed Shore to go to another hotel to meet their friend so they could give him the piece of paper (T: 1573).

After arriving at the Days Inn, the two men told her they were waiting for this friend to arrive, to give him the piece of paper (T: 1579). There came a time when the another man (fugitive Co-Defendant Cisneros) arrived at the hotel, left, and then came back (T: 1582, 1585). During their stay at the hotel, neither Appellant McDonald nor anyone else ever took a shower (T: 1633).

The Appellant asserts that the facts above are just as consistent with a burglary, robbery, or a even a "frame up", as opposed to a murder. This large amount of circumstantial evidence apparently showed the movement of Appellant McDonald and Co-Defendant Gordon before and after the murder. However, the evidence is just as consistent that the "mystery man" in the stairwell to the victim's apartment building (T: 1566) committed the murder by himself, after

Appellant McDonald and Co-Defendant's Gordon and Shore had left the general area.

B. The State's Other Evidence Does Not Show That Appellant McDonald Was Involved In The Victim's Murder

While the State alleges to have found a pair of tennis shoes and a sweatshirt left behind by the Co-Defendants, with the sweatshirt containing, (1) fibers similar to those in the victims' carpet, (2) fibers similar to those in a cashmere coat discovered in the victim's apartment, (3) hairs similar to the Appellant's, and (4) traces of the victim's DNA (T: 1229 1231, 1256, 1276, 1283), this evidence fails to establish beyond a reasonable doubt that Appellant McDonald was in the Victim's apartment and committed the murder.

These items were not found on the Appellant at the time of arrest, but were discovered to have been left behind at the hotel where Appellant McDonald and Co-Defendant's Gordon and Shore allegedly stayed on January 25, 1994, the day of the murder (T: 1115-20). This evidence was not collected by the police from the hotel until February 22, 1994, (T: 1060). Moreover, from the time the defendants checked out of the hotel until its discovery by law enforcement, the sweatshirt and tennis shoes collected from the defendants' room had been placed in a hotel lost and found box (T: 1121). At any one time there were numerous other items collected from other rooms and stored within this lost and found box (T: 1122). All of the hotel's lost and found items were kept within the lost and found box for a period up to 90 days (T: 1122). After factoring in the very real threat of contamination, this evidence, allegedly left behind by the defendants at the hotel and not discovered by the police until nearly one month later, is of little evidentiary value.

Furthermore, there is no evidence which establishes that on the morning of

the murder, Appellant McDonald was wearing the grey sweatshirt collected by the police, from the hotel's lost and found. At best, the accounts given as to what Appellant McDonald was wearing that morning, seem to be in conflict.

For example, one account, was given by the Days Inn front desk clerk, Claire Dodd, who checked in Appellant McDonald and Co-Defendant's Gordon and Shore on the morning of the murder (T: 1077). She testified that at approximately 11:02 A.M., while Co-Defendant Shore was filling out a registration card, Co-Defendant Gordon was sitting on one of the couches in the hotel lobby, and Appellant McDonald was using one of the hotel lobby pay phones (T: 1080). Co-Defendant Gordon was nicely dressed, wearing a casual shirt and pants with dark shoes, and Appellant McDonald was described as wearing dark clothing and a jacket (although she could not remember what color the jacket was) (T: 1081).

A different account was given by the State's star witness Co-Defendant Shore. She testified that after leaving the victim's apartment complex on the morning of the day of the murder, the three Co-Defendant's went to the Days Inn (mentioned above) (T: 1573). Shore was driving the car, and was given directions from the others, to the hotel (T: 1573). When describing the attire worn by Appellant McDonald and Co-Defendant Gordon on the morning when they were at the complex, she testified that one of the men was wearing a black sweatshirt and the other was wearing a grey one (T: 1640). However, she could not recall which man was wearing which sweatshirt (T: 1640).

Moreover, the fact that 2 of Appellant McDonald's head hairs and one facial hair was allegedly found (T: 468-69, 840-43) on the sweatshirt is of little evidentiary value as well. This Court has recognized that hair comparisons, while admissible, cannot constitute [a] positive personal identification, as hairs from 2 different people may have precisely the same characteristics. Long v. State, 689 So.2d 1055 (Fla.

1997); Jackson v. State, 511 So.2d 1047 (Fla.App. 2 Dist. 1987). In any event, this hair would only be relevant if its presence on the sweatshirt was probative of McDonald's presence in the victims apartment at the time of the murder. Sawyer v. State, 561 So.2d 278, 284 (Fla.App. 2 Dist. 1990). However, since nobody ever testified as to witnessing Appellant McDonald's entry into the victim's apartment, and by virtue of the conflicting testimony described above as to what he was wearing that morning, the State has simply failed to link Appellant McDonald to the sweatshirt in the first place.

The State's failure to conclusively link the sweatshirt to Appellant McDonald is not peculiar to that piece of evidence, for the same may also be said about the tennis allegedly worn by McDonald, and discovered nearly one month later in the hotel's lost and found (T: 1144-48). The State's star witness testified that after the Co-Defendant's arrived at the apartment complex on the morning of the murder Appellant McDonald stated he was going jogging, and then walked away (T: 1562). She also testified that, in fact, Appellant McDonald was wearing white tennis shoes (T: 1563). However, Co-Defendant Shore went on to admit that Co-Defendant Gordon was also wearing the same style of white tennis shoes (T: 1563). The mere fact that Appellant McDonald's shoe size matches the size of the pair of shoes discovered at the hotel (T: 1846), is not a convincing enough link to prove that McDonald was ever wearing these shoes.

In order for the State to prove first-degree murder through circumstantial evidence, the evidence must be inconsistent with any reasonable hypothesis of innocence. Bedford v. State, 589 So.2d 245 (Fla. 1991). In the instant case, the State's circumstantial evidence only showed Appellant McDonald and others coming from Miami to the Tampa area, staying in Tampa monitoring the victim, and then returning to Miami. These events took place over a period of a few months.

C. Appellant Asserts That The States Evidence Is More Consistent With Robbery Not Murder

All of the States evidence is consistent with the hypothesis that the Appellant was, at most, planning a robbery and not a killing. His participation ended when the documents were removed. Therefore, it is reasonably argued that the killing was an independent act committed by a party independent of the Appellant.

Co-Defendant Shore testified that the Appellant was not worked up in a manner that would suggest that he killed someone upon re-entering Shore's vehicle. Furthermore, the fact that the Appellant wore no disguises (and in fact drew attention to himself) tends to support the theory of robbery because robbery is a local concern and the Appellant was not worried because he was from out of town, since the murder is of a larger concern and it is likely that the Appellant would have attempted to conceal his identity, if he were knowingly participating in a murder.

The Appellant further points out that the State has failed to prove that the victim was killed during the actual robbery and not at a later time which would be consistent with a theory that the Appellant was set up to take the blame for the killing.

If the Appellant was not actually or constructively present during, and did not participate in the killing which was an independent act of another and was not a part of a common scheme or design, the Appellant cannot be convicted of felony murder. Bryant v. State, 412 So.2d 347 (Fla 1982) at 350.

All of this evidence is just as consistent with the hypothesis that Appellant McDonald was, at most, planning a burglary or robbery and not a murder. However, in reality, since no one witnessed McDonald enter the victim's apartment that morning, since none of McDonald's fingerprints were ever discovered at the scene

of the crime (T: 844), and since the State failed to link any of the evidence discovered at the hotel to McDonald, the record does not sustain a conviction for robbery or burglary.

III. THE TRIAL COURT ERRED IN DENYING APPELLANT MCDONALD'S REQUEST FOR A SEPARATE PENALTY PHASE JURY FROM HIS CO-DEFENDANT, AND A DIFFERENT PENALTY PHASE JURY THAN THE JURY WHICH PRESIDED OVER THE GUILT PHASE

The guilt phase of this trial ended on June 15, 1995 (verdict returned at 7:30 P.M.), with the jury finding both Appellant McDonald and Co-Defendant Gordon guilty of First Degree Murder (T: 2224). The Defendant's were unaware of the theory upon which the jury reached its decision of first degree murder. Even though the State argued that the Co-Defendant's could be found guilty of either premeditated murder or felony murder, the State never elected to pursue a specific theory.[1] . Subsequently, Appellant McDonald and Co-Defendant Gordon had to proceed into the penalty phase not knowing aggravators and/or mitigators to focus on, based on the jury's verdict of guilt.

The trial court conducted the penalty phase on June 16, 1995. Defense counsel requested a different penalty phase jury, and also that there be separate penalty phase jury's for each defendant (T: 2755, R: 2461, 2462). The trial court denied this request (T: 2758). These issues were raised and once again, denied by the trial court at the "Spencer" sentencing hearing, on August 4, 1995 (T: 1874-75).

Appellant McDonald contends that in capital cases, the ability of jurors to be able to follow the law includes, the ability during the penalty phase, to find and then weigh any aggravating circumstances against any mitigating circumstances.

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[1]The defense requested that a special verdict form be given to the jury indicating whether they found Appellant McDonald and Co-Defendant Gordon guilty of premeditated murder or felony murder (T: 2002-2004).

Melton v. State, 638 So.2d 927, (Fla.), cert. denied, __ U.S. __, 115 S.Ct. 441, 130 L. Ed.2d 352 (1994). However, the jury is unable to properly accomplish this task in the penalty phase when they are not specifically given a theory upon which to base their conviction for murder in the first degree.

Assuming, for example, if the jury chose to use felony murder during the course of a burglary or robbery as a basis for the defendant's conviction, how can that same jury not find the aggravating circumstance of murder during the commission of a felony during that defendant's penalty phase? The jury is in effect compelled to find this factor by virtue of it's use during the guilt phase. As a result of this the defendant starts out with one strike against him at the beginning of his penalty phase.

Appellant McDonald believes that if a new and different jury were impaneled to decide upon the his fate, this problem would be alleviated. This jury would be allowed to objectively find and weigh aggravating circumstances against mitigating circumstances irrespective of any theory used as a basis for guilt.

Appellant McDonald contends that the focus of the penalty phase should be on his own culpability and that he should have been granted a separate jury than that of his co-defendant. In Lockett v. Ohio, 438 U.S. 586, 605 (1978), the Supreme Court insisted upon individualized consideration as a constitutional requirement in imposing the death penalty. This meant that the court must focus on the relevant facets of the character and record of the individualized offender. Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

Upon commencement of the penalty phase Appellant McDonald and his Co-Defendant were not aware which roles had been assigned to them by the jury in the in the guilt phase. As a result each was then in the awkward position of having to point a finger at the other while vigorously defending themselves. This most

certainly resulted in the destruction of the credibility of each defendant. Accordingly, since he was not granted the individualized consideration due to him, Appellant McDonald requests that this Court grant him a new penalty phase.

IV ~~III.~~ THE TRIAL COURT ERRED IN SENTENCING APPELLANT MCDONALD TO DEATH AND NOT FOLLOWING THE DOCTRINE OF PROPORTIONALITY

Appellant McDonald was indicted for first degree murder along with 4 others: (1) Denise Davidson, the victim's wife, possible originator of the scheme, along with (2) Leo Cisneros, Ms. Davidson's fiancée at the time of the murder, also a possible planner and possible perpetrator of the actual killing, (3) Co-Defendant Gordon, and (4) Susan Shore, who had her charges reduced to accessory after the fact (R: 32).

Co-Defendant Cisneros is still a fugitive (T: 1846), and naturally has yet to be tried, convicted, or sentenced much of the State's case is specifically against him); Co-Defendant Susan Shore, had her charges reduced to accessory after the fact, received a sentence of probation, and was deported back to home country of England (T: 2825).

Co-Defendant Davidson got a separate trial, and was convicted and sentenced after the instant trial (T: 2489). As a result, Appellant McDonald's jury at the penalty phase was not made aware of the fact that Co-Defendant Davidson received a life sentence (T: 2802). This fact could have potentially had a dramatic affect on the recommendation of the jury during Appellant McDonald's penalty phase. This is evidenced by a statement by Veniremen Richey, who expressed a sentiment commonly held by many. He expressed his strong belief that the victim's wife (e.g. Co-Defendant Davidson) wanted the victim killed (T: 95 et seq.). As a result, the f

fact that the wife received a life sentence is a strong mitigator for Appellant McDonald.

Even though the trial court did delay Appellant McDonald's sentencing until after the sentence of Co-Defendant Davidson, so that the trial court could consider her sentence, there was never a chance for this fact to have an impact on the deliberations of the penalty phase jury, and their subsequent recommendation to the judge. Only 3 more jurors needed to have recommended life, for there to have been the 6 - 6 split necessary for a "life" recommendation. The trial court stated it would have let Appellant McDonald's attorney argue Co-Defendant Davidson's life sentence if she had been sentenced before Appellant McDonald's penalty hearing (T: 2843). Appellant McDonald only asks for this opportunity now.

In Scott v. Dugger, 604 So.2d 465 (Fla. 1992), this Court held that it was proper for it to consider the propriety of disparate sentences to determine whether the death sentence is appropriate given the conduct of all participants in committing the crime. Appellant McDonald asserts that similarly, this Court should consider the disparate sentence given to Co-Defendant Davidson (T: 2804) after his penalty phase jury had recommended death.

IV. THE TRIAL COURT ERRED BY FINDING APPELLANT MCDONALD ACTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER.

> Aggravators must be proven beyond a reasonable doubt. [An] aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. Zant v. Stephens, 462 U.S. 862, 877 (1983).

