IN THE SUPREME COURT OF FLORIDA

MICHAEL ALBERT 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

INITIAL BRIEF OF APPELLANT

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I. PRELIMINARY STATEMENT

MICHAEL HERNANDEZ, was the defendant in the trial court and will be referred to in this brief as either "appellant," "defendant," or by his proper name.

References to the Record on Appeal will be by the volume number in Arabic numbers, the letter "R," followed by the appropriate page number, all in parentheses. Eg. (3 R 56) References to the trial transcript will be by the volume number in Arabic numbers, the letter "T," followed by the appropriate page number, all in parentheses. Eg. (2 T 34). Similarly, references to the Supplemental Record will be by the letters "SR" followed by the appropriate page number, all in parentheses. Eg. (SR 1142)

II. STATEMENT OF THE CASE

An Indictment filed in the Circuit Court for Santa Rosa County on December 13, 2004, charged Michael Hernandez with one count of first-degree murder and one count of robbery with a knife (1 R 10-11).[1] Two weeks before trial, the State filed an information charging the defendant with one count of burglary with an assault or battery (1 R 194), which arose from the same incident as the homicide and robbery, and which it also moved consolidate with the indictment (8 R 553). Over defense objection (8 R 535), the court granted the State's request (8 R 538). The State also filed a notice that it intended to seek the death penalty if Hernandez was convicted of first-degree murder (1 R 20).

The defendant or the State filed the following motions relevant to this appeal:

a. Motion for statement of particulars as to the aggravating factors and theory of prosecution (1 R 86). Denied (1 R 147).

b. Motion in limine regarding victim impact evidence (1 R 93). Denied (1 R 147).

c. Motion to dismiss the indictment (1 R 101). Denied (1 R 147).

d. Motion to suppress statements Hernandez made to the police (1 R 154). Denied (1 R 169).

e. Motion to require the jury to make a unanimous finding of death (2 R 248). Denied (2 R 264).

[1] Christopher Arnold was charged as a co-defendant with first degree murder (17 R 2376). He eventually pled guilty to it and was sentenced to life in prison without the possibility of parole (17 R 2376-78). He entered this plea on the condition that he would testify at Hernandez's trial, but after being sentenced to life he refused to do so (15 T 1959).

At some point, Hernandez pled guilty to the charged offenses, and the court accepted the plea (10 R 727-50). He later asked the court to let him withdraw his plea (2 R 229), which the court permitted (2 R 234).

Immediately before trial, the State orally asked the court to shackle Hernandez (SR 1118), which Hernandez objected to (SR 1119). The court, after hearing evidence and argument on the need for restraints, and the least necessary restraints required, ordered Hernandez shackled during trial (SR 1185). It also directed the court administrator take measures it outlined to reduce the likelihood that the jury would notice the defendant in chains (SR 1185-87).

The defendant proceeded to trial before Judge Ronald Swanson, and the jury, after hearing the evidence, law, and argument, found him guilty as charged on all the counts (2 R 323-25).

At the subsequent penalty phase, and after he and the State had presented their evidence and arguments, the jury, by a vote of 11-1, recommended the court sentenced him to death (3 R 419).

The court, following that verdict, did so (3 R 459-79). Justifying that sentence, it found in aggravation:

A. Hernandez had a previous conviction for a violent felony
B. The murder was committed during the course of a robbery.
C. He committed the murder to avoid lawful arrest.
D. The murder was especially heinous, atrocious, or cruel.

(3 R 459-64).[2]

In mitigation, it found:

A. Statutory mitigating circumstances.

1. Defendant has no significant history of prior criminal activity. Some weight.

B. Nonstatutory mitigating circumstances.

1. He lived in dysfunctional, neglectful, and impoverished childhood circumstances. Some weight.

2. He had essentially no family home with anything normal in it; he did not have any regular schooling; his parents were separated and he was bounced from parent to parent, to abusive foster home, and to abandonment. Substantial weight.

3. His parents were outlaws, motorcycle gang members, hard drug dealers and abusers, who were under threat of death from the motorcycle gang. Substantial weight.

4. His parents introduced Defendant to narcotics at an early age. Substantial weight.

5. His mother had many live-in paramours, who were physically, mentally and emotionally abusive to her and to Defendant. Some weight.

6. Defendant witnessed physical abuse of mother on many occasions. Some weight.

7. Defendant was abandoned by mother on more than several occasions, and placed in foster care, where he was further mentally, physically, and emotionally abused. Substantial weight.

8. Defendant's father was overdosed by drugs at the hands of his girlfriend, while Defendant was living with them. Some weight.

9. The Defendant was mentally, physically, emotionally, and sexually abused in foster care over a four year period as a pre-teen/early teen. Some weight.

[2] The court also considered, but rejected the aggravator, "The murder victim was particularly vulnerable due to her advanced age or disability." (3 R 464)

10. The Defendant ran away because of the abuse and because his mother would not come to his aid; his mother also told him goodbye, and that she was going to commit suicide. Some weight.

11. The Defendant was dysfunctional by this time, and began to live on the streets and continue drug usage. Some weight.

12. The Defendant lived with his ½ brother for a period of time, but was subjected to continued drug exposure and use at the hands of his ½ brother's father, Richard Hartman. Some weight.

13. The Defendant attended learning disabled classes in school when he attended. Some weight.

14. The Defendant was able to marry and supported his family for two years. Some weight.

15. The Defendant has been characterized as a loving person, loving father and husband. Some weight.

16. The Defendant has a life-long addiction to controlled substances due to his involuntary exposure to them at an early age. Some weight.

17. The Defendant was enticed into binging on cocaine at the time of the instant offense by the co-Defendant. No weight.

18. The Defendant had been drinking the night before and was still under the influence of alcohol on the morning of the offense. Some weight.

19. The offense was unplanned, and was initiated by the Defendant.

20. The resulting homicide was a spontaneous, unplanned act. No weight.

21. The co-Defendant actually took the property of the deceased in hopes of finding money or means to get money to purchase cocaine. No weight.

22. When confronted, the Defendant accepted responsibility for taking part in the offense. Substantial weight.

23. The Defendant has continuously shown remorse for his conduct. Slight weight.

24. The Defendant has cooperated with the police to resolve the offense. Some weight.

25. The Defendant has two documented suicide attempts. Some weight.

26. The co-Defendant was offered a life sentence and was equally culpable and actually initiated the entire episode. No weight.

27. The Defendant is not worthy of the death penalty for his participation in this crime. No weight.

28. Defendant has other mental and cognitive disorders that do not qualify as statutory mitigating circumstances. Some weight.

29. Defendant's family members have given sworn and unsworn testimony and provided letters attesting to Defendant's good character. Some weight.

(3 R 463-79)

The court sentenced Hernandez to life in prison for the robbery and burglary convictions, to be served consecutively to the murder sentence (3 R 485).

This appeal follows.

III. STATEMENT OF THE FACTS

1. The murder of Ruth Everette.

In the fall of 2004, Michael Hernandez lived in Tennessee with his wife and two children, ages 2 years and 3 months (8 T 1258). Because hurricanes had hit the Gulf Coast, and seeing an opportunity for work, he and his wife came to Florida where he found a job (8 T 1199-1200), and during October he worked with Richard Hartman, one of his mother's former husbands, and another man, Shawn Arnold (8 T 1194, 1199-1200, 1239).

In coming to this state, Hernandez and his wife had left their children in Tennessee with a friend, but by November 18 they had arranged for a friend to bring them here. The day or night before that, the defendant decided to get drunk "for the last time" because "he didn't want to do wrong" once his family was reunited (17 T 2434). So, he "got a big thing of Jack Daniels and filled up a 32 ounce cup and drank it all night long." (17 T 2434). He also only got about three or four hours sleep (17 T 2434). The next morning, Shawn Arnold showed up at his house to take him to work. Rather than doing that, however, Arnold, a cocaine addict (8 T 1236), suggested they get some cocaine. Hernandez, who had extensive experience with the drug before coming to Florida, agreed (10 T 1546). So, using Arnold's rent money they bought about $300 worth of crack and quickly went through it (8 T 1189).

Deciding they wanted more, Arnold said they should go to where his supplier, David Everette, lived (7 T 1108, 8 T 1236)[3]. About 9 a.m. on the morning of November 19 they drove to his house, looking to get some money Arnold claimed Everette might have (10 T 1530).

When they arrived, 67-year-old Ruth Everette, David Everette's mother, came to the door and said her son was not at home (9 T 1376, 10 T 1516). Arnold ordered Hernandez to "grab her," and he did, taking her inside the house (10 T 1516). Arnold followed them, and told her they were not going to hurt her (10 T 1516). He then explained why they had come: Her son owed him $300, and he had "put a gun to his head the other night" over the money (10 T 1517). Sensing the implied threat to herself, she said she only had about $20 (10 T 1525). Arnold then asked to use the bathroom, and when he came back, he had a pillow. He put it over her head and began to suffocate her.[4] He told Hernandez to hold her hands, which he did (10 T 1518). After a minute or so, she stopped moving, Hernandez grabbed her head, and her neck cracked after pushing Arnold away (8 T 1235, 10 T 1518). He then gave the defendant a pocket knife he had, and he cut her throat

[3] At trial, Everette admitted that he and Arnold had smoked cocaine outside his house on several occasions (7 T 1107).

[4] According Mrs. Hartman, Arnold's mother in law, Arnold told her that after he put the pillow over Ms. Everette's face, Hernandez said she would not die. Arnold took the pillow off and tried to revive her with a baggie to help her breath (8 T 1228). The defendant said he was "a pussy. He couldn't do it." (8 T 1229) Then, according to Mrs. Hartman, Hernandez said the woman was scratching him, would not die, so he snapped her neck (8 T 1230).

from one side to the other because she had seen their faces (8 T 1231, 9 T 1376, 10 T 1518).

Arnold ransacked Ms. Everette's purse, finding only $40 in cash, and her debit card (8 T 1231, 10 T 1534-35). The two men then drove around town, and, using the card at various cash machines, they took about $300 in cash (10 T 1539-40).[5] They spent it all on crack cocaine (10 T 1540).

