IN THE SUPREME COURT OF FLORIDA

MICHAEL HERNANDEZ,

Appellant,

v. CASE NO. SC07-647

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR SANTA ROSA COUNTY, FLORIDA

ANSWER BRIEF

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PRELIMINARY STATEMENT

Appellant, Michael Hernandez, the defendant in the trial court will be referred to as Appellant, or by his formal name. Appellee, the State of Florida, will be referred to as the State. The transcript from the trial, penalty phase hearing, and sentencing hearing will be denominated by a "TT." followed by the appropriate Volume ("Vol.") and page number. References to the appellate record will be denominated by an "R." followed by the appropriate Volume and page number. Finally, references to the Supplemental Record, which includes the transcript from the January 27, 2007 pretrial hearing related to the propriety of shackling Hernandez, will be denominated with an "SR." followed by the appropriate page number.

SUMMARY OF FACTS

On November 18, 2004, 67 year old mother Ruth Everett was inside her Milton, Florida home, she had just taken her troubled son David Everett to work. On that same November 18, 2004 morning, Michael Hernandez and his confederate, Christopher Shawn Arnold, were desperately seeking money to purchase crack cocaine. The men hatched a tragic plan. Hernandez and Arnold believed that they could get money from a cocaine supplier they both knew, David Everett. Hernandez and Arnold went to David Everett's home, which he shared with his mother. However, David Everett was not at home; unfortunately, Ruth Everett, was. Hernandez and Arnold proceeded tell Ruth Everett that her son owed the two men a sum of money.

This was a lie; their story was simply a ruse to get drug money.

The men then proceeded to viciously attack Ruth Everett. At one point, Christopher Shawn Arnold attempted to smother Ruth Everett with a pillow, but he could not (or would not) go through with an attempt to kill Ruth Everett. Hernandez was disgusted by Arnold's reluctance to end Everett's life, and took matters into his own hands. Hernandez, at more than six feet tall and approximately 230 pounds, proceeded to break Ruth Everett's neck. He was not finished. Uncertain as to whether he had indeed killed Ruth Everett, Hernandez then took a knife and slashed Ruth Everett's throat.

Hernandez and Arnold then ransacked Ruth Everett's home and absconded with her purse, which contained her ATM and credit cards. The record shows that the two men used Everett's ATM card at various convenience stores until they were eventually apprehended.

Arnold and Hernandez were each charged with a variety of crimes, including with the murder of Ruth Everett. Arnold (who was not tried with Hernandez) was sentenced to a term of life imprisonment. Hernandez was tried, and was sentenced to death. Hernandez now brings this direct appeal, arguing that his sentence is constitutionally infirm.

FACTUAL BACKGROUND

Testimony was presented from Deputy Charles Stephens of the Santa Rosa Sheriff's Office. Stephens was the first member of law

enforcement to arrive at the crime scene. Stephens saw David Everett in the home, and then saw the body of Ruth Everett sprawled on a couch. Thereafter, Stephens secured the crime scene (TT Vol. VII, 1073). Stephens observed that Ruth Everett's neck had been slashed.

The following day Stephens, and several officers, were dispatched to the residence of Christopher Arnold and his fiancé Michelle Rose. It was believed that individuals within the home had information related to Everett's murder. Inside the residence, Stephens discovered Christopher Shawn Arnold, his fiancé Michelle Rose, and her parents, Richard and Daveine Hartman (TT Vol. VII, 1075).

David Everett testified as to the last moments he saw his mother Ruth Everett alive. He noted that on the day his mother was murdered, he was employed as a roofer; and, his mother drove him to work that day (TT. Vol. VII, 1093-94). His mother drove a 1999 white Ford Escort (TT. Vol. VII, 1094). When Everett completed his day's work, he called his mother, but got no response; and so, he had a coworker drive him home (Vol. VII, 1095). When Everett returned to his mother's home, she was lying on the couch with a cut on her neck (TT. Vol. VII, 1095-96). David Everett proceeded to call 911 (TT. Vol. VII, 1098). Once authorities arrived they began questioning Everett (TT. Vol. VII, 1098). Everett testified that he did know, Christopher Shawn Arnold, one of the suspects

responsible for the murder (TT. Vol. VII, 1098).

Michelle Rose, who has a child with Christopher Arnold testified as to her knowledge regarding the circumstances of Ruth Everett's murder. Rose recalled that on November 19, 2004, Arnold returned to the home they shared, sometime in the early afternoon. Rose noted that Arnold was crying hysterically (TT. Vol. VII, 1124). She was concerned about his emotionally state. Later that same day, several people arrived at the home, including Michael Hernandez and his wife Stephanie. Also in the home on November 19, 2004 was Richard and Daveine Hartman, Michelle Rose's mother and stepfather. Rose acknowledged that a great deal of evidence related to the murder of Ruth Everett was recovered within her home, including: 1) a knife used in the murder; 2) Everett's purse; and 3) Everett's credit cards. (TT. Vol. VIII, 1186).

Daveine Hartman, Michelle Rose's mother testified about, among other matters, discussions she had Hernandez regarding the murder of Ruth Everett. Hartman acknowledged that Hernandez admitted to being involved in Ruth Everett's murder (TT. Vol. VIII, 1217). Hartman testified that she visited Hernandez while he was in jail. Hernandez described to Hartman how the murder occurred. Hernandez stated that he and Arnold went to Ruth Everett's home looking for her son David Everett. Once Arnold and Hernandez confronted Ruth Everett, they brought her into the home, and attempted to choke her; thereafter, Arnold used a pillow in an attempt to smother the

victim (TT. Vol. VIII, 1228). When Arnold proved unable to subdue the victim, Hernandez derisively called him a "pussy" and proceeded to struggle with Ruth Everett until he finally broke her neck (TT. Vol. VIII, 1229-30). Arnold and Hernandez then dragged Everett across the room, placing her in a chair; quickly thereafter, Hernandez took a pocket knife and slashed Everett's throat (TT. Vol. VIII, 1230-31). Hernandez stated that he killed Everett because she had seen Arnold and Hernandez's faces.

Tiffany Telin, Hernandez sister-in-law testified regarding her knowledge of the events surrounding the murder of Ruth Everett. Telin noted that on November 19, 2004, she went to Michael and Stephanie Hernandez's home, and during this visit, Hernandez described how Arnold and he went to the Everett home in order to get crack and/or money to purchase crack (TT. Vol. VIII, 1265-66). Hernandez also told Telin that once he believed Ruth Everett was nearly dead, he stabbed her in the throat.

Dr. Andrea Minyard, a medical examiner, who performed the autopsy on Ruth Everett testified. Minyard described the extent of Everett's injuries. Minyard noted that Everett's "fifth cervical vertebrae was fractured" (TT Vol. IX, 1377); and, that she had "laceration to her spinal chord" (TT. Vol. IX. 1380). Minyard noted that Everett had bruises about her face and body. Minyard stated that Everett's cause of death was the "combined effects of blunt and sharp force injuries of the neck" (TT. Vol. IX, 1380).

Curtis Browning, a crime laboratory analyst testified about, among other matters, the fact that Michael Hernandez's DNA was found underneath Ruth Everett's fingernails (TT. Vol. X, 1467-70).

Jeff Shuler, of the Santa Rosa Sheriff's Department testified as to, among other matters, Hernandez's confession to law enforcement. Hernandez said that he and Arnold went to Ruth Everett's home to steal money in order to support their crack cocaine addiction (TT Vol. X, 1516-17). Hernandez noted that the two men initially struggled with Everett; and that, Arnold briefly (and unsuccessfully) attempted to smother Everett with a pillow (T Vol. X, 1518). However, Arnold was unable – or unwilling – to kill Everett. Thereafter, literally taking matters into his own hands, Hernandez "cracked" Everett's neck, then he slashed her throat with a knife (TT Vol. X, 1518).

Following Shuler's testimony, the defense rested, and did not present any witnesses (Vol XI, 1572). Thereafter, Hernandez presented his closing arguments (TT. Vol. XIII, 1708-32, 1784-95), as did the State (TT. Vol. XIII, 1735-84).

The jury returned a verdict, finding Hernandez guilty as to all three counts against him: 1) first degree murder; 2) robbery with a deadly weapon; and 3) burglary of dwelling (while armed with a deadly weapon) (TT. Vol. XIII, 1840-42).

The Penalty Phase hearing commenced. Among the witnesses who testified were Elaine Simpson and Judy Morrisey, friends of Ruth

Everett, who both testified, inter alia, that Everett was a good mother, that she had a difficult life, and that she was very concerned about her son David Everett's drug use (TT. Vol., XV 2006-21, 2024-36). Moreover, as will be discussed in greater detail in Section VI, of this brief, several additional witnesses testified including: 1) detention officers who opined as to Hernandez's behavior while incarcerated (TT. Vol XV, 2037-48, 2068-85); 2) mental health experts who discussed Hernandez's exceptionally dysfunctional childhood and early adult years – which included exposure to drugs and alcohol from a very early age; 3) a mental health counselor, Dr. John Bingham, who testified as to Hernandez's childhood privation and cocaine addiction (TT. Vol XVI, 2224-2304); 4) Hernandez's mother, Cheryl Walker (who testified via video because she imprisoned for murder), spoke as to the violence and drugs Hernandez was exposed as a child (TT. Vol. XVI, 2151-2219); 5) a neuropsychologist, Dr Brett Wayne Turner testified regarding Hernandez's drug addiction and depression (TT. Vol. XVI, 2311-74); 6) and the State's medical expert, Dr. Harry McClaren, testified as to , inter alia, Hernandez's IQ and various mental disorders (TT. Vol XVII, 2412, 2432, 2446-48).