A. The Evidence Did Not Show That Appellant McDonald Acted In A Premeditated Manner

At Appellant McDonald's sentencing hearing, the lower court sentenced Appellant McDonald to death (Transcript of Penalty Proceeding: 26) based upon

inter alia its finding that he acted in a cold, calculated, and premeditated manner, and the murder was heinous, atrocious, and cruel (Transcript of Penalty Proceeding: 11-16). Appellant McDonald asserts that this finding is not supported by the facts. Cold has been defined as meaning "calm cool reflection, and not an act prompted by emotional frenzy, panic, fit or rage, Jackson v. State, 648 So.2d 85 (Fla. 1994). Calculated has been defined as a careful plan or prearranged design to commit a murder, Jackson v. State, 648 So.2d 85 (Fla. 1994). Premeditated encompasses the need for heightened degree of premeditation and is more than needed to prove First Degree Premeditation, Jackson v. State, 648 So.2d 85 (Fla. 1994). Heightened premeditation has been defined as deliberate ruthlessness, Walls v. State, 641 So.2d 381 (Fla 1994).

A person cannot be held vicariously responsible for the manner in which it was carried out. See Omelus v. State, 584 So.2d 563 (Fla 1991), and Archer v. State, 613 So.2d 446 (Fla 1993). Since there was no evidence that linked the Appellant to the actual killing he cannot be said to have acted in a cold manner according to the definition set for in Jackson v. State, 648 So.2d 85 (Fla. 1994).

In Bedford v. State, 589 So.2d 245 (Fla. 1991), this court held that, although premeditation may be proven by circumstantial evidence, where the State seeks to prove premeditation by circumstantial evidence the evidence must be inconsistent with any reasonable hypothesis of innocence. Co-Defendant Shore testified that Appellant McDonald took nothing with him as he left herself and Co-Defendant Gordon, when he left her car the morning of the murder (T: 1644). The evidence showed that the victim was bound, gagged, and struck with items that were found in the victim's apartment (T: 449).The record in the instant case shows that all the alleged planning done by Appellant McDonald is reasonably consistent with the planning of a burglary or a robbery, and not a murder.

VI. THE TRIAL COURT ERRED BY FINDING THAT THE APPELLANT ACTED IN A MANNER THAT WAS HEINOUS, ATROCIOUS AND CRUEL

A. The Instant Murder was not Heinous, Atrocious and Cruel.

What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - - the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

As it is true that vicarious liability cannot be used to induce a standard of cold, calculated, and premeditated, it is well established that it can not be used to induce a standard of heinous, atrocious and cruel. Archer v. State, 613 So.2d 446 (Fla 1993), and Omelus v. State, 584 So.2d 563 (Fla 1991). No evidence adduced by the State places Appellant McDonald in the victim's apartment or in physical contact with the victim. State v. Dixon, 283 So.2d 698 (Fla. 1973).

Furthermore, nothing done to the victim after his or her death or unconsciousness can be used to support a heinous, atrocious and cruel standard. Jackson v. State, 451 So.2d 458 (Fla. 1984), Jones v. State, 569 So.2d 1234 (Fla 1990), Herzog v. State, 439 So.2d 1372 (Fla 1983). Even if the Appellant could somehow be directly linked to the actual act of killing, the medical examiner testified that the first head injury inflicted upon he victim may have rendered him unconscious. Therefore, the H.A.C. standard is inapplicable and it is reversible error that was applied at the trial level.

Finally, the State did not prove that the murder was committed in such a manner so as to cause the victim unnecessary and prolonged suffering. Gorham v.. State, 454 So.2d 556(Fla 1984), nor was it proven that crime was Both conscienceless or pitiless AND unnecessarily torturous. Richardson v. State, 604 So.2d 1107 (Fla 1992).

B. The Appellant Asserts that the Instructions Given to the Jury Regarding H.A.C. were Unconstitutionally Vague.

Appellant McDonald contends that the instructions that were given to the jury regarding H.A.C. were overly broad, and that the meaning of the words, in plain english, are so vague that the jury could not reasonably decide which crimes encompass an H.A.C. factor. Sochor v. Florida, 504 U.S. 527 (1992), and Shell v.. Mississippi, 494 U.S. 738 (1990).

VI. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW PENALTY PHASE BASED ON CERTAIN INAPPROPRIATE STATEMENTS MADE BY THE PROSECUTION DURING THE CLOSING ARGUMENTS OF THE PENALTY PHASE

Appellant McDonald contends that certain statements made by the prosecution during the closing arguments of the penalty phase were so prejudicial that he should be granted a new penalty phase based on them.

For example, during his closing argument the prosecutor implied that the victim was a productive member of our society when he stated, "Where did Dr. Davidson work? He worked in that emergency room. Every day he went to work". (T: 2301). However, immediately following this statement the prosecutor said in reference to the co-defendants, "You know people in our society want to buy cars and clubs, the American way. The normal way is you get up in the morning and you go to work. And you punch a clock. You don't kill people for it. And that is what these men did. That is the value they placed on human life" (T: 2301-2302).[2]

It is apparent that these statements by the prosecution were intended to be appeals to the emotions or fears of the individual jurors. During the trial the fact

[2]The prosecutor had stated earlier in his closing that the killing of Dr. Davidson to Robert Gordon meant an automobile, a lexus, to Meryl McDonald it didn't mean anything but representaion in some club (T: 2296).

that the Co-Defendant's were not Americans but were Jamaican nationals was made readily apparent (T: 274). Presumably the prosecutor would have the jury believe that a guilty verdict would send a message to those individuals belonging to foreign communities within our borders, not versed in the "American" way of life--the "normal" way of life. These considerations are outside the scope of the jury's deliberation and their injection violates the prosecutor's duty to seek justice, not merely "win" a death recommendation. Bertolotti v. State, 476 So.2d 130, 131 (Fla. 1985).

According to Bertolotti, the proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence; it must not be used to inflame minds and passions of jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law. Id. See also, Watson v. State, 559 So.2d 342 (Fla. App. 4 Dist. 1990), (where a prosecutor's comments during closing arguments, that a homeless defendant's lifestyle was not the 'American way' resulted in a reversal and remand for a new trial.)

Moreover, after considering the totality of circumstances surrounding Appellant McDonald's and Co-Defendant Gordon's trial these comments may be construed as racist. For example, not only were both of the Co-Defendant's Jamaican nationals, but both of these men were black (T: 274). As mentioned earlier, all of the members of the jury were white (T: 274). McDonald and Gordon were living in Miami when they were arrested for the murder of Dr. Davidson
(T: 1675). It would be reasonable to conclude that the average person from Florida, realizes that Miami has become a hub for persons of color emigrating from the Latin world. It is also reasonable to conclude that for many of these persons, their presence is still resented by many white Americans.

The court in McFarland v. Smith, 611 F.2d 414 (1979), has proclaimed that even a reference that is not derogatory may carry impermissible connotations, or may trigger prejudiced responses in the listeners that the speaker might neither have predicted nor intended. Appellant McDonald contends that while these comments were not overt racial slurs, in lieu of the very reasonable inferences above, they were made with full knowledge of their potentially prejudicial results.. These comments were made by the prosecutor in a calculated effort to draw any distinction between the apparent values held by McDonald and his Co-Defendant as the prosecutor saw them, and those of the all white jury assessing his fate. Thus, these comments may reasonably be construed as racist.

Finally, at one point during his closing argument the prosecutor made statements which constitute a variation on the Golden Rule Argument, the prohibition of which has long been the law in Florida. Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985); Barnes v. State, 58 So.2d 157 (Fla. 1951). For example, at one point the prosecutor said, "...consider the ordeal that the victim was placed in, coupled with the method of killing we submit to you..." (T: 2303). Only moments later the prosecutor repeated this plea, "...you must now consider the ordeal, the pain, the agony, and the ordeal that Dr. Davidson went through" (T: 2303). Later on in his closing the prosecutor stated, "Listen to the water as it filled that bath tub, with him either in it or out of it, it doesn't matter. Listen to the water as it filled up. And as he knew his life was going to be taken away" (T: 2308).

Appellant McDonald contends that the prosecutors statements mentioned above were so egregious as to warrant vacating the sentence and remanding for a new penalty phase trial. Bertolotti v. State, 476 So.2d 130 (Fla. 1985). He concedes that most of the prosecutor's closing argument went entirely unobjected to at his

penalty phase. However, taken as a whole, it was such as to destroy the Appellant's right to the essential fairness of his criminal trial. Peterson v. State, 376 So.2d 1230, 1231 (Fla. App. 4 Dist. 1979).

VII. THE TRIAL COURT'S FAILURE TO CONDUCT THE REQUIRED STEP-BY-STEP INQUIRY TO DETERMINE WHETHER EXPERTS DNA TEST RESULTS AND BASIS OF STATISTICAL CONCLUSIONS COULD BE ADMITTED DOES NOT CONSTITUTE HARMLESS ERROR AND A NEW TRIAL IS REQUIRED

Appellant McDonald asserts that because the trial court failed to conduct the necessary inquiry to determine the admissibility of the DNA test results and the basis of the statistical conclusions used to report the results he is entitled to a new trial. Murray v. State, 22 Fla. L. Weekly S203 (Apr. 17 1997).

In Brim v. State, 22 Fla. L. Weekly S45 (Jan. 16 1997), this court took note of the fact that the DNA testing process consists of two distinct steps. The first step of the process relies upon principles of molecular biology and chemistry. The results obtained through this first step simply indicate that two DNA samples look the same. The second step of the testing process does not rely on principles of molecular biology or chemistry but is based on principles of statistics and population genetics. The statistics help a court and jury and give significance to a match. Both of these distinct steps must satisfy the requirements of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). Whether the two steps have satisfied the requirements of *Frye* is a determination the trial judge alone must make.

In the instant case Special Agent Michael Vick was offered by the State as an expert in the field of DNA analysis (T: 1214). Special Agent Vick performed the analysis of the traces of blood discovered on the items allegedly left behind in the hotel room by the Co-Defendants (T: 1222). Throughout his testimony the record

is devoid of any indication that the trial judge made any findings regarding the admissibility of his test results or the probability calculations used to report those test results (T: 1211-1238)--a determination that was hers alone to make.

Because the trial courts' failure to make a determination as to the admissibility of this evidence is clearly error under our caselaw, Appellant McDonald asserts that a new trial is required. Murray v. State, 22 Fla. L. Weekly S203 (April 17 1997).

CONCLUSION

For the reasons outlined above, Appellant McDonald states that this court should reverse the trial court's decision and either a) enter an Order of Acquittal; b) grant a new trial; c) vacate the death sentence and remand with instructions to impose a life sentence, or d) grant a new penalty phase hearing.

APPENDIX

Appellant McDonald's trial counsel also argued several other grounds, which, in an abundance of caution, the Appellant offers for this Court's review and consideration. The contents of the arguments are contained in the motions as they appear in the Record:

1. Defendant's Motion for New Trial-Penalty Phase, (R: 2461, 2462) The trial court erred by (1) denying Defendants' Motion for Separate Guilt and Penalty Phase Juries, (2) allowing a disparaging statement by the State in its closing arguments, (3) allowing the State during its closing argument to make a statement indicative of the cost of a life sentence, (4) allowing the jury instruction of cold, calculated, and premeditated as given, (5) allowing the jury instruction of heinous, atrocious, and cruel, as given, (6) refusing to merge the issue of felony murder in the verdict by the denial of Defendants' motion for a separate verdict on the issue of felony murder, and (7) denying Defendants' motion because there was insufficient evidence as to the aggravators of heinous, atrocious, and cruel, and cold, calculated, and premeditated.

2. Defendants' Motion for a New Trial And/Or Renewed Motion for Judgment of Acquittal, (R: 2463, 2464), regarding (1) the jury's verdict is contrary to law, (2) the jury's verdict is contrary to the weight of the evidence, (3) the trial court erred in denying Defendants' Motion to Strike Jury Venire, (4) the trial court erred in allowing irrelevant, prejudicial testimony before the jury, (5) the trial court erred in denying Defendants' Motion for Judgment of Acquittal, (6) the trial court erred in refusing to give Defendants' requested jury instructions, (7) the trial court erred in denying Defendants' Motion for Separate Juries, (8) the trial court erred in denying Defendants' Motion for Special Jury Verdict, (9) the trial court erred in allowing prejudicial, cumulative photographs of the victims' injuries before the jury, and (10) the trial court erred in allowing cumulative exhibits before the jury.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the forgoing was provided by U.S. Mail to ATTORNEY GENERAL, 2002 North Lois Avenue, Suite 700, Tampa, Florida 33607 on this the 9th day of April, 1998.

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CMD

IN THE SUPREME COURT OF FLORIDA

ROBERT R. GORDON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. 86,955

(TRIAL COURT NO. CRC 94-02958 CFANO)

ON APPEAL PURSUANT TO RULE 9.030(a)(1)
FROM THE JURY VERDICT AND DECISION OF
THE CIRCUIT COURT, PINELLAS COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT ROBERT R. GORDON

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CERTIFICATE OF INTERESTED PERSONS

Counsel for Appellant ROBERT GORDON certifies that the following persons have or may have an interest in the outcome of this case:

Robert Butterworth, Esq., Attorney General
(Counsel for Appellee)

Leo Cisneros
(Fugitive Co-Defendant)

Denise Davidson
(Co-Defendant)

Robert R. Gordon
(Appellant)

Rebecca A. Graham, Esq.
(Trial Counsel for Appellee)

Charles Holloway, Esq.
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Robert Love, Esq.
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Meryl McDonald
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James Marion Moorman, Esq.
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Richard J. Sanders, Esq.
(Appellate Counsel for Co-Appellant Meryl McDonald)

Hon. Susan F. Schaeffer
(Trial Judge)

Frederick L. Schaub, Esq.
(Trial Counsel for Appellee)

Michael S. Schwartzberg, Esq.
(Trial Counsel for Appellant Meryl McDonald)

Susan Shore
(Co-Defendant)

Richard Watts, Esq.
(Trial Counsel for Appellant Meryl McDonald)

STATEMENT OF ADOPTION

This appeal and the various issued raised by the Appellant GORDON and Co-Appellant Meryl McDonald (Appeal Case No. 87,059) arise from one prosecution, one indictment and one jury trial.

