IN THE SUPREME COURT OF FLORIDA

MERYL MCDONALD,

Appellant,

vs. CASE NO. 87,059

STATE OF FLORIDA,

Appellee.

_____/

# SUPPLEMENTAL ANSWER BRIEF OF THE APPELLEE

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## SUMMARY OF THE ARGUMENT

VI. The trial court properly applied the heinous, atrocious or cruel aggravating factor.

VII. Appellant also challenges the propriety of the prosecutor's penalty phase closing argument. It is well established that in order to preserve such a claim for appellate review, a defendant must object to the comment and move for a mistrial. In the instant case, there was never any objection presented to any of the statements now challenged, and therefore this Court must reject this issue as procedurally barred.

VIII Appellant next asserts that the trial court failed to conduct the necessary inquiry to determine the admissibility of the DNA test results. In the instant case, however, counsel did not request a Frye hearing or raise any objection to the admission of the DNA evidence. Accordingly, it is the state's position that this claim is waived.

## ISSUE VI

**WHETHER THE TRIAL COURT ERRED IN FINDING THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING FACTOR. (As previously argued in Issue V)**

The appellant also challenges the trial court's finding the heinous, atrocious or cruel aggravating factor. It is the state's position that this factor was well supported by the evidence.

The trial court found as to heinous, atrocious, or cruel:

> 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 previously noted in Issue V, infra., this argument was considered by this Court in Gordon v. State, 704 So.2d 107 (Fla. 1997), in light of the facts of this case, and rejected. This Court, after setting forth the trial court's findings, stated in pertinent part:

> 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 aggravating factor. Therefore, appellant is not entitled to relief on this issue.

## ISSUE VII

**WHETHER THE APPELLANT IS ENTITLED TO A NEW PENALTY PHASE DUE TO THE PROSECUTOR'S CLOSING ARGUMENT.**

The appellant also challenges the propriety of the prosecutor's penalty phase closing argument. It is well established that in order to preserve such a claim for appellate review, a defendant must object to the comment and move for a mistrial. Allen v. State, 662 So.2d 323, 328 (Fla. 1995); Parker v. State, 456 So.2d 436, 443 (Fla. 1984). In the instant case, there was never any objection presented to any of the statements now challenged, and therefore this Court must reject this issue as procedurally barred.

In addition, there is no merit to the claim that the prosecutor's closing argument contained improper statements. Appellant contends that the prosecutor should not have commented upon the fact that killing is not an acceptable way to make money in our society, and criticizes the prosecutor for describing the pain and terror suffered by Dr. Davidson. However, all of the comments were clearly relevant to the aggravating factors of pecuniary gain and heinous, atrocious or cruel, which were ultimately found by the trial judge. Muehleman v. State, 503 So.2d 310, 317 (Fla.) (comments may have excited passions but were highly relevant in establishing aggravating factors), cert. denied, 484 U.S. 882 (1987).

Appellant mischaracterizes part of the argument as a "Golden Rule" violation. Certainly, it is appropriate for the jury to subjectively consider a victim's suffering in considering the applicability of the HAC factor. Since the prosecutor was not seeking to generate sympathy for the victim, but only to help the jury understand the atrocity of McDonald's actions, no Golden Rule violation occurred. See, Kennedy v. Dugger, 933 F.2d 905, 913 (11th Cir. 1991) (prosecutor's argument "Can you imagine, in your own living room not bothering a soul on a Saturday afternoon? He ... walked back down to your own house, and, a total stranger, because you got in his way, destroys you" not an improper invitation to the jury to place themselves in the position of the victim, but a permissible comment on the future dangerousness of the defendant), cert. denied, 502 U.S. 1066 (1992); Davis v. State, 461 So.2d 67, 70 (Fla. 1984) (comments not Golden Rule violation based on manner and context), cert. denied, 473 U.S. 913 (1985).