Arnold dropped Hernandez at the latter's home about 4 p.m., and he went inside and waited for his children, which he and wife picked up sometime that night (8 T 1260).

By the next morning, Shawn Arnold, who had been crying "hysterically" (8 T 1202), told his wife what he had done. Shortly, Rick Hartman and his wife went to where Hernandez lived and began to drop hints about what had happened (10 T 1548). The defendant confessed. (10 T 1548). He also told his wife they were leaving, but Mrs. Hartman hit him repeatedly and "told him he wasn't going to leave and leave Shawn and Michelle to go through this." (8 T 1208). She said she was returning to where Arnold lived and then they were going to the police (8 T 1210). Within a short while Hernandez also went there (8 T 1210). They talked with their families about what they had done, during which Hernandez said he would kill Arnold and that Ms. Everette was old and it was "her time to go." (8 T

[5] While they said they took $300, it was actually $500 (8 T 1323).

1175, 1222). The two men considered fleeing, but decided, instead, to turn themselves into the police (10 T 1550-51). "You know, everybody's going to think about leaving. . . There ain't nothing else I can do. I mean, I—I'm guilty. I need to be punished, man. I thought about this all day yesterday. It hurt." (10 T 1551). Hernandez, with his wife and children going with him, drove to the Milton Police Department where he confessed to killing Ruth Everette. Arnold called the police, and they came to his home where he likewise admitted to participating in her murder (8 T 1183).[6]

Ruth Everette died as a result of the broken neck and the 4 ½ inch cut to her neck, of which either injury could have been fatal (9 T 1377-78). She also had several bruises on her face, arms, and thigh (9 T 1375). In addition, the medical examiner saw evidence of a blunt force injury to her face, which was indicative of smothering (9 T 1422). She had no injuries to her brain or other internal organs (9 T 1376-77).[7]

Shawn Arnold pled guilty to the first-degree murder of Ruth Everette and was sentenced to life in prison without the possibility of probation (17 T 2378).

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[6] The knife and Ms. Everette's purse were recovered from a dumpster near where Arnold lived. Rick Hartman had thrown them there (8 T 1224).

[7] Ms. Arnold, 67, was frailer than would have been expected because she had "some other natural disease processes going on." Specifically, she suffered from emphysema, which meant that she had a "problem getting oxygenated blood throughout her whole body." (9 T 1379)

About a year after his arrest, Hernandez assaulted a jailer with the lid from a toilet. He was convicted of aggravated battery on a law enforcement officer (15 T 2079-80). He also attacked Shawn Arnold while they were in the jail awaiting trial. For that he was convicted of simple battery on a jail detainee (15 T 2052, State's Exhibit 21).

2. Who is Michael Hernandez?

In November 2004, Michael Hernandez was 22 or 23 years old (15 T 2101, 16 T 2159). He was the third child of Cheryl Ann Walker. She married Richard Hartman in the early 1970s (16 T 2153-54), and while the marriage ostensibly lasted 8 or 9 years, they split after about two years. While together they used drugs, especially methamphetamines (16 T 2156).

Being with Hartman meant that she ran with biker gangs, and after their divorce she met Michael Hernandez Sr, a biker (15 T 2157-59). They stayed with their gang for two years during which time their son, Michael Hernandez, Jr, was born. After his birth, his father and mother went into hiding from the bikers because he had fallen out of favor with them, and they had refused to let him and his wife just leave (15 T 2159). Even though the couple were on the run they continued to do "a lot of drinking and drugs," (16 T 2159) and they wandered around the United States in a bread truck until they settled in Arkansas for a couple

of years, and the senior Hernandez got a job (16 T 2160). Nonetheless his wife left him when he went back to "his wild women and drugs." (16 T 2163).

Eventually they split up but both drifted to California where they traded the three- or four-year-old Michael back and forth, continuing all the while to drink heavily and sell drugs, notably "crystal meth," cocaine, and marijuana (16 T 2160 2166-67). Eventually, his mother gave Michael to the Esterbrooks, friends of Hernandez senior, who were also using and selling drugs (16 T 2171).[8] During the two years he stayed with them, they, or at least Mr. Esterbrook, beat the young boy daily (16 T 2202). He also sexually abused the child (15 T 2124).

In time his mother moved in with a Michael Murphy, who came from a wealthy family. They began to talk about marriage, and Cheryl soon decided she wanted her son to live with her again, and when he was about 8 years old, he moved back with her (16 T 2171). The marriage, however, lasted only about two years because like all the other men in her life, Michael Murphy used drugs, and indeed "was an abuser, both of drugs and women." (16 T 2173) As to the violence, Richard Hartman, Hernandez' older brother, said, "It was mainly just hitting, and choking," (15 T 2111) and, indeed, at one point Murphy was jailed for putting a gun in Cheryl's mouth (16 T 2175). "Murphy was a crazy man. He was into every

[8] Most of this chronology came from Cheryl Walker's testimony given by video tape because she was in prison. It is vague, rambling, and hard to follow because, as she admitted, there were "holes" in her memory from her extensive drug use, and she moved "back and forth, back and forth so much." (16 T 2157, 2169).

drug I believe that's ever known to man. And he constantly used." (16 T 2174) And he did so in front of Michael Hernandez (16 T 2174). Faced with the daily beatings of their mother, and the constant use of the drugs, the young boy "pretty much got used to it. . . . We'd try and walk away, act like it never happened." (15 T 2112)

Cheryl, however was scared, and she sent her son to live with his father (16 T 2176). This was in the late 80s or early 90s when Michael was "eight or 10, about 10 maybe." (16 T 2179). Michael Hernandez, Sr, however, still used drugs, and one day, while his son lived with him in a motel room, he overdosed on heroin and cocaine and died (16 T 2179).

Michael Junior then returned to live with his mother, who had married Anthony Walker, the man she would eventually murder (15 T 2120, 16 T 2180). Like the other men in her life, he verbally and physically abused her, and her son witnessed him repeatedly choke, beat, and shake her (16 T 2180-81). "[P]retty much my mother got beat up every day. . . .We would come home from school. We would hear screaming and yelling. So, I would take Michael, and we would just walk through the woods, go to sleep hearing it." (15 T 2109) Walker also beat the boy, and one time he hit him so hard in the stomach that the child had to have an appendectomy (16 T 2198). As before, drugs and alcohol permeated the adults'

relationship (16 T 2181), and as before, they had a bohemian lifestyle living in a "little bus, a converted bus. . . . in a friend's yard." (16 T 2182).

In desperation Cheryl again sent her youngest son to live with the Esterbrooks (16 T 2183), and although only 12 when he went there he would never live with her again (16 T 2182-83).[9] The beatings at the Esterbrooks resumed, and at one point Mr. Esterbrook put a dead cat in a hole, poured lime on it, and told Hernandez that if he reported any of the abuse the same would happen to him (16 T 2183-84).[10]

Eventually, Michael ran away (16 T 2185), and the state soon became involved with determining who would have custody of the child. His mother, who had missed critical court hearings, never did, so his grandparents took care of him (16 T 2188). The next time she saw her son was at her murder trial in 1998 when he testified for her (16 T 2190).

Life with the grandparents apparently was better, which is not saying much, because neither Michael Hernandez nor his brothers had received much parental guidance. Instead, they "were pretty much on our own." (15 T 2115) Hernandez also lived with Richard Hartman, his older brother (15 T 2126). By then he was 16

[9] She did visit him once. As she drove away after the visit, he ran after her, but she did not stop, and instead left him with the Esterbrooks (16 T 2187).

[10] A state child case worker said Hernandez had told her "That he was afraid he kept saying 'Why isn't my mother here. Why isn't my mother here? She said she was going to come. I know she would be here. And the only reason she wouldn't come is if he has done something to her." (16 T 2188)

or 17 years old (15 T 2126). Richard, however, had just gotten off drugs himself, and he was too strict with his younger brother (15 T 2129). So, after about a year of living with Richard, he went to stay with his other brother where it was "like a full time party, almost." (15 T 2129-30) Shawn, the older brother, however, soon kicked Michael out of the house, and he was reduced to living on the streets until Richard took him back in (15 T 2130). Some time after that he met and married his wife, and they soon had two children. They lived in Tennessee for about a year before coming to Florida (15 T 2136-37).

As a toddler, Hernandez had extensive exposure to and experience with marijuana and other drugs. His older brother thought it was funny that Michael smoked it while still in diapers and barely able to walk (15 T 2105). He had also started drinking alcohol when he was nine years old and continued until the murder, consuming about a pint each day (16 T 2251). By the time he came to live with Richard Hartman as a teenager he had smoked marijuana, "did speed," and crack cocaine (15 T 2126). He had experimented with LSD and had used other hallucinogens (17 T 2252). He had tried "a variety of pills" including tranquilizers and xanax (16 T 2252). He had also snorted heroin (17 T 2252).

As to crack, he began using it when he was 10 years old (17 T 2251), and by November 2004 he had developed a dependence on marijuana and cocaine, and would later be diagnosed with a polysubstance abuse disorder. That is, he was

addicted to marijuana and cocaine (16 T 2252). He also suffered from post traumatic stress disorder, and an antisocial personality disorder (17 T 2330-31, 2335).

IV. SUMMARY OF THE ARGUMENT

ISSUE I. Before trial, the State ordered Hernandez shackled at the waist and legs. It also went to some lengths to hide that from the jury. Towards the end of voir dire, however, one prospective juror admitted that he had seen the defendant in shackles. The court dismissed this prospective juror, but it refused to dismiss the jury pool as requested by defense counsel, and it did nothing else to determine if anyone else had seen the defendant in chains. Indeed, it admitted that it never believed the efforts it had taken to hide the shackling from the jury would work.