In the interest of brevity and judicial economy, Appellant GORDON hereby adopts by reference, as though set forth in their entirety herein, all portions of the briefs of Co-Defendant Meryl McDonald which are applicable to Appellant GORDON and are not adverse to his position on appeal.

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PREFACE

In this brief, Appellant ROBERT R. GORDON shall be referred to as "Appellant" or "Appellant GORDON". Appellee, STATE OF FLORIDA, shall be referred to as "State" or "Appellee". References to the Record shall be identified by a parenthetical containing the letter "R", followed by the page number upon which the cited material appears. References to the Trial Transcript shall be identified by a parenthetical containing the letter "T", followed by the page number upon which the cited material appears.

STATEMENT OF THE CASE

This is a death penalty appeal of a black man convicted by an all-white jury with circumstantial evidence that did not even place him at the actual scene of the crime.

On or about January 25, 1994, Dr. Louis Davidson was killed at Thunder Bay Apartments in Pinellas County, Fl (T:325). Subsequently, 5 people were charged with First Degree Murder; Denise Davidson (victim's wife), Leo Cisneros, Appellant GORDON, Co-Defendant McDonald, and Susan Shore (R:32).

Ms. Davidson was given a separate trial before a different judge (R:2489). Cisneros was and still remains a fugitive (T:913,1846). Susan Shore eventually cooperated with the State, and testified at Appellant GORDON's trial (T:1510). She later had her charges reduced to accessory after the fact (T:1625), received probation, and was deported back to England (T:2825).

On or about June 6 - June 15, 1995, Appellant GORDON and Co-Defendant McDonald were tried before a jury, which returned unanimous verdicts of guilty of Murder in the First Degree on June 15, 1995 (T:2224).

On June 16, 1995, the same jury reconvened for the penalty phase portion of the trial (T:2854). On that same day, they returned an advisory recommendation that Appellant GORDON and Co-Defendant McDonald be sentenced to death by a 9 - 3 vote as to each (T:2761).

The trial court ordered each side to prepare a Sentencing Memorandum, and held the first Spencer hearing on August 4, 1995

(T:2758). Subsequently, Co-Defendant Denise Davidson had her trial before another judge (R:2489). She was also convicted of First Degree Murder (R:2489). However, her judge followed the recommendation of her jury, and sentenced Co-Defendant Davidson to 25 years to life (R:2489,2802).

The second Spencer hearing was held on October 19, 1995 (T:2855). Testimony was taken and arguments made regarding Co-Defendant Davidson's life sentence (T:2804). On November 16, 1995, the trial court entered a 12 - page Order sentencing Appellant GORDON and Co-Defendant McDonald to death (T:2853).

A timely Notice of Appeal was filed on behalf of Appellant GORDON (R:2553), and the instant appeal ensued.

STATEMENT OF THE FACTS

By way of overview, the State put on a circumstantial case trying to prove that the victim was actually murdered by Appellant GORDON and Co-Defendant McDonald (both of whom are black) (T:274-275) at the request of the victim's wife (Denise Davidson) and her then fiance (T:405), Leo Cisneros, also co-defendants. However, the State did not have an eyewitness to the actual murder itself.

The State attempted to place Appellant GORDON and others near the murder scene (the victim's apartment) before the time it generally took place, so that the jury could infer that they were guilty of the murder. The State travelled on two alternate theories, namely that Appellant GORDON and Co-Defendant McDonald committed either (1) premeditated murder, or (2) felony murder

during the course of a robbery or burglary (T:215,220).

The facts adduced at trial were basically as follows. Dr. Davidson, the victim, left work at 9 A.M. on January 25, 1994, and drove to his apartment in Thunder Bay Apartments, Pinellas County, FL (T:416). Appellant GORDON, Co-Defendant McDonald, and Co-Defendant Shore had previously arrived together near said apartment building in the same car (T:1559). Defendant McDonald had left shortly before the victim arrived (T:1563) and went jogging in the general direction of the apartment building.

When the victim got out of his car, he was met by Appellant GORDON, who said something to him (T:1568). The two of them then went back to the victim's car, then proceeded in the general direction of the victim's apartment building and went out of sight (T:1628). Co-Defendant Shore stayed in the car in which had previously arrived (T:1569). Shore also saw an unidentified black man standing in the stairwell of said apartment building (T:1566).

A few minutes later, Appellant GORDON came back to the car where Shore was (T:1569). A few moments after that, Co-Defendant McDonald came back to that car, and said "I got the documents", and patted his stomach area which caused a crinkling sound (T:1571). The 3 then drove away to a motel (T:1576).

When the body of the victim was discovered that day at about 3 P.M., the police began their investigation. The victim's apartment showed no signs of forced entry (T:1028-1035), was in disarray and looked like it had been ransacked, with documents and other personal effects strewn all over the rooms (T:449). The

victim was found tied up with a vacuum cleaner cord, in the bathtub full of bloody water (T:449). There was water in the bathroom and general vicinity, making the carpets very wet (T:498).

The police began to collect evidence from the scene, among which was a cashmere coat and its belt that belonged to the victim's fiance', and carpet samples (T:465).

The police then began to follow Co-Defendant Denise Davidson over the next several days, and watched her go to several Western Union offices (T:660). She sent certain of these wire transfers to Appellant GORDON, and he became a suspect (T:661).

The police then got telephone records from Dooley Groves in Tampa, where Ms. Davidson was working (T:662-669). This led police to a beeper which was called by Cisneros on January 25, 1994, (the day of the murder) 50 times during a 2 1/2 hour period (T:1853,1946). This beeper was registered to Patricia Vega, a girlfriend/business associate of Co-Defendant McDonald, who received that beeper from her as a present (T:662,1430). Appellant GORDON was not seen with a beeper (T:877).

Co-Defendant Davidson had purchased a cellular phone 9T:1842) and activated it on December 17, 1994 (T:1803), which was used by Co-Defendant McDonald. The State, by use of cellular phone records, traced the movement of the phone at certain times before and after the murder (T:1900).

The police then used these cellular phone records to check out some of the different places that were called, including hotels.

For example, a Days Inn Hotel had been called on or about January 18, 1994 (T:1052). The police went there and were told that there were 2 black men (Appellant GORDON and Co-Defendant McDonald), had been to that hotel on January 25, 1994, with a blond female (Shore) (T:1073,1128) and they left behind some clothes (T:1112-1114,1132). None of the 3 used the shower in the hotel room (T:1132,1137,1633).

These clothes were turned over to the FBI, who made a comparison of (1) the carpet fibers taken from the crime scene and the victim's hair samples (T:1248), and (2) hair samples taken from Appellant GORDON (T:1168) and others (T:1244-1245). The FBI did not find a match of any of these hair samples (T:1254,1263,1291), or carpet fibers to Appellant GORDON.

Similarly, fibers from the cashmere coat and belt that were used to wrap the victim's hands, and carpet samples (T:1245), and footprint exemplars from the scene were compared to Appellant GORDON and items which he had, with negative results (T:1254,1263,1291,1292).

The FBI did find fibers on a sweatshirt which matched (1) the fibers from the victim's fiance' cashmere coat and belt, and (2) head hairs of Co-Defendant McDonald (T:1256). The FBI also found the victim's blood sample matched the DNA found on one stain on the sweatshirt allegedly worn by Co-Defendant McDonald (T:1166,1227), with a second blood stain with the victims' DNA and some unknown other (T:1229,1231) along with carpet samples from the victim's apartment on that sweatshirt (T:1276). A footprint

taken from the foyer area of the victim's apartment matched the bottom of a tennis shoe that was the same shoe size as Co-Defendant McDonald (T:468,484,1182-3,1204,1846). Although blood was found on the bathroom wall in the victim's apartment, no blood samples from Appellant GORDON or others was ever taken for comparison (T:1936).

Through receipts, the State showed that on January 24th (the day before the homicide) Ms. Davidson had purchased 3 items, namely a pair of sneakers, a gray sweatshirt, and a purple sweatshirt (T:1925). However, none of these items were linked to Appellant GORDON.

The State also showed that Appellant GORDON and Co-Defendant McDonald had made prior trips to the Tampa area from Miami (T:1345). They would typically be driven by a 3rd person, and would stay in hotels (T:1356) and visit Ms. Davidson and Leo Cisneros at Ms. Davidson's place of work, Dooley Groves (T:1379). Appellant GORDON would typically stay in the car, and Co-Defendant McDonald would go in and talk to Denise Davidson and/or Cisneros (T:1354-5,1362,1366,1379,1394-5). Appellant GORDON would usually become impatient, leave the car and go get Cisneros, and they would leave (T:1534).

The State's main witness against Appellant GORDON who detailed the events of the day of the murder was Co-Defendant Susan Shore. She drove with Appellant GORDON and Co-Defendant McDonald from Miami to Tampa (T:1526), and was at the victim's apartment complex on the morning of the murder (T:1559). However, the only

interaction she witnessed between Appellant GORDON and the victim was when he pulled up in his car near his apartment, spoke briefly with Appellant GORDON, and the two walked away (T:1566). No other witness saw this alleged interaction between the two. She also noticed an unidentified black male standing under the stairwell to the victim's apartment at that time (T:1566), but never saw anyone go into the victim's apartment (T:1653).

Shore testified that neither Appellant GORDON nor Co-Defendant McDonald took anything with them (e.g. murder weapons or gloves (T:1629)) from their car on the morning when they were at the victim's apartment complex, or brought anything back to the car before they left (T:1643). The murder weapon was never found or identified (T:2114). There was $400.00 in the victim's wallet, and $19,300.00 in cash left in his apartment (T:470), and a second wallet with victim's credit cards (T:658).

Appellant GORDON gave no post-arrest statement, and made no statement to any alleged co-conspirator (or any other) about his knowledge of or participation in a murder (T:1606). The State's scientific evidence was consistent with Appellant GORDON never being inside the victim's apartment (e.g. no fingerprints there (T:843); after alleged murder, he was not perspiring, had no water stains on him, had no cuts or bruises or blood stains (T:1628) or carpet or clothes fibers from the victim's apartment), and not being involved in the physical acts necessary to commit this murder.

SUMMARY OF THE ARGUMENT

This Court should reverse the trial court's decision and either a) enter an Order of Acquittal; b) grant a new trial; c) vacate the death sentence and remand with instructions to impose a life sentence, or d) grant a new penalty phase hearing.

In support of this assertion, Appellant GORDON principally submits that the law and record illustrate that the trial court committed reversible error.

In Argument I, Appellant GORDON asserts that he should be given a new trial because he was convicted by an all-white jury selected from an all-white jury venire of 50 people. Appellant GORDON and his Co-Defendant are both black. When the defense attorneys objected, the trial judge said that it could not do anything, because the venire is randomly selected by computer. The trial court later commented "I wish we did have blacks on the panel, but that's the best we can do".

Appellant GORDON asserts that the trial court erred by not making an effort to get some blacks in the venire. This violates the "fair cross-section" rule, where a defendant is entitled to a jury of his peers drawn from a fair cross-section of the community. In Pinellas County in 1995, about 7.9% of the population was black. With very little effort, the trial court could have ensured that the jury pool was fairly representative of the community.

Appellant GORDON asserts that the "affirmative duty rule" forces courts to utilize selection procedures that, regardless of

intent, produce non-discriminatory results. Here, a discriminatory result occurred.

Because Appellant GORDON's life was at stake here, the slight additional effort required by the trial court to give blacks access to the venire, was not too large a price to pay. Because the trial court did not take these prophylactic measures, Appellant GORDON should be given a new trial.

In Argument II, Appellant GORDON asserts that the evidence was insufficient to show that he was involved in a murder. The State put on an entirely circumstantial case, without an eyewitness to the actual murder. Appellant GORDON did not make any post-arrest statements. No one saw him (1) enter the victim's apartment building, or (2) specific apartment where the homicide allegedly occurred, or (3) commit the murder. No one testified that Appellant GORDON was involved in, spoke about, or even knew of an actual murder.

Various scientific and circumstantial evidence showed that Appellant GORDON was never in the apartment building or apartment where the murder occurred. Said apartment had a broken commode, which caused water to spill out from the bathroom area into most of the rest of the apartment. The evidence showed that a fierce struggle must have taken place between the victim and his alleged attacker(s).

However, the State's key witness against Appellant GORDON (an alleged co-conspirator herself), testified that even though Appellant GORDON spoke to the victim near the victim's apartment

building on the day of the murder, she never saw Appellant GORDON go into the building or apartment where the murder took place. More importantly, when Appellant GORDON returned to her after being out of sight for several minutes, he was not perspiring or looked like he had exerted himself, had no water stains on his clothes or shoes, had no cuts or bruises or any other marks on his person, had no gloves, and had no blood stains on him. Further, the FBI expert found no carpet fibers from said apartment, or fibers from a cashmere coat and belt that had been used to tie up the victim, or head hair samples of the victim on Appellant GORDON. No fingerprints of his were found in the victim's apartment. The State failed to adduce <u>any</u> physical or scientific evidence that placed Appellant GORDON in the victim's apartment.

