IN THE SUPREME COURT OF FLORIDA

MICHAEL A. HERNANDEZ, JR.,

Appellant,

v. **CASE NO. SC07-647**

STATE OF FLORIDA,

Apellee.
_____/

APPELLANT'S REPLY BRIEF

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I. PRELIMINARY STATEMENT

References to the State's Answer Brief shall be as "Appellee's Brief," followed by the appropriate page number. All other references shall be as set forth initially.

II. 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.

The gist of the State's argument is that no error occurred because prospective Juror Mancusi had only a brief glimpse of Hernandez in shackles, he was excused, and there was no evidence that anyone else saw the defendant in chains (Appellee's brief at pp. 35-36). The problem is that Mancusi's candid observations clearly showed that even that brief view created a real possibility Hernandez did not receive a fair trial.

That is, the State seems to believe that a brief glimpse is only a "micro" problem, and that little problems do not create major damage. (Appellee's brief at p. 35). If so, Adam and Eve would still be in the Garden of Eden, Chad(hanging or otherwise) would only be a country in Africa, and no one would be overweight. It is not the amount of time, however brief it may be, a juror has to see the defendant in chains that matters. It is the knowledge that he is in chains that is so inherently prejudicial.

Seeing a defendant shackled is not a micro problem. As this and other courts have found, when jurors see a defendant in chains, the real danger exists that they will ignore the presumption of innocence and convict simply because he is an obviously dangerous person. Because of that possibility and probability, even the decision to shackle requires close scrutiny. Seeing a defendant forcibly and obviously restrained is as this Court said, inherently prejudicial. Bell v. State, 965 So.2d 48 (Fla. 2007); Bello v. State, 547 So. 914, 918 (Fla. 1989). Thus, if the need to have a defendant in chains requires such close appellate scrutiny, the presumption of inherent prejudice must attach when one of the prospective jurors brings the issue to the court's attention that he "briefly" saw the defendant shackled. In short, this is not a "micro" problem.

Of course, as the State notes, this Court has found no error in brief glimpses of the defendant in shackles, Neary v. State, 384 So.2d 881, 885 (Fla. 1980). But to reach that decision, it has had to speculate that the view was "not so prejudicial as to require a mistrial." Heiney v. State, 447 So.2d 210, 214 (Fla. 1984). It never cited or otherwise relied on evidence or studies that showed that "brief glimpses" of a defendant in shackles has no damning effect. Indeed, in this case, Mancusi explicitly refuted that notion. Specifically, he admitted he only briefly saw Hernandez shackled, and even though it was only a momentary glimpse, "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. . . .[O]nce again that's hard to get out of your head." (5 T 766-68).

But more than simply being stuck in his head, he admitted the knowledge that the defendant had to be restrained severely tainted his view of the presumption of innocence.

> 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 out of the back of your mind**,** you know, when you see that and - -
>
> **MR. ROLLO:** Is it fair to say that would have affected your ability to be fair by having seen that?
>
> **THE PROSPECTIVE JUROR:** That combined with the other information I told you? Certainly.

(5 T 772-73) (Emphasis supplied.)

Moreover, once he realized Hernandez was in chains, he noticed what the court had done to hide that from the jury. Indeed, he admitted that nothing he saw in the courtroom led him to realize the defendant was in chains (5 T 773). Well, may be not, because once his eyes had been opened, the measures the court took became "obvious to me after the fact." (5 T 774)

Thus, a brief view, can have devastating, avalanching effects on the presumption of innocence. It is the knowledge jurors have that the defendant has

been chained and shackled that creates the problem, not how long they saw him so restrained.

What, then, should the court have done? The State, on pages 35-36 of its brief, says that beyond excusing prospective juror Mancusi, the court need have done nothing more. That is wrong because other prospective jurors were in the hall when Mancusi saw Hernandez in chains, and similarly may have seen him shackled (5 T 770). Now, it would have perhaps been difficult or impossible to find who those other prospective jurors were and to have questioned them without fatally revealing that the defendant had been shackled. Moreover, it is sheer speculation to assume no one either saw or did not see the defendant so restrained. At this point, the only thing we can assume is that we do not know who, if anyone besides Mancusi, saw the defendant in chains.

If so, the only way this Court can resolve this intractable problem is to use the analysis proposed in the Initial Brief at pages 32-34. Cooper v. Oklahoma, 517 U.S. 348 (1996). Because Hernandez would have suffered the far more dire consequences of a conviction for first degree murder and a death sentence if he had a tainted jury than the State would have if the jury had not been aware he was in chains, the court should have declared a mistrial. That it refused to do so then now means this Court must reverse the trial court's judgment and sentence 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.

