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)

FILED
SID J. WHITE
APR 30 1997
CLERK, SUPREME COURT
By_____
Chief Deputy Clerk

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

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# REPLY BRIEF OF APPELLANT ROBERT R. GORDON

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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 Davkdson
(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. Schwartrberg, Esq.
(Trial Counsel for Appellant Meryl McDonald)

Susan Shore
(Co-Defendant)

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

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## PREFACE

In this brief, Appellant ROBERT R. GORDON shall be referred to as "Appellant" or "Appellant GORDON". Appellee, STATE OF FLORIDA, shall be referred to as "State" or "Appellee".

References to the Record shall be identified by a parenthetical containing the letter "R", followed by the page number upon which the cited material appears.

References to the Trial Transcript shall be identified by a parenthetical containing the letter "T", followed by the page number upon which the cited material appears.

References to the State's Reply Brief shall be identified by a parenthetical containing the words "State's Brief", followed by the page number upon which the cited material appears.

## STATEMENT OF THE FACTS

In the State's Answer Brief, there are several references to facts in this case that are inaccurate or misleading. Appellant **GORDON** wishes to address these, so that this Court has a full and complete understanding of the underlying facts.

For example, the State claims that the victim's watch was missing, along with several hundred dollars (State's Brief, p. 1). However, at the time of his arrest, Appellant GORDON did not have the victim's watch **(T:1590)** and **it** was never found **(T:1630).** Similarly, the money that the victim allegedly had on his person was not marked or identified in such a way that **it** could be identified later as being in the possession of Appellant **GORDON** (or co-defendant McDonald). $19,300.00 in cash **(T:470)** and various credit cards **(T:658)** were left in the victim's apartment.

The State also alleged that there was a pager used by both defendants (State's brief, p.3). However, this pager was in co-defendant McDonald's name, and was used predominately by him, if not exclusively (T: 1475).

The State also says that both Appellant **GORDON** and co-defendant McDonald met with Cisneros (boyfriend of Denise Davidson) (State's brief, p.3). However, the State's own witness testified that **it** was generally co-defendant McDonald that met with Cisneros, and that Appellant **GORDON** was usually not a part of these meetings **(T:1534,1539).**

The State claims that Co-defendant **SHORE** (State's main witness) had not decided to enter into a plea or not (State's

Brief, p. 6). However, the record is clear that she was sentenced to probation, then deported back to England (T:2825)(R:32).

The State also claims that the court below found that this murder was committed during the course of a felony (State's Brief, p. 7). However, because there was no special verdict form, and the State did not elect between either (1) felony murder, or (2) pre-meditated murder, the record *is* still ambiguous as *to* which of these theories the jury found Appellant GORDON guilty (T:2237-8).

## SUMMARY OF THE ARGUMENT

This case is about a black man convicted by an all-white jury selected from an all-white venire, who was sentenced to death even though neither testimony nor scientific evidence placed him at the scene of the murder.

In Argument I, Appellant GORDON asserts that his right to a jury selected from a "fair cross-section" of the community was violated. While the trial court commented, "I wish we did have blacks on the panel, but that's the best we can do", the trial court made no effort to abide by the defense request for blacks in the venire. While the State argues that there is no legal basis for such a request, federal statutes and case law, as well as cases decided by this Court, hold otherwise. Appellant GORDON wants to have an evidentiary hearing below to show systematic exclusion of blacks in the venire selection.

In Argument 11, Appellant GORDON asserts that his conviction was not supported by substantial, competent evidence to show he was involved in a murder (as opposed to merely planning a burglary

was involved in a murder (as opposed to merely planning a burglary or robbery at most). There was no evidence placing him in the victim's apartment, and the State's own scientific evidence (e.g. blood samples, hair and carpet samples, water stains, footprints, etc.) showed he was neither (1) at the murder scene, nor (2) involved in the violent struggle with the victim the evidence shows took place.

In Argument 111, the issue of a separate penalty phase jury is properly before this Court because it was raised but denied below. Because of the circumstances below (e.g. no special verdict form, and the State failing to elect between two alternate theories), a separate penalty phase jury was needed to give Appellant GORDON and his co-defendant a fair penalty phase hearing.

In Argument IV, the trial judge did not conduct a penalty phase hearing in a manner that the jury could consider the life sentence of a co-defendant, and the probationary sentence of another co-defendant, when Appellant GORDON'S jury voted 9-3 for death. This additional information could have swayed another 3 jurors below, and now mandates a new penalty phase hearing with said information being presented.

