IN THE SUPREME COURT OF FLORIDA

MERYL MCDONALD,

Appellant,

vs. CASE NO. 87,059

STATE OF FLORIDA,

Appellee.

_____/

SECOND ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellant, Meryl S. 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. (Vol. I, 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. (Vol. XXXV, T 2341; Vol. X, R 1497-98)

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 fiancé, Dr. Louis Davidson, leave his job at Bayfront Medical Center around 9:00 a.m.. (Vol. XXIII, 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.. (Vol. XXIII, T 419-421) She found Dr. Davidson face-down in a bathtub full of bloody water, bound, gagged, and blindfolded. (Vol. XXIII, T 422-23, 449) The apartment had been ransacked and there were signs of a violent struggle in the bathroom. (Vol. XXIII, T 422, 449, 463; Vol. XXIV, T 541) The victim's watch, a camera, and a money clip with several hundred dollar bills were missing. (Vol. XXIII, 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. (Vol. XXIV, T 573-74) The cause of death was homicidal violence including drowning, binding and blunt trauma to the head and torso. (Vol. XXIV, 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. (Vol. XXIV, 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. (Vol. XXIV, 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. (Vol. XXIV, 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. (Vol. XXIV, T 547) Both wrists were also bound with a belt from a coat found on Davidson's bed. (Vol. XXIV, 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. (Vol. XXIV, 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. (Vol. XXIII, T 402-08;

Vol. XXV, T 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. (Vol. XXV, 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 Gordon. (Vol. XXV, T 686; Vol. XXXIII, T 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. (Vol. XXV, T 662-87; Vol. XXXIII, T 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. (Vol. XXV, T 669-70)

Patricia Vega testified that she accompanied the appellant and Gordon to the Tampa area in November or December of 1993. (Vol. XXX, T 1436) McDonald had her dress in a nurse's outfit and she was told to claim she was "Dr. Gordon's" nurse. (Vol. XXX, T 1436-37, 1440-43) They asked if she knew where Thunderbay Apartments were located. (Vol. XXX, T 1443) Clyde Bethel testified that he was paid to drive the appellant and Gordon to the Tampa Bay area on

January 8 and January 17, 1994. (Vol. XXIX, T 1341-84, 1357-64, 1382-84, 1395-97) 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. (Vol. XXIX, T 1341-84, 1357-64, 1382-84, 1395-97) They also went by Bayfront Medical Center, indicating they needed to visit the emergency room area (the victim worked in the pediatric emergency room, see Vol. XXIII, T 401, 411), and by Thunderbay Apartments. (Vol. XXIX, T 1372-73) On January 18, Gordon 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. (Vol. XXIX, T 1300-13, 1317-21) Prior to leaving the defendants were given a layout of the apartment complex and the model two bedroom apartment. (Vol. XXIX, T 1312)

Susan Shore testified that she drove Gordon and McDonald to Tampa on January 24, 1994. (Vol. XXXI, 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. (Vol. XXXI, T 1533-43) Gordon was agitated that McDonald did not get any money from Cisneros. (Vol. XXXI, T 1540) Cisneros came by the hotel and McDonald and the appellant left with him. (Vol. XXXI, T 1547-50) The next morning, they didn't have enough money for much breakfast. (Vol. XXXI, T 1555) Shore was told they had to visit a friend at Thunderbay Apartments and to get a piece of paper from

the friend. (Vol. XXXI, T 1542, 1558) They arrived at Thunderbay about 8:30 or 9 a.m. and waited for the friend to arrive. (Vol. XXXI, T 1559-66) McDonald went off jogging and Shore and Gordon milled around and played catch with a cricket ball she had in her car. (Vol. XXXI, T 1562, 1565) Several neighbors noticed Shore and Gordon and were later able to identify them. (Vol. XXIV, T 587-99; Vol. XXV, T 621-25, 695-703, 722-23)

About thirty minutes later, Gordon indicated that the friend had arrived, and instructed Shore to wait in her car. (Vol. XXXI, T 1565-66) He approached Dr. Davidson getting out of a red sports car and they walked away together. (Vol. XXXI, T 1567-68) Gordon returned to Shore's car in about 20 or 25 minutes and got in the back seat. (Vol. XXXI, 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. (Vol. XXXI, T 1571) Shore drove off and Gordon told McDonald to call Carlos. (Vol. XXXI, T 1572) Shore was then directed to a different hotel, and Gordon told her not to use her real name when she registered. (Vol. XXXI, T 1573, 1575) McDonald gave her a hundred dollar bill to pay for the room. (Vol. XXXI, T 1576)

