IN THE SUPREME COURT OF FLORIDA

PEDRO HERNANDEZ-ALBERTO, :

Petitioner, :

vs. : Case No.SC02-1617

STATE OF FLORIDA, :

Respondent. :

_____:

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Appellant, Pedro Hernandez-Alberto, was convicted of killing his stepdaughters, Donna Berezovsky and Isela Gonzalez, and was sentenced to death for each offense (v12:1389-1390; v3:410).

INTRODUCTION

Hernandez was born and raised in El Ciruelo, a remote, extremely primitive town in mountainous south-central Mexico (v10:971-976, 982-985, 998-1000, 1023-1029, 1102-1103; v11:1134, 1150-1156). The town has no running water, a ditch is used for sewage, the primitive homes lack refrigeration, and coconut shells are used for cooking fuel (v10:973, 1024-1026). The people have exotic customs and dress (v10:974). They speak an Indian dialect which is difficult to understand, and Spanish is a second language (v10:973). Average education is six years but many people are illiterate (v11:1152-1153). Men are expected to be dominant and have authority in the family (v11:1153-1154). Until recently, men abusing wives or children was considered normal[1] (v10:975, 1027).

As a young child, Hernandez lived with his parents (v10:976). His father fished and sharecropped, and his mother worked at home (v10:976, 995). His father was a weekend alcoholic who beat his wife and children when drinking (v10:976, 995-996, 1011, 1020, 1095, 1097-1099). When Hernandez was perhaps ten years old, his mother hemorrhaged from beatings then behaved like she was mentally ill, but she

[1] The police now take reports of such incidents, jail the abuser overnight, and fine him $10, but abuse of spouses and children continues to be common (v10:975, 1027).

received no treatment (v10:976-977, 992-994, 996, 1000-1001, 1018, 1032, 1087, 1094-1097; v11:1126-1127). It was rumored that Hernandez's grandfather became insane (v10:1006-1007).

Hernandez's mother was kept tied to furniture, but she repeatedly escaped (v10:977, 992-995). During one escape she was raped (v10:977). A child resulting from the incident was given away by Hernandez's grandmother (v10:977, 995, 997). Hernandez's mother disappeared and her murder was suspected (v10:977, 995, 1017, 1018, 1094-1097; v11:1126-1127). Hernandez's father deserted the family and later died (v10:977, 981, 998-999, 1017).

Hernandez was raised by a neighbor, perhaps from the onset of his mother's insanity, and a sister was raised by their grandmother (v10:974, 992-993, 998-999, 1003-1004, 1007, 1011, 1018-1019, 1097, 1099). He was abused by the neighbor, and he could not play because of his mandatory chores (v10:1006, 1097, 1099). He was calm, peaceful, capable of loving and respectful relationships, attended school regularly, and achieved high grades (v10:998, 1000, 1010-1011, 1020-1021, 1101; v11:1113-1116). There was no evidence of mental illness in Hernandez during his youth (v11:1125-1126).

Hernandez moved to Mexico City as a teenager, living with an uncle (v10:1033, 1018, 1021-1022, 1100-1101). He worked, including as an auxiliary police officer or security guard, and did not continue his education (v10:1033-1034, 1100-1101, 1116-1117).

Hernandez sought a better life in U.S., moving to California, to Georgia, then to Florida (v10:1021, 1033-1034; v11:1127). He

communicated with family that he was doing well and became religious, and he sent back money (v10:1004-1006, 1021-1022, 1101).

In 1994, Hernandez's car was hit by a Hillsborough County Sheriff's Office vehicle (v7:550; v8:788, 796; v10:979-981, 1030-1031, 1092-1093). He was treated for injuries and released, but he believed his injuries were not properly diagnosed (v8:788, 980; v10:980, 1031). He believed the accident caused broken bones in his head, neck, and back, which were linked to mental problems, painful blood lumps, strong headaches, and a collapsing lung, none of which were properly treated (v7:788-790). No brain injury was diagnosed, and no PET scan, CAT scan, or MRI examinations were done (v10:1032; v11:1135-1136). During nine months of treatment of neck and back injuries at a chiropractic clinic, he complained of head pain, headaches, dizziness, sleep problems, loss of concentration, nervousness, and fatigue which were consistent with a concussion or brain injury (v10:1032, 1089; v11:1129, 1135, 1180, 1199-1201).

Hernandez met Maria Carmen Gonzalez and her children before the 1994 accident, but they began dating after the accident (v7:550; v8:792; v11:1132-1133). Carmen owned the profitable Apollo Family Restaurant in Apollo Beach (v7:552-553; v8:758, 806). Her two adult children Salvador and Isela Gonzalez, and one minor child, Donna Berezovsky, lived in her home and worked at her restaurant (v7:550-553, 603-605). While they were dating, her children may not approved of Hernandez, but Salvador believed he and Hernandez got along (v7:550, 605). Hernandez and Carmen married in 1996, living initially at his home while Carmen's children lived in her home (v7:546,

550-551; v8:758). After their daughter Gabriella was born on October 25, 1996, they moved into Carmen's home with her children (v7:551-552; v8:758). Hernandez began working at the restaurant (v7:553; v8:758).

Carmen believed Hernandez began to change after Gabriella was born and the changes caused problems in the marriage (v7:553-554, 557-558). He was irrational, jealous, suspicious, irritable, and angry, which made him unpopular with the entire household (v4:95-98; v7:553-554, 557-558; v10:1082-1087, 1091-1092; v11:1131-1132, 1136-1138, 1143-1144). Hernandez believed Carmen had been at the emergency room after his accident and he subsequently told her he was not well physically and mentally, but Carmen denied she was present at the emergency room, denied he complained of mental problems, and denied she perceived the change in his behavior after the accident (v7:550, 573; v8:797; v11:1132-1133).

Carmen asserted Hernandez wanted everything, including the restaurant, in his name (v7:553-554). Hernandez denied demanding everything be put in his name, but said someone from Immigration suggested they put some things in both of their names (v8:807-809). Carmen asserted Hernandez blamed her children for marital problems, he did not love them, and he wanted them to leave the home, but he denied blaming the children (v7:557; v8:810). They unsuccessfully sought marriage counselling at church (v7:558).

Hernandez apparently possessed a hand gun for years and he may have kept it in his car (v8:731-732, 803, 806). Carmen was unaware

that he owned a gun and did not allow firearms in her home (v7:572). Hernandez regularly wore a black fanny pack (v7:571; v8:801).

During the weeks preceding January 3, 1999, Hernandez and Carmen argued and no one in the family got along with Hernandez (v7:558, 605, 617; v8:722-725, 758, 809). Hernandez asserted he tried to live in peace, he never thought of harming his family, and he never hit Carmen or the children (v8:792, 794, 809). Carmen believed he overheard her discussion with a friend about getting an attorney for a divorce (v7:558-559). Hernandez asserted the marriage was good and denied believing it was over (v8:809).

In January of 1999, Hernandez's income was from the restaurant (v10:1028). The Apollo Beach home was luxurious compared to the homes of his youth, this was the best standard of living he ever had, and he was aware a loss of income and lifestyle could result from ending the relationship (v10:1030, 1034; v11:1139).

THE INCIDENT

In the morning of January 3, 1999, Carmen and Hernandez spoke in the living room (v7:556-560, 607). Hernandez said he wanted to leave the home and he wanted Carmen to later give him Gabriella (v7:556-557). Carmen agreed to Hernandez leaving, but she did not agree to give him Gabriella (v7:557). While they spoke, Salvador who had recently moved to live with a girlfriend, arrived and joined Donna and Gabriella in the family room (v7:556, 604-606).

At 9:30 a.m., Carmen went to the restaurant which was five minutes away (v7:559). Hernandez had not told Carmen what had upset him (v7:559-560). Salvador left to run some errands at 11:00 or

11:15 a.m., and eleven-year-old Donna, two-year-old Gabriella, and Hernandez remained at home (v7:607; v8:727).

Hernandez asserted he did not subsequently kill Donna or he did not know what happened, and denied later telling an officer he killed Donna or asserted he involuntarily repeated what the officer told him (v8:787, 795, 800, 802-803, 810-811). The officer asserted Hernandez admitted: he put Gabriella into a bedroom; he told Donna, who had put pressure on his troubled marriage, to pick up a toy in the family room; she did not comply; he struck her by her right ear; she fell to the floor; he removed his gun from his fanny pack and shot Donna once as she lay face down, killing her; he killed her because he was upset by her disrespect; and he was acting like an animal[2] (v8:722-727, 732).

Hernandez then drove his car quickly to the restaurant and arrived with an upset expression on his face (v7:563; v8:810). Carmen, Isela, and other employees worked in the kitchen, and customers were present (v7:559-570, 575-576, 580-589, 595-600; v8:747-750). Hernandez walked through the kitchen, entered the men's room for some minutes, and then walked through the kitchen to the food service area (v7:583-587; v8:729). Employees and customers heard three shots, but none saw the shooting (v7:565, 568-569, 587, 596-600; v8:748, 750). Seconds later, Hernandez walked out the back door, carrying a gun and looking straight ahead (v7:587-589). He sped away in his car (v7:589-590; v8:750-752). Isela was laying on the floor and against

[2] The tape of the interview was never played, and the only evidence of the conversation was the officer's testimony (v8:743).

the grill, bleeding and unable to speak (v7:569-570, 590, 626-629; v8:750-752, 774).

Hernandez asserted that although he went to the restaurant, he did not kill Isela or he did not know what happened, and he denied later telling an officer he killed Donna or asserted he involuntarily repeated what the officer told him (v8:787, 795, 800-803). The officer asserted Hernandez admitted: he drove to the restaurant and entered the back door; he went to the men's room and remained there for several minutes; he entered the kitchen; he shot Isela, who had put pressure on his troubled marriage, twice in the back; she fell to the floor, then he shot her again in the back of the head; he went out the back door; he drove directly away toward Mexico, stopping twice for gas before he was arrested in Texas; he killed his step-daughters because he was upset by their disrespect; and he repeatedly referred to his behavior in shooting his stepdaughters as acting like an animal (v8:724-725, 728-732).

At approximately 12:50 p.m., police and paramedics arrived at the restaurant (v7:625). Isela appeared to be dead, but she was treated and flown to a hospital where she died (v7:626-629; v8:674, 679, 774-776). A bullet was recovered from Isela and two spent casings were found in the kitchen (v7:629, 635-642, 652).

Officers arrived at the home at 1:08 p.m., upon being summoned by Salvador (v7:614-617, 619). Donna was laying dead on the family room floor (v7:612-615, 621-623). Gabriella was crying (v7:611, 621). Time of death was estimated at between noon and 1:00 p.m.

(v7:647; v8:666). A bullet was found in Donna's blouse and a spent casing was found nearby (v7:615-616, 647-648, 650, 652; v8:667).

At 3:45 a.m. on January 4, a policeman in Brookshire, Texas saw Hernandez at a gas station near Interstate 10 (v8:692-693). After Hernandez ducked down and watched the officer pass, the officer learned he was wanted in Florida and arrested him (v8:693-696, 804, 811). In his car were two black fanny packs, one of which contained ammunition and a loaded 9 mm handgun (v8:696-701). The officer did not let Hernandez get his brace (v8:805).

Hernandez was questioned in Spanish by the Brookshire Chief of Police, after he obtained information from Florida authorities (v4:146, 149-162; v8:706-713, 719-732, 740-742, 786-787, 802-803). The officer asserted he informed Hernandez of his Miranda rights and his right to contact the Mexican Consul and he had access to a phone, but he agreed to talk, he sought to contact no one, he never asserted a mental or physical disability, and he admitted killing his step-daughters (v4:146, 149-152; v8:709-713, 719-732, 740-741). The officer stated he never contacted the Mexican Consul about the arrest (v4:162). Hernandez agreed he was told of his right to remain silent, but asserted his admissions were involuntary because he told the officer he was not right mentally, he was denied access to a phone, and he was denied access to phone numbers of lawyers and friends in his wallet (v8:787). He denied confessing to the killings and asserted his admissions were mere repetition of what the officer told him (v8:802-803).

An autopsy was done on January 4, 1999 (v8:667). A bruise on Donna's face was consistent with being struck by a man's hand (v8:669). The cause of death was homicide, by a gunshot to the middle of her back through her spinal cord, aorta, lung, and out of her chest, then through her arm (v8:669-673). The injuries were consistent with being shot while face down on the floor (v8:671). The injury to the aorta resulted in death within minutes (v8:673).

Isela died from homicide, from three gunshots, all of which were potentially lethal (v8:674-675, 678-679, 682). A wound to her lower back passed through her hip and intestines, then exited the front of her body (v8:676-677, 682). A wound higher on her back penetrated her lung, diaphragm, spleen, pituitary gland, kidney, pancreas, and stomach, then exited her body (v8:675, 677, 682). Tattooing on this wound indicated the gun was within two feet (v8:682). The wound to her neck struck her spine, then went through her carotid artery and jugular vein (v8:675, 677-678). The bullet was recovered from her neck (v8:679-680, v8:687-689).

Back in Texas, Hernandez consented to a search of his car (v8:732-733, 735). Detectives flew from Florida to Texas and met with the Chief of Police who turned over items including the firearm, bullets, and fanny pack (v8:735-736, 756). A firearms examiner determined the spent casings and bullets were fired from the 9 mm semi-automatic pistol (v8:762-766). No prior criminal history of Hernandez was found in Mexico or the U.S. (v10:979).

PRETRIAL MATTERS

On January 13, 1999, an indictment was filed in Hillsborough County charging Hernandez with two counts of premeditated murder, in violation of section 782.04, Florida Statutes (1997) (v1:1, 19-20). On February 16, 1999, the State filed notice of seeking the death penalty (v1:1, 26).

The defense hired Dr. Mussenden who visited Hernandez three times in March and April of 1999, and gave him many tests (v10:1038-1040, 1044-1045, 1050-1052, 1061). During the first visit Hernandez was cooperative; during the second visit he was less cooperative; and during the last visit he was uncooperative and mentally deteriorated (v10:1039-1040, 1044, 1050-1052, 1061). Hernandez was guarded, defensive, suspicious, and made statements about people which sounded paranoid (v10:1039).

On April 6, 1999, the defense moved for a determination of Hernandez's competency to stand trial (s1:1-2). The motion noted his responses were generally appropriate and relevant when he initially spoke with counsel and investigators, but his ability to communicate deteriorated (s1:1). The court appointed Dr. Saa and Dr. Maher to examine Hernandez (v1:27-30; v12:1272).

At a May 18, 1999 hearing held before Circuit Judge Chet A. Tharpe[3], the defense noted Dr. Saa and Dr. Maher found Hernandez incompetent to proceed (v12:1277). The report of Dr. Maher indicated Hernandez: had a major psychiatric disorder, but might be malingering; was treated in jail with antidepressant and antipsychotic

[3] All subsequent hearings were held before Judge Tharpe.

medications; did not appreciate the charges, the potential penalties, or the legal process; lacked ability to communicate facts to counsel because of poor English, depression, and a thought disorder; and lacked capacity to manifest appropriate courtroom behavior and to testify relevantly (v1:32-36). Dr. Maher found he was not competent to proceed, and he needed further evaluation and treatment (v1:32, 34, 36).

Dr. Saa's report stated Hernandez: had poor attention, memory, and thought process, and his answers did not respond to questions; claimed to have auditory hallucinations; may suffer from depression with psychosis and was so diagnosed by the jail infirmary; was receiving antidepressant and antipsychotic medications; suffered a head/back injury in 1994; did not understand the charges, potential penalties, or legal process; would be unable to disclose relevant facts to counsel; had capacity for appropriate courtroom behavior; lacked capacity to testify relevantly; and might be malingering (v1:40-43). Dr. Saa found he was not competent to proceed and met the criteria for involuntary hospitalization (v1:43). The court found Hernandez was incompetent to stand trial and ordered commitment to a State hospital (v12:1277; v1:37-39).

On June 28, 1999, the Department of Children and Families filed a motion with attachments, seeking Hernandez's return to county jail (v1:45-56; v3:439-451). The documents asserted: he had no mental illness; he was malingering; he was competent to proceed; he smashed a nursing station window while trying to intimidate a psychiatrist;

and the staff feared him and believed he was capable of hurting someone (v1:46-49, 52-56; v3:441-451).

At a hearing held on June 28, 1999, the defense had no objection to the Department's motion and it requested a competency hearing (s1:45). The court ordered Hernandez should again be evaluated by Dr. Saa and Dr. Maher (s1:46; v1:59-63).

At a hearing held on August 17, 1999, an interpreter was present (s1:48-53), and this is true for all subsequent hearings attended by Hernandez. At a hearing held on September 16, 1999, Hernandez asked for appointment of a Spanish speaking attorney (v12:1282). The court informed him that a Spanish speaking attorney, Ms. Goudie, would be assisting the defense (v12:1283).

At a competency hearing held on November 9, 1999, and at the onset of the testimony of Dr. Saa, Hernandez refused to remain silent and he was removed from the courtroom (v12:1292).

Dr. Saa said he twice evaluated Hernandez and based on the interviews and the legal criteria, found him incompetent to proceed (v12:1289-1291, 1298-1303). Dr. Saa noted he had memory gaps (v12:1291). Dr. Saa believed he might be malingering, but noted he could be mentally ill and malingering (v12:1291, 1299-1301). The written report of Dr. Saa indicated that during the second evaluation, Hernandez asked for medication, said he had former head injuries and was hearing voices, and asked to see an attorney, but he did not elaborate on these matters (v1:69-70). He was evasive, gave irrelevant responses, and claimed to have massive memory gaps (v1:70). He claimed not to know the charges against him, the poten-

tial penalties, or the roles of the judge, jury, State Attorney, and Public Defender (v1:70). Dr. Saa believed was he was malingering, but found him incompetent to proceed (v1:70-71).

During the examination of Dr. Maher, Hernandez was again ordered to cease interrupting, and threatened with removal from the courtroom (v12:1307). He complained counsel were not helping him or communicating to the court as he requested (v12:1308-1309).

Dr. Maher said he saw Hernandez on twice, originally found him incompetent, but subsequently found him competent (v12:1304-1317). On August 4, 1999, he attempted a psychiatric exam, and competency and cognitive evaluation (v12:1305-1307). He might be mentally ill, but assessment was prevented by his refusal to participate (v12:1305-1307, 1313-1316). Dr. Maher found he hallucinated during the first visit, but not during the second visit (v12:1309-1310). Dr. Maher believed he was malingering, but agreed mentally ill or incompetent persons may malinger (v12:1306-1311, 1314-1315). Hernandez did not state he appreciated the charges, penalties, or other criteria of competence, but Dr. Maher found him competent based on indirect evidence (v12:1311-1313, 1317).

