

IN THE SUPREME COURT OF FLORIDA

MERYL MCDONALD,

Appellant,

vs.

CASE NO. 87,059

STATE OF FLORIDA,

Appellee.

**FILED**

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TABLE OF CONTENTS

PAGE NO.:

STATEMENT OF THE CASE AND FACTS . . . . . 1

SUMMARY OF THE ARGUMENT . . . . . 6

ARGUMENT . . . . . 7

    ISSUE I . . . . . 7

        WHETHER THE TRIAL COURT ERRED IN DENYING  
        APPELLANT'S REQUEST FOR A NEW PENALTY PHASE  
        BASED ON CO-DEFENDANT'S RECEIPT OF LIFE  
        SENTENCE.

CONCLUSION . . . . . 15

CERTIFICATE OF SERVICE . . . . . 15

TABLE OF CITATIONS

PAGE NO.:

<u>Bush v. Singletary,</u> 21 Fla. Law Weekly S455 (Fla. October 16, 1996) . . . . .	13
<u>Fuentes v. Dugger,</u> 549 So. 2d 652 (Fla. 1989) . . . . .	10, 11
<u>Gamble v. State,</u> 659 So. 2d 242 (Fla. 1995) . . . . .	12, 13
<u>Garcia v. State,</u> 492 So. 2d 360 (Fla.), cert. denied, 479 U.S. 1022, 107 S.Ct. 680, 93 L.Ed.2d 730 (1986) . . . . .	10
<u>Scott v. Dugger,</u> 604 So. 2d 465 (Fla. 1992) . . . . .	10
<u>Steinhorst v. Singletary,</u> 638 So. 2d 33 (Fla. 1994) . . . . .	10, 13

**STATEMENT OF THE CASE AND FACTS**

Appellant Meryl McDonald was charged by Indictment on April 27, 1994 along with Robert Gordon, Susan Shore, Denise Davidson and Leonardo Cisneros with the first degree murder of Dr. Louis A. Davidson. (R 1-2) The Honorable Susan Schaeffer, Circuit Judge for the Sixth Judicial Circuit, in and for Pinellas County, presided over the joint trial of McDonald and Gordon from June 6, 1995 through June 15, 1995. The jury returned unanimous verdicts of guilty of murder in the first degree on June 15, 1995. (R 1458) On June 16, 1995, the same jury reconvened for the penalty phase portion of the trial. The jury returned a 9-3 recommendation for death as to both McDonald and his accomplice, Gordon. The trial court held a Spencer hearing on August 4, 1995. Judge Schaeffer withheld sentencing until they had tried and sentenced co-defendant Denise Davidson. Davidson was convicted of first degree murder, received a life recommendation and was sentenced to life. (R 102) Cisneros has yet to be found. Susan Shore testified for the state and her charges were reduced. (T 365) Judge Schaeffer then requested and received a supplemental memorandum from the state and the defendants regarding Davidson's life sentence and the effect, if any, it should have on McDonald and Gordon's sentence. (R 1629-37) A second Spencer hearing was held on October 19, 1995 and

McDonald was sentenced to death on November 16, 1995. (R 1657-74) Judge Schaeffer 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. In mitigation the court found no statutory mitigators and gave slight weight to two nonstatutory mitigators; McDonald's advanced age at time he would be eligible for release and Davidson's life sentence. McDonald's Notice of Appeal was filed on December 15, 1995. (R 1675)

The evidence presented at McDonald's trial established that the victim Dr. Louis Davidson was married to Denise Davidson. The Davidsons were embroiled in a bitter custody battle and divorce. (T 401-08, 640-45, 1710-15) Dr. Davidson was engaged to Patricia Deninno and Denise Davidson was engaged to Leonardo Cisneros. (T 403-05) Leonardo Cisneros and Denise Davidson hired Robert Gordon and Meryl McDonald to kill Dr. Davidson.

On January 24, 1994, McDonald and Gordon hired Susan Shore to drive them from Miami to Tampa where they met with Davidson and Cisneros. (T 1522) Susan Shore, testifying for the state, admitted that Gordon asked her to drive him and McDonald to Tampa to visit a friend and "pick-up a piece of paper." (T 1526) She stated that McDonald and Gordon met with a couple at Dooley Groves.

(T 1534-48) The next morning they drove to Dr. Davidson's apartment, where Shore backed the rental car into a space at the doctor's complex. While they waited for Davidson to get home, McDonald went jogging. Shore and Gordon played catch on the apartment grounds. (T 1562-64) When the doctor arrived, Gordon told Shore his "friend" had arrived and to get in the car and wait for them. Several neighbors saw Shore and Gordon playing catch and were later able to identify them. (T 587-99, 621-25, 695-703, 722-23)

Dr. Davidson's body was discovered later that day by Patricia Deninno. Worried that she could not reach him, she entered the apartment and found him gagged, tied, bound and submerged in his bathtub in bloody water. He was tied with a vacuum cleaner cord and a cashmere belt. The toilet bowl had been broken, blood was spattered on the bathroom walls and the apartment was ransacked. (T 421-33, 448-57, 463-66, 524-28, 525-36, 540-51)

Based on their initial investigation, St. Petersburg Police Department put Denise Davidson under surveillance. Davidson made many trips to Western Union. (T 725-53) Davidson, using the name Pauline White, made a total of 21 transfers, both before and after the murder. Of those 21 transfers, 19 went to Robert Gordon.

