IN THE SUPREME COURT OF FLORIDA

ROBERT R. GORDON,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 86,955

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

The following is offered to supplement and/or clarify the statement of the case and facts recited by the appellant:

On January 25, 1994, Patricia Deninno saw her fiance, Dr. Louis Davidson, leave his job at Bayfront Medical Center around 9:00 a.m. (T. 418). When she was not able to reach Dr. Davidson by telephone throughout the day, Deninno became concerned and ultimately drove to his apartment in Thunderbay Apartments to check on him around 3 p.m. (T. 419-421). She found Dr. Davidson face-down in a bathtub full of bloody water, bound, gagged, and blindfolded (T. 422-23, 449). The apartment had been ransacked and there were signs of a violent struggle in the bathroom (T. 422, 449, 463, 541). The victim's watch, a camera, and a money clip with several hundred dollar bills were missing (T. 417, 433, 434, 471).

The associate medical examiner, Dr. Hansen, placed the time of Davidson's death between 7:38 a.m. and 12:38 p.m. on January 25th (T. 573-74). The cause of death was drowning (T. 570). Dr. Hansen observed multiple lacerations to the victim's scalp, which indicated that the victim had been struck at least eight or ten times about the head with a blunt object (T. 558, 564-65). The victim also had three broken ribs and an injury to his mouth consistent with a fall or a blow to the mouth, and several

contusions around his arms and shoulders (T. 554-57). A towel was wrapped around his neck; ligature marks and petechia in his eyes suggested that he had been strangled by the towel, but no signs of manual strangling were evident (T. 547, 552-53). He had been bound with a vacuum cleaner cord around his knees and gray electrical wire around his right wrist, which appeared to have slipped off his left wrist (T. 547). Both wrists were also bound with a belt from a coat found on Davidson's bed (T. 547, 550). Dr. Hansen surmised from the multiple bindings that he had been restrained but managed to free one wrist, and was then re-tied with the belt (T. 550).

The police investigation of Davidson's murder focused on the victim's wife, Denise Davidson, as she and the victim were engaged in a bitter divorce and custody battle (T. 402-08, 642-44, 660). Police surveillance of Denise Davidson led to discovery of 21 money transfers from Denise to the appellant and to codefendant Meryl McDonald's girlfriend both before and after the murder (T. 729-30, 734, 738, 744-47, 749-53, 760-70, 777-794; Ex. 51). Denise had also purchased and activated a cellular phone on December 17, 1993, which was in the possession of the appellant and McDonald (T. 686, 1841-42, 1861). Phone records were introduced into evidence establishing that the phone was used between December 27 and January 27, 1994 to call the victim's house 66 times (all hang-up calls); the Bayfront Medical Center eleven times; Denise Davidson's

home over 200 times; and Denise's place of employment, Dooley Groves, 86 times (T. 662-87, 1861-66, 1900-01; Ex. 27, 35, 165-169, 171). In addition, Denise's home telephone records indicated 232 calls were made from her house to a pager used by both defendants during January, 1994 (T. 669-70).

Patricia Vega testified that she accompanied the appellant and McDonald to the Tampa area in November or December of 1993 (T. 1436). McDonald had her dress in a nurse's outfit and she was told to claim she **was** 'Dr. Gordon's" nurse (T. 1436-37, 1440-43). The defendants asked if she knew where Thunderbay Apartments were located (T. 1443). Clyde Bethel testified that he was paid to drive the appellant and McDonald to the Tampa Bay **area** on January 8 and January 17, 1994 (T. 1341-84, 1357-64, 1382-84, 1395-96). Bethel stated that both defendants met with Denise's boyfriend, Leo Cisneros, on numerous occasions, and that they went to the shopping plaza where Denise worked (T. 1341-84, 1357-64, 1382-84, 1395-96). The defendants also went by Bayfront Medical Center, indicating they needed to visit the emergency room **area** (the victim worked in the pediatric emergency room, see T. 401, 411), and by Thunderbay Apartments (T. 1372-73). On January 18, the appellant and McDonald went by the Thunderbay rental office, posing as a father and son and wanting to see the largest two bedroom apartment - the same model as the victim's residence (T. 1300-13, 1317-21). Prior to

leaving the defendants were given a layout of the apartment complex and the model two bedroom apartment (T. 1312).

Susan Shore testified that she drove the appellant and McDonald to Tampa on January 24, 1994 (T. 1526-33). Shore took the defendants by Dooley Groves, where McDonald met with Denise Davidson and Leo Cisneros, and then to a hotel for the night (T. 1533-43). The appellant was agitated that McDonald did not get any money from Cisneros (T. 1540). Cisneros came by the hotel and McDonald and the appellant left with him (T. 1547-50). The next morning, they didn't have enough money for much breakfast (T. 1555). Shore was told they had to visit a friend at Thunderbay Apartments and to get a piece of paper from the friend (T. 1542, 1558). They arrived at Thunderbay about 8:30 or 9 a.m. and waited for the friend to arrive (T. 1559-66). McDonald went off jogging and Shore and the appellant milled around and played catch with a cricket ball she had in her car (T. 1562, 1565). Several neighbors noticed Shore and the appellant and were later able to identify them (T. 587-99, 621-25, 695-703, 722-23).

