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

REPLY BRIEF OF APPELLANT RORY ENRIQUE CONDE

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ARGUMENT AND CITATIONS OF AUTHORITY[1]

I. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S CAUSE CHALLENGES TO DEATH-PRONE JURORS.

The state cites U.S. Supreme Court cases emphasizing the deference owed a trial judge's determination of a prospective juror's qualifications. Appellee's Answer Brief ("AB") at 2-4. However, this and other Florida courts have articulated standards, which this court should follow, more protective of a defendant's impartial jury rights. *E.g.*, ***Overton v. State***, 801 So.2d 877, 890 (Fla. 2001) ("juror must be excused for cause *if any reasonable doubt exists* as to whether the juror possesses an impartial state of mind"); ***Hill v. State***, 477 So.2d 553, 555-6 (Fla. 1985) (jurors not only should be impartial "*but beyond even a suspicion of partiality*"); ***Singer v. State***, 109 So.2d 7, 24 (Fla. 1959) ("[I]f there is *a basis for any reasonable doubt* as to any juror[] . . . render[ing] an impartial verdict . . . he should be excused . . .").[2]

1. Prospective Juror Groom: "Murder is murder." (v99-4153). Groom

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[1] Mr. Conde relies on his initial brief to address those arguments contained in the state's answer brief not addressed here.

[2] The state nowhere contests Mr. Conde's math that reversal is necessary if the trial court erred in denying *three* of his cause challenges. Initial Brief ("IB") at 28.

openly admitted strong, pro-death bias. He flip-flopped at least twice in relating his ability to overcome it. In his first reversal, moments after denying that a guilty verdict would "automatically" result in him voting for death, AB at 5, Groom testified that "in some circumstances," murder included, **the death penalty "should be mandatory**." (v99-4153).[3] When asked which types of murder would warrant automatic death, Groom flippantly retorted, "**Murder is murder**." (*Id*.). When asked if Conde would deserve death upon a determination that he was guilty of premeditated murder, Groom responded unequivocally, "Yes . . .." (*Id*. at 4154). Groom later allowed only a "possibility," "relatively small," that anything about Conde's life would cause him to recommend life. (*Id*. at 4155).

In his second reversal, as if he had not moments earlier strongly indicated the contrary, Groom averred that he could follow the judge's instructions about weighing aggravating and mitigating circumstances. (AB at 6). However, when asked if proof of the other five homicides would affect his ability to do the weighing, Groom equivocated: "**I am not sure**. I don't think so. I think I would focus on one." (v99-

[3] Groom had already twice been explained he would be required to *weigh* evidence as part of the penalty phase deliberations. (v96-3506-8; v97-3877-9; v99-4150).

4159). Asked whether the other murders would cause him to place "an almost impossible burden" on the defense to prove mitigation, he again equivocated, "I don't think so." (*Id.*). Thus, there was more than reasonable doubt about Groom's impartiality.[4]

Independently, Conde argued that Groom should have been excused for misrepresenting his criminal history. IB at 29. The state's response that Groom's testimony demonstrated his truthfulness, AB at 7, is belied by the record. Having initially denied any arrests on the juror questionnaire, (v105-4950), Groom did not admit his criminal history until confronted under oath. This Metro-Dade training director's explanation that he "misread the question" eliciting his criminal record was unbelievable. He also falsely characterized his second degree felony arrest for discharging a deadly missile (firearm) into a dwelling, (SR1-23-24, 28-31), as a mere pre-divorce spat. (v105-4950). These lies and omissions raised further doubts regarding Groom's impartiality.

2. Prospective Juror Huey: "Murderers give up their right to live."

[4] Significantly, Groom was surrounded in his family and neighborhood by law enforcement officers. (v105-4950).

"I believe an eye for an eye." (v97-3682). Huey not only believed that "anyone that would be found guilty of taking someone else's life . . . gives up their right to live" and "an eye for an eye," (v97-3682), but also that the other five homicides were "aggravating circumstances" that he could not disregard. (*Id*. at 3685). Although he subsequently stated he could weigh evidence "that *for whatever reason* qualified as a mitigating circumstance," AB at 9, he repeated afterwards that the other five homicides would be very hard to disregard. (v97-3687).

Huey's after-the-fact averment that he would not allow his bias to influence his recommendation was utterly insufficient to dispel the undeniable suspicion regarding his partiality. Huey believed that a convicted murderer gives up his right to live even *after* being advised, *several times*, that the penalty-phase jury would have to weigh various circumstances after the determination of guilt. (v96-3506-08; v97-3679-80). That he later stated he would be able to weigh the evidence did not vitiate his earlier concession of pervasive bias in favor of death. *See* ***Overton***, 801 So.2d at 892-3.

3. Prospective Juror Owens: Automatic death for first degree

murderers. (v98-3964).[5] The state acknowledges that Owens stated he "would automatically vote for the death penalty" for first degree murder. AB at 11. It asserts, however, that she was "rehabilitated" when, in response to the trial court's efforts, she stated she "would definitely have to hear everything before [she] agreed to the death penalty." *Id*. Following Owens' unequivocal statement that she would automatically recommend death, this subsequent statement conveyed nothing more than that she would hear all of the evidence before acting upon her bias and "agree[ing] to the death penalty." (v98-3968). Given the strength and clarity of Owens' death-prone bias, it cannot reasonably be said that his subsequent statement negated the substantial doubt regarding his impartiality.

