

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00,789

RORY ENRIQUE CONDE,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT,
11TH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY

INITIAL BRIEF OF APPELLANT

RORY ENRIQUE CONDE

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STATEMENT OF THE CASE AND FACTS

Rory Conde was tried on one count of a six count Indictment charging six separate premeditated murders. (R1-1-4). He appeals his conviction for the premeditated murder of Rhonda Dunn and sentence of death. (R9-1723-5).

A. Guilt Phase

1. Overview. On six different dates from September, 1994, through January, 1995, the bodies of six prostitutes were discovered at roadside locations near the Tamiami Trail (S.W. 8th Street) in Dade County. Each victim had been strangled and died of asphyxiation. DNA testing led police to link the homicides.

In a seemingly unrelated event, in June, 1995, a woman was discovered bound and trapped in Rory Conde's apartment. During the investigation of this crime scene, a beeper was discovered which one of the detectives recognized as possibly having been missing from one of the homicide victims. Mr. Conde was arrested based on this crime victim's identification of him as the person who had bound and raped her.

Shortly after his arrest, Conde was interrogated by homicide detectives investigating the six murders. He eventually gave statements implicating himself. DNA and other crime scene evidence ultimately linked him, his apartment, and his automobile to each of these homicides. Rhonda Dunn, the victim of the homicide for which Conde was tried and convicted, was the last of the homicide victims.

2. Discovery of the Homicide Victims. On September 16, 1994, the body

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of Lazaro Comesana was discovered on a grassy swale of a residential neighborhood near the Tamiami Trail. (v116- 6171-4, 6310-13).¹ He was dressed in women’s clothing. (v116 6176, 6192-3; SR1-167). The cause of death was asphyxiation from strangulation. (v117-6381-6401). Body fluids and specimens were collected for rape and DNA testing. (v117-6401-5).

On October 8, 1994, the body of Elisa Martinez was discovered on a grassy swale of a southwest, Miami, residential neighborhood. (v116-6203-7, v117-6254-64; SR1-180-87). She, too, had been strangled to death. (v118-6420-33). Body fluids were collected from her. (v119-6606).

On November 20, 1994, the body of Charity Nava was discovered beside a road of a residential neighborhood near the Tamiami Trail. (v117-6268-76; 6313-18; SR2-236-47). Her back was covered with writing in black magic marker including the following messages: “Third!,” “I Will Call Dwight C.H.A.N. 10,” a pair of eyes followed by the words “If You Can Catch Me,” and “N y R.” (v117-6278-9; SR1-189). She, too, had been strangled and died of asphyxiation. (v118-6434-47). Body

¹ The Record on Appeal, consisting of 9 volumes of pleadings and documents from the trial court file, will be referred to by volume and page number, *e.g.*, R3-652. The Transcript of Proceedings, consisting of 149 volumes of trial and other proceedings transcripts, will be referred to by volume and page number, *e.g.*, v86-3215. The Supplemental Record on Appeal, consisting of 4 volumes of exhibits, will be referred to by volume and page number, *e.g.*, SR3-444-6. The First Supplemental Record on Appeal, consisting of 4 volumes of pleadings and transcripts related to Mr. Conde’s various motions to suppress evidence and statements, will be referred to by volume and page number, *e.g.*, SRiii-362.

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fluids were collected for rape and DNA testing. (v117-6272-3).

On November 26, 1994, the body of Wanda Crawford was discovered in a grassy, roadside area near the Tamiami Trail. (v117-6310-20). Crawford also had been strangled to death. (v118-6447-66). Rape kit testing was conducted.

On December 17, 1994, the body of Necole Schneider was discovered in a grassy swale of another residential neighborhood near the Tamiami Trail. (v117-6329-35, 6340-54). She was wearing a dress and a single shoe. (v117-6343). There were tire marks nearby and a mark on her right leg which the police believed had been made by a tire. (*Id.* at 6344-5). Schneider had been strangled to death. (v118-6466-79). Body fluid samples were collected for testing. (v117-6335).

Dunn's body was discovered on January 12, 1995, also in a grassy swale near the Tamiami Trail. (v123-7091). She was clothed only in a silk jacket and white spandex shorts. (V123-7092). Dunn died from strangulation asphyxiation. (v123-7138). Bodily fluids and specimens were collected. (v123-7125-30).

3. The Link Between the Homicides; Investigative Link to Rory Conde. By Thanksgiving, 1994, between the third and fourth homicides, the police, through DNA analysis, had established a link between the murders. (v119-6664-5, 6676-80). The existence of this link was conveyed to the homicide detectives. (v119-6679-80, 6716-17; v125-7200-1). As DNA links between the subsequent homicides continued to be discovered, the homicide detectives were apprised. (v119-6716-17).

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On June 19, 1995, a woman was discovered half naked, wrapped in duct tape, and trapped in Conde's apartment. She identified Conde as her assailant. (v118-6536-48). A Miami-Dade homicide detective dispatched to Conde's apartment during the subsequent investigation identified a green beeper that he believed belonged to one of the homicide victims but was missing. (v117-6299-6309). Shortly afterwards, a Miami-Dade police DNA specialist advised the homicide detectives that Conde might be involved with the homicides. (v119-6720). Further investigation linked Conde to his grandmother, Maria Rojas, who resided in Hialeah.

4. The Arrest and Interrogation of Rory Conde. On Saturday, June 24, 1995, four armed Miami-Dade homicide detectives went to Conde's elderly grandmother's apartment to locate him for interrogation. (v122-6963-68). Ms. Rojas was noticeably nervous. After Rojas indicated Rory was present, the detectives entered. (v122-6967-72; v123-7014). Detective Estopinan observed Rory in a back room, kneeling beside a bed. (v122-6972). He ordered Rory to freeze. Rory immediately got up and walked toward the front of the apartment. (v122-6972-3). Estopinan grabbed Rory and escorted him outside where he handcuffed him. (v122-6973-5).

The detectives took Rory to the Miami-Dade homicide bureau. They had Rory execute a *Miranda* rights waiver, a consent to search his apartment, and a consent to

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search his automobile. (v122-6977-84; v123-6994-7003; v125-7211-32; SR2-350-55).

About two hours later, the detectives had Rory sign a consent to provide saliva and blood sample which were collected from him. (v125-7232-33; SR2-298-9).

Rory remained in police custody for nearly 14 hours. (v123-7016-17). He was interrogated by at least three veteran homicide detectives in an interrogation room for more than 12 hours. (v123-7017-18; v125-7246-7, 7249; v127-7555). The detectives showed Rory photographs of the homicide victims. (v125-7247-8). They advised him that there was physical evidence, including DNA, that connected him to the homicides and that he would be charged with these crimes soon. (v123-7018-19; v127-7569). They told him “it would be best” if he were truthful. (v123-7019). Rory identified Martinez and stated that he had used her services before. (v125-7248). The interrogation terminated at 2:30 a.m. the next morning when Rory was taken to TGK, a detention facility. He continued to deny any involvement with the homicides. (v125-7246-9).

On Sunday, June 25, 1999, at approximately 2:00 p.m., the detectives retrieved Rory from TGK. (v125-7251-2, 7254-6; v127-7564). After placing him back in the interrogation room, they had Rory execute another *Miranda* waiver. (v125-60; SR2-359). The interrogation continued several hours until Rory was allowed to use a telephone. (v125-7267-8; v127-7565-6). Rory spoke on a telephone for about 45 minutes to his grandmother, and then his wife and children. (v125-7268). Lead

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detective Romagni overheard Conde tell his wife that he loved her and the children and that he was “sorry for everything.” (V125-7268-9; v127-7571-2).

At approximately 5:00 p.m., when interrogation recommenced, Romagni testified that Rory stated he had “killed them.” (v125-7270-2). In response to Romagni’s questioning, Rory gave a statement about each of the six homicides. (v125-7279-82). This interrogation lasted approximately two hours.

Thereafter, the detectives began interrogating Rory about the homicides a second time, this time in greater detail. (v125-7282-7318). Part way through this interrogation the detectives were advised that Rory would have to be returned to jail so that he could be transported to a bond a hearing. (v125-7283-4). At this point, in an effort to get a formal statement, Romagni terminated the interrogation, summoned a court reporter, and began taking a stenographic statement. (v125-7284).

Rory’s formal statement spanned 175 pages. (SR2-360-536). The statement commenced at 11:50 a.m. and terminated at 2:50 a.m. (v126-7354-5).

5. The Confession. (v126-7362-7504; SR3-360-536) After waiving his *Miranda* rights, (v126-7363-5), Rory told the detectives about his background and family. (v126-7365-6). He stated that after problems developed in his marriage he began using prostitutes from the Tamiami Trail. (v126-7366-7). His wife Carla accused him of cheating and eventually left with their children. Rory blamed himself and the prostitutes for the demise of his marriage and family. (v126-7367).

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Rory identified a photograph of Lazaro Comesana. (v126-7366-9). Believing Comesana was a female prostitute, he explained how he picked him up, agreed to pay for sex, and brought him back to his apartment. (*Id.* at 7370-4). Comesana performed fellatio on him until he ejaculated. (*Id.* 7375-7). While reaching down to grab Comesana’s breasts, Rory realized the prostitute was a man. (*Id.* 7377-8). Rory was devastated. (*Id.*). He then got behind Comesana, wrapped his left arm around his neck, and choked him for 15 to 20 seconds. (*Id.* at 7379). Rory laid Comesana on the floor on his chest, removed his pantyhose, and engaged in anal intercourse with him until he ejaculated. (*Id.* at 7379-80). Rory then redressed him.

Rory explained that he killed Comesana out of his anger about Comesana’s deception and his belief that Carla and his children had left him because of his use of prostitutes. (*Id.* at 7380-81). He described kneeling over Comesana’s body for 10 minutes while he blamed him for the loss of his wife and children. (*Id.* at 7980-81). He then made the sign of a cross over Comesana’s body. (*Id.* at 7382).

Rory carried Comesana’s body to his car and drove to the Tamiami Trail area where he placed Comesana’s body. (*Id.* at 7382-8). Rory returned home feeling extremely paranoid. This lasted several days. He stated that he missed work the following Monday and was a “nervous wreck.” (*Id.* at 7389-90).

Rory next identified a picture of Eliza Martinez. (v126-7391). He previously had had a few dates with her; she was the next prostitute he saw after Comesana.

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(*Id.*). Rory explained how the anger and anguish he felt from the loss of his wife and family had been growing. (*Id.* at 7392). He picked up Martinez on Southwest 8th Street. (*Id.* at 7393). After agreeing on a price for sex, he brought Martinez to his apartment. (*Id.* at 7395-6). Rory took off his pants and laid on his bed. (*Id.* at 7397). He described Martinez’s clothing and stated that she got undressed. After a couple of minutes of fellatio, Rory ejaculated. (*Id.* at 7399-74). He stated that Martinez went to the bathroom and came back and sat on the bed. He turned on the television. He then got behind Martinez, put his left arm around her neck, and squeezed for 15 to 20 seconds. (*Id.* at 7401-2). She did not struggle and fell to the floor.

Rory redressed Martinez. He blamed her for his problems, accused her of killing him, then made the sign of the cross over her and asked for forgiveness. (*Id.* at 7402-4). He stated that he killed her because she took away everything important to him. He then described how he carried her to his automobile and drove to a nearby residential location where he placed her body. (*Id.* at 7405-8).

Rory next identified a picture of Charity Nava, the next prostitute he saw after Martinez. (V126-7411). He explained how his anger about the loss of his family had mounted but the rage had dissipated after he had killed Martinez. He stated that the rage had built up, again. He described driving to the Tamiami Trail to “cool off.” (*Id.* at 7412). He was not looking for a prostitute. Ultimately, he encountered Nava from whom he solicited sex. After agreeing on a price, Nava got into Rory’s vehicle and

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went with him back to his apartment. (*Id.* at 7515-16). After putting on a condom, Rory had intercourse with Nava for about 10 minutes. (*Id.* at 7418).

Nava disposed of the condom in the bathroom and returned to the bedroom. She laid with Rory for 15 to 30 minutes while they watched T.V. (*Id.* at 7419). They had sex again. When they finished, Rory continued watching T.V.; Nava listened to music in headphones, ignoring Rory. (*Id.* at 7420). Rory then described strangling Nava from behind. Nava did not struggle. (*Id.* at 7424).

Rory stated that he placed Nava on the floor and performed anal intercourse on her for 1 to 2 minutes until he ejaculated. (*Id.* at 7422). He then leaned over her body and blamed her for his problems. He stated that he decided to kill Nava because she ignored him after their second intercourse. (*Id.* at 7423).

Rory decided to write on Nava's back with black magic marker. (v126-7424). He wrote "Third" because this was the third homicide. (*Id.* at 7425). Under this he wrote: "I will call Dwight (a well-known local T.V. news anchorperson) C.H.A.N. 10." (*Id.* at 7427). Under this he wrote "See If You Can Catch Me." Under this he wrote "N y R," meaning his mother, Nadia, and him. (*Id.* at 7428). Rory said the same things over Nava's body that he had said to the others. (*Id.* at 7432). Rory then redressed her.

Rory described how he brought Nava's body to his car and drove to a nearby residential area where he placed it. (*Id.* at 7432-6). Back at his apartment, Rory

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discarded the property Nava had left but kept a beeper. (v126-7437-8). He remarked that he cared about Nava but that she had caused him a lot of misery.

Rory stated that after Nava's murder, he was invited and went to have Thanksgiving dinner with Carla's family. (v126-7439). Carla rejected him and made him feel unwelcome. He became very angry. (v126-7441).

After leaving, Rory stated that he went to the Tamiami Trail to cool down. (*Id.* at 7441-2). Here he met Wanda Crawford. (*Id.* at 7442-3). After agreeing on a price for sex, Crawford got into Rory's car and went to Rory's apartment. (v126-7444-6). After sex, Rory explained that they laid together on his bed for ten minutes. (*Id.* at 7446-7). They had sex a second time after which Crawford took a bath and Rory watched T.V. (*Id.* at 7448). After Crawford returned and laid down with Rory, he described grabbing her around her neck with his left arm and squeezing for ten to fifteen seconds. (*Id.* at 7449). Rory stated Crawford did not struggle.

Rory did not remember if he had sex with Crawford after killing her. (*Id.* at 7450). He described redressing her, carrying her to his car, and then driving to a different area where he placed her body. (*Id.* at 7451-4). Rory recalled kneeling over Crawford and verbally blaming her for his problems. (*Id.* at 7455). Upon returning to his apartment, he stated that he felt the same paranoia that he had felt before.

Rory next identified a picture of Necole Schneider, the next prostitute he had met. (v126-7457). Rory stated that since the last murder his relationship with Carla

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had deteriorated and that Carla had told him she would not go back to him and did not love him anymore. (*Id.* at 7459). Rory was devastated by this.

When he met Schneider, Rory explained that he was not looking to kill anyone. Once they agreed on a price for sex, Schneider got into Rory's vehicle and they drove to his apartment. (V126-7460). After sex, Rory felt his anger overwhelm him again. He then strangled Schneider. He stated that she struggled a little and scratched him on his chest. (v126-7463-4). Rory stated that this took only twenty seconds. He admitted having had anal sex with Schneider after she was dead. (*Id.* at 7465). Rory verbally blamed Schneider for his problems. (*Id.* at 7465). He then redressed Schneider, carried her to his car, and drove to a location close to Carla's house where he left her on a grassy swale. (*Id.* at 7466-9). Rory returned to his apartment with the same feelings of despair and paranoia. Once home, he disposed of Schneider's purse and discarded her fingernails that had broken off. (v126-7472-3).

Rory next identified a photograph of Rhonda Dunn. (v126-7474). He recalled picking her up near the Tamiami Trail. He was not looking for a prostitute. When Rory saw Dunn, she reminded him of Carla. (*Id.* at 7475-6). After they agreed on a price for sex, Rory brought Dunn to his apartment. He described what she was wearing and again stated that she reminded him of Carla. (*Id.* at 7479). After they had sex, they watched T.V. on Rory's bed. (*Id.* at 7481). They had sex again. Rory explained that after Dunn got up to go to the bathroom, he suddenly went up behind

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her, put his arm around her neck, and began to strangle her. (v126-7481). Rory explained that Dunn struggled, hitting him on the head with a glass pear from on top of the T.V. (*Id.* at 7483). The two fell on the floor where they continued to struggle. Rory stated that between twenty and thirty seconds later, Dunn was dead. (*Id.* at 7485).

Rory repeated that Dunn had reminded him of Carla. (v126-7487). After she was dead, Rory verbally blamed her for destroying his life. Ultimately, Rory redressed her, took her to his car, and drove to a nearby location where he laid her on the grass. (*Id.* at 7488-91). Upon returning home, Rory disposed of Dunn's purse, beeper, and fingernails which had broken off during the struggle. (*Id.* at 7492-3).

Rory again explained the pain he felt from the destruction of his family and the anger that he projected onto the prostitutes. (v126-7494). He stated that this rage had grown since the last killing and that it peaked when he saw Dunn. (*Id.* at 7492). He denied choosing these victims and insisted, instead, that they were killed because they happened to be there. (*Id.* at 7501). Rory stated that he stopped killing after Dunn because his relationship with Carla had improved. (*Id.* at 7494).

6. Pretrial Proceedings. On July 12, 1995, Conde was charged in a Dade County indictment with six counts of first degree murder. (R1-1-4).² He pled not

² The indictment charged the murders as follows: count I - Comesana; count II - Martinez; count III - Nava; count IV - Crawford; count V - Schneider; and count (continued...)

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guilty. (v37-18). The trial court granted Conde’s Motion for Severance of Counts. (R1-65-66; v5-20-24; R4-636-9). Subsequently, the state filed its Notice of Intent to Rely on Evidence of Other Crimes Wrongs, or Acts indicating its intent to introduce evidence of the other five homicides at each of the six murder trials. (R1-81-83). Conde moved to exclude this evidence. (R4 693-714). The court denied his motion in limine, (v86-3189-3220), but granted his motion to reconsolidate the charges. (R5-874-81, 887-9, 906-27; v86-3220-7; v87-3272-87). However, upon the state’s certiorari petition, the order of consolidation was reversed. *State v. Conde*, 743 So.2d 78 (Fla. 3rd DCA 1999). Ultimately, Mr. Conde was tried only on Count VI for the murder of Rhonda Dunn.

Around July, 1997, plea negotiations ensued. An agreement was reached that, in exchange for Mr. Conde’s guilty pleas to the six homicides and multiple charges arising from two additional pending cases, Mr. Conde would be sentenced to consecutive, life sentences without the possibility of parole. (R3-415-16, 426-33). The state represented that the victims’ families, the investigating police agencies, and the Dade County State Attorney had no objection. The trial court also indicated its willingness to accept the plea.

Shortly before the change of plea hearing, the prosecutor advised defense

²(...continued)
VI - Dunn. (R1-1-4).