The written report of Dr. Maher indicated he found Hernandez was competent and appeared to be malingering (v1:64-66). Dr. Maher noted his deception and lack of participation in the evaluation might conceal a thought disorder or psychiatric illness (v1:66-67).

Dr. Balzer, a psychologist at the State Hospital, said that during Hernandez's five weeks at the facility, he was uncoopera-tive, uncommunicative, unfriendly, and menacing (v12:1320-1335). He broke

a window at a nursing station while threatening a doctor (v12:1328). He was able to communicate in English (v12:1325). Dr. Balzer believed he malingered and his purported faulty memory was selective, but he conceded a mentally ill person could malinger (v12:1321-1324, 1331-1334). Dr. Balzer and the treatment team believed he suffered from no major psychiatric illness, he was too dangerous for the hospital, and he was competent (v12:1322-1335). The court found he was competent to proceed (v12:1338-1340).

While in the Hillsborough County Jail, Hernandez stayed isolated and spent his time reading his Bible (v11:1131). He urinated on rags which he rubbed on sores on his head and urinated on clean towels which he stuck in his ears (v11:1129-1131).

On January 20, 2000, the court attempted to hold Nelson hearing, but the hearing was continued because Hernandez refused to remain quiet and he was too disruptive (v12:1343-1349).

At a Nelson hearing held on January 24, 2000, Hernandez said: he did not want his dishonest attorneys who failed to help him, violated the law and his rights, and failed to provide him with information and property such as a letter from his family; the Mexican Consul failed to help him because of counsel; and he needed help from someone trustworthy who would fulfill their duties (s1:63-71, 73, 92-95). He said separation from his family harmed him, his back hurt, and his ear was infected (s1:65-8). Requests to go to the library and to see a doctor had been denied (s1:67-68). He was left crazy by a policeman who hit him with a car, and "they should be

responsible" (s1:65). He asserted he was innocent and he did not understand why he was in court (s1:68, 92).

There was testimony that Assistant Public Defenders Hooper, Skye, and Goodie, mitigation specialist Fulgari, and investigator Allen: visited Hernandez twenty-six times although he communicated only during a few initial visits; visited the crime scene; retained mental health experts who saw him five or six times; deposed dozens of witnesses including officers in Texas; complied with his request for a Spanish speaking attorney; worked with the Mexican Consul to contact relatives in Mexico; obtained an expert on Mexican culture; filed a motion to suppress his confession; searched for mitigation and medical evidence; and prepared to travel to Mexico to gather mitigation evidence (s1:63, 70-73, 76-86, 93). Hooper asserted he was unaware of any failure to do what Hernandez wished (s1:63, 77, 79). Skye asserted Hernandez may have believed he was denied transcripts of persons interviewed in Mexico by the Mexican Consul, but he was denied nothing he requested (s1:83).

The court noted Hernandez disrupted the previous hearing, noted he again was disruptive, threatened to remove him from the courtroom, then ordered him removed (s1:64-73, 87, 94). The court found no adequate basis for a Nelson hearing or discharge of counsel and found no ineffectiveness, but it granted the motion to discharge counsel (s1:66, 68-70, 76, 89-92).

Hernandez asserted he needed his brace for his broken back, which had been taken away in jail (s1:95-96). The court told him to ask medical personnel at the jail about the brace (s1:95).

On March 3, 2000, notice of appearance was filed by Daniel Hernandez (v1:84-85). On March 9, 2000, a memorandum from F&F Global Investigations was filed, which sought financing for a trip to Mexico, and noted Hernandez repeatedly refused to speak with investigators or persons from the Mexican Consulate (v1:91-92). On June 28, 2000, Charles Traina was appointed as counsel (v1:93).

At an August 23, 2000 hearing, the defense sought appointment of a medical doctor to examine Hernandez (v12:1414-1415; v1:94-96). He was uncooperative with counsel, investigators, and psychiatrists, but he had consistently requested medication and treatment for injuries (v12:1415-1418: v1:94-95). Defense counsel believed he might become cooperative with the defense team if he was examined and received medication (v12:1415-1418; v1:95).

Hernandez requested to speak, but the request was denied, the court noting his history of disruption and disrespect, and threatening to remove him from the courtroom if he did not remain silent (v12:1416). Hernandez complained about his back injury, then his removal was ordered (v12:1416). The motion for appointment of a medical doctor was denied in light of Hernandez's behavior and lack of evidence of inadequate treatment at the jail, but a further hearing on the issue was ordered (v12:1418-1420).

At the onset of a hearing held on August 31, 2000, the court warned Hernandez not to disrupt the hearing and threatened to again remove him from the courtroom (s1:102-103). Hernandez said he was not receiving help and the police were hurting him, then his removal was ordered (s1:103). The defense motion for appointment of a

medical doctor was granted, and medical physician/psychiatrist Dr. Martinez was appointed (s1:103-107, 110; v1:97).

At the onset of a September 18, 2000 hearing, Hernandez said the court was unjust, and he sought to discharge counsel because: counsel had not helped him; he was hurt in an accident with a police-man, the hospital did not see him, and he continues to suffer back and neck pain; counsel did not provide needed medical attention; the jail clinic did not provide needed medical attention; counsel had not communicated with him; he suspected records provided by counsel were untrue; he contacted other attorneys, but the jail would not permit them to visit him; the jail forbade him speaking to his wife; counsel had not arranged for contact with his family in Mexico; and counsel and the jail withheld letters from his family (s2:117-120, 123, 128-130).

The court said: the jail always allows lawyers to visit in-mates; jail personnel addressed his medical complaints; doctors would examine and treat him; the jail would be contacted to see whether mail was withheld (s2:119-120, 122, 129).

Defense counsel asserted: the jail had been instructed to examine him for head and back injuries; Hernandez knew the defense was contacting his family in Mexico; the defense did not know whether his wife had restricted phone calls from him, but inquiry would be made at an upcoming deposition; the defense had not withheld his mail and was unaware of the jail doing so; counsel were experienced in capital cases; other than an initial visit which was cut short, the defense had never been able to communicate with Hernandez who refused

to speak other than to utter obscenities; the defense deposed witnesses, reviewed depositions taken by original counsel, reviewed police reports, and researched a suppression motion; and Hernandez's competence to proceed and a potential mental health defense were a continuing concern, but he would not talk to doctors (s2:121-126, 129-130, 134-142).

Hernandez was twice removed from the courtroom for disrupting the hearing (s2:124-125, 131-133). After his initial removal, he said he needed help for pain and broken bones in his neck and back which were the result of being run over by a policeman (s2:128). He said other attorneys stole money from him, and claimed the accident left him in a bad mental and physical state (s2:129).

The court opined Hernandez's refusal to cooperate was not the result of psychosis or inability to assist counsel (s2:141-143). Defense counsel hoped the medical examination by Dr. Martinez which had been ordered would reveal a reason for his lack of cooperation (s2:145-148). The court reserved ruling until a medical examination was completed, and depending on the outcome, a Nelson/Faretta hearing may again be necessary (s2:148-150).

At an October 17, 2000 hearing, Hernandez repeatedly asked to change the judge, then he was removed from the courtroom (s:155-156).

On November 1, 2000, a report of Dr. Martinez was filed (v1:98-102). She did not have Hernandez's medical history and she saw no indications of physical injury or pain (v1:98-99). During the brief interview, he was paranoid, guarded, and suspicious, repeatedly asserting his counsel and persons at the jail were against him and

everyone wanted to hurt him (v1:99-100). He demanded to speak with a relative in Mexico and refused to answer questions, but indicated he hurt his neck, back, and head in an auto accident, and now suffered from neck and back pain (v1:98-99).

Dr. Martinez found Hernandez was very paranoid and psychotic, probably suffering from chronic paranoid schizophrenia, and he should be treated with an antipsychotic medication (v1:100-101). She could not make a specific diagnosis because of the lack of knowledge of his history (v1:100).

At a hearing held on March 30, 2001, defense counsel moved for a PET scan (s2:161; v1:103-104). Hernandez said he did not want that, he did not want counsel who had not helped him or listened to him, and he did not want the judge who discriminated against him (s2:161-162). The court ordered him to remain quiet, then ordered him removed from the courtroom (s2:161-162). Defense counsel stated Hernandez had not cooperated with counsel and experts, experts believed he may have suffered a brain injury which affected his current judgment and his judgment at the time of the offenses, and a PET scan was needed to determine whether he has brain injury resulting from an auto accident (s2:162-166). Dr. Berland indicated he had been unable to examine Hernandez, but medical records and statements of witnesses and investigators support the possibility of a significant head injury (s2:165-168).

Dr. Berland's affidavit noted Hernandez was uncooperative: with present and previous counsel; with Dr. Berland; and with Dr. Martinez, he made outbursts in court, and competency evaluations indicated

psychotic symptoms and malingering (v1:105-107). Although he had not been diagnosed with brain injury, during long-term treatment he received after an auto accident, he complained of severe occipital headaches, dizziness, sleep problems, personality changes, loss of concentration, nervousness, and fatigue which were consistent with brain injury (v1:108-109). PET scans can assess brain injury which can not be determined with other tests, can contribute critical information about brain damage, and can aid testimony about brain activity (v1:109-110).

The court said it would rule the next week (s2:168). Although there was no written order was filed, subsequent discussions establish the court denied the motion (s2:192; s3:261-262, 274; v10:1054-1060, 1074; v11:1134; v12:1382).

At the onset of an August 9, 2001 hearing, Hernandez sought discharge of counsel who discriminated against him (s2:182-183). He was warned not to disrupt the hearing, he was removed from the courtroom, and the court said a Nelson/Faretta hearing was needed (s2:183-184, 188). Defense counsel questioned his competence, noted he had not talked to counsel for months, and asserted Dr. Berland had concerns about his competence but was unable to form a medical opinion because he could not interview or evaluate him (s2:188-190, 192-197). Hernandez spoke to counsel shortly after appointment, complaining about his neck injury, but when he did not get medical relief he cut off communications (s2:194-195).

The State requested a competency evaluation by at least two doctors (s2:191-194). The court ordered another evaluation by Dr.

Saa and Dr. Maher and a competency hearing (s2:197-198; v1:123-127; v2:322-325).

At an August 20, 2001 hearing, as Dr. Maher began testifying about competence, Hernandez insisted he did not want counsel, they did nothing for him, and he would not cooperate with them (v4:6-7). He said police and doctors were guilty, and he had been abused in jail (v1:6-7). He asked to speak with his family (v4:7-8).

The court asked Hernandez if he wished to dismiss counsel for rendering ineffective assistance, noting he received substitute counsel after expressing dissatisfaction with original counsel, and he had a right to represent himself or to have appointed counsel (v4:8). Hernandez said he wished to dismiss counsel, and asserted the Mexican Consul also did nothing for him (v4:8). The court asked for specifics of the ineffectiveness of counsel (v4:8). Hernandez asserted they lied, they did not help him despite promises to do so, they were the court's accomplices in killing people, he did not want them, and he would not talk to them (v4:9, 13-14, 17-18, 23-25).

Defense counsel asserted: they were experienced in capital cases; they did much work in the case including researching the law, conducting depositions, investigating, obtaining mental health experts, filing motions, and cooperating with Mexican Consul, all without Hernandez who would not cooperate with or talk to attorneys, experts, or investigators (v4:9-23). During defense counsel's initial visits with Hernandez, he was not interested in his case and he asked for braces for his neck and back (v4:20). Subsequently Hernandez refused to see defense counsel (v4:20).

Hernandez's continuing interruptions of the proceedings were noted by the court (v4:17-18). He said he did not want to be there and he criticized the court (v4:17-18). The court found counsel were not ineffective and Hernandez could discharge them, but it would not appoint substitute counsel (v4:24-25). Hernandez said he did not want counsel removed but he would not talk to them (v4:25).

As Dr. Maher again began to testify, Hernandez repeatedly interrupted, asserting the doctor would lie, he wished to question him, he did not want such opinion testimony, and these people were not helping him (v4:28, 30-31). The court ordered him to cease interrupting, threatened to have him removed from the court room, then had him removed (v4:28-31). Hernandez said he did not want his attorneys and he wanted to speak with his family (v4:34-35).

Dr. Maher testified he visited Hernandez on May 6, 1999, and concluded he was mentally ill and not competent to proceed, but he had been limited by his less than full participation and he had reservations about possible malingering (v4:29, 35-36, 43, 75). Subsequently, Hernandez was committed to a State Hospital for evaluation and treatment, and was hospitalized for five weeks (v4:36). Dr. Maher reviewed the hospital discharge summary which stated he was competent to stand trial and he was malingering (v4:36). Dr. Maher again examined him on August 4, 1999 after his return to County Jail, but Hernandez did not communicate (v4:36-37, 43, 75). Dr. Maher found him competent based on the prior evaluation, the hospital's description of his behavior, and his presentation during the August 4, 1999 evaluation (v4:37-38).

When Dr. Maher again visited Hernandez in jail on August 15, 2001, he spoke for 10 to 12 minutes, indicated he remembered their previous meeting, and requested the presence of his family, but refused to participate in an evaluation and insisted counsel had not helped him (v4:38-39, 43-45, 50, 52-54, 57-58, 60-61, 72). Dr. Maher believed he understood he faced the death penalty despite his lack of a response to being informed of such (v4:47-49, 72). Dr. Maher admitted he had not included in his written report that he told him about the charges and the potential penalties (v4:48). The written report indicated Hernandez met each of the individual criteria based on prior evaluation and present affect, despite his refusal to discuss the criteria (v2:280-283).

Dr. Maher offered to seek the presence of Hernandez's family if he would talk about his case and circumstances (v4:43-45). He refused the offer, believing neither the doctor nor the lawyers could do it (v4:44-45). Dr. Maher had not known family members had already been brought from Mexico to speak with Hernandez, but continued to believed he was merely being deceptive (v4:46-47).

Dr. Maher relied on police, State Hospital, and jail reports in making his finding, but he had no information from defense attorneys or doctors working with the defense or the prosecution, and had not reviewed court files, hearing transcripts, information about an auto accident in 1994 resulting in head injuries, or observed him in the hospital (v4:46-47, 51-52, 64-65, 72, 75). Dr. Maher denied Hernandez's focus on his accident indicated incompetence because he might rationally believe that he became impulsive, irritable and

aggressive as a result of injuries which was relevant to the homicides, and a brain injury might be relevant to execution (v4:64-68, 75-76). He was aware that Hernandez reportedly put urine in his hair and ears, but he opined this might be a primitive remedy for a malady (v4:77-78).

Dr. Maher found Hernandez was competent to proceed (v4:39-43, 55-56, 58-75; v2:280-283). He asserted Hernandez was suffering from an undiagnosed personality disorder, but his mental illness was not a psychosis or of a level rendering him incompetent, and his demanding, stubborn behavior and his refusal to cooperate with counsel and experts was a voluntary attempt to appear mentally impaired and incompetent (v4:40-42, 58-60, 69-75, 78). Dr. Maher was concerned that he was mentally ill but attempting to appear incompetent (v4:77).

Dr. Saa testified he evaluated Hernandez on three occasions (v4:79-80). In May of 1999, he found Hernandez was psychotic and incompetent to proceed despite concerns he was malingering (v4:80-81). Hernandez was found incompetent, sent to a State Mental Hospital, and returned after approximately six weeks (v4:81). Dr. Saa evaluated him on July 22, 1999, finding he was incompetent to proceed and possibly malingering (v4:81-84). On August 13, 2001, Dr. Saa attempted to evaluate Hernandez, but he would not talk (v4:82, 84-85; v2:278-279). Dr. Saa felt it was improper to render an opinion on competence where the person, such as Hernandez, would not discuss the criteria of competence (v4:85-86; v2:278-279). Dr. Saa believed he should be sent back to a hospital for further evaluation (v4:86).

Dr. Berland said he met briefly with Hernandez who would not cooperate with an evaluation, but launched a diatribe about getting no help from counsel, being hurt and held hostage by the jail, needing help from family, and seeking contact with relatives in Mexico (v4:88-89). Dr. Berland reviewed: documents including police reports, witness statements, medical records relating to injuries resulting from an auto accident, the arrest report and post arrest-interview, and records of Dr. Martinez; he interviewed a former cell-mate; and he sought a PET scan (v4:89-91).

Dr. Berland could not form an opinion about Hernandez's mental illness to a medical certainty, but he believed he suffered a brain injury in an accident and he changed as a result (v4:91-93). The accident apparently caused a psychotic disturbance and he was mentally ill (v4:93). Hernandez's original attorneys were conscientious, but he persisted in believing they were working against him (v4:94). Hernandez gave his successor attorneys no chance to interact with him, asserting they were indifferent, were working against him, and were not helping him (v4:94-95). He also stated the Mexican Consul was working against him (v4:95).

Dr. Berland asserted Hernandez's ex-wife Carmen said he was always angry and had an unfounded belief the victims were conspiring against him which indicated a paranoid disturbance (v4:95). The pastor of Hernandez's church reported his unprovoked angry flare-ups at innocent persons at the restaurant (v4:96). Restaurant employees described him as jealous of decisions which were not his responsibility, and jealousy was typical of paranoids (v4:96). In his confes-

sion Hernandez claimed he was mistreated and abused by his wife and children despite evidence to the contrary (v4:96-98). He asserted his wife's friend brainwashed the children against him, and tried to dominate him (v4:97). There was sufficient evidence that he suffered from a paranoid disturbance (v4:98).

Dr. Berland testified that after Hernandez was in an auto accident in 1994, he complained of personality changes which provide a basis for incompetence (v4:99-100). Dr. Berland developed special strategies for determining whether persons were faking mental illness (v4:100). A mentally ill person may seek to fake additional mental illness despite having a severe mental illness and inability to proceed to trial (v4:100-101). Hernandez may be a crazy playing crazy, and he may be too mentally ill to proceed (v4:101-104). Dr. Berland would not make a diagnosis, but believed mental illness was a threat to his competence, and he should be hospitalized for evaluation (v4:102-105).