4. Prospective Juror Rolle: Death for "serial," "cold blooded" killers. (v98-3926). The state urges that Rolle's testimony did not "in any manner show[] an

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[5] The state argues that the trial court's asserted error in failing to strike Owens was waived because Conde gave "no specific reason why the trial court erred . . .." AB at 10. To the contrary, Mr. Conde explained in his brief that Owens should have been struck because "[s]he agreed . . . that if there were no reasonable doubt that a person committed a first degree murder, she would automatically vote for the death penalty." IB at 31. Conde's further discussion of the law requiring excusal of jurors if any reasonable doubt exists whether they possess an impartial state of mind, IB at 27-28, 33-34, clearly presented his argument in support of his first point on appeal.

irrevokable commitment to vote for the death penalty upon a finding of guilt" and, instead, evinced "a willingness and a sense of responsibility to listen to all the evidence before making a sentencing determination." AB at 13. Rolle's testimony belies the state's argument.

True, as the state emphasizes, in response to initial questioning, Rolle stated she would wait to hear the penalty-phase evidence before determining her recommendation. AB at 13. However, when confronted with her prior statement that "**serial killers deserve the death penalty**," (v98-3928), Rolle expressed "a possibility" that **she would recommend death "[s]imply as a result of [Conde] being convicted.**" (*Id*.). Moreover, clarifying her sentiments, Rolle stated that, if the evidence indicated that Conde "just grabbed these women and just strangled these women without these women having a chance, just for no reason, yes, I would say death." (T. 3929). Further explaining, Rolle indicated that only if Conde had a reason for killing the victims, "self defense or his life was on the line or something like that," would he say *maybe* life. (v98-3929-30). After explaining that such matters would be determined during the guilt phase, defense counsel further queried whether in light of that, if the jury found Conde guilty, "the ball game [would be] over" regardless of

"what personal reason" or what "kind of childhood" Conde had had. (T. 3930). In response, Rolle reiterated what obviously was her firmly held belief that, if Conde had murdered without a reason, she would recommend death. (v98-3930-1).

Despite these clear expressions of death penalty bias, neither the trial court nor the prosecutor rehabilitated Rolle. *See* ***Bryant v. State***, 601 So.2d 529, 532 (Fla. 1992). Thus, excusal for cause was required.

5. Juror Fuentes: "[K]ill[ing] one person with premeditation . . . is worth the death penalty." (v104-4903). Fuentes openly stated he would be predisposed toward the death penalty if it were shown that Conde strangled Dunn with premeditation. (T. 4901). He also expressed his bias regarding every facet of a penalty-phase jury's task about which he was queried. (T. 4901, 4903 (would place burden on defense to persuade him not to recommend death; Conde's background would carry no weight as mitigating evidence; automatic death for premeditated murder)). Fuentes expressed this strong bias *after* having been explained his penalty phase responsibilities *several times*. (v103-4805-6; v104-4896-7).

The state claims Fuentes was adequately rehabilitated. AB at 15. However, even in response to the trial court's skillful efforts to rehabilitate, Fuentes only equivocated

about his ability to perform the penalty phase task: "I think I could;" "To the best of my ability;" "[I] believe [I] can." (T. 4903). He also firmly warned that "human nature" would prevent him from completely blocking out the five uncharged murders. (T. 4903). Given the strength of Fuentes' pro-death bias, nothing was elicited to eliminate the overwhelming doubt about his impartiality.

6. Prospective Juror Loida Hernandez[6]: Automatic death for first degree murderers. (v99-4168). Hernandez's replies to the trial court's initial questions whether she could serve as an impartial penalty-phase juror were equivocal. Asked whether she could weigh aggravating and mitigating circumstances prior to making a sentencing recommendation, she said, "I would think so." (v99-4161). Asked whether, instead of automatically voting for death upon the defendant's murder conviction, she could wait until she heard the evidence, she said "I think so . . . I think so. I think that is the way it should be." (T. 4162).

To defense counsel, Hernandez unequivocally said that the death penalty should

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[6] Counsel was confused by the existence of several Hernandez (William, Jose, and Loida) prospective jurors and mistakenly argued that the trial court erred in denying his cause challenge of William. IB at 29-30. He intended to argue that the denial of his challenge to Loida was error as set forth in his trial court motion. (R6-1153).

be imposed "when the victim doesn't have any opportunity to say anything," (T. 4163); and that if the defendant is convicted of first degree murder of the victim in this case, "**he automatically deserves the death penalty** . . .." (T. 4168). Subsequently, she was unwilling or unable ever to tell defense counsel that she had the ability to recommend life in the event that mitigation was presented. All of her responses to this question were equivocal if not evasive. She said, variously, "I don't know. I guess I would have to go through and find out . . . I cannot make a decision right now, without nothing . . . I don't know. I would have to go through it and listen to what he has to say." (T. 4168-69). The last time defense counsel asked the question, "[s]o are you saying it is a possibility" you could recommend life assuming evidence in mitigation, juror Hernandez said "I *didn't* say that [is a possibility]." (T. 4169).

Neither the prosecution nor the trial judge attempted to rehabilitate Hernandez. Thus, because after unequivocally stating her belief that upon conviction Mr. Conde automatically deserved death, Hernandez could only equivocate about her ability to

serve impartially, she should have been excused.[7]

To support the trial court's denial of Conde's motions to strike venirepersons, the state has cited ***Kearse***, ***Johnson***, ***Castro***, and ***Reaves***,[8] AB at 6-7, 10, 12, 14, 15. These cases are readily distinguishable.

In ***Kearse***, one challenged juror expressed only his "belief in the death penalty" and "frustrations with the criminal justice system." *Id*., 770 So.2d at 1129. The other juror was challenged simply because her husband was a retired police officer and she originally wanted assurances that life meant life and conjugal visits would be prohibited. *Id*. Subsequently, both jurors "unequivocally stated" they could be fair and impartial and follow the law. *Id*. By contrast, Groom, Huey, Owens, Rolle,

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[7] *See, e.g.*, ***Hill v. State***, 477 So.2d 553, 555 (Fla. 1985) ("I think I can" not sufficient); ***Miles v. State***, No. 3D01-1671, 2002 WL 31114114 (Fla. 3rd DCA Sept. 25, 2002) ("I don't think so" in response to question whether juror's background would make it difficult to be impartial required excusal); ***Brown v. State***, 728 So.2d 758, 759 (Fla. 3rd DCA 1999) ("I think so" was equivocal and insufficient); ***Gill v. State***, 683 So.2d 158, 160 (Fla. 3rd DCA 1996) ("I certainly will try" was equivocal and inadequate).