Seeing the defendant in shackles is inherently and highly prejudicial because it destroys the right to a fair trial and presumption of innocence all defendants in a criminal case have as a matter of right. Of course, only the dismissed prospective juror may have seen the defendant in shackles, but the risk of being wrong in that assumption outweighs the benefit of not having to retry Hernandez. That is, if some of the jurors had seen defendant in shackles they may not only have convicted him of first-degree murder they may also have recommended death for that reason. Here we have a man so dangerous that the judge had ordered him confined by chains. A death sentence, regardless of the mitigation, would have been the only choice in light of the obvious threat he poses to civilized society.

ISSUE II. Under this Court's unique obligation to conduct a proportionality review, Hernandez's death sentence must be reduced to life imprisonment. Using the analysis crafted by the United States Supreme Court in Tison v. Arizona, 481U.S. 137 (1987), Shawn Arnold, Hernandez's co-defendant, was a major player in this murder and had at least a reckless indifference to Ms. Everette's life. As such, he was as culpable as the defendant, yet unlike him, he received a life sentence. Because the purpose of proportionality review is to insure defendants with the same level of blameworthiness receive the same sentence, this Court must reduce the defendant's death sentence to life in prison.

ISSUE III. During voir dire, Hernandez sought to excuse Ms. Martina Lindquist, a probation officer with the Department of Juvenile Justice, from serving on his jury because of her inability to render an impartial verdict, as required by the law of this State. The court refused to do that. By then the defendant had exhausted his peremptory challenges, and when he sought an additional challenge to exercise on Ms. Lindquist, the court refused to give him one. As a result, she served. The court erred in allowing her to sit because a reasonable doubt existed that she could render a fair and impartial verdict and sentencing recommendation. That is, she had had several close, tragic encounters with drug addicts, from her former husband to her children, and it is clear from voir dire that she had little sympathy for them, having divorced her former husband

who was a marijuana addict. Making matters worse, she believed that because she was a probation officer she was neutral in her dealings with the criminal justice system. Yet, in her personal and professional life she was immersed in a sea of police officers. Making her blind spot more troubling, she knew and had worked with the lead investigator in this case several times over the course of the previous decade. Too many red flags were raised, and the court should have excused her for cause, or given Hernandez an additional peremptory challenge, as he had requested, so he could have removed her.

ISSUE IV. The court, in sentencing Hernandez to death, found that he murdered Ms. Everette to avoid lawful arrest. For that aggravating factor to apply, the evidence had to show that the defendant's dominant motive for committing the homicide was to avoid being captured. That high level of specific proof was absent in this case. Arnold and Hernandez killed Ms. Everette as much during the course of a robbery and burglary as to avoid lawful arrest. As such, their dominant motive in killing Ms. Everette was as much to steal as it was to avoid lawful arrest.

ISSUE V. The trial court, in justifying imposing a death sentence on Hernandez, found the murder to have been especially heinous, atrocious, or cruel. The evidence shows, however, that Ms. Everette may have been unconscious before being killed. As such she suffered none of the physical or emotional torture required to make the manner of her death especially heinous, atrocious, or cruel.

ISSUE VI. Dr. Harry McClaren testified as a mental health expert for the State during the penalty phase portion of the defendant's trial. Over defense objection, the court let him sit in the courtroom during the defense presentation of its case for mitigation. Besides hearing lay witnesses, this state expert heard the two defense mental health experts testify about the extensive mental mitigation they found in Hernandez. Allowing Dr. McClaren to hear what they had to say, even though the rule of sequestration had been invoked, was reversible error because it unfairly allowed him to specifically tailor his testimony to do the most damage the defendant's case. There was also no need for him to sit in the courtroom because he had been appointed at least six months before trial, so he had sufficient time to not only become familiar with the facts of the case but to learn what the defense experts had to say.

ISSUE VII. By way of a "Motion to Dismiss Indictment," Hernandez asked the court to dismiss the indictment filed against him because it had failed to include the specific aggravating factors the State intended to prove beyond a reasonable doubt applied, and which would justify a death sentence. The court denied that motion. Although, this Court has said that the State need not allege aggravators in the indictment, Rogers v. State, 957 So.2d 538, 554 (Fla. 2007), Hernandez asks it to reconsider that opinion, and require the indictment to do so.

ISSUE VIII. Over defense objection, the Court instructed the jury regarding the victim impact evidence it had heard using an instruction this Court had approved in Kearse v. State, 770 So.2d 1119 (Fla. 2000), and Rimmer v. State, 834 So.2d 304, 331 (Fla. 2002). Despite what this Court held in those cases, Hernandez respectfully asks it to reconsider its opinions, and reverse the trial court's order imposing death in this case and remand for a new sentencing proceeding before a jury.

V. ARGUMENT

ISSUE I:

THE COURT ERRED IN DENYING HERNANDEZ' REQUEST TO DISMISS THE VENIRE BECAUSE PROSPECTIVE JUROR KEVIN MANCUSI SAID THAT HE HAD SEEN THE DEFENDANT WEARING SHACKLES, A VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL AND PRESUMPTION OF INNOCENCE

Before trial, the State, by way of an oral motion, sought to have Hernandez shackled: "Your honor, the State is being requested by the members of the sheriff's department to broach the issue of physical restraints during the trial of the defendant.. . . . .[T]he State would request the use of physical restraints, that meaning shackling of the defendant's feet as well as cuffing of . . . the other hand to a waist belt." (11 R 767, SR 1118). Defense counsel objected, noting that "It's a mechanical nightmare trying to keep it from the jury." (11 R 771, See also SR 1119). After an evidentiary hearing on the matter three days later, the court ordered Hernandez shackled (SR 1185). In making this ruling, it specifically noted that the police had said that a "stun belt" would provide adequate protection (SR 1150-51, 1156), but it rejected that means of restraining the defendant (SR 1184).[11] Instead, it ordered the more severe and obvious restraining device of

[11] At the hearing on the necessity for shackling Hernandez, Santa Rosa Sheriff's Captain, Paul Campbell testified that a stun belt, which the defendant would wear under his clothing, would provide sufficient security when other officers were also present in the courtroom (SR 154). Also, the belt was effective, reliable, his

shackles used (2 R 288-89, SR 1185). To minimize the risk that the jury would see Hernandez physically restrained, it required the tables used by the defense and State covered (2 R 290, SR 1185-1187). Also, a blackboard was used in the hallway to shield the prospective jurors and, later, the jurors from seeing the defendant in leg irons.

Those protections proved inadequate. As part of voir dire, the court and counsel questioned individual prospective jurors, and towards the end of that process, they talked with a prospective juror, Kevin Mancusi. Apparently, he had some initial concerns that he may have known the victim, or known something about the facts of the case, and he had a problem setting them aside (5 T 765-66). It soon became apparent, however, that he had more serious concerns.

> 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 know, 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 that's something that kind of bothered me last night, the fact that I saw that

(5 T 767)

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officers had been trained in its use, and there was only a remote possibility of an accidental discharge (SR 1147-48).

Although Mancusi did not talk with other members of the venire that were gathered in the hallway (5 T 768), he estimated that there were "a handful, six" other prospective jurors close to him (5 T 770). When asked if he had reached any conclusion about having seen Hernandez shackled, he said,

> Seeing the shackles, yes. . . . 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. . . . 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. ... 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 that's --it's a hard thing to get to 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?
>
> T**HE PROSPECTIVE JUROR:** That combined with the other information I told you? Certainly.

(5 T 772-73)

Mr. Mancusi mentioned that the efforts the court had taken inside the courtroom successfully hid the defendant's shackles, but those efforts "Also [became] obvious to me after the fact." (5 T 774)

Both sides stipulated that the court should excuse Mr. Mancusi for cause (5 T 777), but defense counsel raised the more serious issue this prospective juror had uncovered.

> **MR. STOKES [**defense counsel**]:** 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.

(5 T 777)

The State objected, noting:

> 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.

(5 T 778)

The Court rejected Hernandez' request to dismiss the panel.

> **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 and to minimize the impact of the shackling . . .
>
> 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, 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. . . . that would be naïve 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 restrains in this case. . . . and I don't know how I could have shackled him without a possibility that that would have 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 the juror.

> **M R. 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: -- W**hat 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:** [I]t's inherently prejudicial.
>
> **THE COURT:** I have no doubt, . . . but we have done what we had to do in light of the circumstances of the case.

(5 T 779-80)[12]

The court then denied the defendant's renewed motion to strike the panel and to reconsider using the stun belt (5 T 780-81). That was error, and this Court should review this issue under an abuse of discretion standard of review. Griffin v. State, 866 So.2d 1, 11-12 (Fla. 2003).

The issue presented here does not focus on the necessity of shackling. The court's order presents competent, substantial evidence to support its ruling that the defendant needed to be shackled (SR 1125-85). Instead, the problem raised deals with what the court did once it became obvious that at least one prospective juror, and probably more, saw the defendant in shackles.[13] Other than excusing Mr. Mancusi the court saw no need to do anything, rationalizing that position by concluding that the jurors would, by the end of the trial, have seen the defendant in

[12] Later, the court said "[T]he appellate court should assume or find that the jurors will become aware of the shackling over the course of the proceedings. That's just going to happen." (6 T 870)

[13] This happened on the first day of a two week trial (5 T 781).

shackles anyway, so any curative action it might have taken then to assure the defendant had a fair trial would have become a useless, wasted effort. In short, despite defense counsel's correct statement of the law, that shackling is inherently prejudicial, the court saw no need, or it could do nothing to remove that taint to the defendant's constitutionally guaranteed presumption of innocence and right to a fair trial.

The problem, however, is that a less restrictive, but as effective, means of restraint was available (SR 1156): the stun belt, but the court refused to use it (SR 1184-85). Moreover, once the prospective jurors, and ultimately the jurors, discovered the defendant was in chains, the court did nothing to minimize the presumptive damage to his constitutional right to a fair trial, and more importantly, it did nothing to eliminate the damage done to the presumption of innocence he should have enjoyed. Indeed, it seemed to take a fatalistic attitude that it could do nothing since the jurors would have learned of the restraints anyway.

A. The law on shackling defendants.

Prospective juror Mancusi nicely focused on the constitutional problems that arise when a court considers shackling a defendant.