Denise and Cisneros came by the hotel room and talked with Gordon and McDonald, but Shore did not hear the conversation. (Vol. XXXI, T 1581-85) After they left, McDonald wanted to stick around but Gordon was agitated and wanted to leave. Shore also wanted to

return to Miami, so they left. (Vol. XXXI, T 1586-88) After they got back to Miami, McDonald gave Shore a hundred dollar bill and Gordon told her she would get more in a few days, but they never gave her more money. (Vol. XXXI, T 1594-95)

Shore saw Gordon and McDonald nearly every day, coming by a mutual friend's house to use the phone. (Vol. XXXI, 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. (Vol. XXXI, T 1596-97) On another occasion, McDonald and Gordon 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. (Vol. XXXI, T 1600)

Toward the end of February, 1994, Gordon called Shore repeatedly for two or three days telling her she needed to get out of town. (Vol. XXXI, T 1604) He told her that Carlos would pay for her to stay at the Pegasus Motel in Kingston, Jamaica. (Vol. XXXI, T 1609) He also said if the police asked her, she was to deny having taking them to Tampa. (Vol. XXXI, T 1605) Shore learned that law enforcement was looking for her and that there were others that wanted to kill her. (Vol. XXXI, T 1603, 1610) When she asked Gordon why the police were looking for them, he told her that the doctor did not want them to take the piece of paper. (Vol. XXXI, T 1605) She later learned that the doctor had been

killed, and she was scared. (Vol. XXXI, 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. (Vol. XXXI, 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. (Vol. XXXI, T 1612-14) They took a detailed statement from her, and the next day two detectives from FDLE arrived and took another statement. (Vol. XXXI, T 1615) Assistant State Attorney Schaub came the next day and took another statement. (Vol. XXXI, 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. (Vol. XXXI, 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. (Vol. XXXI, T 1618)

The jury returned unanimous verdicts of guilty of murder in the first degree on June 15, 1995. On June 16, 1995, the same jury reconvened for the penalty phase portion of the trial and returned a 9-3 recommendation for death as to both McDonald and Gordon. (Vol. X, R 1458) The trial court held a Spencer[1] hearing on August 4, 1995. (Vol. XX, R 1864-1916) Judge Schaeffer withheld sentencing until they had tried and sentenced co-defendant Denise Davidson. (Vol. XX, R 1908) Davidson was convicted of

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[1]Spencer v. State, 615 So.2d 688 (Fla. 1994)

first degree murder, received a life recommendation and was sentenced to life. (Vol. II, R 102) Susan Shore testified for the state and her charges were reduced. (Vol. XXIII, 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. (Vol. XI, R 1629-37) A second Spencer hearing was held on October 19, 1995 and McDonald was sentenced to death on November 16, 1995. (Vol. XI, 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; 1) McDonald's advanced age at time he would be eligible for release and 2) Davidson's life sentence. McDonald's Notice of Appeal was filed on December 15, 1995. (Vol. XI, R 1675)

SUMMARY OF THE ARGUMENT

I. 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 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. Appellant's conviction is supported by substantial, competent evidence. 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 Appellant assisted in the conspiracy, preparation, and execution of this murder.

III. 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 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. 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[2]

ISSUE I

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

Appellant initially challenges the trial court's ruling on his request for a new jury venire. When 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 (Vol. XXI, T 28) 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 Appellant is not entitled to any relief.

This claim was also raised by McDonald's codefendant, Robert Gordon and rejected by this Court as follows:

> As his first guilt phase issue, Gordon contends that since all the members of the venire from which his jury was chosen were white, he had no chance to get a "jury of his peers" that was a fair cross-section of the community in Pinellas County. (FN10) His claim is without merit.
>
> The United States Supreme Court has set clear guidelines to ensure that juries are drawn from a fair cross section of society. In *Taylor v. Louisiana*, 419 U.S. 522, 538, 95 S.Ct. 692, 702, 42 L.Ed.2d 690 (1975), the Court held that "petit juries must be drawn

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[2] Appellant's attempt to adopt any non-adverse issues presented in the brief of his codefendant, Robert Gordon, 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)

from a source fairly representative of the community [although] we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population." To that end, while defendants are not entitled to a particular jury composition, "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." *Id.*, at 538, 95 S.Ct. at 702 (emphasis added) Accordingly, the Court invalidated those sections of Louisiana's constitution and criminal procedure code which precluded women from serving on juries unless they expressly so requested in writing.

