IN THE SUPREME COURT OF FLORIDA

MERYL MCDONALD,

Appellant,

vs.

CASE NO. 87,059

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE JURY VERDICT AND JUDGMENT AND SENTENCE OF SIXTH JUDICIAL CIRCUIT COURT, PINELLAS COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT MERYL MCDONALD

RICHARD N. WATTS, ESQ.
Florida Bar No. 306428
Attorney for Appellant
4244 Central Ave.
St. Petersburg, FL 33711

STATEMENT OF ADOPTION

This appeal and the various issues raised by the Appellant McDonald and Co-Appellant Robert Gordon (Appeal Case No. 87,059) arise from one prosecution, one indictment and one jury trial.

In the interest of brevity and judicial economy, Appellant McDonald hereby adopts by reference, as though set forth in their entirety herein, all portions of the briefs of Co-defendant Robert Gordon which are applicable to Appellant McDonald and are not adverse to his position on appeal.

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PREFACE

In this brief, Appellant Meryl McDonald shall be referred to as "Appellant" or "Appellant McDonald". 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 penalty phase hearing will be denoted as "Transcript of the Penalty Proceedings" (herinafter referred to as P.P.).

STATEMENT OF THE CASE

This is a death penalty appeal of a black man convicted by an all white jury with circumstantial evidence that did not even place him at the actual scene of the crime.

On or about January 25, 1994, Dr. Louis Davidson was killed at Thunder Bay Apartments in Pinellas County, Florida (T: 325). Subsequently, 5 people were charged with First Degree Murder: Denise Davidson (victim's wife), Leo Cisneros, Appellant McDonald, Co-Defendant Gordon, and Susan Shore (R: 32).

Appellant McDonald and Co- Defendant Gordon were tried first. Ms. Davidson was given a separate trial before a different judge (R: 2489). Cisneros was and still remains a fugitive (T: 913, 1846). Susan Shore cooperated with the State, and testified at Appellant McDonald and Co-Defendant Gordon's trial (T: 1510). Later her charges were reduced to accessory after the fact (T: 1625), she received probation, and was deported to England (T: 2825).

Th trial of Appellant McDonald and Co-Defendant Gordon occurred from June 6 - June 15, 1995. Both were found guilty of Murder in the First Degree on June 15, 1995 (T: 2854).

On June 16, 1995, the same jury reconvened for the penalty phase portion of the trial (T: 2854). They returned an advisory recommendation that Appellant McDonald and Co-Defendant Gordon be sentenced to death by a 9 - 3 vote as to each (T: 2761).

The trial court ordered each side to prepare a Sentencing Memorandum, and held the first Spencer hearing on August 4, 1995 (T: 2758). Subsequently, Co-Defendant Denise Davidson had her trial before another judge (R: 2489). She was

also convicted of First Degree Murder (R: 2489). The judge followed the recommendation of her jury, and sentenced Co-Defendant Davidson to life in prison without the possibility of parole for twenty-five years (R: 2489, 2802).

Appellant McDonald and Co-Defendant Gordon's second Spencer hearing was held on October 9, 1995 (T: 2855). Testimony was taken and arguments made regarding the significance Co-Defendant Davidson's life sentence (T: 2804). On November 16, 1995, the trial court entered a 12 page Order sentencing Appellant McDonald and Co-Defendant Gordon to death (T: 2853).

A timely Notice of Appeal was filed on behalf of Appellant McDonald (R: 2553), and the instant appeal ensued.

STATEMENT OF THE FACTS

The State presented a circumstantial case trying to prove that the victim was actually murdered by Appellant McDonald and Co-Defendant Gordon (T: 274-275) at the request of the victim's estranged wife (Co-Defendant Denise Davidson) and her fiancée (T: 405) fugitive Co-Defendant Leo Cisneros. However, the State did not have an eyewitness to the actual murder.

The State placed Appellant McDonald and others near the murder scene (the victim's apartment) before the time the murder took place, so that the jury could infer that they were guilty of murder. The State relied on two theories, namely that Appellant McDonald and Co-Defendant Gordon committed either (1) premeditated murder, or (2) felony murder during the course of a robbery or burglary (T: 215, 220).

The facts adduced at trial were as follows: Dr. Davidson, the victim, left work at 9 a.m. on January 25, 1994, and drove to his apartment in Thunder Bay

Apartments, in Pinellas County, FL (T: 416). Appellant McDonald, Co-Defendant Gordon, and Co-Defendant Susan Shore had previously arrived together near the apartment building in the same car (T: 1559). Upon arrival, Appellant McDonald went jogging in the general direction of the apartments (T: 1563). In the meantime Co-Defendant's Gordon and Shore walked around the vicinity of the lake that was adjacent to the apartment complex (T: 1564). They were playing catch with a cricket ball (T: 1564). While tossing the ball they noticed apartment residents going about their business (T: 1565). Also about this same time, Co-defendant Shore testified that she saw what appeared to be a shadow of a black man, over by the stairwell of one of the apartment buildings (T: 1566).

Shortly thereafter, the victim pulled up in the parking lot and stepped out of his car. The victim was met by Co-Defendant Gordon, who spoke with him (T: 1568-1569). The two men went back to the victim's car, and then proceeded in the general direction of the apartment building, disappearing out of sight (T: 1628).

Co-Defendant Shore stayed behind in the car in which the group had arrived (T: 1569). While waiting for Gordon and McDonald to return, Shore met an older couple their daughter, and her infant child (T:1569). Shore spoke with these passersby, and observed their tiny infant (T: 1570). These people left about ten minutes later (T: 1570).

About 5 minutes later, Co-Defendant Gordon came back to the car where Shore was (T: 1569). A few moments after that, Appellant McDonald came back to the car, and said "I got the documents", and patted his stomach area which caused a crinkling sound (T: 1571). The three then drove away to a motel (T: 1576).

When the body of the victim was discovered that day at about 3 p.m., the police began their investigation. Although the victim's apartment was in disarray

and looked like it had been ransacked, with documents and other personal effects strewn all over the rooms, the apartment showed no signs of forced entry (T: 449, 1028-1035). The victim was found in a bathtub full of bloody water (T: 449). He had been tied up with a vacuum cleaner cord and a belt that had been taken from a cashmere coat (T: 448-57, 463-66). According to the medical examiner, the cause of Dr. Davidsons death was homicidal violence, including drowning, binding, and blunt trauma to the head and torso (T: 570).

The police then began to collect evidence from the scene, among which was the cashmere coat and matching belt that belonged to the victim's fiancée. Carpet samples were also collected (T: 465). There was $400.00 in the victims' wallet, and $19,300.00 in cash stashed away in his closet (T: 470-471).

The police began to follow Co-Defendant Denise Davidson over the next several days, and watched her go to several Western Union offices (T: 660). She sent several of these wire transfers to Co-Defendant Gordon, and he became a suspect (T: 661).