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counsel of “a change of heart” and withdrew the plea offer. The state then filed Objections to Proposed Sentencing and a motion to recuse the trial judge based on the court’s alleged participation in the negotiations. (R3-415-17, 429). At the hearing, after filing a response, (R3-415-17), Circuit Judge Richard Margolius granted the state’s motion. (v36-620). Mr. Conde’s Motion to Enforce the Plea Agreement or to Preclude the State from Seeking the Death Penalty, (R3-426-33, 441-6), was denied by successor Circuit Judge Gerald Bagley. (v41-727-41).³

Conde moved to suppress his identification, post-arrest statements, and physical evidence seized from his apartment and automobile on various grounds. (R4-725-35, 767-82; SRi-12-95). The trial court conducted various pretrial evidentiary hearings on these motions and incorporated testimony received in another case against Mr. Conde, Case No. 95-22981, in which these issues were litigated. (v85-3030-3124; v86-3233-66; SRii-SRiv-96-696). The trial court denied Mr. Conde’s motion to suppress his post-arrest statements based on violations of the Vienna Convention, (v85-3063), his motion to suppress identification, (v85-3094), his motion to suppress post-arrest statements based on involuntariness, (v85-3123), and his motions to suppress physical evidence seized from his apartment and vehicle. (v85-3123-24; v86-3266).

³ The state’s act in renegeing on its plea offer, despite the support of all interested parties, prompted Mr. Conde’s Motion to Disqualify Prosecutor. (R4-736-60). The trial court denied this motion. (v85-3025-6).

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Jury selection commenced on September 13, 1999, and concluded on September 28, 1999. (v96-V112). The evidentiary portion of the trial commenced on October 6, 1999, and concluded on October 19, 1999. (v116-v128).

7. Trial. The first three days of trial consisted exclusively of testimony regarding the five uncharged homicides. The first testimony regarding the murder of Dunn was not elicited until day four.

The state elicited DNA evidence connecting Mr. Conde to the homicides. Mr. Conde's objections, and related motions, and renewed motions, to exclude all of this evidence on *Frye* and other grounds, (R6-985-1057, 1115-34; v114-5965-96; v116-6037-6113), were overruled and denied. (v114-5996-6008; v116-6113-15).

Regarding Comesana, the state elicited testimony that the body fluid specimens collected from him tested positive for semen. (v119-6588-6602). The state's DNA expert testified that there was a match using both the PCR⁴ and RFLP⁵ DNA profile tests between these specimens and a blood sample from Conde. (v119-6688-93).

⁴ "PCR" stands for "Preliminary Chain Reaction." (v119-6681). This test requires less DNA material and can be performed more quickly than other DNA tests but produces a more generalized profile. (*Id.*) For instance, the "matches" between Mr. Conde's DNA and DNA material found on the victims by this technique would occur randomly among Hispanics once in 760 people. (v119-6690-1, 6706).

⁵ "RFLP" requires more DNA material and takes longer to perform than PCR but identifies much narrower DNA profiles. (v119-6681-2). The matches between Mr. Conde's DNA and DNA material found on the victims by this technique occurred randomly among Hispanics once in 401,000 people. (v119-6692-5, 6706-7).

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Miami-Dade criminalist Borghi testified that he examined fibers from a red bathroom rug and gray carpeting taken from Rory's apartment. (v121-6821-8). He identified fibers on Comesana's black dress identical to fibers from the gray carpeting. (*Id.* at 6828). Miami-Dade criminalist Hart testified that he examined the tires from the car Rory Conde had been driving. (v123-7032-6, 7042-50). He testified that there were impressions on Comesana's body that were "consistent" with having been made by a tire on Mr. Conde's car. (*Id.* at 7051).

None of the specimens collected from Eliza Martinez were amenable to DNA testing. (v119-6605-6). Borghi testified that fibers removed from Martinez's jeans and sandals matched the carpeting samples from Rory's apartment. (v121-6829).

The specimens collected from Charity Nava tested positive for sperm or semen. (v119-6607-14). The state's DNA expert testified that there was a match to Conde's blood using both the PCR and RFLP DNA profile tests. (v119- 6695-6, 6706-7). Borghi testified that fibers collected from Nava's body matched the carpeting from Rory's apartment. (v121-6830-2, 6898-6901). Hart testified that, though there was an impression on Nava's body that appeared to be a tire impression, it was not sufficient to make any comparison to the tires on Rory's car. (v123-7052-3).

Regarding Wanda Crawford, although her body fluid swabs tested positive for semen, (v119-6616-17), no match was made to Rory. (v119-6709). However, Borghi linked a fiber found on Crawford's clothing to Rory's apartment. (v121-6832).

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The specimens collected from Necole Schneider tested positive for semen and sperm. (v119-6620-1). The state’s DNA expert testified that using the PCR DNA test, a major component of the DNA contained on the cervical swab matched Rory. (v119-6710).⁶ Further confirmation could not be made utilizing the RFLP test. (*Id.*). Borghi testified that fibers found on Schneider’s body and clothing matched the standards from Mr. Conde’s apartment. (v121-6832-3). Because a tire impression on Schneider’s right leg was only partial and not detailed, Hart only opined that it could have been made by one of Conde’s vehicle’s tires. (v123-7053-6). ME Bell testified about several injuries she sustained which he characterized as “defensive.”

The specimens collected from Dunn all tested positive for semen. (v119-6622-5). A fingernail swab indicated the presence of blood. (v119-6626). Additionally, a piece of baseboard from Mr. Conde’s apartment tested positive for blood. (*Id.* at 6639-41). The state’s DNA expert testified that the PCR DNA profile test indicated a match between each of the four swabs taken from Dunn and Conde. (v119-6711-13). Additionally, the RFLP DNA profile test indicated a match with the vaginal swabs. (*Id.* at 6715-16). Another state DNA expert testified that the STR (Short Tandem Repeat) DNA test, one even more particularized than RFLP, indicated a match between the blood on the baseboard and Dunn, and that the likelihood of this

⁶ Unlike the matches determined through PCR testing on the other victims, because there was a “mixture” of DNA material collected from Schneider, this match could only be narrowed to occurring randomly once in 127 Hispanics. (v119-6711).

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match occurring randomly among Caucasian women was one in 180 billion. (v121-6872-7). Other state criminalists testified that marks found on Dunn’s body and head were consistent with having been made by one of the tires on Conde’s car, and a pair of shoes found in his closet, respectively. (v123-7056-63, 7134-7).

Associate ME Rao cataloged some 30 injuries Dunn sustained both before and after her death. Rao characterized several as “defensive.” (v123-7097-7124, 7130-7; SR2-302-47). She testified that these injuries probably happened within three hours of Dunn’s death but possibly before. (v123-7161-3). Rao identified a broken tooth. She had no dental expertise and could only date the injury within three or four days of the time of death. (v124-7164-5). Rao could not date the tear on Dunn’s left pinky fingernail. (v123-7120-1; v124-7164). Rao testified that the pattern injuries to Dunn’s scalp were consistent with being kicked with a shoe. (v123-7134-7).

The state read Rory’s 175 page confession to the jury. (v126-7362-7504).

Following closing arguments, (v128-7719-7844), the jury returned its verdict finding Mr. Conde guilty of the premeditated murder of Rhonda Dunn. (R7-1218; v128-7871-2). The trial court denied Mr. Conde’s post-trial Motion for New Trial (R7-1249-52; v134-7919).

B. Penalty Phase (v135-v143)

1. Overview. The state asserted the existence of three aggravators: (1) defendant convicted of previous felony involving violence; (2) HAC; and (3) CCP.

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(R135-7972-6). Mr. Conde asserted, and presented testimony to establish, *inter alia*, that (1) he had no significant history of prior criminal conduct; (2) the capital felony was committed while he was under the influence of an extreme mental or emotional disturbance; (3) his capacity to appreciate the criminality of his conduct and to conform it to the requirements of law was substantially impaired; and (4) numerous non-statutory mitigators related, primarily, to his family background (including being the victim of physical, emotional, and sexual abuse). (R9-1701-21). By vote of nine to three, the jury recommended the death penalty. (R8-1567; v143-9244-8).

2. State Witnesses. The state presented two witnesses. Detective Richter testified about Mr. Conde’s robbery, burglary, kidnaping, and sexual battery offense which occurred subsequent to the charged capital offense but for which he already had been convicted and sentenced. (v135-7991-8045). Assistant ME Rao repeated her trial testimony that Dunn had 30 injuries. (v137-8274). She repeated that the bruise on Dunn’s ear reflected the application of substantial force and that if she had been conscious, it would have been extremely painful. (v137-8275-7). She further testified that it would have taken substantial force to cause Dunn’s broken tooth, (v137-8279), and that Dunn’s defensive wounds were consistent with her crawling away from her murderer. (v137-8282-3). Although Rao claimed that Dunn suffered a painful death, (R137-8301), she acknowledged that (1) her injuries could have preceded her initial contact with Rory, (2) she could have been unconscious when she sustained these

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injuries, and (3) she may have been strangled for less than three minutes before she died. (v137-8293, 8299-8300, 8304).

3. Defense Witnesses. Mr. Conde presented the testimony of three primary experts: psychiatrist Dr. Fred Berlin, (v141-8808-75), neuropsychologist Dr. Charles Golden, (v142-8924-9005) and psychotherapist/social worker Olga Hervis. (v138-8486-8501; v140-8704). Berlin and Golden concurred, without contravention, that Rory did not murder Dunn in a cold, calculated, and premeditated manner. (v141-8849-50, v142-8976). They further concurred that at the time of Dunn’s murder, Rory’s ability to conform his conduct to the requirements of law and appreciate the gravity of his conduct was substantially impaired. (v141-8845-6; v142-8977). Berlin, Golden, and Hervis agreed that at the time of Dunn’s murder, Rory was under the influence of an extreme mental or emotional disturbance. (v140-8689-95; v141-8844; v142-8976).

Dr. Berlin, who specialized in sexual disorders, (v141-8808), based his opinions upon an extensive review of background information, interviews of, *inter alia*, Rory’s father Gustavo and sister Nellie, and a formal interview of Rory. (v141-8815-17). He opined that Rory committed the charged offense amidst a “major depression” with “despondency” and “agitation” that had its roots in chronic emotional and psychological childhood abuse. This was further triggered by the dissolution of Rory’s marriage and family shortly before the first murder. (v141-8818-23, 8826-30).

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Berlin testified that this “major mental illness” is characterized by a persistent “empty feeling,” (v141-8818), and evinces a profound sense of hopelessness that ultimately interferes with the person’s ability to get help. (v141-8829). Berlin testified that Rory was in a very disturbed state of mind. (v141-8823). He testified that depression can lead to killing. (v141-8834). Berlin distinguished this from the fleeting depression which many people feel, by virtue of its sustained and inescapable nature. (v141-8828). Berlin testified that his diagnosis was supported by the statements of people in Rory’s life who spoke about his inattention to appearance and hygiene, weight loss, and his appearance, at times, of being in a trance - sitting in the dark and staring into space. (v141-8818-26).

Dr. Berlin concluded that Rory “snapped” when he learned, while receiving oral sex from Comesana, that this prostitute was a man. (v141-8831-5, 8846). This pushed Rory “over the edge.” Berlin testified that Rory was already in a state of deep despair over the demise of his family. (v141-8835-8). He blamed the prostitutes for having wrought this destruction. (v141-8826). He now became preoccupied with his murder of Comesana and the fact that he was a murderer. (*Id.* at 8835-6). Berlin explained that Rory attempted, unsuccessfully, to displace these feelings. He concluded that Rory’s sense of reality and his appreciation of the gravity of his thoughts and conduct were obstructed by his extremely disturbed mind. (*Id.*).

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Berlin testified that Rory's conduct was not anti-social behavior. (v141-8838-9). Had this been the case, there would have been a long history of criminal conduct instead of the very finite period of bad acts committed by Conde. (*Id.*). As further evidence that this was not anti-social behavior, Berlin cited the fact that Rory ultimately cooperated with authorities, admitted his criminal conduct, empathized with the victims' families, and expressed remorse for his conduct. (v141-8841).⁷

Dr. Golden based his opinions upon a battery of 7-8 objective psychological examinations he administered to Rory on two dates, and his interviews of Berlin and Hervis. (v142-8924-28, 8981). Although Rory did not appear to have problems with his brain or cognitive abilities, and his IQ was in the normal range, (v142-8929-30), Golden found that Rory's psychopathic deviancy and social introversion scores were high. (v142-8931-2, 8947-9). Golden explained that this profile reflected a person with severe negative emotions repressed in his subconscious and unable to process emotional stimuli, which leads to an out-of-control response akin to Post-Traumatic Stress Disorder. (v142-8952-4). He further explained that this profile reflected severe psychological trauma in childhood and was consistent with childhood sexual abuse. (*Id.* at 8954-5).

⁷ Florida psychologist Dr. William Riebsane testified, based on his interview of Rory and others around him, and his administration of the well-recognized Hare Psychopathy Checklist test to Rory, that Rory was neither a psychopath nor a sociopath. (v141-8731-48).

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In light of this profile, Dr. Golden explained that Rory sought to create the stable family that he never had as a child through his marriage to Carla and having children. (v142-8956). Rory’s marriage dissolved as a result of his emotional inaccessibility and having turned to prostitutes for sexual satisfaction. (*Id.*). The breakup drove him deeper into depression and made him more dependent upon the prostitutes for “unconditional love.” (v142-8957-8).

Golden explained that Rory’s pent-up emotions came unhinged when he discovered Comesana was a male. (v142-8959). Thereafter, Rory went through cycles of denying and attempting to repress the earlier murder(s) but being driven to the companionship of the prostitutes, believing that he was getting better and was back in control, but then being overwhelmed by the primitive forces underlying his negative emotions when he subsequently would be with the prostitutes. (v142-8959-63). Golden explained that not only was Rory not stalking the prostitutes or looking for someone to kill, but he wanted to prove to himself that he was not a murderer and would not kill again. (v142-8960-61). Ultimately, it was Rory’s inability to control these intensely negative emotions that resulted in the subsequent murders. (v142-8961-3).

Olga Hervis’ testimony focused on Rory’s familial relationships. (v138-8534-9). Hervis’ evaluation was based on her in-person and telephonic interviews of Rory’s immediate and extended family in Colombia and the United States, including, most

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significantly, his sister Nellie, his father Gustavo, and his paternal grandmother Maria Rojas, as well as numerous friends, neighbors, and other relatives. (v138-8540-49). She also conducted approximately 6 interviews of Rory, totaling 15-18 hours, both individually and together with Nellie, Gus, and Maria. (v138-8533-4; v140-8619-36, 8707). Over the course of four of these interviews, Rory disclosed that from age 6-12, on almost a daily basis, he was sexually molested by his uncles Carlos and Alfredo. (v140-8619-31).

Hervis concluded that Rory's relationships were predominantly triangularized,⁸ marked by dysfunction and unresolved conflict. (v140-8672-7). She summarized the major childhood events affecting Rory emotionally as him having been orphaned; abandoned; kidnaped; emotionally, physically and sexually abused; the victim of racial discrimination; the center of intense conflict; and subjected to mentally and emotionally unstable caregivers. (v140-8680-82). As a result, Hervis testified that Rory suffered from intense fear and terror, ambivalence in feelings, helplessness, humiliation, confusion, and social disassociation. (*Id.* at 8683-5). Hervis summarized that Rory's adolescence was marked by acculturation crisis, rejection, instability, poverty, violence, and unstable caregivers. (*Id.* at 8686-7). This resulted in Rory feeling

⁸ Hervis explained that triangularized relationships are ones where, unlike healthy one-on-one relationships in which participants resolve conflicts directly, a person is thrust in the middle of a conflict between two others resulting in the resolution of the conflict being deferred or ultimately never achieved. (v140-8672-7).

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helpless, isolated, abandoned, humiliated, and having low self-esteem. (*Id.* at 8688). As a result, Hervis concluded that Rory suppressed his emotions and fell into a deep depression. As his marriage began to deteriorate and the threat of losing his family emerged, Rory became confused, panicked, and ultimately out of control. (*Id.* at 8690-93). Hervis testified that this led to his “breaking point” at which time he began committing criminal acts, and ultimately murder. (*Id.* at 8694-6).

Rory’s one-year-older sister Nellie testified about Rory’s life growing up in Colombia. Rory’s mother died of an abortion when he was six months old. (v137-8322-4). She and Rory moved five times, predominantly back and forth between warring maternal and paternal grandmothers, before Rory turned 12 and the two moved to the United States. (*Id.* at 8331-41). Their father, Gustavo, left when they were 2 to 4 years old. They she saw him approximately once per year until Nellie turned 13. (*Id.* at 8332). Nellie described various incidents involving the emotional and physical abuse of Rory. (*Id.* at 8347-74). When Rory turned 12, Nellie, Rory, and their paternal grandmother, Maria Rojas, moved to the U.S. to live with Gustavo, his wife Irene, and their children. (*Id.* at 8382-6). Nellie testified that this household continued to be filled with conflict and violence. (*Id.* at 8382-6, 8450-1).

Irene described their household differently. Although she admitted some violence and instability, (v137-8205-11), she claimed that she and Rory’s dad attempted to make a good home for Rory and Nellie, that Rory’s dad was loving and

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caring, and that he provided for his children's necessities and did not abuse Rory. (v137-8216-18).

Approximately 15 other friends, neighbors, coworkers, and family members testified on Rory's behalf regarding more than 70 proffered mitigating circumstances. (R9-1701-5) of Rory testified. They testified that Rory never spoke about Colombia or his family. (v135-8052, 8107-8133; v137-8232, 8242; v138-8409). They testified that Rory was a family man and a good dad who loved his two children dearly and whose children continued to love and need him. (v135-8062, 8101, 8139-40, 8154-5; v137-8175-6, 8235; v138-8405-7, 8474-80). They testified that Rory suffered tremendously when Carla and his children moved out of his home and became very depressed. (v135-8063-8085, 8138). During this time, Rory's appearance deteriorated, (v137-8180; v140-8661), he lost substantial weight, (v135-8138; v137-8180; v140-8661), and he was seen crying inexplicably. (v135-8085-6, 8089, 8137-8).

4. Sentencing Order. Following its *Spencer* hearing, (v146-v148), the trial court entered its Sentencing Order, (R9-1727-51; v149), finding three statutory aggravators - previous felony involving violence, HAC, and CCP; one statutory mitigator - no significant history of prior criminal activity (but rejecting five others including extreme emotional or psychological distress), and finding or rejecting numerous other non-statutory mitigators, but ultimately imposing a sentence of death.

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SUMMARY OF THE ARGUMENTS

I. The trial court erred in denying the defendant's cause challenges to death-prone prospective jurors Groom, William Hernandez, Huby, Owens, and Rolle, and juror Fuentes. They all manifested significant doubt about their abilities to impartially render a penalty-phase recommendation. One was shown to be a liar Mr. Conde was forced to exercise peremptory challenges on them which were then unavailable to strike identified jurors who served in his case.

II. The trial court erred in striking venireperson Aguirregaviria for cause. Her death penalty views were not shown to prevent or substantially impair the performance of her juror duties. Indeed, she specifically stated that she could vote for the death penalty under appropriate circumstances.

III. The circumstantial evidence was legally insufficient to support Mr. Conde's premeditated murder conviction. It failed to demonstrate premeditation or exclude Mr. Conde's claim that the murder resulted from a fit of rage and emotion.

IV. The trial court reversibly erred by admitting voluminous evidence of five uncharged homicides impermissibly rendering this evidence a feature of the trial. This highly inflammatory evidence was cumulative and unnecessary. The trial court's limiting instructions were ineffectual. The sheer weight of this collateral crimes evidence obscured Mr. Conde's defense and denied him a fair trial.