Had this case involved only a single defendant killing Mrs. Everette, Hernandez would not have raised a proportionality argument because, as much as he hesitates to admit it, this Court would almost summarily have rejected it. Similarly, if Arnold had been found guilty of first degree murder and sentenced to death, Hernandez would not have raised a proportionality claim because, as Hernandez argued in his Initial Brief and this Court has held, equally culpable defendants should receive equal or similar sentences, and both defendants would have received the same punishment.

For whatever reasons the State had, it offered, and Arnold accepted, a deal in which he pled guilty to first degree murder and received a sentence of life in prison. If he were less culpable of the murder of Ms. Everette than Hernandez, he would have no equal guilt equal punishment argument. But he was not, and that forms the crux of this issue.

Shawn Arnold was, as the trial court noted, as responsible for Ms. Everette's death as the defendant (3 R 477), yet the former was sentenced to life in prison

while Hernandez received a death sentence.[1] Hence, the state's citation of cases on page 40 of its brief requires no specific response because those decisions say nothing that the defendant disagrees with. They stand for the admitted proposition that defendants who are more culpable than co-defendants can be punished more harshly. The point here is that Arnold's blameworthiness for the murder of Ruth Everette is the same as that for the defendant. As such, Hernandez is not more culpable than him, and therefore should receive the same punishment as his co-defendant.

The real question is whether a defendant who may "deserve" a death sentence should, nevertheless, be sentenced to life because the State was willing to let a co-defendant plead guilty to first degree murder and receive a life sentence. The answer, under Florida law, is yes, if there is no significant difference between the defendant's and co-defendant's level of participation in the murder. Or, as this Court said, "Under Florida law, when a codefendant is equally culpable or more culpable than the defendant, disparate treatment of the codefendant may render the

[1] The State apparently offered Arnold a life sentence in return for his truthful testimony at Hernandez's trial (15 T 1959). After being sentenced the co-defendant, however, refused to testify (15 T 1959). During its penalty phase closing argument it said that Arnold was "not as guilty as Michael Hernandez" because of what he did or did not do during and after the murder (18 T 2531-32). Defendants, or co-defendants who plead guilty to first degree murder cannot, however, be just "a little bit guilty." Burr v. State, 461 So.2d 1051, 1054 (Fla. 1985).

defendant's punishment disproportionate." Farina v. State, 801 So.2d 44, 55 - 56 (Fla. 2001).

In its sentencing order, the court distinguished Hernandez from Arnold by noting that the defendant was the one who actually killed Ms. Everette, and he did so after Arnold said he could not "complete the murder." (3 R 477). Yet, as argued in the Initial Brief, under the analysis of Tison v. Arizona, 481 U.S. 137 (1987), those distinctions fail to make Arnold less culpable than Hernandez. Arnold, like the Tison brothers, was a major player in the murder. In both cases, even though neither of them actually killed their victims, they were present and provided their partners with the murder weapons. They were actively involved in every element of the crime sprees that ended in murder. Arnold was a major participant in the Everette murder, and he showed a reckless indifference to her life. Tison, at 158. Indeed, when compared with the Tisons, Arnold had a greater blameworthiness than them because he had tried, although unsuccessfully, to kill Ms. Everette before Hernandez completed what he had started.

Also, on page 40 of its brief, the State says, "Thus, the record clearly evidenced that Hernandez's affirmative conduct was solely responsible for Everett's death. . . ." The Tison brothers made a similar argument in their case, but the U.S. Supreme Court rejected it. Their father and another man actually killed the four victims. The sons simply provided them with the guns to do so and then did nothing while they committed the murders. Yet, by being present, providing the

guns, and then doing nothing to stop the killings, they were eligible for a death sentence.

Similarly, in this case, Arnold gave Hernandez the murder weapon, a knife, and then did nothing to stop the murder. Like the Tison brothers, he had the same reckless indifference to life. He was, therefore, as responsible and morally culpable for Ms. Everette's death as the Tison brothers were for the four murders they witnessed.

Under this Court's obligation to insure that equally culpable defendants are equally punished, Hernandez's death sentence must be vacated and a life in prison ordered.

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.

The State asserts that the court made no mistake in refusing to excuse prospective juror Lindquist because she "gave unequivocal assurances that she would follow the law. (Appellee's brief at p. 47). Ah, if only the law were that simple. The standard a court should use in measuring juror impartiality is whether "there is any reasonable doubt about the juror's ability to render an impartial verdict." Singleton v. State, 783 So.2d 970, 973 (Fla. 2001). Certainly, unequivocal assurances of fairness is a factor in measuring impartiality, but it is only one, and sometimes not a very compelling one. See, Irvin v. Dowd, 366 U.S. 717, 728 (1961)(Assurances of impartiality carry little weight where many of the prospective jurors had an admitted prejudice against the defendant.) As argued in the Initial Brief on page 47, "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." The court should have excused her for cause, and that it did not means this Court must now reverse the lower 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.