The police then got telephone records from Dooley Groves, in Tampa, where Denise Davidson was working (T: 662-669). The phone records led police to a beeper which was called by Co-Defendant Cisneros on January 25, 1994, (the day of the murder) 50 time during a 2 1/2 hour period (T: 1853, 1946). This beeper was registered to Patricia Vega, a girlfriend/business associate of Appellant McDonald, who received the beeper from her as a present (T: 662, 1430).

Co-Defendant Davidson had purchased a cellular phone and activated it on December 17, 1993 (T: 1805). This phone was allegedly used by Appellant McDonald (T: 1572). The State, by use of cellular phone records, traced the movement of the phone at certain times before and after the murder (T: 1900).

The police then used these cellular phone records to check out some of the

different places that were called, including hotels. For example, a Days Inn Hotel had been called on or about January 18, 1994 (T: 1052). The police went there and were told that 2 black men (Appellant McDonald and Co-Defendant Gordon) with a blond female (Shore), had been at the hotel on January 25, 1994, (T: 1073, 1128), and that they had left behind some clothes (T: 1112-1114, 1132). Specifically, after they checked out on January 26, 1994, a sweatshirt and a pair tennis shoes were found in the room (T: 1091, 1115-20, 1133-36). Both the sweatshirt and tennis shoes were alleged to have been worn by Appellant McDonald (T: 1166, 1227). None of the three used the shower in the hotel room during their stay (T: 1132, 1137, 1633).

These items were turned over to the FBI for analysis (T: 1256). Flecks of human blood were found on the tennis shoes, but the sample was too small to make a DNA profile (T: 1221-23). The bottom of the tennis shoes matched shoe prints found in the victim's apartment (T: 492-4, 1183-1202). Also, hair similar to the Appellant's was found on the sweatshirt, as were (1) fibers similar to those in the coat belt that was used to tie the victim's hands and (2) fibers similar to those found in the victim's carpet (T: 468-69, 840-43, 1256-77).

One blood stain matching the victims' DNA was found on the sweatshirt (T: 1166, 1227). In addition, a second sample of the victims' DNA was found on a second stain on the sweatshirt. However, this second sample of the victims' DNA, also contained within it, some other unknown DNA sample. (T: 1229, 1231). No blood samples from Appellant McDonald or any of the other Co-defendants was ever taken for comparison (T: 1936).

Through receipts, the State showed that on January 24th (the day before the homicide) Co-Defendant Davidson had purchased three items with a credit card, , namely a pair of sneakers, a gray sweatshirt, and a purple sweatshirt (T: 1925). However, none of the items were directly linked to Appellant McDonald or Co-

Defendant Gordon.

The state also showed that Appellant McDonald and Co-Defendant Gordon had made 3 trips to the Tampa area from Miami prior to Dr. Davidson's murder (T: 1345). They would typically be driven by a third person, and would stay in hotels and visit Co-Defendants Davidson and Leo Cisneros at Ms. Davidson's place of work in Tampa, Dooley Groves (T: 1356, 1379).

One of the third persons hired to accompany the Co-Defendant's on one of these trips to the Tampa area testified that following a meeting with Co-Defendant Davidson and Cisneros at Dooley Groves, the three men drove over to the hospital where Dr. Davidson worked (T: 1372). While he waited in the car, McDonald and Gordon, went into the hospital (T: 1373-4). They claimed they had to go to the emergency room and didn't return for approximately 30 minutes (T: 1373). When they returned the three men went back to Miami (T: 1373-1374).

The following week The Co-Defendant's returned to the Tampa area with this same witness (T: 1375). They went to Dooley Groves (T: 1379).. However, on this occasion after leaving Dooley Groves the three men went to the apartment complex where Dr. Davidson lived (T: 1382). At the complex they met with leasing agent and inquired about renting a couple units (T: 1382). McDonald and Gordon were posing as father and son who along with an imaginary wife needed the largest 2 bedroom unit possible (this would be the same type of unit a that leased by Dr. Davidson) (T: 1383, 1384). The witness who was paid to accompany the Co-defendant's to the Tampa area, was instructed to pretend to be a cousin needing a single bedroom unit (T: 1384). The three men were escorted by the leasing agent and shown the floor plans of both types of units (T: 1384). They were also given a brochure containing diagrams of the floor plans. After this meeting, the men drove around the area of the complex (T: 1385). Later on this same trip the three men

drove back over to the apartment complex from Tampa (T: 1395). The witness testified that Co-Defendant Gordon and Appellant McDonald appeared to have been trying to determine if there was another, second exit out of the apartment complex (T: 1395-1396).

The State's main witness against Appellant McDonald and Co-Defendant Gordon who detailed the events of the day of the murder was Co-Defendant Susan Shore. She drove with Appellant McDonald and Co-Defendant Gordon from Miami to Tampa (T: 1526), and was at the victim's apartment complex on the morning of the murder (T: 1559). She witnessed the interaction between Co-Defendant Gordon and the victim when he pulled up in his car near his apartment. The two spoke briefly and then they both walked away in the direction of the apartment building. (T: 1566). Shore never saw anyone go into the victim's apartment (T: 1653). No other witnesses testified to observing the alleged exchange between Gordon and the victim.

Shore testified that neither Appellant McDonald nor Co-Defendant Gordon took anything with them (e.g. murder weapons or gloves (T: 1629)) from the car on the morning when they were at the victim's apartment complex, or brought anything back to the car before they left (T: 1643). The murder weapon was never found or identified (T: 2114). Further, Shore testified that the men returned to the car within 10-20 minutes.

The State's scientific evidence was not consistent with Appellant McDonald ever being inside the victim's apartment [e.g. no fingerprints nor trace evidence linking McDonald to the crime were found inside apartment; after the alleged murder, he was not wet, had no cuts or bruises or apparent blood stains on him, no parts of his clothes were torn, and nothing was unusual about his shoes (T: 843-4, 1629)].. Nor was there any indication he had been involved in the physical acts

necessary to commit this murder.

SUMMARY OF THE ARGUMENT

This Court should reverse the trial court's decision and either, enter an Order of Acquittal, or grant a new trial, or vacate the death sentence and remand with instructions to impose a life sentence, or grant a new penalty phase hearing.

In support of this assertion, Appellant McDonald principally submits that the law and record illustrate that the trial court committed reversible error as follows:

I. APPELLANT MCDONALD ASSERTS THAT HE SHOULD BE GIVEN A NEW TRIAL BECAUSE HE WAS CONVICTED BY A JURY SELECTED FROM AN ALL-WHITE JURY VENIRE OF 50 PEOPLE.

Appellant McDonald and his Co-Defendant are both black. When the defense attorneys objected the trial judge said that it could not do anything, because the venire was randomly selected by computer. The trial court later commented that, "I wish we did have blacks on the panel, but that's the best we can do".