Several years later under slightly different facts, the Court invalidated a Missouri statute which provided an *automatic exemption* for any woman that asked not to serve on jury duty. *Duren v. Missouri*, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979) To give effect to *Taylor's* fair cross-section requirement, the Court established a three-prong test for determining a prima facie violation thereof. *Id.*, at 364, 99 S.Ct. at 668. The proponent must demonstrate:

> (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Id. (emphasis added) Since the Court in *Taylor* had already found that women "are sufficiently numerous and distinct from men," 419 U.S. at 531, 95 S.Ct. at 698, Duren only needed to satisfy the last two prongs of the test. He did this by presenting statistical

data which showed that women comprised over fifty percent of the relevant community but only approximately fifteen percent of the jury venires, *Duren*, 439 U.S. at 364-66, 99 S.Ct. at 668-69, and demonstrating that this large discrepancy "occurred not just occasionally, but in every weekly venire for a period of nearly a year." Id., at 366, 99 S.Ct. at 669. The Court concluded that this undisputed trend "manifestly indicates that the cause of the underrepresentation was systematic--that is, inherent in the particular jury-selection process utilized." *Id.* Thus the Court instituted the procedures for establishing a prima facie violation of the Sixth Amendment's fair cross-section requirement. (FN11)

In this case, ***there is no evidence in the record that Gordon followed these procedures in challenging the venire.*** Indeed, beyond some general objections about the venire's composition, the issue was only briefly raised and then without supporting data. Since counsel was presumably aware of the fair cross-section requirement and the *Duren* test for establishing a prima facie violation, it made no sense to claim, off the cuff, that there was an unrepresentative venire if, first, counsel did not have any supporting data and, second, counsel was aware of the random method from which venires were generated in his county. (FN12) Counsel made no attempt to comply with the *Duren* procedures for substantiating a fair cross-section violation, not to mention Florida Rule of Criminal Procedure 3.290, which requires that "[a] challenge to the [jury] panel shall be in writing and *shall specify the facts constituting the ground of the challenge.*" (Emphasis added.)

Instead, ***after the venire entered the courtroom, McDonald's counsel simply commented to the court that "despite the fact that both of our clients are black, there are no blacks on the jury panel."*** Counsel objected that

the venire did not represent "a fair cross section of Pinellas County." After Gordon's counsel joined in the objection, the trial judge noted that:

> Counsel on both sides are well aware that the jurors are selected at random in Pinellas County by computer and they are likewise selected at random as a panel downstairs. I'm sure there are some black ones downstairs, but if I started plucking them out, that would be just as wrong. In other words, I have no reason to doubt that these folks were picked totally at random by the computer selection and at this point in time, I'm sure we may be adding to the group, so your motion is noted. It's overruled because there's nothing I can do about it. But as I said, if there's any change, why I will make sure that the record reflects that there are some blacks to be added to the panel. (FN13)

(Emphasis added.) ***Neither McDonald's nor Gordon's counsel challenged the factual basis of the trial judge's ruling that the venire was randomly selected by computer, nor did either of them follow any of the procedures established in Duren or required by Florida Rule of Criminal Procedure 3.290 for substantiating a prima facie violation of the fair cross-section requirement.***

Similarly, on appeal, Gordon does not challenge the process from which the venire is generated in Pinellas County. Indeed, Gordon acknowledges that the venire was selected randomly when he suggests in his brief that "[i]f 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 fifty." (Emphasis added.)

Accordingly, we agree with the State that our decision in *Johnson v. State*, 660 So.2d 648 (Fla.1995), is dispositive of this issue.

> (FN14) In *Johnson*, the defendant claimed that he was not tried by a representative jury since, in his four separate cases, only two out of one hundred sixty venire members were black. We dismissed Johnson's claim, finding no error since it was unrebutted that the venire was randomly generated by computer. Id. at 661. Since that is precisely the situation here, we find no error in the trial court's denial of Gordon's motion. Therefore, we decline to employ a Duren analysis since Gordon made no factual showing to the trial court from which such an analysis could be made.
>
> Gordon v. State, 704 So.2d 107, 110-112 (Fla. 1997)(emphasis added)

Since Appellant, like Gordon, 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. Therefore, as this Court has previously rejected Appellant's claim and McDonald has failed to present any basis for this Court to reverse the holding in Gordon, this claim should be denied. See, also, Johnson v. State, 660 So.2d 648, 661 (Fla. 1995), cert. denied, ___ U.S. ___, 116 S.Ct. 1550, 134 L.Ed.2d 653 (1996)(no error demonstrated even though only two out of 160 venire members were black where the venire was randomly selected by computer); 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.)