[8] ***Kearse v. State***, 770 So.2d 1119 (Fla. 2000); ***Johnson v. State***, 660 So.2d 637 (Fla. 1995); ***Castro v. State***, 644 So.2d 987 (Fla. 1994); ***Reaves v. State***, 639 So.2d 1 (Fla. 1994).

Fuentes, and Hernandez, all of whose biases were far more debilitating than the ***Kearse*** jurors, each made one or more *unequivocal statements* indicating *they would necessarily recommend death*. Additionally, most of them further declared that either no, or only a small, possibility existed that Conde's mitigating evidence would influence their penalty-phase recommendation.

Johnson is also different. There, the defense challenged juror said she "thought and hoped" she would follow the instructions. *Id.*, 660 So.2d at 644. This court's statement that it refused to "get bogged down in semantic arguments about hidden meanings behind the juror's words" indicates that the defendant was requesting this court to divine the juror's bias from some oblique statement. By contrast, the jurors Conde challenged clearly expressed their belief that the death penalty should automatically follow conviction for murder.

Castro and ***Reaves*** are also inapposite. In both, unlike the instant case, the challenged prospective jurors' bias - reflecting statements *preceded* any explanation about their penalty phase responsibilities. ***Castro***, 644 So.2d at 990; ***Reaves***, 639 So.2d at 4 n.6. Moreover, unlike the instant case, in ***Reaves*** the referenced challenged juror indicated throughout that he would follow the law and specifically recited, once

advised, his understanding that no one could automatically be sentenced to death.

Far more persuasive are ***Bryant v. State***, 601 So.2d 529 (Fla. 1992), and ***Hill v. State***, 477 So.2d 553 (Fla. 1985). Both cases reversed death sentences based on the trial court's failure to strike certain jurors for cause. In ***Bryant*** the challenged jurors twice stated they would automatically recommend the death sentence if they found the defendant guilty of premeditated murder. *Id*. at 531-2. In between, after being advised that they would have to take into account aggravating and mitigating circumstances before imposing death, the jurors stated that they could "follow these instructions." Noting that neither the state nor the trial court asked further questions to ensure that these prospective jurors could be impartial, *id*. at 533, this court reversed.

In ***Hill***, one juror indicated he had formed an opinion as to guilt or innocence but stated he believed he could set the opinion aside. *Id*., 477 So.2d at 555. Although the juror indicated he believed premeditated or felony murder deserved the death penalty, he denied belief that the death penalty should follow from *all* premeditated murders and stated that he had not associated his opinion that premeditated and felony murderers deserved the death penalty with the defendant. *Id*. Nonetheless, this court

found it necessary to reverse. *See also* ***Singer v. State***, 109 So.2d 7, 19-25 (Fla. 1959) (reciting standards).

As in ***Bryant*** and ***Hill***, the prospective jurors Mr. Conde challenged possessed preconceived opinions and presumptions concerning the appropriate punishment for a defendant proven guilty of premeditated murder. These jurors were not impartial. Mr. Conde would have been required to overcome a preconceived opinion to earn a life recommendation. As in ***Bryant*** and ***Hill***, reasonable, indeed overwhelming, doubt existed as to whether these jurors could have rendered impartial, penalty-phase recommendations. Accordingly, the trial court erred in failing to excuse each of them for cause.[9]

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[9] Although in ***Bryant*** and ***Hill*** this court reversed only the defendants' penalty-phase verdicts, the nature of the impartial juror violation Mr. Conde has shown requires reversal of his conviction, as well. Unlike in ***Hill***, Mr. Conde's complaint does not merely concern one death-prone juror who deliberated in his case. Instead, his complaint is that, as a result of the trial court's erroneous denial of numerous cause challenges and his subsequent exhaustion of all peremptory challenges, he was forced to have numerous jurors deliberate both his punishment *and his guilt* who he would have peremptorily struck had he not been forced to waste his peremptories on jurors the trial court should have struck for cause. (R6-1152-4). Accordingly, this error permeated guilt phase deliberations too and reversal of his conviction is necessary. *See, e.g.*, ***O'Connell v. State***, 480 So.2d 1284, 1287 (Fla. 1986); ***Rodas v. State***, 821 (continued...)

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As the state acknowledges, the "major focus" of Conde's argument is that the mountain of evidence regarding five uncharged homicides, the unfair prejudice of which overwhelmingly outweighed its relevance, impermissibly became a feature of the trial. (AB at 44-5). The state devotes only six of its fifteen page ***Williams*** Rule argument to this issue.[10]

Although conceding that ***Williams*** Rule evidence must be excluded where "it is unduly emphasized, resulting in prosecutorial 'overkill,'" AB at 45, the state argues that the instant case fell within "the acceptable quantum of collateral crime evidence, and was not 'overkill.'" AB at 46. It urges that its collateral crimes "testimony was

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[9](...continued)
So.2d 1150, 1153-4 (Fla. 4th DCA 2002).

[10] The state devotes the majority of its ***Williams*** Rule discussion to its argument that the evidence of the five uncharged homicides was relevant, *see* section 90.401, Fla. Stats., or "inextricably intertwined" with the charged homicide. AB at 36-44. Mr. Conde did not argue to the contrary in his initial brief. Any relevance of this evidence does not undermine, in the least, Mr. Conde's argument for exclusion.

curtailed . . .." *Id*. Although the state failed anywhere to directly address the factors this court has stated must be considered in determining whether collateral crimes evidence has become an impermissible "feature" of a case, IB at 41-47, its various comments throughout this portion of its brief underscore, rather than negate, the "feature" aspect of this evidence.