The State's circumstantial case only showed Appellant GORDON and others coming from Miami to the Tampa area, staying in the Tampa area monitoring the victim, and returning to Miami. These events took place several times over a period of a few months. The State had 2 alternate theories: (1) premeditated murder, or (2) felony murder during the course of a burglary or robbery. However, all the evidence that the State put forward against Appellant GORDON was consistent with the hypothesis that he was <u>at most</u> only planning a burglary or robbery.

In Argument III, Appellant GORDON asserts that he should be given a new penalty phase hearing. Co-Defendant Denise Davidson (the victim's wife) received a severance, was tried after the instant trial, was convicted of first degree murder, and sentenced

to 25 years to life. Because this happened after the instant trial, the penalty phase jury for Appellant GORDON did not know his co-defendant's life sentence.

It is critical that his penalty phase jury (not just his sentencing judge) know his co-defendant got a life sentence. Appellant GORDON got an advisory recommendation for death from the jury by a 9 - 3 vote. The fact that a co-defendant received a life sentence could very well sway the other 3 jurors necessary to make a "life" recommendation.

Further, because the trial court refused to give a special verdict form which would make the jury indicate under which of the 2 theories the prosecution put forward it found the defendants guilty (premeditated murder or felony murder), Appellant GORDON went into the penalty phase not knowing for what he had been convicted. Because of this, coupled with the fact that his co-defendant at trial was similarly situated, they did not know what roles had been assigned to them by the jury in the guilt phase.

Because the same penalty phase jury heard the evidence against Appellant GORDON and his co-defendant, each was then in the awkward position of having to point the finger at the other had they vigorously defended themselves (e.g. who was the principal or accomplice, etc.), this would destroy the credibility of each.

Further, because there was no special verdict form in this case, it was not possible to render effective assistance of counsel (e.g. be able to attack aggravators or select mitigators) at the penalty hearing.

In Argument IV, Appellant GORDON asserts that the doctrine of proportionality dictates that this case be remanded for re-sentencing. Beyond the fact that a co-defendant got life, the evidence does not show that Appellant GORDON was involved in the actual murder. Even if this Court were to believe that Appellant GORDON was so involved, this murder was not so heinous, atrocious, or cruel that he should receive the death sentence. The trial court even commented that it had seen worse murders. There are many other murders that are worse, in which the murderer received a life sentence.

The trial court erred by finding that Appellant GORDON acted "cold, calculated and premeditated". All of his actions were just as consistent with a burglary or a robbery, as with a murder. That the victim was bound and gagged and struck over the head, with items that were found in his apartment (e.g. electrical cord, towels, and belt from a cashmere coat) is contrary to any notions of premeditation, or a calculated plan to kill. This was coupled with the fact that the State's star witness said that Appellant GORDON left from her car at the victim's complex with nothing in his hands. This also shows that a killing was not contemplated.

The trial court erred by finding that the murder was heinous, atrocious, and cruel. The medical examiner testified that his autopsy revealed that the victim was likely knocked unconscious after the first blow to the head, and would not have been aware of anything that happened after that, before drowning.

ARGUMENT[1]

I. THE TRIAL COURT ERRED BY DENYING APPELLANTS' MOTION TO STRIKE JURY VENIRE

"I have concerns that it would be an all white jury judging two black men."[2]

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[1]Appellant GORDON's trial counsel also argued several other grounds, which - in an abundance of caution - the Appellant offers for this Court's review and consideration. The contents of the arguments are contained in the Motions as they appear in the Record:

1. Defendants' Motion for New Trial-Penalty Phase, (R:2461,2462) regarding the trial court erred by (1) denying Defendants' Motion for Separate Guilt and Penalty Phase Juries, (2) allowing a disparaging statement by the State in its closing arguments, (3) allowing the State during its closing argument to make a statement indicative of the cost of a life sentence, (4) allowing the jury instruction of heinous, atrocious and cruel, as given, (5) allowing the jury instruction of cold, calculated and premeditated as given, (6) refusing to merge the issue of felony murder in the verdict by the denial of Defendants' motion for a separate verdict on the issue of felony murder, and (7) deny defendants' motion because there was insufficient evidence as to the aggravators of heinous, atrocious, or cruel, and cold, calculated and premeditated.

2. Defendants' Motion for New Trial And/Or Renewed Motion for Judgment of Acquittal (R: 2463,2464), regarding (1) the jury's verdict is contrary to law, (2) the jury's verdict is contrary to the weight of the evidence, (3) the trial court erred in denying Defendants' Motion to Strike Jury Venire, (4) the trial court erred in allowing irrelevant, prejudicial testimony before the jury, (5) the trial court erred in denying Defendants' Motion for Judgment of Acquittal, (6) the trial court erred in refusing to give Defendants' requested jury instructions, (7) the trial court erred in denying Defendants' Motion for Separate Juries, (8) the trial court erred in denying Defendants' Motion for Special Jury Verdict, (9) the trial court erred in allowing prejudicial, cumulative photographs of the victims injuries before the jury, and (10) the trial court erred in allowing cumulative exhibits before the jury.

[2]Venireperson Coulson (T:274)

Jury selection in this case began on or about June 6, 1995 (T:3). Appellant GORDON, like his Co-Defendant McDonald, is of Jamaican (black) descent (T:274,275).

Defense counsel objected that there were no blacks in the entire venire of 50 people, and that the defendants are black. The trial court responded by saying it could not do anything, and that the venire is randomly selected by computer (T:27).

Counsel for Appellant GORDON renewed the objection that the entire panel did not contain even 1 black juror (T:303). The trial court asked if the victim was "light complected" and Jamaican, and whether the victim's wife is Jamaican (yes), and whether Co-Defendant Cisneros is Jamaican (yes) (T:303).

The trial court said that the record is clear that the Defendants are Jamaican, and the victim is Jamaican, but "not the same color" (T:28).

The peremptory challenges were exercised by the parties to select the jury (T:284,292). The trial court even commented "I wish we did have blacks on the panel, but that's the best we can do" (T:304). Jury selection ended on the same day it began (T:304).

During the trial, these racial overtones continued. One State witness testified "He (Gordon) was black, and she (Shore) was white, and I'm not used to seeing that in that area" (T:589,591). Another State witness, when identifying Appellant GORDON and Co-Defendant McDonald in open court, testified "They're the only 2 black people here" (T:872).

A. The All-White Venire Violated The "Fair Cross-Section" Rule.

Appellant GORDON asserts that because he was facing an all white panel, he had no chance to get a "jury of his peers" that was a fair cross-section of the community in Pinellas County, which in 1995 had a total population of 851,659 of which 65,868 (7.9%) were black.[3]

Appellant GORDON asserts that when counsel properly objected when the venire first entered the courtroom that there were no blacks (T:21), the court below should have taken corrective action. It was reversible error for the lower court not to do so. For example, the court could have checked with the remaining potential veniremen in the courthouse for jury selection that day, to see if there were any other blacks that could be called up to the instant trial. If there were no blacks there that day, the court could have reconvened the next day and used the same random procedure it used to get these first 50.

This simple procedure would seat an additional amount of veniremen until blacks were in the venire. This may have taken a little extra time and expense. However, Appellant GORDON feels that because his life was hanging in the balance, the trial court and the State should be made to expend this slight additional time and expense.

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[3]Florida Statistical Abstract 1995, 29th Ed., University of Florida (1995) (attached as Appendix). Appellant GORDON has contemporaneously requested that this Court take judicial notice of these facts.

In Melbourne v. State, 679 So.2d 759 (Fla. 1996), f.n. 8, this Court showed its concern for the racial make-up of the venire, and that this is a relevant circumstance surrounding jury selection.

B. Appellant GORDON's Fair Cross-Section Rights Were Violated

In United States v. Perez-Hernandez, 672 F.2d 1380 (11th Cir. 1982), the court said the 6th Amendment to the U.S. Constitution grants every criminal defendant "the right to a speedy and public trial, by an impartial jury." The U.S. Supreme Court has interpreted this right to mean, among other things, that petit jury venire must represent a fair cross-section of its community. Taylor v. Louisiana, 419 U.S. 522 (1975); Duren v. Missouri, 439 U.S. 357 (1979).

The Taylor court, supra, held that:

> "The purpose of a jury is to guard against the exercise of arbitrary power - to make available the common sense judgment of a community as a hedge against the over-zealous or mistaken prosecutor and in preference to the professional or perhaps over-conditioned or biased response of a judge. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinct groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system." 419 U.S. at 530.

Moreover, "[w]hen any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable." Peters v. Kiff, 407 U.S. 493 (1972).

The purpose of a fair cross-section protection is to provide

a criminal defendant with grand and petit juries which are microcosms of the community. In this way, the 6th Amendment right to an "impartial jury" is given fully effect by ensuring that distinct groups of the community are represented, but are not given the opportunity to dominate, or in the alternative, denied the opportunity to participate, in a democratic system of justice. Perez-Hernandez, supra, at 1385.

Criminal defendants in state courts may challenge discriminatory selections of petit juries through the Equal Protection Clause of the 14th Amendment. Alexander v. Louisiana, 405 U.S. 625 (1972).

These notions are particularly sobering in the instant case, where the State sought and got the death penalty for Appellant GORDON, a black man. This Court can take judicial notice of the disproportionately high number of black defendants who get the death penalty, and how this has been attacked as a form of discrimination. Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied 440 U.S. 976 (1979).

Appellant GORDON finds it disturbing that the trial court made comments like "Is he (victim) light complected?" (T:303), and in relation to the victim being Jamaican like the defendants, "but not the same color" (T:28). Witnesses for the State made other such remarks (T:589,591,872). The law is supposed to be color blind.

Appellant GORDON wants this Court to know that he is not making the argument of "systematic exclusion" of blacks in

Pinellas County. The fair cross-section analysis employs a prima facie test which is virtually identical to the Equal Protection prima facie test for establishing a presumption of discrimination. Compare Duren v. Missouri, 439 U.S. at 364, with Castaneda v. Partida, 430 U.S. 482 (1977).

A significant distinction, however, is the way that each prima facie case may be rebutted. For an equal protection claim, the presumption can be rebutted by proving an absence of discriminatory intent. Castandea, supra, 430 U.S. at 497-8. In a fair cross-sectional analysis, however, the purposeful discrimination is irrelevant since the emphasis is purely on the structure of the jury venire; a prima facie case can be rebutted only by establishing a significant government interest which justifies the imbalance of classes. Duren, supra, 439 U.S. at 367-8.

The instant case is factually different from the vast majority of cases in this area. Typically there are 1 or 2 or more blacks in the venire, and preemptory strikes are used by the State against the blacks, who then do not make it to the petit jury. See State v. Slappy, 522 So.2d 18 (Fla.) cert. denied 487 U.S. 1219 (1988). Here, however, even though the black population in Pinellas County is nearly 8%, there were no blacks in the initial 50-person venire. More disturbingly, there was no subsequent effort by the trial court to correct the situation.

Since the fair cross-section requirement is based on due process and is broader in scope than the systematic exclusion

rule, the requirement of representative juries imposes an affirmative duty on the State. Comment, 5 Loyola U.L.Rev.(La.), 87, 120 (year). Currently, it is provided by federal statute that all litigants in federal courts are entitled to juries drawn from a fair cross-section of the community (see 28 U.S.C. §§1861-3).

In Spencer v. State, 545 So.2d 1352,1355 (Fla. 1989), this Court held that the jury districts created under §40.015 must "reflect a true cross-section of the county, with no systematic exclusion of any group in the juror selection process".

It is ironic that the trial court said that "I wish that there were blacks on the panel, but that's the best we can do" (T:304). All the court had to do was pick up the telephone and have the Clerk send up additional veniremen that day or the next, until she got a satisfactory number of blacks.

A party relying on the fair cross-section rule must still establish a prima facie case by proving that the group in question, although constituting a significant portion of the total population, has consistently been omitted from or under-represented on jury panels. See 8 Colum. J. L. and Soc. Prob. 589,598 (year). However, since the fair cross-section requirement is an affirmative command and is directed at results, rather than discriminatory intent, only evidence showing a compelling state interest for the disparity may be a sufficient rebuttal. Comment, 20 UCLA L.Rev., 581,598. Appellant GORDON submits that the result here (no blacks) meets this test.

In United States v. Rodriguez, 776 F.2d 1509,1511 (11th Cir.

1985), the court held that although the absolute disparity method is not the sole means of establishing unlawful jury discrimination, where small absolute disparities are proven and the minority group involved exceeds 10% of the population, it is not necessary to consider other statistical methods (0% of blacks in venire, but nearly 8% in Pinellas County, with over 10% in the general population of the U.S.).

C. The "affirmative duty rule" was not applied here

In an attempt to achieve the required representative cross-section, some courts have adopted what is known as the "affirmative duty rule" or test. This test imposes on jury selectors the affirmative duty to utilize selection procedures that, regardless of intent, produce non-discriminatory results (emphasis supplied). (Comment, 36 Albany L.Rev. 305, 326). **If necessary to produce the required fair cross-section, the selectors may be required to actively seek out members of under-represented or excluded groups** (Id.)(emphasis supplied). Failure to utilize selection procedures that would obtain members of such a group, considered with the actual under-representation of that group, may be sufficient to make out a prima facie case of discrimination. Id. at 305,327. Appellant GORDON meets this test on the facts sub judice.

That blacks are members of a group recognizable as a distinct class often singled out for separate treatment under the laws is well-settled. Castenada, supra, 430 U.S. at 494; Hernandez v. Texas, 347 U.S. 475, 478-9 (1954).

The affirmative duty test if generally considered two-fold. First, jury selection officials are required to familiarize themselves with all elements of the community's population containing eligible potential jurors. Secondly, jury officials must not pursue a course of conduct or utilize methods that, whether intentionally or not, naturally tend to exclude any members of a community group (Comment, 20 UCLA L.Rev. 581, 597).