V. The trial court reversibly erred in admitting irrelevant and unfairly

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prejudicial evidence of (A) Rory’s battery/false imprisonment of a woman six months following the charged homicide; (B) a police officer’s warning to Dunn thirty-six hours before her death regarding “the Tamiami strangler;” and (C) Rory’s concealment at the time of his arrest. This evidence, individually and cumulatively, had no tendency to prove any material issue and was highly inflammatory. It only served to deny Mr. Conde a fair trial.

VI. The state engaged in prosecutorial misconduct during guilt phase opening statement and closing argument. The prosecutor improperly attacked Mr. Conde’s character, urged conviction based on his commission of uncharged offenses, and disparaged defense counsel. These remarks pervaded all of the prosecutor’s direct comments to the jury. Ultimately, they denied Mr. Conde a fair trial.

VII. The trial court erred in failing to suppress Mr. Conde’s confession. The coercive interrogation rendered his confession involuntary. Conde’s waivers of his right to silence and counsel were not knowingly, intelligently, or voluntarily rendered. The police failed to honor Conde’s right to a prompt initial appearance. Finally, Conde’s interrogation without consulate consultation violated the Vienna Convention.

VIII. The evidence was legally insufficient to establish the aggravators CCP and HAC. The state’s circumstantial evidence failed to exclude Mr. Conde’s reasonable hypothesis that Dunn’s murder was the result of an impulsive act committed by a profoundly emotionally disturbed person which neither intended nor

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caused prolonged or heightened suffering.

IX. The trial court erroneously rejected statutory and non-statutory mitigators. At least a preponderance of the evidence established that when Rory murdered Dunn he was under the influence of an extreme mental or emotional disturbance and capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired. Additionally, the greater weight of the evidence established numerous other mitigating circumstances including Rory's history of extreme emotional, physical and sexual abuse; the devastatingly negative effect execution will have on his family including two young children; and the genuine remorse he expressed.

X. Mr. Conde was denied a fair sentencing hearing as a result of the trial court's erroneous admission of uncharged crimes evidence. This evidence impermissibly supported a recommendation of death based upon bad character and propensity to commit murder. This unfair prejudice was substantially exacerbated by the prosecutors' concluding remarks effectively urging the death penalty because Conde was a serial murderer.

XI. The trial court erred in excluding crucial defense mitigation evidence that Mr. Conde being sexually abused as a child. Exclusion of this evidence denied Mr. Conde a fair sentencing hearing.

XII. Mr. Conde's death sentence is disproportionate to the applicable

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aggravators and mitigators. This court has reduced other death sentences to life imprisonment under similar circumstances where overwhelming mental mitigating evidence must be weighed against one or two aggravators.

XIII. Florida's death penalty statute violates the United States and Florida Constitutions because it (1) does not require notice of aggravating circumstances or specific jury findings regarding the sentencing factors; (2) permits a non-unanimous recommendation of death; (3) improperly shifts the burden of proof and persuasion to the defense; and (4) fails adequately to guide the jury's discretion, thereby precluding adequate appellate review.

ARGUMENTS AND CITATIONS OF AUTHORITY

I. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S CAUSE CHALLENGES TO DEATH-PRONE JURORS FOR WHOM THERE WAS MANIFEST REASONABLE DOUBT ABOUT THEIR IMPARTIALITY.

A defendant has a constitutional right to an impartial jury capable of setting aside any bias or prejudice regarding the death penalty and rendering a penalty-phase recommendation based solely on the evidence and law. *Overton v. State*, No. SC 95404, 2001 WL 1044890 at 9 (Fla. Sept. 13, 2001); see U.S. Const. amends. VI, VIII, XIV; art. I, sections 9, 16, 17, Fla. Const. Accordingly, upon a motion to strike a juror for cause, the trial judge is obliged to excuse the juror "if any reasonable doubt exists as to whether the juror possesses an impartial state of mind." *Id.* A juror

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should not only be impartial, but should be “beyond even the suspicion of partiality.” *O’Connor v. State*, 9 Fla. 215, 222 (1860). A juror’s ability to be fair and impartial must unequivocally be asserted in the record; his inability to make an unequivocal assertion establishes a reasonable doubt about his impartiality. *E.g.*, *Henry v. State*, 586 So.2d 1335, 1337 (Fla. 3rd DCA 1991). Close cases must be resolved in favor of excusing the juror. *Martinez v. State*, 795 So.2d 279, 282 (Fla. 3rd DCA 2001). The trial court’s error is reversible for an abuse of discretion. *See Kears v. State*, 770 So.2d 1119, 1128 (Fla. 2000).

In this case, the trial court erred in denying defense cause challenges for six prospective jurors - Groom, William Hernandez, Huey, Owen, Rolle, and Fuentes - against whom Conde was required to exercise peremptory challenges. (v109-5435-6; v103-4697, v112-5901; v96-3689, v109-5438; v98-3965, v109-5442; v98-3931, v109-5444). After he exhausted his peremptories, Mr. Conde was granted, and used, two additional strikes. (v109-5451-3). Conde identified eight sitting jurors he would have struck had his request for additional peremptory challenges been granted. (v112-5902; R6-1152-4). Thus, this court is required to reverse if three or more of the jurors Mr. Conde moved to strike for cause should have been struck. *Overton* at 8. **1** .

Prospective Juror Groom. In his juror questionnaire, Groom wrote that his views on the death penalty were “good.” He wrote that the death penalty should be imposed for “murder” and “rape.” (v99-4153). During jury selection, when

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requested to clarify what type of murder he believed deserved of the death penalty, Groom retorted, “Murder is murder.” (*Id.*). When asked if he believed, if the jury determined beyond reasonable doubt that Conde had committed premeditated murder, Conde would deserve the death penalty, Groom responded: “Yes, I would.” (*Id.* at 5154). Groom acknowledged that there were “possibly” some things about Conde, if convicted of premeditated murder, that might cause him to recommend life, but also stated that the possibility was “relatively small.” (*Id.* at 4155). Groom later expressed his view (though subsequently retracted) that a killing by strangulation is necessarily first degree murder. (v109-5393-6).

Groom, whose two stepsons, and half of his neighbors, were police officers, stated on his questionnaire that previously he had never been arrested. (v105-4950). He corrected this during jury selection, admitting that his wife had had him arrested eight to nine years earlier during their divorce, for breaking into his own home. He claimed she was scheming to obtain the house. (*Id.*). However, Groom’s criminal record reveals that this arrest was for discharging a deadly missile into a dwelling. Additionally, Groom failed to reveal that he also had been arrested for DUI, and on a separate occasion for unlawful possession of alcohol by a minor. (SR1-23-24, 28-31). The trial court denied Mr. Conde’s cause challenges based on both Groom’s perjury and proclivity toward the death penalty. (v109-5435-7).

2. Prospective Juror William Hernandez. Hernandez first caught the

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trial court’s attention because of a facial gesture he made during its explanation of the presumption of innocence. (v103-4686). He told the court, though he was not thinking Conde was guilty, he was concerned about the “stigma” that attaches to a defendant charged in six counts of murder. (*Id.*). When asked if he had any moral, religious, or philosophical views against the death penalty, Hernandez answered “no.” (*Id.* at 4687). However, in response to a question whether, upon finding the defendant guilty, he would have made up his mind to recommend death or could he wait until the penalty phase, Hernandez indicated that he might have a preconceived notion that the defendant should be sentenced to death. (*Id.* at 4688). Hernandez further stated that, if he believed Conde had committed six homicides, there was probably nothing the defense could tell him regarding Conde’s background or life that was going to have any weight with him. (*Id.* at 4692). He acknowledged that it was “unrealistic” that given these facts, there was any evidence the defense could produce that would lead him to recommend life, that “it would be difficult,” and “highly unlikely.” (*Id.* at 4693). The trial court denied Mr. Conde’s motion to strike Hernandez for cause. (v103-4695-7).

3. Prospective Juror Huey. Mr. Huey stated on his juror questionnaire that “murderers give up their right to live.” (v97-3682). In jury selection he explained: “[A]nyone that would be found guilty of taking someone else’s life I think gives up

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their right to live. I believe an eye for an eye.”⁹ (*Id.*). When asked if the evidence of the other five homicides would affect his decision, Huey responded: “I would certainly consider that an aggravating circumstance” and that there would be no way for him to disregard it. (*Id.* at 3685). Huey repeated that this would be very hard to disregard. (*Id.* at 3687). The trial court denied Mr. Conde’s motions, to strike Huey for cause. (v97-3689; v109-5439).

4. Prospective Juror Owens. Venireperson Owens stated on her juror questionnaire that she was in favor of the death penalty. (v98-3964). She agreed during jury selection that if there were no reasonable doubt that a person committed a first degree murder, she would automatically vote for the death penalty. In response to the trial court’s efforts to rehabilitate her, Owens stated that she “would definitely have to hear everything before [she] agreed to the death penalty” and that she was prepared to “wait and listen to all the mitigating and aggravating factors” before she made up her mind. (*Id.* at 3968).¹⁰ Based on these answers, the court denied the defense challenge for cause. (*Id.* at 3969).

5. Prospective Juror Rolle Ms. Rolle stated in her juror questionnaire

⁹ Huey later stated that his view of “an eye for an eye” would not interfere with his ability to sit as a juror. (v97-3687).

¹⁰ This line of rehabilitation, which the trial court repeatedly used, merely established that the venirepersons would wait until all of the penalty phase evidence was in before allowing their bias for death determine their recommendation.

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that the death penalty should be imposed for “serial” and “cold blooded” killers. (v98-3926). Rolle explained that, if Conde was shown to have killed the five other women in addition to the charged offense, he would qualify as a serial killer. (*Id.* at 3926-7). She further stated that there was “a possibility” that she would recommend the death penalty for Mr. Conde, “[s]imply as a result of him being convicted.” (*Id.* at 3928). Rolle further explained

Rolle: I feel like this. With the six, if he just shot, strangled, just grabbed these women and just strangled these women without these women having a chance, just for no reason, yes, I would say death.

Defense counsel: Okay, now, you say with no reason.

Rolle: Right.

Defense counsel: Are you saying that if he had a good enough reason that maybe you wouldn’t vote for the death penalty?

Rolle: I wouldn’t say that, but I am just saying cold blooded, you know, just catch these women, walk behind them and just strangle them and one by one, to me that is no reason. (*Id.* at 3930)

When asked if the defendant’s reason for killing would affect the determination, Rolle stated: “If it was self-defense or his life was on the line or something like that, I would say maybe life.” (*Id.*). When counsel explained that self-defense was a matter that only would be considered during the guilt phase and asked, again, if Rolle was saying that if Conde “just . . . killed these people,” she would vote for death, (*id.*), Rolle responded: “Yes. Because I would want to know why would he kill these people? What did they do to him? And if he just, you know, without a reason, just hate women or, whatever. That is my answer, yes.” (*Id.* at 3930-1). The trial court denied Mr. Conde’s motion and renewed motion to strike Rolle for cause. (v98-3931;

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v109-5444).	

6. Juror Fuentes

Juror Fuentes advised the court that if he were persuaded that Mr. Conde had strangled Rhonda Dunn with premeditation, he would be predisposed to the death penalty. (v104-4901). He stated he then would place a burden on the defense to justify not giving the death penalty. (*Id.*). He further explained that evidence regarding Mr. Conde’s background or how he led his life would not have any weight with him and that he would be unable to consider those factors as mitigating evidence. (*Id.*). Regarding the fact that he might hear evidence that Conde killed six people, Fuentes had the following discussion with defense counsel:

- Q. If you believe he killed six people you will not be willing under any circumstances to give him life imprisonment?
- A. No, if I believe that or even one person for that matter.
- Q. I’m sorry?
- A. Even one person.
- Q. Say that out (*sic*)?
- A. I say, if he kill one person with premeditation, to me that is worth the death penalty. (*Id.* at 4903).

During the trial court’s attempted rehabilitation, Fuentes could only say he thought he could wait to hear all of the evidence in the penalty phase before rendering a recommendation. (*Id.* at 4903). However, he continued to caution: “But the question with those five other questions (*sic*) having a baring (*sic*) on your decision, I said that is human nature you couldn’t block out complete (*sic*) regardless but you only trying (*sic*) on one murder here.” (*Id.*). He ultimately acknowledged only that he

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would follow the instructions “[t]o the best of my ability.” (*Id.* at 4904). The trial court denied Conde’s motions to strike Fuentes for cause. (v104-4905-6; v112-5900).

The mere fact that some of these venirepersons reluctantly stated, in response to the trial court’s skilled attempt to rehabilitate them, that they would follow the law, did not negate their prior, frank statements of strong bias in favor of the death penalty.

As this court reiterated in *Overton*:

It is difficult, if not impossible, to understand the reasoning which leads to the conclusion that a person stands free of bias of (*sic*) prejudice who having voluntarily and emphatically asserted its existence in his mind, in the next moment under skillful questioning declares his freedom from its influence. By what sort of principle is it to be determined that the last statement of the man is better and more worthy of belief than the former?

Overton at 10 (citation omitted).

The above referenced juror and prospective jurors repeatedly expressed their pro-death sentiments even after it was explained that they must wait for the penalty phase to weigh mitigating and aggravating circumstances before arriving at a recommendation. (v96-3506-08; v98-3877-79; v100-4239-41; v103-4805-6). Thus, they were not lacking in “any true insight whatsoever into the elements or factors involved in capital sentencing proceedings” when they expressed their pro-death penalty bias and, for some, an inability to follow the court’s instructions. Although some of these venirepersons ultimately stated that they would follow the court’s

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instructions, the above referenced remarks were “sufficiently equivocal to cast doubt on” their later statements. *Bryant v. State*, 656 So.2d 426, 428 (Fla. 1995). Thus, at the very least, reasonable doubt exists whether they could provide Conde a fair trial. The trial court’s failure to strike them for cause constituted reversible error.

II. THE TRIAL COURT ERRED IN STRIKING VENIRE PERSON AGUIRREGAVIRIA FOR CAUSE WHERE SHE SPECIFICALLY STATED SHE COULD VOTE FOR THE DEATH PENALTY UNDER APPROPRIATE CIRCUMSTANCES.

The Defendant has a constitutional right to a juror, not otherwise unqualified, whose views about capital punishment would not prevent or substantially impair the performance of her duties in accordance with her instructions and her oath. *E.g.*, *Adams v. Texas*, 448 U.S. 38, 45 (1980); *see* U.S. Const. amends. VI, VIII, XIV; Art. I, §§ 9,16, 17, Fla. Const. The trial courts excusal for cause is reviewed for an abuse of discretion. *Farina v. State*, 680 So.2d 392, 398 (Fla. 1996).

The trial court erroneously granted the state’s cause challenge of Aguirregaviria. Although her views on the death penalty were equivocal (V97-3736 (“well, I don’t know if I believe in it or not;” “No” in response to question “Do you support it or not?” but “[t]hat is just [a] feeling...”)), she fully committed herself to listening to and weighing the evidence, and making a recommendation. (*Id.*) In response to defense questioning, Aguiregaviria stated she “guess[ed]” she could weigh circumstances and vote for the death penalty in some situations. (*Id.* at 3738-9). Ultimately, in response

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to the question whether she “could... make the recommendation or vote for the death penalty under the appropriate circumstances,” she stated: “Yes, sir, I guess.”

Aguirregaviria’s sentiments were similar to, and certainly no more equivocal than, those of venire person Hudson in *Farina* who, said she had “mixed feelings” about the death penalty but would “try” to consider the state’s request for the death penalty fairly, and was found to have been improperly excused for cause. *Id.*, 680 So.2d at 396-8. As in *Farina*, this improper ruling requires a new sentencing. See *Gray v. Mississippi*, 481 U.S. 648 (1987)(exclusion of juror for cause in capital prosecution who is not irrevocably committed to vote against death penalty regardless of facts and circumstances is reversible constitutional error).

III. THE CIRCUMSTANTIAL EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT MR. CONDE’S PREMEDITATED MURDER CONVICTION.

Premeditation is the essential element which distinguishes first-degree from second-degree murder. *E.g.*, *Randall v. State*, 760 So.2d 892, 901 (Fla. 2000); *Hoefert v. State*, 617 So.2d 1046, 1048 (Fla. 1993). Premeditation is a “fully formed conscious purpose to kill that may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act.” *Kirkland v. State*, 684 So.2d 732, 734 (Fla. 1996) (citation omitted). Premeditation contemplates an even higher *mens rea* than specific intent. See *Carpenter v. State*, 785 So.2d 1182, 1196 (Fla. 2001). While

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premeditation may be proven by circumstantial evidence, such evidence must be inconsistent with every other reasonable inference. *See id.* at 1194. Where the state’s proof fails to exclude a reasonable hypothesis that the homicide occurred other than by premeditated design, a verdict of first-degree murder cannot be sustained. ***Randall***, 760 So.2d at 901; ***Kirkland***, 684 So.2d at 734; *see* U.S. Const. amend. XIV.

The state’s evidence of premeditation was entirely circumstantial. Conde’s confession, fully endorsed by the state and corroborated by other evidence, failed to evince “a fully formed conscious purpose to kill.” To the contrary, it demonstrated that Rory strangled Dunn as a result of an instantaneous combustion of the wrenching emotions he harbored from Comesana’s sexual betrayal of him and his belief that prostitutes cost him his marriage and family. (v126-7366-7, 7380-1, 7441, 7459, 7492-4). Rory’s chance meeting of Dunn proved to be particularly incendiary because Dunn physically resembled Carla. (v126-7474-6, 7487). There was absolutely no evidence that Rory exhibited, mentioned, or even possessed an intent to kill Dunn prior to the actual homicide. ***Kirkland***, 684 So.2d at 735. When Rory picked her up, he was not even looking for a prostitute. (v126-7475). There was no evidence that Rory had a preconceived plan - he did not have or use any instrument to commit the murder and took no other measures ahead of time to attempt to conceal any criminal act. Instead, Rory acted suddenly and without warning.

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The method of killing, strangulation, was equally or more consistent with a killing committed impulsively in a fit of emotion. *See Carpenter* (first degree murder by blunt trauma and neck compression reduced to second degree murder); *Randall* (double strangulation murder reduced to second degree homicide); *Hoefert* (murder resulting from homicidal violence due to asphyxiation reduced from premeditated to second degree murder). The uncharged homicides, likewise, failed to shore up the state's evidence. *See Hoefert* (*Williams* rule evidence that defendant choked four other women in the course of assaults or sexual batteries failed to support premeditated murder conviction). Finally, Rory's confession supported his claim of second degree murder. *Cf. Carpenter* (conviction reduced despite defendant's multiple conflicting post-arrest statements including admission that he previously lied to minimize his role in the murder). Thus, the trial court erred in denying Mr. Conde's mid-trial and post-trial motions to reduce the charge or his conviction from premeditation to second degree murder. (v127-7645-9, 7659-61).

IV. THE TRIAL COURT REVERSIBLY ERRED BY ADMITTING VOLUMINOUS EVIDENCE OF FIVE UNCHARGED HOMICIDES IMPERMISSIBLY RENDERING THIS EVIDENCE A FEATURE OF THE CASE AND DENYING THE DEFENDANT A FAIR TRIAL.