About thirty minutes later, the appellant indicated that the friend had arrived, and instructed Shore to wait in her car (T. 1565-66). He approached Dr. Davidson getting out of a red sports car and they walked away together (T. 1567-68). The appellant returned to Shore's car in about 20 or 25 minutes and got in the

back seat (T. 1569-70). About five or ten minutes later, McDonald came to the car and said he had the paper, then patted his stomach, which made a crinkling sound (T. 1571). Shore drove off and the appellant told McDonald to call Carlos (T. 1572). She was directed to a different hotel, and the appellant told her not to use her real name when she registered (T. 1573, 1575). McDonald gave her a hundred dollar bill to pay for the room (T. 1576).

Denise and Cisneros came by the hotel room and talked with the appellant and McDonald, but Shore did not hear the conversation (T. 1581-85). After they left, McDonald wanted to stick around but the appellant was agitated and wanted to leave; Shore also wanted to return to Miami, so they left (T. 1586-88). After they got back to Miami, McDonald gave Shore a hundred dollar bill and the appellant told her she would get more in a few days, but they never gave her more money (T. 1594-95). Shore saw the appellant and McDonald nearly every day, coming by a mutual friend's house to use the phone (T. 1596). One time they had Shore dial a number in Jamaica for them; McDonald took the phone, asked for Carlos, and said to tell him that Paul called (T. 1596-97). On another occasion, the defendants had Shore call long distance from a telephone booth and ask to speak to "Mrs. D," she was instructed to tell Mrs. D she was Paul's secretary, and that Paul wanted to know when he would get the rest of the money for the land in Jamaica (T. 1600).

Toward the end of February, 1994, the appellant called Shore repeatedly for two or three days telling her she needed to get out of town (T. 1604). He told her that Carlos would pay for her to stay at the Pegasus Motel in Kingston, Jamaica (T. 1609). He also said if the police asked her she was to deny having taken them to Tampa (T. 1605). Shore learned that law enforcement was looking for her and that there were others that wanted to kill her (T. 1603, 1610). When she asked the appellant why the police were looking for them, he told her that the doctor did not want them to take the piece of paper (T. 1605). She later learned that the doctor had been killed, and she was scared (T. 1606). She talked to an attorney but did not have money to pay her, so she went to Jamaica to try to mortgage some of her property there (T. 1606). She spoke with **a** friend of **a** friend in Jamaica, a policeman, and he told her she needed protection and took her into custody (T. 1612-14). They took a detailed statement from her, and the next day two detectives from FDLE arrived and took another statement (T. 1615). Assistant State Attorney Schaub **came** the next day and took another statement (T. 1615). She did not like Schaub but told him that she would cooperate and testify against the men that had gotten her into this ordeal (T. 1616). Shore acknowledged at the time of trial that she had been given the offer of entering a plea to accessory to murder on her first degree murder charge, but stated

that she had not decided whether to enter a plea, as she was innocent (T. 1618).

The appellant was convicted as charged. The trial judge followed the jury's recommendation and imposed a sentence of death, finding in aggravation that the murder was committed during the course of a felony; the murder was committed for pecuniary gain; the murder was especially heinous, atrocious or cruel; and the murder was committed in a cold, calculated and premeditated manner without any pretense of moral justification (R. 2531-35). The court rejected the statutory mitigating factors of age and that the appellant was a relatively minor actor in the murder and the nonstatutory mitigating factor of being a caring parent (R. 2539-41). The judge gave very little weight to the appellant's "totally unremarkable" family background and some weight to his religious devotion (R. 2540-41). She discussed extensively the mitigating circumstance of Denise Davidson's life sentence, concluding that it was entitled to a modest amount of weight (R. 2537-39, 2541-42).

SUMMARY OF THE ARGUMENT

I. The appellant's argument that he is entitled to a new trial due to the lack of African Americans on his jury venire is without merit. There is no constitutional requirement that a venire must include representatives from all distinct groups within a community; to the contrary, this Court and the United States Supreme Court have rejected this claim. Since the appellant has not proven or even alleged any systematic exclusion or purposeful discrimination in the selection of his petit jury or the venire from which it was drawn, he is not entitled to any relief on this issue.

II. The appellant's conviction is supported by substantial, competent evidence. The appellant's claim that physical evidence proves he **was** never in the victim's apartment is refuted by the record, since the state established that the appellant assisted in the conspiracy, preparation, and execution of this murder.

III. The appellant's argument for **a** separate penalty phase jury is not properly before this Court, since it was not presented to the trial court before the penalty phase was conducted. In addition, there is no authority which supports the appellant's claim that the trial court should have granted separate penalty phase juries for each defendant. In fact, this Court has rejected

the suggestion that a new penalty phase jury should be empaneled following a first degree murder conviction.