Clearly, the state devoted a disproportionately large number of witnesses and exhibits to the collateral crimes. IB at 37-9 & nn.11-16. It appears to concede that, based on consideration of only "the order in which the witnesses were presented, the number of witnesses who testified, [and] the number of transcript pages their testimony filled," the collateral crimes evidence attainted "feature" status. AB at 45. Thus, the state urges this court to look, instead, to "the ***substance*** of the collateral crime evidence presented." *Id*. However, nowhere does it describe or assess the substance of the challenged evidence.

Besides its sheer volume, *qualitatively*, the collateral crimes evidence "so overwhelmed the evidence of the charged crime" that it transcended the bounds of relevance. There was nothing "curtailed" about the state's presentation of this evidence. It introduced evidence of virtually every aspect of the collateral crimes in

a way materially indistinguishable from the charged offense. *Compare* IB at 37-8 nn.11-15 *with* IB at 39 n.16. It presented every last bit of minutia from descriptions of the victims' clothing and testimony about the trace evidence (*i.e.*, fiber, DNA, serology, and tire-print) found at the various crime scenes, to autopsy and crime scene photographs, and Conde's description of his precise sexual activities (pre-and post-mortem) with each victim. **It spared no detail**. The state's repeated, direct and indirect references to the five collateral murders during opening statements and summation, IB at 54-56, unduly emphasized the collateral evidence and constituted prosecutorial overkill.

The prosecution's overzealous presentation of collateral crimes evidence was particularly egregious in light of the vigor with which it opposed consolidating the six homicides for trial. Obviously favoring sequential trials to obtain multiple "bites" at the death penalty "apple," the state "vociferously" resisted Mr. Conde's efforts to reconsolidate after the court initially severed based on misjoinder, but denied Conde's motion to exclude the collateral homicides from each of the murder trials. (R5-874-81; v86-3220-7; v87-3272-87). The trial court reconsolidated reasoning that, if the evidence of all the homicides was going to be admitted at each of the sequential trials,

and Mr. Conde had waived any misjoinder, no basis for the original severance existed. (R5-887-9; v87-3272-87). The state appealed and ultimately persuaded the Third District Court of Appeal to reinstate the original severance. ***State v. Conde***, 743 So.2d 78 (Fla. 3rd DCA 1999).[11] Having won its hard fought battle for sequential trials to secure multiple opportunities to win a death sentence against Conde, the state should not have been free to introduce evidence, and try its case, in a manner indistinguishable from how it would have proceeded had Mr. Conde been jointly tried for all six homicides.

1. "Need" for the Collateral Crimes Evidence: Although acknowledging the appropriateness of this consideration, AB at 45-46, in perhaps a Freudian slip, the state urges that "it was necessary for the State to present each of the collateral witnesses . . . *[i]n order to establish that Conde was the perpetrator of the five collateral crimes in this case* . . .." AB at 46. The state's argument suggests that

[11] The Third District held that a misjoinder could not be waived by a defendant, *i.e.*, "if the offenses cannot be joined, they cannot be consolidated . . .." ***Conde***, 743 So.2d at 79. Contrary to this reasoning, a defendant can waive an objection to misjoinder resulting in a permissible, consolidated trial of misjoined offenses. *See* ***Brooks v. State***, 762 So.2d 879, 889 (Fla. 2001); Fla. R. Crim. P. 3.153.

establishing Conde was the perpetrator of the five uncharged murders had some independent relevance, as if it were a material element of the charged offense. Furthermore, the state seems to equate "necessity" with "relevance" urging that the introduction of the evidence of the five other homicides was justified because the homicides "were *relevant* to establishing the **pattern** of Conde's murders which, in turn, was *vitally relevant* to the state's theory of premeditation . . .." AB at 49. Clearly, merely because particular evidence is "relevant" does not mean its introduction is "necessary."

Assuming, arguendo, it was "relevant" to identify Conde as the perpetrator of the uncharged homicides, it was certainly not "necessary" to introduce the testimony of seven to nine witnesses for each uncharged murder, and enough crime scene and autopsy photographs to comprise more than half of the exhibits introduced at trial. Indeed, in its argument that any error in introducing extensive, detailed evidence of five uncharged homicides was "harmless," the state argues that this evidence "did not [even] contribute to the verdict." AB at 51. The state easily could have accomplished any legitimate objective by introducing Mr. Conde's uncontradicted confession

regarding the uncharged murders[12] and/or the DNA and fiber evidence which conclusively identified Conde as the perpetrator of the collateral homicides. *See* ***Steverson v. State***, 695 So.2d 687, 690 (Fla. 1997) (reversing first-degree murder conviction where, though collateral offense evidence "may have [had] some limited relevancy and perhaps have been admissible [for limited purpose], . . . there was **no justification for the admission of extensive details of this event offered by four different witnesses** . . .."); ***Henry v. State***, 574 So.2d 73, 75 (Fla. 1991) (reversing first-degree murder conviction where, though "[s]ome reference to the [collateral] killing may have been necessary to place the events in context, . . . **it was totally unnecessary to admit the abundant testimony concerning the details . . ..**").