Although Mr. Conde was prosecuted for only one murder, his trial proceeded as if he were charged with six. Victim by victim, the state presented crime scene evidence, victim photographs, DNA evidence, fiber evidence, tire-print evidence,

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medical examiner evidence, and Mr. Conde's confession regarding five uncharged homicides. The state presented nine witnesses regarding the murder of Lazaro Comesana;¹¹ seven witnesses regarding Eliza Martinez;¹² nine witnesses regarding Charity Nava;¹³ eight witnesses regarding Wanda Crawford;¹⁴ and nine witnesses regarding Necole Schneider.¹⁵ Well more than half the crime scene and autopsy

¹¹ Homicide Detective Estopinan (v116-6173-6201); crime scene officer Byrd (v117-6310-23); medical examiner Bell (v117-6381-6405; v118-6419-20); forensic serologist Hinz (v119-6587-6604); DNA criminalist Kahn (v119-6688-90); trace evidence specialist Borghi (v121-6821-54); criminalist and tire tread specialist Hart (v123-7032-6, 7042-52); lead detective Romgani (v125-7285-96); Conde's confession (v126-7366-90).

¹² Homicide detective Portilla (v116-6201-16); criminalist Seriski (v117-6254-67); medical examiner Bell (v118-6420-33); serologist Hinz (v119-6605); criminalist and trace evidence specialist Borghi (v121-6821-55); lead detective Romgani (v125-7296-7303); Conde's confession (v126-7391-7409).

¹³ Homicide detective Butcho (v117-6268-86); crime scene officer Melgarejo (v117-6358-66); medical examiner Bell (v118-6434-47); forensic serologist Hinz (v119-6606-13); DNA criminalist Kahn (v119-6695-6708); criminalist and trace evidence specialist Borghi (v121-6821-55); crime scene officer Melgarejo (v121-6894-6900); criminalist and tire tread specialist Hart (v123-7052-3); lead detective Romgani (v125-7304-15); Conde's confession (v126-7411-42).

¹⁴ Homicide detective Portilla (v117-6324-7); crime scene officer Byrd (v117-6322); medical examiner Bell (v118-6447-65); serologist Hinz (v119-6614-17); DNA criminalist Kahn (v119-6707-8); criminalist and trace evidence specialist Borghi (v121-6821-55); lead detective Romgani (v125-7315-18); Conde's confession (v126-7443-55).

¹⁵ Homicide investigator Tymes (v117-6329-37); crime scene officer Melgarejo (v117-6338-53); medical examiner Bell (v118-6466-79); serologist Hinz (v119-6618-21); DNA criminalist Kahn (v119-6709-11); criminalist and trace evidence specialist

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photographs and other exhibits concerned the uncharged murders. (St. Exs. 2-82; SR1-158-201; SR2-202-275).	

The state introduced virtually no evidence regarding the homicide of Rhonda Dunn, the victim of the charged homicide, for the first three days of trial. (v116-18). On the fourth day, after serologist Hinz testified regarding the vaginal, anal, mouth, and fingernail swabs she tested for the other five homicide victims, (v119-6583-6620), she finally testified about the tests she conducted on Dunn’s specimens. (v119-6621-44). As with the *Williams* Rule victims, there were approximately eleven witnesses who testified regarding the Dunn homicide.¹⁶

The Florida Evidence Code sanctions the introduction of evidence of uncharged crimes to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Section 90.404(2)(a), Fla. Stat. However, to be admissible, these facts must be material to the state’s prosecution. Such evidence is still subject to exclusion if the danger of unfair prejudice substantially outweighs its

¹⁵(...continued)
Borghi (v121-6821-55); crime scene officer Melgarejo (v121- 6901-4); criminalist and tire tread specialist Hart (v123-7052); Conde’s confession (v126-7457-73).

¹⁶ Forensic serologist Hinz (v119-6621-6, 6638-48); DNA criminalist Kahn (v119-6711-17, 6723-29); detective Martinez (v121-6783-6803); criminalist and trace evidence specialist Borghi (v121-6821-55); DNA specialist Dr. Crouse (v121- 6864-90); crime scene officer Melgarejo (v121-6908-12, 6915-62); detective Luis Estopinan (v122-6963-6986); criminalist and tire tread specialist Hart (v123-7056-75); associate medical examiner Dr. Valerie Rao (v123-7084-7190); lead detective Romgani (v125-7198-7272); Conde’s confession (v126-7457-94).

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<p>probativeness. <i>See Steverson v. State</i>, 695 So.2d 687, 688 (Fla. 1997); <i>Henry v. State</i>, 574 So.2d 73, 75 (Fla. 1991); section 90.403, Fla. Stat. This exclusionary rule is implicated when the state’s collateral offense evidence is so extensive that it becomes a feature of the trial. <i>E.g.</i>, <i>Steverson</i>; <i>Henry</i>.</p>	

Evidence of collateral crimes becomes a feature where it has “so overwhelmed the evidence of the charged crime as to be considered an impermissible attack on the defendant’s character or propensity to commit crimes.” *Bush v. State*, 690 So.2d 670,673 (Fla. 1st DCA 1997); *Snowden v. State*, 537 So.2d 1383, 1385 (Fla. 3^d DCA), *rev. denied*, 540 So.2d 1210 (Fla. 1989). The mere volume of the evidence does not necessarily make it a feature. *Snowden* at 1386. The question is whether the collateral crimes evidence has transcended the bounds of relevance *See Williams v. State*, 117 So.2d 473, 475-6 (Fla. 1960); *Bush* at 673; *Snowden* at 1385 n.3.

The concern with such evidence is that “the jury may choose to punish the defendant for the similar rather than the charged act, or the jury may infer that the defendant is an evil person inclined to violate the law.” *Snowden* at 1384 (quoting *Huddleston v. United States*, 485 U.S. 681, 686 (1988)). Stated differently, evidence of uncharged crimes “will frequently prompt a more ready belief by the jury that the defendant might have committed the charged offense, thereby predisposing the mind of the juror to believe the defendant guilty.” *Bush* at 673 (citations omitted). It implicates a defendant’s right to a fair trial. *See* U.S. Const. amend. XIV.

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In *Steverson*, the defendant was convicted, *inter alia*, of the first-degree murder of Bobby Lucas. The state introduced extensive evidence of the defendant's attempted murder of a police detective four days later who, investigating the Lucas murder, located the defendant. Under the theory that the police shooting was "inextricably intertwined" with the murder, the state elicited substantial evidence regarding the police shooting at the defendant's murder trial including the nature of the detective's injuries, the reaction of other officers, and the detective's hospital treatment. *Id.* at 690.

In weighing the danger of unfair prejudice against the probativeness of the challenged evidence, this court directed courts to consider (1) the prosecution's need for the evidence; (2) the tendency of the evidence to suggest to the jury an improper, *e.g.*, emotional, basis for resolving the matter; (3) the chain of inferences necessary to establish the material fact; and (4) the effectiveness of any limiting instruction. *Id.* at 689. Additionally, courts must pay particular attention to the extent to which the collateral crimes evidence "inflames the jury or appeals improperly to the jury's emotions." *Id.* at 688-9.

As an example of a proper application of this balancing test, this court cited *Henry v. State*, 574 So.2d 73 (Fla. 1991). There, this court reversed the defendant's conviction for the first-degree murder of his wife because the trial court admitted excessive testimony concerning the defendant's murder of his wife's son:

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Some reference to the boy's killing may have been necessary to place the events in context, to describe adequately the investigation leading up to Henry's arrest and subsequent statements, and to account for the boy's absence as a witness. However, it was totally unnecessary to admit the abundant testimony concerning the search for the boy's body, the details from the confession with respect to how he was killed, and the medical examiner's photograph of the body. Even if the state had been able to show some relevance, this evidence should have been excluded because the danger of unfair prejudice substantially outweighed its probative value. § 90.403, Fla. Stat. (1985). Indeed it is likely that the photograph alone was so inflammatory that it could have unfairly prejudiced the jury against Henry.

Id. at 489 (quoting *Henry*, 574 So.2d at 75).

Relying on *Henry*, this court reversed *Steverson's* conviction holding that, though the police shooting had some relevance to the charged offense, "there was no justification for the admission of [the] of extensive details . . . offered by four different witnesses, all of whom focused most of their testimony on the police officer's injuries and recovery." *Id.* at 689-90.

In our case, the collateral homicide details were so excessive as to impermissibly transcend any relevance. For each murder the state presented seven to nine witnesses detailing virtually every aspect including (1) the method of murder, (2) the injuries sustained by the victim, (3) the sexual relations between Mr. Conde and the victim both before and after death, (4) the DNA evidence connecting Mr. Conde to the victim, (5) the fiber evidence connecting the victim with Mr. Conde's apartment, (6)

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the tire-print evidence connecting the victim to Mr. Conde's vehicle, and (7) crime scene evidence from the location where the body was found. For instance, though M.E. Bell testified over two days consisting of some 150 pages of transcript, (v117-6370-6404; v118-6419-6535), he never looked at Dunn's file. (v118-6482). The state also introduced Conde's entire confession describing his contact with each collateral crime victim including (1) how they met (2) their sexual relations, (3) how he killed each victim, and (4) how he removed each victim's body from his apartment and disposed of it. Of Mr. Conde's 175 page statement, this comprised approximately 125 pages. (SR3-370-496).¹⁷

The state's need for this evidence was nominal. It initially proffered that it was relevant to prove identity, intent, and modus operandi. (R4-861). Instead, the collateral crimes evidence was unnecessary, and cumulative of other evidence bearing on these predominantly undisputed issues. *See Foburg v. State*, 744 So.2d 1175, 1176 (Fla. 2nd DCA 1999). Regarding identity, besides Mr. Conde's confession that he murdered Dunn, (v126-7474-88), the state introduced DNA evidence which both conclusively linked Conde to Dunn's body fluids and Dunn to blood discovered in Conde's apartment. (v119-6711-16, 6723-29). The state further introduced fiber, tire

¹⁷ A more subtle prejudice Mr. Conde suffered was his practical inability to effectively cross-examine the collateral homicide evidence. Any effort to aggressively attack it would have further highlighted it. This resulted in a denial of Conde's confrontation and due process rights.

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mark, and shoe-print evidence which linked Dunn to carpeting in Mr. Conde's apartment, the tires on his car, and shoes found in his closet. (v121-6833-7; v123-7056-63). Evidence of uncharged crimes to prove identity should only be allowed if necessary, where identity cannot be shown without such evidence. *See San Fartello v. State*, 154 So.2d 327, 329-30 (Fla. 2nd DCA 1963).

The excessive and detailed evidence of other crimes also was unnecessary to prove intent. As with identity, this was not a particularly contested issue at trial. Mr. Conde's confession admitted his intent to murder Rhonda Dunn. (v126-7481-7, 7492-4). The evidence of manual strangulation clearly excluded any theory of "accident." (v123-7138). The numerous bruises and injuries Dunn sustained at about the time of her death (v123-7106-38) corroborated the other evidence that this was an intentional killing. Rory did not claim self-defense or that Dunn was the initial aggressor. No further proof, and certainly not the details of five uncharged homicides, was necessary to bolster the state's case on this issue.

The state's claim that this evidence of five uncharged murders was necessary to prove modus operandi is illusory. Modus operandi is not an ultimate fact. *See Duncan v. State*, 291 So.2d 241, 243 (Fla. 2nd DCA), *cert. denied*, 297 So.2d 833 (Fla. 1974). It is only relevant where necessary to prove an ultimate fact like identity. *See, e.g., Miller v. State*, 791 So.2d 1165, 1170 (Fla. 4th DCA 2001). Thus, any relevance of the collateral crimes evidence to prove modus operandi collapsed into its

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relevance to prove identity. Since identity was not in dispute, there was no legitimate reason to prove any modus operandi.

The tendency of the state's evidence of five, separate, collateral homicides to suggest an improper, emotional basis for the jury to resolve the material issues at trial was overwhelming. This evidence established Mr. Conde was a serial murderer. Indeed, in closing argument, the prosecutor argued that Mr. Conde had committed six murders in 117 days, all the same, "like clockwork." (v128-7775). The evidence that Mr. Conde knowingly engaged in homosexual relations with Comesana and had sexual relations with several of his victims after death, (v119-6601-2, 6690-1, 6611-12, 6616-18, 6690-1, 6706-7; v126-7379-80, 7421-22, 7450, 7464-5), is precisely the type of evidence that would cause a jury to decide a case on an emotional basis. Similarly, the state's evidence that Mr. Conde used Nava's body like a chalkboard, writing his desperate message to police and the world that he had killed more than once, and taunting police to see if they could catch him, (v117-6277-79), was revulsive.¹⁸ The state presented evidence of the saliva, vaginal, and anal swabs it took from each of the victims of the uncharged homicides. (v119-6601-4, 6611-20, 6690-2, 6696-7, 6706-10). It introduced numerous victim and autopsy pictures concerning the collateral

¹⁸ The state introduced the macabre picture of Nava's back showing Conde's writing: the word "Third!" (indicating this was his third murder), "I Will Call Dwight (a well-known T.V. news anchorperson) C.H.A.N. 10," a pair of eyes followed by "If You Can Catch Me," and then "N y R," indicating Nadia (Rory's deceased mother) and Rory. (SR1-189; v117-6277; v126-7424-8; St. Ex. 22).

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murders including several particularly grotesque close-ups. (SR2-223, 225, 239, 241, 259, 261, 263, 273, 275). It is this type of inflammatory evidence evincing inhumanity and immorality that constitutes an impermissible attack on a defendant's character and would drive a jury to improperly convict based on emotion. <i>See Bush</i> , 690 So.2d at 673; <i>Snowden</i> , 537 So.2d at 1384 (quoting <i>Williams v. State</i> , 117 So.2d 473, 475-6 (Fla. 1960)).	

This excessive and inflammatory evidence completely obscured Rory's defense. In the face of this evidence, the jury was incapacitated from evaluating Rory's well supported claim that his attack of Dunn, an act imminently dangerous, was not the result of premeditation. Instead, it was the result of the instantaneous combustion of the highly charged emotions that emanated from Comesana's sexual betrayal of him and his belief that prostitutes had cost him his marriage and family. The sheer weight and magnitude of the collateral homicides evidence ensured that the jury would return a verdict finding Rory guilty of the most serious offense.¹⁹

Regarding the effectiveness of any limiting instructions, though the trial court

¹⁹ The trial court's reliance on *Townsend v. State*, 420 So.2d 615 (Fla. 4th DCA 1982), *rev. denied*, 430 So.2d 452 (Fla. 1983) (v86-3196, 3212) does not support its decision. There, in addition to evidence regarding the three charged homicides, the trial court allowed evidence of six uncharged murders. Despite this collateral crimes evidence, the jury acquitted the defendant on one of the charged homicides, to which he confessed. Thus, the court's affirmance was based on clear evidence that the jury had not been overwhelmed by the uncharged crimes evidence. *Id.* at 617.

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parroted the standard *Williams* Rule instruction throughout trial as the jury was inundated with the collateral crimes evidence, the instruction could not have staved off the overwhelming prejudice. The instruction was not particularized for this case or the evidence. Instead, according to the state’s claim of relevance and the trial court’s ruling, the court rattled off all of the conceivable purposes for which uncharged crimes evidence might be considered, *e.g.*, motive, opportunity, intent, preparation, plan, knowledge, identity, lack of accident or mistake on the part of the defendant, without further explanation. Could the court’s instruction that the jury could consider the five uncharged murders to prove absence of mistake or accident, *issues utterly irrelevant in this case*, conceivably protect the jury from its natural instinct to view this incendiary evidence as probative of Conde’s bad character? Could the court’s instruction that the jury could consider five collateral murders to show Mr. Conde had the “opportunity” to kill Rhonda Dunn really shield it from finding guilt based on propensity? Clearly the answer is “no.”

The prosecutor exacerbated the unfair prejudice of the collateral homicides during closing argument. It is improper for a prosecutor to focus on a defendant’s collateral crimes during closing argument, *see State v. Lee*, 531 So.2d 133, 137-8 (Fla. 1988), or argue that a defendant is guilty of the charged offense because of his involvement in prior, uncharged acts or the defendant’s bad character. *See, e.g., Consalvo v. State*, 697 So.2d 805, 813 (Fla. 1997). Nonetheless, during closing

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argument, the prosecutor expertly deployed the *Williams* rule evidence to urge conviction based on bad character, propensity, and moral indignation. The prosecutor argued that Conde’s mentality when he attacked Dunn was that she would end up dead “just like the others.” (v128-7797). He argued that Conde killed Dunn just “as he had done with the others,” (v128-7809), and that Conde had gone out “hunting for his victims.” (v128-7822). Thus, the state urged the jury to convict Conde based on its evidence that he had committed the five uncharged murders, thereby negating the effect of the court’s cautionary instructions.²⁰

As a final indication of the devastating effect of the uncharged crimes evidence, shortly before the jury returned its verdict, it requested and obtained a copy of Conde’s confession. (v128-7869; SR3-537-8). Although this confession provided key support to counsel’s argument that Mr. Conde was guilty of only second degree murder, (v128-7721-7741, 7750, 7761-4), it also consisted primarily of the sordid details of the five uncharged murders. The jury obviously placed tremendous importance on this diary of a serial murderer. The proximity of the jury’s verdict to its focus upon this compendium of collateral crimes speaks volumes to the likely impact of this inflammatory evidence.

V. THE TRIAL COURT REVERSIBLY ERRED IN

²⁰ Mr. Conde maintains that the state’s improper remarks during closing argument denied him a fair trial and constitute an independent basis for reversal. *See* argument VI, *infra*.

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ADMITTING IRRELEVANT AND UNFAIRLY PREJUDICIAL EVIDENCE OF (A) RORY'S AGGRAVATED BATTERY/FALSE IMPRISONMENT OF A WOMAN SIX MONTHS FOLLOWING THE CHARGED HOMICIDE; (B) A POLICE OFFICER'S WARNING TO DUNN THIRTY-SIX HOURS BEFORE HER DEATH REGARDING "THE TAMiami STRANGLER; AND (C) RORY'S CONCEALMENT AT THE TIME OF HIS ARREST.

A. THE GLORIA MAESTRE EVIDENCE.

Over defense objection, the state introduced evidence that on June 19, 1995, more than six months following the homicide of Rhonda Dunn, a woman was discovered locked alone in Conde's apartment, wrapped from head to toe with duct tape. (R5-890-92; v118-6536). The prosecutor announced in opening statement, over renewed objection, that Gloria Maestre was found trapped and bound in Conde's apartment. (v116-6141-3). The state elicited testimony that, when a pedestrian heard tapping noises coming from the apartment, fire rescue responded, broke down the door, and discovered a frightened woman completely bound with duct tape. (v118-6537-47). Once freed, the woman identified Rory Conde as her assailant from a picture located on the apartment refrigerator. (v118-6541-42, 6545, 6547).

The state also questioned Dr. Roger Kahn, its expert who examined DNA evidence obtained from the body fluid specimens of the various homicide victims and determined a link between them and Mr. Conde, (v119-6664-71, 6676, 6679-80, 6689-90, 6696, 6708, 6710, 6711), whether he had received "physical evidence" that had

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been taken from Gloria Maestre. (v119-6717). Defense objection resulted in the question not being answered. (v119-6717-20). However, moments later Kahn testified that on June 24, 1995, he advised the lead homicide detective that Rory Conde was a suspect in his investigation. (v119-6720).