Defense counsel asserted he was perplexed by Dr. Maher's undue reliance on the State Hospital reports, and his failure to engage Hernandez in any direct dialogue about the criteria of competence (v4:106-107, 114-115). It was irrational and incompetent for Hernandez to refuse to cooperate with those seeking to help him (v4:107-108). Dr. Maher originally said Hernandez did not appreciate the charges or the legal process, he spoke English poorly, and he was probably mentally ill, and nothing changed later (v4:109-111, 114-115, 119). Defense counsel noted Dr. Maher did not assert Hernandez

could testify appropriately or responsively, and there was no indication in this case that he could so testify (v4:108, 115-118).

The defense had to defend Hernandez on two counts of first-degree murder without talking to him about the charges (v4:112-114, 118, 123). During the defense's limited contact with Hernandez, he spoke about neck pain, not about the case (v4:123). Hernandez had indicated he believed the police and the doctors from the 1994 accident should be on trial, and he would likely testify at trial about such irrelevant matters (v4:118-119). The defense believed he did not understand the charges and he was unable to inform counsel about his case (v4:111-113). He might be malingering but hospitalization for further evaluation was warranted (v4:120, 122).

The court agreed with the State that Hernandez was competent, noting he was uncooperative throughout of the case, and relying on testimony of doctors, especially Dr. Maher (v4:125-126).

Defense counsel moved to withdraw or to act in an advisory capacity due to irreconcilable differences, stating Hernandez refused to ever discuss the case, his hostility to counsel was increasing, and he repeatedly stated he did not want the defense team (v4:127, 130-133; v2:270-272). Hernandez was returned to the courtroom and ordered to act appropriately (v4:127). He said he did not want his attorneys, he wanted his family present, he wanted to talk with his family (v4:127). The court stated these issues had already been addressed, and ordered him to cease interrupting the proceedings (v4:127-128).

The court declined to hold a Nelson hearing, noting Hernandez did not discharge counsel at the earlier Nelson hearing (v4:129-130, 133). The court denied the motion to withdraw, but informed Hernandez he had a right to discharge counsel, counsel were not ineffective, and substitute counsel would not be appointed (v4:133-134, 136). Hernandez asserted: he wanted replacement of counsel who had not helped him; he wanted help with the abuse in jail including placement in a punishment cell, and insults and mistreatment by jail nurses; and he wanted help with establishing phone contact with his family (v4:134-137). The court ordered him to cease interrupting the proceedings (v4:137).

The defense stated it would not go forward with a motion to suppress based on a violation of the Vienna Convention on Consular Rights, because it could not establish prejudice without cooperation of Hernandez (v4:137-140). Hernandez asserted the policeman was a liar (v4:138). The court ordered Hernandez not to interrupt and threatened to remove him from the courtroom (v4:138). Hernandez requested to be removed, and his request was granted (v4:138). The court noted the defense was not proceeding on the motion, but granted the State's request to proffer the testimony of the Brookshire Police Chief (v4:141-142).

Many defense motions were considered and most of them were denied (v1-v2:128-267, 269-268; v4:162-180). The motions included: to bifurcate and continue the penalty phase because of difficulties in arranging presence of witnesses from Mexico - ruling reserved (v4:163-165); to declare section 921.141, Florida Statutes (1997)

unconstitutional because of a lack of requirement of a unanimous death verdict - denied (v4:166; v1:167-169); to declare section 921.141 unconstitutional for failing to give jury guidance in determining and weighing sentencing factors, to state whether the factors must be found unanimously, by majority, by plurality, or individually, or to provide for a maximum or minimum standard of proof regarding mitigating factors - denied (v4:170-171; v1:175-176); to declare section 921.141 unconstitutional for precluding consideration of mitigation evidence by imposing improper burdens of proof and persuasion - denied (v4:171-172; v1:177-184); for finding of facts by the jury as to the aggravating and mitigating circumstances - denied (v4:174-175; v2:245-246); for interrogatory penalty phase verdict with a vote as to each aggravating and mitigating factor - denied (v4:175; v2:247-251); for a statement of particulars as to aggravating circumstances and to dismiss the indictment for lack of notice of aggravating circumstances - denied (v4:175-176; v2:252-260, 261-264); and to strike portions of the Florida Standard Jury Instructions and Criminal Penalty Phases because it is improper to inform jury its sentencing decision is merely advisory - denied (v4:178-179; v2:240-242).

THE TRIAL

At the onset of the trial on August 21, 2001, the court offered Hernandez an opportunity to be present and assist counsel, but threatened to remove him if he was disruptive (v6:186-188). Hernandez sought discharge of counsel who did not help him, claimed the judge was violating the law, asserted he was not guilty and the

policeman accusing him was lying, asked to confront the officer, and refused to behave or cooperate with counsel (v6:186-189). He was ordered removed, and he complained about counsel during his removal and while the prospective venire was brought into the courtroom (v6:189).

After a lunch break during voir dire, the motion to postpone penalty phase in order to arrange for the presence of witnesses from Mexico was granted (v7:293-299). The court declined to give Hernandez another opportunity to be present in court (v7:296).

Hernandez was present during selection of the jurors (v7:460-474), and again stated he did not want his attorneys (v7:471). At the conclusion of the jury selection, the court told Hernandez he had a right to discharge counsel, but if he did so, substitute counsel would not be appointed and he would have to represent himself (v7:474). Hernandez said he was discharging counsel, and he would represent himself (v7:474, 476). The court stated he would hold a Faretta hearing, and if Hernandez chose, he would allow him to represent himself and appoint present counsel to be standby counsel (v7:475). Hernandez asserted, "I want to talk to my family and they don't let me. They have me isolated." then he was removed from the courtroom (v7:478). The jury was sworn, instructed and released for the night (v7:478-481). The court stated the Faretta hearing would be held in the morning, in light of Hernandez's outburst (v7:482-483).

Upon the resumption of trial on August 22, 2001, the court initiated a Faretta colloquy which included: most of the questions

from the model colloquy in the comments to Florida Rule of Criminal Procedure 3.111; largely unresponsive replies and familiar complaints by Hernandez upon each question about the waiver of rights; replies to the competence portion of the inquiry establishing he was 28 years old[4], he had up to six years of education, could not read or write English, he had been diagnosed and treated for mental illness, and he had one prior pro se court experience, appearing in traffic court with an interpreter; assertions of not receiving discovery and paperwork; and denials of repeated pro se requests for time to prepare (v7:488-503, 508-518). In the middle of the colloquy, the court conducted an investigation, questioning persons from the Public Defender Office to establish what discovery had been shown to Hernandez early in the case, establishing he was informed about some discovery two years earlier but may have received no documents, apparently to support the denials of continuance requests (v7:503-508). The court found he was competent to waive counsel and his waiver was knowing and intelligent, but it had a serious concern with his ability "to capably conduct an effective defense." (v7:515). The trial continued with Hernandez proceeding pro se, and he repeatedly declined offers for reappointment of counsel (v7:545-546; v8:660, 745-746, 772).

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[4] The criminal report affidavit indicates Hernandez's birth date was January 15, 1963 (v1:17). Dr. Saa noted in 1999 that he was a poor informant who said he was approximately 40 years old (v1:42). The South Florida Evaluation and Treatment Center reported in 1999 that he was 36 years old and "[h]e appeared his stated age" (v1:50, 52). In 2000, Dr. Martinez indicated Hernandez was 37 years old (v1:98). His youngest sister indicated she was 32 years old in 2001 (v10:997, 1001, 1003).

During his opening statement, Hernandez asserted: he had long-term physical problems; a hospital failed to treat him; a post-arrest statement was involuntary and incomplete; he was abused in jail; and he unsuccessfully sought to contact his ex-wife Carmen (v7:536-544). The court repeatedly instructed Hernandez to limit his statements to the evidence he believed would be presented (v7:541-542, 744), then presumed he had no relevant statements to make to the jury, and told him to sit down (v7:544).

During the State's case, Hernandez initiated no objections, but each time the State sought to admit evidence, the court offered him an opportunity to object. Hernandez expressed confusion about this procedure, referred to his familiarity with the evidence or lack there of, his objections to some of the evidence were based on unclear confusing grounds, and all of his objections were denied (v7:554, 561, 563, 566-567, 572, 578, 580-582, 593-594, 622-623, 628-629, 636, 638-639, 641-645, 649, 650-653; v8:672, 676, 683-685, 698-702, 715, 718-719, 733-734). For the most part, he did not cross-examine the State's witnesses, he attempted to refute some answers from the few witnesses he questioned, and his examination of witness had little if any substantive effect (v7:573-574, 591-592, 601, 617, 624, 631, 654; v8:685-686, 689, 702-703, 737-744, 749, 752, 757-758, 766, 776). Hernandez attempted to question only the Brookshire Police Chief at some length, but then largely just stated or implied: he had been deprived of property by officers; he was denied the ability to use a phone to call family, the Mexican Consul or attor-

ney; and the audio tape of the confession was incomplete in some manner (v8:737-744).

The court stated it was having the jury instructions prepared in Spanish for Hernandez (v8:768-769). When the court asked if he would present witnesses, he said no, the witnesses and the lawyers, even his lawyers, were against him (v8:769). He chose to testify (v8:769). He agreed to the State's request that its witnesses be admitted to hear the defense case, but the State said it would keep out his ex-wife Carmen as a possible rebuttal witness, then asserted the witnesses chose to not enter the courtroom (v8:770-772).

At the close of the State's case, the court offered Hernandez an opportunity to make motions (v8:776). His request to make a motion to the jury, and his repeated motions for presence of his family, including ex-wife Carmen and daughter Gabriella, and including persons in Mexico, were denied (v8:777-780). The court stated his family chose not to be present, and it refused to continue the case to bring persons from Mexico (v8:779-780).

The court repeatedly asked Hernandez if he wished to have standby counsel make motions, or whether he wished to continue pro se (v8:778-780). He chose to continue pro se and stated he wished to testify, but requested more time, asserting he had not been given sufficient time to prepare (v8:779-783).

The State requested the court determine if the State presented a prima facie case (v8:785). The court denied the State's motion for judgment of acquittal (v8:785).

Hernandez testified about: his injuries caused by police in an accident; lack of proper treatment after the accident; resultant physical and mental problems; a little about his life with Carmen; some details of the incidents of January 3, 1999, but with no admission of guilt; his arrest in Texas and the involuntary inaccurate post-arrest statement; and abuse he suffered in jail (v8:786-811). The court repeatedly ordered him to testify only about matters relevant to the case and his defense, and to not testify about his medical condition (v8:791, 794-799). He objected that he had received insufficient information about the case and he had insufficient time to prepare (v8:798-799).

After the testimony of Hernandez, the court offered to reappoint counsel, but he declined the offer (v8:813). A lengthy discussion was had about his wish to present witnesses he had been unable to contact: some from Mexico; some from his church; Carmen and Gabriella; and defense investigators (v8:814-818, 821-822). Standby counsel said they had not intended to present such persons as guilt phase witnesses (v8:819, 823, 825-827). Hernandez complained about standby counsel intruding in his case and asserted he would have called the witnesses if the judge informed him, but now he would call no witnesses (v8:824, 827-834).

Upon the resumption of trial on August 24, 2001, the court began a charge conference (v9:842). Hernandez asserted he read the instructions only briefly because of fatigue (v9:842). His request to speak with a person the Mexican Consulate was granted (v9:843). After doing so, he moved pro se for reappointment of counsel (v9:844-

846; s3:3). A letter to the trial judge was also submitted, in which he sought a continuance in order gather facts and information, and to research and prepare his case (v9:846-847; s1:4). He asserted in the letter that appointed counsel failed to provide him with paper work, including discovery (v9:846-847; s1:4). The court declined to appoint substitute counsel, reappointed defense counsel, and rejected the continuance request (v9:846-848).

The defense renewed the initial motion for judgment of acquittal, and again moved for judgment of acquittal (v9:848-849). The motion was denied (v9:849).

During the State's closing argument, it asserted premeditation was established as to Donna by the motive of revenge and by time to reflect as Hernandez took Gabriella to other room (v9:865-866).

The jury began deliberations at 12:14 p.m. (v9:914). During deliberations, the jury had a question:

> Question:
> Transcription of Joe Garcia's testimony - may we have Transcription of the taped confession to Joe Garcia (looking to hear that youngest child was placed in another room prior to shooting).

(v2:316; v9:919-920). With agreement of counsel, the jury was instructed: there were no transcripts of Garcia' testimony or of the confession; such transcripts could be prepared in 45-60 minutes; the jurors could rely on their memories of the testimony of Garcia or have it read in its entirety; and the jury could hear the entire confession tape if it wanted (v9:920-923). The jury was brought in at 1:33 p.m. (v9:925). The jury found Hernandez guilty of first-degree murder on both counts (v9:926-927; v2:317-318).

PENALTY PHASE

At a September 6, 2001 hearing, Hernandez asserted he wanted to meet with his family and for help with speaking with family by telephone (v12:1354). Defense counsel asserted he would attempt to facilitate this, with the assistance of the court (v12:1354).

On September 18, 2001, a pro se motion for termination of counsel based on conflicts of interest was filed (s1:5). On September 18, 2001, a pro se discovery demand, a pro se motion for reappointment of public defender, and a pro se motion for disqualification of the judge were filed (s1:6, 7, 8-9). On October 2, 2001, a pro se motion to withdraw guilty plea was filed (v2:327).

At an October 3, 2001 hearing, the court granted the State's motion for a continuance of the penalty phase, based on the need to rebut testimony of Dr. Berland that Hernandez was mentally ill, including at the time of the offense (s3:210-213, 235; v3:328-329).

Hernandez stated: relatives brought for the hearing were not the relatives requested; he was allowed only an hour to visit with the relatives; counsel did not arrange phone calls with other relatives as promised; counsel did not provide copies of X-rays as requested which were needed because of pain from the fractured bones in his back and neck; he needed help with these injuries; the jail failed to provide medication; and the court had not ruled on his motions for a new counsel and discovery (s3:218-219, 223).

Defense counsel said he had attempted to arrange phone calls between relatives in Mexico and Hernandez in jail, but there were difficulties (s3:220). The defense sought to obtain many witness

from Mexico, but witnesses could not be subpoenaed there, some with more useful information were unwilling to come, and the defense obtained only three witnesses (s3:220-221). Counsel gave him the medical records it had and could seek copies of the jail's X-rays but questioned the relevance (s3:222). Hernandez objected to the presentation of mental health testimony, and counsel was uncertain whether he would proceed pro se (s3:223-224).

Upon Hernandez stating he did not want representation by counsel who did not help him, the court held a Nelson hearing (s3:225-235). The court told him that if counsel was discharged, other counsel would not be appointed (s3:226). Hernandez asserted: he wanted to discharge counsel, but he did not want to represent himself; he wanted to see a doctor for his broken back; a jail doctor prohibited him from receiving medication and an X-ray, and improperly diagnosed him well; counsel failed to help with his back and neck problems, and failed to provided discovery or provide anything about the investigation; no one helped him during the trial and everything the police said was accepted; the arresting officer lied about a detail of the arrest (s3:227, 229).

Defense counsel asserted he: was experienced in the penalty phase of capital trials; he prepared for the penalty phase; Hernandez consistently only wanted to discuss his medical problems; counsel sought evaluation and treatment; and although he asked for discovery at trial, he had not asked for it since (s3:230-234).

The court found defense counsel was not rendering ineffective assistance of counsel, and informed Hernandez that if counsel was

discharged, another attorney would not be appointed (s3:234). Hernandez said he would retain counsel if he would promise to provide the help he requested (s3:235). He did not reply to the court's inquiry as to whether he wanted to discharge counsel and proceed pro se (s3:235). The court ordered defense counsel to continue as counsel (s3:235).

On November 2, 2001, Hernandez filed a pro se motion to disqualify the trial judge (v2:330). On November 14, 2001, the court filed an order denying the motion (v3:332-333).

At a hearing held on November 19, 2001, defense counsel moved for reconsideration of competence, based on new more definitive testimony of Dr. Berland that Hernandez was mentally ill and incompetent (v12:1398; v3:334-335). Hernandez said he opposed and disagreed with the opinion, his rights and the constitution were being violated, and he was being prevented from speaking with his family (v12:1399). He was ordered removed from the courtroom for the disruption and use of profanity (v12:1399-1400).

Dr. Berland testified he originally believed Hernandez was not competent to proceed, but he then lacked solid evidence of mental illness (v12:1401, 1403). Hernandez refused to cooperate with mental health experts (v12:1405). Subsequently Dr. Berland obtained clear evidence of mental illness through a conversation with his ex-wife Carmen (v12:1401-1407). Hernandez's behavior during the marriage was consistent with delusional paranoid thinking, he is psychotic, and he is incompetent to proceed (v12:1401-1403). The court denied the motion and found he was competent, relying on the prior evaluation of

Dr. Maher and Hernandez's appropriate behavior during the trial (v12:1407-1409).

At the November 28-29, 2001, the penalty phase hearing, Hernandez asserted he was not guilty (v10:940). The court ordered him to remain quiet, ordered him removed from the courtroom (v10:940-941). Hernandez said "The jury is worth a shit because of you. I did not chose them." (v10:942).

The State asserted in its opening statements that experts had difficulty because of little evidence (v10:942). Defense experts would say Hernandez was psychotic, but Dr. Merin would say he was not psychotic (v10:955) The State asserted he was not psychotic, "he was just mean as a snake and it was payback time" (v10:T955).

The State moved all evidence and testimony from the guilt phase into evidence (v10:964). The State presented a statement by the fiancee of Isela about the value of the lives of Donna and Isela, then closed its case (v10:966-970).

During a lunch recess, Hernandez was offered an opportunity to remain in the courtroom if he would cease interrupting the proceedings and cease making outbursts (v10:1014-1015). Hernandez asserted the court was depriving him of his rights and would not let him say what he needed to say (v10:1014). He called the judge and jury shit, and was removed from the courtroom (v10:1015).

The defense presented videotape of his hometown, videotaped questioning of witnesses from Mexico, and live witnesses about the hardship, abuse, and poverty Hernandez suffered as a youth (v10:970-1033, 1094-1099; v11:1126-1127, 1149-1156).

Dr. Mussenden testified that during three visits with Hernandez in early 1999, he gave him many tests, did a mental status examination, a structured interview, and used other inter-viewing techniques (v10:1040; 1050-1051). During the first visit he was cooperative, during the second visit he was less cooperative, and during the third visit he was uncooperative and mentally deteriorated (v10:1039-1040, 1044, 1050-1052, 1061). During the evaluations, he was guarded, defensive, and suspicious, and made statements about people which sounded paranoid (v10:1039). Dr. Mussenden did not evaluate him for sanity at the time of the killings (v10:1045-1046). He never found a history of psychiatric illness (v10:1046).