> 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 know, that –that they're innocent until proven guilty . . .

> [L]ike I said, I understand that he's presumed innocent. That is the foundation of this country and I understand that, but that that's --it's a hard thing to get to of the back of your mind, you know, when you see that and - -

(5 T 772-73)

The constitutionally guaranteed right to a fair trial and presumption of innocence provide the guiding principles for this issue, and the United States Supreme Court, this Court, and lower appellate courts of this state have repeatedly emphasized the overarching concerns that defendants, as guilty as they may appear, and in fact may be, are presumed innocent and have the right for their guilt to be fairly determined. Lewis v. State, 864 So.2d 1211, 1212 (Fla. 4th DCA 2004)(The presumption of innocence is a basic component of the fundamental right to a fair trial.) Shackling, however, and however much justified, destroys or seriously undermines that presumption and right. It does so because defendants like Hernandez are entitled to have their guilt or innocence determined "solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." Taylor v. Kentucky, 436 U.S. 478, 485 (1978). Shackling the defendant is one of those practices that poses such a threat to the fairness of the factfinding process that this Court must give what the lower court did "close judicial scrutiny." Holbrook v. Flynn, 475 U.S. 560 (1986); Bello v. State, 547

So.2d 914, 918 (Fla. 1989)(Shackling is an inherently prejudicial practice that can be done only with a showing of necessity)

> Trying a defendant for a crime while he or she sits bound and gagged before the judge and jury would to an extent comply with that part of the Sixth Amendment's purposes that accords the defendant an opportunity to confront the witnesses at the trial. But even to contemplate such a technique, much less see it, arouses a feeling that no person should be tried while shackled and gagged except as a last resort. Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold.

Illinois v. Allen, 397 U.S. 337, 344, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970);

Accord, Miller v. State, 852 So.2d 904, 905-906 (Fla. 4th DCA 2003); McCoy v. State, 503 So.2d 371, 371-72 (Fla. 5th DCA 1987)(Shackles should be rarely used.)

> In England v. State, 940 So.2d 389, 403-404 (Fla. 2006), this Court said, Certainly, a judge must use care when ordering a defendant gagged, as it is "possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, [and] the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold." Jackson v. State, 698 So.2d 1299, 1302 (Fla. 4th DCA 1997) (quoting Illinois v. Allen, 397 U.S. 337, 344, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970)). Therefore, "such a confinement should be used only as a last resort in extreme situations." Id.

Accord, Bryant v. State, 785 So.2d 422, 428 (Fla. 2001); see also Diaz v. State, 513 So.2d 1045, 1047 (Fla. 1987)(As a general rule, "[a] defendant in a criminal

trial has the right to appear before the jury free from physical restraints, such as shackles or legal and waist restraints.")

Indeed, in this case, prospective Juror Mancusi validated that observation when he acknowledged that seeing Hernandez in shackles affected his ability to be fair (5 T 773).

Echoing this Court's conclusion in England, the Fourth DCA in Jackson v. State, 698 So.2d 1299, 1302 (Fla. 4th DCA 1997), noted:

> The Florida Supreme Court has recognized that restraining a defendant with shackles in view of the jury adversely impacts an accused's presumption of innocence. . . .To ensure that the presumption remains viable, courts must guard against practices which "unnecessarily mark the defendant as a dangerous character or suggest that his guilt is a foregone conclusion." . . .As one court has observed, if a defendant is to be presumed innocent, he must be allowed to display the indicia of innocence. *See* United States v. Samuel, 431 F.2d 610, 614 (4th Cir.1970).

Id. at 1302 (citations omitted.)

Hence, the trial court's fatalistic, almost cavalier, acceptance that the jurors would inevitably see Hernandez in shackles is at disturbing odds with what this Court, the United States Supreme Court, and the appellate courts of this state have said about the highly corrosive effect shackling has on the defendant's rights to a fair trial and his presumption of innocence.[14] Despite counsel's warning that

[14] Hernandez in no way denigrates the trial court's initial, extensive efforts to shield the jury from seeing the defendant in shackles. They were commendable, yet the court seemed to give its efforts little significance by its glum assumption

accepting a jury that had seen his client in shackles was "inherently prejudicial," (5 T 780) the court refused to do anything other than dismiss Mancusi. Instead, it simply threw up its hands to what it saw as an inevitability. Yet, by doing nothing, it also made inevitable the denial of this defendant's constitutionally guaranteed right to a fair trial.

So, what should the court have done? It dismissed Mancusi, but other members of the venire very well might have seen the defendant in shackles. Hernandez provided the only solution: strike the panel and start over (5 T 780). A curative type instruction given to the venire would have been impossible to fashion without illuminating and accentuating Hernandez' condition, thus making a bad situation worse.

Of course, at the time, dismissing the panel seemed to be a harsh, extreme solution. The court and counsel had worked hard for many, many hours trying to select a fair and impartial jury. Prospective juror Mancusi was individually questioned near the end of voir dire. Peremptory challenges were nearly exhausted, and a 12-person jury had almost been chosen, and then he dropped his bombshell. Thus, it is hard to fault the court for what it did. Yet, in retrospect, it should have grudgingly, reluctantly, granted Hernandez' request. It was the <u>only</u> action the

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that "all the jurors will at some point become aware [that the defendant was shackled.]" (5 T 783)

court could have taken to have fully protected this defendant's Sixth Amendment right to a fair trial. Rather than have "wasted" hours in trying to select a fair and impartial jury, the lower court made the subsequent trial, including the penalty phase, a fruitless exercise because this Court can only sigh and conclude that Hernandez was denied his fundamental right to a fair trial, reverse, and remand for a new trial.

At trial, the State raised the tantalizing possibility that even if some of the prospective jurors other than Mancusi saw Hernandez in shackles no evidence existed that any of them ever actually sat on the defendant's jury. There is, of course, no evidence to the contrary, and at least one of the prospective jurors who saw him in shackles may have sat on this jury. In short, of the jurors who actually determined the defendant's guilt and recommended he die, we have no knowledge of whether they saw him in shackles or not. As such there is no way to resolve this impasse with facts or logic, but the problem can be solved using a risk benefit analysis. Cf. Cooper v. Oklahoma, 517 U.S. 348 (1996).

In Cooper, the court held that while a state may require a defendant to prove his or her incompetency, it could not increase the risk of convicting an incompetent defendant by requiring him or her to establish that fact by clear and convincing evidence. A defendant who may be incompetent by a preponderance of the evidence but competent under a clear and convincing measure had far more to lose

if a court required him to prove he was incompetent under the latter standard than the State did if it required only that he meet a preponderance of the evidence test.

> For the defendant, the consequences of an erroneous determination of competency are dire. . . .[A]n erroneous determination of competence threatens a "fundamental component of or criminal justice system"- the basic fairness of the trial itself. By comparison to the defendant's interest, the injury to the State of the opposite error-a conclusion that the defendant is incompetent when he is in fact malingering-- is modest.

Id.

This analytical approach can be applied to the problem presented by this issue. If members of the jury saw Hernandez in shackles, and the trial court refused to give him a new trial, his right to a fair trial would have been compromised by that incorrect ruling. The consequences of refusing to retry him would have been "dire." He would have been unfairly convicted and sentenced to death. Not only would he have personally suffered from that error, the integrity of our judicial system the verdict and death recommendation would have legitimately been called into question.

On the other hand, if none of the jurors had seen him in shackles, but the court dismissed the venire and started jury selection anew, the cost to the state from that incorrect ruling would have been modest. The parties would only have had to start over in picking a jury.

Hence, using the Cooper analysis, this Court should reject the claim that because we have no way of knowing if any of the jurors saw the defendant

shackles, we should presume none did. The consequences of doing so are simply too great to justify. This Court should, therefore, reverse the trial court's judgment and sentence of death and remand for a new trial.

ISSUE II

THE COURT ERRED IN SENTENCING HERNANDEZ TO DEATH BECAUSE THE CO-DEFENDANT, SHAWN ARNOLD, WAS EQUALLY MORALLY CULPABLE YET HE WAS SENTENCED TO LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE, A VIOLATION OF THE DEFENDANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 17 OF THE FLORIDA CONSTITUTION.

This issue requires this Court to consider the capital sentencing problem that arises when two people commit a murder, and one is sentenced to life in prison while the other has a death sentenced imposed on him. If the one with the life sentence is less culpable than the defendant facing execution, resolution is easy. Similarly, when they are equally blameworthy they should both receive a life or death sentence. What becomes sublimely unacceptable occurs, as it did here, when equally guilty defendants receive different sentences: one life and the other death. Shawn Arnold and Michael Hernandez, not only are guilty of murdering Ms. Ruth Everette, they are so equally culpable that the trial court could not legitimately do what it did here: sentence Arnold to life while imposing a death sentence on the defendant. That it did so was error, and this Court should review this issue to determine if competent, substantial evidence exists to support the trial court's

culpability determination and sentence of death. Hertz v. State, 803 So.2d 629, 652 (Fla. 2001)[15]

I. What the trial court said regarding Arnold's life sentence.

The court considered Arnold's life sentence only as a mitigating factor, and it rejected it as such, saying:

> **26. The co-Defendant was offered a life sentence and was equally culpable, and actually initiated the entire episode.**
> While both Defendant and the co-defendant are responsible for the victim's death, Defendant, himself, admitted that this hands broke the victim's neck and held the knife that slashed her neck. Subsequently, when Defendant spoke to Ms. Hartman during a jail visit, he indicated that the co-defendant could not complete the murder. While the Court recognizes that disparate treatment does exist in this case, the treatment is justified. The disparate treatment does not mitigate the offense and is given no weight.[16]

(3 R 477)

II. This Court's proportionality review obligation.

When reviewing the correctness of a death sentence this Court has the unique, final obligation to determine if it is proportionately warranted. Normally,

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[15] Since proportionality review is uniquely this Court's obligation, a de novo standard of review would seem more appropriate, if there is one at all. C.f., Ford v. State, 802 So.2d 1121, 1135 (Fla. 2001) (" Whether a particular circumstance is truly mitigating in nature is a question of law and [is] subject to de novo review by this Court[.]"); Cave v. State, 727 So.2d 227, 233, f.n.7 (Anstead, dissenting. "Further, there can be no serious dispute that *this* Court's constitutional duty to 'foster uniformity in death-penalty law' cannot be fulfilled by or delegated to the trial court." (Emphasis in quote.))