The prohibition against following a course of conduct that naturally tends to exclude members of a group may include a corollary duty to utilize source lists that will produce the required representative cross-section. (Comment, 36 Albany L.Rev. 305,326-7). Use of a source list that itself does not represent a fair cross-section of the community, and therefore results in under-representation of some group or groups, may be unconstitutional under this test. (Comment, 52 Ore.L.Rev. 482, 494).

The affirmative duty concept has led some courts to adopt purposeful inclusion as a remedy for jury selection procedures that result in unrepresentative juries. (Comment, 20 UCLA L.Rev. 581,648-9, 652). Thus, if the sources ordinarily utilized to select potential jurors result in significant under-representation of some group(s), jury officials may be required to give consideration to the excluded race or group and to seek out and purposefully include members of that group. (See Comment, 36 Albany L.Rev. 305, 326).

The concept of purposeful inclusion or compensatory selection

reflects a shift in emphasis from the systematic exclusion rule, with its intent oriented approach, to the requirement of a fair cross-section, with its result oriented approach.

Appellant GORDON asserts that his factual scenario yields such a result (e.g. no blacks in venire) that the trial court erred by not taking steps to get blacks on the venire.

In Leonard v. State of Florida, 20 FLW D1459 (4th DCA 1995), the defendant challenged the method of jury selection, asserting that minorities were systematically excluded from jury service. However, in his venire of 80 persons, there were 3 African-Americans (3.5% of the venire). While the court ultimately held that the defendant did not make out a prima facie case, the instant case is stronger because of no presence of blacks.

Appellant GORDON urges this Court to use a common sense approach to this problem. The concern shown supra by Venireperson Coulson about an all-white jury judging two black men (T:274) still reverberates through the heart of this case. It was obvious to her as a lay person that from the very outset of this case, something wasn't right. Because the trial court did nothing to correct this error, Appellant GORDON urges this Court to remedy this error by giving him a new trial.[4]

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[4]If this Court feels it cannot rule on this issue because it does not have enough data regarding racial makeup or veniremen selection in Pinellas County, Appellant GORDON asks that this Court remand this issue back to the trial court for an evidentiary hearing.

II. THE TRIAL COURT ERRED IN DENYING APPELLANT GORDON'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE EVIDENCE

At the close of the State's case (there was no defense case), Appellant GORDON made a Motion for Judgment of Acquittal (T:1974, R:2463,2464), which was denied by the trial court (T:1981).

Appellant GORDON asserts that even when this Court looks at the evidence in the light most favorable to the jury verdict (including testimony of a co-defendant and scientific evidence), it does not show that he was involved in the actual murder. As a result, his conviction should be reversed, or this matter remanded for a new trial. A careful examination of the evidence shows that at best, the State places Appellant GORDON near the murder scene around the alleged time the murder occurs. Scientific evidence shows Appellant GORDON never was in the apartment where the murder took place.

Co-Defendant Shore was the State's only witness that put Appellant GORDON near the scene. She generally testified that after Appellant GORDON spoke to the victim, they walked away (T:1566), and came back to her car (T:1569). According to the State, the murder had just occurred. However, there were no eye-witnesses to the actual murder, and the body was not found until about 3 P.M. (T:422), nearly 6 hours later.

Specifically, Shore testified that she was asked by a mutual friend on January 22, 1994, to go on a trip with Appellant GORDON and a friend (T:1522). When Shore, Appellant GORDON and Co-Defendant McDonald arrived in Tampa, Shore and McDonald went to

the Dooley Grove store, while Appellant GORDON went to another store (T:1534). Co-Defendant McDonald talked to a man and a woman later identified as Denise Davidson and Leo Cisneros (T:1534). Appellant GORDON never went into the store, and later joined the other two back at the car (T:1539). Co-Defendant McDonald told Shore that he and Appellant GORDON had to see a friend and he would not be home until the next morning, and they had to get a piece of paper from him (T:1542). The 3 then checked into a hotel, paid for by cash given to her by Defendant McDonald (T:1543-5).

Shore testified that the next A.M. (January 25), when arriving at Thunder Bay Apartments, Co-Defendant McDonald told Shore where to park the car (T:1559), and he then left the two in the car and went jogging near the Thunder Bay Apartments. Co-Defendant McDonald had tennis shoes on, but Shore was not sure what kind of shoes Appellant GORDON's had. Appellant GORDON and Shore then played catch with a cricket ball, waiting for the friend to arrive from work (T:1565,1566). Shore saw an unidentified black male in the shadows under the stairwell (T:1566).

A few minutes later, the victim pulled up in his car, and Appellant GORDON went over to talk to him, but Shore could not hear the conversation (T:1566,1568).

Shore waited in the car for a few minutes, and talked to other people. About 5 minutes later, Appellant GORDON came back to her car (T:1569). Shore was positive she did not see any blood on Appellant GORDON's clothing (T:1570).

When he came back to the car, Appellant GORDON was not perspiring at all, had no water on his shoes, and was not out of breath. No part of his clothing appeared to have been touched, and he had no cuts, bruises or other marks, or any gloves. He showed no signs of exertion, and Shore did not even suspect anything was wrong (T:1628,1643).

The two then sat and waited for Co-Defendant McDonald, who upon return said "I got the piece of paper" and patted his stomach. She heard paper making a crinkling sound (T:1571).

Shore further testified she did not see either Appellant GORDON or Co-Defendant McDonald take anything with them from the car on their way to the vicinity of the apartment (e.g. murder weapons) (T:1644), and did not see them bring anything with them, when they returned to the car (T:1643).

Shore also did not see Appellant GORDON go back to the car at anytime after he initially left her, or see anyone go into the victim's apartment (T:1653).

Shore did not see either Appellant GORDON or Co-Defendant McDonald with a beeper on January 24 or 25, 1994 (T:1546). (so the 50 calls to the beeper, and other calls on that day, have little evidentiary value).

McDonald told Shore to leave, and he used a cellular phone and called a man and said "I have it", and then in an irate voice repeated "Yes, I have it" (T:1572). The two men then told Shore to go to another hotel to meet their friend so they could give him the piece of paper (T:1573).

After arriving at the Days Inn, the two men told her they were waiting for a friend to give him the piece of paper (T38-1579). While in the hotel, neither Appellant GORDON nor anyone else took a shower (T:1633).

Appellant GORDON told Co-Defendant McDonald "I'm still not happy", and he (McDonald) replied "Don't worry, I still have the Rolex", and showed it to Appellant GORDON (although this was not a real Rolex, and the watch of the victim was never found) (T:1590,1630). That Co-Defendant McDonald had the piece of paper and knew about the Rolex and came back to their car on the day of the murder after Appellant GORDON, shows Appellant GORDON was not knowledgeable about what happened with the victim.

There came a time when the other man (Cisneros) arrived, left, and came back (T:1582,1585).

The above facts are just as consistent with a burglary or a robbery (as opposed to the charged murder), even though $19,300.00 in cash (T:470) and credit cards (T:658) were left in the apartment. There was a lot of circumstantial evidence that allegedly showed the movement of Appellant GORDON and Co-Defendant McDonald before and after the murder. However, the evidence is just as consistent that the "mystery man" at the stairwell to the victim's apartment (T:1566) committed the murder by himself, after Co-Defendant McDonald and/or Appellant GORDON had left the general area.

That the FBI fiber expert did not find any of the victim's (1) hair (T:1263), (2) apartment carpet fibers, (3) clothes fibers

from the cashmere belt and pajamas (T:1291), or (4) blood, on Appellant GORDON, points to the fact that Appellant GORDON was not present at the apartment. No fingerprints of Appellant GORDON were found in the victim's apartment, either (T:843). Based on this, the record does not even sustain a robbery or burglary charge.

The medical examiner also stated that there was a violent struggle in the victim's apartment, which knocked over the commode. The more violent the struggle, the greater the chance for an exchange of hair, fiber, blood, or other items between the attacker and the victim.

Contrast this to the physical state of Appellant GORDON, where he was not perspiring, had no blood or other stains of any kind on his clothes (T:1628), and did not have any water on any part of his body or clothes. That Appellant GORDON did not have any water on his clothes or shoes, or blood on any part of his person (shoes included) is strong evidence showing he was never in the apartment.

III. THE TRIAL COURT ERRED IN DENYING APPELLANT GORDON's REQUEST FOR A SEPARATE PENALTY PHASE JURY FROM HIS CO-DEFENDANT, AND A NEW PENALTY PHASE JURY

The guilt phase of this trial ended on June 15, 1995 (verdict returned at 7:30 P.M.), with the jury finding both Appellant GORDON and Co-Defendant McDonald guilty of First Degree Murder (T:2224). The trial court conducted the penalty phase the next

morning.

Defense counsel requested a separate penalty phase jury, and also that there be a separate penalty phase jury for each defendant (T:2755, R:2461,2462). The trial court denied this request (T:2758).

Because the special verdict form which the defense requested in the guilt phase was not given, Appellant GORDON and Co-Defendant McDonald did not know on which theory put to the jury by the State they had been convicted (premeditated murder or felony murder during a burglary or robbery). As a result, they had to go forward a "second" time (e.g. the penalty phase) and make arguments to the jury not knowing which aggravators and/or mitigators or role to emphasize to the jury based on its prior guilty verdict. They then had to go forward a "third" time and get sentenced, not knowing then (or now) exactly what theory on which they were convicted.

IV. THE TRIAL COURT ERRED IN SENTENCING APPELLANT GORDON TO DEATH AND NOT FOLLOWING THE DOCTRINE OF PROPORTIONALITY

Appellant GORDON was indicted for first degree murder along with 4 others: (1) Denise Davidson, the victim's wife, originator of the scheme along with (2) Leo Cisneros, Ms. Davidson's fiance' at the time of the murder, a planner and possible perpetrator of the actual killing, (3) Co-Defendant McDonald, and (4) Susan Shore, who had her charges reduced to accessory after the fact

(R32).

Co-Defendant Denise Davidson got a separate trial, and was convicted and sentenced after the instant trial (T:2489). As a result, Appellant GORDON's jury at the penalty phase was not made aware of the fact that Co-Defendant Davidson got a life sentence (T:2802). This fact could potentially have had a dramatic affect on a recommendation by the penalty phase jury on Appellant GORDON. This was evidenced by a statement by Venireman Richey, who expressed a sentiment commonly held by many. He expressed his strong belief that the victim's wife (e.g. Co-Defendant Davidson) wanted the victim killed (T:95 et seq.). As a result, the fact that the wife got a life sentence is a strong mitigator for Appellant GORDON.

Even though the trial court did delay Appellant GORDON's sentencing until after said sentence of Co-Defendant Davidson so that the trial court could consider said sentence, this had no impact on the recommendation of the penalty phase jury. Only 3 more jurors needed to have recommended life, for there to have been the 6 - 6 split that would have been a "life" recommendation.

The trial court stated it would have let Appellant GORDON's attorney argue Co-Defendant Davidson's life sentence if she had been sentenced before Appellant GORDON's sentencing hearing (T:2843). Appellant GORDON only asks for this opportunity now.

Co-Defendant Cisneros is still a fugitive (T:1846), and naturally has not yet been tried, convicted, or sentenced (a lot of the State's case is specifically against him); Co-Defendant

Susan Shore received a sentence of probation, and was deported back to England (T:2825). All the other co-defendants already sentenced got a life sentence, except for Appellant GORDON and Co-Defendant McDonald.

In Scott v. Dugger, 604 So.2d 465 (Fla. 1992) this Court held that it was proper for it to consider the propriety of disparate sentences to determine whether the death sentence is appropriate given the conduct of all participants in committing the crime. Appellant GORDON asserts that similarly, this Court can consider the disparate sentence given to Co-Defendant Davidson (life) (T:2804) after his penalty phase jury had recommended death for him. In Scott, the co-defendant's life sentence was imposed after this Court had affirmed the defendant's death sentence, and it constituted "newly discovered evidence" for which post-conviction relief could be afforded. Appellant GORDON similarly wants the benefit of this "new evidence" (life sentence) of his co-defendant.

In Scott, supra, this Court held that the defendant and co-defendant had similar criminal records, were about the same age, had comparable low IQ's and were equally culpable participants in the crime.

Similarly, in the instant case, the vast majority of these characteristics are the same between Co-Defendant Davidson and Appellant GORDON. Appellant GORDON concedes that there is case law that says that a planner of a murder can get less of a sentence than the person that actually carries it out. However,

here the evidence against Appellant GORDON & Co-Defendant Davidson is about the same; at most they were planning some act, whether it be a burglary, robbery or murder. No evidence was shown that Appellant GORDON actually did any of the physical acts necessary to kill the victim. To come to such a conclusion requires rank speculation that falls far short of beyond a reasonable doubt.

V. THE TRIAL COURT ERRED BY FINDING THAT APPELLANT GORDON ACTED IN A COLD, CALCULATED AND PREMEDITATED MANNER, AND THAT THIS MURDER WAS HEINOUS, ATROCIOUS AND CRUEL

> Aggravators must be proven beyond a reasonable doubt. [An] aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. Zant v. Stephens, 462 U.S. 862,877 (1983).

The evidence did not show that Appellant GORDON acted in a premeditated manner.

At Appellant GORDON's sentencing hearing (T:2849), the court below entered a 12-page Order sentencing Appellant GORDON to death (T:2849) based upon inter alia its finding that he acted in a cold, calculated and premeditated manner, and the murder was heinous, atrocious and cruel (R:2526). Appellant GORDON asserts that this finding is not supported by the facts.