Carol Cason picked up 2 at the request of McDonald. (T 760-66, 776-94, 859-67, 1010-1019)

Having developed a list of suspects, the police began pulling phone records of the individuals that showed numerous contacts between the principal players both before and after the killing. (T 662-87, 962-1009, 1669-72, 1709-23, 1804-22) The records established that on the day of the murder Davidson called McDonald's beeper 50 times during a two and a half hour period. Additionally, the evidence shows that Davidson bought a cellular phone and gave it to McDonald and Gordon. This cell phone was used repeatedly to make hang up calls to the victim's home and business.

Records also established that Gordon and McDonald stayed at the Days Inn in Tampa several times before the murder and finally on the day of the murder. (T 1054-65, 1071-77, 1110-13, 1129-36) When they checked out on January 26, 1995, they left behind a sweatshirt and a pair of tennis shoes. These clothes were analyzed for blood, hair and fiber matches. (T 468-69, 840-43, 1223-27, 1256-77) McDonald's sweatshirt contained fibers from Dr. Davidson's carpet and Deninno's cashmere belt as well hairs that matched McDonald's hair. The victim's blood sample matched the DNA found in stains on the sweatshirt. (T 1166, 1227-31)

Personnel at the doctor's apartment complex, testified that McDonald and Gordon were in the management office on January 18, 1994 and received a copy of the floor plan to the doctor's apartment. (T 1300-21) This was confirmed by McDonald's friend, Clyde Bethel, who also testified that he drove the defendant's from Miami, that they met with Leo Cisneros and a lady on January 8 and 17, 1994, and that they drove past a hospital to see an emergency room. (T 1341, 1357-64, 1372-73 1382-84, 1395-96)

Maurine Hogan of the Pinellas County Detention facility testified in the penalty phase that McDonald was born on 8/15/46 and that he had no DRs. (T 2277) McDonald also introduced actuarial life expectancy tables. (T 2277-78)



SUMMARY OF THE ARGUMENT

Appellant claims that this Court should give him a new penalty phase because his co-defendant, Denise Davidson, received a life sentence after his penalty phase. It is the state's position that the trial court properly imposed the sentence of death after considering Davidson's life sentence and that appellant is not entitled to relief on this claim.

## ARGUMENT

### ISSUE I

**WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST FOR A NEW PENALTY PHASE BASED ON CO-DEFENDANT'S RECEIPT OF LIFE SENTENCE.**

Appellant claims that this Court should give him a new penalty phase because after McDonald and Gordon's penalty phase, Denise Davidson went to trial and received a life sentence. He contends that his jury recommendation of 9-3 in favor of death may have been different if the jury had been aware of Davidson's life sentence.

This claim was presented to the trial judge, the Honorable Susan Schaeffer, following the penalty phase but before sentencing. Judge Schaeffer requested and received a supplemental memorandum from the state and the defendants regarding the co-defendant's and the effect, if any, that Davidson's sentence should have on defendant Gordon and McDonald's sentence. (R 1657-58) A hearing was held on October 19, 1995, in which the court heard arguments and testimony regarding Davidson's penalty phase and sentence. (R 1658) On November 16, 1995, Judge Schaeffer entered her sentencing order, imposing a sentence of death on McDonald and Gordon. (R 1674) The order thoroughly addressed the issue of Davidson's

sentence and distinguished the basis for McDonald's sentence of death from Davidson's life sentence as follows:

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, it is entitled to only a modest amount of weight. (R 1668-70)

It is the state's position that the trial court properly imposed the sentence of death in the instant case and that

appellant is not entitled to relief on this claim. To support his position appellant relies this Court's decisions in Scott v. Dugger, 604 So. 2d 465 (Fla. 1992) and Fuentes v. Dugger, 549 So. 2d 652 (Fla. 1989). Both cases are readily distinguishable.

First, in Scott v. Dugger, 604 So. 2d 465 (Fla. 1192), Scott received relief on the basis of newly discovered evidence because this Court affirmed Scott's death sentence before his co-defendant was sentenced to life in prison. In contrast, McDonald'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 co-defendant's sentence in Scott. See, also, Steinhorst v. Singletary, 638 So. 2d 33, 35 (Fla. 1994).