IV. The appellant's sentence of death was properly imposed in this case. The trial judge considered the fact that one defendant in this case received a life sentence, and it was not necessary for the jury to have the opportunity to consider this information.

V. The trial court properly applied the heinous, atrocious or cruel and cold, calculated and premeditated aggravating factors for this tortuous contract murder.

ARGUMENT'

ISSUE I

WHETHER THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO STRIKE JURY VENIRE.

The appellant initially challenges the trial court's ruling on his request for a new jury venire. When the appellant initially complained that there were no African Americans in the entire venire, the trial judge noted that the venire was selected randomly by computer (T. 28). The appellant now asserts that the alleged underrepresentation of blacks on his venire entitles him to a new trial. However, a review of the legal basis of his claim establishes that the appellant is not entitled to any relief.

This Court has previously rejected the appellant's claim. In Johnson v. State, 660 So. 2d 648, 661 (Fla. 1995), cert. denied, U.S. ___, 116 S. Ct. 1550, 134 L. Ed. 2d 653 (1996), this Court held that no error had been demonstrated although in four cases against Johnson, only two out of 160 venire members were black.

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[1]The appellant's argument begins with a footnote reciting the claims asserted in two motions for new trial filed below, one relating to the guilt phase and one relating to the penalty phase (Appellant's Initial Brief, p. 13). This Court should specifically find that issues presented in the motions which are not otherwise discussed in the appellant's brief are barred, since issues which are not briefed on appeal must be deemed waived. Duest v. Dugger, 555 So. 2d 849, 851-852 (Fla. 1990). Similarly, the appellant's attempt to adopt any non-adverse issues presented in the brief of his codefendant, Meryl McDonald, in a separate appeal is improper and should be stricken (Appellant's Initial Brief, p. Ii). Johnson v. State, 660 So. 2d 648, 653 (Fla. 1995), cert. denied, ___ U.S. , 116 S. Ct. 1550, 134 L. Ed. 2d 653 (1996).

Since the record reflected that the venire was randomly selected by computer, no discrimination was suggested. Similarly, in Valle v. State, 474 So. 2d 796, 799-800 (Fla. 1985), vacated on other grounds, 476 U.S. 1102, 106 S. Ct. 1943, 90 L. Ed. 2d 353 (1986), due process and equal protection claims were denied against an argument that women, blacks, and Latin Americans were substantially underrepresented on grand and petit jury venires. Valle reaffirmed language from State v. Silva, 259 So. 2d 153, 160 (Fla. 1972), that the fair cross section requirement did not mean "that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community," but only that "prospective jurors must be selected at random by the proper selecting officials without systematic and intentional exclusion of any of these groups." See also, Hendrix v. State, 637 So. 2d 916, 920 (Fla.), cert. , ___ U.S. , 115 S. Ct. 520, 130 L. Ed. 2d 425 (1994); Bryant v. State, 386 So. 2d 237, 239-240 (Fla. 1980).

The appellant acknowledges that he is not alleging systematic exclusion of blacks from Pinellas County juries, or that any discriminatory intent is to blame for the lack of African Americans in his venire (Appellant's Initial Brief, p. 17-18). Rather, he claims that due process requires the venire to be a true representative cross section of the community, placing an

affirmative duty on government officials to secure such representation. However, the only authorities cited for this affirmative duty rule are law review articles. Even if this Court believes that the law review articles cited by the appellant suggest reasonable and desirable policies, it is not the function of this Court to legislate how jury venires are to be selected.

Federal courts have consistently rejected the assertion that due process, or any other constitutional right, demands the result sought by the appellant. See, Taylor v. Louisiana, 419 U.S. 522, 538, 95 s. ct. 692, 42 L. Ed. 2d 690 (1975) ('It should also be emphasized that . . . we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition; but the jury wheels, pools of names, panels, or venires from which juries are drawn must not *systematically* exclude distinctive groups in the community and thereby fail to be reasonably representative thereof" [citations omitted; emphasis added]). In Swain v. Alabama, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965),[2] the Court noted that the Constitution does not entitle a defendant "to demand a proportionate number of his race on the jury which tries him nor on

[2]Swain was overruled in part on other grounds in Batson v Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

the venire or jury roll from which petit juries are drawn." 380 U.S. at 208. Furthermore, the Court rejected the argument that purposeful discrimination could be satisfactorily proved solely by underrepresentation, even by as much as 10%. Id., at 308-309.

In order to show a prima facie violation of the fair cross section requirement, a defendant must show (1) that the group alleged to be excluded is a distinctive group within the community; (2) that representation of this group in jury venires is not fair and reasonable in relation to the number of such persons in the community; and (3) that underrepresentation is due to systematic exclusion of the group in the jury selection process. Duren v. Missouri, 439 U.S. 357, 364, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979); United States v. Rodrisuez, 776 F.2d 1509, 1511 (11th Cir. 1985). As noted previously, the appellant in this case does not allege systematic exclusion, yet that is one of the elements of a prima facie case. The Constitution does not forbid underrepresentation of a distinct group in an individual case "due solely to chance or accident," as is clearly the case here. Rose v. Mitchell, 443 U.S. 545, 571, 99 S. Ct. 2993, 61 L. Ed. 2d 739 (1979).