In Argument V, the trial court did not have the sufficient evidentiary basis to apply heinous, atrocious or cruel, and cold, calculated and pre-meditated aggravating factors here. The evidence showed that (1) Appellant GORDON was not involved in a murder, and (2) the victim was likely unconscious at an early

stage, and died from drowning (as opposed to head trauma).

## ARGUMENT

### I. THE TRIAL COURT ERRED BY DENYING APPELLANT GORDON'S MOTION TO STRIKE JURY VENIRE

The State contends that Appellant GORDON acknowledges that he is not alleging systematic exclusion of blacks from Pinellas County juries, or that discriminatory intent is to blame, for the lack of African-Americans in his venire (State's brief, p. 11). This is not accurate.

When this Court looks at Appellant GORDON'S Renewed Motion to Supplement Record, Or In The Alternative, Motion To Take Judicial Notice (filed contemporaneously with this Reply Brief), it's obvious that Appellant GORDON wants a full-blown evidentiary hearing so that he can prove systematic discrimination. However, even beyond that, he wants this Court to look at the discriminatory effect that the jury selection system in Pinellas County has, whether it is intentionallv discriminatory or not. Therefore, he is in effect arguing both of these theories.

The State also complains that Appellant GORDON only cites Law Review articles for the proposition that government officials have the affirmative duty to secure equal representation of all groups. This is also fallacious. Appellant GORDON previously and still asserts that the federal Jury Selection and Service Act (28 U.S.C. §§ 1861- 1869 (1982) is a mandate of federal law, that the jury represent a fair cross-section of the community. In U.S v.

Rodriguez, 776 F2d 1509, 1511 (11th Cir. 1985) the court verified that a defendant has a right to a representative venire. The Rodriauez court held that to determine a "fair cross-section" in the venire, one must compare the percentage of the group (e.g. blacks) on the qualified jury wheel, and the percentage of the group among the population eligible for jury service. Rodriauez, supra, at 1511. Appellant GORDON wants to have a hearing establish this.

It is firmly established that the 6th Amendment guarantees a defendant the right to a jury selected from a venire representing a fair cross-section of the community. Duren v. Missouri 439 U.S. 357, 358-9 (1979). In Rose v. Mitchell 443 U.S. 545 (1979), the Court held that racial discrimination in selection of a grand jury is a valid ground for setting aside a criminal conviction even where defendant has been found guilty by a properly constituted petit jury (emphasis supplied). A fortiori, discrimination in selection of a venire is also sufficient for setting aside a conviction.

This Court also stated in Johnson v. State 660 So. 2nd 648, 661 (Fla. 1995) cert. den. 116 S. Ct. 1550 (1996), its concern about Blacks on the venire, and not just Blacks on the petit jury. A similar result should lie here.

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

Here again, the State makes loose references to the facts that

give a skewed view of the evidence. For example, the State says that Appellant GORDON and co-defendant McDonald went to the victim's apartment (State's brief, p. 17). However, the evidence was that they went to the victim's apartment building. (T:1644,1653) No one ever saw them enter into the building itself, or specifically into the victim's apartment. The State also says that the two were in the apartment of the victim for 1/2 hour (State's brief, p. 17). However, it is more accurate to say that Susan Shore, the State's main witness, said they were pone from the car near said apartment building where they left her for about 1/2 hour (T:1569,1571,1643).

The State concedes that scientific evidence at best tied only Defendant McDonald (but not Appellant GORDON) to the apartment and the victim (State's brief, p. 17). Co-Defendant McDonald returned to the car 5 - 10 minutes later than Appellant GORDON (T:1571), and therefore could have done the critical acts by himself without the knowledge or aid of Appellant GORDON.

The State also alleges that phone records show extensive contact between Appellant GORDON, co-Defendant McDonald, Denise Davidson and Cisneros before and after the murder (State's brief, p. 17). The evidence shows that Appellant GORDON'S telephone numbers were not used.

Finally, the State again mistakenly asserts that Appellant GORDON was placed in the apartment by Shore's testimony (State's brief, p. 18). He was only placed at the apartment building, after which he walked out of Shore's sight. While the State

alleges that these acts show that Appellant **GORDON** was involved in a murder, even his alleged statement that "The doctor didn't want to give up the piece of paper", is entirely consistent with a burglary or robbery, as opposed to a murder.

