FILED
SID J. WHITE
NOV 19 1996
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

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

MICHAEL HURSEY, P.A.
Attorney for Appellant
One River Plaza, Suite 701
305 South Andrews Avenue
Fort Lauderdale, FL 33301
Telephone: 954/779-1880
Facsimile: 954/779-7980
Florida Bar No. 457698

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.
(Trial Counsel for Appellant Gordon)

Robert Love, Esq.
(Trial Counsel for Appellant Gordon)

Meryl McDonald
(Co-Defendant/Appellant)

James Marion Moorman, Esq.
(Trial Counsel for Appellant Gordon)

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Other Authorities:

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 **any** 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 **at most** 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 iurv (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'

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]

'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.

---

[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. Tavlor v. Louisiana, 419 U.S. 522 (1975); Duren v. Missouri, 439 U.S. 357 (1979).

The Tavlor 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. Wainwrioht, 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 Lovola 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 iudice.

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 Albanv 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 Albanv 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]

---

[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.

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,

MICHAEL HURSEY, P.A.
Counsel for Appellant GORDON
One River Plaza, Suite 701
305 South Andrews Avenue
Fort Lauderdale, FL 33301
Telephone: (954) 779-1880
Facsimile: (954) 779-7980

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