In conclusion, the appellant's claim that a constitutional violation can be found based solely on underrepresentation in fact, without regard to systematic or purposeful exclusion, cannot be

sustained. The Constitution does not place any affirmative duty on jury selectors to ensure that jury venires are truly representative of the community; it only forbids intentional acts or procedures which result in distinctive groups being excluded from possible jury service. Since the appellant has not shown, and indeed declines to even allege, that systematic or discriminatory exclusion of blacks caused him to be tried by an all-white jury, he is not entitled to relief on this issue.

ISSUE II

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

The appellant also challenges the trial court's denial of his motion for judgment of acquittal, alleging that the evidence was insufficient to establish his involvement in the actual murder. Of course, a court should not grant a motion for judgment of acquittal unless there is no view of the evidence which the jury might take favorable to the opposite party that can be sustained under the law. DeAngelo v. State, 616 So. 2d 440, 441-442 (Fla. 1993); Taylor v. State, 583 So. 2d 323, 328 (Fla. 1991), cert. denied, ___ U.S. , 115 S. Ct. 518, 130 L. Ed. 2d 424 (1994); Lynch v. State, 293 so. 2d 44, 45 (Fla. 1974). In moving for judgment of acquittal, a defendant admits the facts in evidence as well as every conclusion favorable to the state that the jury might fairly and reasonably infer from the evidence. If there is room for a difference of opinion between reasonable people as to the proof or facts from which an ultimate fact is to be established, or where there is room for such differences on the inferences to be drawn from conceded facts, the court should submit the case to the jury. Lynch, Taylor.

While this Court has recognized that circumstantial evidence may be deemed insufficient where it is not inconsistent with a reasonable theory of defense, this Court has also recognized

repeatedly that the question of whether any such inconsistency exists is for the jury, and that a verdict which is supported by substantial, competent evidence will not be disturbed. Spencer v. State, 645 So. 2d 377, 380-381 (Fla. 1994); Cochran v. State, 547 So. 2d 928, 930 (Fla. 1989); Heiney v. State, 447 So. 2d 210, 212 (Fla.), cert. denied, 469 U.S. 920 (1984); Williams v. State, 437 so. 2d 133, 134 (Fla. 1983), cert. denied, 466 U.S. 909 (1984); Rose v. State, 425 So. 2d 521 (Fla. 1982), cert. denied, 461 U.S. 909 (1983). It is not this Court's function to retry a case or reweigh conflicting evidence; the concern on appeal is limited to whether the jury verdict is supported by substantial, competent evidence. Tibbs v. State, 397 So. 2d 1120 (Fla. 1981), aff'd., 457 U.S. 31, 102 S. Ct. 2211, 72 L. Ed. 2d 652 (1982). As will be seen, the state clearly presented substantial, competent evidence that the appellant participated in the preparation and commission of this murder, and therefore he is not entitled to any relief on this issue.

Direct evidence presented below established that the appellant and McDonald had been stalking the victim, calling him repeatedly at his home and his place of employment, only to hang-up (T. 410, 411, 662-87, 1861-66, 1900-01). The defendants had gone to the Tampa area on several occasions in order to scope out the victim's home and place of employment and to meet with Denise Davidson and Leo Cisneros (T. 1300-13, 1317-21, 1436-37, 1341-84). They went to

the victim's apartment during the time frame established for the murder in order to visit the victim and to get a piece of paper; they were in the apartment for approximately half an hour and when McDonald returned to Shore's car he indicated that he had the sought-after paper (T. 1542, 1558-66, 1569-71). They drove immediately to a hotel, registering under an alias, to change clothes and to meet once again with Denise and Cisneros (T. 1573-75, 1581-85). They had several hundred dollar bills and a watch, both of which were missing from the victim (T. 417, 433, 471, 1576, 1590). Scientific evidence tied McDonald to the victim and to the apartment (T. 468-69, 840-43, 1166, 1223-31, 1256-77). Both the appellant and McDonald received large sums of money from the victim's wife over an extended period of time before and after the murder (T. 729-730, 734, 738, 744-47, 749-53, 760-70, 777-94). Phone records established extensive contact between the appellant, McDonald, Denise and Cisneros both before and after the murder (T. 662-87, 962-1009, 1669-72, 1709-23, 1804-22, 1861-66, 1900-01). When the police investigation started to close in, the appellant told Shore repeatedly that she must leave town and, if questioned, deny that she took them to Tampa (T. 1603-05, 1609).