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

The State mistakenly contends in its Brief that the issue of whether Appellant **GORDON** and his co-defendant McDonald should receive separate penalty phase juries was not preserved below. This issue was raised below (T:2755,R:2461-2). The trial court denied this request (T:2758).

The idea of separate penalty phase juries was critical in this case because the State never elected which theory to pursue (e.g. felony murder or pre-meditated murder), and there was not a special jury verdict form that delineated the theory on which Appellant **GORDON** was found guilty. The trial court below even admitted that it did not know on which theory the jury based its decision (T:2237-8,2244).

This placed Appellant **GORDON** and his co-defendant in an awkward position sitting next to each other at the penalty phase. Should they accuse each other of wrongdoing, each trying to lessen his respective role, yet increasing the role of the other?

This offends the notions of due process, and a fair and individualized penalty phase hearing for each.

The State places undue reliance on Melton v. State 638 **So.** 2d 927 **(1994)** to support its theory that no separate penalty phase jury was warranted here. In Melton, the jury was told at the penalty phase of **Melton's** prior murder conviction. Melton wanted a separate jury to be able to conduct voir dire on the effect on **said** jury of his prior murder conviction. These **are** not the same type of facts before the Court in the case sub iudice.

Similarly, the State's reliance on **Riley** v. State 366 ***So.* 2d 19,21 (1978) is** misplaced. In **Riley,** this Court made the narrow ruling that a defendant in a capital case is not entitled to have on the jury which determines guilt or innocence, persons who are unalterably opposed to the death penalty. The issue in Gordon is vastly different.

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

The State argues that **it** is sufficient that the trial court below knew of the life sentences of co-defendant Davidson and others **(e.g.** Shore's probation), when passing on its sentence for Appellant GORDON (State's brief, **p.23).** Appellant **GORDON** asserts that this **is** not sufficient.

In his case, without even knowing about the life sentence of the co-defendant, Appellant **GORDON'S** jury voted 9-3 for death. **As** this Court knows, another **3** jurors voting for life would have been a recommendation *of* a life sentence to the trial court, which must give great deference to such a finding. **Is** the fact that **a** co-

defendant(s) received a life sentence potentially worth another 3 votes by jurors for life? Appellant GORDON says "yes". Because the trial court did not conduct the proceeding below so that the sentencing phase jury knew about the life sentence of a co-defendant(s), this case should be remanded so that a new sentencing phase jury would be made aware of this fact before casting its vote.

The State mistakenly relies on Gamble v. State 659 So.2d 242 (1995) to show the court below was justified in not having the penalty phase jury know about the life sentence of co-defendant Davidson. However, in Gamble, the co-defendant pled guilty, and was not convicted of the same facts at a trial as the complaining defendant, like GORDON was. This makes a substantial difference.

## 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

The State contends that it was the intention of Appellant GORDON and his co-defendant to inflict torture and pain upon the victim (State's brief, p. 33). The evidence to sustain such a finding is simply not present.

The evidence in this record is just as consistent with a robbery and the victim being left alive, with the drowning occurring after the perpetrator(s) left.

Further, Appellant GORDON was not shown to be directly involved by either testimony or scientific evidence in any of the

critical **acts** that led to the actual robbery of the victim, let alone his death. Because the evidence is consistent with the defense theory that Appellant **GORDON** was not involved in a murder, Appellant **GORDON** should be given a new trial and released immediately on bond pending said trial.

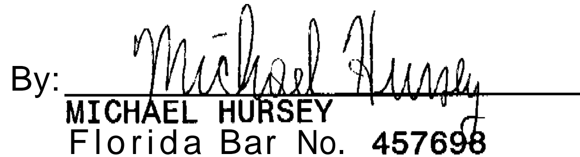
That this Court **has** reversed the death penalty for many other defendants who have been directlv linked to committing heinous acts, merits serious consideration here.

## 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,

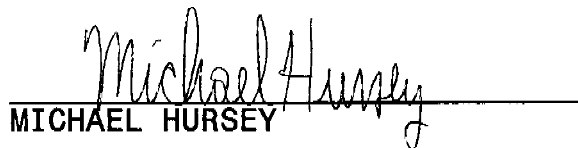
MICHAEL **HURSEY,** P.A.
Counsel for Appellant **GORDON**
One River Plaza, Suite 701
305 South Andrews Avenue
Fort Lauderdale, FL 33301
Telephone: **(954)** 779-1880
Facsimile: **(954)** 779-7980

By: 
**MICHAEL HURSEY**
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 28th day of April, 1997.



MICHAEL HURSEY