ISSUE II

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

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 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 victim Dr. Louis Davidson was married to Denise Davidson. The Davidsons were embroiled in a bitter custody battle and divorce. (Vol. XXIII, T 401-08; Vol. XXV, T 640-45; Vol. XXXII, T 1710-15) Dr. Davidson was engaged to Patricia Deninno and Denise Davidson was engaged to Leonardo Cisneros. (Vol. XXIII, 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. (Vol. XXXI, 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." (Vol. XXXI, T 1526) She stated that McDonald and Gordon met with a couple at Dooley Groves. (Vol. XXXI, 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. (Vol. XXXI, 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. (Vol. XXIV, T 587-99; Vol. XXV, T 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. (Vol. XXIII, T 421-33, 448-57, 463-66; Vol. XXIV, T 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. (Vol. XXV, 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. (Vol. XXV, T 760-66, 776-94; Vol. XXVI, T 859-67; Vol. XXVII, T 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. (Vol. XXV, T 662-87; Vol. XXVII, T 962-1009; Vol. XXXI, T 1669-72; Vol. XXXII, T 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. (Vol. XXVII, 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. (Vol. XXIII, T 468-

69; Vol. XXVI, T 840-43; Vol. XXIX, T 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. (Vol. XXVIII, T 1166; Vol. XXIX, T 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. (Vol. XXIX, 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. (Vol. XXIX, T 1341, 1357-64, 1372-73 1382-84, 1395-96)

Appellant argues that the physical evidence in this case does not show that he was ever in the victim's apartment. However, the evidence showed that McDonald's sweatshirt, not only had the victim's blood on it, it also contained fibers from Dr. Davidson's carpet and Deninno's cashmere belt. (Vol. XXVIII, T 1166; Vol. XXIX, T 1227-31) Furthermore, Appellant was placed in the apartment by virtue of Susan Shore's testimony.

McDonald also argues that the facts are "just as consistent with a burglary, robbery or even a 'frame up,' as opposed to a

murder." Upon review of Gordon's identical claim, this Court stated:

> *Motion for Judgment of Acquittal*
>
> Gordon next claims that since the State could only place him near the scene around the alleged time the murder occurred and scientific evidence shows that he was never in the apartment where the murder took place, the trial court erred in not granting Gordon's motion for judgment of acquittal. We disagree.
>
> We have repeatedly reaffirmed the general rule established in *Lynch v. State*, 293 So.2d 44 (Fla.1974), that:
>
> > [C]ourts should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law.
>
> *Id.* at 45; see *Gudinas v. State*, 693 So.2d 953 (Fla.1997), *cert. denied*, --- U.S. ----, 118 S.Ct. 345, 139 L.Ed.2d 267, (1997); *Barwick v. State*, 660 So.2d 685 (Fla.1995); *DeAngelo v. State*, 616 So.2d 440 (Fla.1993); *Taylor v. State*, 583 So.2d 323 (Fla.1991) In circumstantial evidence cases, "a judgment of acquittal is appropriate if the State fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt." *Barwick*, 660 So.2d at 694.
>
> Therefore, at the outset, "the trial judge must first determine there is competent evidence from which the jury could infer guilt to the exclusion of all other inferences." *Barwick*, 660 So.2d at 694. After the judge determines, as a matter of law, whether such competent evidence exists, the "question of whether the evidence is inconsistent with any other reasonable inference is a question of

fact for the jury." *Long v. State*, 689 So.2d 1055, 1058 (Fla.1997)

In this case, Gordon does not deny that voluminous circumstantial and direct evidence links him to the extensive planning and surveillance activities in the weeks and months leading up to Dr. Davidson's murder. Gordon also does not deny that he was present at Thunder Bay apartments the day Dr. Davidson was murdered, that he met Dr. Davidson at his car, and that he walked with him toward his apartment. Although he claims that no evidence places him in the apartment, he does not account for his precise whereabouts during the time from when he left Susan Shore's sight while accompanying Dr. Davidson to his apartment door and his reappearance at the car twenty to twenty-five minutes later, a time when other evidence suggests the homicide occurred.