2. Tendency of Collateral Crimes Evidence to Suggest Improper Basis

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[12] The state asserts, without citation or explanation, that Conde's entire 175 page confession, 125 pages of which concerned the uncharged murders, (SR3-370-496), was admissible without regard to the ***Williams*** Rule. AB at 50 n.5, 64. Mr. Conde maintains that, because he was not being tried for these other five homicides (the evidence of which ostensibly was introduced to prove "motive, intent, plan, knowledge, and the absence of mistake or accident," AB at 37), his confession to these collateral offenses was admissible only if it was ***Williams*** Rule evidence. Conde's confession easily could have been redacted to eliminate any reference to the uncharged offenses.

for Deciding Case: The state urges that its evidence was immune from challenge because it did not consist of prior victims' testimony. AB at 48, 49. Although somewhat different, the prosecution's collateral evidence below, including graphic details from Mr. Conde's confession, testimony of various medical examiners and homicide detectives regarding all of the injuries sustained by the collateral homicide victims, evidence recovered from the crime scenes, and numerous grotesque and disturbing autopsy and crime scene photographs, (*e.g.*, St. Exs. 6, 10, 11, 14, 16, 19, 27, 31, 34, 35, 41, 42, **44**, **45**, **52**, **53**, **60**, **62**, **63**, 66, **70**; SR1-167, 175, 177, 183, 187, 189, 199; SR2-205, 211, 213, 217, 219, **223**, **225**, **239**, **241**, **255**, **259**, **261**, 267, **275**), likely had the same "emotional impact" as victim testimony.

3. Chain of Inferences Necessary to Establish the Material Fact: The state introduced its collateral crimes evidence to prove a material fact many inferential steps away. Clearly, the longer the chain of inferences the state must link to establish the material fact, the more likely it is that the ***Williams*** Rule evidence impermissibly became a feature.

From the mountain of collateral crimes evidence it introduced, the state sought the jury to infer that (1) Conde was the perpetrator of the collateral homicides; (2)

these homicides constituted a related "pattern" of homicidal violence; (3) based on this "pattern," Conde acted with premeditation in committing the uncharged homicides; (4) the killing of Rhonda Dunn was part of the same "pattern" as the other homicides; and (5) because the murder of Dunn was part of this pattern of premeditated murders, Conde's murder of Dunn was premeditated. Given this long chain of inferences the state needed to establish to prove premeditation, this factor strongly supports a conclusion that the voluminous collateral crimes evidence became an impermissible feature.

4. Limiting Instructions: Although the state stresses that the trial court gave limiting instructions following the introduction of the ***Williams*** Rule testimony, AB at 46, 49, nowhere did it address their *effectiveness*. It did not address the trial court's failure to particularize the instruction for the specific evidence it offered, or the specific matters which the evidence was offered to prove. IB at 46. It did not address the fact that it never committed to a particular purpose for which the evidence was being offered.

The only case the state cites to suggest that a limiting instruction may vitiate any prejudice resulting from the admission of ***Williams*** Rule testimony, ***Oats v. State***, 446

So.2d 90, 94 (Fla. 1984), AB at 49, is one in which the instruction "sufficiently distinguished the permissible/impermissible uses of similar evidence" and was given to the jury "two different times . . .." By contrast, in the instant case, the trial court's repeated reiteration, 50-100 times, of an incomprehensible instruction limiting consideration of the collateral crimes evidence to a lengthy list of (predominantly irrelevant) purposes, cannot be deemed to have erased the inherently, unfairly prejudicial impact of the state's overwhelming collateral crimes evidence.

The state offers ***Townsend v. State***, 420 So.2d 615 (Fla. 4th DCA 1982), and ***Wuornos v. State***, 644 So.2d 1000 (Fla. 1994), as cases "directly on point with this case." AB at 49. Neither case supports the decision below. The state has failed to address the primary circumstance in ***Townsend*** which the court stated supported the trial court's ruling that the collateral crimes evidence had not become an impermissible feature: the jury acquitted the defendant of one of the charged murders to which he confessed. IB at 46 n.19 (citing ***Townsend***, 420 So.2d at 617).

In ***Wuornos***, unlike the instant case, the most significant evidence against the defendant was her multiple, contradictory pre-and post-arrest confessions. There was little crime scene evidence connecting her with the charged murder. Her various

statements and confessions contained built in defenses including intoxication and self-defense. *Id*. at 1004 ("Wuornos described herself as 'drunk royal.'"), 1006 ("Wuornos' own testimony at trial . . . [that the victim] viciously abused her and then engaged in actions suggesting he intended to kill her . . . portrayed her as the actual victim here"). Accordingly, evidence that Wuornos was involved with six other homicides was essential to rebut the defendant's testimony that she was a victim who was attacked first. *Id*. 1007.

The state attempts to distinguish this court's decision in ***Steverson v. State***, 695 So.2d 687 (Fla. 1997), asserting that the collateral crime evidence was "admitted for no real purpose . . .." AB at 50. The state there had urged that the collateral crime evidence was admissible because it was "inextricably intertwined" with the charged crime evidence. *Id*. at 690. This is one of two theories upon which the state claims the collateral crimes evidence was admissible in the instant case. AB at 42-44. Regarding ***Henry***, the other case upon which Mr. Conde placed primary reliance, IB at 39-42, the state failed to even cite this case. Thus, the applicable caselaw most strongly supports a conclusion that the collateral crimes evidence became an impermissible feature at trial.

5. Harmless Error: In claiming harmless error, the state, in essence, argues that this court should affirm because the evidence overwhelmingly established that Conde murdered Dunn. AB at 50-51. The evidence the state cites, Conde's confession and the DNA and fiber evidence, does not address the issue of premeditation. Moreover, "[even] overwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict reached . . ." ***Goodwin v. State***, 751 So.2d 537, 542 (Fla. 1999).

Henry refutes the state's harmless error argument. There, though the evidence established that the defendant stabbed his wife 13 times in the throat with a kitchen knife, hid her body under a rug in her house, and gave a detailed confession to police, the court held that collateral evidence of a single, additional killing that had become a feature of the trial constituted prejudicial, reversible error. *Id.*, 574 So.2d at 74-75. *A fortiori*, the state's collateral evidence in the instant case of five additional homicides constituted prejudicial, reversible error.