Mr. Conde filed a pretrial motion to exclude any evidence of or reference to the jury about the crimes against Gloria Maestre. (R5-892-901). The state urged that this evidence was inextricably intertwined with the charged offense. (v87-3290). The trial court denied the motion. (v87-3289-97). However, it specifically prohibited the prosecutor from eliciting any testimony of DNA linkage between Maestre and Conde. (*Id.*). The defense renewed its objection throughout trial.

In *Hartley v. State*, 686 So.2d 1316 (Fla. 1996), *cert. denied*, 522 U.S. 825 (1997), this court explained the theory of admission for “inextricably intertwined” evidence: “. . . [E]vidence of other crimes that are ‘inseparable from the crime charged, or evidence which is inextricably intertwined with the crime charged,’ is admissible under section 90.402 (admissibility of relevant evidence) because it is relevant and necessary to adequately describe the crime at issue.” *Id.* at 1320.

Professor Charles Ehrhardt describes inseparable acts as those “so linked together in time and circumstance with the happening of another crime, that the one cannot be shown without proving the other.” C. EHRHARDT, FLORIDA EVIDENCE § 404.17 at 208 (2000). He states that this evidence is admissible “where it is impossible

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to give a complete or intelligent account of the crime charged without reference to the other crime.” *Id.* at 209 (citations omitted). Ehrhardt cautions that this exception to the general rule of exclusion must be narrowly interpreted to ensure it does not swallow the rule. *Id.* at 210. Like all other relevant evidence, evidence of inseparable crimes must be excluded if the danger of unfair prejudice substantially outweighs any probative value. Section 90.403, Fla. Stat.(1978).

The state argued, and the trial court apparently accepted, that evidence of the discovery of Gloria Maestre, half nude, bound in duct tape, and trapped in Mr. Conde’s apartment, was necessary to demonstrate the basis for Conde’s arrest. (v87-3290-1, 3296-7). This court has repeatedly concluded that the marginal probity of such evidence is substantially outweighed by the danger of unfair prejudice.

In a solid-line of cases culminating in *Keen v. State*, 775 So.2d 263 (Fla. 2000), this court has held that hearsay evidence in the form of information learned by a police officer which explains the genesis of the investigation leading to a defendant’s arrest is inadmissible and constitutes reversible error. Although the “sequence of events” theory avoids the inherent hearsay problem, this court stressed that “an alleged sequence of events leading to an investigation and an arrest is *not a material issue* in this type of case.” *Id.* at 274 (emphasis added). Accord *State v. Baird*, 572 So.2d 904, 904 (Fla. 1990); *Conley v. State*, 620 So.2d 180, 183 (Fla. 1993) (contents of police dispatch report not relevant to establish sequence of events leading to

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defendant’s arrest; reason why officers arrived at arrest scene not material issue).

Not only was the evidence of Mr. Conde’s uncharged crime against Maestre not “so linked together in time and circumstance” with the murder of Dunn that it would have been “impossible to give a complete or intelligent account of [the Dunn murder] without reference to the [crimes against Maestre],” this collateral crime was not relevant to *any* material issue. The battery and false imprisonment of Maestre occurred more than six months after the murder of Dunn. Moreover, there was no evidence that the crimes against Maestre were in any way similar to the crime against Dunn. *Cf. Erickson v. State*, 565 So.2d 328 (Fla. 4th DCA 1990) (evidence regarding uncharged sexual assault against second victim was “remarkably similar” to assault on victim in charged offense).

Clearly, it was not “impossible” to prove the murder of Dunn absent reference to the crimes against Maestre. Indeed, as this court’s cases leading up to *Keen* demonstrate, the basis for Mr. Conde’s arrest was not even relevant to the charged offense. Conde’s arrest was more than adequately explained (as was done through arresting detective Estopinan) by testimony that the arrest resulted from “follow-up” on “leads” to the person who lived in Mr. Conde’s apartment (where other evidence established Dunn had been murdered). (v122-6963-71).

Assuming any probative value, the probity of the Maestre evidence was substantially outweighed by its danger of unfair prejudice. Evidence of uncharged

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crimes is presumptively prejudicial. <i>E.g., Holland v. State</i> , 636 So.2d 1289, 1293 (Fla. 1994). Not only did the state’s evidence establish Conde’s uncharged commission of a battery and false imprisonment, it left the unmistakable inference that Conde had committed a kidnaping and sexual battery against Maestre. The prosecutor needlessly highlighted this evidence during closing argument. (v128-7806). <i>See Consalvo v. State</i> , 697 So.2d 805, 813 (Fla. 1997), <i>cert. denied</i> , 523 U.S. 1109 (1998); <i>Pacifico v. State</i> , 642 So.2d 1178, 1183 (Fla. 1 st Cir. 1994). Thus, admission of the uncharged crimes against Maestre constituted reversible error.	

B. THE TAMIAMI STRANGLER WARNING.

Over defense objection, the state elicited testimony from vice detective Martinez that, approximately 36 hours before the discovery of Dunn’s body, he met with Dunn, who he knew worked alone as a prostitute on the Tamiami Trail. He urged her to stay close to the other prostitutes because there was a person that was strangling the prostitutes in the area. (v121-6784-98). Martinez testified that Dunn refused to heed his warning and only laughed and smiled back at him. (*Id.* at 6798-9). The prosecutor previewed this testimony in his opening statement. (v116-6139).

The state argued that Martinez’s warning was relevant to Dunn’s “state of mind as to whether or not she was aware of the fact that there was such a person out there who was, in fact, assaulting or killing prostitutes and the fact that she somehow ended up with the defendant.” (v121-6785). The state further asserted that the warning was

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relevant to “the defendant’s demeanor and the manner in which he dealt with these women” (*Id.*). The trial court overruled the defense objection based on its determination that the warning was relevant to “the identification of the Tamiami Strangler” (*Id.* at 6787-8).

The testimony regarding Martinez’s warning to Dunn was irrelevant. It had no tendency to prove any material issue of fact. *See* § 90.401, Fla. Stat. Moreover, the danger of its unfair prejudice, reinforcing that the person who assaulted Dunn was a serial murderer, substantially outweighed any conceivable probative value. Section 90.403, Fla. Stat. Accordingly, it should have been excluded.

C. DEFENDANT’S CONCEALMENT AT TIME OF ARREST.

Over defense objection, (v116-6167; v122-6975), the state was permitted to elicit testimony that at the time of his arrest, Rory was found crouching behind a bed as if hiding. (v116-6975). The prosecutor highlighted this evidence, over objection, in closing. (v128-7807). This evidence had no relevance other than to impermissibly suggest consciousness of guilt of the charged homicide. However, Rory’s arrest followed the charged homicide by six months. If it was probative of any consciousness of guilt, it concerned the irrelevant, uncharged crimes against Gloria Maestre. Under these circumstances, this evidence was irrelevant and unfairly prejudicial and its admission constituted reversible error. *See, e.g., Escobar v. State*, 699 So.2d 988, 994-97 (Fla. 1997); *Dailey v. State*, 594 So.2d 254, 256 (Fla. 1992).

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VI. THE CUMULATIVE EFFECT OF IMPROPER PROSECUTORIAL COMMENTS DURING GUILT PHASE OPENING STATEMENT AND CLOSING ARGUMENT DENIED MR. CONDE A FAIR TRIAL.	

This court explained in *Bertolotti v. State*, 476 So.2d 130 (Fla. 1985):

The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

Id. at 134. A prosecutor must be especially circumspect in his remarks because of the office he holds. Thus, he must not strike foul blows and must “refrain from improper arguments calculated to produce a wrongful conviction . . .” *Berger v. United States*, 295 U.S. 78, 88(1936); accord *Gore v. State*, 719 So.2d 1197, 1202 (Fla. 1998). When such egregious tactics are used which prejudice the defense, a defendant’s right to a fair trial is compromised and his conviction must be reversed. See *Ruiz v. State*, 743 So.2d 1, 9-10 (Fla. 1999); U.S. Const. amend XIV.

In accordance with these general principles, a prosecutor may not attack a defendant’s character. *E.g.*, *Gore*, 719 So.2d at 1201. A prosecutor also may not conviction based on a defendant’s commission of uncharged offenses. See, *e.g.*, *Consalvo v. State*, 697 So.2d 805, 813 (Fla. 1996), *cert. denied*, 523 U.S. 1109 (1997); *Pacifico v. State*, 642 So.2d 1178, 1183 (Fla. 1st DCA 1994). A prosecutor may not disparage defense counsel. See, *e.g.*, *Lewis v. State*, 780 So.2d 125, 130

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(Fla. 3 rd DCA 2001) (<i>reh'g en banc</i>).	

Even where all of a prosecutor's improper remarks are not objected-to, reversal is necessary where the objected to comments, together with the unobjected-to comments, compromise "the integrity of the judicial process" and result in "convictions and sentences irreparably tainted." *Ruiz v. State*, 743 So.2d 1, 7 (Fla. 1999). Alternatively, such improper remarks, even absent objection, require reversal if they are so prejudicial as to constitute fundamental error. *E.g.*, *Caraballo v. State*, 762 So.2d 542, 547 (Fla. 5th DCA 2000); *Knight v. State*, 672 So.2d 590, 591 (Fla. 4th DCA 1996).

In opening statement, the prosecutor began to condition the jury to view Rory as a serial murderer - an evil person who had murdered six women, not someone merely guilty of the charged offense. He told the jury that police had dubbed Rory "*the Tamiami strangler*" and that he was "*out there killing prostitutes.*" (v116-6139). Under the guise of previewing the warning detective Martinez had given Dunn, the prosecutor declared that Rory had murdered "*five other prostitutes*" by "*manually strangl[ing them] to death.*" (*Id.*).

The prosecutor referred to Conde as "*this strangler,*" "*their attacker,*" "*their killer,*" (*id.* at 6140), "*the strangler[,]*" (*id.* at 6143), "*the Tamiami strangler,*" (*id.* at 6149, 6160 (objection, motion reserved)), and the "*man who went out hunting for victims.*" (*Id.* at 6157). He referred to the police as "*the strangler task force . . .*" (*Id.*

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at 6145).

Describing Rory’s confession, the prosecutor exclaimed that Rory “showed . . . how he had killed Rhonda Dunn, *how he had killed them all*,” “[a]bout how fast it was to *kill these people*,” and “[h]ow easy it was to *kill those people*.” (*Id.* at 6150). Concluding this segment, the prosecutor asserted not only that Rory said “I killed Rhonda Dunn,” but also “*I killed them all*.” (*Id.* at 6154). Wrapping up, the prosecutor urged that Rory “was going to strangle [Dunn] to death *as the other five had been strangled to death*.” (*Id.* at 6157).

During closing argument, the prosecutor repeatedly reminded the jury of Mr. Conde’s collateral homicides and urged it to find him guilty based on them. The prosecutor asserted: “Six murders in 117 days and they are all the same. They are all like clock work.” (v128-7775). The prosecutor then called Rory an “adulterer” and a “sociopath.” (v128-7776-7777).²¹ Urging that Rory intended to kill Dunn, the prosecutor continued: “He did that *six separate times to six different people*. You don’t think he knew what was going to happen to Rhonda Dunn? You don’t think when he put his arm around her neck that he knew he was going to suffocate her *just like all the others*.” (v128-7782-3). After describing Rory’s struggle with Dunn, the prosecutor argued that Rory intended that she was “going to end up dead this night

²¹ The trial court ultimately instructed the jury to disregard these two remarks. (v128-7789).

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just like the others.” (v128-7797). Further describing Dunn’s struggle, the prosecutor again harkened the uncharged murders: “Ultimately the defendant was able to kill Rhonda Dunn *as he had done with the others.*” (*Id.* at 7809).

Turning to Rory’s post-arrest statement, the prosecutor urged that this alone was enough to convict: “If the jury were listening only to the confession, and I am using quote with real big quotes around it, do you think the jury should let a person go when they say, “I killed *these people*”? Isn’t that enough evidence?” (*Id.* at 7812). The prosecutor continued to invoke the uncharged murders: “And the truth is that you jurors know what this evidence is. You know the truth about what happened. You know that *this defendant went out hunting for victims. That was his thing.*” (*Id.* at 7822). Concluding, the prosecutor again emphasized the uncharged murders: “The defense attorney told you ‘[Rory] killed *them*, but that is not the point.’ Ladies and gentlemen, *that is the only point.*” (*Id.* at 7824).

In addition to the uncharged homicides, the prosecutor unnecessarily reminded the jury about Rory’s uncharged crimes against Gloria Maestre (that were admitted only because they were “inextricably intertwined” with the charged offense):

They haven’t caught him yet and then he makes that mistake on June 19th of 1995, and the fire rescue people break open the door and they find inside Gloria Maestre mummified, duct taped head to toe. . . . They find her duct taped head to toe. They cut the tape off of her mouth although that is a two little air holes in nostrils to life so they cut the tape away

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(v128-7806). The defense objection and motion to strike were overruled.

The prosecutor also took shots at defense counsel. Of his cross-examination of Estopinan, the prosecutor argued: “[Defense counsel] is trying to get under Estopinan’s skin . . .” (v128-7799-7800). The prosecutor urged that defense counsel had the same nefarious objective in his cross-examination of Romagni:

So why are all those questions asked? To try and help you come to the right decision or to maybe try and lead you down a different road in the hopes that maybe you are not going to pay attention and make the right decision. The defense attorney, in fact, was going to concede, as he did today, I think his words that this defendant took Rhonda Dunn’s life, then what was all of that cross examination about?

(*Id.* at 7801). The prosecutor then argued that defense counsel had sought to mislead the jury regarding the DNA evidence:

I mean, what was the business with who touched these little white packets. You know, where is Jeff Johnson? Where is the guy who moved the packet from one place to another. Let me open up one of these packets. The swabs are here, the blood is here and that is how it is packaged. And it is put inside of this envelope so it doesn’t touch anybody else’s blood or swabs. And what is the claim? That the DNA somehow jumped from here to here or from there to there? They have little legs on it and it sort of walks across. You know that is not true. But without throwing that idea out to you, you know, maybe he is going to convince one person who says, well, maybe the DNA evidence isn’t so good. Maybe that is not accurate. Maybe it is not valid evidence that I should rely on.

(*Id.* at 7801-2).

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This egregious prosecutorial misconduct, which pervaded all of the prosecutor's direct remarks to the jury, irreparably tainted Rory's conviction. Such attacks on Rory's character, *see Brooks v. State*, 762 So.2d 879, 898-900 (Fla. 2000); *Pacifico*, 642 So.2d at 1183, entreaties to convict by implying Rory's propensity to commit murder, *see Birren v. State*, 750 So.2d 168, 169 & n.2 (Fla. 3rd DCA 2000); *Pacifico* at 1183; *Davis v. State*, 397 So.2d 1005, 1008 (Fla. 1st DCA 1981); and attacks on defense counsel, *see Lewis*, 780 So.2d at 130, *Alvarez v. State*, 547 So.2d 1119 (Fla. 3rd DCA 1991) were sufficient, individually, to necessitate a new trial. Unquestionably in combination they require reversal. *See Ruiz; Caraballo v. State*, 762 So.2d 542 (Fla. 5th DCA 2000).

VII. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS MR. CONDE'S CONFESSION WHERE (1) COERCIVE INTERROGATION RENDERED HIS CONFESSION INVOLUNTARY; (2) HIS WAIVERS OF HIS RIGHTS TO SILENCE AND COUNSEL WERE NOT KNOWINGLY, INTELLIGENTLY, OR VOLUNTARILY RENDERED; (3) POLICE FAILED TO HONOR HIS RIGHT TO A PROMPT INITIAL APPEARANCE; AND (4) HIS INTERROGATION VIOLATED THE VIENNA CONVENTION..

A. Facts

The suppression hearing testimony²² established that Rory was subjected to a

²² Mr. Conde's motions to suppress statements and evidence are located in volume 1 of the most recent supplemental record on appeal. (SRi). In addition to the various hearings conducted by the trial court in the instant case upon these motions, (continued...)

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warrantless arrest in his elderly grandmother's apartment by four armed homicide detectives. (SRiii-549-51). They told him they were arresting him for an unrelated sexual battery five days earlier, (SRiii-555), but they had just received information that he was the prime suspect in their six-month-old serial murder investigation. (SRii-111-17). Their manifest, but undisclosed, intent was to interrogate him regarding the homicide, and obtain a confession. (SRiii-568-70). The detectives entered the apartment without advising Rory's frail, nervous grandmother of their intentions. (SRiii-567-70). When the detectives saw Rory kneeling behind a bed in a back bedroom, one detective directed him to freeze and then apprehended him in the hallway of the cramped apartment as he walked toward the door. (SRiii-552-4).

The detectives took Rory directly to the homicide office, bypassing the Dade County Jail where he would have been booked and cued for an initial appearance the next morning. (SRii-217). By noon they had placed Rory in a chilly, 8 by 10, windowless interrogation room. (SRii-122-3, 225, 259-60). Rory again was advised that he was under arrest for sexual assault. (SRiii-562). Within minutes the detectives had Rory sign a *Miranda* waiver, as well as consents to search his apartment and car. (SRii-121-143; SR2 350-355). They did not tell him the reasons for these consents.

²²(...continued)

(v85, v86), the parties agreed to incorporate all of the testimony elicited at the motion to suppress hearing in his prior sexual battery prosecution, Case No. 95-22981. (v85-3058). The testimony, arguments, and ruling on these motions to suppress are also contained in the most recently filed supplemental record on appeal. (SRii-SRiv).

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Additionally, the detectives now knew that Rory had a pending felony case upon which he was represented by an attorney whose business card they had located in Rory's wallet. (SRii-217-18; SRiii-5604). The detectives made no effort to contact Rory's attorney. (SRii-217). Finally, though the detectives knew that (1) Rory, a Colombian national, (v85-3041-2), was born in Colombia, (2) he might well be a Colombian citizen, and (3) procedures were in place for contacting national consulates before commencing interrogation of their citizens, they failed to contact the Colombian consulate. (v85-3044-8, 3057-8).

The detectives interrogated Rory for two hours regarding the rape case. Rory steadfastly denied committing the alleged sexual battery. (SRii - 222). Thereafter, the detectives had Conde execute a consent to give saliva and blood specimens. (SRii-144-8; SR2-298-9). Again, they did not tell Rory why these were needed. The detectives took these specimens. They still had not advised Rory that he was the prime suspect in their serial murder case.

For the next 12 hours Rory was continuously interrogated by a series of interrogators in an effort to get him to confess to the homicides. (SRiii-531). The detectives used a variety of techniques suggested by the FBI for use with serial killers. (SRii-159, 220-1). They exaggerated and lied to Rory about the strength of their evidence against him. (SRii-227-8, 251, SRiii-510). Detective Jimenez admitted leading Conde to believe that there was a one-on-one DNA match though he knew this

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wasn't true. (SRiii-531). The detectives advised Rory that they were impressed with way he had "fooled" police about his involvement in an attempt to boost his ego. (SRii-157-9, 225; SRiii-505-10). When the interrogators detected Rory's sensitivity regarding how this investigation would be perceived by his family, they worked this angle. (SRii-230-2, 248-50). Romagni portrayed himself as Rory's friend, someone sensitive to Rory's feelings. (SRiii-528). When one detective was unsuccessful, a "fresh face" was brought in to continue the interrogation. (SRii-166-07; SRiii-537). The detectives gave Conde customized "Christian burial speeches" advising him that the perpetrator would be portrayed in the press as "a monster" and that he would be "better off" if he "confessed" and "told his side of the story" for the press. (SRii-229-30, 233; SRiii-526-31).