Moreover, Gordon contradicts himself when he states in his brief that "even [my] alleged statement [to Susan Shore] 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." If that is so, then Gordon apparently concedes, as the circumstantial evidence indicates, that he was inside the apartment to, at least, perpetrate a robbery. Susan Shore placed Gordon near Davidson's apartment door by testifying that she saw Gordon and Davidson "go underneath the stairwell" proximate to Davidson's apartment door. ***In other words, Gordon has no alibi. (FN15) While he ultimately argues that the State produced insufficient evidence to convict him of first-degree murder, Gordon advances no argument that remotely challenges the legal basis of the trial court's denial of his motion for judgment of acquittal.*** Accordingly, we approve of the trial court's denial of Gordon's motion for judgment of

> acquittal. *Gudinas; Barwick; DeAngelo; Taylor.*
>
> Gordon v. State, 704 So.2d 107, 112-13 (Fla. 1997) (emphasis added)

Similarly, it is clear that sufficient circumstantial evidence exists to support the first degree murder conviction in this case. Therefore, Appellant is not entitled to relief on this claim.

ISSUE III

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

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. Appellant's brief cites to page 2758 of the record[3] 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. (Vol. XX, R 1872-73, 1875, 1878)

The part of the record noted is a transcript of the initial Spencer hearing, held on August 4, 1995, following the penalty phase of the trial. The jury recommendations of death had been returned on June 16, 1995 (Vol. X, R 1497-98) 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. The judge noted that she did not recall any argument or ruling on having separate juries (Vol. XX, R 1872-73) Although counsel indicated at

[3] Appellant's reference to the record appear to be in reference to the appellate record of co-defendant, Robert Gordon.

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 and appellant has failed to present any record support for that proposition.

Upon consideration of this claim, based on the same trial record and the same objections, this Court in Gordon held:

Separate Penalty-Phase Jury

> As his first penalty-phase issue, Gordon argues that the trial court erred in not granting his motion for not only a separate penalty-phase jury but also a separate jury for each defendant. This claim is without merit.
>
> Our review of the record confirms the State's assertion that during the trial, Gordon never made a motion for a separate jury for the penalty phase or for separate penalty-phase juries for each co-defendant. (FN16) There is no mention of either of these issues during the guilt phase or in the transcript of the penalty-phase proceedings. Before the jury was sworn for the penalty phase, the discussion exclusively centered on jury instructions. ***The State correctly notes that McDonald's counsel first raised the issue in open court at the initial Spencer hearing on August 4, 1995, nearly two months after the penalty phase was conducted on June 16, 1995.*** At that time, McDonald's counsel referred to a joint defense motion filed on June 23, 1995, titled "Motion for New Trial-Penalty Phase." While the motion does request "a new penalty phase of the trial," it does not address the discrete issue of separate penalty-phase juries for each defendant. Beyond that, the motion was filed a week after the penalty phase concluded. ***Therefore, since the issues were not raised contemporaneously with the***

penalty phase proceedings, they are procedurally barred.

Gordon v. State, 704 So.2d 107, 113-14 (Fla. 1997)(emphasis added)

Further, even if Appellant's argument was not procedurally barred, no relief is warranted. 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, Appellant is not entitled to relief on this issue.

ISSUE IV

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

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 Appellant's trial. This Court has specifically rejected the claim that the penalty phase jury must have the opportunity to consider such evidence.

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 Gordon and/or McDonald's sentence. (Vol. XI, 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. (Vol. XI, R 1658) On November 16, 1995, Judge Schaeffer entered her sentencing order, imposing a sentence of death on McDonald and Gordon. (Vol. XI, 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) <u>The sentence of a co-defendant to a sentence less than death.</u> (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.

(Vol. XI, 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 this Court should find, as it did in Gordon, that appellant is not entitled to relief on this claim. In Gordon this Court found the sentence proportionate, stating:

Proportionality

> Next, Gordon contends that his death sentence is disproportionate since co-defendant Denise Davidson only received a life sentence. We disagree.

The trial judge found Davidson's life sentence to be mitigating, but accorded it only a modest amount of weight "in light of the vast differences in the aggravating and mitigating circumstances presented in her case" as opposed to Gordon's. The trial court was informed of the details of Denise Davidson's sentencing and the factors applied by Assistant State Attorney Shaw's sworn testimony and the State's supplemental sentencing memorandum, dated October 9, 1995. After convicting her of first-degree murder, the jury recommended that Davidson be sentenced to life imprisonment without the possibility of parole for twenty-five years. The trial judge followed the jury's advisory sentence and imposed the recommended life sentence. The trial judge found the two statutory aggravators that the capital felony was committed while Davidson was an accomplice in or engaged in the commission of or attempt to commit a burglary or robbery or both and CCP; the trial judge found the three statutory mitigators of Davidson's age; lack of significant prior criminal history; and action under extreme duress or under the substantial domination of another person; and, finally, the trial judge found significant nonstatutory mitigation, including Davidson's family background; her community activities; the quality of being a caring parent; and her employment background. Our prior case law supports the trial judge's finding and sentence of death here. Again, we find our reasoning in Gamble helpful in addressing this issue.