In Bedford v. State, 589 So.2d 245 (Fla. 1991), this Court held that although premeditation may be proved by circumstantial evidence, where the State seeks to prove premeditation by

circumstantial evidence the evidence must be inconsistent with any reasonable hypothesis of innocence. The record in the instant case shows that all the alleged planning done by Appellant GORDON is reasonably consistent with him planning a burglary or robbery and not a murder.

In Cox v. State, 555 So.2d 352 (Fla. 1989), this Court set out the standards to be used in a circumstantial case, and reversed the first degree murder conviction and death sentence due to insufficient circumstantial evidence. This same result should lie here based in part on the following facts.

Co-Defendant Shore testified that Appellant GORDON took nothing with him as he left her (T:1644), when he left her car the morning of the murder. The evidence showed that the victim was bound, gagged (T:449), and struck with items that were found in the victim's apartment. These facts show the lack of evidence that Appellant GORDON had a premeditated intent to kill.

The cold, calculated and premeditated aggravating circumstance focuses more on the perpetrator's state of mind than on the method of killing. Johnson v. State, 465 So.2d 499 (Fla. 1985), Hill v. State, 422 So.2d 816 (Fla. 1982). The evidence in the instant case regarding Appellant GORDON's state of mind, is more consistent with a burglary than a murder.

Further, because there was no evidence that linked Appellant GORDON to the actual killing, he cannot be held vicariously responsible for the manner in which it was carried out. See Omelus v. State, 584 So.2d 563 (Fla. 1991) and Archer v. State,

613 So.2d 446 Fla. 1993).

The instant murder was not heinous, atrocious, or cruel

What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim. No evidence adduced by the State places Appellant GORDON in the victim's apartment or in physical contact with the victim. State v. Dixon, 283 So.2d (Fla. 1973). However, the medical examiner here testified that the victim may have been rendered unconscious after the first blow and when put in the bathtub (T:575), the head blows alone did not kill him (T:567), drowning was the cause of death (T:574), and there was no evidence to show he was held down in the water (T:583). The trial court even said this is not as gruesome as some she's seen (T:516).

These factors take this murder out of the realm of heinous. The evidence disproved that it was committed so as to cause the victim unnecessary and prolonged suffering. See Gorham v. State, 454 So.2d 556,559 (Fla. 1984). Therefore, this aggravator should not apply to Appellant GORDON.

CONCLUSION

For the reasons outlined above, Appellant GORDON states that this Court should reverse the trial court's decision and either a) enter an Order of Acquittal; b) grant a new trial; c) vacate the

death sentence and remand with instructions to impose a life sentence, or d) grant a new penalty phase hearing.

Respectfully submitted,

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By: Michael Hursey
MICHAEL HURSEY
Florida Bar No. 457698

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was provided by U.S. Mail to Candace Sabella, Esq., Department of Legal Affairs, 2002 North Lois Avenue, Suite 700, Tampa, Florida 33607 and Robert Gordon, Union Correctional Institution, Raiford, Florida this 18th day of November, 1996.

Michael Hursey
MICHAEL HURSEY

APPENDIX B

Florida Supreme Court Docket

Case Docket

Case Number: SC03-648 - Closed

MERYL S. MCDONALD vs. STATE OF FLORIDA

Lower Tribunal Case(s):CRC94-2958CFANO-B

2/26/2019 5:39:01 PM

Doc.	Date Docketed	Description	Filed by	Notes
	03/31/2003	**NOTICE-APPEAL (3.850-EVIDENTIARY HEARING)	Meryl S. Mcdonald BY:	WITH ATTACHMENTS
	03/31/2003	LETTER	DM Meryl S. Mcdonald 180399 BY: DM Meryl S. Mcdonald 180399	(PRO SE) W/COPIES OF NOTICE OF APPEAL, ETC.
	04/03/2003	ORDER-DISTRICT COURT OF APPEAL		DATED 04/01/2003 TSFR APPEAL TO FSC W/COPIES OF NOTICE OF APPEAL, ETC.
	04/22/2003	No Fee Required		3.850 PROCEEDING
	04/30/2003	ORDER-RECORD FILING (HEARINGS/TRIAL)		TR: 06/09/2003; ROA: 06/30/2003; EXH: 12/01/2003 (IF ANY)
	05/21/2003	ORDER-RELINQUISHMENT (MISC)		Appellant Meryl S. McDonald has filed pro se in this case a notice of appeal, which appeals an order denying a postconviction motion for relief. Appellant cannot proceed without counsel in this proceeding in this Court. We therefore relinquish jurisdiction to the Circuit Court of the Sixth Judicial Circuit in and for Pinellas County, Florida, and direct that the circuit court, within thirty (30) days of the date of this order, appoint counsel to represent appellant in the appeal in this Court. Within ten (10) days of the date of the circuit court order appointing counsel, appellant's appointed counsel shall file a notice of appearance in this Court, at which time this Court will set a briefing schedule for briefs which are to be filed by counsel on behalf of appellant.
	06/09/2003	ORDER-CIRCUIT COURT		APPOINTING PUBLIC DEFENDER DATED 06/02/2003
	06/12/2003	NOTICE-APPEARANCE	DM Meryl S. Mcdonald 180399 BY: WD Ronald Jon Eide 216607	FILED AS PUBLIC DEFENDER RESPONSE TO ORDER OF 05/21/2003.
	06/12/2003	MOTION-REHEARING ON MISC ORDER		(PRO SE) RE: ORDERS DATED 04/30/2003 & 05/21/2003. - (SEE ORDER DATED 06/24/2003)
	06/23/2003	RECORD/TRANSCRIPT	Hon. Karleen F. Deblaker, Clerk BY: Hon. Karleen F. Deblaker, Clerk	VOLUMES 1 - 21; TRANSCRIPTS VOLS 14 - 21 (1 BOX); 06/30/2003: DISKS FILED
	06/24/2003	ORDER-RESPONSE/REPLY REQUESTED		TO PRO SE MOT/REHEARING FILED 06/12/2003
	06/25/2003	ORDER-DEP BRIEF SCHED (100)		120-90-60 (L: 100-100-25)
	06/30/2003	LETTER	Kanabay & Kanabay Reporting PINELLA BY: Kanabay & Kanabay Reporting PINELLA	W/DISKS FOR 11/29-30/2001 & 07/25/2001 HEARINGS
	07/02/2003	DESIGNATION-PUBLIC DEFENDER		10TH JUDICIAL CIRCUIT FOR HANDLING OF APPEAL
	07/02/2003	MAIL RETURNED		DM Meryl S. Mcdonald 180399 BY: AA Ronald J. Eide 0216607 - 06/24/2003 ORDER; 07/02/2003: RE-MAILED TO CORRECT STREET ADDRESS
	07/03/2003	RESPONSE	AE State Of Florida STATE1 BY: AE Kimberly Nolen Hopkins 986682	TO PRO SE MOT/REHEARING (O&7 W/DISK)
	07/03/2003	MOTION-COUNS WITHDRAWAL BASED ON CONFLICT	DM Meryl S. Mcdonald 180399 BY: WD Deborah Kucer Brueckheimer 278734	AND NO RESPONSIBLITY UNDER CH. 27
	08/26/2003	ORDER-STRIKE		Meryl S. McDonald's motion for rehearing to reconsider this Court's Orders dated April 30, 2003, and May 21, 2003, is hereby stricken.

	08/26/2003	ORDER-COUNS WITHDRAWAL BASED ON CONFLICT DY		The Motion to Withdraw as Appellate Counsel Due to Conflict and No Responsibility Under Ch. 27 filed in the above cause by Deborah K. Brueckheimer is denied without prejudice to file in the trial court.
	09/24/2003	ORDER-CIRCUIT COURT		DATED 9/18/2003, APPOINTING CCRC-MIDDLE TO REPRESENT DEFENDANT FOR PURPOSES OF COLLATERAL APPEAL
	11/19/2003	EXHIBITS	Hon. Karleen F. Deblaker, Clerk BY: Hon. Karleen F. Deblaker, Clerk	1 VOLUME; 03/11/2005: RETN'D TO CIRC CT FOR COPIES TO COUNSEL; 04/11/2005: EXHIBITS RETURNED FROM CIRC CT (1 VOLUME)
	12/22/2003	MOTION-EXT OF TIME (INITIAL BRIEF-MERITS)	DM Meryl S. Mcdonald 180399 BY: AA Daphney Elaine Gaylord 136298	
	02/04/2004	LETTER		(PRO SE) STATUS OF INITIAL BRIEF; 02/11/04: ADVISED WHEN BRF IS DUE & MOT-EXT OF TIME FILED.
	03/29/2004	ORDER-EXT OF TIME GR (INITIAL BRIEF-MERITS)		
	04/19/2004	MOTION-COUNS WITHDRAWAL BASED ON CONFLICT	DM Meryl S. Mcdonald 180399 BY: DM Meryl S. Mcdonald 180399	(PRO SE); SEE ORDER DATED 05/03/2004, REQUESTING RESPONSES.
	04/21/2004	INITIAL BRIEF-MERITS		(PRO SE) ORIGINAL ONLY/NO DISK (BRIEF EXCEEDS PAGE LIMIT)
	04/30/2004	INITIAL BRIEF-MERITS	DM Meryl S. Mcdonald 180399 BY: AA Daphney Elaine Gaylord 136298	O&7 W/DISK (ORAL ARGUMENT REQUESTED IN BRIEF)
	05/03/2004	ORDER-RESPONSE/REPLY REQUESTED		Appellant, Pro Se, has filed a Motion to Discharge Appointed Counsel Because of an Irreconcilable Conflict, and Failure to Act as Appellant's Legal Agent During Postconviction Appeal Proceedings. Counsel for the parties are hereby requested to serve responses to the above-referenced motion on or before May 18, 2004.
	05/03/2004	ORDER-STRIKE		Appellant's pro se initial brief and index of exhibits filed with this Court on April 21, 2004, is hereby stricken without prejudice to refile if Court grants pro se motion to discharge counsel filed with this Court on April 19, 2004.
	05/03/2004	MOTION-RECORD SUPPLEMENTATION	DM Meryl S. Mcdonald 180399 BY: AA Peter James Cannon 109710	05/19/2004: AMD MOTION FILED
	05/07/2004	LETTER		(PRO SE) W/COPY OF LETTER SENT TO HIS COUNSEL REQUESTING COPY OF INITIAL BRIEF
	05/10/2004	RESPONSE	AE State Of Florida STATE1 BY: AE Kimberly Nolen Hopkins 986682	TO PRO SE MOTION TO DISCHARGE APPOINTED COUNSEL/MOTION TO STRIKE INITIAL BRIEF - (O&7 W/DISK)
	05/10/2004	MOTION-STRIKE	AE State Of Florida STATE1 BY: AE Kimberly Nolen Hopkins 986682	INITIAL BRIEF FILED BY ATTORNEY CANNON; 07/12/2004: PRO SE MOT/STRIKE CCRC'S INITIAL BRIEF.
	05/19/2004	RESPONSE	DM Meryl S. Mcdonald 180399 BY: AA Peter James Cannon 109710	MOTION TO DISCHARGE APPOINTED COUNSEL
	05/24/2004	REPLY TO RESPONSE	DM Meryl S. Mcdonald 180399 BY: DM Meryl S. Mcdonald 180399	(PRO SE) TO PRO SE MOTION TO DISCHARGE APPOINTED COUNSEL/MOTION TO STRIKE INITIAL BRIEF
	05/28/2004	REPLY TO RESPONSE	DM Meryl S. Mcdonald 180399 BY: DM Meryl S. Mcdonald 180399	(PRO SE) TO MR. CANNON'S RESPONSE TO PRO SE MOTION TO DISCHARGE APPOINTED COUNSEL; 08/19/2004: (PRO SE) 2ND REPLY TO RESPONSE.
	06/17/2004	MOTION-TOLL TIME	AE State Of Florida STATE1 BY: AE Kimberly Nolen Hopkins 986682	FOR FILING ANSWER BRIEF
	06/24/2004	ORDER-TOLLING GR		