The appellant argues extensively that the physical evidence in this case 'proves" he was never in the victim's apartment. However, the lack of forensic evidence placing him at the scene is inconsequential. Crime scene technician David Kidd testified that

only one potentially usable fingerprint was lifted from the entire apartment (T. 498). He noted that the high humidity in the bathroom and the overflowing water would hamper the ability to retrieve scientific evidence at the scene (T. 498-499). Furthermore, the appellant was placed in the apartment by virtue of Susan Shore's testimony. The appellant told Shore that he was at Thunderbay to visit his "friend," Dr. Davidson; Shore placed him with Davidson at the time of the crime; and when Shore later asked the appellant why the police were looking for them, the appellant told her it was because "the doctor did not want him to take the piece of paper" (T. **1542, 1558, 1565-68, 1605).**

In conclusion, there was substantial, competent evidence presented below to support the first degree murder conviction in this case. Therefore, the appellant is not entitled to relief in this issue.

ISSUE III

WHETHER THE TRIAL COURT ERRED BY DENYING APPELLANT GORDON'S REQUEST FOR A SEPARATE PENALTY PHASE JURY FROM **HIS CO-DEFENDANT, AND A NEW PENALTY PHASE JURY.**

The appellant next claims that a new penalty phase trial is warranted because the court erred in rejecting his request for a separate penalty phase jury for each defendant. However, this argument has not been preserved for appellate review. The record herein contains no motion for a separate penalty phase jury and no ruling denying any such request. The appellant's brief cites to page 2758 of the record in asserting that the court 'denied" his request, but the judge clearly indicates in the transcript that she was not ruling on anything that had not previously been raised (R. 2754-55, 2758).

The part of the record noted is a transcript of the initial 'Spencer" hearing (Spencer v. State, 615 So. 2d 688 (Fla. 1993)), held on August 4, 1995, following the penalty phase of the trial. The jury recommendations of death had been returned on June 16, 1995 (R. 2402-03). At the August 4 hearing, the defense sought a ruling on a "Motion for New Trial - Penalty Phase" which stated that the court had erred in denying a motion for separate guilt and penalty phase juries (R. 2461-62). The judge noted that she did not recall any argument or ruling on having separate juries (R. 2752-55). Although counsel indicated at that time that the issue had been raised just prior to the penalty phase proceeding, a

review of the transcript of that proceeding does not support this assertion.[3] And even if the argument contained in the motion for new trial is considered to have sufficiently presented the issue, the basis of the request for a new jury in the motion -- that separate juries for each codefendant were necessary to insure individualized sentencing for both defendants -- is different from the contention urged in this appeal (separate juries were necessary due to the lack of a special guilt phase verdict form). Therefore, this Court cannot consider the new argument now asserted. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

Even if the appellant's argument is considered, no relief is warranted. The appellant has not cited any authority requiring separate penalty phase juries under these circumstances. In fact, this Court has expressly rejected the argument that separate juries should be empaneled for the guilt and penalty phases of a capital trial. Melton v. State, 638 So. 2d 927, 929 (Fla.), cert. denied, U.S. , 115 s. ct. 441, 130 L. Ed. 2d 352 (1994); Riley v. State, 366 So. 2d 19, 21 (Fla. 1978), cert. denied, 459 U.S. 981 (1982). No reasonable justification for reconsideration of this issue has been offered. Therefore, the appellant is not entitled to relief on this issue.

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[3]Although the transcript of the penalty phase proceeding is not currently included in the record on appeal, the undersigned has moved to supplement the record with the transcript.

ISSUE IV

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

The appellant next asserts that his sentencing was flawed by the fact that the recommending jury was never aware that one of his codefendants, Denise Davidson, was convicted and sentenced to life imprisonment following the appellant's trial. This Court has specifically rejected the claim that the penalty phase jury must have the opportunity to consider such evidence. In Gamble State, 659 So.2d 242 (Fla. 1995), cert. denied, ___ U.S. ___, 116 s. ct. 933, 133 L. Ed. 2d 860 (1996), Gamble and an accomplice, Michael Love, robbed and murdered their landlord by striking him several times in the head with a claw hammer and choking him with a cord. The jury found Gamble guilty of conspiracy to commit armed robbery, armed robbery, and murder in the first degree and recommended the death sentence by a ten-to-two vote. After Gamble's penalty phase, Love entered into an agreement with the state for a reduced sentence. In reference to the instant claim, this Court stated:

> Gamble asserts that his jury would have also recommended a life sentence if it had been informed of Love's sentence. Gamble proffers that this factor singlehandedly requires a sentence reduction. We disagree. Love's sentence was based on a guilty plea entered after Gamble's penalty phase proceedings. Clearly the Gamble trial judge was not required to postpone Gamble's sentencing and await Love's plea and sentence. We refuse to

> speculate as to what may have occurred had the Gamble jury been made aware of the posture of Love's case. We find no error relative to the issue.

Gamble, 659 So. 2d at 245.