Even if the prosecutor's comments in this case were deemed to be improper, such comments are not reversible error, let alone fundamental, where the remarks did not become a feature of the trial. See, Sims v. State, 602 So.2d 1253, 1257 (Fla. 1992) (rejecting claim of ineffective assistance of counsel for failure to object to Golden Rule violation), cert. denied, 506 U.S. 1065 (1993); Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985) (prosecutor's penalty phase closing argument, including Golden Rule

violation, not egregious enough to warrant new sentencing). In this case, the prosecutor's closing argument comprises twenty-three pages of transcript (Vol. 35, T. 2290-2313). The appellant has recited from selected portions of four pages of the argument, including the pages where the prosecutor was discussing the applicability of the heinous, atrocious or cruel aggravator.

In order to constitute fundamental error, the prosecutor's statements had to "reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." State v. Delva, 575 So.2d 643, 644-45 (Fla. 1991), quoting Brown v. State, 124 So.2d 481, 484 (Fla. 1960). The complained-of comments herein clearly did not meet this standard. See, Crump v. State, 622 So.2d 963, 972 (Fla. 1993) (prosecutor's comments, including a narrative to gain sympathy for the victim, not so outrageous as to taint the jury recommendation); Jones v. Wainwright, 473 So.2d 1244, 1245 (Fla. 1985) (rejecting ineffective assistance of appellate counsel claim based on failure to challenge prosecutorial comments, including Golden Rule argument). This was an deplorable offense involving four aggravating circumstances and no significant mitigation. The recommendation of death would surely have been obtained and followed without the challenged comments. Thus, no new penalty phase is warranted.

## ISSUE VIII

**WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN THE ADMISSION OF DNA TEST RESULTS.**

Appellant next asserts that the trial court failed to conduct the necessary inquiry to determine the admissibility of the DNA test results as required by this Court in Brim v. State, 695 So.2d 268 (Fla. 1997) and Murray v. State, 692 So.2d 157 (Fla. 1997), wherein this Court reaffirmed that each stage of the DNA process, i.e., the methodology for determining DNA profiles, as well as the statistical calculations used to report the test results are subject to the Frye test. In the instant case, however, counsel did not request a Frye hearing or raise any objection to the admission of the DNA evidence. (Vol XXIX, T 1211-1229). Accordingly, it is the state's position that this claim is waived. Jordan v. State, 694 So.2d 708 (Fla. 1997); Hadden v. State, 690 So.2d 573, 580 (Fla. 1997).

In Jordan, this Court found a similar claim waived in the absence of a specific and contemporaneous objection:

> We note that this profile evidence should have been tested for general acceptance within the relevant scientific community. See Frye v. United States, 293 F. 1013 (D.C.Cir.1923). It is this type of new or novel scientific profile evidence for which the safeguards of a Frye test are needed in order to guarantee reliability. *The defense did not, however, specifically object on Frye grounds, leaving this issue unpreserved.* See Hadden v. State, 690 So.2d 573 (Fla.1997).

694 So.2d at 717 (emphasis added).

Similarly, in Hadden, this Court held that "it is only upon proper objection that the novel scientific evidence offered is unreliable that a trial court must make this determination. Unless the party against whom the evidence is being offered makes this specific objection, the trial court will not have committed error in admitting the evidence." This Court further noted that in Glendening v. State, 536 So.2d 212 (Fla.), cert. denied, 492 U.S. 907 (1989), where the defendant objected to an expert witness testifying as to her opinion about whether the alleged victim had been sexually abused on the basis that the question called for an opinion on the ultimate issue in the case and that the witness was not competent to make this conclusion and not on the basis that the testimony was scientifically unreliable, that the claim was waived. This Court stated, "As the defendant did not make a Frye objection, the only basis upon which the trial court could rule on this evidence was the relevancy standard for expert testimony as outlined in the evidence code. Accordingly, this was the only basis for the appellate court to rule on the evidence." Hadden, at 690 So.2d 580.

Even if the claim now presented was properly before this Court, a review of Special Agent Vick's testimony establishes that no error was committed. After Agent Vick was accepted without objection as an expert in the field of DNA analysis, he explained the methodology used, the particular tests employed and the basis

of the FBI database. (Vol XXIX, T1227-29, 1231-33) Based on this record, no reversible error has been shown.

## CONCLUSION

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

Respectfully submitted,

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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Richard N. Watts, Esq., 2167 Fifth Avenue North, St. Petersburg, Florida 33713 this 18 day of November, 1998.

**COUNSEL FOR APPELLEE**