Appellant McDonald asserts that the trial court erred by making no effort to get some blacks on the venire. This violates the "fair cross-section" rule, where a defendant is entitled to a jury of his peers drawn from a fair cross-section of the community. In Pinellas County in 1995, about 7.9% of the population was black. With very little effort, the trial court could have ensured that the jury pool was fairly representative of the community.

Appellant McDonald asserts that the "affirmative duty rule" forces courts to utilize selection procedures that, regardless of their intention, produces non-discriminatory results. Here, a discriminatory result occurred.

Because Appellant McDonald's life was at stake here, the slight additional effort required by the trial court to give blacks access to the venire was not too large a

rice to pay. Because the trial court did not take these protective measures, Appellant McDonald should be given a new trial.

II. APPELLANT MCDONALD ASSERTS THAT THE EVIDENCE WAS INSUFFICIENT TO SHOW THAT HE WAS INVOLVED IN THE MURDER.

without an eyewitness or other direct evidence, the State's case as to the homicide is circumstancial. No one ever saw Appellant McDonald (1) enter the victim's apartment building, or (2) specific apartment unit where the murder occurred, or (3) commit the murder. No one testified that Appellant McDonald was involved in, spoke about, or even knew of an actual murder.

The evidence proffered by the state falls short of the necessary standard of being inconsistent with any reasonable hypothesis of innocence.

Even if the Appellant was involved in a robbery, this act should not rise to the level of premeditated felony murder. While the State may have offered sufficient evidence which challenges the Appellant's reasonable contention that he may have been involved in a robbery, the evidence fails to rebut the hypothesis that he knew nothing about a killing which he contends must have occurred at some point after the robbery and was committed by an assailant unknownto him.

Various scientific and circumstantial evidence did not show that Appellant McDonald was ever inside the apartment building or apartment unit where the murder occurred. The State's key witness Co-Defendant Shore, simply testified that McDonald had gone on a morning jog upon their arrival to the apartment complex. In any event, the commode in the apartment unit had been broken, which caused water to flood the bathroom area and spill out into most of the rest of the apartment. Moreover, blood was spattered on the bathroom walls and the victim

was lying face down in a bathtub full of bloody water when he was discovered. This evidence indicates that a fierce struggle must have taken place between the victim and his attacker(s).

However, Co-Defendant Shore testified that when Appellant McDonald returned after leaving Co-Defendant's Shore and Gordon, he had no water stains on his clothes or shoes, he had no blood stains on him, there were no cuts, bruises, or lacerations on him, no parts of his clothing were torn, and there was nothing unusual about his shoes that would draw attention to him. Further, no fingerprints of either Appellant McDonald or Co-Defendant Gordon were ever found inside the victim's apartment.

While the state alleges to have found a pair of blood stained tennis shoes and a sweatshirt left behind by the Co-Defendants, with the sweatshirt containing, (1) fibers similar to those in the victims' carpet, (2) fibers similar to those in a cashmere coat discovered in the victim's apartment, (3) head hairs similar to the Appellant's, and (4) traces of the victim's DNA, this evidence fails to establish beyond a reasonable doubt that Appellant McDonald was in the victim's apartment and committed the murder.

This evidence was not found on the Appellant at the time of arrest, but was discovered to have been left behind at the Days Inn hotel where Appellant McDonald and Co-Defendant's Gordon and Shore allegedly stayed on January 25, 1994, the day of the murder. It was not collected by the police from the hotel until February 22, 1994, and up until that point had been stored in an unsecured fashion in the hotels' lost and found box. Because of this, the sweatshirt, the hair and carpet fibers found on the sweatshirt, the victim's DNA found allegedly found on the sweatshirt (along with some unknown other DNA), as well as the sneakers, fail to establish beyond a reasonable doubt that Appellant McDonald is responsible for the

killing.

In fact, the State's circumstantial case only showed Appellant McDonald and others coming from Miami to the Tampa area on 3 occasions, staying in the Tampa area monitoring the victim, visiting with Leo Cisneros and Co-Defendant Davidson, and then returning to Miami. All of this evidence is entirely consistent with the fact that they were, at most, only helping Cisneros and Co-Defendant Davidson to plan a burglary or robbery, which unbeknownst to them was a smaller part of the much larger murder scheme, to be executed by Cisneros but resulting in their arrests .

For example, this Honorable Court need only look to the open and obvious nature of Appellant McDonald and Co-Defendant Gordons conduct during the two months prior to the victims murder. On each occasion that they visited the Tampa area they felt compelled to hire third parties to escort them. They would then parade about Pinellas county in an open and notorious fashion monitoring Dr. Davidson. They would visit the Doctor's place of employment and go so far as to meet with the leasing agent of the apartment complex, touring the layout of the units therein. While doing this they would dress up and play roles, pretending to be in positions that they weren't. They would make those persons escorting them assume roles that they did not hold.

III. APPELLANT MCDONALD ASSERTS THAT HE SHOULD BE GIVEN A NEW PENALTY PHASE HEARING

Defense counsel for both Appellant McDonald and his Co-Defendant requested a special verdict form be given to the jury, in which they would indicate their basis for a conviction for first degree murder (premeditated murder or felony murder during course of a robbery or burglary). This request was denied. Defense counsel also requested a separate jury for the penalty phase as well as separate juries

for each Co-Defendant. These requests were also denied. The result of this was that the Co-Defendant's went into the penalty phase unaware of which theory their conviction was based on (premeditated murder or felony murder in the course of a burglary/robbery), or which roles had been assigned to them (e.g. principal and/or accomplice).

The Appellant contends that a separate jury in the penalty phase can more objectively weigh aggravating and mitigating factors. Furthermore, Appellant McDonald contends that a separate jury would have shifted the focus of the penalty phase towards his own culpability. Had this been the case, both Appellant McDonald and Co-Defendant Gordon would not have been in the awkward position of having to point a finger at the other while vigorously defending themselves.

IV. APPELLANT MCDONALD ASSERTS THE TRIAL COURT ERRED IN SENTENCING HIM TO DEATH BASED ON THE DOCTRINE OF PROPORTIONALITY.

Co-Defendant Denise Davidson (the victim's wife) received a severance, was tried after the instant trial, was convicted of first degree murder, and sentenced to life. Because this happened after the instant trial, the penalty phase jury for Appellant McDonald was not aware of his co-defendant's life sentence.

It is critical that Appellant McDonald's penalty phase jury (and not just his sentencing judge) know that his co-defendant received a life sentence. The appellant got an advisory recommendation for death from the jury with a 9 - 3 vote. The fact that a co-defendant received a life sentence is a mitigating circumstance that could very well sway the other 3 jurors necessary to make a "life" recommendation.

IV. APPELLANT MCDONALD ASSERTS THAT THE TRIAL COURT ERRED BY FINDING THAT APPELLANT ACTED IN A "COLD, CALCULATED, AND PREMEDITATED" MANNER.