On appeal, Gamble claimed that his sentence of death was disproportionate because, among other reasons, codefendant Love received a life sentence. Gamble, 659 So.2d at 245. In rejecting his argument, we reasoned as follows:

> One of [Gamble's] non-statutory mitigating factors given "some" weight was Love's sentence of life. 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.*

Id. (emphasis added) Therefore, we found no error in the trial court's refusal to postpone the penalty phase until after Love's plea and sentence.

Like Mrs. Davidson, Love was a participant in a conspiracy to murder. Unlike Mrs. Davidson, Love was an active participant in the murder itself and may have actually delivered the fatal blows to his landlord's head. *Id.* at 244 n. 1 (noting that the official cause of death was "blunt head injury due to multiple blows to the head, with a neck injury as a contributory factor") Therefore, since we found no error in Gamble's penalty phase concluding without Love's life sentence coming before the jury, we reach the same conclusion in this case.

In the final analysis, the record does not support Gordon's claim that "the evidence against [him] and Davidson is about the same." See *Hannon v. State*, 638 So.2d 39, 44 (Fla.1994) ("[A] death sentence is not disproportionate when a less culpable codefendant receives a less severe punishment."); *Coleman v. State*, 610 So.2d 1283, 1287 (Fla.1992) (same); *Hayes v. State*, 581 So.2d 121 (Fla.1991); *Downs v. State*, 572 So.2d 895 (Fla.1990); *see also Steinhorst v. Singletary*, 638 So.2d 33, 35 (Fla.1994)("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.") Since Mrs. Davidson and Gordon were not equally culpable, Gordon's death sentence is not disproportionate on the basis of her life sentence.
>
> We conclude that substantial, competent evidence exists in the record to support the trial court's finding of four aggravators and relatively minor nonstatutory mitigation. Accordingly, we find that Gordon's death sentence is proportionate to other cases where sentences of death have been imposed. *Gamble; Marshall v. State*, 604 So.2d 799 (Fla.1992) (affirming death sentence where four strong aggravators, including HAC, prior violent felony convictions, and murder during commission of burglary outweighed minor mitigation)
>
> Gordon v. State, 704 So.2d 107, 117-18 (Fla. 1997)

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. (Vol. XI, R 1631-34) Accordingly, McDonald'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 MCDONALD ACTED IN A COLD, CALCULATED AND PREMEDITATED MANNER, AND THAT THIS MURDER WAS HEINOUS, ATROCIOUS OR CRUEL.

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 Appellant's argument is without merit, as both of these aggravating factors were proven beyond any reasonable doubt.

As to heinous, atrocious, or cruel, 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.
>
> (Vol. XI, R 1663-64)

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.
>
> (Vol. XI, R 1664-65)

Like Gordon before him, McDonald argues that the evidence was just as consistent with the planning of a robbery or burglary as planning a murder and that the state failed to prove that the murder was "Both conscienceless or pitiless AND unnecessarily torturous." (Brief of Appellant, pg. 27)

These arguments were considered by this Court, in light of the facts of this case, and rejected on the following basis:

HAC and CCP

> Gordon challenges the evidentiary basis for the trial court's findings that the murder was cold, calculated, and premeditated and heinous, atrocious, or cruel. We find his claim to be without merit.
>
> Initially we note the abundance of circumstantial evidence that this was a contract murder, a killing that was painstakingly planned for months, and which included harassment and extensive surveillance of the victim at work and home. See *Archer v. State*, 673 So.2d 17, 19 (Fla.1996) (CCP is primarily reserved for contract, execution-style, and witness-elimination killings), cert. denied, --- U.S. ----, 117 S.Ct. 197, 136 L.Ed.2d 134 (1996); *Dailey v. State*, 594 So.2d 254, 259 (Fla.1991) (same); *Hansbrough v. State*, 509 So.2d 1081 (Fla.1987) Therefore, based on review of our prior case law and the facts of this case, we affirm the trial court's finding of the CCP aggravator.
>
> In *Jackson v. State*, 648 So.2d 85 (Fla.1994), we extensively analyzed our prior case law. From that survey, we limited CCP to the following elements:

> [T]he jury must first determine that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated); and that the defendant exhibited heightened premeditation (premeditated); and that the defendant had no pretense of moral or legal justification.