[16] Contrary to the court's refusal to consider Arnold's life sentence as mitigation, this Court in Witt v. State, 342 So.2d 497, 500 (Fla. 1977) said, "that a codefendant's life sentence was a factor that had to be considered when sentencing Witt."

it does this by comparing other cases with similar facts as the one at hand to ensure, or guarantee as much as is possible in capital sentencing, that persons who are similarly culpable receive similar sentences. Tillman v. State, 714 So.2d 411, 416-17 (Fla. 1998)("[P]roportionality review is a unique and highly serious function of this Court, the purpose of which is to foster uniformity in death-penalty law.") This analysis becomes particularly important in situations such as this case where there are two defendants, and one of them received a life sentence while the other faces execution. Where such wide sentencing disparity exists, this Court closely examines the record to insure that it is justified.

> This Court has an independent obligation to review each case where a sentence of death is imposed to determine whether death is the appropriate punishment. *See Morton v. State*, 789 So.2d 324, 335 (Fla.2001). . . . In deciding whether death is a proportionate penalty, the Court must consider the totality of the circumstances of the case and compare the case with other capital cases. *See Urbin v. State*, 714 So.2d 411, 417 (Fla.1998). However, in cases where more than one defendant was involved in the commission of the crime, this Court performs an additional analysis of relative culpability. Underlying our relative culpability analysis is the principle that equally culpable co-defendants should be treated alike in capital sentencing and receive equal punishment. *See Ray v. State*, 755 So.2d 604, 611 (Fla.2000). *See also Jennings v. State*, 718 So.2d 144, 153 (Fla.1998) ("While the death penalty is disproportionate where a less culpable defendant receives death and a more culpable defendant receives life, disparate treatment of codefendants is permissible in situations where a particular defendant is more culpable.").

Shere v. Moore, 830 So.2d 56, 60 (Fla. 2002); accord, Slater v. State, 316 So.2d 539 (Fla. 1975)(Defendants should not be treated different upon the same or

similar facts.); Hazen v. State, 700 So.2d 1207, 1214 (Fla. 1997); Scott v. Dugger, 604 So.2d 465, 468-69 (Fla. 1992).

In this case, Shawn Arnold pled guilty to the first-degree felony murder of Ms. Everette, an admission that he was as responsible for her death as Hernandez (3 R 477). Yet, the court sentenced him to life in prison when the only relevant fact distinguishing the two men was that Hernandez broke Ms. Everette's neck and slashed her throat, and he said that Arnold could not complete the murder.[17] The question thus arises of whether those facts sufficiently separated the two men to justify such utterly disparate sentences.

The rationale used by the United States Supreme Court in Tison v. Arizona, 481 U.S. 137 (1987), says it does not. In that case, Gary Tison's two sons helped their father escape from an Arizona prison where he was serving a life sentence for murder, and as part of the prison break they armed him with guns. Several days later and still on the run, they waylaid four people and took their car. Before continuing their flight Gary Tison and a fellow escapee(who also was in prison for committing a murder) murdered the four in cold blood with the weapons the sons

[17] Actually, Ms. Hartman never testified that Arnold told her he could not complete the murder. Instead, he said "The woman just wouldn't die." (8 T 1228) The court found four aggravating factors, and except for the prior conviction of a violent felony aggravator, they would apply to Arnold with as much force as they did to Hernandez (3 R 459-62). Whether the prior conviction aggravator would apply to Arnold is unknown because there was no evidence of his criminal record introduced at Hernandez's penalty phase hearing because it would have been irrelevant.

had provided. During the killings, the children stood by and did nothing to stop them. The gang then drove away but were killed, caught, or died several days later after a shootout with the police.

In an earlier case, Enmund v. Florida, 458 U.S. 782 (1982), the nation's high court had said that because Earl Enmund had been absent during a robbery that had ended in two murders and had not intended any homicide, he could not be sentenced to death. That is, "the minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have any culpable mental state" lacked the additional culpability required to justify a death sentence. Tison, at 149: Van Poyck v. State, 564 So.2d 1067, 1070-71 (Fla. 1990). Said another way, death was disproportional for defendants who had a minor role in a felony-murder and had no intent to kill.

The Tison brothers presented a scenario not covered by Enmund. Instead of being minor participants in a robbery gone bad, and having no intent to kill, they were major players in the escape and later robbery. More troubling was the lack of any evidence they intended to kill the victims, but the nation's high court found that even if they had lacked that level of premeditation they had a demonstrated

reckless indifference to human life, and those to conclusions justified sentencing them to death.[18]

> Far from merely sitting in a car away from the actual scene of the murders acting as the getaway driver to a robbery, each petitioner was actively involved in every element of the kidnaping-robbery and was physically present during the entire sequence of criminal activity culminating in the murder of the Lyons family and the subsequent flight.. . . [W]e simply hold that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement.

Tison, at 158. (Footnote omitted.)

Tison, has significance for Hernandez in light of this Court's obligation to conduct a proportionality review. In this case, Arnold was at least as culpable as Hernandez for Ms. Everette's death, and under Tison's rationale could have been sentenced to death. He was present when the murder occurred, and by his actions exhibited a reckless disregard or indifference for life.

1. Arnold's presence at the murder and major participation in the murder.

Without any question, Arnold was present when Ms. Everette was killed. And more than simply being present, he moved the events along and had a leadership role in her murder. Cave v. State, 727 So.2d 227 (Fla. 1998) It was

[18] The State proved this reckless disregard for human life when it presented evidence that the defendants had provided guns to their father and another inmate, both convicted killers; stopped the car with the four people so they could be robbed; assisted in the robbery; guarded them; and then stood by and did nothing while they were murdered.

Arnold, not Hernandez, who knew where they might get some cocaine, and it was at his instigation that they went to Ms. Everette's house ostensibly looking for her son (7 T 1108, 8 T 1236). He commanded the defendant to "grab her," and then followed them inside (10 T 1516). Once there it was Arnold who terrorized Ms. Everette by telling her that he had "put a gun to [her son's] head the other night" and had demanded $300 he supposedly owed Arnold (10 T 1517). And it was in response to this veiled threat that she pled with him, saying she only had $20 (10 T 1525). See, Larzelere v. State, 676 So.2d 394, 406-407 (Fla. 1996)(Death proportional where the defendant was a major player and "Her primary motive was financial gain, which motive was in her full control.")

2. Arnold had either an intent to kill Ms. Everette or a reckless disregard for her life.

But threat became reality when Arnold started the final acts leading to Ms. Everette's death. After using her bathroom, he returned with a pillow in his hands. He, not Hernandez, put it over her face, and he, not Hernandez, tried to suffocate her (8 T 1228), and, as the medical examiner testified, he almost succeeded (9 T 1422-23, 1427). Yet, he did not, but then he did nothing to stop Hernandez when he broke her neck and slashed her throat. Instead, he gave the defendant the murder weapon. He never refused to hand over the knife or tried to stop what the defendant was doing. By trying to kill the victim and giving the defendant the knife, he showed as much a reckless disregard for Ms. Everette's life

as did the Tison brothers when they gave their father a shotgun he used to kill his victims. Tison, cited above, at 151-52. Indeed, by trying to suffocate her with a pillow he showed that his intent was more than simply to rob her. It included murder. See, Jackson v. State, 575 So.2d 181, 192 (Fla. 1991)(Jackson's death sentence is reduced to life because although he was a major participant in the murder, he never intended the robbery to escalate into a murder.) What else could he have been thinking when he gave the defendant his knife almost immediately after his failed murder attempt?

3. The events after the murder exhibited the same level of involvement in the murder as Hernandez.

After the murder, Arnold, rather than fleeing, crying, or going to the police to confess, ransacked Ms. Everette's house along with Hernandez looking for money to buy cocaine. He, not Hernandez, found the purse, and he, not Hernandez discovered the identification number that enabled the pair to ride about town using the debit card at ATMs to get money. Then the pair spent the cash buying cocaine, which they snorted until they had exhausted the money. Thus, by participating equally in the events before, during, and after the murder with Hernandez, Arnold was as culpable as the defendant in committing her murder.

Now, Hernandez makes no claim that Arnold is more blameworthy than he is; but he is at least as culpable. In the same way as the Tison brother's participated in the murder of the four people, Arnold was a major player in this tragedy. In no

way could he be seen as a minor player, or in some way under the defendant's domination. Clearly he showed as reckless a disregard for Ms. Everette's life as did the Tison brothers for the four people their father murdered. As such, he could have been sentenced to death. That he was not means that under this Court's obligation to insure that defendants who are equally culpable receive equal sentences, it must reduce Hernandez' death sentence to life in prison without ever have the possibility of parole. See, Hazen v. State, 700 So.2d 1207 (Fla. 1997) (Hazen's death sentence reduced to life in prison because the co-defendant Bufkin was more culpable but the State had offered him life.)

This argument has been raised before in other cases, but this Court has often, but not always, rejected it, finding distinguishing facts that set the defendant apart from Enmund, or failing to find them so that Tison applies.

For example, in Van Poyck, cited above, this Court found death warranted although the co-defendant committed the killings. "[Van Poyck] was the instigator and the primary participant in this crime. He and Valdez arrived at the scene 'armed to the teeth.' Since there is no question that Van Poyck played the major role in this felony murder and that he knew lethal force could be used, we find that the death sentence is proportional." Id. At 1070-71.

In Perez v. State, 919 So.2d 347 (Fla. 2005), the jury, by its verdicts for first degree murder, burglary, and robbery, found Perez acted with a reckless disregard

for human life. These verdicts also showed that he was a major participant in those crimes.