All of the Appellant's actions were just as consistent with a burglary or a robbery, as with murder. The fact that the State's star witness said that Appellant McDonald had left the car at the victim's apartment complex on the morning of the murder with nothing in his hands, along with the fact that the victim was bound, gagged, and struck over the head, with items that were found in his apartment (e.g. electrical cord, towels, and a belt from a cashmere coat) is contrary to any notions of premeditation. Certainly this did not encompass a heightened degree of premeditation. Nor did the evidence support a calculated plan to kill.

Finally, the Appellant argues that since there is not direct evidence which supports a finding that he directly participated in the actual killing he should not be held vicariously responsible for the manner which it was carried out.

V. APPELLANT MCDONALD ASSERTS THAT THE TRIAL COURT ERRED BY FINDING THAT THE APPELLANT ACTED IN A HEINOUS, ATROCIOUS, AND CRUEL MANNER, AND THAT THE INSTRUCTIONS GIVEN TO THE JURY REGARDING THIS FACTOR WERE UNCONSTITUTIONALLY VAGUE

The Appellant argues that there is no evidence to support a finding that this murder was done with such extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to, or enjoyment of, the suffering of another so as to be heinous, atrocious, and cruel (H.A.C.)

At the trial, the medical examiner entered unrefutted testimony that the victim may have been rendered unconscious immediately after the first blow that was struck. This Court has established that crimes against dead or unconscious persons do not fall within the definition of H.A.C. because unconscious persons are incapable of comprehending fear or pain.

The Appellant asserts that the instructions given to the jury regarding the H.A.C. aggravator were unconstitutionally vague because they did not adequately define the terms of H.A.C. in a manner which enabled the jury to narrow those crimes that are eligible for the death penalty.

VI. APPELLANT MCDONALD ASSERTS THAT HE SHOULD BE GIVEN A NEW PENALTY PHASE HEARING BASED ON CERTAIN INAPPROPRIATE STATEMENTS MADE BY THE PROSECUTION DURING THE CLOSING ARGUMENTS OF HIS PENALTY PHASE.

Comments designed to appeal to any xenophobic emotions and fears of the individual jurors, comments which may reasonably be construed as appeals to racial tendencies, and variations upon the Golden Rule argument, utterly destroyed the Appellants right to the essential fairness of a criminal trial.

III. APPELLANT MCDONALD ASERTS THE TRIAL COURTS' FAILURE TO CONDUCT A NECESSARY INQUIRY TO DETERMINE WHETHER THE EXPERTS DNA TEST RESULTS AND THE BASIS OF HIS STATISTICAL CONCLUSIONS COULD BE ADMITTED IS CLEARLY ERROR AND A NEW TRIAL IS REQUIRED.

This court has determined that DNA testing involves two distinct steps both of which must satisfy the requirements of *Frye*. This is a determination that the trial Judge alone must make. In the instant case the record does not indicate that a determination was made. Thus, a new trial is required.

ARGUMENT

I. JURY COMPOSITION

Appellant McDonald reaffirms the Summary of Argument as stated previously herein.

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

At the close of the State's case (there was no defense case), Appellant McDonald made a Motion for Judgment of Acquittal (T: 1974, R: 2463-4), which was denied by the trial court (T: 1981).

"In circumstantial evidence cases a trial judge must determine if there is competent evidence from which the jury could infer guilt to the exclusion of all other reasonable interferences." Barwick v. State, 660 So.2d 685 (Fla 1995) at 694. Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. McArthur v. State, 351 So.2d 972 (Fla 1977).

In the instant case, the Appellant asserts that his conviction lies solely on insufficient circumstantial evidence. While the Appellant may have been involved in a robbery, he reasonably states that he knew nothing about a murder or plan to commit murder. The Appellant further asserts that the murder must have taken place after the robbery by an unknown assailant.

The Appellant's reasonable hypothesises that if he was hired to commit a robbery it was to obtain papers that would be used to affect a domestic situation that the victim was involved in at the time of the murder. The evidence shows Appellant was casing the victim's residence, but states they needed the doctor to show the location of the paper and that the victim was tricked into revealing the whereabouts of the documents which were then stolen without any violence. Furthermore, circumstantial evidence suggests that Appellant was hired to commit the robbery by the very same person who murdered the victim at some point after the simple robbery.

The verdict must be overturned since the State has offered no evidence to support a finding that the murder actually took place during the robbery attempt and not, as the Appellant argues, after the robbery.

Appellant McDonald asserts that even when this court looks at the evidence in the light most favorable to the jury verdict (including the testimony of a co-defendant and other evidence), it does not show that he was involved in the actual murder. He would like to remind this Court that evidence that creates nothing more than a strong suspicion that a defendant committed the crime is not sufficient to support a conviction. Cox v. State, 555 So.2d 52 (Fla. 1989).

A careful examination of the State's circumstantial evidence shows at best, the State places Appellant McDonald near the murder scene around the time the murder occurs (T: 1556-1573). Scientific evidence does not show that Appellant McDonald was ever in the apartment where the murder took place. Moreover, there were no eyewitnesses to the actual murder, and the victim's body was not found until about 3 P.M. (T: 422), nearly 6 hours later. As a result, the Appellant asserts that his conviction should be reversed, or this matter remanded for a new trial.

A. The Testimony of the State's Key Witness Does Not Show That Appellant McDonald Murdered the Victim

Co-Defendant Shore was the State's only witness that put Appellant McDonald near the scene on the morning of the murder. She testified that she was asked by a mutual friend on January 22, 1994, to go on a trip with Co-Defendant Gordon and a friend (Appellant McDonald) (T: 1522). When Shore, Co-Defendant Gordon and Appellant McDonald arrived in Tampa, Shore and McDonald went to the Dooley Grove store, while Gordon went to another store (T: 1534). Appellant McDonald talked to a man and a woman later identified as Co-Defendant's Denise

Davidson and Leo Cisneros (T: 1534). Co-Defendant Gordon never went into the store, and later joined the other two back at the car (T: 1539). Appellant McDonald told Shore that he and Co-Defendant Gordon had to see a friend, that he would not be home until the next morning, and that they had to get a piece of paper from him (T: 1542). The 3 then checked into a hotel, paid for by cash given to her by Appellant McDonald (T: 1543-5).

Shore testified that the next morning (January 25), when arriving at Thunder Bay Apartments, Appellant McDonald told Shore where to park the car (T: 1559), and he then left the two in the car and went jogging near the apartment complex (T: 1562-3). Appellant McDonald had tennis shoes on, but Shore was not sure what kind of shoes Co-Defendant Gordon had. Gordon and Shore then played catch with a cricket ball, waiting for the friend to arrive from work (T: 1565-6). About this time, Shore saw an unidentified black male in the shadows under the stairwell (T: 1566). A few minutes later, the victim pulled up in his car, and Co-Defendant Gordon went over to talk to him, but Shore could not hear the conversation (T: 1566, 1568). Co-Defendant Gordon and the victim then left the area (T: 1628).