Next, the co-defendants in Scott were equally culpable participants. The evidence presented at trial shows that the instant case does not involve equally culpable participants. When co-defendants are not equally culpable, the death sentence of the more culpable co-defendant is not unequal justice when another co-defendant receives a life sentence. Steinhorst v. Singletary, 638 So. 2d 33, 35 (Fla. 1994), citing, Garcia v. State, 492 So. 2d 360 (Fla.), cert. denied, 479 U.S. 1022, 107 S.Ct. 680, 93 L.Ed.2d 730 (1986).

Based on this Court's decision in Fuentes v. Dugger, 549 So. 2d 652 (Fla. 1989), wherein this Court held that a life recommendation in a contract killing was reasonable where when Fuentes' accomplice and the victim's wife who hired them were given reduced sentences based on a plea, appellant contends that the "question of relative culpability and disparity in punishment should have been put before the jury for its consideration." (Brief of Appellant, pg. 15) Unlike Fuentes the jury in the instant case did not recommend life. Further, unlike Fuentes, McDonald's co-defendant Gordon also received death. Finally, as noted by Judge Schaeffer, Davidson's jury, unlike McDonald'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 evidence 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 1669)

Curiously, appellant maintains that "it does not appear that this Court has addressed the problem that arises in factual circumstances like those in the present case (i.e., an accomplice receives a life sentence sometime between a defendant's penalty

phase and final sentencing)." (Brief of Appellant, pg. 12-13) In the defense memorandum in support of a new penalty phase McDonald references this Court's decision in Gamble v. State, 659 So. 2d 242 (Fla. 1995) wherein this Court specifically addressed this argument and rejected same. (R 1636) A review of the case shows that 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 v. State, 659 So.2d 242, 245 (Fla. 1995). See, also, Hannon v. State, 638 So.2d 39, 44 (Fla. 1994)

Even absent this Court's decision in Gamble, this Court has repeatedly upheld death sentences where a co-defendant's life sentence was imposed after the imposition of the appellant's death sentence. Bush v. Singletary, 21 Fla. Law Weekly S455 (Fla. October 16, 1996); Steinhorst v. Singletary, 638 So. 2d 33, 35 (Fla. 1994). This Court in Bush, stated:

In this appeal, Bush points out that Parker and Cave were also sentenced to death for the murder while Johnson received a life sentence. However, Cave's sentence has been set aside, and he is scheduled for resentencing proceedings on November 15, 1996. Bush argues that should Cave receive a life sentence when there is some evidence that Cave admitted that he rather than Parker shot the victim, Bush's sentence would become disproportional. *See Scott v. Dugger*, 604 So. 2d 465, 469 (Fla. 1992) ('[I]n a death case involving equally culpable defendants, the death sentence of one codefendant is subject to collateral review under rule 3.850 when another codefendant subsequently receives a life sentence.').

We reject Bush's contention. At the outset, we know of no legal basis for staying Bush's third death warrant pending a subsequent penalty hearing for a codefendant. More importantly, however, is the fact that Bush played a predominant role in this crime. The four assailants drove in Bush's car, and Bush admitted that they intended to rob the store. While Bush's stab wound was not fatal, he nevertheless inflicted a two-inch wound in the victim's stomach. Bush himself said it was Parker, not Cave, who administered the fatal shot. Moreover, Bush had committed a



prior violent felony at the time of the murder, whereas Cave had not done so. See *Cave v. State*, 476 So. 2d 180 (Fla. 1985), cert. denied, 476 U.S. 1178, 106 S. Ct. 2907, 90 L. Ed. 2d 993 (1986). Therefore, even if Cave were to receive a life sentence, it could not be said that Bush's death sentence would be disproportional. Bush v. Florida, at S455

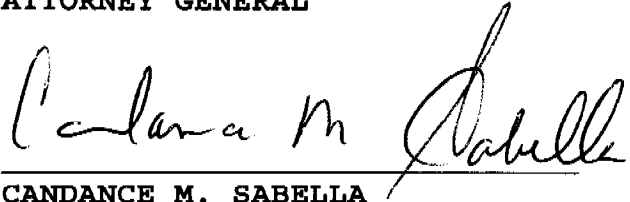
Thus, where, as in the instant case, the basis for a death sentence is well supported by the record and considerably more aggravated and less mitigated than the nondeath sentenced co-defendant, the sentence is not disproportional and resentencing is not warranted. Judge Schaeffer found four aggravating 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. In mitigation the court found no statutory mitigators and gave slight weight to two nonstatutory mitigators, McDonald would be in his seventies before he would be eligible for release and Davidson's life sentence. In contrast Davidson's jury was instructed on only two aggravators and was presented with substantial evidence of statutory and nonstatutory mitigation. (R 1631-34) Accordingly, McDonald's death sentence is not disproportional and the state urges this court to affirm the instant sentence.

**CONCLUSION**

Based on the foregoing arguments and authorities, the judgment and sentence should be affirmed.

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 Richard J. Sanders, Esq., 2728 52nd Street South, Gulfport, Florida 33707, this 21 day of February, 1997.



**COUNSEL FOR APPELLEE**