By 2:00 a.m., when the interrogation terminated, Rory had been in police custody for some sixteen hours and the subject of more than twelve hours of intensive interrogation. (SRii-265-9; SRiii-437-47). He was so emotionally distraught that he cried during the interrogation. (SRiii-505-10). Nonetheless, throughout this entire day's ordeal, Rory did not give any statement implicating himself in the murders. By 2:00 a.m., he had turned his chair away from detective Jimenez and had begun to look down making clear that he wanted the interrogation terminated. (SRiii-538-40). The detectives never advised Rory of his right to an initial appearance before a magistrate by noon the following day, within 24 hours of his arrest. The detectives brought Rory

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to TGK, the closest detention facility, to be booked and spend the night. (SRii-167). Detective Romagni testified that he expected Rory to be brought to his initial appearance later that day and that, when he returned to pick him up, Rory would have invoked his rights. (*Id.*).

The next day, at approximately 2:00 p.m., detective Romagni and sergeant Jimenez went to TGK to see if Rory would still talk with them. Romagni called and learned that Rory had not been taken to a bond hearing. (SRii-172). The detectives went to get Rory. (SRii-173-4). After eliciting from Rory that he would still talk, the detectives checked Rory out of the jail and returned to the interrogation room. (SRii-173-5). Romagni had Rory execute another *Miranda* waiver. (SRii-175-77; SR2-358-9). Shortly after the interrogation began, Rory was allowed to call his grandmother, wife, and children on the telephone. (SRii-178-9). These calls lasted approximately 45 minutes. (SRii-179-80). Upon resuming the interrogation, Rory began to confess to each one of the six homicides. (SRii-182).

Rory's stenographic statement commenced at 11:45 p.m. on June 25th and was concluded at 2:50 p.m. on June 26th. (SRii-193). The three hour statement spanned 175 pages of transcript. (SR3-360-536). Following the statement, and further interrogation by detective Richter regarding the Maestre case, Rory was brought to the Dade County Jail to attend his belated first appearance later that morning. (SRii-201-3). Although detective Romagni testified that Rory agreed to review and verify the

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transcript, (SRii-203), when they approached Rory at the jail following his first appearance hearing, both he and his attorney advised the detectives that he had invoked his right to counsel. (Srii-204).

B. Involuntary Confession

Although physical abuse, per se, renders a confession involuntary and subject to suppression under the Fifth and Fourteenth Amendments, *see Brown v. Mississippi*, 297 U.S. 278, 286-87 (1936), it has long been recognized that more subtle forms of psychological coercion also render a confession involuntary. *Reck v. Pate*, 367 U.S. 433, 440-1(1961) (citations omitted); *Spanno v. New York*, 360 U.S. 315, 320-1(1959).

The circumstances detailed above, including Rory's interrogation in a small, windowless, cold, interrogation room; for over 14 hours one day and over 12 hours the next day; without the benefit of a timely initial appearance; by several different detectives on a rotating basis; who lied, exaggerated, deceived, and used other techniques in an effort to break Rory and extract a confession, rendered Rory's confession involuntary. (SRi-50-8). *See, e.g., Spanno; State v. Sawyer*, 561 So.2d 278, 281-82, 285-91 (Fla. 2nd DCA 1990); *State v. Madruga-Jimenez*, 485 So.2d 462 (Fla. 3rd DCA 1986); *Williams v. State*, 441 So.2d 653, 656 (Fla. 3rd DCA 1983), *rev. denied*, 450 So.2d 489 (Fla. 1984). Accordingly, the trial court's ruling, (SRiv-681-6), subject to *de novo* review, *e.g., Connor v. State*, No. SC93697, 2001 WL1013245

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at 7 (Fla. Sept. 6, 2001), must be reversed.

C. *Miranda* waiver not knowing, intelligent or voluntary.

To be effective, a waiver of *Miranda* rights must be knowing, intelligent and voluntary. See *e.g.*, *Miranda v. Arizona*, 384 U.S. 436, 470 (1966); *Coleman v. Singletary*, 30 F.3d 1420, 1426 (11th Cir. 1994); *Thompson v. State*, 548 So.2d 198, 204 (Fla. 1989). For the same reasons Mr. Conde's confession was coerced and involuntary, any waiver of his *Miranda* rights was not knowing, intelligent, involuntary. For this reason, too, his confession must be suppressed.

D. Failure to provide prompt initial appearance.

In Florida, a felony arrestee must be taken before a judicial officer within 24 hours of arrest to be informed of the charge and basic constitutional rights. Fla. R. Crim.P. 3.130. The imperative for a prompt initial appearance also is anchored in the Fourth Amendment. *Riverside v. McLaughlin*, 500 U.S. 44 (1991). While a failure to honor a Florida defendant's right to a first appearance does not necessarily require suppression of any resulting confession, it does where the violation results in an involuntary confession. See *Keen v. State*, 504 So.2d 396, 399-400 (Fla. 1987). In this case, as argued *supra*, other factors, in addition to the violation of his rights under Rule 3.130, resulted in an involuntary confession. Had Mr. Conde's right to a hearing been honored, it is clear that he would have invoked his right to silence and counsel (as he later did). For this reason, too, Conde's confession must be suppressed.

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E. Violation of Vienna Convention.

The police also violated Mr. Conde's rights secured by the Vienna Convention by failing to contact the Colombian consulate and by failing to advise Conde of his right to contact the consulate. (R4-767-82). Article 36 of the Vienna Convention, 21 U.S.T. 77; section 901.26, Fla. Stat.(1997).²³ Mr. Conde had standing to enforce these self-executing rights. *See Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir.), *cert. denied*, 519 U.S. 995 (1996); *but see Maharaj v. State*, 778 So.2d 944, 959 (Fla. 2000). Clearly, had Mr. Conde been advised of his right to consulate contact, he would have availed himself of this right and would have, upon proper advice and recommendation, invoked his rights to counsel and silence. Thus, he was prejudiced by the violation of his Vienna Convention rights and his confession must be suppressed.

VIII. THE EVIDENCE WAS LEGALLY INSUFFICIENT TO ESTABLISH THE AGGRAVATORS CCP AND HAC.

A. Legal Standard

The state must prove any aggravating circumstance beyond reasonable doubt. *E.g., Mahn v. State*, 714 So.2d 391, 398 (Fla. 1998); *Geralds v. State*, 601 So.2d 1157, 1163 (Fla. 1992). Where the state's evidence is entirely circumstantial, it must

²³ The June, 2001, amendment to section 901.26 does not affect this argument.

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be inconsistent with any reasonable hypothesis which might negate the aggravating factor. *Id.* This court must ensure that the trial court correctly applied the rule of law for each aggravating circumstance and, if so, that there is substantial evidence supporting its finding. See *Willacy v. State*, 696 So.2d 693, 695-6 (Fla. 1997).

B. CCP

To sustain a finding of CCP, four elements must be established:

(1) the killing was the product of cool and calm reflection rather than an act prompted by emotional frenzy, panic, or a fit of rage; (2) the defendant had a careful plan or prearranged design to commit murder before the fatal incident; (3) the defendant exhibited heightened premeditation; and (4) the defendant had no pretense of moral or legal justification.

Buckner v. State, 714 So.2d 384, 389 (Fla. 1998). CCP “is usually, but not exclusively, applied to ‘those murders which are characterized as execution or contract murders, or witness-elimination murders.’” *Mahn*, 714 So.2d at 398. Heightened premeditation contemplates “a cold-blooded intent to kill that is more contemplative, more methodical, more controlled than that necessary to sustain a conviction for first degree murder.” *Nibert v. State*, 508 So.2d 1, 4 (Fla. 1987).

The state failed to prove that Rory’s murder of Dunn was the product of “cool and calm reflection.” The uncontradicted opinion of mental health experts Berlin and Golden was that Rory did not murder Dunn in a cold, calculated, and premeditated manner. (v141-8849-50; v142-8976). As Dr. Berlin explained:

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I do not believe that he was able to reflect. I believe he was in a very disturbed state of mind and he was fighting, I believe, at the time recurrent thoughts and preoccupations about murder and ultimately and tragically gave into those feelings in his disturbed state. But I think this is anything but a man of sound mind who is sitting there coldly and casually reflecting in deciding to take a life the way somebody might, for example, who has got a grudge against the person next door and is clearly in a state of mind where they can rationally come out with a plan that they premeditated and reflected and thought about it.

(v141-8850). Berlin, Golden, and Hervis further concurred that Rory was acting under the influence of an extreme emotional or psychological disturbance which substantially impaired his ability to conform his conduct to the requirements of law and appreciate the gravity of his conduct. (v140-8689-95; v141-8844-6; v142-8976-7).

Rory had been raped repeatedly by his two uncles throughout his childhood. (v140-8630-1). After successfully repressing the resulting anger and hurt, these intensely negative emotions came unhinged when he realized Comesana, with whom he had just had consensual sexual relations, was a man. (v141-8831-5; v142-8959-9). This caused Rory to snap and murder Comesana. Dr. Golden explained that, each time Rory subsequently gave in to his addiction to prostitutes, he struggled to prove to himself that he was not a murderer. (v142-8959-61). Ultimately, Golden explained that the primitive forces underlying Rory's intense and pervasive suffering were beyond his control. (*Id.* at 8962). See *Spencer v. State*, 645 So.2d 377, 384 (Fla. 1994) (evidence offered in support of mental mitigating circumstances negated CCP);

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Santos v. State, 591 So.2d 160, 162-3 (Fla. 1991) (although defendant acquired gun in advance of double homicide of daughter and daughter's mother and had made death threats to mother, unrebutted expert testimony established that domestic dispute deranged defendant negating CCP).

These opinions were consistent with Rory's uncounseled confession which contradicted the state's theory that Rory planned to murder Dunn from his first encounter with her (v128-7773-75). Rory explained the deep anguish and frustration he suffered as a result of Carla having taken his children and left him. (v126-7392). He explained how his anger and despair about the breakup of his family had built over time. (v126-7411). This was exacerbated when Carla respected him at her family's Thanksgiving gathering, (v126-7439-42), and again in December - weeks before the murder - when Carla told him she no longer loved him. (v126-7459).

When Rory came upon Dunn, he was not even looking for a prostitute. (v126-7475). Dunn was a lightning rod for Rory's emotions because she physically reminded him of Carla and generated heightened sexual arousal. (v126-7476, 7479, 7487).

After having had sex with Dunn once, watching TV, and then having sex a second time, Rory stated he laid in bed with her for five minutes. It was not until Dunn got up and walked toward the bathroom that Rory went behind her and began strangling her.(v126-7481-2).This appears to have been the result of an emotional spur-

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of-the-moment decision, not the “coldness” contemplated by CCP. ²⁴.

Clearly there was no “careful plan” or “prearranged design” to murder Dunn. Rory did not procure or use tools or instruments to assist him. Rory apparently had a gun that he easily could have used, but did not. (v135-8010-11). He did not have or use a bag to cover Dunn as he conspicuously carried her over his shoulder to his car. The evidence also failed to establish “heightened” premeditation. Nothing suggests that Rory contemplated and planned this murder ahead of time.

The trial court concluded that the murder of Dunn was “cold,” (R9-1730), based on the state’s theory that, in committing this murder, Rory “did not act out of emotional frenzy, panic, or a fit of rage.” (*Id.*). The court acknowledged that Rory’s confession “was to the contrary” but, relying on *Wuornos v. State*, 644 So.2d 1000, 1008 (Fla. 1994), *cert. denied*, 514 U.S. 1070 (1995), rejected his statement as “self-serving and unbelievable because it is contrary to the facts that could be inferred from the similar crimes evidence, or . . . other facts adduced at trial.” (*Id.*). The court

²⁴Rory’s statements regarding his encounters with the other prostitutes also indicated he had no prearranged plan or heightened premeditation. Rory stated that he killed Comesana because of his deception regarding his gender, which Rory discovered only moments before he killed him. (v126-7380). The mental health experts agreed that upon learning that Comesana was a man, Rory snapped. (v141-8831, 8835; v142-8959, 8994). Rory stated he did not decide to kill Nava until she ignored him following their second sex act, immediately before Rory strangled her.(v126-7423). When asked about Schneider, Rory specifically responded that he had no intent to kill her when he picked her up. (v126-7459, 7463).

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further stated that Rory’s actions “were spawned by his ongoing separation with his wife, Carla, which did not involve any level of intensity of emotion.” (*Id.*). The court failed to reference the pertinent, contrary, expert mental health testimony.

The trial court’s conclusion that the murder was “cold” is in error for several reasons. First, a murder does not need to be committed “out of emotional frenzy, panic, or a fit of rage” in order to negate a finding of CCP. Instead, any murder that fails to evince “the more contemplative, more methodical, more controlled” type of intent beyond that necessary to sustain a conviction of premeditated murder, fails to establish CCP. *Nibert*. This court has found CCP unsupported for murders that did not occur while the defendant was in the midst of a frenzy or fit of rage. *See, e.g., Almeida v. State*, 748 So.2d 922, 932-3) (CCP rejected on facts very similar to the instant case where witnesses testified defendant was calm in hours preceding murder).

Second, the court was not entitled to reject Rory’s confession. Uncontroverted factual evidence cannot be rejected unless it is contrary to law, improbable, untrustworthy, unreasonable, or contradictory. *Walls v. State*, 641 So.2d 381, 390 (Fla. 1994), *cert. denied*, 513 U.S. 1130 (1995). This rule applies even to a defendant’s self-serving testimony. *See Brannen v. State*, 94 Fla. 656, 661-2, 114 So. 429, 430-1 (Fla. 1927). Here, Rory’s uncounseled confession, endorsed and presented by the state, was utterly uncontroverted. It was internally consistent. Contrary to the trial court’s assertion, it was consistent with the *Williams* Rule

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evidence and the other significant facts adduced at trial²⁵. Contrary to the state’s speculation, Rory’s confession reflected that his murder of Dunn and the others **was** the result of “emotional frenzy” or a “fit of rage” that built during the weeks between murders and overwhelmed him at the moment he strangled Dunn.²⁶ (v126-7380, 7392, 7404, 7411, 7441, 7459, 7492).

The trial court’s assertion that Conde’s actions “did not involve any level of intensity of emotion” is also unsupported. In addition to those portions of Rory’s confession reflecting frenzy and rage, the mental health experts gave uncontroverted testimony that Rory suffered from a major depression with “despondency [and] agitation,” (v141-8826); Rory struggled mightily following the first murder to displace

²⁵ Without knowing the details of the evidence in the hands of the police, Rory admitted many of the most morally and legally incriminating facts which were later corroborated by physical evidence. Rory admitted post-mortem anal intercourse with Comensana. (v126-7379-80). This was corroborated by the physical evidence. (v119-6690). He admitted stealing back the money he had paid the victims for sex, as well as a beeper from Nava and other physical property. (v126-7416, 7437-9, 7451, 7494). This, too, was corroborated by other evidence. (v117-6305-10). Rory admitted stuffing garments and other items under the clothing of several victims. (v126-7405, 7432). This was subsequently corroborated. (v116-6209-10 SR1-187-195). He admitted struggles with Schneider and Dunn, (v126-7463-4, 7482-86), which were both corroborated. (v118-6468-78). Romagni, Rory’s primary interrogator, testified that he does not believe Rory would have lied in response to additional questions had they been asked. (v127-7634).

²⁶ *Wuornos* fails to support the trial court’s rejection of Rory’s confession. There, unlike here, the defendant had given several post-arrest statements that materially contradicted each other. *Id.*, 644 So.2d at 1003-4, 1009. Additionally, unlike the instant case, the defendant’s confessions were “largely controverted by the facts of the murder and the similar crimes evidence . . .” *Id.* at 1009.

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his ruminations about it, (v141-8835-6); and his emotions became out of control and overwhelmed him at the moments he committed the murders. (v142-8961-2). As Dr. Berlin explained, Rory’s condition was far worse than the “feelings of sadness” or momentary depression that healthy people experience. (v141-8828-9).

In addressing the “calculated” element, the trial court appears to have relied exclusively on the similar crimes evidence to support its finding that “Dunn’s murder was the product of a careful plan or prearranged design . . .” (R9-1731). However, a finding of CCP may not rest exclusively on collateral crimes evidence. *See, e.g., Finney v. State*, 660 So.2d 674, 681 (Fla. 1995), *cert. denied*, 516 U.S. 1096 (1996); *Crump v. State*, 622 So.2d 963, 972 (Fla. 1993). Thus, the trial court’s reliance on this evidence was error.

Finally, the trial court opined that “heightened premeditation” “ha[d] been established by the very manner of this killing.” (R9-1731). This court has rejected CCP as an aggravating circumstance in other cases involving strangulation. *E.g., Hoskins v. State*, 702 So.2d 202, 204, 210 (Fla. 1997); *Crump v. State*, 622 So.2d 963, 967, 971, 972 (Fla. 1993); *cf. Carpenter v. State*, 785 So.2d 1182, 1185-7, 1196-7 (Fla. 2001) (evidence insufficient to establish premeditation where defendant hogtied victim who died of neck compressions); *Randall v. State*, 760 So.2d 892, 894-5, 901-2 (Fla. 2000) (evidence insufficient to establish premeditation for two homicides where victims died of strangulation). Thus, the manner of the killing was insufficient

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to establish CCP.

As explained above, neither the similar crimes evidence nor Conde’s confession proved beyond reasonable doubt that Dunn’s murder was committed by premeditation above and beyond that required to support the homicide conviction. This evidence failed to negate the substantial defense evidence that the murder was committed by a profoundly emotionally disturbed person, incapable of cold reflection, who had become overwhelmed by intense despair that his life had been ruined by prostitutes when he killed Dunn. Accordingly, the trial court’s finding of CCP cannot be sustained.²⁷

C. HAC

In *State v. Dixon*, 283 So.2d 1 (Fla. 1973), this court defined HAC:

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.

Id. at 9. Accord *Hartley v. State*, 686 So.2d 1316, 1322 (Fla. 1996), *cert. denied*, 522

²⁷ In its Sentencing Order, the trial court asserted that even if its finding of HAC were reversed, it still would have found that the aggravators outweighed the mitigators. (R9-1750). By implication, any error in the trial court’s finding of CCP was clearly prejudicial.

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U.S. 825 (1997). Stated differently, a finding of HAC is “only proper in torturous murders—those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another.” <i>Cheshire v. State</i> , 568 So.2d 908, 912 (Fla. 1990). Although this court has held that death by strangulation is nearly per se heinous, <i>Hitchcock v. State</i> , 578 So.2d 685, 692 (Fla. 1990), this is only when it has been established that the victim was conscious when strangled to death. See <i>Overton v. State</i> , No. SC 95404, 2001 WL 1044890 at 20 (Fla. Sept. 13, 2001).	