Dr. Mussenden found he was functioning at the borderline level of intelligence which indicates impaired judgment (v10:1041, 1046-1050, 1063). He was borderline literate (v10:1041). He complained about hurting his head, neck, and back in an auto accident in 1994 (v10:1051). There were soft signs of organic brain damage from the accident, such as a WAIS test and affected motor skills and recall, but no medical tests such as MRI, CAT scan, PET scan had been conducted (v10:1041-1042, 1052-1054, 1060). He also suffered from a paranoid disorder and had so suffered for some time (v10:1041-1042). He was paranoid of everyone, appeared to be hallucinating, was delusional (v10:1042-1043, 1061). His paranoid disorder affected his thinking and caused illogical decision making (v10:1043, 1063-1064). The addition of brain injury could aggravate this and make him susceptible to being impulsive and losing emotional control

(v10:1043-1044). Dr. Mussenden did not believe he was malingering (v10:1064).

During the cross-examination of Dr. Mussenden, the State asked him in reference to his finding soft signs of brain damage, whether any tests such as MRI, CAT scan, or PET scan had been done which could conclusively establish brain damage (v10:1054). The defense objected, moved for mistrial because the court had denied the request for PET scan and the jury was given an impression that the defense had not sought such, and sought a curative instruction (v10:T1054-1055, 1057-1058). The court agreed with the State that testimony about soft signs mislead the jury, the objection was overrule, and the motion for mistrial and request for a curative instruction were denied (v10:T1055-1088).

Dr. Berland attempted to evaluate Hernandez's competency and sanity approximately one year earlier (v10:1070-1071). He had been unable to conduct a normal evaluation because Hernandez refused to speak with him or take tests (v10:1071-1072; v11:1120-1123). Berland had a patchwork of information from Hernandez's interactions with his attorneys and doctors, review of documents, and interviews of others which indicate a psychotic disturbance involving delusional paranoid thinking (v10:1074, 1079-1093; v11:1122, 1129-1144).

Dr. Berland's conversation with Hernandez's ex-wife about his irrational, jealous, paranoid behavior, his unprovoked irritability and anger, and his depression establish a psychotic disturbance and mental illness before and during the offense (v10:1082-1087, 1091-1092; v11:1131-1133, 1136-1138, 1143-1144). An interview with

Hernandez's sister established a family history of mental illness, their mother was crazy, and their grandfather reputedly was crazy (v10:1087). Hernandez was sane at time of the murders, most psychotic persons are not legally insane, but although his mental illness did not deprive him specific intent to commit first-degree murder, his mental illness impaired his judgment (v11:1111-1112, 1142). Hernandez's mental illness, including a paranoid delusion about his children hurting his marriage, were part of the psychotic episode of committing the murders (v11:1136-1137).

Dr. Berland found Hernandez was unable to conform his conduct to the requirements of law because a brain injury contributed to his mental illness (v10:1087-1093). After Hernandez's car was hit by a police car, he was treated for back and neck injuries and not for brain injury, but during nine months of treatment he complained of pain in the back of his head, headaches, dizziness, sleep problems, loss of concentration, nervousness and fatigue which were consistent with brain injury (v10:1089, 1092-1093; v11:1129, 1135). At the time of the accident, doctors at a hospital did not order for tests brain injury, but his results on the WAIS test given by Dr. Mussenden were consistent with brain damage (v10:1089-1091; v11:1122, 1135-1136). Brain injury typically is manifested by depression or mania and sleep disturbance (v10:1091). The defense was unable to obtain funding for a PET scan to verify Dr. Berland's opinion that Hernandez suffered brain injury (v10:1074; v11:1134).

Dr. Berland found evidence of mitigating facts: extreme mental or emotional disturbance; substantially impaired capacity to conform

conduct to the requirements of law; brain injury affecting behavioral and emotional functioning; loss of his mother at very early age; abuse from his father; abuse from his neighbor who cared for him; his training and service as an auxiliary officer in Mexico; he was capable when young of maintaining loving and respectful relationships; and he lived in extreme poverty when a child (v10:1075, 1077-1078).

Dr. Merin, a psychologist, testified for the State that because he had no opportunity to examine the uncooperative Hernandez, he would express hypotheses rather than a diagnosis (v11:1168, 1176-1179, 1191-1193, 1201). When he attempted to evaluate Hernandez, he demanded discovery and an opportunity to speak with his family, then refused to cooperate (v11:1176-1178). Dr. Merin reviewed information, documents, videotapes, depositions, police reports, pretrial testimony, statements about an auto accident and treatment of back injury, mental health evaluations and reports of doctors and the State Hospital (v11:1168-1170, 1191-1192). He interviewed no witnesses (v11:1192, 1197).

Dr. Merin hypothesized: there was a probability Hernandez suffered a concussion in the 1994 accident which would have been resolved in six to eighteen months, but not brain damage; he was not under the influence of extreme mental or emotional disturbance or mentally ill, at the time of the crime; his capacity to conform his conduct to the requirements of law was not substantially impaired at the time of the crime; he primarily viewed Isela and Donna as having treated him unfairly; he had a long term psychological-behavioral

problem, a paranoid personality disorder and chronic oppositional personality, but not a mental illness and not a paranoid delusional disorder; and he had at least average intelligence (v11:1180-1189, 1192-1199).

The court asked Hernandez whether he wished to testify (v11:1159-1161). He was upset that his attorneys had not asked a question as he requested (v11:1159-1162). Hernandez wanted X-rays taken of his neck and back, an opportunity to view the X-rays himself for broken bones and to present them to the jury, and he had wanted this for a year and a half (v11:1162-1163). His request was denied (v11:1162-1164). Hernandez said if his request was denied then he had no right to testify or he did not wish to testify (v11:1163-1164).

During State closing, it asserted Hernandez was motivated by greed and desire for vengeance (v11:1214-1215). Hernandez asserted the State lied, then he was ordered to not interrupt (v11:1215). The State asked the jury to reject opinion testimony that Hernandez had brain damage because such opinions were supported by mere "soft signs" (v11:1216-1217).

The jury advised a sentence of death by a vote of ten to two on both counts (v11:1261-1265; v3:339, 353; s1:10).

At a hearing held on December 10, 2001, the court granted defense counsel's request that the jail be ordered to replace a neck collar which it took from Hernandez (s:253).

On January 4, 2002, the State filed a sentencing memorandum, seeking three aggravating circumstances in the murder of Donna

Berezovsky: Donna was under twelve years of age; Donna was particularly vulnerable because Hernandez was in familial or custodial authority over her; and the previous conviction of another capital felony (v3:356-357). The State sought two aggravating circumstances in the murder of Isela Gonzalez: the murder was committed in a cold, calculated, and premeditated matter (CCP); and the previous conviction of another capital felony (v3:357-358).

On January 7, 2002, the defense filed a sentencing memorandum, asserting the CCP aggravating factor was inapplicable and there was much mitigating evidence: extreme mental or emotional disturbance at the time of the offenses; substantially impaired ability to appreciate criminality of actions; brain damage; mental illness and/or problems; mental illness in his family; borderline intelligence; no prior criminal activity; extreme poverty when young; childhood abuse; alcoholic father; his father abused his mother; loss of mother at early age; training and employment as reserve police officer and guard in Mexico; capable of maintaining loving and respectful relationships when young; he sent money to relatives in Mexico; and his confession (v3:360-377). The defense asserted the death penalty would be disproportionate (v3:366, 377-378).

On January 25, a motion, a joint stipulation and orders for a PET scan were filed (v3:379, 380-381, 382, 383).

On February, 22, 2002, a pro se discovery demand was filed (s1:11).

At a hearing held on March 19, 2002, defense counsel noted Hernandez refused to submit to a PET scan which was contrary to his

interests, and questioned whether he was competent (s3:271-273). Hernandez asserted he was innocent and counsel had not helped him or listened to him, that he appealed (s3:271-272). He was removed from the courtroom for interrupting (s3:272). The court noted that throughout the case he repeatedly had to be removed from the courtroom because of his outbursts, disrespect, and refusal to cooperate with anyone, and his refusal to cooperate with the PET scan was consistent (s3:273). The court stated he was competent, but refused to conform (s3:273).

At the April 30, 2002 Spencer hearing, Hernandez repeatedly sought to discharge counsel, then he was removed from the courtroom for refusing to be quiet (s3:280). The defense and the State relied on the written sentencing memoranda, the evidence, and prior arguments, and declined to present further testimony (s3:281).

At the onset of a May 28, 2002 hearing, the court ordered Hernandez not to interrupt (v12:1358). He asserted he did not want counsel and they had not given him any papers (v12:1359). The court ordered his removal from the courtroom (v12:1359-1360).

The defense asserted Florida capital sentencing was unconstitutional in light of Apprendi v. New Jersey, 530 U.S. 446 (2000), and Ring v. Arizona, 536 U.S. 584 (2002) and the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution because "every single finding of fact that raises the maximum punishment to which a defendant may be subjected must be made by a jury" (v12:1361-1364; v3:384-385). The motion was denied (v12:1364).

The court read the sentencing order (v12:1365-1390; v3:396-411). The court noted that throughout the action, it was contented Hernandez suffered from mental illness and brain damage, and he was uncooperative with counsel, investigators, and doctors seeking to evaluate him (v12:1368; v3:397). He was repeatedly removed from the courtroom for outbursts and profanity, but after discharging counsel at the beginning of trial, he conducted himself appropriately, asked relevant questions, and attempted to make valid points (v12:1368-1369; v3:398). After both sides rested, counsel were reappointed and counsel made closing argument (v12:1369; v3:398).

The court found three aggravating factors in the murder of Donna Berezovsky: Donna was under twelve years of age; Donna was particularly vulnerable because Hernandez was in familial or custodial authority over her; and the previous conviction of another capital felony, and gave great weight to each aggravating factor (v12:1369-1371; v3:398-399). The court found two aggravating factors in the murder of Isela Gonzalez: the previous conviction of another capital felony; and CCP, and it gave great weight to each aggravating factor (v12:1371-1373; v3:399-400).

The court weighed the following statutory mitigating factors: no prior criminal history, some weight; crime committed while under the influence of extreme mental or emotional disturbance, no weight; substantial impairment of the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, no weight; age at the time of the offenses, no weight; and any other factors in his background, some weight to him being a noble, like-

able, non-violent youth, and sending money home to help his family after leaving home (v12:1373-1377; v3:401-403). The court weighed the following nonstatutory mitigating factors: suffers from brain injury, little weight; lost mother at early age, little weight; beatings by father when drunk, some weight; beatings by neighbor who cared for him little weight; trained and worked as auxiliary police officer in Mexico City, little weight; capable of maintaining loving and respectful relationships when young, little weight; living in extreme poverty as young child, no weight; confession upon arrest, some weight; and borderline intelligence, little weight (v12:1378-1390; v3:403-410). The court summarized:

> "In cold blood, the defendant shot and killed his eleven-year-old stepdaughter in the family home. He then drove to the family owned and operated restaurant, gathered his thoughts in the bathroom of the restaurant, and then walked up behind his grown stepdaughter and shot her three times, causing her death. After the killings, the defendant attempted to flee this country for Mexico. The circumstances of the case, these aggravating circumstances, outweigh the relatively insignificant mitigating circumstances established by this record.

(v12:1389-1390; v3:410). He was adjudged guilty and sentenced to death (v12:1390; v3:389, 392, 395). The interpreter stated Hernandez understood the translation of the proceedings, but he complained that his neck and back were never checked and doctors never treated him (v12:1392).

SUMMARY OF THE ARGUMENT

The trial court erred in allowing Appellant to proceed pro se where a colloquy established his incompetence to proceed: he lacked knowledge of the charges and potential penalties, and he lacked a rational and factual understanding of the proceedings. The colloquy

also failed to establish a knowing and intelligent waiver of counsel. Additionally, throughout the proceedings, the trial court repeatedly failed to order a competency hearing upon being presented with good cause for such.

The trial court denied Appellant due process and abrogated his constitutional right to self-representation by simultaneously granting his request to proceed pro se and denying his requests for a continuance in order to prepare for trial.

The trial court erred by denying Appellant's request for a PET scan. The test was necessary to confirm well-founded suspicions that Appellant suffered brain damage in an accident prior to the offenses. The results of the test would have been relevant to the issue of intent at trial and to the statutory mental mitigators which were rejected at sentencing.

The trial court erred in denying the motion for judgment of acquittal as to count one. The circumstantial evidence of premeditation was not inconsistent with a reasonable hypothesis of innocence.

The death sentences are disproportionate, especially in light of the improper determination of aggravating factors and the improper rejection of weighty mitigating factors.

The Florida capital sentencing scheme is unconstitutional in light of recent cases of the United States Supreme Court.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN ALLOWING APPELLANT TO PROCEED PRO SE AT TRIAL WITHOUT A PROPER FINDING OF COMPE-

TENCE AND WITHOUT A KNOWING AND INTELLIGENT WAIVER OF COUNSEL, AND IN FAILING TO HOLD COMPETENCY HEARINGS ON OCCASIONS THROUGHOUT THE PROCEEDINGS.

The trial court erred in allowing Hernandez to proceed without a proper determination of competence, and him to proceed pro se without a proper determination of competence or a proper showing his waiver of counsel was knowing and intelligent. "Under both Florida and Federal law, it is well settled that due process prohibits a person accused of a crime from being proceeded against while incompetent." Nowitzke v. State, 572 So. 2d 1346, 1349 (Fla. 1990); Drope v. U.S., 420 U.S. 162, 172 (1975). The test for competency to stand trial is whether the defendant has "sufficient present ability to consult with his or her attorney with a reasonable degree of rational understanding" and whether the defendant "has a rational as well as factual understanding of the pending proceedings." Dusky v. U.S., 362 U.S. 402 (1960); § 916.12(1), Fla. Stat. (1999); Fla.R.Crim.P. 3.211(a)(1). The standard of review on a court's competency decision is abuse of discretion. Watts v. State, 593 So. 2d 198, 202 (Fla. 1992), cert. denied 505 U.S. 1210 (1992).

Hernandez was initially found incompetent a few months after the incident and his arrest, based upon the evaluations Dr. Maher and Dr. Saa (v12:1277; v1:32-43). After a short commitment to a State Mental Hospital, Dr. Saa believed he remained incompetent, but Dr. Maher reversed his opinion (v1:R64-67, 68-71; v12:1289-1291, 1298-1317). Based on the testimony and report of Dr. Maher, documents from the State Hospital, and the testimony of a State Hospital

Psychologist, Dr. Balzer, the court found he was competent to proceed (v1:45-56; 64-67; v3:441-451; v12:1289-1340).

After this hearing and until trial, Hernandez was disruptive and disrespectful in court; demanded care for injuries, contact with family, and help with abuse in jail; sought and was granted discharge of his original counsel; sought and was denied replacement of the second defense team; and refused to communicate with the new defense team (v1:91-92, 94-104, 108-110, 123-127; v45-35, 112-114, 118-138; v12:1343-1349, 1414-1420; s1:63-96, 102-110; s2:117-148, 155-156, 161-168, 182-184, 188-195). In August of 2000, the defense sought appointment of a physician to examine Hernandez, in the hope that he might become cooperative if he was examined and medicated as he had demanded (v12:1414-1420; v1:94-96). The motion was granted and physician/psychiatrist Dr. Martinez was appointed (s1:103-107, 110; v1:97).

On November 1, 2000, Dr. Martinez filed a report stating she found Hernandez was very paranoid and psychotic, probably suffering from chronic paranoid schizophrenia, and he should be treated with an antipsychotic medication (v1:100-101). "Florida Rule of Criminal procedure 3.310 unambiguously requires the trial court to order a competency hearing when it has `reasonable ground to believe the defendant is not mentally competent to proceed.' This obligation is a continuing one." Nowitzke, 572 So. 2d at 1349. The court erred in failing to hold a competency hearing upon receiving Dr. Martinez's report.

Two weeks before trial, the court reappointed Dr. Saa and Dr. Maher to examine Hernandez and ordered a competency hearing upon motions of the State and the defense (s2:188-198; v1:123-127; v2:322-325). At the competency hearing held on the day before trial (v4:26-146), Dr. Maher said Hernandez was competent and knew he was charged with murder and faced the death penalty despite failing to respond to being told of such (v4:39-43, 47-49, 55-56, 58-75, 72; v2:280-283). Dr. Saa testified Hernandez would not discuss the criteria of competence, and it was improper to find competence without a discussion of the criteria (v4:84-86). Dr. Berland could not form an opinion to a medical certainty about Hernandez's competence because he had not participated in an evaluation, but he believed he was mentally ill and brain damaged (v4:91-105).

Defense counsel asserted he was perplexed by Dr. Maher's lack of any direct dialogue with Hernandez about the criteria of competence (v4:106-107, 114-115). Counsel noted Dr. Maher did not assert Hernandez could testify appropriately or responsively, and there was no indication in this case that he could so testify (v4:108, 115-118).

The trial court found Hernandez was competent to proceed on the day before trial (v4:125-126). On the second day of trial, after jury selection, the trial court conducted a Faretta inquiry (v7:T488-503). "The defendant's decision to waive counsel must be knowing, voluntary, and competent before it can be recognized." U.S. v. Boigergrain, 155 F.3d 1181, 1185-1186 (10th Cir. 1998).

The right to self-representation is implied in the Sixth Amendment. Faretta v. California, 422 U.S. 806, 819-821 (1975).

> When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, the accused must "knowingly and intelligently" forgo those relinquished benefits. Johnson v. Zerbst, 304 U.S. [458] at 464-465, 58 S.Ct. at 1023 [(1938)]. Cf. Von Molke v. Gillies, 332 U.S. 708, 723-724, 68 S.Ct. 316, 323, 92 L.Ed. 309 [(1948)] (plurality opinion of Black, J.). Although a defendant need not himself have the skill and experience of a lawyer in order completely and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open." Adams v. United States ex. rel McCann, 317 U.S. [269] at 279, 63 S.Ct. at 242 [(1942)].

Faretta, 422 U.S. at 835. Whether a waiver of counsel is knowing and intelligent is a mixed question of law and fact which is reviewed de novo. U.S. v. Cash, 47 F.3d 1083, 1088 (11th Cir. 1995). The government has the burden of proving the validity of the waiver on direct appeal. Id.