The appellant's reliance on Scott v. Dugger, 604 So. 2d 465 (Fla. 1992), to demonstrate a lack of proportionality in the instant case is misplaced. First, in Scott, relief was granted based on newly discovered evidence because Scott's codefendant was sentenced to life in prison after this Court affirmed Scott's death sentence. In contrast, the appellant's sentence was imposed only after the court heard argument on the import of Davidson's life sentence. Therefore, Davidson's sentence cannot be considered newly discovered evidence as was the codefendant's sentence in Scott. See also, Steinhorst v. Singletary, 638 So. 2d 33, 35 (Fla. 1994).

Next, the codefendants in Scott were equally culpable participants. The evidence presented at trial shows that the instant case does not involve equally culpable participants. When codefendants are not equally culpable, the death sentence of the more culpable codefendant is not unequal justice when another codefendant receives a life sentence. Steinhorst, 638 So. 2d at 35, citing Garcia v. State, 492 So. 2d 360 (Fla.), cert. denied, 479 U.S. 1022 (1986).

The trial judge expressly considered the significance of the sentences received by the codefendants in this case, and her sentencing order thoroughly addresses the issue:

> 3) The sentence of a co-defendant to a sentence less than death. (Note: this mitigating factor was suggested in defendant's supplemental sentencing memorandum).
>
> If two co-defendants are equally culpable, and both have similar aggravating and mitigating circumstances, it would be a violation of the fourteenth amendment for one to live and one to die. Scott vs. Dugger, 604 So 2d 465 (Fla.1992). In this case, five persons were indicted for murder in the first degree. Defendants Gordon and McDonald, Denise Davidson, Leo Cisneros and Susan Shore. Leo Cisneros has not yet been captured. Susan Shore was a state's witness in both McDonald and Gordon's trial and in co-defendant Davidson's trial. The jury in Gordon and McDonald's trial knew Shore was going to be allowed to plead guilty to accessory after the fact and receive probation. Frankly, this court believes this is the most the state could prove against her. She was clearly a minor player, if she was a player at all. Denise Davidson was not a minor player nor is Leo Cisneros. However, there is one major distinction between Gordon and McDonald, and Davidson and Cisneros. Davidson and Cisneros did not kill Dr. Davidson. Gordon and McDonald did. Nor is there any evidence in the record that Davidson and Cisneros knew the victim would be killed in a heinous, atrocious, or cruel manner. Since this aggravating factor cannot be applied vicariously, it was not given to the jury to consider in Denise Davidson's trial. There is no reason to believe it will be given to the jury in Leo Cisneros' trial, if he is ever captured. It is unknown what other aggravating or mitigating factors will exist in the Cisneros trial, but a powerful statutory mitigating factor - no significant history or prior criminal activity - was given

> to the jury in Mrs. Davidson's trial and another one was given - that the defendant acted under extreme duress or under the substantial domination of another person - presumably Leo Cisneros. Mrs. Davidson's age **was** also argued. Several witnesses testified in her trial to non-statutory mitigation. Neither Mr. McDonald or Mr. Gordon asked for the powerful statutory mitigator of no substantial history of prior criminal activity. Additionally, the aggravating factor of a murder committed for pecuniary gain was not given to the jury at Mrs. Davidson's trial.
>
> Accordingly, Mrs. Davidson's jury had only two aggravating circumstances to consider and three statutory and many non-statutory mitigating circumstances to consider. It is not surprising that her jury, following the court's instructions, found the aggravating circumstances did not outweigh the mitigating circumstances. The judge was required by law to follow the Davidson's jury recommendation of life.
>
> The sentence given to Susan Shore is not mitigating since she was clearly not guilty of murder. It is not mitigating that one co-defendant, Leo Cisneros, has managed to avoid arrest to date. The life sentence given to Denise Davidson is mitigating since she is guilty of murder. However, in light of the vast differences in the aggravating and mitigating circumstances presented in her case as opposed to Mr. McDonald's,[4] it is entitled to only a modest amount of weight.

(R. 2537-39). The lower court's analysis was correct. This Court has repeatedly acknowledged that a death sentence may be imposed on the actual killer when a non-killing codefendant receives a life sentence. See, Bush v. Singletary, 21 Fla. L.

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[4]The court adopted the same conclusion with regard to Mr. Gordon (R. 2541-42).

Weekly S455 (Fla. October 16, 1996); Hannon v. State, 638 So. 2d 39, 44 (Fla. 1994), cert. denied, U.S. , 115 S. Ct. 1118, 130 L. Ed. 2d 1081 (1995); Colina v. State, 634 So. 2d 1077 (Fla.), cert. denied, ___ U.S. , 115 S. Ct. 330, 130 L. Ed. 2d 289 (1994); Mordenti v. State, 630 So. 2d 1080 (Fla.), cert. denied, U.S. , 114 S. Ct. 2726, 129 L. Ed. 2d 849 (1994).