Shore waited in the car for a few minutes, and spoke with passers-by. About 5 minutes later, Co-Defendant Gordon came back to her car (T: 1569). Thereafter, Appellant McDonald followed (T: 1574). Shore testified that when McDonald returned, she did not notice any blood on his clothes, or anything else unusual about his appearance (T: 1629). No part of his clothing appeared to have been torn (T: 1629). He had no cuts, bruises, or lacerations, and he wasn't wearing gloves (T: 1628-9). He did not appear to have water on his clothes or shoes (T: 1629). Moreover, Appellant McDonald was not perspiring at all, and didn't appear to be acting nervously, but in fact, directed Shore in a calm manner to start the car and leave the complex (T: 1630-1).

Shore Further testified that she did not see either Co-Defendant Gordon or Appellant McDonald take anything with them when they left the car after pulling up to the apartment complex that morning (e.g. murder weapons) (T: 1644). She also testified she did not see them bring anything back with them, when they returned to the car (T: 1643). However, when Appellant McDonald returned, he said, as he got into the car, "I got the piece of paper" and patted his stomach. She then heard what she believed to be paper making a crinkling sound (T: 1571).

Shore did not see either Appellant McDonald or Co-Defendant Gordon with a beeper on either January 24th or 25th, 1994 (T: 1546) [so the 50 calls to the beeper, and other calls on that day (T: 970), have little evidentiary value]. After he got back into the car, McDonald did however, use a cellular phone and called someone and said "I have it", and then in an irate voice repeated "Yes, I have it" (T: 1572). The two men then directed Shore to go to another hotel to meet their friend so they could give him the piece of paper (T: 1573).

After arriving at the Days Inn, the two men told her they were waiting for this friend to arrive, to give him the piece of paper (T: 1579). There came a time when the another man (fugitive Co-Defendant Cisneros) arrived at the hotel, left, and then came back (T: 1582, 1585). During their stay at the hotel, neither Appellant McDonald nor anyone else ever took a shower (T: 1633).

The Appellant asserts that the facts above are just as consistent with a burglary, robbery, or a even a "frame up", as opposed to a murder. This large amount of circumstantial evidence apparently showed the movement of Appellant McDonald and Co-Defendant Gordon before and after the murder. However, the evidence is just as consistent that the "mystery man" in the stairwell to the victim's apartment building (T: 1566) committed the murder by himself, after

Appellant McDonald and Co-Defendant's Gordon and Shore had left the general area.

B. The State's Other Evidence Does Not Show That Appellant McDonald Was Involved In The Victim's Murder

While the State alleges to have found a pair of tennis shoes and a sweatshirt left behind by the Co-Defendants, with the sweatshirt containing, (1) fibers similar to those in the victims' carpet, (2) fibers similar to those in a cashmere coat discovered in the victim's apartment, (3) hairs similar to the Appellant's, and (4) traces of the victim's DNA (T: 1229 1231, 1256, 1276, 1283), this evidence fails to establish beyond a reasonable doubt that Appellant McDonald was in the Victim's apartment and committed the murder.

These items were not found on the Appellant at the time of arrest, but were discovered to have been left behind at the hotel where Appellant McDonald and Co-Defendant's Gordon and Shore allegedly stayed on January 25, 1994, the day of the murder (T: 1115-20). This evidence was not collected by the police from the hotel until February 22, 1994, (T: 1060). Moreover, from the time the defendants checked out of the hotel until its discovery by law enforcement, the sweatshirt and tennis shoes collected from the defendants' room had been placed in a hotel lost and found box (T: 1121). At any one time there were numerous other items collected from other rooms and stored within this lost and found box (T: 1122). All of the hotel's lost and found items were kept within the lost and found box for a period up to 90 days (T: 1122). After factoring in the very real threat of contamination, this evidence, allegedly left behind by the defendants at the hotel and not discovered by the police until nearly one month later, is of little evidentiary value.

Furthermore, there is no evidence which establishes that on the morning of

the murder, Appellant McDonald was wearing the grey sweatshirt collected by the police, from the hotel's lost and found. At best, the accounts given as to what Appellant McDonald was wearing that morning, seem to be in conflict.

For example, one account, was given by the Days Inn front desk clerk, Claire Dodd, who checked in Appellant McDonald and Co-Defendant's Gordon and Shore on the morning of the murder (T: 1077). She testified that at approximately 11:02 A.M., while Co-Defendant Shore was filling out a registration card, Co-Defendant Gordon was sitting on one of the couches in the hotel lobby, and Appellant McDonald was using one of the hotel lobby pay phones (T: 1080). Co-Defendant Gordon was nicely dressed, wearing a casual shirt and pants with dark shoes, and Appellant McDonald was described as wearing dark clothing and a jacket (although she could not remember what color the jacket was) (T: 1081).

A different account was given by the State's star witness Co-Defendant Shore. She testified that after leaving the victim's apartment complex on the morning of the day of the murder, the three Co-Defendant's went to the Days Inn (mentioned above) (T: 1573). Shore was driving the car, and was given directions from the others, to the hotel (T: 1573). When describing the attire worn by Appellant McDonald and Co-Defendant Gordon on the morning when they were at the complex, she testified that one of the men was wearing a black sweatshirt and the other was wearing a grey one (T: 1640). However, she could not recall which man was wearing which sweatshirt (T: 1640).

Moreover, the fact that 2 of Appellant McDonald's head hairs and one facial hair was allegedly found (T: 468-69, 840-43) on the sweatshirt is of little evidentiary value as well. This Court has recognized that hair comparisons, while admissible, cannot constitute [a] positive personal identification, as hairs from 2 different people may have precisely the same characteristics. Long v. State, 689 So.2d 1055 (Fla.

1997); Jackson v. State, 511 So.2d 1047 (Fla.App. 2 Dist. 1987). In any event, this hair would only be relevant if its presence on the sweatshirt was probative of McDonald's presence in the victims apartment at the time of the murder. Sawyer v. State, 561 So.2d 278, 284 (Fla.App. 2 Dist. 1990). However, since nobody ever testified as to witnessing Appellant McDonald's entry into the victim's apartment, and by virtue of the conflicting testimony described above as to what he was wearing that morning, the State has simply failed to link Appellant McDonald to the sweatshirt in the first place.

The State's failure to conclusively link the sweatshirt to Appellant McDonald is not peculiar to that piece of evidence, for the same may also be said about the tennis allegedly worn by McDonald, and discovered nearly one month later in the hotel's lost and found (T: 1144-48). The State's star witness testified that after the Co-Defendant's arrived at the apartment complex on the morning of the murder Appellant McDonald stated he was going jogging, and then walked away (T: 1562). She also testified that, in fact, Appellant McDonald was wearing white tennis shoes (T: 1563). However, Co-Defendant Shore went on to admit that Co-Defendant Gordon was also wearing the same style of white tennis shoes (T: 1563). The mere fact that Appellant McDonald's shoe size matches the size of the pair of shoes discovered at the hotel (T: 1846), is not a convincing enough link to prove that McDonald was ever wearing these shoes.