V. THE TRIAL COURT REVERSIBLY ERRED IN ADMITTING THE GLORIA MAESTRE AND TAMIAMI STRANGLER WARNING EVIDENCE.

A. The Gloria Maestre evidence.

To support a the trial court's ruling, the state has quoted familiar definitional language for inextricably intertwined evidence: evidence that is "inseparably linked in time and circumstance" or "necessary to fully describe the way in which the criminal deed happened." AB at 53. Inseparable means "incapable of being separated or disjointed." Webster's Third New International Dictionary Unabridged 1168 (1986). "Necessary" means "essential." *See id.* at 1510. The state has failed to show how the false imprisonment of Maestre *six months after* Dunn's murder was "incapable" of being separated in time and circumstance from the murder of Dunn or was "essential" to describe the way in which the Dunn murder happened.

The state asserts that the Maestre evidence was "necessary to describe adequately the investigation leading up to Conde's arrest and subsequent statements." AB at 54. However, the state was not, in any way, obliged to describe or prove the *investigation* of Conde; it only was required to prove that he committed the premeditated murder of Dunn. The police investigation was virtually irrelevant. ***Keen***

v. State, 775 So.2d 263, 274 (Fla. 2000).[13]

The state asserts that it presented only a "limited account" of the crimes against Maestre. AB at 53. To the contrary, the state introduced evidence of wholly gratuitous details including that Maestre, half nude, was wrapped from head to toe with duct tape, Fire Rescue personnel had to break down Conde's door to free her, and she was frightened when she was found. IB at 48. These details had no bearing on the charged offense. This incident, which the state unnecessarily referenced in summation, (v128-7806), proved neither Conde's motive nor intent to murder Dunn six months earlier. AB at 55. Despite Conde's confession and the other evidence connecting him to Dunn, it cannot be said beyond reasonable doubt that this highly inflammatory evidence did not play a substantial part in the jury's deliberations and contribute to its verdict.

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[13] The state argues that this court's cases culminating in ***Keen*** are inapplicable because the evidence erroneously introduced to explain the sequence of events leading up to the investigation and arrest was *hearsay* while in the instant case it was not. AB at 55. The significance of ***Keen*** is its recognition 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.

B. The Tamiami strangler warning.

Contrary to the state's contrived argument, AB at 56-7, Dunn's state of mind was not relevant to prove Conde's premeditation, to rebut a defense raised by Conde, or to any other issue in this case. *See* ***Brooks v. State***, 787 So.2d 765,770-1 (Fla. 2001); ***Stoll v. State***, 762 So.2d 870, 874-5 (Fla. 2000). Introduction of this highly inflammatory evidence constituted reversible error.

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

Claiming a procedural bar, AB at 58-9, the state has completely ignored this court's declaration in ***Ruiz v. State***, 743 So.2d 1, 7 (Fla. 1999), that, where defense counsel objects to some improper arguments but not others, if the properly preserved errors combined with the additional acts of misconduct compromised the integrity of the judicial process, reversal is necessary. *Accord* ***Lewis v. State***, 780 So.2d 125, 129 (Fla. 3rd DCA 2001). Moreover, the trial court's repeated denials of Conde's innumerable written and oral complaints about the state introducing evidence of, or basing any part of its prosecution on, the five collateral homicides, established that the

trial court was well aware of Conde's objection and that any further assertion of it would have been futile. *See* ***Thomas v. State***, 419 So.2d 634, 635 (Fla. 1982).

Regarding Mr. Conde's charge that the prosecutor, in both opening and summation, repeatedly attacked his character and urged conviction based on the uncharged offenses, IB at 54-7, the state asserts that the challenged remarks were merely "a description of what happened and an outline or preview of what the evidence would show," AB at 60, did not "directly refer[] to or mention[] Conde," AB at 61, and were "not directly linked to Conde and w[ere] simply a reference to the man who had killed these victims." *Id*. at 62. The state's response is unrealistic and unsupported.

By the prosecutor's repeated references to Conde as "the Tamiami strangler," "*their* attacker," and "*their* killer," and his numerous, similar characterizations of Conde and his offense as encompassing all six murders, the state portrayed Conde as a serial murderer, not simply the premeditated murderer of Dunn. The prosecutor's remarks that Conde "did that six separate times to six different people," killed Dunn "just like the others," and that Conde's "thing" was going "out hunting for victims," painted a vivid picture of a serial killer, one fundamentally different from the sole

allegation before the jury that Conde had murdered Dunn with premeditation. The prosecutor's use of this rhetoric throughout his arguments improperly assassinated Conde's character and overtly, and covertly, urged the jury to convict based on the uncharged murders.

Regarding the prosecutor's attacks on defense counsel, IB at 57, the state responds that this was "fair reply" to defense counsel's comments on the mistakes of law enforcement personnel and attack on the credibility of the physical evidence. AB at 65. To the contrary, while it was entirely appropriate for defense counsel to highlight law enforcement mistakes and to urge that these errors created reasonable doubt, it was unethical and impermissible for the prosecutor to disparage defense counsel and suggest that he was attempting to mislead the jury. *See* ***Adams v. State***, 192 So.2d 762, 764 (Fla. 1966); ***Briggs v. State***, 455 So.2d 519 (Fla. 1st DCA 1984). This was not **fair** reply. Accordingly, the prosecution's pervasive, egregious misconduct throughout guilt phase opening and summation compromised the integrity of the judicial process, severely prejudiced Conde, and requires a new trial.

VIII. THE EVIDENCE WAS LEGALLY INSUFFICIENT TO ESTABLISH CCP.

No two case are exactly alike. Nonetheless, Mr. Conde cited at least eight cases in support of his argument in which this court reversed the lower court's finding of CCP.[14] The state has chosen not to comment on any of these cases. Mr. Conde maintains that this constellation of cases mandates a determination that the evidence was insufficient to establish CCP.