The critical point here is that for the avoid lawful arrest aggravator to apply, it must be the dominant motive for the murder. Not just a motive, but the overriding, dominant reason for the homicide. That is why this Court has held that killing a victim because he or she saw the defendant's face or knew who he was provides an insufficient amount of proof to support this aggravator. Because it applies primarily to the killings of law enforcement officers, when applied to others, more proof than simply identification of the defendant is needed. It is required because when defendants kill persons other than police officers they may have other, more compelling reasons, for doing so than avoiding arrest.

Indeed, in this case that is the scenario. While Hernandez may have killed Ms. Everette because she recognized him (or more likely, Arnold), murder to avoid arrest was not the main reason he committed the homicide. Her death was part of his and Arnold's plan to get money so they could continue their cocaine binge. What they did before and after the killing clearly showed that. Avoiding arrest, while perhaps a reason for the murder, was not the dominant justification for it. As such, the court erred in finding that aggravator applied to this case.

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.

Section 90.616, Florida Statutes (2007), codifies the Rule of Sequestration.

> **90.616. Exclusion of witnesses**
> (1) At the request of a party the court shall order, or upon its own motion the court may order, witnesses excluded from a proceeding so that they cannot hear the testimony of other witnesses except as provided in subsection (2).
> (2) A witness may not be excluded if the witness is:
> (a) A party who is a natural person.
> (b) In a civil case, an officer or employee of a party that is not a natural person. The party's attorney shall designate the officer or employee who shall be the party's representative.
> (c) A person whose presence is shown by the party's attorney to be essential to the presentation of the party's cause.
> (d) In a criminal case, the victim of the crime, the victim's next of kin, the parent or guardian of a minor child victim, or a lawful representative of such person, unless, upon motion, the court determines such person's presence to be prejudicial.

Subsection (c) provides the only possible justification for what the court did in this case, yet it fails to do so. Assuming that Dr. McClaren's testimony was necessary for the State's penalty phase case does not mean that his presence was "essential to the presentation the party's cause" when Hernandez's presented his penalty phase witnesses. This expert had at least six months to do whatever he needed to do to prepare for trial (1 R 178-79). This is not the case where the penalty phase hearing provided the first or only opportunity for him to get ready. Burns v. State, 609 So.2d 600, 606 (Fla. 1992); Cain v. State, 758 So.2d 1257

(Fla. 4th DCA 2000). This experienced death penalty expert had plenty of time, and there is no just reason he should have been allowed to sit through Hernandez's penalty phase case.

The State says on page 55 of its brief, that "Hernandez has not identified the harm that occurred by having McClaren present in the courtroom subsequent to his own testimony on behalf of the State."

The correct analysis requires that this Court first determine if the trial court abused its discretion in allowing Dr. McClaren to sit through this defendant's entire penalty phase case. If so, it must then determine the harm done by that error. As to that latter inquiry, the State has the burden to carry to show its harmlessness. The defendant has no obligation to prove prejudice. That is, the State on appeal must show the harmlessness of the court's ruling beyond a reasonable doubt. State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986)("The burden to show the error was harmless must remain on the state.") In this case, it simply has not done so. Harm, therefore, must be presumed. See, U.S. v. Jackson, 60 F.3d 128 (2d Cir. 1995). In U.S. v. Farnham, 791 F.2d 331 (4th Cir. 1986), the 4th Circuit analyzed the federal court's Rule of Sequestration, which is comparable to Section 90.616. Finding that the use of "shall" required the exclusion of witnesses when requested, the court found the lower court's error in not doing so required a new trial:

> We reject the government's suggestion that the technical violation of Rule 615 lacks consequence because the defendant cannot prove prejudice. Instead, we understand the mandatory, unambiguous language of the rule to reflect the drafters' recognition that any defendant in Farnham's position would find it almost impossible to sustain the burden of proving the negative inference that the second agent's testimony would have been different had he been sequestered. A strict prejudice requirement of this sort would be not only unduly harsh but also self-defeating, in that it would swallow a rule carefully designed to aid the truth-seeking process and preserve the durability and acceptability of verdicts. Rule 615 thus reflects an *a priori* judgment in favor of sequestration, and the exceptions should be construed narrowly in favor of the party requesting sequestration.

Farnham, at p. 335.

This Court should similarly hold that the mandatory language of section 90.616 required the trial court to have excluded Dr. McClaren from watching Hernandez present his penalty phase case. It should remand for a new penalty phase hearing.

V. CONCLUSION

Based on the arguments presented here and the Initial Brief, 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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to **RONALD A. LATHAN, JR.**, Assistant Attorney General, The Capitol, Tallahassee, FL 32399-1050, and **MICHAEL A. HERNANDEZ, JR., #P31867,** Florida State Prison, 7819 NW 228th Street, Raiford, FL 32026, on this ____ day of May, 2008.

CERTIFICATE OF FONT SIZE

I hereby certify that this brief has been prepared using Courier New 12 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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