In Chamberlain v. State, 881 So.2d 1087 (Fla. 2004), the defendant personally committed a robbery, supplied the murder weapon, instigated the witness elimination, and reloaded the murder weapon. He exhibited not only a reckless disregard for human life, but actively encouraged the murder.

In Duboise v. State, 520 So.2d 260, 265-66 (Fla. 1988), this Court found the defendant's death sentence appropriate because he was "a major participant in the robbery and sexual battery. He made no effort to interfere with his companions killing the victim."(Emphasis supplied.)

On the other hand, in Jackson v. State, 575 So.2d 181, 190-91 (Fla. 1991), this Court reduced Jackson's death sentence because no evidence showed that Jackson possessed a gun or fired it during the robbery, or intended to harm the victim. And, although present when the murder occurred, "There was no real opportunity for Jackson to prevent the murder since the crime took only seconds to occur, and the sudden, single gunshot was a reflexive reaction to the victim's resistance."

In this case, Arnold's culpability more closely matches that of Van Poyck, Perez, Duboise, and Chamberlain than that of Jackson. He was present from beginning to end. He supplied the murder weapon. He did nothing to stop the

murder. Hence, under the Tison rationale Arnold could have received a death sentence. That he did not means that under this Court's obligation to do a proportionality review, Hernandez's death sentence must be vacated.

ISSUE III

THE COURT ERRED IN REFUSING TO GRANT HERNANDEZ' CAUSE CHALLENGES TO PROSPECTIVE JUROR MARTINA LINDQUIST AFTER THE DEFENDANT HAD EXHAUSTED HIS PEREMPTORY CHALLENGES AND HAD REQUESTED AN ADDITIONAL ONE TO EXCUSE HER FROM SERVING ON HIS JURY, A VIOLATION OF HIS FIFTH, SIXTH , AND FOURTEENTH AMENDMENT RIGHTS.

During voir dire, Hernandez sought to excuse Ms. Martina Lindquist, a probation officer with the Department of Juvenile Justice, because of her inability to render an impartial verdict, as required by the law of this State. Singleton v. State, 783 So.2d 970, 973 (Fla. 2001). The court refused to excuse her for cause (6 T 932). By then he had exhausted his peremptory challenges (5 T 851), and when he sought to peremptorily challenges Ms. Lindquist, the court refused to give him one to do that (6 T 932). As a result, she served on his jury (6 T 1000). Hernandez, thus, has clearly preserved this issue for review. Trotter v. State, 576 So.2d 691, 693 (Fla. 1990); Ross v. Oklahoma, 487 U.S. 81 (1988) .

Our system of justice rests on the unchallenged prerequisite of juror impartiality. Carratelli v. State, 27 Fla. L. Weekly D 2510 (Fla. 4th DCA November 20, 2002). A court should excuse a prospective juror if "there is any reasonable doubt about the juror's ability to rend an impartial verdict." Singleton, cited above. Or, as this Court said in Busby v. State, 894 So.2d 88, 95 (Fla. 2004) "A juror must be excused for cause if any reasonable doubt exists as to whether the

juror possesses an impartial state of mind." In this case, Ms. Lindquist's extensive, daily; close, personal and professional contacts with the criminal justice system and law enforcement officers met the any reasonable doubt standard.

When questioned, Ms. Lindquist revealed that she favored the death penalty. "I believe that I strongly support it in situations where it is warranted, depending on the circumstances of the case." (6 T 906-907). That, of course, would not have justified excusing her for cause. Keeping her on the jury became more troublesome when she revealed that she had had personal, extensive experience with drug addictions because her ex-husband, children, cousins, and former sister in law were addicts (6 T 902, 904). She was so angry or fed up with her former spouse that she had divorced him because he could not or would not stop smoking marijuana (6 T 902). More poignantly, she watched at least one of her children sink into the miasma of the drug culture (6 T 904).

Making this prospective juror's impartiality more questionable, she worked for the Department of Juvenile Justice as a Probation Officer supervisor (6 T905). Of course, just being a probation or corrections officer, by itself, would provide some, but not enough, reason to have found her incapable of sitting as a juror. State v. Williams, 465 So.2d 1229, 1230-1231 (Fla. 1985). But she had a more specific disability than simply working for the State. As a probation officer, she had contacts with 50 or 60 of the police officers in Santa Rosa and Escambia

Counties. More troublesome, she knew Detective Jeffrey Schuler, the lead officer in this case, and the one who had questioned Hernandez when he confessed to killing Ms. Everett. She had worked with him at least five times over the past 10 years (6 T 911).

What becomes even more troubling is that she was oblivious to her bias. She believed that because she that because she worked with "the Public Defender, the State Attorney, or law enforcement" (6 T 906) she was "very neutral." (6 T 905). See, Williams v. State, 638 So.2d 976, 978 (Fla. 4th DCA 1994)(A juror's response that 'I'll be impartial because that's my character' was insufficient to erase the doubt created by his other comments.) Yet, by statute she was a law enforcement officer, Section 784.07(1)(a), Fla. Stat. (2006), and for a person awash in a sea of law enforcement officers it is difficult to believe that she could be "very neutral" in this case when virtually everyone in her life, from her fiancé (6 T 905) to most of her daily contacts were other police officers.[19]

Thus, there was much more than her simply being a probation officer that raised a reasonable doubt about her ability to be fair and impartial. Because this Court has set the standard for juror impartiality so high in order for us to have an abiding confidence in the fairness of jurors, particularly those who must

[19] Defense counsel noted that "this panel has been perforated by law enforcement contact. . . . We have been required to exercise peremptories that we wouldn't expect. . . . It's just been a particularly difficult panel to deal with. It seems to go beyond the ordinary." (5 T 851)

recommend whether a person should live or die, the lower court should have excused her for cause or peremptorily. That it did neither was error, and this Court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE IV

THE COURT ERRED IN FINDING THAT HERNANDEZ COMMITTED THE MURDER FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY, A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

In justifying sentencing Hernandez to death, the court found that he had committed the murder "for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." Section 921.141(5)(e), Fla. Stat. (2004). Specifically, it said:

> This factor properly exists if the dominant motive of the murder was to eliminate a witness. Walls v. State, 641 So.2d 381 (Fla. 1994). Other than Defendant, the co-defendant, and the victim, there were no witnesses to the murder. During a jail visit Defendant admitted to Ms. Daveine Hartman that he intentionally twisted and broke the victim's neck after his and the co-defendant failed attempt to immobilize and suffocate her. He admitted both to Ms. Hartman and to police that he later slashed the victim's throat. His reason for doing so, as relayed by Ms. Hartman, was because the victim had seen his and the co-defendant's faces. Furthermore, the murder consisted of a series of progressively brutal attacks because, as Defendant explained, the victim would not die. The Court finds that Defendant's dominant motive for the murder was to eliminate the victim to the burglary and robbery. The court attaches great weigh to this aggravating circumstance.

(3 R 460-61)

The court erred in finding this aggravating factor because the evidence shows that Arnold and Hernandez killed Ms. Everette as much during the course of the robbery and burglary as to eliminate her as a witness. This Court should

review this issue under a competent, substantial evidence standard of review. Brooks v. State, 918 So.2d 181 (Fla. 2005)

As the court correctly noted, the avoid lawful arrest aggravator applies to the killings of persons other than policemen only if the State can show beyond a reasonable doubt that the dominant motive for the murder was to avoid lawful arrest. Zack v. State, 753 So.2d 9 (Fla. 2000). If other motives or reasons for the killing exist this Court has consistently refused to find this aggravator. For example, in Zack,

> The record suggests only that Smith's murder was part of Zack's premeditated plan to kill her and take her car and possessions. While it is true that Zack did not have to murder Smith to accomplish his monetary goals, this alone does not make Zack's dominant motive the desire to avoid arrest.

Id. at 20.

Moreover, even though the victim may have been able to identify the defendant, as the defendant acknowledged, that fact, without more, cannot justify finding that he or she committed the murder solely to avoid lawful arrest. Id.; Consalvo v. State, 697 So.2d 805 (Fla. 1996).

In this case, after Arnold and Hernandez had spent Arnold's rent money buying cocaine (8 T 1189), they wanted more of the drug, and Arnold suggested they go to Everette's house, not to kill her, but to get money, or perhaps more cocaine, from Arnold's supplier, David Everette, the victim's son (9 T 1376, 10 T

1516). After they learned he had left the house, the co-defendant told the defendant to "grab" her (10 T 1516), which he did, and then they went inside. Even then, they still wanted money so they could buy cocaine because in reply to the questions about money, Ms. Everette said she only had $20 (10 T 1525). After the murder, rather than hiding the body and fleeing, as would have been expected had they killed to avoid lawful arrest, they searched the house for cash. Eventually Arnold found her purse and debit card (10 T 1539-40). Only then did the pair leave and use her card to get between $300 and $500, which they promptly used to buy cocaine (8 T 1323, 10 T 1540).

Thus, these two men killed Ms. Everette as much during the course of a robbery and burglary as to avoid lawful arrest.[20] Their dominant motive in killing Ms. Everette was to steal, not to avoid lawful arrest.

As such, this Court should reverse the trial court's sentence of death and remand for resentencing.

[20] The court also found that Hernandez committed the murder during the course of a robbery and burglary (3 T 460). It did not find, however, that he had murdered Ms. Everette in a cold, calculated, or premeditated manner without any pretense of moral or legal justification, which would have supported a finding that the dominant motive of the murder was to avoid lawful arrest. Section 921.141(5)(i) Fla. Stat. (2004)

ISSUE V

THE COURT ERRED IN FINDING THIS MURDER TO HAVE BEEN COMMITTED IN AN ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL MANNER A VIOLATION OF HERNANDEZ' EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The trial court found that Hernandez killed Ms. Everette in an especially heinous, atrocious, or cruel manner (3 R 461-62). Whether it correctly reached that conclusion depends entirely on whether she was conscious for an appreciable time after the assault began but before she died. If she were, then this aggravator applies. If not, it does not. This Court should review this issue under a competent, substantial evidence standard of review. Brooks v. State, 918 So.2d 181 (Fla. 2005).