Acknowledging that the trial court's opinion regarding CCP was contrary to the unrebutted testimony of three mental health experts, the state urges that the trial court was free to reject the expert testimony if it was "difficult to square with the other evidence in the case." AB at 85. Without explanation, the state asserts that the experts' testimony of Conde's inability to cooly and calmly reflect could not be squared with the fact that he committed these six murders. *Id*. The state's circular reasoning is unpersuasive. The murders themselves provided only circumstantial evidence of premeditation which, at best, was "susceptible to . . . divergent

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[14] ***Almeida v. State***, 748 So.2d 922, 932-3 (Fla. 1999); ***Buckner v. State***, 714 So.2d 384, 389 (Fla. 1998); ***Crump v. State***, 622 So.2d 963, 972 (Fla. 1993); ***Geralds v. State***, 601 So.2d 1157, 1163-4 (Fla. 1992); ***Hoskins v. State***, 702 So.2d 202, 210 (Fla. 1997); ***Mahn v. State***, 714 So.2d 391, 398-9 (Fla. 1998); ***Nibert v. State***, 508 So.2d 1, 4 (Fla. 1987); ***Santos v. State***, 591 So.2d 160, 162-3 (Fla. 1991); ***Spencer v. State***, 645 So.2d 377, 384 (Fla. 1994).

interpretations . . .." ***Geralds v. State***, 601 So.2d 1157, 1164 (Fla. 1992). Additionally, the experts, themselves, uniformly and persuasively testified how Conde's criminal acts were fully consistent with his unreflective state of mind. (v141-8831-5, 8849-50; v142-8659-62, 8976). Additionally, even the trial court acknowledged that the expert testimony was consistent with Rory's uncounseled, state-endorsed confession indicating Dunn's murder was not planned but, instead, the result of uncontrolled rage. (R9-1730; v126-7392, 7411, 7439-42, 7459, 7475-6, 7479, 7487). Finally, the cases the state has cited fail to support its argument. *E.g.*, ***Morton v. State***, 789 So.2d 324, 330-1 (Fla. 2001) (no basis for trial court to have rejected expert testimony); ***Foster v. State***, 679 So.2d 747, 755 (Fla. 1996) (expert testimony that defendant was under influence of extreme mental or emotional disturbance and capacity to conform his conduct to requirements of law was substantially impaired at time of murders properly rejected where defendant twice expressed his intent to kill intended robbery victims if they had no property prior to confronting them and trial court gave expert testimony weight in support of non-statutory mitigator).

The state challenges Conde's argument that the trial court could not reject his uncounseled, internally consistent, and state endorsed confession. AB at 85. The fact

that Conde's confession was "self-serving" did not support the trial court's rejection of it. *See* ***Brannen v. State***, 94 Fla. 656, 661-2, 114 So. 429, 430-1 (Fla. 1927). Regarding the state's claim that rejection was proper because the confession was contrary to facts that could be inferred from the similar crimes evidence, Mr. Conde maintains that his confession, reflecting that his murder of Dunn was the result of "emotional frenzy" or a "fit of rage" that overtook him the moment he strangled Dunn, was entirely consistent with the similar crimes evidence. (v126-7380, 7392, 7404, 7411, 7441, 7459, 7492). Thus, indeed, his confession did reveal "anger, rage, or other loss of emotional control." AB at 85. Although the state claims that "Conde had time to reflect upon his actions . . . during the lengthy struggle with Rhonda," AB at 85-6, the evidence demonstrated that this struggle may have been of short duration, (v117-6398-6401; v124-7169-70), and was too fast moving for careful reflection. Finally, ***Hertz v. State***, 803 So.2d 629 (Fla. 2001), cited by the state, AB at 85, is materially distinguishable and provides it no support. *Id*. at 635-6, 650 (CCP aggravator upheld where robbery victims murdered execution-style after being bound and gagged for two hours); *cf*. ***Almeida***, 747 So.2d at 931-3 (CCP rejected where evidence established defendant had "calmed down" in the hours between anger

provoking conduct of victim and murder).

Ignoring the cases cited by Mr. Conde regarding "heightened premeditation," IB at 71, the state primarily urges that the manner of Conde killing Dunn, *i.e.*, approaching her from behind, wrapping his arms around her neck, subduing her after she initially broke free, and manually strangling her with such force that it fractured her hyoid bone, evinced heightened premeditation. Clearly, there is nothing to distinguish these circumstances from an unaggravated, premeditated murder. Even the similar crimes evidence fails to exclude the reasonable hypothesis that Conde was overcome by a fit of rage at the moment he strangled and killed Dunn.

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

The state urges that this court must pay "overwhelming deference" to the trial court's ruling. AB at 90. This supposed standard appears nowhere in ***Guzman v. State***, 721 So.2d 1155 (Fla. 1998), cited by the state, nor in any other case counsel has found. Instead, a trial court must find a mitigator "[w]henever a reasonable quantum of competent, uncontroverted evidence of mitigation has been presented," ***Spencer v. State***, 645 So.2d 377, 385 (Fla. 1994); a mitigator may not be rejected unless "the record contains competent substantial evidence to support the . . . rejection." *Id*.

The state points to Conde's IQ, favorable employment record, and good relationships as evidence contradicting the unanimous opinion of three mental health experts that Conde suffered from an extreme mental or emotional disturbance at the time Conde murdered Dunn. AB at 91. There was no testimony that these circumstances were inconsistent with the experts' opinions. Indeed, Golden, Berlin, and Hervis each testified that these circumstances were entirely consistent with Rory's profile. IB at 77-8, 83. The state urges that family and friends "merely noted that Conde seemed depressed or sad," but never indicated there were "major" or

"extreme" changes in Conde's personality," AB at 91-2. To the contrary, the record is replete with testimony regarding Rory's appetite/weight loss, inexplicable crying, and loss of attention to personal hygiene, all of which corroborated the existence of a major depression. IB at 78 & n.30. Thus, factual support for the three experts' opinions of Conde's extreme emotional and psychological disturbance not only was "not lacking," it was abundant and persuasive.[15]

The state urges that the trial court properly rejected Mr. Conde's proffered non-statutory mitigators because "the evidence was conflicting." AB at 93. A careful examination of the mitigators Conde proffered and the evidence bearing on these factors demonstrates that they were largely supported by substantial, uncontradicted evidence that the trial court was not free to reject. IB at 86-8.