In Godinez v. Moran, 509 U.S. 389 (1993), the Court found defendants need no more competence to proceed pro se than they need to proceed. Godinez was wrongly decided. As Justice Blackmun stated in dissent, the term "competent" can not be applied in a vacuum: "A person who is competent to play basketball is not thereby competent to play the violin." Godinez, 509 U.S. at 413. Godinez has been criticized as providing for trials lacking due process, including trials in which mentally disturbed defendants are given a court sanctioned ability to dispense with counsel. Jennifer W. Corinis, A Reasoned Standard for Competency to Waive Counsel After Godinez V. Moran, 80 B.U.L.Rev. 265, 280-288 (2000); Martin Sabelli, Stacey

Leyton, Train Wrecks and Freeway Crashes: an Argument for Fairness and against Self-Representation in the Criminal Justice System, 91 J.Crim.L.&Criminology 161 (2000). See also, David C. Donehue, Peters v. Gunn: Should the Illiterate Have a Right to Self-Representation, 57 U.Pitt.L.Rev. 211 (1995).

In Godinez, 509 U.S. at 400-401, the Court noted there is a heightened standard for waiving counsel, in that the court must satisfy itself the waiver is knowing and voluntary. "The purpose of the `knowing and voluntary' inquiry, by contrast, is to determine whether the defendant actually does understand the significance and consequences of a particular decision." Id. at 401 fn. 12. The Court also left the states "free to adopt competency standards that are more elaborate." Id., at 402. Some states have provided for a higher level of competence. See State v. Klessig, 211 Wis.2d 194, 564 N.W.2d 716, 724 (1997); People v. Lego, 168 Ill.2d 561, 214 Ill.Dec. 264, 660 N.E.2d 971, 973, 978-979 (1993); Commonwealth v. Simpson, 44 Mass.App.Ct. 154, 689 N.E.2d 824, 831 (1998). Florida should also do so.

In Bowen v. State, 698 So. 2d 248 (Fla. 1997), this Court held one need not have the technical knowledge of an attorney in order to be allowed to proceed pro se, citing the competence standard of Godinez. This Court found Bowen, a high school graduate, had two years experience in legal research, represented himself in two prior felony cases, winning one, "was literate, competent, and understanding, and that he was voluntarily exercising his free will." Bowen, 698 So. 2d at 251, quoting Faretta, 509 U.S. at 399. The trial

court conducted a Faretta inquiry which largely followed the model in the Committee Notes to Florida Rule of Criminal Procedure 3.111 (v7:488-518). That colloquy establishes a lack of competence and the lack of a voluntary waiver:

> THE COURT: Mr. Hernandez-Alberto.
> THE DEFENDANT: Yes.
> THE COURT: Yesterday you indicated your desire to discharge your court-appointed attorneys and that you wanted to represent yourself. He can stand right now that we are talking.
> THE DEFENDANT: Yes, sir.
> THE COURT: Sir, I need to ask you some questions with regard to your representation of yourself. Do you still desire to discharge your attorneys and to represent yourself?
> THE DEFENDANT: Yes.
> THE COURT: Okay. Mr. Hernandez-Alberto, you understand, sir, that you do have the right to a lawyer and that I have appointed attorneys for you. You do have the constitutional right to discharge them.
> THE DEFENDANT: I want them to withdraw because they are not helping me in any way.
> THE COURT: Okay. You understand that there are advantages to having lawyers represent you. Do you understand that?
> THE DEFENDANT: I know that there are certain advantages, but the attorneys are violating my rights. I don't see any advantage.
> THE COURT: Okay.
> THE DEFENDANT: For some time now I have been requesting the documents, the discovery documents, the accusation documents. And I have not received anything. I have wanted to go to the library and I have never been allowed to go to the library.
> THE COURT: Okay. Throughout the proceedings, Mr. Hernandez-Alberto, you have not given your attorneys the opportunity to speak with you.
> THE DEFENDANT: I don't count on their help. I want them to withdraw. I don't need them.
> THE COURT: That's why we are at this --
> THE DEFENDANT: Because they are not helping me. They are not helping me. That's the motive. That's the reason. They are not helping me.
> THE COURT: That's why, sir, we are at this stage of the proceedings. And I'm going to ask you some questions with regard to you representing yourself.
> Do you understand, Mr. Hernandez-Alberto, that your attorneys have the experience and knowledge of the entire legal process and that they will argue for your side during the

entire trial and that they will present the best legal argument for your defense?

THE DEFENDANT: Why should I have them if there's no trust and there's no communication?

THE COURT: Well, I am just asking you, sir, if you understand the advantages of experienced attorneys representing you.

Do you understand, sir, that your attorneys can call witnesses for you, that they can question the witnesses against you and they can present evidence on your behalf?

THE DEFENDANT: Do I have a right to make those questions? Yes or no?

THE COURT: You have the right to assist your attorneys, sir, in formulating the questions.

THE DEFENDANT: The attorneys, I don't want to communicate with them because they haven't done anything for me. I want to communicate with my family and they have not helped me.

THE COURT: Well, in fact, Mr. Hernandez-Alberto, we have gone over these exact issues. And your family, at least your sister, has been brought to Hillsborough County and taken to the jail and you have refused, in fact, to see her.

Do you understand, sir, that your attorneys can advise you on whether you should testify?

THE DEFENDANT: Whom?

THE COURT: The consequences of that decision and what you have a right not to say?

THE DEFENDANT: Speaking about my sister, I saw her. She spoke with me. She left me some telephone numbers to her home. And now at the jail they don't let me talk with her.

MR. TRAINA: Judge, just for the record, he did speak with his sister. I don't know if you have got the impression from something that we had said earlier that he had did not speak to his sister.

There have been many people that he did not speak to, but he has, indeed, had visits with his sister.

THE COURT: Okay. Do you understand, sir, that your attorneys can discuss with you your right to testify and whether you should or should not testify and what you have a right not to say?

THE DEFENDANT: I don't want the attorneys. I want them to withdraw.

THE COURT: You further understand, sir, that your attorneys have studied the rules of evidence and they know what evidence can or cannot come into your trial?

THE DEFENDANT: They haven't shown it to me. They have not explained it to me. They haven't -- that's what I would like to find out, in fact. But they have not communicated any of this to me.

THE COURT: Mr. Hernandez-Alberto, that's because you have refused to talk with your attorneys.

Do you understand, sir, that your attorneys may provide assistance in assuring that the jury is given complete and

accurate jury instructions by the Court. And that they may make an effective closing argument on your behalf?

THE DEFENDANT: This gentlemen Daniel, he went to the jail. I spoke to him three or four times. We talked about the situation, about the accusation. I told him about how I was treated. So it is not that I have not spoken with the attorneys.

THE COURT: Do you understand, Mr. Hernandez-Alberto, that your attorneys, in assisting in this trial and representing you in this trial, that they may prevent an improper argument by the prosecutor if that were to happen?

THE DEFENDANT: But I am not in agreement that they are representing me. I am not in agreement with that. I don't have any trust in either one of the two.

THE COURT: Do you understand, Mr. Hernandez-Alberto, that your attorneys could insure that any errors committed during the trial are properly preserved for appellate review by a higher court?

THE DEFENDANT: I don't know about law. I know almost nothing. But I need to learn. If I could go to the library then I would study and I would possibly find some things that would be of benefit to me.

THE COURT: That's why, sir, that I'm going to ask you a series of questions that would outline some of the damages and disadvantages of you discharging your attorneys and asking the Court that you represent yourself.

Do you understand, sir, that you will not get any special treatment from the Court just because you're representing yourself?

THE DEFENDANT: What do you mean by special treatment?

THE COURT: I am not going to treat you any differently than I would treat the attorneys.

THE DEFENDANT: Are you saying then that you would not or that I would not be allowed the opportunity to find the documents or to go to the library?

THE COURT: I am telling you that I am not going to allow you or you will not be entitled to a continuance simply because you have chosen to represent yourself.

THE DEFENDANT: I want to represent myself because the attorneys have done nothing toward my defense. Nothing in my defense. That's why I want to represent myself. But I would like for you to give me the opportunity to familiarize myself, to take certain steps so that I can find out what is going on.

Also, it would be to my advantage to find out through these documents what is against me.

THE COURT: Mr. Hernandez-Alberto, if you choose to represent yourself, I am not going to continue the trial. We are going to proceed this morning.

We have picked this jury yesterday. The jury is here. You obviously have a right to represent yourself. But I am not going to prolong the trial.

You are not required to possess the legal knowledge or the skills of an attorney in order to represent yourself. However, you will be required to abide by the rules of criminal law and the rules of courtroom procedure.

These laws took the lawyers years to learn and abide by. If you demonstrate an unwillingness to abide by these rules, I may terminate your self-representation. Do you understand that, sir?

THE DEFENDANT: I don't understand very well. But is it allowed what I am asking from you?

THE COURT: Is what allowed?

THE DEFENDANT: That you let me go to the library and you let me have the discovery. If it is in English, someone can translate it for me so I know what is going on so I can find out what is written there. Because the attorneys that you have sent to help me have not helped me with that.

THE COURT: Mr. Hernandez-Alberto, we have already gone through these issues. I have found that your attorneys have been representing you effectively and that they have done everything that they possibly could have done in light of the fact that you have not cooperated with anyone.

Now that you are requesting to represent yourself, and you have the constitutional right to do so, I will give you that opportunity. But I am not going to continue the trial. Do you understand that, sir?

THE DEFENDANT: What do you mean to continue the trial?

THE COURT: I am not going to delay the trial. The jury is here and we are going to proceed with the trial this morning. Do you understand?

THE DEFENDANT: If this is the case then I would like all the news media to be present and spread the news that I am not being given the opportunity to go to the library to obtain the self discovery or to discuss any matters with my family.

THE COURT: Okay. Do you still want to represent yourself, Mr. Hernandez-Alberto?

THE DEFENDANT: I don't want the attorneys. I want to represent myself. I want to communicate with my family.

THE COURT: Do you understand that if you're disruptive in the courtroom that the Court can terminate your self-representation and remove you from the courtroom? In which case the trial would continue without your presence?

THE DEFENDANT: I do not understand that. But if I'm going to be judged, it has to be done in front of the people and that I be given an opportunity to present those cases to those people.

THE COURT: Mr. Hernandez-Alberto, in virtually every court appearance that you have made, with the exception of this morning so far, you have created a disturbance. You have interrupted the court proceedings, you have used profanity. You have been vulgar.

And I am telling you, sir, that if you want to represent yourself, that you have the constitutional right to do so. And I will allow to you do so.

However, if you are disruptive, as you have been throughout all of the Court proceedings up until today, that I can terminate your self-representation and remove you from the courtroom. In which case the trial will continue without your presence. Do you understand that, sir?

THE DEFENDANT: Are you not violating the laws in that way?

THE COURT: Mr. Hernandez-Alberto, I'm going to ask you, sir, please answer the question.

THE DEFENDANT: Yes or no?

THE COURT: I'm going to ask you to please answer the question. If you're disruptive, I will remove you from the courtroom and we'll proceed with the trial without your presence.

THE DEFENDANT: No, because the law -- not exactly the law of what I think, but I believe that when one is tried, one has to be tried before the people.

So that the people must find out if one is guilty or not guilty. Whereas, if everybody turns against one, then that would not be very fair.

THE COURT: Mr. Hernandez-Alberto, this is an open courtroom. You will have a jury of your peers determine whether you're guilty or innocent. There is not going to be anyone that will be denied access to the court.

There are certain rules and procedures, however, that you will be required to follow just as a lawyer is required to follow them. If you do not follow those rules and procedures, if you are otherwise disruptive, I'm going to remove you from the courtroom and I will continue the trial without your presence. Do you understand, sir?

THE DEFENDANT: Yes, I understand what you are saying. But that doesn't mean that I agree with what you are saying. What I am asking for you is, again, to let me speak with my family and give me the opportunity to have the discovery.

THE COURT: Do you understand, Mr. Hernandez-Alberto, that the State will not go any easier on you or give you any special treatment because you're representing yourself? That the State will present its case against you as an experienced lawyer?

THE DEFENDANT: As I was saying, I want to know what is going on. I want the report of the information. The report of the charges that are against me.

THE COURT: All of these items in which you complain, Mr. Hernandez-Alberto, could have and would have been provided to you long ago had you only been cooperative with your attorneys and their investigators. You chose not to be cooperative, sir. That's why you're in the position that you're in today.

Finally, Mr. Hernandez-Alberto, do you understand that if you're convicted, you cannot claim on appeal that your own lack

of legal knowledge or skill constitutes a basis for a new trial.

In other words, you cannot claim that you received ineffective assistance of counsel. Do you understand that, sir?

THE DEFENDANT: Why I cannot complain if you yourself know that the lawyers are not helping me? I had mentioned to you a few times the same thing.

THE COURT: Do you understand these damages and disadvantages of representing yourself, sir?

THE DEFENDANT: I need time to come back later on.

THE COURT: I am not going to continue the trial, sir. Do you have any questions about these damages and disadvantages?

THE DEFENDANT: Do you understand that when you hire somebody to do a job for you and you pay that person some amount of money, if that person could not do the job, he is not being fair to you because he is not complying with the money that you had already paid him?

These persons, that they already have been paid money for my case to represent me. But as I repeated to you, they had done nothing, nothing, to help me. And then what happened was that the one who paid the money to the person to do the job, he doesn't trust that person and will not hire that person again to do another job for him.

THE COURT: If you're discussing the facts of discharging your attorneys, I'm going to give you that opportunity. You will be allowed to represent yourself.

THE DEFENDANT: Then I am not going to obtain the discovery?

THE COURT: Have you received and read a copy of the charges against you?

THE DEFENDANT: Who gave it to me, the lawyer?

THE COURT: My question to you is it have you received and read a copy of the charges against you?

THE DEFENDANT: No.

THE COURT: Okay. Make a copy of the indictment, take him to the holding cell and give him an opportunity to read it.

THE DEFENDANT: No, I need, please, to give me the discovery.

THE COURT: Take him back to the holding cell and let him read the indictment. I will be in recess for a few moments.

THE DEFENDANT: My sister came in --

MR. PRUNER: Is that the original?

(A short recess was taken.)

(v7:488-503). The court conducted an investigation by questioning public defender office employees who originally represented Hernandez, apparently to satisfy itself that no continuance was necessary (v7:503-508), then concluded the Faretta inquiry:

THE COURT: Okay. Thank you. The Court is satisfied that Mr. Hernandez-Alberto was been afforded the opportunity to review the evidence and discovery in preparation of his defense. Do you still wish to represent yourself, Mr. Hernandez-Alberto?

THE DEFENDANT: I told you a while ago that I wanted -- not to exchange -- but the discovery, the documentation, that I can prepare myself and present my case.

THE COURT: Mr. Hernandez-Alberto, I am not going to continue this matter. I am asking you a specific question. And I'm going to ask you to respond specifically to my question. Do you still want to represent yourself?

THE DEFENDANT: Yes.

THE COURT: Do you understand the charges against you?

THE DEFENDANT: That's what I want to make sure of.

THE COURT: You're charged with two counts --

THE DEFENDANT: I need the opportunity.

THE COURT: -- of first degree murder. Do you understand that, sir?

THE DEFENDANT: I am being accused of two counts of murder?

THE COURT: Yes. You understand that?

THE DEFENDANT: I am hearing and I understand the information that is against me, but I need the papers, the discovery, in order to be able to talk --

THE COURT: Do you understand that the maximum penalty, if you're found guilty of the charges, is either death by electrocution or by lethal injection or life imprisonment without the possibility of parole. Do you understand that, sir?

THE DEFENDANT: Well, I am not going to say yes, but if you're going to base yourself on the information that the police gave you and the information is incorrect, you're going to base yourself on that information.

THE COURT: Do you understand that if you are not a citizen of the United States and if you're found guilty, you could be deported from this country, excluded from entering this country in the future and denied the opportunity to become a naturalized citizen?

THE DEFENDANT: I am not guilty, sir, of the accusation that's being made against me.

THE COURT: My question to you -- I would ask that you please respond to the question, sir.

THE DEFENDANT: Could you tell me that question again, please?

THE COURT: Do you understand if you are not a citizen of the United States and you're found guilty, you could be deported from the country, excluded from entering the country in the future and denied the opportunity to become a naturalized citizen?

THE DEFENDANT: From something that I am guilty? As I told you, I am not guilty of such an action.

THE COURT: Do you have any questions about the charges or the possible consequences and penalties if you're found guilty as I have explained them to you?

THE DEFENDANT: What did you say?

THE COURT: Do you have any questions about the charges or the possible consequences and penalties if you're found guilty as I have explained them to you?

THE DEFENDANT: I don't understand that question very well.

THE COURT: Let me ask you some other questions to determine whether you're competent to make a knowing and competent waiver of counsel. How old are you?

THE DEFENDANT: Twenty-eight years old.

THE COURT: Can you read or write the English language?

THE DEFENDANT: No.

THE COURT: How many years of school have you completed?

THE DEFENDANT: Up until number six.

THE COURT: Are you currently under the influence of any drugs or alcohol?

THE DEFENDANT: What do you mean? What did he say?

THE COURT: Are you currently under the influence of any drugs or alcohol?

THE DEFENDANT: No.

THE COURT: Have you ever been diagnosed and treated for a mental illness?

THE DEFENDANT: Yes. In jail I was taking medicine for about five months.

THE COURT: Do you have any physical problem which would hinder your self-representation in this case such as a hearing problem, speech impediment or poor eyesight? Do you have an answer?

THE DEFENDANT: No.

THE COURT: Do you have a hearing problem?

THE DEFENDANT: No.

THE COURT: Do you have a speech impediment?

THE DEFENDANT: No.

THE COURT: Do you have poor eyesight?

THE DEFENDANT: Sometimes my sight fails me, but it doesn't mean that it's permanent. It fails me possibly due to tiredness.

THE COURT: Has anyone told you not to use a lawyer?

THE DEFENDANT: From the ones that are here?

THE COURT: No, sir. Has anyone ever threatened you not to use a lawyer?

THE DEFENDANT: No.

THE COURT: Has anyone threatened you if you hire a lawyer or accept a lawyer appointed by the Court?

THE DEFENDANT: They have prohibited the use of an attorney over there in the jail because they never come in to see me.

THE COURT: Have you ever represented yourself in trial?

MR. HERNANDEZ: I have never been in jail before.

THE COURT: Okay. I take that as the answer is no. Is that correct?

THE DEFENDANT: One time I had to go in front of a judge, I don't remember when it was, for a ticket that had been given to me.