In order for the State to prove first-degree murder through circumstantial evidence, the evidence must be inconsistent with any reasonable hypothesis of innocence. Bedford v. State, 589 So.2d 245 (Fla. 1991). In the instant case, the State's circumstantial evidence only showed Appellant McDonald and others coming from Miami to the Tampa area, staying in Tampa monitoring the victim, and then returning to Miami. These events took place over a period of a few months.

C. Appellant Asserts That The States Evidence Is More Consistent With Robbery Not Murder

All of the States evidence is consistent with the hypothesis that the Appellant was, at most, planning a robbery and not a killing. His participation ended when the documents were removed. Therefore, it is reasonably argued that the killing was an independent act committed by a party independent of the Appellant.

Co-Defendant Shore testified that the Appellant was not worked up in a manner that would suggest that he killed someone upon re-entering Shore's vehicle. Furthermore, the fact that the Appellant wore no disguises (and in fact drew attention to himself) tends to support the theory of robbery because robbery is a local concern and the Appellant was not worried because he was from out of town, since the murder is of a larger concern and it is likely that the Appellant would have attempted to conceal his identity, if he were knowingly participating in a murder.

The Appellant further points out that the State has failed to prove that the victim was killed during the actual robbery and not at a later time which would be consistent with a theory that the Appellant was set up to take the blame for the killing.

If the Appellant was not actually or constructively present during, and did not participate in the killing which was an independent act of another and was not a part of a common scheme or design, the Appellant cannot be convicted of felony murder. Bryant v. State, 412 So.2d 347 (Fla 1982) at 350.

All of this evidence is just as consistent with the hypothesis that Appellant McDonald was, at most, planning a burglary or robbery and not a murder. However, in reality, since no one witnessed McDonald enter the victim's apartment that morning, since none of McDonald's fingerprints were ever discovered at the scene

of the crime (T: 844), and since the State failed to link any of the evidence discovered at the hotel to McDonald, the record does not sustain a conviction for robbery or burglary.

II. THE TRIAL COURT ERRED IN DENYING APPELLANT MCDONALD'S REQUEST FOR A SEPARATE PENALTY PHASE JURY FROM HIS CO-DEFENDANT, AND A DIFFERENT PENALTY PHASE JURY THAN THE JURY WHICH PRESIDED OVER THE GUILT PHASE

The guilt phase of this trial ended on June 15, 1995 (verdict returned at 7:30 P.M.), with the jury finding both Appellant McDonald and Co-Defendant Gordon guilty of First Degree Murder (T: 2224). The Defendant's were unaware of the theory upon which the jury reached its decision of first degree murder. Even though the State argued that the Co-Defendant's could be found guilty of either premeditated murder or felony murder, the State never elected to pursue a specific theory.[1] . Subsequently, Appellant McDonald and Co-Defendant Gordon had to proceed into the penalty phase not knowing aggravators and/or mitigators to focus on, based on the jury's verdict of guilt.

The trial court conducted the penalty phase on June 16, 1995. Defense counsel requested a different penalty phase jury, and also that there be separate penalty phase jury's for each defendant (T: 2755, R: 2461, 2462). The trial court denied this request (T: 2758). These issues were raised and once again, denied by the trial court at the "Spencer" sentencing hearing, on August 4, 1995 (T: 1874-75).

Appellant McDonald contends that in capital cases, the ability of jurors to be able to follow the law includes, the ability during the penalty phase, to find and then weigh any aggravating circumstances against any mitigating circumstances.

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[1]The defense requested that a special verdict form be given to the jury indicating whether they found Appellant McDonald and Co-Defendant Gordon guilty of premeditated murder or felony murder (T: 2002-2004).

Melton v. State, 638 So.2d 927, (Fla.), cert. denied, __ U.S. __, 115 S.Ct. 441, 130 L. Ed.2d 352 (1994). However, the jury is unable to properly accomplish this task in the penalty phase when they are not specifically given a theory upon which to base their conviction for murder in the first degree.

Assuming, for example, if the jury chose to use felony murder during the course of a burglary or robbery as a basis for the defendant's conviction, how can that same jury not find the aggravating circumstance of murder during the commission of a felony during that defendant's penalty phase? The jury is in effect compelled to find this factor by virtue of it's use during the guilt phase. As a result of this the defendant starts out with one strike against him at the beginning of his penalty phase.

Appellant McDonald believes that if a new and different jury were impaneled to decide upon the his fate, this problem would be alleviated. This jury would be allowed to objectively find and weigh aggravating circumstances against mitigating circumstances irrespective of any theory used as a basis for guilt.

Appellant McDonald contends that the focus of the penalty phase should be on his own culpability and that he should have been granted a separate jury than that of his co-defendant. In Lockett v. Ohio, 438 U.S. 586, 605 (1978), the Supreme Court insisted upon individualized consideration as a constitutional requirement in imposing the death penalty. This meant that the court must focus on the relevant facets of the character and record of the individualized offender. Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

Upon commencement of the penalty phase Appellant McDonald and his Co-Defendant were not aware which roles had been assigned to them by the jury in the in the guilt phase. As a result each was then in the awkward position of having to point a finger at the other while vigorously defending themselves. This most

certainly resulted in the destruction of the credibility of each defendant. Accordingly, since he was not granted the individualized consideration due to him, Appellant McDonald requests that this Court grant him a new penalty phase.

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

Appellant McDonald was indicted for first degree murder along with 4 others: (1) Denise Davidson, the victim's wife, possible originator of the scheme, along with (2) Leo Cisneros, Ms. Davidson's fiancée at the time of the murder, also a possible planner and possible perpetrator of the actual killing, (3) Co-Defendant Gordon, and (4) Susan Shore, who had her charges reduced to accessory after the fact (R: 32).

Co-Defendant Cisneros is still a fugitive (T: 1846), and naturally has yet to be tried, convicted, or sentenced much of the State's case is specifically against him); Co-Defendant Susan Shore, had her charges reduced to accessory after the fact, received a sentence of probation, and was deported back to home country of England (T: 2825).

Co-Defendant Davidson got a separate trial, and was convicted and sentenced after the instant trial (T: 2489). As a result, Appellant McDonald's jury at the penalty phase was not made aware of the fact that Co-Defendant Davidson received a life sentence (T: 2802). This fact could have potentially had a dramatic affect on the recommendation of the jury during Appellant McDonald's penalty phase. This is evidenced by a statement by Veniremen Richey, who expressed a sentiment commonly held by many. He expressed his strong belief that the victim's wife (e.g. Co-Defendant Davidson) wanted the victim killed (T: 95 et seq.). As a result, the f

fact that the wife received a life sentence is a strong mitigator for Appellant McDonald.