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

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[15] Significantly, not only did the experts find independent support for their opinions at the time they interviewed Conde and other relevant witnesses, but numerous witnesses testified about observations and information contemporaneous with Dunn's murder that reflected Conde's severe emotional and psychological disturbance.

The fatal vice of the prosecutor's penalty phase summation, to which Conde objected two out of three times, was referring to him as a serial killer. (v143-9095, 9153). By overruling Conde's objections, the trial court placed its imprimatur on these characterizations. Clearly, any objection to the prosecutor's third, related malfeasance, "[a]nd he killed, and he killed, and he killed," (v143-9102), would have been futile.

The state urges that this issue is meritless because evidence of the five uncharged homicides was *not* introduced at the penalty phase and the jury was instructed not to consider them. AB at 36 n.3. However, Mr. Conde maintains that by the prosecutor's repeated characterizations of Conde as a serial killer during penalty-phase summation, the state resurrected the uncharged murder evidence from guilt-phase and effectively rendered it a laboring oar in the penalty-phase deliberations. Accordingly, these highly inflammatory exhortations deprived Conde a fair sentencing hearing.

Chaplain Bazarro's excluded testimony that in 1995, shortly after Rory's arrest, Rory confided that he had been sexually abused as a child, was crucial to Conde's penalty phase defense. **As the state urged in penalty phase closing, the issue of whether Rory had been sexually abused as a child "was almost the entire crux of the defense case.**" (v143-9101). Given, especially, the trial court's finding that the defense failure to list Bazarro as a witness until the commencement of penalty-phase proceeding, was inadvertent, (v140-8588), the court's findings that the state would be prejudiced, the statement was self-serving, and it was cumulative, (T. 8588-9), were utterly inadequate to justify impinging Conde's 6th, 8th, and 14th amendment rights by its exclusion.

Any prejudice the state would have suffered by Bazarro's testimony contradicting its opening statement was negligible. Attorneys often err in their opening statement predictions of what the evidence will be or show. This must be balanced against the substantial prejudice Conde suffered by being stuck with the prosecution's false depiction that his claim of childhood sexual abuse was belated, and thus fabricated. (v135-7977). That Conde's statement to Bazarro was "self-serving" is no more valid a consideration than a defendant's claim that prosecution evidence should

be excluded because it is "prejudicial." If admitted, the prosecutor could have argued that Conde's statement to Bazarro should be disbelieved on this basis. Finally, contrary to the trial court's finding, Bazarro's testimony was not simply "cumulative" of Hervis' testimony. Bazarro's testimony did not suffer from the defect which the state urged rendered Hervis' recounting of Conde's childhood sexual abuse unworthy of belief: Conde's convenient recent disclosure.

Contrary to the state's argument, that Bazarro testified at the ***Spencer*** hearing did not render exclusion of his testimony from the penalty-phase harmless. AB at 96. Had the evidence of Conde's childhood sexual abuse been strengthened with Bazarro's testimony, not only would it have solidified the apparently rejected expert opinions that Conde suffered from an extreme emotional or psychological disturbance, it also may have independently persuaded the jury of the non-statutory mitigator of childhood sexual abuse. The state should not have been permitted to benefit from exclusion while arguing that the issue of whether Rory had been sexually abused as a child was "the crux of the defense case." Accordingly, exclusion was an abuse of discretion and devastatingly prejudicial to Conde.

XIII. FLORIDA'S DEATH PENALTY STATUTE VIOLATES

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Since the filing of Conde's Initial Brief, the United States Supreme Court decided ***Ring v. Arizona***, 122 S.Ct. 2428 (2002), applying ***Apprendi v. New Jersey***, 530 U.S. 466 (2000), to invalidate Arizona's judge-based capital sentencing procedure. While the state asserts that ***Ring*** does not apply to Florida's "hybrid system," AB at 100, the ***Ring*** opinion leaves substantial doubt regarding the state's conclusion. Indeed, this court's grant of stays of execution to evaluate the impact of ***Ring*** on Florida's capital punishment scheme suggests its applicability. *See* ***Bottoson v. Moore***, 824 So.2d 115 (Fla. 2002); ***King v. Moore***, 824 So.2d 127 (Fla. 2002).

Mr. Conde maintains that, for the reasons explained in his initial brief, IB at 94-96, and which compelled the decision in ***Ring***, section 921.141 is unconstitutional. With regard to the particular constitutional concerns that drove the decision in ***Ring***, Florida's death penalty procedure is largely indistinguishable from the now defunct Arizona scheme. Like Arizona, the jury makes no findings of fact that justify aggravating the presumptive life sentence for a premeditated murder to death. *See* §775.082, 921.141 Fla. Stats. It is the trial judge that makes these findings.

Additionally, even the jury's general recommendation of death, for whatever its constitutional value, is not required to be unanimous. (Conde's jury voted nine to three for death.) Finally, the Florida penalty-phase jury's recommendation is only advisory. Ultimately, the final decision maker, as in Arizona, is the judge. *See* ***Bottoson***, 824 So.2d at 120-122 (Pariente, J., concurring). Thus, Florida's death penalty scheme must fall with Arizona's and Conde's death sentence must be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by United States mail this ____ day of October, 2002, to: Debra Rescigno, Assistant Attorney General, Office of the Attorney General, Criminal Division, 1515 N. Flagler Drive, 9th Floor, West Palm Beach, FL 33401-5099.

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TABLE OF CITATIONS (continued)

CASE **PAGE(S)**

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