At the conclusion of the penalty phase, the parties provided their closing arguments (TT. Vol XVIII, 2508-2533, 2545-75). The Penalty Phase Jury returned an 11-1 sentencing recommendation of death (TT. Vol. XVIII, 2590). On March 22, 2007 a sentencing

hearing was held. The trial court found several aggravating circumstances: 1) while awaiting trial for the murder of Everett, Hernandez committed two violent felonies; one, which stemmed from his October 4, 2006 conviction for aggravated battery of a law enforcement officer (wherein Hernandez hit the officer with a porcelain toilet lid); and the second, stemming from his November 7, 2006 conviction for battery on his codefendant Christopher Shawn Arnold (whose nose was broken during the attack); 2) Hernandez committed the burglary of Everett's home while armed with a dangerous weapon; 3) the capital felony was committed for the purpose of avoiding arrest; and 4) the capital felony was heinous, atrocious, or cruel (R3. 459-61).

The trial court addressed statutory mitigation: 1) prior to being incarcerated for Everett's murder, Hernandez had no prior criminal history (some weight); 2) the murder of Everett was committed while under the influence of extreme mental or emotional distress (no weight); 3) Hernandez's ability to appreciate the criminality of his actions or to conform his conduct to the requirements of the law was impaired (no weight); 4) Hernandez was under extreme duress or the substantial domination of another (no weight); and 5) Hernandez's age – 23 – at the time of the crime (no weight) (R3 463-68).

As to nonstatutory mitigation, the trial court considered: 1) Hernandez's dysfunctional childhood (some weight); 2) Hernandez's

troubled home life (substantial weight); 3) Hernandez's parents belonged to an outlaw motorcycle gang (substantial weight); 4) Hernandez was exposed to drugs at a very early age (substantial weight); 5) Hernandez's mother brought many physically and emotionally abusive boyfriends into their home (some weight); 6) Hernandez witnessed his mother being physically abused (some weight); 7) Hernandez was abandoned by his mother (substantial weight) and was subsequently abused while in foster care (no weight); 8) Hernandez's father overdosed on drugs (some weight); 9) Hernandez was repeatedly abused while in foster care (some weight); 10) Hernandez's mother refused to rescue him from an abusive foster care situation (some weight); 11) Hernandez's dysfunctional home forced him to live on the streets (some weight); 12) Hernandez's half-brother exposed him to drugs (some weight); 13) Hernandez attended learning disabled classes (some weight); 14) Hernandez was happily married for two years (some weight); 15) Hernandez was a loving father (some weight); 16) Hernandez's drug addiction was caused by his early childhood exposure (some weight); 17) Hernandez was high on cocaine at the time of the offense (no weight); 18) Hernandez had been heavily drinking on the night prior to the offense (some weight); 19) the offense was unplanned, and was initiated by Christopher Shawn Arnold (no weight); 20) the murder was spontaneous and unplanned (no weight); 21) Arnold took Everett's money in order to buy cocaine (no weight); 22) Hernandez

accepted responsibility for his actions (substantial weight); 23) Hernandez has shown remorse (slight weight); 24) Hernandez cooperated with police (some weight); 25) Hernandez has previously attempted suicide (some weight); 26) Christopher Shawn Arnold was sentenced to life (no weight) 27) Hernandez's conduct was not worthy of the death penalty (no weight); 28) Hernandez had several mental and cognitive disorders (some weight); 29) Hernandez's family members sent letters to the trial court attesting to his good character (some weight) (R3 468-479).

The trial court, giving great weight to the jury's sentencing recommendation, found the applicable aggravating factors outweighed the relevant mitigating factors, and sentenced Hernandez to death. Moreover, the trial court sentenced Hernandez to a term of life imprisonment for robbery with a deadly weapon; and, similarly, the trial court sentenced Hernandez to a term of life imprisonment for assault or battery, within an occupied dwelling, while armed with a dangerous weapon (R3. 479).

This appeal ensued.

SUMMARY OF ARGUMENT

ISSUE 1: Hernandez argues that because a prospective juror saw him wearing shackles in a hallway adjacent to the courtroom, his constitutional rights were improperly prejudiced. This claim of error is without merit. The United States Supreme Court has noted that a decision to shackle a defendant during a trial, while

disfavored, is certainly not impermissible when there is a clear record evidencing the need for shackles. Similarly, this Court has noted that a hearing should held prior to a trial court making a determination as to whether a defendant should be shackled.

In the instant case, the trial court held a hearing prior to determining that Hernandez should be shackled. The trial court heard testimony that, while incarcerated, Hernandez had violently attacked two detention officers. During one attack, Hernandez hit a guard with a porcelain toilet lid; and during a separate attack, Hernandez struck an officer so hard, the officer's molars were loosened. Moreover, the trial court heard testimony about an incident wherein Hernandez got into a violent altercation with his codefendant Christopher Arnold while they were in a cell together. Hernandez severely beat Arnold and broke his nose. Further, the trial court heard testimony regarding Hernandez's comportment during a prior non-capital trial. During the non-capital trial, while in front of a judge and jury, Hernandez took out a razor, which he had secreted, and began engaging in self-mutilation. Finally, the trial court heard evidence of verbal threats that Hernandez made to other detention officers.

The trial court ultimately decided that shackling Hernandez would be appropriate. However, several precautions, previously approved by the Florida Supreme Court, were undertaken to insure that the shackles were obscured from the jury's view. These

precautions included: 1) placing bunting around the parties' tables; 2) rearranging the courtroom's layout; and 3) not having the bailiff announce "All rise" so as to prevent having Hernandez to stand.

However, during jury selection – notwithstanding the trial court's efforts – a prospective juror briefly observed Hernandez wearing shackles while both Hernandez and the juror were standing in a hallway outside of the courtroom.[1] Following *voir dire* questioning, the juror was struck for cause. Hernandez now argues that because other jurors may have seen Hernandez in shackles as well, his due process rights were impinged.

Hernandez overstates the constitutional harm. All the record truly evidences is that one prospective juror (who was struck), had a fleeting glance of Hernandez in shackles outside of the courtroom. In fact, during *voir dire* questioning, the prospective juror stated that nothing he had seen inside of the courtroom had led him to believe that Hernandez was shackled. Because both federal and state courts (including this Court) have repeatedly held that a fleeting observation of a defendant in handcuffs or shackles – outside of the courtroom – is not constitutionally infirm, this claim of error should be rejected.

ISSUE 2: Hernandez argues that he improperly received a

[1] Actually, the record indicates that the juror and Hernandez were separated in the hallway by a chalkboard.

sentence more harsh than his codefendant, Christopher Shawn Arnold. Hernandez received a death sentence, whereas Arnold was sentenced to life. Hernandez believes that he and Arnold shared the same moral culpability and therefore should have received the same sentence. However, this Court has repeatedly recognized that a more culpable codefendant may permissibly receive a harsher sentence. In this case, it is uncontroverted that, based on Hernandez's confession, and expert medical testimony, Hernandez was clearly more culpable then Arnold. Hernandez admitted to breaking Ruth Everett's neck and slashing her throat. These actions specifically caused her death. Therefore, because Hernandez's conduct clearly lead to Everett's death, this claim should be rejected.

ISSUE 3: Hernandez opines that a juror, whose family had problems with substance abuse, and who worked on a day-to-day basis with law enforcement, should have been struck for cause. During *voir dire* questioning, the juror provided that she would not give more credence to the testimony of law enforcement; and, she would adhere to the trial court's directives as to the law. The record demonstrates that the juror never gave equivocal responses regarding her ability to be fair. Accordingly, because there has been no showing that the trial court's failure to strike the juror for cause was manifest error, this claim should be rejected.

ISSUE 4: Hernandez maintains that the avoid arrest aggravator

was not applicable. However, the trial court heard testimony from a witness, Daveine Hartman, who testified that Hernandez told her that he killed Ruth Everett because she had seen Hernandez's face. This Court has recognized that statements by the accused, indicating that witness elimination was a motive for the murder, support applicability of the avoid arrest aggravator. The trial court relied on the testimony of Hartman in rendering its decision as to the applicability of the avoid arrest aggravator; deference should be accorded to the determination, and this claim should be rejected.

ISSUE 5: Hernandez challenges the applicability of the Heinous, Atrocious, or Cruel (HAC) aggravator. Hernandez admitted to breaking the victim's neck and slashing her throat. Medical testimony was presented suggesting that Everett was still alive after her neck had been broken. Everett fought for her life, as evidenced by the fact, among other matters, that Hernandez's DNA was found underneath her fingernails. Additionally, Hernandez told others that he slashed Everett's throat because he wanted insure that she was dead. Moreover, it is doubtless that Ruth Everette was placed in great apprehension of her life when she was attacked by Hernandez. Because of the grievous and tortuous nature of this crime, the HAC aggravator was appropriately found.

ISSUE 6: Hernandez believes that the trial court improperly permitted the State's mental health expert, Dr. Harry McClaren, to

remain in the courtroom during the penalty phase hearing. Hernandez opines, without much support in the record, that McClaren may have slanted his own testimony by what he heard in court prior to testifying on behalf of the State. The record does not remotely indicate that the trial court abused its discretion by allowing McClaren to remain in the courtroom. Accordingly, given that Hernandez cannot meet his requisite burden on appeal, this claim must denied.

ISSUE 7: Hernandez contends that United States Supreme Court precedent commands that the aggravating factors supporting imposition of the death penalty should be included in the indictment. However, this Court has found on numerous occasions that statutory aggravators do not have to be enumerated in the indictment. Accordingly, the trial court's denial of Hernandez's motion to dismiss the indictment was proper.

ISSUE 8: Finally, Hernandez challenges the fact that the jury received an instruction related to victim impact evidence. Hernandez contends that the instruction is needlessly confusing and should not have been heard by the jury in the first place. This claim is without merit. First, *Fla. Stat.* §921.141(7) provides that, where appropriate, victim impact evidence may be presented during the penalty phase. Moreover, the instruction read to the jury has been approved by this Court on repeated occasions. Accordingly, this claim should be denied.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR WHEN IT DENIED HERNANDEZ'S MOTION TO DISMISS PREMISED ON THE FACT THAT ONE PROSPECTIVE JUROR BRIEFLY OBSERVED HERNANDEZ WEARING SHACKLES IN A HALLWAY; THE TRIAL COURT HELD A HEARING WHICH CLEARLY EVIDENCED THE NEED FOR PLACING HERNANDEZ IN RESTRAINTS; AND, BECAUSE THE PROSPECTIVE JUROR WAS STRUCK FOR CAUSE AND NEVER SAT IN JUDGMENT OF HERNANDEZ, THIS CLAIM IS MERITLESS

Hernandez argues that it was improper to shackle him during his capital murder trial, opining that the trial court's determination impinged on his due process rights as understood by the Fifth and Fourteenth Amendments. Conversely, the State firmly believes that the trial court's determination was firmly rooted in United States Supreme Court precedent. Moreover, the State believes that Hernandez has not truly articulated the factual basis undergirding the trial court's decision.