Even though the trial court did delay Appellant McDonald's sentencing until after the sentence of Co-Defendant Davidson, so that the trial court could consider her sentence, there was never a chance for this fact to have an impact on the deliberations of the penalty phase jury, and their subsequent recommendation to the judge. Only 3 more jurors needed to have recommended life, for there to have been the 6 - 6 split necessary for a "life" recommendation. The trial court stated it would have let Appellant McDonald's attorney argue Co-Defendant Davidson's life sentence if she had been sentenced before Appellant McDonald's penalty hearing (T: 2843). Appellant McDonald only asks for this opportunity now.

In Scott v. Dugger, 604 So.2d 465 (Fla. 1992), this Court held that it was proper for it to consider the propriety of disparate sentences to determine whether the death sentence is appropriate given the conduct of all participants in committing the crime. Appellant McDonald asserts that similarly, this Court should consider the disparate sentence given to Co-Defendant Davidson (T: 2804) after his penalty phase jury had recommended death.

IV. THE TRIAL COURT ERRED BY FINDING APPELLANT MCDONALD ACTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER.

> Aggravators must be proven beyond a reasonable doubt. [An] aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. Zant v. Stephens, 462 U.S. 862, 877 (1983).

A. The Evidence Did Not Show That Appellant McDonald Acted In A Premeditated Manner

At Appellant McDonald's sentencing hearing, the lower court sentenced Appellant McDonald to death (Transcript of Penalty Proceeding: 26) based upon

inter alia its finding that he acted in a cold, calculated, and premeditated manner, and the murder was heinous, atrocious, and cruel (Transcript of Penalty Proceeding: 11-16). Appellant McDonald asserts that this finding is not supported by the facts. Cold has been defined as meaning "calm cool reflection, and not an act prompted by emotional frenzy, panic, fit or rage, Jackson v. State, 648 So.2d 85 (Fla. 1994). Calculated has been defined as a careful plan or prearranged design to commit a murder, Jackson v. State, 648 So.2d 85 (Fla. 1994). Premeditated encompasses the need for heightened degree of premeditation and is more than needed to prove First Degree Premeditation, Jackson v. State, 648 So.2d 85 (Fla. 1994). Heightened premeditation has been defined as deliberate ruthlessness, Walls v. State, 641 So.2d 381 (Fla 1994).

A person cannot be held vicariously responsible for the manner in which it was carried out. See Omelus v. State, 584 So.2d 563 (Fla 1991), and Archer v. State, 613 So.2d 446 (Fla 1993). Since there was no evidence that linked the Appellant to the actual killing he cannot be said to have acted in a cold manner according to the definition set for in Jackson v. State, 648 So.2d 85 (Fla. 1994).

In Bedford v. State, 589 So.2d 245 (Fla. 1991), this court held that, although premeditation may be proven by circumstantial evidence, where the State seeks to prove premeditation by circumstantial evidence the evidence must be inconsistent with any reasonable hypothesis of innocence. Co-Defendant Shore testified that Appellant McDonald took nothing with him as he left herself and Co-Defendant Gordon, when he left her car the morning of the murder (T: 1644). The evidence showed that the victim was bound, gagged, and struck with items that were found in the victim's apartment (T: 449).The record in the instant case shows that all the alleged planning done by Appellant McDonald is reasonably consistent with the planning of a burglary or a robbery, and not a murder.

V. THE TRIAL COURT ERRED BY FINDING THAT THE APPELLANT ACTED IN A MANNER THAT WAS HEINOUS, ATROCIOUS AND CRUEL

A. The Instant Murder was not Heinous, Atrocious and Cruel.

What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - - the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

As it is true that vicarious liability cannot be used to induce a standard of cold, calculated, and premeditated, it is well established that it can not be used to induce a standard of heinous, atrocious and cruel. Archer v. State, 613 So.2d 446 (Fla 1993), and Omelus v. State, 584 So.2d 563 (Fla 1991). No evidence adduced by the State places Appellant McDonald in the victim's apartment or in physical contact with the victim. State v. Dixon, 283 So.2d 698 (Fla. 1973).

Furthermore, nothing done to the victim after his or her death or unconsciousness can be used to support a heinous, atrocious and cruel standard. Jackson v. State, 451 So.2d 458 (Fla. 1984), Jones v. State, 569 So.2d 1234 (Fla 1990), Herzog v. State, 439 So.2d 1372 (Fla 1983). Even if the Appellant could somehow be directly linked to the actual act of killing, the medical examiner testified that the first head injury inflicted upon he victim may have rendered him unconscious. Therefore, the H.A.C. standard is inapplicable and it is reversible error that was applied at the trial level.

Finally, the State did not prove that the murder was committed in such a manner so as to cause the victim unnecessary and prolonged suffering. Gorham v.. State, 454 So.2d 556(Fla 1984), nor was it proven that crime was Both conscienceless or pitiless AND unnecessarily torturous. Richardson v. State, 604 So.2d 1107 (Fla 1992).

B. The Appellant Asserts that the Instructions Given to the Jury Regarding H.A.C. were Unconstitutionally Vague.

Appellant McDonald contends that the instructions that were given to the jury regarding H.A.C. were overly broad, and that the meaning of the words, in plain english, are so vague that the jury could not reasonably decide which crimes encompass an H.A.C. factor. Sochor v. Florida, 504 U.S. 527 (1992), and Shell v.. Mississippi, 494 U.S. 738 (1990).

VI. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW PENALTY PHASE BASED ON CERTAIN INAPPROPRIATE STATEMENTS MADE BY THE PROSECUTION DURING THE CLOSING ARGUMENTS OF THE PENALTY PHASE

Appellant McDonald contends that certain statements made by the prosecution during the closing arguments of the penalty phase were so prejudicial that he should be granted a new penalty phase based on them.

For example, during his closing argument the prosecutor implied that the victim was a productive member of our society when he stated, "Where did Dr. Davidson work? He worked in that emergency room. Every day he went to work". (T: 2301). However, immediately following this statement the prosecutor said in reference to the co-defendants, "You know people in our society want to buy cars and clubs, the American way. The normal way is you get up in the morning and you go to work. And you punch a clock. You don't kill people for it. And that is what these men did. That is the value they placed on human life" (T: 2301-2302).[2]

It is apparent that these statements by the prosecution were intended to be appeals to the emotions or fears of the individual jurors. During the trial the fact

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[2]The prosecutor had stated earlier in his closing that the killing of Dr. Davidson to Robert Gordon meant an automobile, a lexus, to Meryl McDonald it didn't mean anything but representaion in some club (T: 2296).

that the Co-Defendant's were not Americans but were Jamaican nationals was made readily apparent (T: 274). Presumably the prosecutor would have the jury believe that a guilty verdict would send a message to those individuals belonging to foreign communities within our borders, not versed in the "American" way of life--the "normal" way of life. These considerations are outside the scope of the jury's deliberation and their injection violates the prosecutor's duty to seek justice, not merely "win" a death recommendation. Bertolotti v. State, 476 So.2d 130, 131 (Fla. 1985).