As noted by Judge Schaeffer, Davidson's jury, unlike the appellant's, was not instructed on the pecuniary gain or the heinous, atrocious or cruel aggravators. Davidson, in addition to not being present at the scene of the murder, also presented substantially more evidence in mitigation, including no significant history of prior criminal activity, extreme duress or under the substantial domination of another person (Leo Cisneros), age, and several nonstatutory mitigators (R. 2538)

Where, as in the instant case, the basis for a death sentence is well supported by the record and is considerably more aggravated and less mitigated than the non-death sentenced co-defendant, the sentence is not disproportional and resentencing is not warranted. The court below found four aggravating circumstances: 1) during the commission of a burglary and/or robbery, 2) pecuniary gain (based on payment for contract killing), 3) heinous, atrocious or cruel, and 4) cold, calculated and premeditated. The court found no statutory mitigators and gave slight weight to nonstatutory mitigation, including the appellant's family background and

religious devotion, as well as Davidson's life sentence (R. 2526-43). Accordingly, the appellant's death sentence is not disproportional and the state urges this court to affirm the instant sentence.

ISSUE V

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

The appellant's final challenge concerns the trial court's findings of the aggravating factors of cold, calculated and premeditated, and heinous, atrocious or cruel. Once again, a review of the record clearly demonstrates that the appellant's argument is without merit, as both of these aggravating factors were proven beyond any reasonable doubt.

As to the cold, calculated and premeditated factor, the trial court found:

> This was a murder for hire. There is nothing to show either defendant knew the victim. They were paid to do a job. There was much planning that went into this killing. The defendants made numerous trips to check things out. They went to the doctor's place of work on at least one occasion. They went to the rental office at the condominium where Dr. Davidson lived and posed as father and son interested in buying a unit exactly the same as the doctor's, They asked for and received a layout of the unit and the entire complex. They had a sales agent show them a unit identical to the doctor's. A rental brochure was observed in the car on the morning of the murder while it was in the parking lot of the condominium. The defendants Gordon and McDonald had various meetings with the defendants Davidson and Cisneros. Special clothing was purchased for the murder. Numerous calls to the doctor's hospital and home were made which were traced to a phone in the possession of defendants McDonald and Gordon. On the day of the murder, the evidence proved Gordon and McDonald perfected

> a plan to get into the doctor's home, kill him, escape to a motel, discard the telling clothes, visit with their co-conspirators to deliver the paper and head back to Miami, out of harm's way to await the rest of their money. The murder for hire was cold, calculated and premeditated. No one suggested there was any pretense of moral or legal justification available to defendants Gordon and McDonald.

(R. 2533-34). The appellant's suggestion that this evidence was just as consistent with the planning of a robbery or burglary as planning a murder is not persuasive. If the defendants were not planning to kill the victim, one would certainly wonder why they found it necessary to do so. They knew his work schedule and purposefully waited for his arrival before entering the apartment. He was clearly incapacitated and the conclusion that they may simply have become frustrated with him when he would not cooperate in their efforts to locate the piece of paper is not reasonable, since he was not beaten to death in a fit of anger, he was drowned.

As the trial court found, the evidence at trial showed that this was a contract murder. The appellant and McDonald made numerous trips to the Tampa Bay area prior to the murder. State witness Clyde Bethel testified that on January 8, 1994, he was paid to drive Gordon and McDonald to the Tampa Bay area, and that both defendants met with the victim's wife's boyfriend, Leo Cisneros, on numerous occasions. After these meetings McDonald would state that they needed to go see the "lady" to get money, and they then drove to a shopping plaza where the victim's wife worked. Bethel **was**

paid to drive both defendants to the Tampa Bay area on a second trip on January 17, 1994. Bethel testified that on these trips the defendants drove to Bayfront Hospital, where the victim worked in the pediatric emergency room area. On three separate occasions both defendants drove to Thunderbay Apartments, where the victim lived. On January 18, 1994, both defendants went to the Thunderbay Apartment complex rental office and posed as father and son inquiring about the availability of apartments. McDonald wanted to look at the largest two bedroom apartment, which was the same model as the victim's apartment. Prior to leaving the defendants were given a layout of the apartment complex and of the victim's particular model. A Thunderbay Apartment rental brochure was observed in the vehicle Shore had driven to Thunderbay Apartments the day of the murder. Patricia Vega also testified that in November or December 1993 she accompanied both defendants to the Tampa Bay area. She was requested by McDonald to dress up in a nurse's outfit, which she did; the defendants asked her while in Tampa if she knew where Thunderbay Apartments were.

Phone records introduced at trial showed between December 27, 1993 and January 27, 1994, a cellular phone used by both defendants was used to call the victim's home 66 times; Bayfront Medical Center where the victim was Head of Pediatrics 11 times; the victim's wife's home 201 times; and the wife's work place, Dooley Groves, 86 times. The calls to the victim's home were all hang-

ups. Denise Davidson's home telephone records show 232 calls to a pager used by both defendants in January, 1994, the month the victim was killed. Financial records, phone records, and witness testimony show that this murder involved a long term plan and prearranged design to kill. The aggravating factor of cold, calculated and premeditated was proven beyond a reasonable doubt.