The record amply supports the fact that the decision to shackle Hernandez was not premised on a desire to impinge on the fairness of his trial; rather, the trial court was confronted with an exceptionally violent defendant, who had on repeated occasions: fought with corrections officers, brutally assaulted fellow prisoners, and engaged in self-mutilation during the course of a prior non-capital felony trial. The trial court certainly had reason to be concerned with the prospect of a defendant whose actions while incarcerated; and, during previous legal proceedings; exhibited the capacity to harm not only himself – but others as well. The State believes that the record clearly establishes that

the trial court had a legitimate basis to support its determination.

On January 27, 2007, a hearing was held to address the issue of whether Hernandez would be shackled during the entirety of his capital trial. Several law enforcement officers testified.

First, Deputy John Wade Jarvis of the Santa Rosa Sheriff's Office testified. Wade testified that on December 2, 2005,while Hernandez was being psychologically evaluated, he (Hernandez) was permitted to use the restroom during a break from testing; and, while in the bathroom, Hernandez struck Jarvis with a porcelain toilet lid (SR 1128-30). Jarvis noted that he received several scratches following the attack, and a female deputy who was assisting Jarvis subdue Hernandez received several stitches (SR 1132).

Deputy Jarvis further testified that Hernandez was tried for the assault on Jarvis; and, during the course of the trial, while Hernandez was sitting at the defendant's table, he began cutting himself (and drawing blood) -- using a razor blade he had secreted on his person (SR 1136).

Following Deputy Jarvis' testimony, Captain Paul Campbell of the Santa Rosa Sheriff's Department testified. Campbell noted that his responsibilities at trial would entail devising means to potentially restrain Hernandez during the course of his trial, including use of shackles or an electronic stun belt (SR 1146).

Campbell noted that the stun belt could, when appropriate, send an electrical current through Hernandez's body (1146-48). Campbell further provided that a stun belt could potentially be used in lieu of shackles (1150-51).

Upon questioning by the trial court, Campbell acknowledged that if Hernandez had unfettered use of his hands (which would occur with if Hernandez was simply restrained with a stun belt), he could potentially use a weapon available to him at his counsel's table (SR 1157). Moreover, Captain Campbell noted that a stun belt could not prevent Hernandez from engaging in self-mutilation (i.e., via use of a pen); nor could a stun belt prevent Hernandez from suddenly attacking his attorney (SR 1158-59).

Matthew Bartley, a detention officer with the Santa Rosa County Sheriff's Office also testified. Bartley noted that on January 2, 2005, while he was making his daily rounds, he observed Hernandez choking Christopher Shawn Arnold (Hernandez's co-defendant) while the two were incarcerated in the same cell (SR 1162). Bartley noted that Arnold had been bloodied as a result of the attack; moreover, Arnold's nose was fractured(SR 1162).

Additionally, Bartley testified that on January 3, 2007 he too was attacked by Hernandez (SR 1164). Bartley observed that it took several officers to restrain Hernandez; and, that as a consequence of Hernandez's attack, Bartley molar was loosened (1164-65).

Finally, Deputy Bonita Faircloth, of the Santa Rosa Sheriff's

Office testified during the hearing. Faircloth noted that on January 4, 2007 she was on duty – distributing razors (SR 1169). Because of Hernandez's physical altercation with Officer Bartley the previous day, Hernandez was not administered a razor (SR 1170). When informed that he would not be issued a razor, Hernandez made a threatening comment to Faircloth, asserting "That's okay. I'll take it out on another officer." (SR 1170).

Following the presentation of arguments by both sides, the trial court ultimately determined that Hernandez should be shackled. The trial court took into consideration the fact that Hernandez had, on multiple occasions, violently attacked law enforcement personnel (SR 1183-84). In turn, the trial court considered the testimony of Captain Campbell, who believed that a stun belt would be sufficient; however, the trial court weighed Campbell testimony versus the fact that testimony was also presented suggesting that a stun belt was not absolutely failsafe (1184-85).

The trial court further articulated the precautions that would be undertaken to insure that Hernandez's constitutional rights were not impinged, such as: 1) the parties would not be required to rise every time the jury entered and exited the courtroom; 2) rearranging the courtroom's layout to block the jury's view; and 3) ordering that bunting be wrapped around both counsels' tables to insure that the shackles would be obscured from the jury. (SR

1185).

Hernandez presently contends that the trial court improperly mandated that he be shackled, and that his shackling, in and of itself, constituted a violation of his constitutional rights. Notwithstanding Hernandez's argument, it is belied by United States Supreme Court precedent. Similarly, he argues that the trial court erred when it denied his motion to dismiss the entire jury venire because a prospective juror, observed Hernandez – in a hallway – wearing shackles.

The prospective juror, Kevin Mancusi, was subjected to *voir dire* questioning by: Hernandez's counsel, Michael Rollo; Assistant State Attorney, Robert Elmore, and the trial court. Following Mancusi's questioning, he was dismissed for cause. Hernandez then moved to dismiss the entire panel of prospective jurors; however, the trial court rejected Hernandez's motion. Hernandez now opines that the trial court erroneously denied his motion to dismiss. Some understanding of the *voir dire* proceedings supports the trial court's determination.

The entire voir dire questioning of prospective juror Mancusi proceeded as follows:

> **THE COURT**: Mr. Mancusi, how are you doing?
>
> **PROSPECTIVE JUROR MANCUSI**: Good. How are you?
>
> **THE COURT**: Good. You indicated that there was something you wanted to talk to us about privately. What was that?

PROSPECTIVE JUROR MANCUSI: Well, just that when I got my summons and I saw everything, you just got to understand that the business that I'm in, I'm kind of like sort of connected in the area with what's going on and stuff.

THE COURT: What's your business?

PROSPECTIVE JUROR MANCUSI: I'm with Hungry Howie's. So I have a lot of drivers going around. And actually that day also, the day in question, was my wife's birthday. And I remember the next day when I was in the store when one of my drivers had kind of told me that they had seen something going on that we had, you know, we put the address in our computer to see if this person or this address was a customer that I had heard some things, some detail about the case, that you might need to know.

THE COURT: Like what?

PROSPECTIVE JUROR MANCUSI: Well, that the individuals, when they were caught, had – and I'm just going off what I recall – that they had possession of this person's property, and that they had admitted that they had done it. So it's kind of in the back of my head.

THE COURT: Okay.

PROSPECTIVE JUROR MANCUSI: That they had –

THE COURT: Is there anything that you've heard that you could not set aside?

PROSPECTIVE JUROR MANCUSI: Well, I don't think I could set that aside, if you want me to be honest with you.

THE COURT: Okay. So what you are saying is that no matter what the evidence was that was presented you would nevertheless have that in the back of your mind that you would –

PROSPECTIVE JUROR MANCUSI: Yeah.

THE COURT: – that would impact your objectivity?

PROSPECTIVE JUROR MANCUSI: Well yeah. And I would have to say yes to that. I mean I'm feeling like a lot of anxiety. I understand the importance of this case and the

fact that I've kind of had all of this in my head and waited until this point to obviously release that to you that I know that –

THE COURT: Do you feel better telling us?

PROSPECTIVE JUROR MANCUSI: I do. Like last night I was – I had a lot of anxiety, like, I didn't sleep real well.

THE COURT: Right. Now that you've told us is there anything else that you'd like to tell us besides that, that you think would be important for us to know. And this is the time to do it, what you're supposed to do.

PROSPECTIVE JUROR MANCUSI: Right. And I'm glad I do have the opportunity. And I just wanted to just – you know, this is an opportunity for me to be honest about what I've seen and experienced in this process. I think we definitely need a new courthouse. And I'll explain to you why.

You know, I had also indicated about the presumption of innocence. And I, you know I'm well aware of the fact that everybody is guaranteed, you, that — that they're innocent until proven guilty; but it's really hard especially when we're all crammed in that hallway and you guys got a chalkboard blocking off the hallway. And, you know, you can see the defendant walking from one door to the other with shackles on his feet. I mean, it's a hard thing to get out of your head, you know. And something that kind of bothered me last night, that fact that I saw that. You know, we're all crammed in the hallway, and there's only one guy that probably got those on his legs. And that's – once again that's hard to get out of your head.

THE COURT: Mr. Elmore?

MR. ELMORE: Judge, I don't have any questions.

THE COURT: Mr. Stokes?

MR. STOKES: Mr. Mancusi, did you share with any of the other prospective jurors the information that you had concerning –

PROSPECTIVE JUROR MANCUSI: Absolutely not.

MR. STOKES: – the defendant –

PROSPECTIVE JUROR MANCUSI: No. I understand the importance. So that's why I've had all this inside of me like – no. I definitely understand that that would not be the thing to do. So no. I did not.

MR. STOKES: Were there other prospective jurors who also observed the defendant in shackles?

PROSPECTIVE JUROR MANCUSI: I don't know the answer to that. I just know what I saw.

MR. STOKES: Okay. Were there others situated –

PROSPECTIVE JUROR MANCUSI: Yeah.

MR. STOKES: – in the proximity to you where they could have seen?

PROSPECTIVE JUROR MANCUSI: Yes.

MR. STOKES: Did anybody comment on it?

PROSPECTIVE JUROR MANCUSI: No. And even when I saw it, I kept it to myself. And like I said I kind of went home with that last night like, you know, this is an intense thing. It's – I kind of wish I had maybe not a capital trial as my first thing. I understand the seriousness of it, and that's weighing on me a lot, you know. I'm the kind of guy that I get wrapped up in my own thoughts. And, you know, it's just been something hard to think about all night and all day today.