THE COURT: But you have never represented yourself in a trial. Is that correct?

THE DEFENDANT: I was there speaking. I was there speaking with a translator, but I did not have an attorney.

THE COURT: Having been advised of your right to counsel, the advantages of having counsel, the disadvantages and damages with proceeding without counsel, the nature of the charges and the possible consequences in the event of a conviction, are you certain that you do not want me to appoint these lawyers to defend you?

THE DEFENDANT: I have been conscious of what you said about the attorneys that I had over here, that they have not helped me. If you appoint another attorney for me, yes, I want an attorney.

THE COURT: I am not going to appoint substitute counsel. Are you certain that you do not want me to keep these attorneys on your case and let them defend you, sir?

THE DEFENDANT: Yes, I don't want them.

THE COURT: I'm going to, on the Court's own motion, order that Mr. Hernandez and Mr. Traina act as standby counsel. That means, Mr. Hernandez-Alberto, that they will be available to you if you have any questions during the course of these proceedings.

However, you will be responsible for the organization and content of presenting your case. You still have the entire responsibility for your own defense. Do you understand that?

THE DEFENDANT: Yes, I understand. I understand that. That's why I am asking you to let me go to the library and get acquainted with some things that I need to know, necessary for me to know.

THE COURT: I have already discussed that matter with you, sir. I am not continuing the trial. Do you understand that you're going to have the entire responsibility for your own defense?

THE DEFENDANT: Yes. But I also -- I agree that I need the opportunity to know about the discovery. Because if I did hear it, I don't know.

THE COURT: The Court's going to make the following finding that the defendant is competent to waive counsel. And that his waiver of counsel is one that is both knowing and intelligent according to the applicable case law. I have a serious concern, however, with him being able to capably conduct an effective defense.

However, this is not a basis in which to not allow him to represent himself. And that's pursuant to State versus Bowen, 698 So 2d, 248, which is a Florida Supreme Court case decided

in 1997. Have the defendant take a seat. Mr. Pruner, have a seat at counsel table.

MR. PRUNER: Your Honor, if I may. On -- not on that issue. Through the course of the actual trial, may Mr. Hurd assist me and sit at counsel table?

THE COURT: Yes.

MR. PRUNER: Does Your Honor intend to advise the jury that Mr. Hernandez-Alberto will be representing himself?

THE COURT: Yes.

MR. PRUNER: Thank you. And I'm passing forward to you a copy of the second degree murder instruction. It was omitted from the original packet.

THE COURT: Mr. Hernandez-Alberto, I have been provided with a copy of the preliminary jury instructions. Do you have any objections to the first three pages?

THE DEFENDANT: What did you say.

THE COURT: Do you have an objection to the first three pages of the preliminary jury instructions?

MR. TRAINA: He doesn't have the jury instructions.

THE COURT: Give it to him.

MR. TRAINA: That's what I was getting ready to do.

THE COURT: Give him everything. While Mr. Traina is doing that, I want to make one further comment for your benefit, Mr. Hernandez-Alberto.

I want to make it perfectly clear that you are going to be required to abide by the rules of criminal law and the rules of courtroom procedure. That if you demonstrate an unwillingness to abide by these rules, I may terminate your self-representation.

Further, if you are disruptive in the courtroom, the Court can terminate your self-representation and remove you from the courtroom, in which case the trial will continue without your presence. Having been provided a copy of the preliminary jury instructions, pages one through three, do you have any objections?

Not hearing an answer, Mr. Amador have a seat next to him, please. In the event he needs to ask a question in Spanish, Mr. Hernandez, Mr. Traina, you will also be available.

On the third page, there's a paragraph in which the defendant has the right, the absolute right, to remain silent. Do you want the Court to read that to the jury?

THE DEFENDANT: I need the opportunity to get familiar with this situation so I could defend myself.

THE COURT: Are you asking for a continuance?

THE DEFENDANT: Yes.

THE COURT: Denied. Bring in the jury.

(v7:T488-518).

Throughout the inquiry Hernandez made non-responsive replies (v7:488-518). To individual questions about his knowledge of the rights he was waiving, Hernandez largely complained about counsel, inability to communicate with family, not receiving discovery and documents in his case, and the need for time to prepare, but not acknowledging he understood the rights he was waiving. He said he had not known he was charged with two counts of first-degree murder; he was ambiguous about whether he knew he faced a possible death penalty; he gave an apparently inaccurate age[5]; and he indicated he could not read or write English, had little education, he had been diagnosed and treated for mental illness, and he had no significant prior pro se court experience -- all establishing he lacked competence to waive counsel and proceed pro se.

"[W]here a defendant's competence to stand trial is in question, a court may not allow that defendant to waive [his] right to counsel and proceed pro se until the issue of competency is resolved." U.S. v. Klat, 156 F.3d 1258, 1263 (D.C.Dist. 1998). The trial court erroneously found Hernandez competent to proceed pro se where it lacked evidence he had a knowledge of the charges and potential penalties, present ability to consult with counsel (himself) with a reasonable degree of rational understanding, and a rational factional understanding of the proceedings.

The inquiry does not establish Hernandez understood the risks of self-representation, and there was no knowing, intelligent, and

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[5] Hernandez was apparently 38 years old at the time of trial (v1:17, 42, 50, 52, 98; v10:997, 1001, 1003).

voluntary waiver of counsel. "[T]he knowingly and voluntary prong of the Godinez standard requires more than merely exposing a defendant to information -- it requires that `the defendant actually does understand the significance and consequences of a particular decision.'" Wilkins v. Delo, 886 F.Supp. 1503 (W.D.Mo. 1995), quoting Godinez, 509 U.S at 401 fn 12. Every reasonable presumption against waiver should be indulged. Brewer v. Williams, 430 U.S. 387, 404 (1977). "The ultimate test is not the trial court's express advice, but rather the defendant's understanding." Rogers v. Singletary, 698 So. 2d 1178 (Fla. 1996); U.S. v. Balough, 820 F.2d 1485, 1487-1488 (9th Cir. 1987) ("Throughout this inquiry, we must focus on what the defendant understood, rather than on what the court said or understood."), cert. denied 525 U.S. 1083 (1999). The trial court clearly erred in finding a literate, competent, understanding, and voluntary waiver of counsel.

After the trial, and prior to the guilt phase jury proceeding, Hernandez: asserted at a hearing he needed to contact his family (v12:1354); filed a pro se discovery demand and pro se motions for termination of counsel, reappointment of the public defender, disqualification of the judge, and to withdraw guilty plea (s1:6-9; v2:327). He complained at a hearing that: relatives brought for the hearing were not the relatives requested; he was allowed only an hour to visit with the relatives; counsel did not arrange phone calls with other relatives as promised; counsel did not provide copies of X-rays as requested; he needed help with injuries; the jail failed to provide medication; the court had not ruled on his pro se motions; he

wanted to discharge counsel, but he did not want to represent himself; he wanted to see a doctor for his broken back; a jail doctor prohibited him from receiving medication and an X-ray, and improperly diagnosed him well; counsel failed to help with his injuries, and failed to provided anything about the investigation; no one helped him during the trial and everything the police said was accepted; the arresting officer lied about a detail of the arrest (s3:218-219, 223-227, 229). He again filed a pro se motion to disqualify the judge (v2:330).

On November 19, 2001, before the penalty phase jury proceeding, the defense moved for reconsideration of competence, based on new more definitive testimony of Dr. Berland that Hernandez was mentally ill and incompetent (v12:1398; v3:334-335). Dr. Berland testified he originally believed Hernandez was not competent to proceed, but he lacked solid evidence of mental illness (v12:1401, 1403, 1405). Dr. Berland had now obtained clear evidence of mental illness through a conversation with his ex-wife Carmen (v12:1401-1407). Dr. Berland asserted Hernandez's behavior during the marriage was consistent with delusional paranoid thinking, he is psychotic, and he is incompetent to proceed (v12:1401-1403).

> If, at any material stage of a criminal proceeding the court of its own motion, or on motion of counsel for the defendant ... has reasonable ground to believe that the defendant is not mentally competent to proceed, the court shall immediately enter its order setting a time for a hearing to determine the defendant's mental condition ... and shall order the defendant to be examined by no more than 3, nor fewer than 2, experts prior to the date of the hearing.

Fla.R.Crim.P. 3.210(b). Sentencing is such a "material stage." Fla.R.Crim.P. 3.214; Pridgen v. State, 531 So. 2d 951 (Fla. 1988). The standard for determining whether a competency hearing is required is whether there are reasonable grounds to believe the defendant may be incompetent, not whether he actually is incompetent. Tingle v. State, 536 So. 2d 202, 203 (Fla. 1988). "If a reasonable ground' exists, the language of rule 3.210(b) is mandatory." Boggs v. State, 575 So. 2d 1274, 1275 (Fla. 1991). The standard of review of a decision whether to hold a competency hearing is abuse of discretion. Kelly v. State, 797 So. 2d 1278 (Fla. 4th DCA 2001).

An experts's opinion that a defendant is not competent provides a reasonable ground for a formal competency hearing. See Kothman v. State, 442 So. 2d 357 (Fla. 1st DCA 1983) (physician's testimony that the defendant was not in full possession of his faculties and his recall ability was impaired); Boggs v. State, 375 So. 2d 604 (Fla. 2d DCA 1979) (jail psychiatrist's indication of lack of competence provided reasonable grounds to believe Boggs was not competent). See also Tingle, 536 So. 2d at 203 (mental health worker had "informal" impression Tingle might be paranoid schizophrenic); Manso v. State, 704 So. 2d 516 (Fla. 1997) (court abused discretion in failing to grant continuance during penalty phase to determine Manso's competence where two psychologists recommended he be observed in a hospital setting). The obligation to hold a competency hearing upon reasonable grounds "is a continuing one." Nowitzke, 572 So. 2d at 1349. "[A] prior determination of competency does not control when

new evidence suggests the defendant is at the current time incompetent." Id.

The court denied the motion and found he was competent, relying on the prior evaluation of Dr. Maher and Hernandez's appropriate behavior during the trial (v12:1407-1409). The court erred in declaring Hernandez competent relying on past medical reports and the court's observation of him at trial several months earlier. Gibson v. State, 474 So. 2d 1183 (Fla. 1985). As in Nowitzke, 572 So. 2d at 1349, the trial court erroneously denied motion for competency hearing "on the basis of an evaluation made three months earlier."

At the jury penalty phase hearing, Dr. Mussenden testified Hernandez suffered from a brain damage and a paranoid disorder and had so suffered for some time (v10:1039-1064). Dr. Berland testified Hernandez was psychotic and brain damaged at the time of the offenses, and continued to be mentally ill (v10:1074-1092; v11:1131-1144). Dr. Merin hypothesized that Hernandez had no mental illness but suffered from a paranoid personality disorder (v11:1168-1201).

At a hearing held on March 19, 2002, prior to the Spencer hearing, counsel noted Hernandez refused to submit to a PET scan which was contrary to his interests, and questioned whether he was competent (s3:271-273). Defense counsel's assertions of incompetency upon seeking a competency hearing may provide reasonable grounds for a hearing. See Nowitzke, 572 So. 2d at 1349 (counsel asserted Nowitzke lacked a rational thought process and it was doubtful whether he had a present ability to assist counsel or understand the proceedings in light of his irrational reasons for rejecting a plea

offer); Brehm v. State, 495 So. 2d 253 (Fla. 3d DCA 1986) (defense counsel's request for an evaluation of uncooperative defendant before sentencing should have been granted despite the trial court's "understandable displeasure with the defendant's disruptive behavior"); Scott v. State, 420 So. 2d 595 (Fla. 1982) (defense counsel's request for an evaluation because of lack of communication and inability to assist in preparation with the defense, coupled with Scott's overriding a deal exchanging waiver of the death penalty for a six person jury established reasonable grounds for a hearing).

The trial court said that throughout the case Hernandez was removed from the courtroom because of his outbursts, disrespect, and refusal to cooperate with anyone, and his refusal to cooperate with the PET scan was consistent (s3:273). The court stated he was competent, but refused to conform (s3:273). "Intentional action by a defendant does not avoid or eliminate the necessity of applying the test of whether a defendant has the sufficient present ability to assist counsel with his defense and to understand the proceedings against him." Lane v. State, 388 So. 2d 1022, 1026 (Fla. 1980). The court erred by not holding a competency hearing.

The evidence that Hernandez understood the charges and potential penalties, had a present ability to consult with counsel with a reasonable degree of rational understanding, and had a rational, factional understanding of the proceedings was of dubious value. Also, throughout this case the experts indicated Hernandez was incompetent and probably suffering from a paranoid psychosis, or he was competent and suffering from a mere paranoid personality disor-

der. A paranoid personality disorder appears to be inconsistent with criteria of competence such as the ability to disclose facts pertinent to the proceedings, manifest appropriate courtroom behavior, and testify relevantly.

> The essential feature of the paranoid disorder (ppd) is a pattern of pervasive distrust and suspiciousness of others; the motives of others are interpreted as malevolent. The suspiciousness may be expressed by overt argumentativeness, recurrent complaining, or hostile aloofness. While individuals with a paranoid personality disorder [appear] cold, objective, and rational, they more often display hostile, stubborn, and sarcastic affect. ...

DSM IV, 1994, pp 634-635. "In any scheme that tries to classify persons in terms of relative mental health, those "with personality disorder would fall near the bottom." Comprehensive Textbook of Psychiatry (4th Ed. 1985), p. 958. See U.S. v. Vazquez, 2002 WL 31769703 (S.D.N.Y Dec. 10, 2002) (a defendant who maintained an uncooperative and paranoid posture with defense counsel was not able to properly assist with his defense and was not competent to proceed whether he suffered from a paranoid delusion disorder or a mere paranoid personality disorder).

The judgment and sentence must be vacated and the cause reversed for a new trial. In the alternative, the sentence must be vacated and the cause reversed for a new sentencing proceeding.

ISSUE II

THE TRIAL COURT ERRED IN DENYING THE PRO SE MOTION FOR A CONTINUANCE IN ORDER TO PREPARE FOR TRIAL.

"The court on motion of the state or a defendant or on its own motion may in its discretion for good cause shown grant a continu-

ance." Fla.R.Crim.P. 3.190(g)(2). "[A] defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense." Powell v. Alabama, 287 U.S. 45, 59 (1932).

Hernandez repeatedly sought a continuance in order to prepare for trial, but each request was denied (v7:494-497, 501, 508-509, 515, 518; v8:779, 781; v9:846-848; s1:4). The court conducted an investigation by questioning employees of the public defender office who originally represented Hernandez, apparently to satisfy itself that no continuance was necessary (v7:503-508). In this investigation of assistant public defenders, asked to testify as officers of the court, the judge improperly departed from his position of neutrality. "While it is permissible for a trial judge to ask questions deemed necessary to clear up uncertainties as to issues in cases that appear to require it, [citation deleted], the trial court departs from a position of neutrality, which is necessary to the proper functioning of the judicial system, when it sua sponte orders the production of evidence that the state itself never sought to offer in evidence." J.F. v. State, 718 So. 2d 251 (Fla. 4th DCA 1998); Chillingworth v. State, 2003 WL 21275984 (Fla. 4th DCA June 4, 2003) (judge departed from position of neutrality by soliciting letters from lawyers, as officers of the court, to provide evidence for the pending sentencing of Chillingworth).

This judicial investigation merely established that two years earlier Hernandez was informed of some discovery, but it did not establish he was aware of all the evidence the State provided in

discovery and did not establish he needed no time to prepare for trial. The court would have been within its discretion in denying the request to proceed pro se because of prior inappropriate courtroom behavior, or because a request made at trial is made too late, but the trial court abused its discretion by allowing him to proceed pro se but denying an opportunity to prepare for trial.

> The United States Supreme Court in Faretta v. California, 422 U.S. 806 (1975) recognized a defendant's right to self-representation. This right is only unconditional, however, when a defendant makes an unequivocal assertion of that right within a reasonable time prior to trial. (People v. Windham 19 Cal.3d 121, 137 Cal.Rptr. 8, 560 P.2d 1187 (1977), cert. denied, 434 U.S. 848 (1988).) When a request to proceed pro. per. is made on the eve of trial, the grant or denial is within the sound discretion of the trial court after it has inquired sua sponte into the specific factors underlying the request. (Id. at 128.) When this inquiry reveals the defendant has no reasonable cause for requesting self-representation at this late juncture, it is not considered an abuse of discretion to deny the request. (Ibid.)
>
> On the other hand, when the court in its discretion determines to grant the defendant's motion to proceed pro. per. in close proximity to trial, it has been held an abuse of discretion and a denial of due process to deny a request for a reasonable continuance. [Citations deleted.]
>
> . . .
>
> These principles are equally applicable to a defendant who competently elects to serve as his own attorney. It is true that such a defendant `is not entitled either to privileges and indulgences not accorded defendants who are represented by counsel.' [Citation deleted.] But neither is he entitled to less consideration than such persons. In particular, he must be given, if he requires it as much time to prepare for trial as an attorney; and if a reasonable continuance is necessary for this purpose, it must be granted upon timely request. To deny him that opportunity would be to render his right to appear in propria persona an empty formality, and in effect deny him the right to counsel.

Id,[6], 77 Cal.2d at 652-653, 63 Cal.Rptr. 371, 433 P.2d 163).

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[6] People v. Maddox, 67 Cal.2d 647, 63 Cal.Rptr. 371, 433 P.2d 163 (1967)☺

People v. Wilkins, 225 Cal.App.3d 299, 303-304, 275 Cal. Rptr. 74, 76-77 (1990); Ohio v. Brown, 2002 WL 1163760 (Ohio App. 10 Dist. 2002) (upon granting motion to proceed pro se on day of trial, error to deny motion for continuance to prepare for trial).

The granting of Hernandez's motion to proceed pro se during trial while denying his motion for a continuance to prepare abrogated his Sixth Amendment right to self-representation. U.S. v. Royal, 43 Fed.Appx. 42, 45 (9th Cir. Or. 2002) (after granting motion to proceed pro se on day of trial, "the simultaneous denial of the continuance motion was tantamount to denying Royal's motion to appear pro se, and depriving Royal of the right to self-representation."); Armant v. Marquez, 772 F.2d 552, 557 (Cir. 1985) (after granting motion to proceed pro se on day of trial, denial of continuance to prepare for trial "was the effective denial of his Constitutional right to self-representation.").