The factor of heinous, atrocious, or cruel was also well established. As to this factor, the trial court found:

> These two defendants broke into Dr. Davidson's home, used the cord from his vacuum cleaner to bind his hands and feet, and hogtied him. He was blindfolded and gagged. He was struck on the head eight to ten times. His ribs were broken. He was ultimately placed face down in his own bathtub and drowned. While the medical examiner opined that the doctor could have been rendered unconscious from the first blow to the head, the facts belie that this is what happened. If the victim had been rendered unconscious from the first blow, why inflict the others? Why blindfold him if he couldn't see? Why tie him up if he were lifeless?
>
> All of the physical evidence at the scene shows signs of a struggle, and a conscious victim. Blood was splattered on the wall of the bathroom. The toilet was broken at its base, obviously from a struggle. The doctor managed to get one hand free from the vacuum cord and it **was** retied with a belt from the doctor's coat. Neck injuries were observed indicating a ligature mark consistent with a tightening of the bindings around the victim's neck.
>
> Dr. Davidson **was** tortured, plain and simple. Finally these defendants placed his battered, bruised, and hogtied body face down in his own tub, As the water filled up around

> him, Dr. Davidson surely knew death was a certainty. This was a conscienceless, pitiless, and unnecessarily tortuous murder.

(R. 2532-33) . The appellant does not allege that Davidson's murder was not heinous, atrocious, or cruel, but claims that the factor cannot be applied in his case because (1) there is no evidence that he was the actual killer, and the factor cannot be applied vicariously pursuant to Omelus v. State, 584 So. 2d 563 (Fla. 1991), and (2) the medical examiner's testimony that the victim may have been unconscious after the first blow precludes application of the factor. These arguments must be rejected on the facts of this case.

This case is clearly distinguishable from Omelus, Archer v. State, 613 So. 2d 446 (Fla. 1993), and Williams v. State, 622 So. 2d 456 (Fla.), cert. denied, 510 U.S. 1000 (1993). This Court held in those cases that a codefendant that was not present at the scene and did not have knowledge as to how the victim would be killed cannot commit a heinous, atrocious or cruel murder. The appellant in this case was present at the murder and, as the trial judge found, Gordon and McDonald "acted as a team at all times" (R. 2563).

The assertion that the state failed to prove that the victim was conscious up until the time of his death similarly does not warrant the striking of this factor. The trial judge expressly found that the circumstances rebutted any inference that the victim

may not have been conscious. The fact that there was a violent struggle and the fact that the defendants resorted to binding, gagging, and blindfolding the victim, and indeed apparently retied his arms behind his back when one wrist was freed from the initial restraints, clearly supports the application of this factor. The lack of evidence affirmatively establishing Davidson's degree of consciousness during the entire attack does not preclude the application of this factor. Colina v. State, 634 So. 2d 1077, 1081 (Fla.), cert. denied, ___ U.S. , 115 S. Ct. 330 (1994); Taylor v. State, 630 So. 2d 1038 (Fla. 1993).

The victim in this case was beaten, blindfolded, gagged, and hogtied. The victim was submerged under water in his bathtub. Blood was spattered along the north wall of the bathroom and the toilet was broken at the base. Testimony of the associate medical examiner, Dr. Marie Hansen, indicated that the injuries to the head area of the victim are consistent with having been struck with an object at a minimum of eight to ten times. Further medical testimony indicated blunt trauma to the chest area of the victim which included three broken ribs. Factually the crime scene is consistent with the victim having been conscious when hogtied, gagged, and blindfolded, otherwise there would have been no reason to have restricted the victim in such a manner. The victim struggled with the defendants. At one point the victim got one hand free of his bindings, only to be tied up again. Neck injuries

sustained indicate a ligature mark along the neck area consistent with a tightening of the bindings around the victim's neck. Dr. Hansen testified that this injury is consistent with signs of petechia found in the victim's eyes. The ultimate cause of death was drowning, with the homicidal violence as a contributing factor. Dr. Hansen stated that it would take approximately four minutes for a person to drown. If the death of the victim was the defendants' sole goal it would have been accomplished in a much more immediate fashion than exhibited from the evidence. The defendants had an intention of torturing the victim and a desire to inflict a high degree of pain and victim suffering. The method of killing along with the ordeal that the victim endured evidences a murder that was especially heinous, atrocious or cruel. This aggravating factor was proven beyond a reasonable doubt.

On these facts, the trial court properly found and weighed the heinous, atrocious, or cruel and cold, calculated and premeditated aggravating factors. Therefore, the appellant is not entitled to relief on this issue.

CONCLUSION

Based on the foregoing arguments and citations of authority, the appellee respectfully requests that this Honorable Court affirm the judgment and sentence of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Michael Hursey, P.A., One River Plaza, Suite 701, 305 South Andrews Avenue, Fort Lauderdale, Florida, 33301, this 21st day of February, 1997.

Carol M. Dittmar

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