MR. STOKES: Can you explain as best as you can where you were located when you saw the defendant in shackles?

PROSPECTIVE JUROR MANCUSI: Just – there's the hallway going that way, and then you got – you know, that thing is blocking it off. And I was – the door that the young lady walks out of to go across into the right-hand door on the – if you're standing in the hallway facing the back of your Honor's bench, there's a door on the right and a door on the left. Okay. Everyone goes in the door on the right. All you guys are going in the door on the right. . . I was standing basically at that door, you know, because the hallway where we're all entering is

just jampacked with people. There's people on the stairway, you know. And that's what I can't get out of my head. It's like God, if there's ever a need for more space and, you know. And I understand you guys are doing the best you can to make things be correct, but –

MR. STOKES: So you saw the shackles underneath the chalkboard?

PROSPECTIVE JUROR MANCUSI: That's right, just him walking from – I guess from one door across to the other door where you get him into the courtroom.

MR. STOKES: How many other prospective jurors were in that hallway close proximity to you?

PROSPECTIVE JUROR MANCUSI: There's you know, a few ladies. And we were talking. And I mean, a handful, six.

MR. STOKES: Six? But you're not able to say which ones?

PROSPECTIVE JUROR MANCUSI: No, no.

MR. STOKES: Okay. There was couple of ladies you said or –

PROSPECTIVE JUROR MANCUSI: Yeah. It was – I mean, if I recall correctly, it was just – I don't even know who it was. We were just making small talk, just waiting for you guys to open up the courtroom. I mean, hopefully you guys see like the way we're all jammed in there and we're just standing there waiting to like get back in. And, you know, it's something that just like I just saw.

MR. STOKES: Thank you very much, Mr. Mancusi.

THE COURT: May this witness be excused?

MR. ROLLO: May I confer with Mr. Stokes?

(Off-the record discussion between attorneys.)

MR. ROLLO: Mr. Mancusi, first of all let me ask you a general question. You mentioned about the courthouse. Are there any other concerns that you have from where you were seated or any other concerns about the courthouse other than those that you mentioned that have impacted

you or affected your ability to be fair and impartial juror in this case?

PROSPECTIVE JUROR MANCUSI: About the courthouse itself? No.

MR. ROLLO: Okay.

PROSPECTIVE JUROR MANCUSI: That would be the only one.

MR. ROLLO: And let me ask you, once you observed the person in shackles – and hypothetically we'll presume that that's Mr. Hernandez – did that leave you with an impression? Did you form any kind of opinion of idea about Mr. Hernandez at that point in time?

PROSPECTIVE JUROR MANCUSI: Based on just that, that I just saw that.

MR. ROLLO: Seeing the shackles, yes.

PROSPECTIVE JUROR MANCUSI: No.

MR. ROLLO: Did you reach any conclusion about the need for shackling or anything having to do with that?

PROSPECTIVE JUROR MANCUSI: Yes.

MR. ROLLO: And what was that conclusion?

PROSPECTIVE JUROR MANCUSI: Well, the need for shackles, I mean, demonstrates that, I mean, that he's an individual that has to be restrained, you know that he's – this is a serious offense. And obviously we don't want him scooting getting away, I guess. I mean, I would assume that it's a security measure that the defendant, you know, if he were to make an attempt at leaving, that he would be – it would be difficult for him to do that obviously.

MR. ROLLO: Did you draw a negative inference for that, seeing him shackled?

PROSPECTIVE JUROR MANCUSI: I think the shackles definitely – I mean, I see the Court going out of its way to not go either direction. And that was you know, like I said I understand that he's presumed innocent. That is

the foundation of this country and I understand that, but that's – it's a hard thing to get out of the back of your mind, you know, when you see that and –

MR. ROLLO: Is it fair to say that would have affected your ability to be fair by having seen that?

PROSPECTIVE JUROR MANCUSI: That combined with other information I told you? Certainly.

MR. ROLLO: Yes. No other questions.

THE COURT: Thank you sir.

MR. ELMORE: I have just a couple since we've turned this into an inquiry versus a voir dire, Judge. Mr. Mancusi, while inside the courtroom –

PROSPECTIVE JUROR MANCUSI: Uh-huh.

MR. ELMORE: – did you ever see anything inside the courtroom that led you to the conclusion that the defendant was shackled?

PROSPECTIVE JUROR MANCUSI: No.

MR. ELMORE: Okay. So the measures we have taken inside the courtroom –

PROSPECTIVE JUROR MANCUSI: Yes.

MR. ELMORE: – if he were shackled were successful?

PROSPECTIVE JUROR MANCUSI: Were successful, but also obvious to me after the fact.

MR. ELMORE: I understand, but only because you had seen that someone was walking –

PROSPECTIVE JUROR MANCUSI: Correct.

MR. ELMORE: – behind the chalkboard –

PROSPECTIVE JUROR MANCUSI: Right.

MR. ELMORE: – in shackles on the ankles –

PROSPECTIVE JUROR MANCUSI: Right.

MR. ELMORE: – correct? Okay.

PROSPECTIVE JUROR MANCUSI: I did want to throw one other thing out, if you don't mind. I know we're pressed for time, but the forum in there, it's difficult in that situation. And I want you to know that I found it difficult to answer all those questions in there in that forum with that group of people. And I'm sure other people have to feel the same way.

THE COURT: Well that's why we conduct the individual voir dire.

***

MR. ELMORE: One other question, Judge. When in time was it that you noticed the shackles and –

PROSPECTIVE JUROR MANCUSI: It was yesterday.

MR. ELMORE: Yesterday?

PROSPECTIVE JUROR MANCUSI: During one of our breaks.

MR. ELMORE: I guess you've seen today that the Court has taken additional measures to place paper –

PROSPECTIVE JUROR MANCUSI: Yes.

MR. ELMORE: – down below the chalkboard?

PROSPECTIVE JUROR MANCUSI: Yes. And I also saw them actually discussing that. I want to say an officer or two officers were discussing how they were going to do that while we were all in the hallway.

MR. ELMORE: Okay.

***

MR. ROLLO: Your honor, I do have one question.

THE COURT: All right.

MR. ROLLO: The person you saw shackled, was he in a green jumpsuit or did he have a suit on? Could you see the suit?

PROSPECTIVE JUROR MANCUSI: I saw – I want to say I saw black pants.

MR. ROLLO: Thank you. No other questions.

THE COURT: Thank you, sir.

PROSPECTIVE JUROR MANCUSI: Uh-huh.

COURT SECURITY: You can have a seat back in the courtroom.

(Prospective juror exits the room.)

THE COURT: All right. Do we stipulate to him for cause?

MR. ELMORE: Yes your honor.

MR. STOKES: Judge, I think at this point we need to challenge the panel or move for a mistrial since we're not able to determine who the other people were in the hallway, and we're not able to determine who saw the shackles. I think it's reasonable to conclude that more people other than Mr. Mancusi saw it, was in close proximity. We're not able to say which juror might or might not have seen it.

THE COURT: Mr. Elmore?

MR. ELMORE: Judge, because Mr. Mancusi, who is certainly an intelligent and inquisitive individual, concluded that it was the defendant whose shackles he saw, that does not follow that other jurors either noticed or reached the same conclusion. As Mr. Mancusi stated, inside the courtroom he drew no conclusions until he saw the shackles beyond the chalkboard earlier.
It certainly would be improper for the Court to speculate that other jurors saw it. And, as Mr. Stokes pointed out himself, even if some other juror saw it, it might be someone we never reach in the jury pool.

THE COURT: Well, let me make an observation. The Court has gone to great lengths given the facilities and the availability of logistics issues that challenge the Court to insure that the visibility of shackling was a mask [sic] and to minimize the impact of the shackling. Nonetheless the defendant is shackled. That is a fact.

And the Court made the determination that the defendant needed to be shackled for reasons articulated previously by the Court.

When the Court took the steps to minimize the impact of the shackling, this Court never anticipated that it was a fail safe procedure. The Court fully anticipated that at some point it was possible, maybe even probable, that prospective jurors would become aware or jurors would become aware of the restraints.

So the issues disclosed by this prospective juror were not unanticipated. And with that as a backdrop I don't know – I think we would be naive to be surprised that some prospective juror or a juror became aware of the shackling. That would be naive to think that we were going to go through two weeks without somebody becoming aware of it. The Court has taken those steps to minimize the impact of it, but the Court fully recognizes that a juror, or a prospective juror, or all jurors will ultimately become aware that there are restraints in this case. The Court made the decision to restrain the defendant for reasons articulated, and I don't know how I could have shackled him without a possibility that that would become a matter that the jury was aware of.

Accordingly I don't see a need for any remedy in this instance other than excusing that juror. Is there anything further that anybody would like to place of the record for the purposes of the record?

MR. STOKES: Yes, sir. Judge, of course that's why I made that argument originally against shackles is given this courthouse and given the length of the trial it's almost impossible for someone.

THE COURT: I think that's right, Mr. Stokes. I think its impossible to think that we're going to go through a two-week trial without the – what we have tried to do is minimize the visual impact, but not the potential that people are going to become aware of it.

MR. STOKES: Your honor, as the case law says, it's inherently prejudicial.

THE COURT: I have no doubt. You heard the testimony of that prospective juror, but we have done what we had to do in light of the circumstances of this case.

MR. STOKES: I still maintain my motion –

THE COURT: What's the remedy you're requesting?

MR. STOKES: – motion to strike the panel, motion for mistrial; but I'll let the Court rule on that first. Then I'll make some more suggestions.

THE COURT: All right. Anything further you would like to say for the record?

MR. ELMORE: No, your honor.

THE COURT: Denied –

MR. STOKES: Okay.

THE COURT: – for the reasons articulated by the Court.

MR. STOKES: I earnestly ask the Court reconsider the use of shackles and to use the stun belt. You remember the testimony from Captain Campbell that it was basically safe, as far as the use, that it would accomplish the purpose. And I just think we can go through two weeks – we didn't even get past the first day without somebody seeing the shackles.

THE COURT: I said that I fully anticipate by the time we're done all jurors would be aware of the shackles.