In the instant case, the state’s evidence made it no more likely than not that Dunn was conscious when she was strangled. Associate medical examiner Rao testified that any one of the blows causing injuries to Dunn’s head *probably* rendered her unconscious. (v124-7169-70). Rao was unable to determine the order in which these injuries were inflicted but did testify that they were inflicted while she was alive. (v137-8276-7). Thus, if any one of these blows rendered Dunn unconscious, she was not conscious of being strangled. Even without these blows, medical examiner Bell testified that, if the blood supply to a victim’s brain is cut off during strangulation, the victim loses consciousness in as little as a few seconds, but on average within six seconds. (v117-6398-6401). He further testified that there is no way to determine whether, in a particular case, this has occurred. (*Id.*) Thus, there was substantial evidence supporting a reasonable hypothesis that Dunn was unconscious, or only

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briefly conscious, at the time she was strangled. See *Deangelo v. State*, 616 So.2d 440, 442-3 (Fla. 1993) (upholding trial court’s rejection of HAC in strangulation case where evidence of victim’s consciousness at time of strangulation was equivocal).

There was no evidence indicating that Mr. Conde had a “desire to inflict a high degree of pain” or an “utter indifference to or enjoyment of the suffering” of Dunn. To the contrary, Rory’s uncounseled confession reflects that when he became overwhelmed with the impulse to kill, he acted quickly. (v126-7378-9, 7382, 7401-2, 7423-4, 7463-4, 7481-5). See *Donaldson v. State*, 722 So.2d 177, 186-7 (Fla. 1998); *Buckner v. State*, 714 So.2d 384, 390 (Fla. 1998). There was no mutilation or torture. Indeed, despite the violent nature of his crimes, Rory’s statement reflected concern for the dignity of his victims, apologizing and praying over their bodies, carefully redressing them, and then placing their bodies in conspicuous, well traveled places where they would quickly be discovered. (v126-7381-2, 7402-3, 7430-32, 7465-6, 7488; v141-8826; v142-8961-2). Dr. Berlin, who had specific expertise in sexual disorders, (v141-8808), testified that Rory was not a sexual sadist and did not receive pleasure from the pain, suffering, or degradation of others. (v141-8850-1).

In finding HAC, the trial court appeared to be persuaded that Dunn suffered a prolonged and painful death. The court cited the medical examiner testimony that “the victim struggled to breath and was unable to do so because of the force on the neck which took a few minutes.” (R9-1729). To the contrary, the medical examiner

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testimony reveals that Dunn probably was rendered unconscious before any such suffering by one of the blows to her head or the arrest of blood flow to the brain. (v117-6398-6401; v124-7169-72). The testimony established that the on-set of unconsciousness would have been quick. (v117-6398-6401).

The court also pointed to the fear it asserted Dunn must have felt as evidenced by the intensity of her struggle and the fact that she had been warned several days earlier about prostitutes having been murdered. (R9-1729). Contrary to the judge's conclusion, it appears that Dunn was resolute in her belief that she was in no danger. She rebuffed the police warning. (v121-6798-9). Regarding the struggle before her death, the evidence was highly equivocal. Although Dr. Rao testified that several of Dunn's injuries were "consistent" with being defensive, she admitted that several of these injuries occurred prior to one day before Dunn's death. (v123-7160; v124-7177). As for the rest, she could only say that they "probably" occurred within three hours of Dunn's death but possibly before. (v123-7161-3). Thus, Dunn could have sustained some or all of these injuries before she even met Rory.²⁸ Rao also could not determine the order in which these injuries were inflicted or how quickly they were inflicted and admitted that it was possible that many of these injuries could have been

²⁸ Co-lead detective Butchko testified at the *Spencer* hearing that Dunn's father reported that Dunn had been a prostitute since age 12 and that she had a violent relationship with an alcoholic boyfriend at the time of her murder. (v146-9291-3). The trial court ultimately sustained the state's hearsay objection to this testimony, (v146-9295), which Mr. Conde maintains was error, as well.

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sustained simultaneously. (v137-8293, 8299-8300). This is consistent with a short struggle.

Rory's confession indicates that any struggle was very brief, twenty to thirty seconds. (v126-7485). The combination of cocaine and cocaine metabolites in Dunn's system, as well as cold medicine, (v124-7182-3), suggest that Dunn's sensitivity to any fear was significantly dulled. At bottom, the trial court's belief that Dunn may have experienced fear at the time of her death was based on sheer speculation which cannot serve as a basis for finding HAC. See *Knight v. State*, 746 So.2d 423, 435 (Fla. 1999); *Hartley*, 686 So.2d at 1323-4. Accordingly, the trial court's finding of HAC cannot be sustained.

IX. THE TRIAL COURT ERRONEOUSLY REJECTED STATUTORY AND NON-STATUTORY MITIGATORS.

A. Legal Standard

A sentencing court must find the existence of any and all statutory or non-statutory mitigating circumstances that are "reasonably established by the greater weight of the evidence." *Nibert v. State*, 574 So.2d 1059, 1061 (1990) (citation omitted). "Whenever a reasonable quantum of competent, uncontroverted evidence

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of mitigation has been presented, the trial court must find that the mitigating circumstance has been proved.” *Spencer v. State*, 645 So.2d 377, 385 (Fla. 1994). A trial court may not reject the existence of a mitigator or unless “the record contains competent substantial evidence to support the trial court’s rejection .” *Id.*

B. Extreme Emotional or Psychological Disturbance.

Mr. Conde’s three primary mental health experts - Berlin, Golden, and Hervis - unanimously opined that Rory was under the influence of an extreme mental or emotional disturbance when he murdered Dunn. (v140-8689-95; v141-8844; v142-8976). The state offered no contrary testimony.

The trial court rejected this statutory mitigator. (R9-1733-8). The court ignored Dr. Golden’s major opinions, acknowledging only that he interpreted Rory’s personality tests as showing Rory was “depressed” at the time he murdered Dunn and the other five victims. (*Id.* at 1733). The court acknowledged Dr. Berlin’s conclusion that Rory was “in the midst of extreme mental and emotional disturbance” at the time of the murder and was “in the throes of a major depression...” (*Id.* at 1733-4). The court further acknowledged Berlin’s opinion that Rory “snapped” when he learned that his first victim was a man and that the subsequent murders were “the result of an irrational mind that clouded and distorted his judgment.” (*Id.*). The court also acknowledged Hervis’ opinion that Rory suffered “from post traumatic stress disorder and depression” and “suffered an emotional and mental collapse because of his

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negative self-concept that resulted from his dysfunctional family life” (*Id.* at 1734). Nonetheless, the trial court rejected all three of these experts’ opinions.

Regarding Dr. Golden’s opinions, the trial court appears to have rejected them because (1) Rory’s IQ was in the normal range; (2) Rory held down two jobs, established meaningful relationships, and supported his two small children at the time of Dunn’s murder; (3) Rory was not clinically depressed when Golden evaluated him in jail four years after the murder; and (4) Rory told Golden that he did not believe he was depressed at the time of the murders. (R8-1734-5). None of these reasons provides a “competent” or “substantial” basis to reject Golden’s opinions. *See Spencer*, 645 So.2d at 385.

Regarding Rory’s IQ score, there was no testimony that this was inconsistent with the extreme emotional or psychological disturbance which Golden testified affected Rory at the time of the murder. Regarding Rory’s ability to maintain the appearance of a normal existence such as working two jobs and taking care of his children, Golden testified that Rory’s profile was one of a person who suppressed negative emotions in his subconscious and that he had developed a protective mechanism by which he would deny the existence of the traumatizing events. (v142-8954). Regarding the fact that Golden did not find that Rory was clinically depressed after four years in jail, Golden explained that, indeed, Rory was, and would likely continue to be, a model prisoner. (v142-8969). He testified, in essence, that Rory

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functioned better in the highly structured prison environment and was unlikely to succumb to depression in prison. (*Id.* at 8969-71).²⁹

Finally, regarding Rory’s denial that he was depressed at the time of Dunn’s murder, this is consistent with the observations of several of the mental health experts that Rory tended to suppress or minimize negative, painful feelings in his life. (v140-8630; v142-8935). As Dr. Golden testified, the far more persuasive evidence of Rory’s psychological state at the time of the murders was his own description of his symptoms: trouble sleeping, loss of interest in things he did, and decreased interaction with others. (v142-8991-2). Moreover, numerous other witnesses testified to Rory’s appetite/weight loss, (v135-8138; v137-8180; v138-8413; v140-8661), inexplicable crying, (v135-8085-6, 8089, 8137-8), and loss of attention to personal hygiene, (v137-8180-1; v140-8661), all of which corroborated the existence of a major depression.³⁰ Thus, the trial court erred in rejecting Dr. Golden’s opinion.

The trial court rejected Berlin’s opinions because (1) the court opined that most people suffering from depression do not kill; (2) Rory was not clinically depressed

²⁹Dr Michael Radelet, chairman of sociology at the University of Miami and an expert in penology, testified that Rory’s profile reflects an “overwhelmingly strong chance” of successful prison adjustment. (v141-8769-82).

³⁰ William Ferra, Rory’s friend since age 14, testified that Rory was depressed when Carla moved out and would no longer talk with him. (v135-8047-9, 8063-4). Susana Gomez, a friend of Nellie Conde, testified that Rory became depressed when Carla left him. (v137-8241). Coworker Meadows told Rory to seek counseling. (v137-8185).

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<p>when interviewed in jail; and (3) Rory was not in need of treatment for depression. (R9-1735). The trial judge’s assertion that depressed people do not kill was purely a matter of personal opinion, completely unsupported by record evidence. In fact, Berlin compared Rory’s depression to post-partem depression which in documented cases leads to the killing of an infant. (v141-8834). Berlin also distinguished garden-variety depression from the major mental illness from which Rory suffered. (v141-8828-9). As noted above, Dr. Golden explained why the fact that Rory was not clinically depressed several years after the murders was fully consistent with Rory having been depressed at the time of the murders. Since Berlin did not believe Rory was currently suffering from depression, it is not surprising that he saw no need for treatment. (v142-8971 (Golden believed therapy would assist Rory)). Thus, the trial court also erred in rejecting Dr. Berlin’s opinion.³¹</p>	

The court rejected psychotherapist Hervis’ opinion based on doubts about “the reliability or truthfulness of the information or witnesses that she relied upon . . .” (R9-1735). The court claimed that the information she received by telephone from family members, friends, or former neighbors, without “meeting” them, was “conflicting” and “uncorroborated.” (*Id.* at 1735-6).³² Without specifying which

³¹ Mr. Conde submits that the extreme emotional or psychological disturbance should have been found based on *either* the opinion of Dr. Golden or Dr. Berlin.

³² This criticism, besides unfounded, is ironic. Although Conde moved to
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information or witnesses the court questioned, it rejected Hervis’ lengthy, detailed testimony in its entirety. (*Id.*).

Contrary to the trial court’s assertion, the information upon which Olga Hervis based her opinions was substantially corroborated and reconcilable. That Rory grew up “in . . . home[s] filled with horrible fights [and] violence,” (R9-1736), was confirmed by information provided to Hervis by Nellie Conde, (v138-8553), Gustavo Conde, (v139-8563-4), Nurias Meralda (a neighbor from Colombia), (v139-8566-7), and Luis Fernando (a relative from Colombia). (v140-8605). Nellie Conde also testified that Rory was beaten as a child in Colombia. (v138-8449-50). The existence of “violence or conflicts between [the] two grandmothers” during Rory’s childhood in Colombia was supported by the testimony of Nellie, (v137-8341), and information Hervis obtained in person from the paternal grandmother, Maria Rojas. (v138-8560). The information Hervis obtained from Luis Fernando that Inosencia, the maternal grandmother, would beat Rory, (v140-8606), was specifically corroborated by direct testimony from Nellie. (v137-8348). That Rory was “emotionally abused” throughout his childhood as a result of being (1) discriminated against based on his skin color, (v137-8350; v138-8451; v140-8605); (2) threatened by the family’s chained dog,

³²(...continued)

continue the penalty phase due to Hervis’s inability to interview certain Colombian witnesses in person (because of political unrest in Colombia), and his inability to secure the presence of certain Colombian witnesses, (R7-1297-1303; v133-7912-15; v135-7956), the trial court denied his motion. (v133-7915;v135-7956).

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(v137-8349); and (3) isolated from friends and neighbors, (v137-8347; v139-8566; v140-8600), was also fully corroborated.³³

The trial court implied that Hervis was unjustified in accepting Rory's confession that he had been sexually abused as a child, (R9-1736), and rejected this finding itself. (R9-1743-4). The record shows, however, that the sexual abuse allegation was both credible and corroborated. Hervis, a seasoned psychotherapist and social worker with impeccable credentials, (v138-8486-8500), suspected Rory had been sexually abused as a child based on the information she had gathered. (v140-8622). She described the difficult process of the four meetings over which Rory slowly came to admit this terrible secret from his childhood culminating in the meeting on November 30, 1999, during which, while crying uncontrollably and shaking from head to toe, Rory disclosed that from age 6 to 12, on an almost daily basis, his uncles Carlos and Alfredo took turns sexually molesting him both anally and orally. (v140-8619-31).³⁴ Hervis testified that in 30 years of practice she had never witnessed anybody react as Rory did while admitting the sexual abuse. (v140-8631).

Rory's allegation of sexual abuse was substantially corroborated. Nellie testified that Rory and Alfredo slept in the same bed during this time. (v138-8366-7). Meralda,

³³ An especially poignant story concerned the pig that Rory's family adopted as a pet for Rory which he later learned he was fed for dinner. (R140-8628-9).

³⁴ The trial court's assertion that Rory claimed he was only sexually abused by his uncle Alfredo D'Andres (R9-1736) is belied by the record. (v140-8630).

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the neighbor, told Hervis that *her* grown son had confessed to her that Alfredo had sexually molested him. (v140-8595-6). Other neighborhood boys had said that they, too, had been molested. (v140-8599). Drs. Berlin and Golden testified that childhood sexual abuse was consistent with their diagnoses and conclusions regarding Rory's mental state at the time of Dunn's murder. (v141-8833, 8857; v142-8954-5). Dr. Golden also testified that Rory came close to admitting the sexual abuse to him. (v142-8966-7). Finally, the claim of sexual abuse was corroborated by Chaplain Bizarro whose testimony, which the trial court excluded from the penalty phase on *Richardson* grounds, (v140-8579-89) established that Rory had confided the sexual abuse allegations to him beginning in 1995. (v140-8579-80; v142-9014-22).

In rejecting Hervis' testimony regarding the sexual abuse, (R9-1736), the trial judge once again substituted his personal opinion for uncontroverted expert opinion. The court also ignored the uncontradicted testimony that Carlos had kidnaped Nellie and Rory from their paternal grandmother Maria and delivered them to the home of his violent mother Inosencia. (v137-8335-8). The trial claimed, in essence, that Rory's uncle could not have sexually abused Rory because he "absolutely loved [Rory] and treated him like a 'golden child.'" (R9-1736). Hervis explained, however, that it is typical for a perpetrator of child sex abuse to show favor to his victim. (v140-8632).

The testimony and information regarding the "emotional, physical and verbal abuse and rejection of [Rory]" during his adolescent years, (R9-1736), was also fully

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corroborated. Several sources provided information about fighting and violence in the home of Gustavo and Irene (Rory’s step-mother) where Rory lived in the United States. (v138-8383, 8386; v140-8642-3). Nellie testified that Irene tried to beat Rory. (v138-8451). Even Irene, who the trial court found to be particularly worthy of belief, (R9-1743), testified to various acts of violence and fighting in her home. (v137-8207, 8211, 8213-14). Ultimately, because of this conflict, Nellie and Rory’s grandmother Maria were forced out of the house. (v137-8206-7).

In an effort to contradict this information, the trial court cited Rory’s relative success as an adolescent - not using drugs or alcohol, not breaking the law or disobeying his father, and doing well in school. (R9-1736-7).³⁵ As Hervis explained, however, Rory was able to maintain a veneer of normalcy only by suppressing his emotions, (v140-8632-3, 8688-9); Dr. Golden similarly explained that denial and repression are protective mechanisms by which persons like Rory can continue to function. (v142-8954). These coping mechanisms failed when Rory’s family life with Carla and his children began to disintegrate. (v140-8693-5).

To reject Hervis’ opinion that Rory was amidst an emotional breakdown when he murdered Dunn, the trial court also relied on Rory’s ability as an adult to maintain

³⁵Although the trial court discredited Hervis for her reliance upon unreliable or untrue information and witnesses, (R9-1735-6), the court plainly relied on some of this very same information (“the defendant’s father told Ms. Hervis...”) to sketch its rosy picture of Rory’s upbringing. (R9-1735-6,1743).

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employment, marry, and become a father. (R9-1737-8). Hervis, however, fully accounted for this information in her assessment, (v140-8689-95), as did Drs. Berlin and Golden in reaching their conclusions, that Rory suffered from an extreme mental or emotional disturbance at the time he murdered Dunn. (v141-8827, 8862, 8871-4; v142-8954-7).

Ultimately, the opinions of Berlin, Golden, and Hervis, that Rory suffered from an extreme emotional or psychological disturbance at the time of Dunn’s murder, were based on credible and corroborated factual information. Their opinions were internally consistent and consistent with each other. The record does not contain competent, substantial evidence to reject these opinions. *See Spencer*, 645 So.2d at 385. Accordingly, the trial court erred in rejecting this statutory mitigator.

C. Defendant’s Capacity to Appreciate the Criminality of his Conduct or Conform Conduct to the Requirements of law Substantially Impaired.

The defense mental health experts also testified that at the time Rory murdered Dunn, his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired. (v141-8845-7; v142-8977). On this point, too, the state offered no contrary testimony.

In the portion of its Sentencing Order rejecting this statutory mitigator, the trial court relied, again, upon the fact that Rory “was not found to be depressed at the time of his interview by both experts [and] . . . was not in need of treatment for

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depression.” (R9-1739). The court also relied upon Rory’s appearance of normalcy in working hard at two jobs and supporting his family. (*Id.*). For the reasons explained *supra*, these factors do not provide a competent or substantial basis to reject Golden’s or Berlin’s opinions. (v142-8954, 8969-71).

The trial court concluded that Rory’s conduct in manually strangling the victims, re-dressing them, and leaving a message on Nava’s body showed that he was “rational.” (R9-1739) The judge’s personal opinion about the psychological significance of these factors was contrary to the testimony of Dr. Berlin - a psychiatrist and leading national expert on sex offenders - who testified that the murders were the product of an irrational and disturbed mind. (V141-8843).³⁶

As evidence that Rory demonstrated a “capacity to conform his conduct to the requirements of the law,” the trial court asserted that Rory did not have sex with prostitutes in his car to avoid the risk of detection or arrest, redressed his victims out of respect, and planned the killings. (R9-1739). The trial court’s reasoning misinterprets and misapplies this mitigator. The evidence cited by the trial court does not have any logical relevance to whether Rory’s *capacity to conform his conduct* to the requirements of the law was substantially impaired. Rory’s confession as well as the uncontroverted expert testimony established that he was subject to a powerful

³⁶ The record contained ample evidence - ignored by the trial court-that Rory was irrational, *e.g.* talking to the dead victims, blaming the victims for his problems but apologizing to them for having killed them, etc. (V141-8826)

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compulsion to kill that he resisted but was ultimately unable to control. ³⁷ Contrary to the trial court’s implication, insanity is not the standard for establishing this mitigator. See *Knowles v. State*, 632 So.2d 62, 67 (Fla. 1994). Thus, there was no competent or substantial basis in the record -to support the trial court’s rejection of this mitigator.