Hernandez had no preparation time. Defending two capital murders is necessarily complex. The denial of the motion for continuance to prepare for trial violated his Sixth Amendment self-representation right, and State and Federal due process rights. See U.S. v. Cronic, 466 U.S. 648, 656-657 (1984) ("But if the process loses its character as a confrontation between adversaries, the constitutional guarantee [of subjecting the prosecution to meaningful adversarial testing] is violated."). "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." U.S. ex. rel. Williams v. Twomey, 510 F.2d 634,

640 (7th Cir. Ill. 1975), cert. denied sub nom. Sielaff v. Williams, 423 U.S. 876 (1975).

> A judicial trial becomes a farce, a mere burlesque, and in serious cases a most gruesome one at that, when a person is hurried into a trial upon an indictment charging him with a high crime without permitting him the privilege of examining the charge and time for preparing his defense. It is unnecessary to dwell upon the seriousness of such an error, it strikes at the root and base of constitutional liberties; it makes for a deprivation of liberty or life without due process of law, it destroys confidence in the institutions of free America and brings our very government into disrepute. [Footnote deleted.]

Coker v. State, 82 Fla. 5, 89 So. 222 (1921). The judgment and sentence must be vacated and the cause reversed for a new trial.

ISSUE III

THE TRIAL COURT ERRED BY DENYING THE DEFENSE MOTION FOR A PET SCAN.

The trial court's denial of the defense motion for a PET scan denied Hernandez due process in violation of the Florida and U.S. Constitutions. The results of a PET scan would have been relevant to the degree of homicide found at the guilt phase, as was noted in the defense motion, and relevant to whether the circumstantial evidence of CCP was adequate. The results are relevant to mental mitigating factors under section 921.141(b)&(f), Florida Statutes (1995), as noted in Hoskins v. State, 702 So. 2d 202, 210 (Fla. 1997). "There is also no question that the PET scan is scientifically reliable for measuring brain function." Hose v. Chicago Northwestern Transp. Co., 70 F.3d 968, 973 (8th Cir. 1995).

> "As noted by the United States Supreme Court in Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), when a defendant demonstrates to the trial judge that his mental condition is at issue, the defendant must have access to a mental health expert who will conduct an appropriate examina-

> tion and assist in evaluating, preparing and presenting the defendant's defense. This is especially true in death cases, where "the consequence of error is so great. Id. at 84, 105 S.Ct. at 1097. We have previously found the failure of a mental health expert to adequately investigate a defendant's mental history and to order, if warranted, additional testing regarding the defendant's condition deprives the defendant of due process. Sireci, 536 So. 2d 231 (Fla. 1981). This is so because such failure may deny a defendant to the opportunity through an appropriate examination to rebut factors in aggravation and develop factors in mitigation of the death penalty. Ake; Sireci.

Hoskins, 702 So. 2d at 210.

At a pretrial hearing the defense sought a PET scan (s2:161; v1:103-104). Defense counsel stated Hernandez had not cooperated with counsel and experts, experts believed he may have suffered a brain injury which affected his current judgment and his judgment at the time of the offenses, and a PET scan was needed to determine whether he suffered brain injury in an auto accident (s2:162-166). Dr. Berland testified he was unable to examine Hernandez, but medical records and statements of witnesses and investigators support the possibility of a significant brain injury (s2:165-168).

Dr. Berland's affidavit noted lack of cooperation with counsel and doctors, misbehavior in court, and competency evaluations indicating psychosis and malingering (v1:105-107). Although he was not diagnosed with brain injury after an auto accident, subsequently he complained of problems which were consistent with brain injury (v1:108-109). A PET scan could assess brain injury which can not be determined with other tests, could contribute critical information about brain damage, and be an aid to testimony about brain activity

(v1:109-110). The motion was denied (s2:168, 192; s3:261-262, 274; v10:1054-1060, 1074; v11:1134; v12:1382).

Hernandez proceeded to guilt and penalty phases without the benefit of the results of a PET scan. At the guilt phase, he proceeded pro se and implied in opening statements, during cross-examination, and in his testimony that his injuries from the auto accident were in some way responsible for the homicides, or were somehow essential to understanding the case (v7:536-544, 573; v8:703, 787-790, 793-798).

At the penalty phase hearing, during opening statements, the State said opinions about Hernandez's state of mind would conflict because of the lack of evidence, but he was not psychotic, "he was just mean as a snake and it was payback time" (v10:954-955).

Dr. Mussenden testified there were soft signs of organic brain damage from an accident, such as a WAIS test and affected motor skills and recall, but he conceded no medical tests such as MRI, CAT scan, and PET scan had not been conducted (v10:1041-1042, 1052-1054, 1060). The State in cross-examination asked whether medical tests, including PET scan, had been done which could conclusively establish brain damage, rather than mere soft signs of brain damage (v10:T1054). The defense objected, moved for mistrial because the jury was left with the impression that the defense did not seek such tests, and requested an instruction to disregard (v10:T1054-1055, 1057-1058). The trial court agreed with the State that testimony about soft signs of brain damage was misleading the jury, it over-

ruled the objection, denied the mistrial motion, and it rejected the request for a curative instruction (v10:T1055-1059).

Dr. Berland testified for the defense that he found Hernandez was unable to conform his conduct to the requirements of law based on brain injury which contributed to his mental illness (v10:1087-1093). After Hernandez was injured in an auto accident, he was treated only for back and neck injuries despite complaints which were consistent with brain injury (v10:1089, 1092-1093; v11:1129, 1135-36). His results on the WAIS test given by Dr. Mussenden were consistent with brain damage, but the defense was unable to obtain funding for a PET scan to verify Dr. Berland's opinion that he suffered brain injury (v10:1074, 1089-1091; v11:1122, 1134).

Dr. Merin testified for the State that he hypothesized a probability Hernandez suffered a mere concussion in the auto accident which would have been resolved within in six to eighteen months (v11:1176-1180, 1199-1201).

During the State's closing, it asserted Hernandez was motivated by greed and desire for vengeance, and asked the jury to reject opinion testimony that Hernandez had brain damage because such opinions were supported by mere "soft signs" (v11:1214-1217).

In Hoskins, an expert testified the PET scan was necessary to render a definitive opinion regarding Hoskins' mental condition. This Court remanded with instructions to consider whether the expert's opinion would change after the PET testing. Id. at 209-210. On remand, the trial court concluded the PET scan showed an abnormality and the expert's opinion changed based on the PET scan results.

Hoskins v. State, 735 So. 2d 1281 (Fla. 1999). This Court then remanded for new penalty phase proceeding. Id.

The defense experts testified Hernandez had symptoms consistent with brain damage. Dr. Berland requested the PET scan in order to verify his suspicion of brain damage. It's results would have been relevant at guilt phase, and would have affected the expert testimony at penalty phase. The State exploited the lack of PET scan testing, asserting opinion testimony of brain injury was not credible without the support of such testing.

In Hoskins, 702 So. 2d at 209, the error was compounded by the trial court finding no statutory mental mitigation and an apparently lightly weighted mitigating factor of a mild brain abnormality. In this case the trial court found no statutory mental mitigation and gave little weight to conflicting evidence of brain damage (v12:1373-1379; v3:401-403). It can not be said, "without the benefit of the requested testing, that this error had no effect on the outcome of the proceeding." Hoskins, 702 So. at 210.

The trial court's denial of the motion for a PET scan deprived Hernandez his Eighth Amendment right to an individualized sentencing process where the jurors and the court considered all relevant mitigating evidence which could cause them to reject a sentence of death. Lockett v. Ohio, 438 U.S. 586 (1978); McCleskey v. Kemp, 481 U.S. 279, 306 (1987). As the Eleventh Circuit held:

> We interpret Lockett v. Ohio and Gregg v. Georgia [428 U.S. 153 (1976)] as vehicles for extending a capital defendant's right to present evidence in mitigation to the placing of an affirmative duty on the state to provide the funds necessary for production of the evidence. Permit-

> ting an indigent capital defendant to introduce mitigating evidence has little meaning if the funds necessary for compiling the evidence is unavailable.

Westbrook v. Zant, 704 F.2d 1487, 1496 (11th Cir. 1983).

The trial court erred in denying the request for PET scan testing. A judge's refusal to order a needed PET scan is an abuse of discretion. Hoskins v. State, 702 So. 2d 202 (Fla. 1997). Hernandez's judgment and/or sentence should be vacated and new proceedings ordered, after the administration of a PET scan[7].

ISSUE IV

THERE WAS INSUFFICIENT EVIDENCE OF PREMEDITATION AS TO COUNT ONE.

The due process clauses of the U.S. and Florida Constitutions require the State to bear the burden to prove beyond a reasonable doubt every element of the offense. In re Winship, 397 U.S. 357 (1970); Purifoy v. State, 359 So. 2d 446 (Fla. 1978). A motion for judgment of acquittal must be granted unless the State can "present evidence from which the jury can exclude every reasonable hypothesis except that of guilt." State v. Law, 559 So. 2d 187, 188 (Fla. 1989). Premeditation may be shown by circumstantial evidence. Sireci v. State, 399 So. 2d 964 (Fla. 1981), cert denied, 456 U.S. 984 (1982). Evidence which establishes a suspicion or probability of guilt is insufficient, the evidence must be consistent with guilt and inconsistent with any reasonable hypothesis of innocence. McArthur

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[7] Although Hernandez refused to cooperate with a PET scan prior to the Spencer hearing (v3:379-383; s3:267), he may have cooperated with a PET scan prior to the guilt and penalty phase hearings and he may cooperate with PET scan testing on remand.

v. State, 351 So. 2d 972 (Fla. 1977). "In reviewing a motion for judgment of acquittal, a de novo standard of review applies. Light v. State, 841 So. 2d 623, 625 (Fla. 2d DCA 2003).

There is no evidence that Hernandez exhibited an intent to kill Donna before the killing occurred. There was testimony that he felt his wife's children and his wife's friend were working against his marriage, but no evidence that he threatened or abused anyone before the incident (v4:95-98; v7:550, 553-554, 557-559, 573, 605, 617; v8:722-725, 792, 794, 797, 809-810; v10:1082-1087, 1091-1092; v11:1131-1133, 1136-1138, 1143-1144). On January 3, 1999, he argued with his wife, she left for work, and he stayed home with his infant daughter and his eleven-year-old stepdaughter Donna (v7:556-560, 604-607; v8:727. He shot his Donna after she refused to pick up a toy, killing her because he was acting like an animal and because of her disrespect (v8:722-727, 732, 787, 795, 800, 802-803, 810-811). There was evidence that Hernandez possessed a gun and may have kept it in his car, and that his wife did not know he possessed a gun and she did not allow guns in their home (v7:572; v8:731-732, 803, 806), but there was no evidence Hernandez surreptitiously approached Donna with the gun.

Although there was evidence that Hernandez may have believed Donna was contributing to a deterioration of his marriage, the marriage was not over. Hernandez's testimony that he never threatened or hit any members of his family was unrebutted. Although he shot Donna once in the middle of her back, the wound was just as consistent with an impetuous attack as with a calculated plan to take

life. See Norton v. State, 709 So. 2d 87 (Fla. 1998) (single gunshot to the back of the head is insufficient to establish premeditation and is consistent with a "spur of the moment" homicide). Although he stated he shot her for disrespecting him, this after the fact rationalization of the incident does not prove beyond a reasonable doubt that Hernandez reflected on his actions before shooting her. His confession to acting like an animal after she disobeyed him presents a reasonable hypothesis of acting mindlessly or an unreasoning rage.

Premeditation requires "more than a mere intent to kill; it is a fully formed conscious purpose to kill." Roberts v. State, 510 So. 2d 885, 888 (Fla. 1987), cert. denied, 485 U.S. 943 (1988). "In fact, the total absence of evidence as to the circumstances specifically surrounding the shooting militates against a finding of premeditation." Norton, 709 So. 2d at 92. This first-degree murder conviction must be reversed and the death sentence vacated.

ISSUE V

THE DEATH PENALTY IS NOT APPROPRIATE ON EITHER COUNT.

The 8th and 14th Amendments to the United States Constitution require that capital punishment be imposed fairly and with reasonable consistency, or not at all. Eddings v. Oklahoma, 455 U.S. 104 (1982).

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring); accord Dixon, 283 So. 2d 1, 8 (Fla,. 1973) (appropriate that legislature "has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes"). The arbitrary and capricious imposition of the death penalty violates both the United States and Florida Constitutions. Furman; Dixon.

The death penalty is not appropriate in this case because it was: A) not proportional; B) premised on inapplicable aggravating factors; and C) premised on the improper disregard of critical mitigating factors.

A. DEATH IS DISPROPORTIONATE

"Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988). The doctrine of proportionality is to prevent the imposition of "unusual" punishments contrary to article I, section 17 of the Florida Constitution, among other reasons. While the existence and number of aggravating or mitigating factors do not in themselves prohibit or require a finding that death is disproportionate, the nature and quality of the factors must be weighed as compared with other death appeals. Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993), citing, Tillman v. State, 591 So. 2d 167, 168-169 (Fla. 1991). Even when a jury recommends the death penalty, the presence of uncontroverted, substantial mitigation removes the case from the category of "the most aggravated and least mitigated of serious offenses." See e.g., Penn v. State, 574 So. 2d 1079, 1083-84 (Fla. 1991); Nibert v. State, 574 So. 2d 1059, 1063

(Fla. 1990) (evidence that the defendant had been an abused child, became chronic alcoholic who lacked substantial control over his behavior, and drank heavily on the day of the murder, constituted substantial mitigation to aggravating factor of heinous, atrocious and cruel; death sentence disproportional); Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988) (death not proportional despite finding of five aggravating factors; mitigation showed extreme mental or emotional disturbance, inability to appreciate criminality of conduct or conform conduct to law, and low emotional age); Livingston v. State, 565 So. 2d 1288, 1292 (Fla. 1990) (childhood abuse and neglect, marginal intellectual functioning, and evidence of extensive use of cocaine and marijuana counterbalanced the two factors found in aggravation, prior violent felony and felony murder; death penalty vacated). "If the ruling consists of a pure question of law, the ruling is subject to de novo review." State v. Glatzmayer, 789 So. 2d 297, 301 fn.7 (Fla. 2001).

The court found three aggravating factors in the murder of Donna Berezovsky: Donna was under twelve years of age; Donna was particularly vulnerable because Hernandez was in familial or custodial authority over her; and the previous conviction of another capital felony, and gave great weight to each aggravating factor (v12:1369-1371; v3:398-399). The court found two aggravating factors in the murder of Isela Gonzalez: the previous conviction of another capital felony; and CCP, and it gave great weight to each aggravating factor (v12:1371-1373; v3:399-400).

The court gave; some weight to statutory mitigating factors of no prior criminal history, found the statutory mental mitigators inapplicable, gave no weight to age, and gave some weight to Hernandez being a noble, likeable, non-violent youth, and sending money home to help his family after leaving home (v12:1373-1377; v3:401-403). The court weighed the following nonstatutory mitigating factors: suffers from brain injury, little weight; lost mother at early age, little weight; beatings by father when drunk, some weight; beatings by neighbor who cared for him little weight; trained and worked as auxiliary police officer in Mexico City, little weight; capable of maintaining loving and respectful relationships when young, little weight; living in extreme poverty as young child, no weight; confession upon arrest, some weight; and borderline intelligence, little weight (v12:1378-1390; v3:403-410).

Death is disproportionate under the circumstances present here. This is especially so in light of the trial court's flawed weighing procedure, both in the consideration of aggravating factors and disregard of vital mitigating factors.

B. THE DEATH PENALTIES ARE IMPROPERLY PREMISED ON THE FOLLOWING AGGRAVATING FACTORS: COLD, CALCULATED, AND PREMEDITATED; PRIOR CONVICTION; AND FLIGHT.

At trial the State had the burden of proving the aggravating factors beyond a reasonable doubt. Robertson v. State, 611 So. 2d 1228, 1232 (Fla. 1993). On appeal, this Court must "review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent

substantial evidence supports its finding." Willacy v. State, 696 So. 2d 693, 695 (Fla. 1997), cert. denied 522 U.S. 970 (1997).

1. CCP

> To support a finding of the CCP aggravator, the evidence must establish beyond a reasonable doubt that: (1) the murder was the product of cool and calm reflection; (2) there was a careful plan or prearranged design to commit murder before the fatal incident; there was heightened premeditation; that is premeditation over and above what is required for unaggravated first-degree murder; and (4) there was no pretense of moral or legal justification for the murder. Walls v. State, 641 So. 2d 381 (Fla. 1994). Generally, this aggravating factor is reserved for execution or contract murders or witness elimination type murders. See, e.g., Maharaj v. State, 597 So. 2d 786 (Fla. 1992); Pardo v. State, 563 So. 2d 77 (Fla. 1990). Simply proving a premeditated murder for purposes of guilt is not enough to support CCP; greater deliberation and reflection is required. Walls.

Hoskins v. State, 702 So. 2d 202, 210 (Fla. 1997) ("[T]he circumstantial evidence presented on this issue was legally insufficient to negate other reasonable hypothesis of the degree of premeditation to murder."). All of these elements must be established for a finding of the CCP aggravating circumstance to be upheld. Woods v. State, 733 So. 2d 980, 991 (Fla. 1999).

The evidence establishes Hernandez apparently had ill-feelings towards his wife, his stepson, his stepdaughters, and his wife's friend, and a deteriorating marriage (v4:95-98; v7:550, 553-554, 557-559, 573, 605, 617; v8:722-725, 792, 794, 797, 809-810; v10:1082-1087, 1091-1092; v11:1131-1133, 1136-1138, 1143-1144). On January 3, 1999, he argued with his wife, she left for work, and he stayed home with his infant daughter and his minor stepdaughter Donna (v7:556-560, 604-607; v8:727. He shot Donna after she refused to pick up a toy, killing her because he was acting like an animal and because of

her disrespect (v8:722-727, 732, 787, 795, 800, 802-803, 810-811). He then drove to the family's nearby restaurant, remained in the men's room for some minutes, then shot his adult stepdaughter Isela twice in the back and once in the back of her neck, killing her because he was acting like an animal and because of her disrespect (v7:559-570, 575-576, 580-589, 595-600; v8:724-725, 728-732, 747-750, 810). He left the restaurant without speaking to anyone, including his wife who was present, and fled (v7:569-570, 587-590, 626-629; v8:750-752, 774).