MR. STOKES: I think we're just asking for a reversal if we do that.

THE COURT: What's the State's position, Mr. Elmore, Mr. Eddins?

MR. ELMORE: Judge, first I would state that the fact that this juror saw some shackles on a pair of black pants and concluded it was the defendant does not create a foregone conclusion that every juror in the jury box will actually know he's isn't in shackles. Yes. They may speculate and they may conclude –

THE COURT: I think you have to work based on that they're going to know. I think that's were the Court is.

MR. ELMORE: Nonetheless, Judge, Captain Campbell did not testify that the stun belt would protect the defendant or his counsel from the violence he's previously exhibited

> in the courtroom. He's testified otherwise. And your ruling was correct to shackle the defendant.
>
> ***
>
> **THE COURT:** I think for the record this Court is working from the baseline that all jurors will at some point become aware. I think it would be – we would have our head in the sand to believe that we can go through two weeks trial without it becoming aware.
>
> Nonetheless for reasons articulated previously the Court feels that in this case in this instance the Court had no alternative. An so the motion is denied.

(TT. Vol V., 768-83).

In *Deck v. Missouri*, 544 U.S. 622 (2005), the Supreme Court confronted whether it was constitutionally permissible to shackle a defendant during a penalty phase, when the shackling determination was premised only on a *very* unparticularized concern about security. While the facts in *Deck* principally dealt with the propriety of shackling a defendant during the penalty phase of a trial, *Deck* also encompassed the propriety of shackling during the *guilt phase* portion of a trial – as is challenged in the instant case.

The Supreme Court recognized that the visible shackling of a defendant is inherently prejudicial and must only be undertaken when a "special need" presents itself. *Id.* at 626. The Supreme Court went on to note that, particularly within the context of a guilt phase, the federal constitution proscribes "the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are

justified by a state interest specific to a particular trial." *Id.* at 629 (emphasis added).

Deck's recognition that a trial court has the discretion, where appropriate, to shackle a defendant, has long been understood by Florida courts. *See, e.g., Elledge v. State*, 408 So. 2d 1021, 1022-23 (Fla. 1981) (observing that a trial court's decision to require a defendant to wear shackles is reviewed by this Court under the abuse of discretion standard). For example, this Court has observed that "shackling is a permissible tool to be exercised in the sound discretion of the trial judge when circumstances involving the security and safety of the proceeding warrant it." *Bryant v. State*, 785 So. 2d 422, 428 (Fla. 2001)(citing *Derrick v. State*, 581 So.2d 31, 35 (Fla. 1991)). Moreover, to insure that a defendant's due process rights are not infringed, a hearing should be held, wherein the trial court "may consider a variety of sources, including prisoner records, criminal records, witnesses and correctional and law enforcement officials and a defendant may challenge the validity and import of the information provided." *Jackson v. State*, 698 So. 2d 1299, 1302-03 (Fla. 4th DCA 1997)(quoting *Elledge v. Dugger*, 823 F.2d 1439, 1451-52 (11th Cir.), *opinion withdrawn in part*, 833 F.2d 2250 (1987).

Additionally, if a trial court requires a defendant to be shackled, and the defendant objects, the hearing is also necessitated in order to establish a clear record as to the

underlying basis for the decision to shackle the defendant. *See, e.g., Bello v. State*, 547 So. 2d 914, 918 (Fla. 1989) (noting that "there is not evidence in the record to support the need for such restraint . . . [therefore] [b]ecause the trial judge in this case made no inquiry into the necessity for the shackling, the defendant is entitled to a new sentencing proceeding before a jury"); *see also Bryant*, 785 So. 2d at 429-30 (finding that the trial court's failure to conduct an evidentiary hearing as to the propriety of shackling the defendant was erroneous; however, the error was harmless given that the trial court's decision was based on the trial judge's personal awareness of the defendant's disruptive behavior during his previous trials).

In the instant case, the trial court did indeed hold a hearing to determine whether Hernandez should be shackled. During the hearing, law enforcement officers who had been violently assaulted and/or physically threatened by Hernandez testified; moreover, testimony was presented which detailed how during a separate trial, Hernandez engaged in self-mutilation with a razor blade he had secreted on his person – while in front of the judge and jury .

Further, the trial court, in rendering its decision to shackle Hernandez, took several precautionary measures so as to insure that the jury's view of the shackles was obscured. The trial court's order provided that: 1) court security officers would not state the phrase "All rise," and individuals within the courtroom would

remain seated at all times; 2) arranging counsels' tables in such a way as to block the jury's view of the restraints; 3) placing a podium between counsels' tables to further obscure the jury's view; and 4) positioning chairs within the courtroom in such a manner as to, again, limit the jury's ability to see Hernandez's shackles. See R. Vol. II, at p. 291.

Precautions similar to those undertaken by the trial court in the instant case, have been deemed appropriate exercises of discretion by Florida's courts. *See, e.g., Dufour v. State,* 495 So. 2d 154, 162 (Fla. 1986) (approving of the trial court's efforts to limit the jury's ability to see Dufour's leg shackles; efforts which included "granting defense counsel's request to place a table in front of the defense table in order to hide the leg shackles"); (*Czubak v. State,* 644 So. 2d 93, 94 (Fla. 2d DCA 1994) (approving of the trial court's precautions to limit the jury's ability to see defendant's shackles, such as not allowing the defendant to be moved in the jury's presence, and rearranging courtroom seating so as to prevent restraints from being seen).

The State would also note that Hernandez has failed to remotely suggest that he was *prejudiced* by the fact that a prospective juror – who was struck for cause, and never even sat in judgment of Hernandez – briefly saw Hernandez wearing shackles in a hallway adjacent to the courtroom. *See, e.g., Allen v. Montgomery,* 728 F.2d 1409, 1414 (11th Cir. 1984) (observing that

"the well-established rule in this circuit is that a brief and fortuitous encounter of the defendant in handcuffs is not prejudicial and requires an affirmative showing of prejudice by the defendant"); *Heiney v. State,* 447 So. 2d 210, 214 (Fla. 1984) ("[w]e [ ] find that in the present case the inadvertent sight of Heiney [wearing handcuffs], if in fact he was seen by some of the jurors, was not so prejudicial as to require a mistrial"); *Neary v. State*, 384 So. 2d 881, 885 (Fla. 1980) ("we find that the inadvertent sight of the appellant in handcuffs was not so prejudicial that it required a mistrial").

Finally, the remedies sought by Hernandez – granting a mistrial and/or striking the entire jury panel – were simply "macro" solutions for a "micro" harm. *See United States v. Wright*, 564 F. 2d 785, 790 (8th Cir. 1977) (denying motion for mistrial "[i]n view of the meager evidence that any *juror* saw appellants handcuffed while they were being transmitted to the courtroom") (emphasis added). The trial court, in the instant case, undertook great efforts to insure that, within the courtroom, jurors did not see Hernandez in handcuffs or shackles. In fact, all that the record truly shows is that a prospective juror – who, was struck for cause – saw Hernandez in an adjacent hallway being transferred into the courtroom. *Cf. United States v. Fahnbulleh*, 748 F.2d 473, 477 (8th Cir. 1984) ("The danger of prejudice to defendants is slight where a juror's view of defendants in custody is brief,

inadvertent, and *outside* of the courtroom") (emphasis added). Prospective juror Mancusi, acknowledged that nothing he had seen *inside* of the courtroom led him to believe that Hernandez was shackled:

> **ELMORE**: . . . [D]id you ever see anything inside the courtroom that led you to the conclusion that the defendant was shackled?
>
> **MANCUSI**: No.

(TT. Vol. V., p. 773).

Accordingly, given that: 1) the trial court went to great lengths – including measures previously approved by this Court – to insure that Hernandez's restraints would be obscured; 2) the prospective juror who apparently saw Hernandez in restraints while he being transported into the courtroom was eventually struck for cause; and 3) the decision to shackle Hernandez was justified by a State interest specific to Hernandez's trial; this ground of error must be denied.

II. THE TRIAL COURT DID NOT ERR IN SENTENCING HERNANDEZ TO DEATH NOTWITHSTANDING THE FACT THAT HIS CODEFENDANT, CHRISTOPHER SHAWN ARNOLD, RECEIVED A TERM OF LIFE IMPRISONMENT; THIS COURT HAS REPEATEDLY RECOGNIZED THAT A MORE CULPABLE CODEFENDANT MAY RECEIVE A MORE SEVERE SENTENCE; IN THIS CASE THE RECORD EVIDENCES THAT HERNANDEZ SLIT THE VICTIM'S THROAT AND BROKE HER NECK; HERNANDEZ'S ACTIONS WERE DIRECTLY RESPONSIBLE FOR RUTH EVERETT'S DEATH AND HIS DEATH SENTENCE WAS ENTIRELY APPROPRIATE.

Hernandez asserts that he was improperly sentenced to death. He premises this claim on the fact that his codefendant,

Christopher Shawn Arnold, who was sentenced prior to Hernandez, received a life sentence for his complicity in the murder of Ruth Everett; whereas, Hernandez was sentenced to death. Hernandez appears to makes the remarkable argument that the conduct of both he and Arnold was largely indistinguishable, asserting that "the only relevant fact distinguishing the two men was that Hernandez broke Ms. Everett's neck and slashed her throat." Appellant's IB at 38. Said differently, Hernandez believes that he and Arnold should have received *identical* life sentences.

This claim is completely without merit; the simple fact that Hernandez received a more harsh sentence than did his codefendant does not thereby mean that Hernandez's sentence is constitutionally infirm. *See, e.g., United States v. Harrison,* 918 F.2d 469, 475 (5th Cir. 1990) ("It is clear that disparity of sentences, standing alone, is not grounds for reversal . . . [d]efendants cannot rely on the sentences received by other defendants as proper yardsticks for the sentences they should receive"); *Doorbal v. State*, 837 So. 2d 940, 963 (Fla. 2003) ("we agree with the trial court's statement that 'it is clear from the evidence that [Doorbal's codefendant] in the murders [was] dramatically less than [Doorbal's]. We therefore conclude that Doorbal's death sentences do not lack proportionality.").