D. Non-Statutory Mitigators.

The trial court regrouped the 61 non-statutory mitigating circumstances proffered by the defense (R9-1701-5) into 12. (R9-1740-1). The court found several existed but rejected the rest claiming they were not supported by “any credible or significant evidence . . .” (R9-1743). Mr. Conde maintains that many of these mitigators were established by the greater weight of the evidence and were, therefore, not properly rejected.

The trial court rejected the defense assertion that Rory was “orphaned by the abandonment of his father at an early age” and that his “father repeatedly [abandoned him] throughout his life *including at the time of trial.*” (R9-1742 (1, 2)). These

³⁷ The court relied upon Rory’s criminal conduct in connection with Gloria Maestre to negate the experts’ opinions regarding the impairment of Rory’s ability to conform his conduct to the requirements of the law. (R9-1739-40). There is, however, nothing but the court’s speculation that Rory’s state of mind in June, 1995, reflected his state of mind six months earlier when he murdered Dunn. *See, e.g. Hartley*, 686 So.2d 1323-4 (court cannot rely on speculation to find statutory aggravator). Dr. Berlin’s contrary opinion that the crimes Rory committed after Dunn’s murder reflected a different, more controlled state of mind than before, (v141-8837-8), was well-substantiated by the evidence.

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mitigating circumstances were established by substantial record evidence that was completely uncontradicted. (v137-8228, 8322-4, 8331-2, 8340; v139-8562). Similarly, the trial court rejected the defense assertion that “[w]hile living in Colombia as a child, [Rory] was subjected to violent, unsafe, unstable and/or unpredictable environments, at home and in the community,” (R9-1742 (3)), even though it was established by uncontradicted evidence. (v137-8331-41, 8350; v138-8560-62; v139-8563-6; v140-8600, 8605-6).³⁸

The trial court rejected the defense assertion that Rory’s “execution will have further negative effects on his children, wife, in-laws, grandmother, sister, . . . and friends, and will cause them to suffer.” (R9-1742-3 (16)). There was overwhelming and uncontradicted evidence that Rory’s children continued to have a strong, loving relationship with him even while he was in jail and they would suffer a tremendous loss in the event of his execution. (v135-8101, 8109, 8127, 8127, 8139; v137-8175, 8235; v138-8405-7, 8475-80; v140-8668-70).

In rejecting each of the 16 proffered circumstances regarding Rory’s “family background during childhood and adulthood,” the trial court resorted to the most strained interpretation of the testimony possible. It found that Rory’s uncle Carlos D’Andres, the person Rory disclosed had raped him nearly daily from the age of 6 to

³⁸ The record likewise supports numerous of the other childhood and adulthood family background factors, which the trial court rejected, by reliable and uncontradicted evidence.

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12, (v140-8630-32), provided Rory and his sister “with a wonderful and loving home with a maid.” (R9-1743). The trial court further concluded that Rory’s father Gustavo, who, repeatedly abandoned Rory throughout his childhood and adolescence, and through and including trial, (v137-8228, 8331-2, 8340; v139-8562; v140-8640), “loved [Rory] and . . . considered [him] to be a great and wonderful child . . .” (R9-1743). The trial court’s acceptance of this most unlikely scenario is belied by the weight of the evidence, strains all credibility, and must be rejected.

The court rejected the mitigating factor of physical, mental, or sexual abuse because it found there was “no direct proof of such abuse, but rather conflicting evidence that any abuse occurred . . .” (R9-1743-4). Direct proof is not necessary to prove a mitigator. As discussed *supra*, there is abundant, compelling, and uncontradicted evidence demonstrating emotional abuse, (v137-8347-50; v138-8451; v139-8566; v140-8600, 8605), physical abuse, (v137-8348; v138-8451; v140-8606), and sexual abuse. (v138-8366-7; v140-8579-80, 8595-9; v141-8833, 8857; v142-8966-7, 9014-22). The record contains no competent or substantial evidence to negate their existence.

The trial court rejected remorse as a mitigating circumstance. (R9-1746). The court acknowledged that the defense offered evidence of remorse through Dr. William Riebsane, (v141-8743-4), Dr. Berlin, (v141-8841), and Chaplain Bazarro. (v147-9306-11). The trial court asserted, however, that it had doubts about the genuineness of

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<p>Rory’s remorse based on “prior conflicting evidence offered by the aforementioned witnesses.” (R9-1746). The trial court failed to identify this “conflicting” evidence. Moreover, the trial court asserted that the “manner of death of the victim as well as the manner in which [the defendant] disposed of or dumped the victim’s body belie[d] his claim of remorse.” (<i>Id.</i>). Certainly, neither the manner of death nor the manner in which Rory disposed of the bodies (which Dr. Berlin testified reflected remorse and respect for the victims (v141-8826)) could have preempted his <i>subsequent</i> showing of genuine remorse. Thus, the trial court erred in rejecting this, and the other, non-statutory mitigator(s).³⁹</p>	

X. THE DEFENDANT WAS DENIED A FAIR SENTENCING HEARING AS A RESULT OF THE TRIAL COURT’S ERRONEOUS ADMISSION OF COLLATERAL CRIMES EVIDENCE AND THE PROSECUTOR’S RELATED IMPROPER ARGUMENTS.

Assuming, *arguendo*, that the collateral crimes evidence does not require a new trial, at the very least, it requires a new sentencing. Mr. Conde’s Motion in Limine regarding the collateral homicides contemplated their inflammatory impact on the penalty phase. (R4-693, 701-4; v86-3192). Additionally, the trial court erroneously admitted, over defense objection, evidence regarding Conde’s collateral crimes against

³⁹ For the same reason any error in the trial court’s finding of CCP must be deemed harmful, *see* footnote 27, *supra*, its erroneous failure to find of the statutory or non-statutory mitigators urged on appeal must also be deemed harmful.

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Maestre. (R5-890-2; v118-6536). <i>See</i> argument VB, <i>supra</i> . Also, though the jury was permitted to hear evidence that Conde previously had been convicted of a violent felony, section 921.141(5)(b), the admission of detective Richter’s detailed testimony about the facts of this offense (v135-7991-8045) was error, particularly in light of the defense offer to stipulate to Rory’s conviction for armed sexual battery. (v135-7963-4) . <i>See Old Chief v. United States</i> , 519 U.S. 172(1997).	

As the jury was specifically advised, the collateral homicides were not to be considered aggravating circumstances, (v143-9224), and, hence, had no relevance. Thus, the only likely impact of the collateral crimes evidence during the penalty phase was its inherent tendency to improperly suggest a recommendation of death based on bad character or propensity to commit murder. *See Finney v. State*, 660 So.2d 674, 681(Fla. 1995).

Any confidence in the trial court’s instruction to defuse this tendency was undermined by the prosecutor’s improper and inflammatory remarks during penalty phase closing argument. The prosecutor referred to Rory as a “*brutal person who committed sexual murders...*” (v143-9095). Arguing that Rory derived some feeling of power from killing, the prosecutor urged: “He liked how that felt. He liked not being the underdog. He lived having the power of life and death. *And he killed, and he killed, and he killed.*” (v143-9102). At the end of his argument, the prosecutor, again, raised the impermissible “serial murderer” theme: “A person once said no serial

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killer was so concerned to murder that he did it in front of a policeman . . . and that is the truth.” (V143-9153). Defense objection was overruled. (*Id.*) See **Brooks v. State**, 762 So.2d 879, 898-902 (Fla. 2000) Accordingly, Mr. Conde was denied a constitutionally fair sentencing, see U.S. Const. amends. VI, VIII, XIV, and his death sentence must be reversed.

XI. THE TRIAL COURT ERRED IN EXCLUDING CRUCIAL DEFENSE EVIDENCE OF MR. CONDE BEING SEXUALLY ABUSED AS A CHILD IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS TO PRESENT MITIGATION.

A defendant in a capital case has an absolute right to introduce non-statutory mitigating evidence at the penalty phase. **Lockett v. Ohio**, 438 U.S. 586 (1978); **Griffin v. State**, 639 So.2d 966, 970 (Fla. 1994); **Hitchcock v. State**, 578 So.2d 685, 689 (Fla. 1990), *vacated on other grounds*, 112 S.Ct. 3020 (1992); see U.S. Const. amends. VI, VIII, XIV; Art. I, §§ 9, 17, Fla. Const. Mitigating evidence consists of matters relevant to the defendant’s character or record, or the circumstances of the offense, proffered as a basis for a sentence less than death. **Rogers v. State**, 511 So.2d 526, 534 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988). In presenting such evidence, a defendant need not strictly adhere to the rules of evidence. **Hitchcock**, 578 So.2d at 690; § 921.141(1), Fla. Stat. (1996).

A significant issue during the penalty phase was whether Rory had been sexually abused as a child. This was offered as a non-statutory mitigator. (R9-1702). It was

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also a factor bearing on Rory’s psychological profile at the time of the charged murder and contributed to the mental health experts’ opinions regarding the severe emotional/psychological disturbance that led to Rory’s criminal conduct. It explained Rory’s explosive reaction to his sexual encounter with Comesana which set him on the path to Dunn’s murder. (v141-8835). The state claimed in penalty phase closing argument that whether Rory had been sexually abused as a child “was almost the entire crux of the defense case.” (v143-9101).

Psychotherapist Hervis, who extensively interviewed Rory’s family and friends to develop a comprehensive picture of Rory’s relationships, testified that over the course of a series of painful interviews with Rory shortly before the penalty phase trial, Rory admitted that he had been repeatedly and continuously sexually abused by his two uncles when he was from 6 to 12 years old. (v140-8619-37). This was one of the factors that Hervis testified led to Rory’s “breaking point” when he began committing the murders. (v140-8680-95).

Dr. Berlin testified that one of the causes of sexual addiction in adulthood (the condition that Berlin testified brought Rory into contact with the murder victims) is abuse in childhood. (v141-8833). He testified that he had been told by a “defense investigator” that Rory had been molested by his two uncles but did not rely heavily on this information in rendering his mitigation opinions. (*Id.* at 8856-7). Dr. Golden testified that Rory’s personality profile was consistent with Rory having been the

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victim of childhood sexual abuse. He believed that Rory had been abused as a child. (v142-8949-55). On cross-examination, the state elicited that Golden had only learned about Rory's claimed sexual abuse as a child about three weeks earlier. (*Id.* at 8990). Thus, the question of whether Rory had been sexually abused as a child was critical.

In its opening, penalty phase statement, the state sought to discredit the defense evidence that Rory had been sexually abused as a child, and the mental mitigation that was substantially linked to it, by urging that this claim had only surfaced one week earlier. (v135-7977). The state urged that the late disclosure of this information indicated its falsity. (*Id.*).

On the fourth day of the penalty phase proceedings, the defense proffered the testimony of jail Chaplain Bizarro who Rory had met in 1995, shortly after his arrest and long before the defense development of any mitigation, and to whom Rory had confided the sexual abuse allegations. (v140-8579-80 (proffer by counsel); v142-9014-22 (proffered testimony of witness)). The defense had just discovered this witness. Bizarro's testimony was critical not only to corroborate Rory's claim of childhood sexual abuse, but also to rebut the state's assertion that this claim was recently fabricated. (v135-7977). Bizarro's testimony was clearly Rory's best evidence on this crucial point. It was also essential to bolster the experts' opinions.

Upon the state's *Richardson* objection, the trial court agreed that the late disclosure of Bizarro's testimony was inadvertent. However, because the testimony

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supposedly (1) prejudiced the state by contradicting its opening statement, (2) was “self-serving,” and (3) was cumulative of Hervis’ testimony, the court excluded the testimony. (v140-8588-9). This ruling unconstitutionally prevented Rory from presenting crucial evidence to the jury that was integral to his mitigation.

**XII. IMPOSITION OF THE DEATH PENALTY AGAINST
CONDE IS CONSTITUTIONALLY
DISPROPORTIONATE.**

As argued above, Mr. Conde maintains that the trial court improperly found CCP and HAC and erroneously rejected the mental mitigator, of extreme psychological or emotional disturbance, and substantial impairment of defendant’s capacity to appreciate the criminality of its conduct or conform his conduct to the requirements of law, as well as numerous non-statutory mitigators. If this court agrees with Mr. Conde on any of these issues, given the forceful, uncontroverted evidence indicating a severe emotional or psychological disturbance, he maintains that his sentence of death is disproportionate and must be reduced to life in prison. *See Farinas v. State*, 569 So.2d 425, 431 (Fla. 1990)(death sentence disproportionate though murder committed while defendant committing another felony and HAC aggravators upheld and trial court found statutory mental mitigators entitled to little weight and outweighed by aggravators); U.S. Const. amend. VIII, XIV; Art. I § 17, Fla. Const.

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XIII. FLORIDA’S DEATH PENALTY STATUTE VIOLATES THE UNITED STATES AND FLORIDA CONSTITUTIONS BECAUSE IT (1) DOES NOT REQUIRE NOTICE OF AGGRAVATING CIRCUMSTANCES OR (2) REQUIRE SPECIFIC JURY FINDINGS REGARDING THE SENTENCING FACTORS; (3) PERMITS A NON-UNANIMOUS RECOMMENDATION OF DEATH; (4) IMPROPERLY SHIFTS THE BURDEN OF PROOF AND PERSUASION TO THE DEFENSE; AND (5) FAILS ADEQUATELY TO GUIDE THE JURY’S DISCRETION.

Mr. Conde moved to declare section 921.141, Florida Statutes, unconstitutional because of, *inter alia*, its failure to require specific jury findings regarding the sentencing factors, (R7-1367-70, R8-1405-7, 1586-7), its failure to require a unanimous recommendation of death, (R8-1420-1), improper burden shifting, (R7-1380-5), and failure to provide the jury adequate guidance. (R7-1323-31). The trial court denied each of these motions. (v134-7938-49).

The U.S. Supreme Court recently held that held that “it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.” *Apprendi v.*

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New Jersey, 530 U.S. 466, 490 (2000) (quoting *Jones v. United States*, 526 U.S. 227, 252-53 (1999)). Grounding its decision both in the jury’s traditional role under the Sixth Amendment and principles of due process, the Court made clear that

[i]f a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others . . . it necessarily follows that the defendant should not — at the moment the state is put to proof of those circumstances — be deprived of protections that have, until that point unquestionably attached.

Id. at 484. These essential protections include (1) notice of the government’s intent to establish facts that will enhance the defendant’s sentence, (2) determination by a unanimous jury that the sentence-enhancing facts exist, and (3) such facts have been established by the government beyond a reasonable doubt. *Id.* at 490.

While the *Apprendi* and *Jones* majorities attempted to distinguish capital sentencing schemes, as the *Jones* dissenters noted, the distinction is illogical:

If it is constitutionally impermissible to allow a judge’s finding to increase the maximum punishment for carjacking by 10 years, it is not clear why a judge’s finding may increase the maximum punishment for murder from imprisonment to death.

Jones, 526 U.S. at 272 (Kennedy, J., dissenting); *see also Apprendi*, 530 U.S. at 538 (“If the Court does not intend to overrule *Walton [v. Arizona]*, 497 U.S. 639 (1990)], one would be hard pressed to tell from the [majority] opinion.”) (O’Connor, J., dissenting). As Justice Kennedy anticipated, the majority’s ruling compels a reexamination of this court’s capital jurisprudence regarding the roles of judge and jury. *Jones*, 526 U.S. at 272.

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Florida’s capital sentencing scheme, like the hate crimes statute in *Apprendi*, exposes a defendant to enhanced punishment — death rather than life imprisonment — when a murder is committed “under certain circumstances but not others.” *Id.*, 530 U.S. at 484). However, under Florida law, contrary to the principles espoused in *Apprendi*, (1) the state is not required to provide notice of the aggravating circumstances it intends to establish at the penalty phase; (2) the jury is not required to make any specific findings regarding the existence of aggravating circumstances, or even of a defendant’s eligibility for the death penalty; (3) there is no requirement of jury unanimity for finding individual aggravating circumstances or for making a recommendation of death; and (4) the state is not required to prove the appropriateness of the death penalty beyond a reasonable doubt.⁴⁰ Accordingly, the sentencing scheme violates the Eighth and Fourteenth Amendments to the U.S.

⁴⁰ *Cf. State v. Harbaugh*, 754 So.2d 691 (Fla. 2000) (prior DUI must be charged, presented to jury, and proven beyond reasonable doubt for felony DUI prosecution); *Combs v. State*, 525 So.2d 853, 859 (1988) (Shaw, J., specially concurring) (lack of jury findings, combined with *Tedder* deference, raises serious arbitrariness problem); *Williams v. State*, 438 So.2d 781 9Fla. 1983 (unanimity at the guilt/innocence stage of a capital case required); § 921.141(2)(b), (3)(b), Fla. Stat. (1993)(burden on *defendant* to prove that “sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist”); *Jackson v. Dugger*, 837 F.2d 1469, 1473 (11th Cir.)(instruction that advised jury that “death is presumed to be the proper sentence unless [aggravating factors] are overridden by one or more . . . mitigating circumstances” violated Eighth Amendment), *cert. denied*, 486 U.S. 1026 (1988).

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Constitution and article I, sections 9 and 17 of the Florida Constitution. ⁴¹

CONCLUSION

For the foregoing reasons, Mr. Conde's convictions and death sentence must be reversed and the case be remanded for a new trial. Alternatively, Mr. Conde's death sentence should be reduced to life or this case should be remanded for a new sentencing proceeding.

Respectfully submitted,

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⁴¹ In *Mills v. Moore*, 786 So.2d 532, 535-7 (Fla. 2001), this court held that *Apprendi* did not invalidate Florida's capital sentencing scheme because the Supreme Court did not overrule *Walton v. Arizona*, 497 U.S. 639 (1990), which upheld the constitutionality of judge sentencing in capital cases. As the court recognized in *Espinosa v. Florida*, 505 U.S. 1079, 1092 (1992), however, Florida's capital sentencing scheme differs from Arizona's because the jury is a co-sentencer in Florida. This court also stated that no court had yet extended *Apprendi* to capital sentencing schemes. *Id.* Since *Mills* was decided, an Indiana trial court in *State v. Barker*, case no. 49G05-9308-CF-095544 (Marion County, Indiana Superior Court) (Sept. 19, 2001), held that Indiana's capital sentencing statute-which is similar in all material respects to Florida's - is unconstitutional under *Apprendi*. Finally, *Mills* relied erroneously on the denial of *certiorari* in *Weeks v. Delaware*, 121 S.Ct. 476 (2001), wherein the Delaware Supreme Court concluded that *Apprendi* does not apply to capital sentencing schemes. It is well-settled that the denial of *certiorari* has no precedential value.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by United States mail this ____ day of November, 2001, to: Sandra Jaggard, Assistant Attorney General, Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 950, Miami, FL 33131.

By: _____
BENJAMIN S. WAXMAN

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

By: _____
BENJAMIN S. WAXMAN