				Appellee/Respondent's motion to toll time for filing answer brief and response to petition for writ of habeas corpus is granted and the time for filing said answer brief and response is tolled pending disposition of the pro se motion to discharge appointed counsel filed in the Court on April 19, 2004, appellee's motion to strike initial brief filed in this Court on May 10, 2004, and appellant's motion to supplement the record filed in this Court on May 19, 2004.
	07/21/2004	NOTICE-APPEARANCE	AE State Of Florida STATE1 BY: AE Katherine Vickers Blanco 327832	BY KATHERINE V. BLANCO AS COUNSEL FOR THE STATE OF FLORIDA
	01/21/2005	MOTION-RECORD SUPPLEMENTATION	AE State Of Florida STATE1 BY: AE Katherine Vickers Blanco 327832	FILED AS "MOTION TO REQUIRE COMPLETION OF THE RECORD (O&7)
	03/10/2005	ORDER-COUNS WITHDRAWAL BASED ON CONFLICT DY		Appellant's Pro Se Motion to Discharge Appointed Counsel Because of an Irreconcilable Conflict, and Failure to Act as Appellant's Legal Agent During Postconviction Appeal Proceedings is hereby denied without prejudice.
	03/10/2005	ORDER-BRIEF STRICKEN (NON-COMPLIANCE)		Upon consideration of Appellee's Response to Pro Se Motion to Discharge Appointed Counsel/Motion to Strike Initial Brief, it is ordered that the Motion to Strike Initial Brief is granted and appellant's initial brief on the merits, which was filed with this Court on April 30, 2004, does not comply with Florida Rule of Appellate Procedure 9.210(b) and is hereby stricken. Appellant is hereby directed, on or before April 11, 2005, to serve an original and seven (7) copies of an amended initial brief which complies with said rule and issues presented in the Motion to Strike Initial Brief.
	03/10/2005	ORDER-RECORD SUPPLEMENTATION GR (CIRC CT)		Appellant's Amended Motion to Supplement the Record and Motion to Require Completion of the Record are granted. The court reporters are directed, on or before March 3, 2005, to file with the trial court clerk the transcripts (along with diskettes) for the hearings held January 30, 2001, April 19, 2001, and July 25, 2001. Counsel for appellant is directed to deliver a copy of this order to all court reporters involved in the transcription of the above dates and to take whatever steps are necessary to ensure that the transcripts are filed within the time period designated. The trial court clerk is directed, on or before March 14, 2005, to supplement the record with the above items. The trial court clerk is further directed to supplement the record and provide counsel for the parties and this Court with a complete copy of all copyable exhibits introduced during the lower court proceedings as requested in said motion (copy attached). The exhibits filed in this Court on November 19, 2003, are returned herewith to the Clerk of the Circuit Court of the Sixth Judicial Circuit in and for Pinellas County, Florida, to enable the trial court clerk to comply with this Court's order. The copies provided to counsel for the parties and to this Court shall be properly bound, indexed and paginated pursuant to Florida Rule of Appellate Procedure 9.200(d). The trial court clerk is further directed to return all original exhibits to this Court.
	03/11/2005	EXHIBITS RETURNED		(1 VOLUME) TO CIRC CT TO COPY ALL COPYABLE EXHIBITS TO COUNSEL
	03/23/2005	SUPP RECORD/TRANSCRIPT	Hon. Karleen F. Deblaker, Clerk BY: Hon. Karleen F. Deblaker, Clerk	VOLUME 1 (CONSISTING OF TRANSCRIPTS ONLY)
	04/11/2005	SUPP RECORD/TRANSCRIPT	Ken Burke PINELLA BY: Ken Burke PINELLA	1 VOLUME EXHIBITS (COPIES)
	04/11/2005	MOTION-COUNS WITHDRAWAL BASED ON CONFLICT		(PRO SE)

			DM Meryl S. Mcdonald 180399 BY: DM Meryl S. Mcdonald 180399	
	04/12/2005	EXHIBITS	Hon. Karleen F. Deblaker, Clerk BY: Hon. Karleen F. Deblaker, Clerk	1 VOLUME (ORIGINALS)
	04/18/2005	INITIAL AMD BRIEF-MERITS	DM Meryl S. Mcdonald 180399 BY: AA Peter James Cannon 109710	O&7 & E-MAIL
	04/18/2005	MOTION-ACCEPTANCE AS TIMELY FILED (BRIEF)	DM Meryl S. Mcdonald 180399 BY: AA Peter James Cannon 109710	Appellant's Motion to Accept Out of Time Brief is hereby denied as moot.
	04/19/2005	MOTION-STRIKE	AE State Of Florida STATE1 BY: AE Katherine Vickers Blanco 327832	AMENDED BRIEF OF APPELLANT
	05/09/2005	MOTION-STRIKE	DM Meryl S. Mcdonald 180399 BY: DM Meryl S. Mcdonald 180399	(PRO SE) CCRC'S AMENDED INITIAL BRIEF - Appellant's Pro Se Motion to Strike CCRC'S Amended Initial Brief is hereby denied.
	05/27/2005	ORDER-COUNS WITHDRAWAL BASED ON CONFLICT DY		Appellant's Second Pro Se Motion to Discharge Appointed Appellate Postconviction Counsel is denied without prejudice to file in the trial court.
	06/22/2005	ORDER-BRIEF STRICKEN (NON-COMPLIANCE)		Appellee's Motion to Strike Amended Brief of Appellant is hereby granted with leave to file a second amended brief within thirty (30) days. Counsel is cautioned that continued failure to file an adequate brief in conformance with appellate rules may result in sanctions or removal from the case. Appellant's amended brief, which was filed with this Court on April 18, 2005, does not comply with Florida Rules of Appellate Procedure 9.210(b)(3)-(4) and is hereby stricken. Appellant is hereby directed, on or before July 22, 2005, to serve an original and seven (7) copies of an amended initial brief which complies with said rules and issues presented in the Motion to Strike Amended Brief. Per this Court's Administrative Order In Re: Mandatory Submission of Electronic Copies of Documents AOSC04-84 dated September 13, 2004, counsel are directed to include a copy of all briefs in an electronic format as required by the provisions of that order. Appellant's Pro Se Motion to Strike CCRC'S Amended Initial Brief is hereby denied. Appellant's Motion to Accept Out of Time Brief is hereby denied as moot.
	07/08/2005	NOTICE	DM Meryl S. Mcdonald 180399 BY: DM Meryl S. Mcdonald 180399	(PRO SE) OF OBJECTION TO COURT ORDER DATED 06/22/2005.
	07/11/2005	ORDER-CIRCUIT COURT		ORDER TO STATE SETTING A HEARING ON DEFENDANT'S AMENDED MOTION TO DISCHARGE APPOINTED APPELLATE POSTCONVICTION COUNSEL AND FOR SELF-REPRESENTATION (DATED07/05/2005, BY JUDGE SUSAN F. SCHAEFFER)
	07/25/2005	INITIAL AMD BRIEF-MERITS	DM Meryl S. Mcdonald 180399 BY: AA Peter James Cannon 109710	(2nd) O&7 & E-MAIL (SEE 08/31/2005, ORDER)
	08/08/2005	MOTION-STRIKE	DM Meryl S. Mcdonald 180399 BY: DM Meryl S. Mcdonald 180399	(PRO SE) CCRC'S SECOND AMENDED BRIEF AND MOTION TO ACCEPT PRO SE AMENDED INITIAL BRIEF AND APPELLANT'S INDEX OF EXHIBITS; 01/04/2006: COPY FILED
	08/31/2005	ORDER-STRIKE DY		The Motion to Strike CCRC's Second Amended Brief and Motion to Accept Pro Se Amended Initial Brief and Appellant's Index of Exhibits filed by Meryl S. McDonald is hereby denied. Appellant's Second Amended Brief was filed with this Court on July 25, 2005.
	09/19/2005	MOTION-REHEARING ON MISC ORDER		

			DM Meryl S. Mcdonald 180399 BY: DM Meryl S. Mcdonald 180399	
	10/26/2005	ANSWER BRIEF-MERITS	AE State Of Florida STATE1 BY: AE Katherine Vickers Blanco 327832	O&7 & E-MAIL
	11/07/2005	LETTER		(PRO SE) INQUIRING RE: DIRECTIONS TO CLERK & WHETHER THESE DOCUMENTS WERE INCLUDED IN THE RECORDL 11/08/2005: ADVISED FORWARDING LETTER TO HIS COUNSEL FOR REVIEW.
	11/18/2005	ORDER-OTHER SUBSTANTIVE DY		Appellant's Pro Se Motion for Rehearing on Order dated August 31, 2005, is hereby denied.
	03/03/2006	ORDER-OA SCHED		The above case is hereby scheduled for oral argument at 9:00 a.m., Wednesday, May 3, 2006. A maximum of twenty (20) minutes to the side is allowed, but counsel is expected to use only so much of that time as is necessary. NO CONTINUANCES WILL BE GRANTED EXCEPT UPON A SHOWING OF EXTREME HARDSHIP.
	03/03/2006	ORAL ARGUMENT CALENDAR		
	03/20/2006	MOTION-COUNS WITHDRAWAL BASED ON CONFLICT	DM Meryl S. Mcdonald 180399 BY: DM Meryl S. Mcdonald 180399	PRO SE (FILED AS "APPELLANT'S THIRD MOTION TO DISCHARGE CCRC-MR, AND MOTION FOR CONTINUANCE OF ORAL ARGUMENT".
	04/20/2006	MOTION-COUNS WITHDRAWAL BASED ON CONFLICT	DM Meryl S. Mcdonald 180399 BY: DM Meryl S. Mcdonald 180399	PRO SE (FILED AS "APPELLANT'S SECOND AMENDED MOTION TO DISCHARGE CCRC-MR, AND MOTION FOR CONTINUANCE OF ORAL ARGUMENT)
	05/03/2006	ORAL ARGUMENT HELD		
	05/04/2006	ORDER-COUNS WITHDRAWAL BASED ON CONFLICT DY		Appellant's Pro Se Motions to Discharge CCRC-MR, and Motion for Continuance of Oral Argument are denied.
	06/05/2006	LETTER		(PRO SE) DATED 06/01/2006
	09/29/2006	LETTER		(PRO SE) DATED 09/26/2006 RE: STATUS OF CASE
	11/02/2006	DISP-AFFIRMED		For the reasons discussed above, we affirm the circuit court's denial of postconviction relief and deny the petition for writ of habeas corpus.
	11/09/2006	NOTICE	AE State Of Florida STATE1 BY: AE Katherine Vickers Blanco 327832	OF SCRIVENER'S ERROR IN SLIP OPINION (O&7)
	11/16/2006	WEST CORRESPONDENCE		CORRECTED OPINION - On page 20, in the third line of the paragraph that begins on page 20, the clause "trial counsel was ineffective for requesting a Frye hearing on the bloodstain evidence" has been corrected to read "trial counsel was ineffective for not requesting a Frye hearing on the bloodstain evidence."
	11/20/2006	MOTION-REHEARING	DM Meryl S. Mcdonald 180399 BY: AA Peter James Cannon 109710	O&7 (FILED LATE) (RC)
	11/20/2006	MOTION-REHEARING	DM Meryl S. Mcdonald 180399 BY: DM Meryl S. Mcdonald 180399	(PRO SE) (STRICKEN)
	11/29/2006	MOTION-STRIKE	AE State Of Florida STATE1 BY: AE Katherine Vickers Blanco 327832	FILED AS "MOTION TO STRIKE PRO SE MOTION FOR REHEARING AS UNAUTHORIZED AND MOTION TO STRIKE CCRC'S MOTION FOR REHEARING AS UNTIMELY AND IN VIOLATION OF RULE 9.330" (O&7) (03/12/2007: GRANT MOT/STRIKE PRO SE REH; DENY MOT/STRIKE CCRC REH).
	11/29/2006	RESPONSE	DM Meryl S. Mcdonald 180399 BY: AA Peter James Cannon 109710	TO STATE'S MOTION TO STRIKE MOTION FOR REHEARING
	12/11/2006	RESPONSE		

			DM Meryl S. Mcdonald 180399 BY: DM Meryl S. Mcdonald 180399	(PRO SE) TO STATE'S MOTION TO STRIKE MOTION FOR REHEARING
	02/02/2007	LETTER		(PRO SE) DATED 01/29/2007 REQUESTING TO BE NOTIFIED UPON REH DISPOSITION AND MANDATE
	03/12/2007	DISP-REHEARING DY		Upon consideration of Appellee/Respondent's Motion to Strike Pro Se Motion for Rehearing as Unauthorized and Motion to Strike CCRC's Motion for Rehearing as Untimely and in Violation of Rule 9.330, it is ordered that the Motion to Strike Pro Se Motion for Rehearing as Unauthorized is granted and said pro se motion for rehearing filed with this Court on November 20, 2006, is hereby stricken. The Motion to Strike CCRC's Motion for Rehearing as Untimely and in Violation of Rule 9.330 is hereby denied. Appellant/Petitioner's Motion for Rehearing is hereby denied.
	03/28/2007	MANDATE		CC: PARTIES
	03/29/2007	EXHIBITS RETURNED		1 YELLOW ENVELOPE (ORIGINALS)
	06/12/2007	ARCHIVES		M/R Box 3032 (Add on M/R Box 3065, 3066 11/30/2007)

APPENDIX C

Filing # 12664958 Electronically Filed 04/18/2014 09:32:32 AM

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

v. **CASE NO.: CRC94-02958CFANO**
Death Penalty Case

MERYL MCDONALD,
Defendant.
_____/

RESPONSE TO MOTION FOR RECONSIDERATION OF CONDITIONAL APPOINTMENT BASED ON CERTIFICATION OF CONFLICT OF INTEREST

COMES NOW, the State of Florida, by and through the undersigned counsel, and requests this Court deny Defendant's motion to reconsider the appointment of counsel and appoint substitute counsel:

1. Capital Collateral Regional Counsel - Middle (CCRC-M) has been appointed to represent McDonald since his conviction became final in 1999. After McDonald's federal habeas petition and appeals were denied in February 2012, there have been occasions when he decided to pursue his own remedies with this Court and CCRC-M has acted as stand-by counsel. Yet, throughout those proceedings, either as stand-by counsel or as counsel of record on appeal, CCRC-M has remained capital collateral counsel for McDonald.

2. On December 26, 2013, McDonald filed another *pro se* successive postconviction motion in this Court. This Court

ordered a case management conference be held on February 3, 2014 and required CCRC-M to attend because CCRC had previously acted as stand-by counsel in McDonald's prior two *pro se* motions. This Court once again appointed CCRC-M as stand-by counsel for the pendency of the postconviction motion in this Court. After denying McDonald's successive postconviction motion, the Court appointed CCRC-M to represent McDonald on appeal on February 28, 2014.

3. In the April 3, 2014 motion filed by CCRC-M, they allege a conflict has recently developed between them and McDonald. At the hearing on April 10, it was further explained that the conflict involves ethical concerns about McDonald's candor with the court. The State requested an opportunity to file a written response, which this Court granted. The hearing on the motion to withdraw was continued until April 24.