As is well-understood, Florida's capital litigation jurisprudence seeks to insure that the death penalty is imposed

only in the most aggravated and least mitigated circumstances. *See Kramer v. State,* 619 So. 2d 274, 278 (Fla. 1993); *see also* Fla. Const. Art I, § 17. Hernandez seems to be asserting that he and Arnold shared equal moral culpability for the murder of Everett; and, because Arnold received a life sentence; Hernandez similarly believes that the circumstances underlying his crime were *not* amongst the most aggravated and least mitigated.

Hernandez references a series of United States Supreme Court and Florida Supreme Court cases which he relies upon for the proposition that his sentence must be reduced to life because he was no more culpable than his codefendant Arnold. *See, e.g., Enmund v. Florida*, 458 U.S. 782 (1982) (holding that death penalty may not be imposed based on felony murder conviction where the record demonstrates the accused did not contemplate, attempt, nor intend to kill the deceased, nor that any lethal force be used); *Tison v. Arizona*, 481 U.S. 137 (1987) (holding that consistent with *Enmund* "major participation in the felony committed, combined with reckless indifference to human life" evidences sufficient culpability to impose a death sentence). However, the cases cited by Hernandez are inapposite.

Recall, the jury heard testimony from Davine Hartman, the mother-in-law of Christopher Shawn Arnold. Hartman specifically testified about a conversation she had with Hernandez, while he was incarcerated. Hernandez explained what had transpired in Everett's

home the morning of the murder. Hernandez told Hartman that, upon what he thought was Arnold's directive, he [Hernandez] began choking Everett (TT Vol. VIII, 1227). Hartman further testified that, according to Hernandez, Arnold tried to smother Everett with a pillow (TT. Vol. VIII, 1228). Because Everett was still alive, Hernandez took it upon himself to end Everett's life. According to Hartman, Hernandez used a pejorative to describe Arnold's inability to kill Ruth Everett (TT. Vol. VIII, 1229). Hernandez told Hartman that he "snapped" the victim's neck; he then placed her in a chair, and slit her throat with a pocket knife (TT. Vol. VIII, 1229-30).

Moreover, the jury heard Hernandez's confession to Detective Jeff Shuler of the Santa Rosa Sheriff's Department. Hernandez said that he and Arnold went to Ruth Everett's home to steal money in order to support their crack cocaine addiction (TT. Vol. X, 1516-17). Hernandez noted that following their initial struggle with Everett;[2] Arnold briefly, and unsuccessfully, attempted to smother Everett with a pillow (TT. Vol. X, 1518). However, Arnold was unable to kill Everett. Thereafter, literally taking matters into his own hands, Hernandez "cracked" Everett's neck, and then he slashed her throat with a knife (TT. Vol. X, 1518). And as noted by the testimony of Dr. Andrea Minyard, the medical examiner who performed the autopsy on Everett, her death was caused by the

[2] Moreover, Hernandez's DNA was found underneath Ruth Everett's fingernails (TT. Vol. X, 1467-70).

"combined effects of blunt and sharp force injuries of the neck" (TT. Vol. IX, 1380).

Thus, the record clearly evidenced that Hernandez's affirmative conduct was solely responsible for Everett's death; and, this Court has long recognized that a harsher sentence may be imposed on the more culpable codefendant; particularly when the defendant challenging his sentence was actually responsible for causing the victim's death. *See Rimmer v. State*, 825 So. 304, 332 (Fla. 2002) (observing "that the fact that [Rimmer's] co-felon received life imprisonment does not render [Rimmer's] sentence disproportionate because the facts in this case clearly reveal that [Rimmer] is the more culpable defendant"); *Sliney v. State*, 699 So. 2d 662, 672 (Fla. 1997) ("we agree with the trial court that the codefendant's life sentence does not require a different result because Sliney was more culpable than his codefendant"); *Cook v. State*, 581 So. 2d 141, 143 (Fla. 1991) ("[w]e also reject Cook's claim concerning his accomplices sentences since their level of participation was clearly less than Cook's . . . [i]t was Cook not his accomplices who killed the [victims]"); *Marek v. State*, 492 So. 2d 1055, 1058 (Fla. 1986) ("we have approved the imposition of a death sentence when the circumstances indicate that the defendant was the dominating force behind the homicide, even though the defendant's accomplice received a life sentence for participation in the same crime").

Accordingly, because Hernandez actually admitted to breaking Everett's neck and slashing her throat – injuries which the medical examiner said caused Everett's death – he may not argue that he was improperly sentenced to death. This cause of error should be rejected.

III. THE TRIAL COURT DID NOT COMMIT MANIFEST ERROR WHEN IT DENIED HERNANDEZ'S CAUSE CHALLENGE TO JUROR MARTINA LUNDQUIST; THE JUROR CLEARLY STATED THAT SHE WOULD FOLLOW THE LAW; SHE STATED THAT NEITHER HER FAMILY'S PROBLEMS WITH SUBSTANCE ABUSE NOR HER PREVIOUS INTERACTIONS WITH LAW ENFORCEMENT WOULD AFFECT HER ABILITY TO BE IMPARTIAL; THEREFORE, THE JUROR SHOULD NOT HAVE BEEN STRUCK FOR CAUSE AND THERE IS NO BASIS TO ARGUE THAT THE TRIAL COURT ERRED

Hernandez opines that a member of his jury panel, provided answers during *voir dire* questioning which indicated that she should have been struck for cause. Hernandez believes that the juror, Martina Lundquist, should never have been permitted to sit in judgment of him. Hernandez premises this argument on the fact that, among other reasons, she had family members affected by substance abuse; and, because Lundquist routinely had professional contacts with members of law enforcement – including potential witnesses at Hernandez's trial. However, the record evidences that Lundquist assured the trial court (and the respective parties) that she would be an impartial juror notwithstanding her: 1) familial issues, 2) daily professional contacts with law enforcement, or 3) her personal relationship with a member of law enforcement.

Lundquist, a Probation Office Supervisor with the Department of Juvenile Justice (DJJ), was asked several probing questions

regarding her ability to be impartial. During *voir dire*, Lundquist stated that her first marriage had been negatively impacted by drug abuse (TT. Vol. VI, 902). Additionally, Lundquist's son, two of her cousins, and various other family members had issues with substance abuse (TT. Vol. VI, 902-04). However, Lundquist affirmatively stated that her family members' issues with drugs and alcohol would in no way impact her ability to be an impartial juror in Hernandez's case, and that she would base her verdict solely on the evidence presented (TT. Vol. VI, 904).

Moreover, Lundquist was asked about the fact that as a DJJ employee, she often had to interact with members of law enforcement; Lundquist stated that notwithstanding her employment with the DJJ, she would listen to the evidence and follow the trial court's instructions on the law (TT Vol. VI, 905). Lundquist stated that she would follow the law with regard to the death penalty, and she affirmed that she would require the State to meet its burden (TT Vol. VI, 907-08).

Hernandez's counsel asked Lundquist a series of questions regarding whether she was acquainted with Detective Jeff Shuler of the Santa Rosa Sheriff's Office. Shuler was the individual to whom Hernandez confessed, and Shuler was a prospective State witness. Lundquist stated that she dealt with Shuler approximately five times over the course of ten years, but that she would not give Shuler's testimony – or any other member of law enforcement – more

credence than other witnesses (TT Vol. VI, 910-18). Additionally, Lundquist said that, on a professional level, she knew between 55 and 60 members of the Santa Rosa Sheriff's Department; and, she knew three members on a personal level (TT Vol. VI, 918).

Further, Lundquist provided that she would fairly consider mitigating evidence that might be presented during the penalty phase (TT Vol. VI, 925-26). She also stated that imposition of the death penalty necessarily depends on the individual circumstances of the particular case (TT Vol. VI, 927).

Thereafter, Hernandez sought to strike Lundquist for cause, based in large measure on her personal and professional relationships with law enforcement (TT. Vol. VI, 929-30). The cause challenge was denied by the trial court; Hernandez moved for an additional peremptory challenge; and the peremptory request was also denied by the trial court (TT Vol. VI, 932). Hernandez now asserts that the trial court erroneously denied his cause challenge. As will be shown, Hernandez's claim is without merit.

An instructive case, *Busby v. State*, 894 So. 2d 88 (Fla. 2004), held that a trial court's denial of a cause challenge could constitute reversible error. In *Busby*, this Court considered whether a trial court's erroneous failure to strike a juror for cause, which thus required the defense to exercise a peremptory challenge to strike the juror, constituted reversible error. Busby had been charged with first degree murder for killing a

fellow inmate. He was found guilty and was sentenced to death. Though he raised several issues on appeal, the only issue confronted by this Court was whether the erroneous denial of Busby's cause challenge constituted reversible error. During *voir dire* it was learned that a prospective juror, Lapan, had previously served as a correctional officer for death row inmates at Florida State Prison. Under questioning, the prospective juror seemingly gave equivocal responses regarding whether he could be an impartial juror; the defense sought to remove the juror for cause on two separate occasions and these motions were denied. *See id.* at 95. This Court found that the denial of the cause challenges were erroneous, and proceeded to consider whether the trial court's rulings constituted reversible error.

This Court recognized that it is reversible error under Florida law, if a party is forced to expend a peremptory challenge to remedy a trial court's erroneous denial of a cause challenge; and if, as a result, the "defendant exhausts all remaining peremptory challenges and can show that a objectionable juror has served on the jury." *Id.* at 96-97 (citing *Trotter v. State*, 576 So. 2d 691 (Fla. 1991)). As this Court further explained, in accordance with *Trotter*, the allegedly objectionable juror must have been "'an individual who actually sat on the jury and whom the defendant either challenged for cause or attempted to challenge peremptorily or otherwise objected to after his peremptory

challenges had been exhausted.'" *Id.* at 97 (quoting *Trotter*, 576 So. 2d at 693).