In finding this aggravator, the court said:

> The victim's attack began when she was grabbed by the head and forced into her home by Defendant. Soon after they entered the home, the co-defendant covered the victim's face with a pillow in an attempt to suffocate her while Defendant held her arms and hands to immobilize her. At some point the victim began to hyperventilate, and the co-defendant provided her a bag in which she was allowed to breathe to calm her. Also at some point during the attacks, the victim resisted and scratched the Defendant. DNA analysis revealed that DNA found under the victim's fingernails partially matched Defendant's DNA profile. The photographs of the victim reveal that her nose, lips, and eyes contained large dark bruises that indicated that extreme force was used against her when she was grabbed by the face, or during the attempted suffocation, or both.
>
> Unable to quickly and easily suffocate the victim - - and after the co-defendant expressed his reluctance to complete the murder - - Defendant then intentionally twisted the victim's neck with a two-handed grip. He later demonstrated the motion to Ms. Hartman, who

> tearfully demonstrated it to the jury. According to Dr. Andrea Minyard, the medical examiner, the victim was alive, likely paralyzed, and possibly conscious when Defendant stabbed her neck with a small pocket knife, dragging it several inches along the victim's neck. Dr. Minyard could neither rule out nor confirm whether the victim could feel pain associated with the neck wound. The victim bled profusely, which indicated that her heart was beating when she was stabbed. According to Defendant's own words, the attacks were prolonged because the victim would not die

(3 R 461-62)(Emphasis supplied.)

Any consideration of the HAC aggravator must begin with the definition this court provided in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973):

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

As this Court has applied that definition, it has required HAC murders to have been torturous to the victim. Not simply physically so, but crucial and necessary, the victims must have been mentally tortured as well. Wickham v. State, 593 So.2d 191, 193 (Fla. 1991); Richardson v. State, 604 So.2d 1109 (Fla. 1992). Thus, where the defendant shot a victim, causing instant death, this aggravator may have applied because preceding the painless death was a prolonged or significant period where the victim was aware of his or her impending death. Cooper v. State, 492

So.2d 1059 (Fla. 1986)(victim bound and helpless, gun misfired three times.); Preston v. State, 607 So.2d 404 (Fla. 1992)(Fear and strain can justify a HAC finding.) On the other hand, quick deaths, in which the victim had no awareness he or she was about to be killed, or that they knew for only a short time, did not become especially heinous, atrocious, or cruel, even where he or she was stabbed. Wickham v. State, 593 So.2d 191 (Fla. 1991)(Ambushing a "Good Samaritan" and shooting him twice was not HAC even though he pled briefly for his life); Scull v. State, 533 So.2d 1137 (Fla. 1988) (Single blow to the head.); Wilson v. State, 436 So.2d 908 (Fla. 1983)(Single stab wound is not HAC).

Awareness of death becomes an important factor, and murders committed when the victim was unconscious or even semi-conscious typically lacked the mental and emotional gruesomeness that made them especially heinous, atrocious, or cruel. Herzog v. State, 439 So.2d 1372, 1379-80 (Fla. 1983); Clark v. State, 443 So.2d 973, 977 (Fla. 1984).

From the Dixon, supra, definition of HAC, if the Defendant tortured the victim, or exhibited a morbid delight in his or her suffering, the resulting murder can be HAC. Multiple stabbings, brutal beatings, strangulations, and prolonged struggles exhibit this level of indifference to the pain suffered. Pittman v. State, 646 So 2d 167, 172-73 (Fla. 1994)(Victim strangled, stabbed, drowned in her blood.); Whitton v. State, 649 So.2d 861, 866-67 (Fla. 1994)(30-minute attack);

Hardwick v. State, 521 So.2d 1071 (Fla. 1988) (5-6 minute attack during which victim was stabbed three times, shot in back and struck about the head.) If he did not, it does not apply. Kearse v. State, 662 So.2d 677 (Fla. 1995)(No evidence the "defendant intended to cause officer unnecessary and prolonged suffering."); Williams v. State, 574 So.2d 136 (Fla. 1991)(HAC "is permissible only in torturous murders .... as exemplified either by the desire to inflict a high degree of pain or utter indifference or enjoyment of the suffering of another.")

Thus, this court in Orme v. State, 677 So.2d 258 (Fla. 1996), declared that "Our case law establishes, however, that strangulation creates a prima facie case for this aggravating factor. . . ." Id. at 263. In that case, Orme strangled a former girlfriend who had responded to his call for help because he was having a bad drug high. That choking death became especially heinous, atrocious, or cruel because she knew for a significant time that she was about to die. "Her death in this manner presented the prototypical strangulation murder: the victim knows he or she is about to die, and it is that prolonged mental suffering that makes the resulting death especially shocking." Id. It is permissible to infer that strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness applies. Tompkins v. State, 502 So.2d 415, 421 (Fla. 1986).

In Rhodes v. State, 547 So.2d 1201 (Fla. 1989), although the victim was "manually strangled" this court rejected the lower court's finding of the HAC aggravator. The victim was either "knocked out," drunk, or semiconscious at the time of her death. In Herzog v. State, supra, relied on in Rhodes, to justify rejecting the HAC factor, the victim was also semiconscious when attacked. DeAngelo v. State, 616 So.2d 440, 442-43 (Fla. 1993).

In this case, the evidence is, at best, inconclusive of whether Ms. Everette was conscious, and hence aware of her impending death for any appreciable time. Specifically Dr. Minyard, the medical examiner and key witness on this issue, could not say whether the victim was unconscious after her neck had been broken.

> Q. But you can't say whether or not she was still conscious after the neck was broken?
> A. That's correct, I cannot.
> Q. So if she wasn't conscious, she couldn't feel pain.
> A. That's correct.

(9 T 1433)

Now, this Court requires the State to prove aggravating factors beyond a reasonable doubt before a jury or judge can rely on them. Hernandez-Alberto v. State, 889 So.2d 721, 733 (Fla. 2004). In this case, we have no direct evidence of Ms. Everette's suffering, only circumstantial evidence of it. So, the proof of her suffering, of her awareness of her impending death was inconclusive, or said another way, the State never proved beyond a reasonable doubt that she knew she was about to die.

Strangulations and stabbings typically provide enough justification for finding the HAC aggravator. They normally do, but this is an unusual case because it is only the second case this Court has considered in which the victim had her neck broken. Everrette v. State, 893 So.2d 1278 (Fla. 2004)(victim's neck broken after being beaten and raped.) Thus, no case law has developed like it has for stabbings and strangulations when this unusual means of death occurs. Logically, however, unlike stabbings, which are almost per se HAC, a killing done by breaking a neck has much more inherent ambiguity about it, as the medical examiner's testimony in this case reveals. Maybe she was conscious. Maybe the murder was HAC, but in this case we just do not know how much suffering Ms Everette consciously endured, if any. As such, the State never established beyond a reasonable doubt the victim's murder was especially heinous, atrocious, or cruel.

ISSUE VI

THE COURT ERRED IN ALLOWING THE STATE'S MENTAL HEALTH EXPERT, DR. HARRY MCCLAREN, TO SIT IN THE COURTROOM DURING THE PRESENTATION OF THE HERNANDEZ'S PENALTY PHASE EVIDENCE, A VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

Immediately before the penalty phase part of the Hernandez' trial began, the State sought to have its mental health expert, Dr. Harry McClaren, sit in the courtroom while the State and defense presented their evidence.[21]

> MR. ELMORE (the prosecutor): Judge, the State has –as the Court is aware, has secured the services of Doctor Harry McClaren, a licensed forensic psychologist for possible rebuttal testimony in this case. He has requested of me leave of the Court to sit in on the information that comes before the Court from this point forward concerning Michael Albert Hernandez, Junior.
>
> THE COURT: He's an expert. Do you have any problem with that?
>
> MR. ROLLO [Defense counsel]: I think he's entitled to sit through the presentation of our experts. But I don't know that he can gather facts that go into—that help him base I opinion on whatever their rebuttal opinion is, which by the way I haven't had a chance to talk to him about. Based on the factual presentation of evidence expert opinion is one thing and fact witnesses I think are another.
>
> THE COURT: Are you objecting?
>
> MR. ROLLO: I am.
>
> MR. ELMORE: Judge, the factual witnesses, such as the State's aggravating evidence, as well as the background evidence that will be presented concerning the defendant, are the very type things that a psychologist bases their expert opinion on. And that's why he's asked to be allowed to—
>
> THE COURT: Either of you have any law on this? Do you think it's discretionary?

[21] Hernandez invoked the Rule of Sequestration at the beginning of trial (7 T 1023-25). The court had appointed Dr. McClaren as the State's mental health expert in May 2006, more than six months before Hernandez' trial began (1 R 178079).

> MR. ELMORE: Judge, the law is that it's discretionary with the Court.
>
> THE COURT: I think it's discretionary. He's an expert and subject to cross. I'll permit it.

(15 T 3025-36)

Dr. McClaren then sat through the State's and Defendant's presentation of their cases (17 T 2408, 2434). The court erred in allowing him to do that, and this Court should review this issue under an abuse of discretion standard of review.

The Rule of Sequestration tends to prevent the testimony of witnesses from influencing that of other persons called to testify. Mendoza v. State, 32 Fla. L. Weekly S278 (Fla. May 24, 2007). Once the rule is invoked, the court should exclude witnesses "during proceedings when he or she is not on the witness stand." Strausser v. State, 682 So.2d 539, 540-41 (Fla. 1996). As with most or many rules of law this one too has exceptions, or said otherwise, the trial court has discretion of when to relax the black letter application of the rule.