Hernandez's confession to acting like an animal during the killings offers the reasonable hypothesis that he acted in emotional frenzy and a fit of rage. "`Rage is inconsistent with the premeditated intent to kill someone,' unless there is other evidence to prove heightened premeditation beyond a reasonable doubt." Thompson v. State, 565 So. 2d 1311 (Fla. 1990), quoting Mitchell v. State, 527 So. 2d 179, 182 (Fla. 1988) cert. denied 488 U.S. 960 (1988). There is only conjecture that the killing of Isela was the product of cool and calm reflection; that there was a careful plan or prearranged design to commit the killing; or that there was heightened premeditation. Speculation may not provide proof of an aggravating factor. Hamilton v. State, 547 So. 2d 630, 633-634 (Fla. 1989). A suspicion of a plan to kill is not enough. Besaraba v. State, 656 So. 2d 441, 444-445 (Fla. 1995).

There is no domestic dispute exception to imposition of the death penalty, but in many cases involving domestic disputes, this Court has found CCP inapplicable because heated passions are incon-

sistent with cold deliberation. See Santos v. State, 591 So. 2d 160 (Fla. 1990); Douglas v. State, 575 So. 2d 165 (Fla. 1991); Mauldin v. State, 617 So. 2d 298 (Fla. 1993); Wilson v. State, 493 So. 2d 1019 (Fla. 1986); Garron v. State, 528 So. 2d 353 (1988). The killing of Isela was not the result of cold deliberation, a preconceived plan, or heightened premeditation.

"[C]ircumstantial evidence must be inconsistent with any reasonable hypothesis which might negate the aggravating factor." Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992). The State did not prove beyond a reasonable doubt that the homicide of Isela was cold, calculated, and premeditated.

2). PRIOR CONVICTION

The trial court found the previous conviction of another capital felony aggravating factor applied to each homicide based on the contemporaneous capital offenses (v12:1369-1371; v3:398-400). Section 921.141(5)(b), Florida Statutes (1997), provides there is an aggravating circumstance: "The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." Logic would suggest that previously convicted means a conviction occurring before the commission of the capital offense, the statute does not refer to a contemporaneous capital felony, and such a construction is improper.

In 1972, the Florida legislature first provided for the finding of aggravating and mitigating factors in capital sentencing. Section 921.141(2)(b), Florida Statutes (Supp. 1972) provided that aggravating factors would include, but not be limited to those enumerated in

what was then subsection (3). Section 921.141(3)(b), Florida Statutes (Supp. 1972) provided there was an aggravating circumstance: "The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." Section 921.141(3)(c), Florida Statutes (Supp. 1972), provided there was another aggravating circumstance: "At the time the capital felony was committed the defendant also committed another capital felony." This statute, enacted in Chapter 72-72, became effective on October 1, 1972. Therefore, Florida once had an aggravating factor of a contemporaneous capital offense.

Later in 1972, during an emergency session, the legislature amended this statute, section 921.141, Florida Statutes (1973), providing that aggravating factors shall be limited to those in new subsection (5), and eliminating "At the time the capital felony was committed the defendant also committed another capital felony" as an aggravating factor. This statute, enacted in Chapter 72-724, became effective on December 9, 1972. The contemporaneous capital offense aggravating factor had a short life. The legislature eliminated it as a statutory aggravating factor at the same time that it limited aggravating factors to those included in the statute. The legislature consciously decided that an aggravating factor of a contemporaneous capital offense was improper or unnecessary, perhaps feeling aggravating circumstances should focus solely on failed rehabilitation, as is the purpose with other sentence enhancing schemes such as habitual felony offender sentencing.

It is improper to read or imply a nonstatutory aggravating factor of contemporaneous capital offense into the prior conviction statutory aggravating factor. This is contrary to statutory intent. Contemporaneous capital offense is therefore an improper nonstatutory aggravating circumstance.

The concept of a previous conviction should be consistent with other Florida sentencing enhancements. In habitual felony offender sentencing, a conviction that is pending on appeal and is not yet final cannot be a predicate previous conviction. Breeze v. State, 641 So. 2d 450 (Fla. 1st DCA 1994); Martin v. State, 592 So. 2d 1219 (Fla. 1st DCA 1992). Hernandez's convictions in this case are pending on appeal and are not yet final, and therefore the convictions should not be used to qualify each other for the death penalty. In habitual felony offender sentencing, the offense for which a defendant is sentenced must have occurred after the conviction used as a predicate for habitualization. Palmore v. State, 584 So. 2d 135 (Fla. 1st DCA 1991); Popolo v. State, 477 So. 2d 1081 (Fla. 1st DCA 1985). Therefore, the conviction for count two should not be used to qualify count one for the death penalty.

Also a prior conviction should require a prior adjudication. See Smith v. State, 75 Fla. 468, 473, 78 So. 530, 532 (1918) ("The meaning of the word 'convicted' as used in the statute ... means the adjudication by the court of the defendant's guilt."); State v. Smith, 160 Fla. 288, 290, 34 So. 2d 533, 534 (Fla. 1948) ("The word `convicted' as used in the [second offender] statute, means the adjudication by the court of the defendant's guilt and the pronounce-

ment by the court of the penalty imposed upon acceptance of a plea of guilty or upon a verdict of guilty, or a finding of guilty by the court."); McFadden v. State, 772 So. 2d 1209, 1216 (Fla. 2000) ("[A] definition of `conviction' under section 90.610(1) that encompasses an adjudication by the court or final judgment of conviction is consistent with the limited purpose for which convictions have been historically admissible.")

The trial court did not adjudicate Hernandez at the conclusion of the guilt phase proceeding. No adjudication occurred at the time of the jury's consideration of penalty. The trial court did not adjudicate Hernandez until the conclusion of the final sentencing hearing and after the court had found the existence of prior convictions. "After all is said and done, and due weight accorded to the functions of the jury, the latter is merely an arm of the court, and the court speaks only through the presiding judge. It is the judgment of the court adopting the findings of the jury which breathes life and effectiveness into the jury's verdict." Ellis v. State, 100 Fla. 27, 129 So. 106, 110 (1930).

In Lucas v. State, 376 So. 2d 1149, 1152 (Fla. 1979), the trial court adjudged Lucas guilty of first-degree murder and two counts of attempted first-degree murder before imposing sentence. On appeal, Lucas argued that the attempted murder convictions which were entered contemporaneously with the first-degree murder conviction did not support a statutory aggravating circumstance. This Court disagreed, finding a statutory aggravating factor pursuant to section 921.141(5)(b), Florida Statutes (1975): "The defendant was previously

convicted of another capital felony or of a felony involving the use or threat of violence to the person." Id. at 1152. This Court explained:

> Prior to sentencing in this case, appellant was convicted of the attempted murders of Ricky Byrd and Terri Rice. It is true that the two felony convictions were entered contemporaneously with the conviction of murder in the first degree, but **both were entered "previous" to sentencing and were therefore appropriately considered by the trial judge as an aggravating circumstance**.

Id. at 1152-1553. The convictions of the murders were not entered previous to sentencing and therefore were not appropriately considered as aggravating factors.

For the reasons above, the trial court erred in determining the contemporaneous capital offenses as aggravating factors.

3. FLIGHT AFTER THE KILLINGS

In the sentencing order, the trial court while summarizing the facts of the murders noted that Hernandez "fled in his car for Mexico and was arrested in a small town near Houston, Texas." (v12:1367-1368; v3:397). The sentencing order reflects the trial court considered Hernandez' attempted flight immediately after the killings to be an aggravating circumstance. The court summarized its decision to impose the death penalty by stating:

> "In cold blood, the defendant shot and killed his eleven-year-old stepdaughter in the family home. He then drove to the family owned and operated restaurant, gathered his thoughts in the bathroom of the restaurant, and then walked up behind his grown stepdaughter and shot her three times, causing her death. After the killings, the defendant attempted to flee this country for Mexico. The circumstances of the case, these aggravating circumstances, outweigh the relatively insignificant mitigating circumstances established by this record.

(v12:1389-1390; v3:410).

The Eight Amendment requires the sentencer consider only specifically defined aggravating circumstances. See Maynard v. Cartwright, 486 U.S. 356, 362 (1988). "Only statutory aggravating factors may be considered." Drake v. State, 441 So. 2d 1073, 1082 (Fla. 1983) ("Paragraph 4 of the trial court's findings of fact and conclusions of law reflects impermissible consideration of a nonstatutory aggravating factor: 4. The crime for which the Defendant is sentenced is without regard to human feeling by dumping in a rural area, disrobed, with the weather elements and animals to further act upon the body."); Lucas v. State, 376 So. 2d 1149 (Fla. 1979) ("[T]he finding that the attempted murders were heinous and atrocious is a non-statutory aggravating factor and should not have been considered."). That a capital felony was committed during flight after committing an enumerated offense is a statutory aggravating factor, section 921.141(5)(d), but mere flight after committing capital offenses is not a statutory aggravating factor. § 921.144(5), Fla. Stat. (1997). The court's consideration of flight as an aggravating factor was clearly improper and violative of the Florida and U.S. Constitutions.

C. THE DEATH PENALTIES ARE IMPROPERLY PREMISED ON THE DISREGARD OF CRITICAL MITIGATING FACTORS.

The sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence. Hitchcock v. Dugger, 481 U.S. 393 (1987). The trial court and this Court must consider any mitigating evidence found anywhere in the record. Parker v. Dugger, 498 U.S. 308 (1991).

1. THE CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

The trial court erroneously rejected the statutory mitigating factor of capital felony committed while under the influence of extreme mental or emotional disturbance, section 921.141(6)(b), Florida Statutes (1997), giving it no weight in light of conflicting evidence of mental illness and no evidence of mental or emotional disturbance at the time of the offenses (v12:1373-1376; v3:401-402). The court stated Dr. Berland "concluded that the defendant has suffered from extreme or emotional disturbances. Dr. Berland could not specifically address, however, whether the defendant suffered from extreme mental or emotional disturbance when he committed these offenses." (v12:1375). The trial court concluded:

> It could be assumed that the defendant does, in fact, suffer from a mental illness. But based upon the testimony of the doctors, it cannot be assumed that the defendant was suffering from an extreme emotional -- or from an extreme mental or emotional disturbance at the time of the homicides. Therefore this court gives this statutory factor no weight.

(v12:1375-1376).

At the penalty phase hearing, Dr. Berland testified Hernandez suffered from psychotic disturbance involving delusional paranoid thinking which was aggravated by brain injury he suffered in an accident, and had so suffered before and during the offenses (v10:1074, 1077, 1079-1093; v11:1129-1444). Dr. Berland testified Hernandez's wife's description of his behavior established "he was a mentally ill person during the entire time that she knew him." (v10:1087). Dr. Berland asserted information from Hernandez's wife

established his attitudes about his stepdaughter were paranoid delusions (v11:1136-1139). Dr. Berland testified that at the time of the offenses, there was not "some specific command hallucination that told him to do this, but was an indirect by-product of his ongoing mental illness that these actions were sort of a natural consequence and are in many cases I see of that kind of mental illness." (v11:1136).

The trial court erroneously dismissed this mitigating factor based upon the erroneous finding that there was no evidence of mental or emotional disturbance at the time of the offenses, stating repeatedly and contrary to the record that Dr. Berland's opinion of the existence of this mitigator does not cover the time of the commission of the offenses. The trial court also irrationally placed more weight on musings of Dr. Merin which he declined to state as a diagnosis than the positive opinions of Dr. Berland and Dr. Mussenden which support the mitigating factor.

This Court is not bound to accept the trial court's findings "when . . . they are based on misconstruction of undisputed facts and a misapprehension of law." Pardo v. State, 563 So. 2d 77, 80 (Fla. 1990), cert. denied 500 U.S. 928 (1991). Thus, as this Court said in Knowles v. State, 632 So. 2d 62, 67 (Fla. 1993):

> . . . we have made clear that "when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved." Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990); see also Campbell, 571 So.2d at 419. Thus, the trial court erred in failing to find

> as reasonably established mitigation the two statutory mental mitigating circumstances, plus Knowles' intoxication at the time of the murders, and his organic brain damage.

The trial court erred in eliminating this weighty mitigating factor. See Santos v. State, 629 So. 2d 838, 840 (Fla. 1994) (mental mitigating factors are among the weightiest mitigating factors).

> 2. THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS OR HER CONDUCT OR TO CONFORM HIS OR HER CONDUCT TO THE REQUIREMENT OF LAW WAS SUBSTANTIALLY IMPAIRED.

The trial court erroneously rejected the statutory mitigating factor, the capacity to appreciate criminality of his conduct or to conform his conduct to the requirements of law, section 921.141(6)(f), Florida Statutes (1997), giving it no weight:

> the capacity to appreciate criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. Dr. Berland opined that the defendant was legally sane at the time of the commission of these murders. He went on to say that the defendant knew right from wrong and he knew the consequences and the wrongfulness of his actions at the time of the homicides.
>
> Any mental illness that the defendant might have had at the time of the offense, according to Dr. Berland, did not deprive him of having the specific intent to be able to commit first degree murder. Based on the foregoing, this Court gives this statutory mitigating factor no weight.

(v12:1376: v3:402)

This ruling of the trial court is patently absurd. A mental mitigating factor does not require proof of insanity -- if one is insane, one is not convicted of first-degree murder. Dr. Berland testified Hernandez was sane at time of the murders, most psychotic persons are not legally insane, but although his mental illness did

not deprive him specific intent to commit first-degree murder, his mental illness impaired his judgment (v11:1111-1112, 1142).

> Extreme mental or emotional disturbance is a second mitigating consideration, pursuant to § 921.141(7)(b), Fla. Stat. which is easily interpreted as less than insanity but more than an average man, however inflamed.
>
> . . .
>
> Mental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong may also be considered as a mitigating circumstance. § 921.141(7)(f), Fla. Stat. Like subsection (b), this circumstance is provided to protect that person who, while legally answerable for his actions, may be deserving of some mitigation because of his mental state.

State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973). The trial court's reliance on testimony concerning Hernandez's sanity at the time of the offenses to exclude a weighty mitigating factor is contrary to Florida law and violative of the Eighth Amendment. See Knowles v. State, 632 So. 2d 62, 67 (Fla. 1993) (resentencing ordered where trial court failed to find reasonably established statutory mental mitigation because defendant was sane); Huckaby v. State, 343 So. 2d 29, 33-34 (Fla. 1997) (vacating death sentence where court ignored mental mitigation because defendant knew right from wrong), cert. denied 434 U.S. 920 (1997). This Court has "consistently characterized mental mitigation as one of the "weightiest mitigating factors." White v. State, 664 So. 2d 242, 247 fn7 (Fla. 1995), quoting Santos v. State, 629 So. 2d 838, 840 (Fla. 1994). The trial court erred in eliminating this weighty mitigating factor.

3. IMPOVERISHED CHILDHOOD

The trial court erroneously held: "The fact that the defendant was raised in poverty should not and does not mitigate the fact that

the defendant killed two human beings. As such, the Court gives no weight to this non-statutory mitigating factor." (v12:1387).

"[T]he circumstance of impoverished childhood is mitigating in nature and qualifies as treatment as a mitigating factor." Blanco v. State, 706 So. 2d 7, 10-11 (Fla. 1997); White v. State, 729 So. 2d 909 (Fla. 1999) (jury was improperly precluded from hearing mitigating evidence including evidence of impoverished childhood); Jones v. State, 732 So. 2d 313 (Fla. 1999) (nonstatutory mitigation established included appellant's impoverished childhood); Hardy v. State, 716 So. 2d 761 (Fla. 1998) (nonstatutory mitigating factors included Hardy's impoverished childhood); Hoskins v. State, 702 So. 2d 202 (Fla. 1997) (mitigation included Hoskins' impoverished background): Robertson v. State, 699 So. 2d 1343, 1347 (Fla. 1997) (substantial mitigation found included deprived childhood), cert. denied 522 U.S. 1136 (1998); Henyard v. State, 689 So. 2d 239 (Fla. 1996) (nonstatutory mitigation included impoverished upbringing), cert. denied 522 U.S. 846 (1997). A trial court errs in concluding a disadvantaged childhood does not establish mitigation as a matter of law. Brown v. State, 526 So. 2d 903, 908 (Fla. 1988), cert. denied 488 U.S. 944 (1988).

ISSUE VI

FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

It is unconstitutional to remove from the jury the assessment of factors that increase the prescribed range of criminal penalties. Apprendi v. New Jersey, 530 U.S. 466 (2000). Due process and the

role of the jury under the Sixth Amendment require notice of the State's intent to establish factors that will enhance the defendant's sentence, including pleading them in the charging document, and determination by the jury that the factors have been established beyond a reasonable doubt. Id. Also, in Ring v. Arizona, 536 U.S.584, (2002), the Court held the Sixth and Fourteenth Amendments to the U.S. Constitution require the jury to decide whether a death qualifying aggravating factor has been proven beyond a reasonable doubt.

Florida's capital sentencing scheme unconstitutionally provides: (1) the State is not required to provide notice of the aggravating circumstances it intends to establish at the penalty phase; (2) the jury is not required to make any specific findings regarding the existence of aggravating circumstances, or even of a defendant's eligibility for the death penalty; (3) there is no requirement of jury unanimity for finding individual aggravating circumstances or for making a recommendation of death; and (4) the State is not required to prove the appropriateness of the death penalty beyond a reasonable doubt.

Although the facial constitutionality of the capital sentencing statute may be challenged on appeal without objection below, Trushkin v. State, 425 So. 2d 1126, 1129-1130 (Fla. 1983); State v. Johnson, 616 So. 2d 1, 3-4 (Fla. 1986), the defense preserved these issues with objections and motions (v1:167-169, 175-184; v2:240-242, 245-264; v3:384-385; v4:166-179; v12:1361-1364). This is an issue of law, therefore the standard of review is de novo. State v.

Glatzmayer, 789 So. 2d 297, 301, fn.7 (Fla. 2001). No aggravating circumstances were alleged in the indictment, no aggravating circumstances were expressly found by the jury, there was no jury unanimity as to the death sentence, and the State had not been required to prove death was appropriate beyond a reasonable doubt, therefore the death sentence should be vacated.

CONCLUSION

Based on the foregoing reasons, arguments, and authorities, Appellant respectfully asks this Honorable Court, requests that this Court reverse his conviction for a new trial [Issues I, II and III], and reduce count one to second degree murder or manslaughter [Issue IV]. For all of these reasons, and those asserted in Issue V and VI, Appellant requests that his death sentence be vacated.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Charles Crist, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this ____ day of June, 2003.

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