Busby identified two jurors whom he would have exercised peremptory challenges on -- had he any challenges remaining. Because one of these jurors actually served on the final jury, this Court determined that Busby had satisfied the criteria articulated by *Trotter*. Id. at 97. This Court further expressed that its underlying concern is a scenario wherein "a defendant desires to peremptorily challenge a juror, but is without remaining challenges due to the need to correct the trial court's errors[.]" *Id.* at 103. Accordingly, Busby's conviction was reversed, and remanded for a new trial.

However, the circumstances presented in Busby are not present in the instant case. First, it should be noted that Lundquist never provided equivocal responses during *voir dire*. She consistently stated that she would follow the law, would not give more credence to law enforcement, and would abide by the trial court's directions.

This Court reviews the denial of a cause challenge for an abuse of discretion. *See Singleton v. State*, 783 So. 2d 970, 973 (Fla. 2001). And while a witness may certainly be dismissed if there is reasonable doubt as to his ability to be impartial, *see, e.g., Price v. State,* 538 So. 2d 486, 489 (Fla. 1989) ("A juror is not impartial when one side must overcome a preconceived opinion in

order to prevail"); this Court has also recognized that "[t]he test for juror competency is whether the juror can lay aside any bias or prejudice and render a verdict solely on evidence presented and the instructions on the law given by the court." *Smith v. State*, 699 So. 2d 629, 635 (Fla. 1997) (citing *Lusk v. State*, 446 So. 2d 1038, 1041 (Fla. 1984)). This Court accord's deference to a trial judge's determination regarding the competency of a juror, and the court's determination should not be "overturned absent manifest error." *Ault v. State*, 866 So. 2d 674, 684 (Fla. 2003).

Simply because Lundquist worked with law enforcement on a routine basis, this fact, standing alone, did not remotely suggest that she should have been struck for cause. *See, e.g., Kearse v. State,* 770 So. 2d 1119, 1129 (Fla. 2000) (noting that the trial court did not abuse its discretion by refusing to dismiss prospective jurors for cause even though the jurors had "expressed certain biases and prejudices" given that the jurors "also stated that they could set aside their personal views and follow the law in light of the evidence presented"). Instead, this Court must determine whether the juror in question will dutifully abide by the trial court's instructions and weigh all the evidence fairly. *See Singer v. State,* 109 So. 2d 7, 24 (Fla. 1929) (noting that the test to determine whether a juror is impartial is whether the juror can divorce himself from any preconceived biases, opinions, or prejudices "and base his opinion only on the evidence given at

trial").

Lundquist gave unequivocal assurances that she would follow the law. *See Gore v. State*, 964 So. 2d 1257, 1275 (Fla. 2007) (noting that a lawyer could not be held to be ineffective for a failing to challenge a particular juror given that the juror stated that he would be impartial and would follow the law); *Pietri v. State*, 885 So. 245, 257-58 (Fla. 2004) (denying ineffective assistance of counsel claim predicated on failure to challenge a juror for cause; this Court observed that "after receiving information concerning the controlling law, [the juror] clearly expressed that he would be a proper juror . . . clearly indicat[ing] that he would follow the law and weigh aggravating and mitigating factors").

Accordingly, the trial court's failure to strike Lundquist for cause was not manifest error, and this claim should be rejected.

IV. COMPETENT SUBSTANTIAL EVIDENCE SUPPORTED THE TRIAL COURT'S FINDING THAT THE AVOID ARREST AGGRAVATOR WAS APPLICABLE TO HERNANDEZ; TESTIMONY WAS PRESENTED DURING THE COURSE OF THE TRIAL INDICATING THAT HERNANDEZ MURDERED RUTH EVERETT BECAUSE SHE WAS ABLE TO IDENTIFY HERNANDEZ AS THE PERPETRATOR OF THE CRIME

Hernandez argues that the trial court erred by finding the avoid arrest aggravator applicable to him. "In reviewing an aggravating factor challenged on appeal, this Court's task is to 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."

Douglas v. State, 878 So. 2d 1246, 1260-61 (Fla. 2004) (citations and internal quotation marks omitted). The trial court's finding with regard to the applicability of the aggravator was premised on the testimony of Daveine Hartman. *See, e.g., Swafford v. State*, 533 So. 2d 270, 276 (Fla. 1988) (observing that "[e]ven without direct evidence of the defendant's thought processes, the arrest avoidance factor can be supported by circumstantial evidence through inference from the facts shown"). During the trial, the prosecutor, Robert Elmore, asked Hartman about a conversation she had with Hernandez while he was incarcerated:

> **ELMORE:** And, now, did [Hernandez] say to you – let me ask you this, did you ask [Hernandez] why he killed [Ruth Everett] – why he cut her throat with a knife?
>
> **HARTMAN:** Because she'd seen their faces.
>
> **ELMORE:** Were those his words?
>
> **HARTMAN:** Yes.
>
> **ELMORE:** Because she'd seen our faces?
>
> **HARTMAN:** Yeah, their faces.

(TT. Vol. VIII, 1231).

As it pertains to the applicability of the avoid arrest aggravator:

> this Court has stated that it will look at whether the victims knew and could identify their killer, but that this fact alone is insufficient to prove the aggravator beyond a reasonable doubt. See *Farina v. State,* 801 So. 2d 44, 54 (Fla. 2001). We have held that the following evidence is also pertinent when reviewing this

> aggravator: "[W]hether the defendant used gloves, wore a mask, *or made any incriminating statements about witness elimination;* whether the victims offered resistance; and whether the victims were confined or were in a position to pose a threat to the defendant." Id.

Nelson v. State, 850 So. 2d 514, 526 (Fla. 2003) (emphasis added).

The trial court's determination was not based simply on the State's theory as to why Everett was murdered. *Cf. Buzia v. State*, 926 So. 2d 1203, 1209 (Fla. 2006) (observing that "mere speculation on the part of the state that witness elimination was the dominant motive behind the murder will not support the avoid arrest aggravator"). Rather, the record evidences that Hernandez made incriminating statements to Hartman suggesting that he killed Everett because she was able to identify him. The trial court's sentencing order specifically referenced Hartman's testimony as the basis for finding the avoid arrest aggravator applicable (R3 460-61); and, given the trial court's superior vantage point (as it pertained to assessing Hartman's credibility on the witness stand), deference should be accorded to the trial court's findings. *See, e.g., Reynolds v. State*, 934 So. 2d 1128, 1158 (Fla. 2006) (crediting the testimony of a witness to whom Reynolds' confessed; the witness' testimony supported the applicability of the avoid arrest aggravator; and, as this Court observed, "[t]he trial court [was] in the best position to assess the credibility of a witness, and we are mindful to accord the appropriate deference to the trial court's assessment of this witness' testimony in our review of

whether competent, substantial evidence exists to support this statutory aggravator").

Moreover, even if the avoid arrest aggravator was erroneously found; given the strong aggravators which are unquestionably present – including the Heinous, Atrocious, or Cruel (HAC) and prior violent felony aggravators – any error regarding the alleged inapplicability of the avoid arrest aggravator is harmless. *See, e.g., Hall v. State*, 614 So. 2d 473, 477 n. 2 (Fla. 1993).

Accordingly, this claim of error should be rejected.

V. THE TRIAL COURT APPROPRIATELY FOUND THAT THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATOR WAS APPLICABLE TO HERNANDEZ'S MURDER OF RUTH EVERETT

Hernandez argues that the Heinous, Atrocious, or Cruel (HAC)[3] Aggravator should not be found applicable to his crime. Hernandez contends that the evidence presented during the course of his trial does not necessarily support the applicability of the HAC aggravator because the record is inconclusive as to whether Everett was cognizant of her impending death. The State respectfully disagrees with the overview presented by Hernandez.

This Court has plainly recognized, the HAC aggravator is

[3]The terms incorporating the HAC aggravator, Heinous, Atrocious,or Cruel, are terms of art, wherein "heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others." *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973).

amongst "'the most serious aggravators set out in the statutory sentencing scheme.'" *Dessaure v. State,* 891 So. 2d 455, 473 (Fla. 2004) (quoting *Larkins v. State,* 739 So. 2d 90, 95 (Fla. 1999)). And as is well understood, this Court accords deference to the trial court's findings regarding the applicability of an aggravator – provided the findings are supported by the record. *See., e.g., Reynolds v. State,* 934 So. 2d 1128, 1156 (Fla. 2006). This Court does not simply compare the aggregate total of aggravators and mitigators to determine the appropriateness of a death sentence. *See Terry v. State*, 668 So. 2d 954, 965 (Fla. 1996); accord *Lynch v. State*, 841 So. 2d 362, 377 (Fla. 2003). To the contrary, this Court assesses whether the trial court correctly applied the relevant law governing the aggravator, and, whether the trial court's findings as to the particular aggravator were supported by competent substantial evidence. *See Alston v. State*, 723 So. 2d 148, 160 (Fla. 1998).

This Court has stated the HAC aggravator is applicable to those murders where the victim is tortured, *i.e.*, wherein the perpetrator's actions were so wanton, remorseless, and egregious as to exemplify a seeming "desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." *Guzman v. State*, 721 So. 2d 1155, 1159 (Fla. 1998)(citation omitted). Moreover, this Court has also recognized that in order to apply the HAC aggravator, the victim must be cognizant of her

imminent death. *Way v. State*, 760 So. 2d 903, 919 (Fla. 2000); see also *Swafford v. State*, 533 So. 2d 270, 277 (Fla. 1988) (observing that the applicability of the HAC aggravator must be assessed from the victim's vantage point "in accordance with a common-sense inference from the circumstances"). Plainly stated, "the HAC aggravator focuses on the means and manner in which death is inflicted and the immediate circumstances surrounding the death." *Brown v. State*, 721 So. 2d 274, 277 (Fla. 1998).

Hernandez argues that the HAC aggravator is not applicable. However, given both the testimony of medical examiner, Andrea Minyard, and the substance of Hernandez's confession to law enforcement, the HAC aggravator was appropriately found in this case.