Id. at 89 (citations omitted) Thus, unless all the elements are established, we will not uphold the finding of a CCP aggravator. Further, while CCP can be established by circumstantial evidence, it "must be inconsistent with any reasonable hypothesis which might negate the aggravating factor." *Geralds v. State*, 601 So.2d 1157, 1163 (Fla.1992)

In *Geralds*, we invalidated the CCP aggravator after concluding that the defendant had proffered a "cohesive reasonable hypothesis" that he lacked the requisite heightened premeditation. Id. at 1164. We reached that conclusion after observing that:

> Geralds argues that this evidence establishes, at best, an unplanned killing in the course of a planned burglary, and that a planned burglary does not necessarily include a plan to kill. Geralds offers a number of reasonable hypotheses which are inconsistent with a finding of heightened premeditation. Geralds argues, first, that he allegedly gained information about the family's schedule to avoid contact with anyone during the burglary; second, the fact that the victim was bound first rather than immediately killed shows that the homicide was not planned; third, there was evidence of a struggle prior to the killing; and fourth, the knife was a weapon of opportunity from the kitchen

rather than one brought to the scene.

> Thus, although one hypothesis could support premeditated murder, another cohesive reasonable hypothesis is that Geralds tied the victim's wrists in order to interrogate her regarding the location of money which was hidden in the house. However, after she refused to reveal the location, Geralds became enraged and killed her in sudden anger. Alternatively, the victim could have struggled to escape and been killed during the struggle.
>
> In light of the fact that the evidence regarding premeditation in this case is susceptible to these divergent interpretations, we find the State has failed to meet its burden of establishing beyond a reasonable doubt that this homicide was committed in a cold, calculated, and premeditated manner.

Id. at 1163-64.

Similarly, in *Barwick v. State*, 660 So.2d 685, 696 (Fla.1995), we invalidated the CCP aggravator after concluding that the evidence only supported the defendant's intention to rape, rob, and burglarize rather than murder. After observing the victim while she sunbathed at her apartment complex, Barwick drove home, parked his car, got a knife from his house, and walked back to the victim's apartment complex. Barwick then walked past her three times and followed her into her apartment. Barwick stated that he only intended to steal something, but lost control and stabbed the victim when she resisted. Barwick said he continued to stab the victim as they struggled and fell to the floor. Id. at 689. In striking the CCP aggravator, we found that the evidence did not demonstrate that Barwick had a careful plan or prearranged design to murder, noting that a "plan to kill cannot be inferred solely from a plan to commit or the commission of another felony." Id. at 696 (quoting *Geralds*, 601

So.2d at 1163)

In contrast, we upheld the CCP aggravator in *Lockhart v. State*, 655 So.2d 69 (Fla.1995) We found that:

> The facts of this case alone support a finding of CCP. [Defendant] Lockhart went to Colhouer's house in the afternoon. There was no evidence of forced entry, so apparently Lockhart convinced Colhouer to let him in. The evidence shows that she was bound at one time and tortured by small pricking knife incisions just below the skin. She was then strangled and, while still alive, stabbed with several incisions. She was also anally assaulted. When police arrived, Colhouer was found naked from the waist down.
>
> It is evident that this killing was not something that occurred on the spur of the moment. The fact that Colhouer was bound and tortured before she was killed indicates that the incident happened over a period of time. The nature and complexity of the injuries indicate that Lockhart intended to do exactly what he did at the time he entered Colhouer's house. Thus, the trial court did not err in finding CCP.

Id. at 73. We reached the same conclusion in *Gamble v. State*, 659 So.2d 242, 244 (Fla.1995), where the defendant told his girlfriend six days prior to the murder that he was going to "take out" the eventual victim, his landlord. Gamble actually rehearsed the murder with his girlfriend by sneaking up behind her and practicing a choke hold on her with a cord. Id. The day of the murder Gamble picked up his paycheck and returned home where he and his roommate, Michael Love, gathered money to use as a guise for rent payment. Id. After speaking with the landlord in his garage, they asked him for a receipt. While the landlord went to his apartment to get a receipt, Love searched for a weapon in the garage and found a claw hammer.