Typically, this Court has found no abuse of that discretion when a trial judge has permitted an expert, such as Dr. McClaren, to listen to only portions of a trial. For example, in Burns v. State, 609 So.2d 600, 606 (Fla. 1992), this Court found no error when the lower court allowed the State's mental health expert to remain in the courtroom during the penalty phase testimony, and particularly when the defendant and the defense psychologist's testified. This Court found nothing wrong with this because the law as it existed precluded the State from having its

expert examine the defendant. Thus, the court allowed him to observe Burns at trial as a substitute of sorts for a personal examination. "Under the circumstances, this was the only avenue available for the state to offer meaningful expert testimony to rebut the defense's evidence of mental mitigation."[22] Similarly, in Strausser, cited above, this Court found no abuse of discretion when the lower court allowed the State's expert to observe "only the direct examination of Strausser." Id.

Thus, a party's expert may be excused from the rule of sequestration when no other means exists to get the information he or she needs to complete an informed analysis of the defendant. No court has approved what the trial judge did in this case. That is, he allowed Dr. McClaren to sit through the entire penalty phase for no reason except to gain "background information." (15 T 3025-26) Unlike the necessity that existed in Burns, or the limited exception allowed in Strausser, here the trial court extended to Dr. McClaren an open invitation to stay in the courtroom throughout the entire penalty phase when there was no need for him to have done so. That is, the court had appointed him more than six months before trial started, so he had ample time to discover the evidence Hernandez's witnesses, lay and expert, may have presented during the penalty phase of

[22] In light of Burns, this Court approved Rule 3.202, Fla. R. Crim. P., which permits the State's expert to examine a defendant facing a death sentence when he or she has given notice that they intend to rely on expert testimony as part of their penalty phase defense.

Hernandez' trial. There simply was no need for Dr. McClaren to gather "background information" by attending that proceeding. By letting him do that, the court abused the discretion this Court has given trial courts in dealing with this type of issue.

So, if the court erred, was it fatal, reversible error? That is hard to say because we simply cannot unravel his testimony to show that because he sat in the courtroom and heard all the penalty phase witnesses he changed, shaded, or slanted his testimony. In his opinion, and contrary to those of the defense experts, neither mental mitigator applied to Hernandez (18 T 2471, 2476). Similarly, although he agreed with Drs. Bingham and Turner that the defendant suffered from Post Traumatic Stress Disorder and other disorders, he minimized their impact by finding no "direct link" between these diagnosis and the murder of Ms. Everette. "Perhaps an indirect link." (18 T 2468) "[B]ut that would be an indirect rather than a direct link." (18 T 2470). Dr. McClaren, having heard the defense case, including the lay and expert witnesses, could rebut it with long discussions about insanity, psychosis, breaks from reality, and issues that had nothing to do with penalty phase mental mitigation (18 T 2472).

> So none of the mental health disorders that you diagnosed or that Dr. Binghm or Dr. Turner diagnose, in your professional opinion, have any causal effect as far as this defendant's criminal conduct in murdering, robbing, and burglarizing Ruth Everett?
>
> A. No.

(18 T 2470-71)

Thus, showing harm in allowing Dr. McClaren to improperly sit through all the penalty phase testimony becomes extraordinarily difficult because he may have slanted, shaded, or modified it in ways that cross-examination simply could not expose. Posed differently, if Dr. McClaren had no legitimate reason to sit through the penalty phase, as did the experts in Burns and Strausser, why did he want to if not to find ways to alter his testimony to defeat or minimize the impact of the defense evidence? By January 2007, he had been on the case long enough to know the "factual background" and what the defense experts would say. There simply was no need for him to have sat through the penalty phase, and the error was so egregious that it is inherently prejudicial.

This Court should, therefore, reverse the lower court's sentence of death and remand for a new sentencing hearing before a jury.

ISSUE VII

THE COURT ERRED IN FAILING TO DISMISS THE INDICTMENT BECAUSE IT FAILED TO INCLUDE THE AGGRAVATING FACTORS THE STATE BELIEVED JUSTIFIED A DEATH SENTENCE IN THIS CASE, A VIOLATION OF THE SIXTH , EIGHTH, AND FOURTEENTH AMENDMENTS.

By way of a "Motion to Dismiss Indictment,"[23] Hernandez asked the court to dismiss the indictment filed against him because it had failed to include the specific aggravating factors the State intended to prove beyond a reasonable doubt which would justify a death sentence (1 R 101-105). The court denied that motion (1 R 147, 9 R 697). Although, this Court has said that the State need not alleged aggravators in the indictment, Rogers v. State, 957 So.2d 538, 554 (Fla. 2007), Hernandez asks it to reconsider that opinion, and require the indictment to do so. Simple fairness and the defendant's due process right to a fair notice of the charges against argue for that holding.

He also asks this Court to reconsider its opinion in Coday v. State, 946 So.2d 988 (Fla. 2006), which held that there is no requirement that the jury specifically indicate on the verdict form which aggravating factors it found applied. Recently, Justice Pariente, with Justice Anstead concurring, urged this

[23] The motion, as completely worded was "Motion to Dismiss Indictment ; Alternative Motion to Require Jury to Make Unanimous Findings of Fact with Respect to Any Aggravator Alleged by the State, and to Indicate those unanimous Findings for Each Aggravator on a Special Interrogatory Verdict Form."

Court to reject that holding and require jurors to indicate what specific aggravators it found applied to justify their death recommendation.

> More than four years ago, in Bottoson v. Moore, 833 So.2d 693 (Fla.2002), we first addressed the effect of Ring on Florida's capital sentencing statute. Although I concurred in the result in that case, a denial of relief on a successive postconviction habeas petition, I recommended two steps that could be taken without contravening Florida's death penalty scheme. First, I stated that "jurors [should be] told that they are the finders of fact as to the aggravating circumstances." Second, I stated that trial courts should be required to "utilize special verdicts that require the jury to indicate what aggravators the jury has found and the jury vote as to each aggravator." Bottoson, 833 So.2d at 723 (Pariente, J., concurring in result only). In their separate opinions in Bottoson, Justice Anstead and Justice Quince also recognized that special verdicts should be considered after Ring. See id. at 708 (Anstead, C.J., concurring in result only) (stating that under the bare advisory recommendation required of juries under the current standard instructions, "there could hardly be any meaningful appellate review" because "it would be impossible to tell which, if any, aggravating circumstances a jury or any individual juror may have determined existed"); id. at 702 (Quince, J., specially concurring) (stating that "it may be a good idea to give the jury special interrogatories at the penalty phase").
>
> That was 2002. It is now 2007, and we still have not amended the standard instructions and penalty-phase verdict form to reflect jury findings on aggravators that operate as "the functional equivalent of an element of a greater offense." Ring, 536 U.S. at 609, 122 S.Ct. 2428 (quoting Apprendi v. New Jersey, 530 U.S. 466, 494 n. 19, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)). Steele [State v. Steele, 921 So.2d 538 (Fla. 2005)] leaves open the possibility of recorded jury votes on individual aggravators if jurors are appropriately instructed. The majority's reference to the vote on these verdicts in addressing challenges to several aggravators in this case and Hoskins [Hoskins v. State, 32 Fla. L. Weekly S159, S165 (Fla. Apr. 19, 2007)] illustrates their usefulness. I therefore urge my colleagues to consider the proposal previously submitted by the Criminal Court Steering Committee, including a penalty-phase special verdict and

> accompanying instructions crafted to avoid the conflict with the substantive law identified in Steele.

Franklin v. State, 32 Fla. L. Weekly S359 (Fla. June 21, 2007)(Pariente, specially concurring).

Hernandez asks this honorable Court to adopt Justice Pariente's logic, reverse the trial court's judgment and sentence in this case, and remand for a new trial.

ISSUE VIII

THE COURT ERRED IN GIVING THE JURY THE INSTRUCTION ON VICTIM IMPACT EVIDENCE APPROVED IN KEARSE V. STATE, 770 So.2d 1119, 1132 (Fla. 2000) AND RIMMER V. STATE, 835 So.2d 304, 331 (FLA. 2002), A VIOLATION OF THE DEFENDANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Over defense objection (14 T 1863), the Court instructed the jury as follows regarding the victim impact evidence it had heard from two witnesses:

> Ladies and gentlemen, now 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 members by Ruth Winslow Everett's death. Family members are unique to each other by reason f their relationship and role each has in the family. A loss of 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 as evidence in this case.

(15 T 2022, 2034-35)(Emphasis supplied.)[24]

This instruction follows the instruction approved by this Court in Kearse v. State, 770 So.2d 1119 (Fla. 2000) and Rimmer v. State, 834 So.2d 304, 331 (Fla. 2002). Although approved, it is confusing. First the court told the jury that the evidence had no relevance to any of the aggravating and mitigating factors, then it said it could "consider it as evidence in this case." Evidence of what? Relevance, as defined by section 90.401, Fla. Stat. (2006), is "evidence tending to prove or disprove a material fact. In a capital sentencing proceeding the only material facts

[24] The court gave a similar introductory instruction without the emphasized part of the quote before the witnesses testified (15 T 2006, 2022).

are those that tend to establish (or not) an aggravating or mitigating circumstance. Evidence that tends to establish anything else is irrelevant and hence inadmissible. So, giving this instruction could only confuse the jury and encourage them to wander into forbidden paths.

Thus, although this Court has approved the instruction, Hernandez respectfully asks this honorable Court to reconsider it opinions in Kearse and Rimmer, and reverse the trial court's order imposing death in this case and remand for a new sentencing proceeding before a jury.

VI. CONCLUSION

Based on the arguments presented here, Michael Hernandez respectfully requests this Honorable Court to reverse the trial court's judgment and sentence and remand for a new trial, or to reverse the trial court's sentence of death and either remand for a new sentencing hearing, or remand for imposition of a sentence of life in prison without the possibility of parole.

VII. CERTIFICATES OF SERVICE AND FONT SIZE

I hereby certify that a copy of the foregoing has been furnished by U.S. Mail to **RONALD LATHAM**, Assistant Attorney General, Counsel for the State, The Capitol, Tallahassee, FL 32399-1050, and to **MICHAEL A.** HERNANDEZ, #P31867, Florida State Prison, 7819 NW 228th Street, Raiford, FL 32026, on the _____ day of January, 2008. I hereby certify that this brief has been prepared using Times New Roman 14 point font in compliance with the Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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