Recall, Minyard believed that Everett could see and hear what was happening to her after her neck was broken; moreover, Minyard opined that she believed Everett was still alive when Hernandez slashed her throat (TT Vol. IX, 1391). Moreover, Hernandez told Detective Jeff Shuler that, in increasingly violent order, first, he attempted to choke Everett, then he broke her neck; and thereafter, he slashed her throat (TT. Vol. X, 1518). In addition, Hernandez's wife, Stephanie, provided that Hernandez stated that he slashed Everett's throat because he wanted to make sure she was dead (Vol XV, 2059).

The testimony of Minyard, and the confession of Hernandez –

as to how Everett died – support the applicability of the HAC aggravator. *See, e.g., Frances v. State*, 970 So. 2d 806, 816 (Fla. 2007) (finding that based on Frances' confession, and the medical examiner's testimony, competent substantial evidence supported the applicability of HAC aggravator). Additionally, irrespective of whether Everett was felled by having her neck broken, or by having her throat slashed – the HAC aggravator was warranted, given the brutal nature of Everett's murder. *See, e.g., Everett v. State*, 893 So. 2d 1278, 1288 (Fla. 2004) (upholding HAC aggravator based on underlying grievous facts of murder which included the fact that the defendant "forcefully twist[ed]" the victim's neck until it was broken); *Cole v. State*, 701 So. 2d 845, 852-53 (Fla. 1997) (upholding HAC aggravator under circumstances where the cause of death were blows to the head and a slashed throat, which ultimately led to extensive blood loss).

Accordingly, the HAC aggravator should be upheld in this case.

VI. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING THE STATE'S MENTAL HEALTH EXPERT TO REMAIN IN THE COURTROOM DURING HERNANDEZ'S PRESENTATION OF MITIGATION EVIDENCE DURING THE PENALTY PHASE

Hernandez asserts that it was improper to allow the State's mental health expert, Dr. Harry McClaren, to sit through the entire penalty phase. Hernandez contends that by permitting McClaren to remain in the courtroom during the entirety of the penalty phase hearing, McClaren's subsequent testimony may have been improperly influenced by the testimony he heard. Hernandez principally

believes that the trial court erred and McClaren should not have been permitted to remain in the courtroom. As such, Hernandez contends the trial court committed reversible error.

Hernandez's argument is entirely without merit. The record demonstrates that, following a bench conference on the matter, the trial court exercised its discretion and permitted Dr. McClaren to remain in the courtroom during the penalty phase (TT. Vol. XV, 2035-36), notwithstanding Hernandez's objection (TT. Vol. XV, 2036).

As such, Hernandez believes he was prejudiced because McClaren was permitted to remain in the courtroom to hear testimony from a litany of witnesses. Among the witness who testified were Deputies Matthew Bartley and John Wade Jarvis, detention officers within the Santa Rosa Jail, who testified as to the extent of Hernandez's violent nature while he was incarcerated. The deputies noted Hernandez violently attacked both detention officers and his codefendant Christopher Arnold while he was incarcerated (TT Vol. XV, 2037-48, 2068-85). Hernandez's mother, Cheryl Ann Walker, testified via a videotaped deposition; Walker testified as to the highly dysfunctional nature of Hernandez's upbringing; and, she described how he was exposed to drugs and violence from an early age (TT Vol. XVI, 2151-2219).

Dr. John Bingham, a mental health counselor who evaluated Hernandez testified as well; Bingham spoke with several members of

Hernandez's family who discussed the dysfunctional and abusive milieu he was brought up in; and, Bingham discussed, among other matters, the debilitating effects of Hernandez's crack cocaine addiction (TT Vol. XVI, 2224-2304). Moreover, Dr. Brett Wayne Turner, a neuropsychologist who evaluated Hernandez testified; Turner noted that Hernandez had a history of substance abuse and depression; Turner noted that Hernandez self-medicated with cocaine; and, that Hernandez was likely suffering from extreme emotional disturbance at the time of the murder (TT Vol. XVI, 2311-74).

Thus, given the foregoing testimony presented during the penalty phase, it is certainly difficult to say that the trial court abused its discretion by allowing Dr. McClaren to remain in the courtroom. McClaren testified that he interviewed Hernandez, and administered various psychological tests (TT Vol. XVII, 2412). McClaren noted that Hernandez's IQ on the WAIS-III was 89 (TT. Vol XVII,2432); and, McClaren diagnosed Hernandez with: 1) post-traumatic stress disorder, 2) antisocial personality disorder, and 3) borderline personality disorder (TT. Vol XVII, 2446-48).

Hernandez has not identified the harm that occurred by having McClaren present in the courtroom subsequent to his own testimony behalf of the State. *See, e.g., West v. State*, 6 So. 2d 7 (Fla. 1942) (determining that the trial court did not abuse its discretion by allowing several witnesses to remain in the courtroom

preceding these same witnesses subsequent testimony on behalf of the State). In addition, Hernandez has not remotely made a showing that McClaren's testimony was altered via any information he may have gleaned by remaining in the courtroom. *See, e.g., Spencer v. State*, 133 So. 2d 729, 731(Fla. 1961) ("Unless a trial judge can be said to have abused the discretion which is his to exercise in such situations, then his judgment will not be disturbed. The burden is on the complaining party to demonstrate an abuse of discretion with resultant injury.").

Accordingly, because no showing has been made suggesting that the trial court abuse its discretion, nor that Hernandez was harmed, this claim of error should be rejected.

VII. THE TRIAL COURT CORRECTLY DENIED HERNANDEZ'S MOTION TO DISMISS THE INDICTMENT NOTWITHSTANDING THE FACT THAT THE INDICTMENT DID NOT CONTAIN THE AGGRAVATING FACTORS WHICH WOULD SUPPORT IMPOSITION OF THE DEATH PENALTY

Hernandez contends that the trial court erred when it denied his motion to dismiss his indictment – an argument he implicitly bases on – but does not cite – United States Supreme Court precedent. Similarly, he relies on cases which he believes stand for the proposition that Florida's capital litigation jurisprudence should mandate that the aggravating factors present in a capital case, must be alleged in the indictment, and must be proven beyond a reasonable doubt. *See, e.g., Ring v. Arizona*, 536 U.S. 584 (2002)(holding that a capital defendant must have any fact which

increases his sentence beyond the statutory maximum proven before a jury beyond a reasonable doubt). Additionally, Hernandez asks this Court to recede from its opinion in *Coday v. State*, 946 So. 988, 1006 (Fla. 2006) (observing, *inter alia*, that "Coday claims that the failure to allege the aggravating circumstances in the indictment renders his sentence unconstitutional under *Ring*. This Court has rejected similar claims that *Ring* requires aggravating circumstances be alleged in the indictment.") (collecting cases).

Hernandez's contention is without merit, given that the foregoing argument – that aggravators should be included in the indictment – has long been rejected by this Court. *See, e.g., Bowles v. State*, 2008 Fla. LEXIS 214, at *24-25 n. 5 (Fla. February 14, 2008) (noting that the federal constitution does not require that aggravating circumstances be proven in the indictment); *Elledge v. State*, 911 So. 2d 57,80 (Fla. 2005) ("this Court has rejected constitutional challenges to the State's failure to list aggravating factors in the indictment"); *Brown v. Moore*, 800 So. 2d 223, 225 (Fla. 2001) (rejecting argument that the aggravating factors must be alleged in the indictment); *Mann v. Moore*, 794 So. 2d 595 (Fla. 2001) (noting that argument that aggravators must be alleged in the indictment are "routinely" rejected); *see also Sireci v. State*, 399 So. 2d 964 (Fla. 1981).

Accordingly, this claim of error should be rejected.

VIII. THE TRIAL COURT DID NOT ERR BY PERMITTING THE JURY TO HEAR A JURY INSTRUCTION REGARDING VICTIM IMPACT EVIDENCE; THE INSTRUCTION CHALLENGED BY HERNANDEZ HAS LONG BEEN UPHELD BY THE FLORIDA SUPREME COURT

Fla. Stat. §921.141(7) provides that once the prosecution provides evidentiary support for a statutory aggravator:

> [T]he prosecution may [then] introduce, and subsequently argue, victim impact evidence to the jury. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual, human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not permitted as part of victim impact evidence.

Notwithstanding §921.141(7), Hernandez contends that the following jury instruction was improper:

> Ladies and gentlemen, you've heard evidence that concerns the uniqueness of Ruth Winslow Everett as an individual human being and the result and loss to the community's members by Ruth Winslow Everett's death. Family members are unique to each other by reason of their relationship and role each has in the family. A loss to the family is a loss to both the community of the family and to the larger community outside of the family.
> While such evidence is not to be considered in establishing either an aggravating circumstance or a mitigating circumstance, you may still consider it evidence in this case.

(TT. Vol XV, 2034-35).

The victim impact instruction was objected to prior to being read to the jury (TT. Vol XIV, 1863-64); consequently, this issue is not procedurally barred. *Cf. Nelson v. State*, 850 So. 2d 514, 525 (Fla. 2003) (recognizing that failing to object to a jury instruction will render a subsequent appellate challenge to the

instruction procedurally barred). However, the instruction, as read to the jury, was entirely consistent with this Court's prior rulings on permissible victim impact instructions. *See, e.g., Rimmer v. State,* 825 So. 2d at 330-31 (upholding the identical victim impact jury instruction that was read in Hernandez's case); *Farina v. State*, 801 So. 2d 44, 54 (Fla. 2001) ("Finally, we find no instructional error relating to the admission of victim impact evidence. The jury was instructed that the evidence could not be considered as an aggravating circumstance, but only should be considered 'insofar as it demonstrates [the victim's] uniqueness as an individual human being and the result of the loss to the community and its members by her death.' This instruction is entirely consistent with §921.141(7) and complies with the guidelines that we explained [in our prior precedent]"). In the instant case, the trial court took pains to insure that the victim impact instruction read to the jury was verbatim to that approved in *Rimmer, supra* and other similar cases.

Accordingly, this claim of error should be rejected.

CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm the trial court's imposition of a sentence of death against Michael Hernandez.

Respectfully submitted,
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_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to David A. Davis, Leon County Courthouse, 301 S. Monroe St., Suite 401, Tallahassee, FL 32301 this 7th day of April, 2008.

_____
Ronald A. Lathan, Jr.
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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New font 12 point.

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