4. In a case eerily similar to McDonald's, the Florida Supreme Court was concerned that death penalty defendants were attempting to "game the system" through requests to represent themselves or obtain counsel of their choosing. Lambrix v. State, 124 So. 3d 890 (Fla. 2013). Lambrix alleged his CCRC counsel failed to investigate newly discovered evidence and wanted new counsel appointed. Id. at 898. As Judge Helinger has previously done in McDonald's case, the judge in Lambrix's

case determined that CCRC was not ineffective and would not remove them from the case. Id. Lambrix then filed a civil complaint against his counsel in federal court, which caused his counsel to file a motion to withdraw due to a conflict of interest. Id. at 898-99. In response, Lambrix, as McDonald has done, filed a motion to represent himself. Id. at 899. The state circuit court denied Lambrix's motion to represent himself. Id.

5. The Florida Supreme Court affirmed the ruling denying Lambrix's request for self-representation. Lambrix, 124 So. 3d at 899. The court reviewed the constitutional right to represent oneself at trial and how that right ends when trial is over.[1] Id. The court recognized a right to self-determination for a defendant during postconviction but not to the same degree as at trial. Id. The right to self-representation is not limitless. Id. at 899-900. Courts must ensure that the death penalty is fair and reliable and administered responsibly. Id. Lambrix had already exhausted all of his legal remedies with his current counsel and having new counsel appointed would create unnecessary delays. Id. In addition, Lambrix's excessive, meritless pleadings were disruptive to the judicial system, and

[1] The United States Supreme Court outlined the trial right of self-representation in Faretta v. California, 422 U.S. 806 (1975).

with counsel appointed to represent him, all pleadings would presumably be made in good faith. Id.

6. As recognized in Lambrix, McDonald neither has the constitutional right to newly appointed counsel nor to represent himself. It does not matter if McDonald wants CCRC-M to file certain pleadings or disagrees with how CCRC-M has represented him; through McDonald's abuse of the judicial system and filing of multiple frivolous motions, he has forfeited any choice of self-representation over appointed counsel. Lambrix, 124 So. 3d at 900 ("[A] defendant does not have the right to disrupt the judicial system, frustrate the administration of justice, or prevent his or her case from being litigated.").

7. Under Florida's statutory scheme, McDonald does not receive appointed counsel of his choosing. Instead, he receives qualified counsel that allows the courts to administer justice in a timely manner. CCRC-M should remain counsel of record in this case. The appointment of capital postconviction counsel in this state comes from Florida Statutes, not the Florida or United States constitutions. Darling v. State, 45 So. 3d 444, 455 (Fla. 2010). Thus, the determination of whether CCRC-M may withdraw from this case can only be based on interpreting the statutory scheme for representation of death row inmates in chapter 27. See State v. Kilgore, 976 So. 2d 1066, 1968 (Fla.

2007). Florida Statutes require that CCRC-M remain counsel of record for McDonald unless an actual conflict of interest exists. See § 27.703(1), Fla. Stat. ("[T]he sentencing court shall, upon determining that an ***actual conflict*** exists, designate another regional counsel. ... A possible, speculative, or merely hypothetical conflict is insufficient to support an allegation that an actual conflict of interest exists.") (emphasis added).

8. A conflict of interest arises when a lawyer is forced to choose between alternative courses of actions because of competing interests, one of which does not involve his client. Kormondy v. State, 983 So. 2d 418, 434 (Fla. 2007). See also § 27.703, Fla. Stat. ("An actual conflict of interest exists when an attorney actively represents conflicting interests."). In criminal cases, alleged conflicts of interest most often arise when a defense attorney has represented two defendants or a defendant and a witness. See, e.g., Turner v. State, 340 So. 2d 132 (Fla. 2d DCA 1976). To show a conflict, a defendant must prove that another attorney, who does not have the same conflict, would have employed a different defense strategy. United States v. Mers, 701 F.2d 1321, 1328-30 (11th Cir. 1983). Conflicts of interest do not arise simply because a defendant and his counsel fail to establish a meaningful relationship.

Morris v. Slappy, 461 U.S. 1, 13-14 (1983). Contention between counsel and client, even rising to the filing of a bar complaint, does not create a conflict of interest. Hutchinson v. State, 17 So. 3d 696, 703-704 (Fla. 2009). Neither does a conflict of interest arise when a defendant requests counsel present false testimony and facts. Sanborn v. State, 474 So. 2d 309, 312 (Fla. 3d DCA 1985) (finding that there is no requirement for attorneys to "withdraw from a case whenever his client insists on presenting false testimony"). The reason for this is because the duty of loyalty to a client and the ethical duty of candor with the court do not create a conflict of interest. Nix v. Whiteside, 475 U.S. 157, 176 (1986).

9. In Whiteside, the Court outlined the duty an attorney has to disclose false evidence a client wants to present to a court. 475 U.S. at 168-70. Florida has the same ethical obligation. Rule 4-3.3(a) of the Rules of Professional Conduct states:

> A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer [or] (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client[.]

The rule also states that, "A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends

to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." R. Regulating Fla. Bar 4-3.3(b).[2] The comments to the rule tell attorneys that the proper course of conduct is to inform the court of the false information and allow the court to determine the appropriate action. In McDonald's case, this Court (the Sixth Judicial Circuit) has already denied his motion for postconviction relief and his motion for rehearing. No litigation is currently pending before this Court.

10. McDonald's counsel has provided general information that an alleged conflict of interest has arisen between CCRC-M and McDonald because McDonald either has or wants to present false information to the court. This does not provide a conflict of interest that permits CCRC-M to withdraw from representing McDonald. First, the tension between properly representing McDonald and the ethical duty to the court does not create a conflict of interest requiring CCRC-M to withdraw. Second, allowing CCRC-M to withdraw, in fact, frustrates the administration of justice by allowing McDonald to continue to act, without discretion. Without ethical counsel, as CCRC-M has

[2] Other rules that require an attorney to refrain from committing fraud or to report fraud include Rule 4-1.2(d), 4-1.6(b), 4-3.4(b), 4-8.4(b) and 4-8.4(c).

demonstrated, McDonald would be left, unchecked, to disrupt the judicial system. Third, appointing different counsel would not solve the problem before this Court. This Court would still be presented with an ethical disagreement concerning fraud between McDonald and his counsel which does not go away because CCRC-M withdraws from the case. Moreover, without the same knowledge of the case as CCRC-M has, new counsel may fail to recognize the false evidence. Thus, the granting of this motion to withdraw, in the end, results in condoning McDonald's fraud upon the Court. See Sanborn, 474 So. 2d at 314.

WHEREFORE, based on the foregoing, the State respectfully requests this Honorable Court deny Defendant's motion for reconsideration of appointment of CCRC-M for McDonald's appeal.

Respectfully Submitted,

PAMELA JO BONDI
ATTORNEY GENERAL
STATE OF FLORIDA

/s/ Sara Elizabeth Macks
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CO-COUNSEL, STATE OF FLORIDA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic service and U.S. mail to The Honorable J. Thomas McGrady, Chief Judge (**hskidmore@jud6.org**), Clearwater Criminal Justice Center, 14250 49th St. North, Clearwater, Florida 33762; and by electronic service to James V. Viggiano, Jr., CCRC, Office of the Capital Collateral Regional Counsel, Middle Region, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619-1136 (**viggiano@ccmr.state.fl.us** and **support@ccmr.state.fl.us**); and by U.S. mail to Meryl McDonald, DC #180399, Union Correctional Institution, 7819 N.W. 228th St., Raiford, Florida 32026-4450, on this 18th day of April, 2014.

/s/ Sara Elizabeth Macks
SARA ELIZABETH MACKS
CO-COUNSEL, STATE OF FLORIDA

cc: Damien Kraebel, Assistant State Attorney
dkraebel@co.pinellas.fl.us

APPENDIX D

Filing # 48705762 E-Filed 11/09/2016 02:42:33 PM

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-973

MERYL S. McDONALD,

Appellant,

v.

THE STATE OF FLORIDA

Appellee.

_____/

RESPONSE TO DEFENDANT'S MOTION TO DISCHARGE APPELLATE COUNSEL BECAUSE OF IRRECONCILABLE CONFLICT AND FAILURE TO ACT AS APPELLANT'S LEGAL AGENT AND FAILURE TO COMMUNICATE WITH APPELLANT AND MOTION TO APPOINT CONFLICT-FREE COUNSEL

The undersigned files this Response to Appellant McDonald's Motion to Discharge Appellate Counsel Because of Irreconcilable Conflict and Failure to Act as Appellant's Legal Agent and Failure to Communicate with Appellant and Motion to Appoint Conflict-Free Counsel, and states as follows;

1. Appellant McDonald was previously represented by Capital Collateral-Southern Region. The Office of Capital Collateral-Southern Region filed an initial brief, but Appellant McDonald moved this Court to discharge Capital Collateral-Southern Region and strike the initial brief based on almost identical grounds to the present motion. Thereafter, the undersigned was appointed as appellate counsel for Appellant Meryl S. McDonald in this cause and was charged with representing Appellant solely on his appeal from the summary denial of his second successive motion for post-conviction relief.

2. The undersigned proceeded to thoroughly review the record in this case, which consists of thousands of pages of documents and transcripts, and other items, contained in 22 boxes. The undersigned also reviewed the various court decisions involving Appellant's case, including *McDonald v. State*, 743 So.2d 501 (Fla. 1999), *McDonald v. State*, 952 So.2d 484 (Fla. 2006), *McDonald v. State*, 117 So.3d 412 (Fla. 2013) and *McDonald v. Florida*, Case No. 8:07-cv-564-T-26EAJ (Middle District of Florida), as well as previous briefs filed in his appellate cases.

3. Appellant McDonald filed the present motion prior to the filing of the initial brief. Appellant McDonald maintains that the undersigned was required to work as his agent and have him approve any brief filed in this cause. Appellant McDonald also asserts that the undersigned failed to adequately communicate with him and failed to raise specific matters in the initial brief.

4. Contrary to Appellant's claims, the undersigned carefully reviewed Appellant's communications concerning this case. In correspondence, Appellant outlined his view on the history of this case and potential arguments that could be advanced. The undersigned undertook a thorough review of the record in an effort to ascertain whether the record on appeal substantiated an appellate claim that the trial court erred in summarily denying Appellant's second successive motion for post-conviction relief. Appellant maintains that the documentation mentioned in his correspondence was "marginally part" of his circuit court claims. The undersigned exercised his professional opinion in the preparation of the initial brief in the instant appeal. The undersigned was governed by the record on appeal and could not raise nor argue matters which were not substantiated in regard to the trial court's order summarily denying the second successive motion for post-conviction relief. It is instructive to note that Appellant's prior counsel, Capital Collateral-Southern Region, reached the same conclusion as the undersigned when presenting an initial brief in this cause.

5. Appellant's charge that the undersigned failed to "investigate" the DNA, hair and fiber evidence appears to suggest that Appellant believes that the undersigned was appointed for circuit court proceedings, as opposed to an appellate case where the record on appeal had been completed. This misunderstanding is evident where Appellant asserts that the June, 1994 DNA report and the November, 2001, State Attorney letter "requires a full investigation." Appellant McDonald alludes to NACDL's letter concerning hair evidence, which was advanced as "substantive evidence" in the lower court. Appellant also points out that the DOJ/FBI letters "opens this case to full investigation and litigation," and that such litigation should be conducted "in any future proceeding." Appellant McDonald's continually alludes to the DOJ/FBI investigation in support of the instant appeal and notes that the circuit court "ignored" this matter. In reality, as noted in the initial brief, the circuit court pointed out that this information was not advanced as a claim or even as argument and, therefore, there was nothing for the court to adjudicate. The undersigned attempted to implement Appellant's reasonable requests for argument, but, as in the case of prior counsel, found that the record conclusively refuted the claims as alleged. Trial court counsel did not, as the circuit court noted, file any amendments to the second successive motion for post-conviction relief, nor present any pleadings or arguments regarding Agent Wong's July 28, 2014 letter or Agent Wong's November 10, 2015 letter. The record on appeal simply contained a Notice of Filing attaching a copy of the November 10, 2015 letter to co-defendant Gordon.

6. As noted in the initial brief, the matters raised in Agent Wong's letters were raised in the fourth successive motion for post-conviction relief. This motion is being held in abeyance pending the outcome of this appeal. Consequently, the issues are presently before the circuit court and will be ripe for evidentiary development and will allow, at the appropriate time and with an appropriate record, for a full and adequate appellate review on the merits of any issue or argument related thereto should the circuit court rule adversely to Appellant. As such, Appellant's desire to have "a full investigation" and to fully litigate in any "future proceeding," the matters so raised and argued will be realized.

7. Appellant asserts that there exists a conflict of interest because the undersigned has failed to act as his agent in this appeal. However, the presentation of issues on appeal are decisions within an appellate attorney's ambit. As previously noted, the undersigned did conscientiously review Appellant's correspondence and attempted to implement Appellant's reasonable requests for argument, but, as in the case of prior counsel, found that the record conclusively refuted the claims as alleged.

8. Appellant requests that the undersigned be discharged and that attorney Mark E. Olive be appointed to represent him in this cause. The undersigned expresses no opinion as to Mr. Olive, but submits that due to Appellant's belief that a conflict of interest exists with the undersigned, this Court should appoint separate counsel or remand this matter for appointment of separate counsel.

WHEREFORE, the Defendant submits this Response to Appellant McDonald's motion.

Respectfully submitted,

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s/ J. Rafael Rodríguez
J. RAFAEL RODRÍGUEZ, ESQ.
FLA BAR NO. 302007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed on November 9, 2016, and served on opposing counsel and Appellant Meryl S. McDonald, #180399, Union Correctional Institution, P.O. Box 1000, Raiford, FL 32083.

s/ J. Rafael Rodriguez
J. RAFAEL RODRÍGUEZ
FLA BAR NO. 302007