According to Bertolotti, the proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence; it must not be used to inflame minds and passions of jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law. Id. See also, Watson v. State, 559 So.2d 342 (Fla. App. 4 Dist. 1990), (where a prosecutor's comments during closing arguments, that a homeless defendant's lifestyle was not the 'American way' resulted in a reversal and remand for a new trial.)

Moreover, after considering the totality of circumstances surrounding Appellant McDonald's and Co-Defendant Gordon's trial these comments may be construed as racist. For example, not only were both of the Co-Defendant's Jamaican nationals, but both of these men were black (T: 274). As mentioned earlier, all of the members of the jury were white (T: 274). McDonald and Gordon were living in Miami when they were arrested for the murder of Dr. Davidson
(T: 1675). It would be reasonable to conclude that the average person from Florida, realizes that Miami has become a hub for persons of color emigrating from the Latin world. It is also reasonable to conclude that for many of these persons, their presence is still resented by many white Americans.

The court in McFarland v. Smith, 611 F.2d 414 (1979), has proclaimed that even a reference that is not derogatory may carry impermissible connotations, or may trigger prejudiced responses in the listeners that the speaker might neither have predicted nor intended. Appellant McDonald contends that while these comments were not overt racial slurs, in lieu of the very reasonable inferences above, they were made with full knowledge of their potentially prejudicial results.. These comments were made by the prosecutor in a calculated effort to draw any distinction between the apparent values held by McDonald and his Co-Defendant as the prosecutor saw them, and those of the all white jury assessing his fate. Thus, these comments may reasonably be construed as racist.

Finally, at one point during his closing argument the prosecutor made statements which constitute a variation on the Golden Rule Argument, the prohibition of which has long been the law in Florida. Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985); Barnes v. State, 58 So.2d 157 (Fla. 1951). For example, at one point the prosecutor said, "...consider the ordeal that the victim was placed in, coupled with the method of killing we submit to you..." (T: 2303). Only moments later the prosecutor repeated this plea, "...you must now consider the ordeal, the pain, the agony, and the ordeal that Dr. Davidson went through" (T: 2303). Later on in his closing the prosecutor stated, "Listen to the water as it filled that bath tub, with him either in it or out of it, it doesn't matter. Listen to the water as it filled up. And as he knew his life was going to be taken away" (T: 2308).

Appellant McDonald contends that the prosecutors statements mentioned above were so egregious as to warrant vacating the sentence and remanding for a new penalty phase trial. Bertolotti v. State, 476 So.2d 130 (Fla. 1985). He concedes that most of the prosecutor's closing argument went entirely unobjected to at his

penalty phase. However, taken as a whole, it was such as to destroy the Appellant's right to the essential fairness of his criminal trial. Peterson v. State, 376 So.2d 1230, 1231 (Fla. App. 4 Dist. 1979).

VII. THE TRIAL COURT'S FAILURE TO CONDUCT THE REQUIRED STEP-BY-STEP INQUIRY TO DETERMINE WHETHER EXPERTS DNA TEST RESULTS AND BASIS OF STATISTICAL CONCLUSIONS COULD BE ADMITTED DOES NOT CONSTITUTE HARMLESS ERROR AND A NEW TRIAL IS REQUIRED

Appellant McDonald asserts that because the trial court failed to conduct the necessary inquiry to determine the admissibility of the DNA test results and the basis of the statistical conclusions used to report the results he is entitled to a new trial. Murray v. State, 22 Fla. L. Weekly S203 (Apr. 17 1997).

In Brim v. State, 22 Fla. L. Weekly S45 (Jan. 16 1997), this court took note of the fact that the DNA testing process consists of two distinct steps. The first step of the process relies upon principles of molecular biology and chemistry. The results obtained through this first step simply indicate that two DNA samples look the same. The second step of the testing process does not rely on principles of molecular biology or chemistry but is based on principles of statistics and population genetics. The statistics help a court and jury and give significance to a match. Both of these distinct steps must satisfy the requirements of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). Whether the two steps have satisfied the requirements of *Frye* is a determination the trial judge alone must make.

In the instant case Special Agent Michael Vick was offered by the State as an expert in the field of DNA analysis (T: 1214). Special Agent Vick performed the analysis of the traces of blood discovered on the items allegedly left behind in the hotel room by the Co-Defendants (T: 1222). Throughout his testimony the record

is devoid of any indication that the trial judge made any findings regarding the admissibility of his test results or the probability calculations used to report those test results (T: 1211-1238)--a determination that was hers alone to make.

Because the trial courts' failure to make a determination as to the admissibility of this evidence is clearly error under our caselaw, Appellant McDonald asserts that a new trial is required. Murray v. State, 22 Fla. L. Weekly S203 (April 17 1997).

CONCLUSION

For the reasons outlined above, Appellant McDonald 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.

APPENDIX

Appellant McDonald's trial counsel also argued several other grounds, which, in an abundance of caution, the Appellant offers for this Court's review and consideration. The contents of the arguments are contained in the motions as they appear in the Record:

1. Defendant's Motion for New Trial-Penalty Phase, (R: 2461, 2462) The trial court erred by (1) denying Defendants' Motion for Separate Guilt and Penalty Phase Juries, (2) allowing a disparaging statement by the State in its closing arguments, (3) allowing the State during its closing argument to make a statement indicative of the cost of a life sentence, (4) allowing the jury instruction of cold, calculated, and premeditated as given, (5) allowing the jury instruction of heinous, atrocious, and cruel, as given, (6) refusing to merge the issue of felony murder in the verdict by the denial of Defendants' motion for a separate verdict on the issue of felony murder, and (7) denying Defendants' motion because there was insufficient evidence as to the aggravators of heinous, atrocious, and cruel, and cold, calculated, and premeditated.

2. Defendants' Motion for a New Trial And/Or Renewed Motion for Judgment of Acquittal, (R: 2463, 2464), regarding (1) the jury's verdict is contrary to law, (2) the jury's verdict is contrary to the weight of the evidence, (3) the trial court erred in denying Defendants' Motion to Strike Jury Venire, (4) the trial court erred in allowing irrelevant, prejudicial testimony before the jury, (5) the trial court erred in denying Defendants' Motion for Judgment of Acquittal, (6) the trial court erred in refusing to give Defendants' requested jury instructions, (7) the trial court erred in denying Defendants' Motion for Separate Juries, (8) the trial court erred in denying Defendants' Motion for Special Jury Verdict, (9) the trial court erred in allowing prejudicial, cumulative photographs of the victims' injuries before the jury, and (10) the trial court erred in allowing cumulative exhibits before the jury.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the forgoing was provided by U.S. Mail to ATTORNEY GENERAL, 2002 North Lois Avenue, Suite 700, Tampa, Florida 33607 on this the 9th day of April, 1998.

RICHARD N. WATTS, Esquire
Attorney for Appellant
4244 Central Avenue
St. Petersburg, Florida 33711
(813) 323-1974
FBN 306428 SPN 00171931