When the landlord returned to the garage, Gamble struck him on the head with the claw hammer. Id. at 245. The extreme force of the blow knocked the landlord to the ground. Gamble then got on top of the landlord and held him down while he told Love to shut the garage doors. Id. After closing the garage doors, Love repeatedly struck the landlord on the head with the hammer. After he stopped pummeling the landlord with the hammer, Love wrapped a cord around his neck and began choking him. At this point, Gamble told Love that there was no reason to choke the victim and suggested that they leave him. Id. Gamble and Love then stole the landlord's car, picked up their girlfriends, ate at Kentucky Fried Chicken, forged and cashed an $8544 check on the landlord's account, and then drove to Mississippi. Id. We found that "[t]hese facts, which speak for themselves, completely support the trial court's finding of cold, calculated, and premeditated." 659 So.2d at 245.

Against that backdrop, we now analyze Gordon's claim that there is a reasonable hypothesis that he was planning a burglary or robbery rather than a murder. At the outset, assuming that Gordon and McDonald were truly planning a burglary, a reasonable hypothesis would be that they would want to break into Davidson's apartment when he was not at home to take "the piece of paper" they were allegedly seeking. If that was their goal, they would probably want to focus their energies on finding that paper and taking any valuables, rather than confronting an occupant who could possibly have a gun, phone 911, etc. (FN17) As they certainly knew Davidson's schedule almost down to the minute as a result of their extensive surveillance activities, they could have easily avoided encountering him if that is what they truly desired. Instead, they waited for him to return home before executing their plan, a critical fact we must consider in determining this issue.

Alternatively, if the defendants were

planning a robbery, they could have certainly achieved their aims after binding, gagging, and hogtieing Dr. Davidson. Obviously, he was in no position to resist any robbery attempts at that point. Furthermore, since they found the "piece of paper" they were allegedly seeking, and Dr. Davidson was powerless to resist them, they had no reason to kill him unless that is what they intended to do all along. As noted above, the fact that Gordon and McDonald did not take the substantial amount of cash and credit cards in the apartment appears to belie Gordon's proffered theory of burglary or robbery as their motive.

Gordon also claims that since McDonald had the piece of paper, knew about the Rolex watch, (FN18) and returned to their car after he did, it shows that he, Gordon, "was not knowledgeable about what happened with the victim." However, at most, that exchange indicates Gordon wished they had taken more valuables from Davidson's apartment, and McDonald's delayed return to the car was meant to maintain the ruse that McDonald was only then returning from his jog.

Accordingly, we do not believe Gordon has proffered any reasonable hypothesis of what may have happened other than a plan to rob and murder Dr. Davidson. Beyond veiled allusions that McDonald may have committed the murder since McDonald returned to the car later than he did and his unconvincing references to a "mystery man" in the stairwell's shadows, Gordon has no reasonable explanation of what happened that differs from what the trial court found. As such, we conclude that the factors which led us to invalidate the CCP findings in *Geralds* and *Barwick* are not present in this case. On the other hand, we find *Lockhart* and *Gamble* comparable.

Regarding the HAC aggravator, the trial court found as follows:

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

This aggravating factor was proven beyond a reasonable doubt against each defendant.

Our review of the record indicates that this is an accurate statement of the evidence adduced at trial. We believe the evidence "is broad enough that a trier of fact could reasonably infer that [Dr. Davidson] was conscious," *Gudinas*, 693 So.2d at 966, while the violent beatings and injuries were inflicted upon him before he was placed in the

> bathtub and drowned. Accordingly, we conclude that the trial judge did not abuse her discretion in finding this aggravator. See *Taylor v. State*, 630 So.2d 1038, 1043 (Fla.1993) (affirming HAC finding where victim was stabbed twenty times and suffered twenty-one other lacerations and wounds even though medical examiner could not confirm consciousness during all or any part of attack)
>
> Gordon v. State, 704 So.2d 107, 114-117 (Fla. 1997)

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

CONCLUSION

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

Respectfully submitted,

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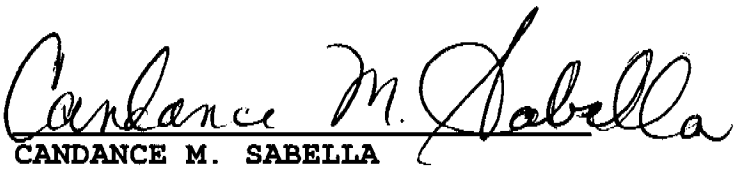
ATTORNEY GENERAL



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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 N. Watts, Esq., 4244 Central Avenue, St. Petersburg, Florida 33711 this 10 day of July, 1998.

COUNSEL FOR APPELLEE