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

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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TABLE OF CONTENTS

PAGE(S)

TABLE OF CITATIONS

CASE **PAGE(S)**

TABLE OF CITATIONS (continued)

CASE **PAGE(S)**

I. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S CAUSE CHALLENGE TO DEATH-PRONE VENIREPERSON LOIDA HERNANDEZ FOR WHOM THERE WAS MANIFEST REASONABLE DOUBT ABOUT HER IMPARTIALITY.

After tracing the entire inquiry of venireperson Loida Hernandez from beginning to end, Appellee's Supplemental Answer Brief ("SAB") at 3-7, the state concludes that "Ms. Hernandez possessed the state of mind necessary to render an impartial verdict" because she "repeatedly . . . said that she could follow the court's instructions and wait to hear all the evidence prior to making a [penalty phase] determination . . .." *Id*. at 7. The record of Ms. Hernandez's statements belies the state's assertion.

Nowhere did Ms. Hernandez clearly and unequivocally state that she could follow the court's instructions and wait to hear all the evidence before making a recommendation. From the beginning, she could offer no more than equivocation regarding her ability to perform her mandatory duty. Although Hernandez answered "yes" that she understood the jury's penalty phase responsibilities after the trial court explained them to her (for a second time), (v99-4161), when asked if she could "do that," Hernandez could only equivocate, ". . . **I would think so**." (*Id*.). When, apparently sensitive to Hernandez's equivocation, the trial court "asked the question

another way," SAB at 4, Hernandez could only respond to the question whether she was thinking ". . . I can follow the Judge's instruction, wait until I hear that evidence and make a recommendation,": "**I think so**." (*Id*. at 4162). When the court continued to press Hernandez for a direct answer whether she could perform her duty, Hernandez continued to equivocate: "**I think so**. I think that is the way it should be." (*Id*.).

Despite Hernandez's plainly equivocal statements, the state declined to question her. (v99-4162).

Throughout the balance of her questioning, Ms. Hernandez never retracted her self-expressed doubt about her ability to follow the court's penalty phase instructions. She stated unequivocally that she "believe[d] in the death penalty as to serve justice." (v99-4163). She also explained "that it deserves [the death penalty] when the victim doesn't have any opportunity to say anything [about being killed, this] is not right," and that under such circumstances the death penalty would serve justice. (*Id*.). Although she corrected defense counsel when he characterized her response as indicating "that there are certain types of crimes that . . . require the death penalty," (*id*. at 4164), she explained that she merely intended to say that there are some crimes

that would "lead" to the death penalty. (*Id*.).[1]

The likely reason for Ms. Hernandez's persistent equivocation came to light half way through defense counsel's questioning. When asked if, upon finding Mr. Conde guilty of the first degree murder of Rhonda Dunn, she would believe that that means that he **automatically** deserved the death penalty, Ms. Hernandez declared directly and unequivocally: **"If he is guilty of that, yes."** (v99-4168). Following this statement, Ms. Hernandez returned to uncertainty and equivocation. When asked if, following the court's instructions regarding aggravating and mitigating factors, mitigating factors would make a difference to her, Hernandez responded: "**I don't know**. I guess I would have to go through and find out." (*Id*. at 4168). When asked if she could listen to things about Conde's life and say that, even if he strangled Rhonda Dunn to death that he shouldn't get the electric chair, Hernandez, again,

[1] Interestingly, though the court twice had explained to Loida Hernandez the jury's penalty phase responsibilities, (v96-3506-8; v98-3878-9; v99-4161), when defense counsel asked Ms. Hernandez if she knew the court did the sentencing but that the jury would give a "verdict regarding that sentence," Ms. Hernandez responded: ". . . I didn't know that." (*Id*. at 4165).

equivocated: "**I don't know**. I would have to go through it and listen to what he has to say." (*Id*. at 4169). When defense counsel pressed **whether there was "a possibility" that**, even believing in Conde's guilt, **she could tell the court that she thought he should get life**, Hernandez refused to commit to this possibility stating: **"I didn't say that. I said I will have to make a decision later**." *Id*. Although counsel attempted several more times to have Ms. Hernandez address her ability to consider mitigating evidence and make a life recommendation, Ms. Hernandez refused to attest to any such ability and ultimately, in essence, refused to answer any more questions. (V99-4171-2).[2] No further attempt was made to rehabilitate Hernandez from her direct and unequivocal statements of death-prone bias.

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[2] The state appears to suggest that Hernandez's equivocation and uncertainty were the result of defense counsel "pressur[ing] her." SAB at 6. To the contrary, the record reveals that defense counsel was deferential and courteous. When Hernandez corrected counsel's mischaracterization of a statement she made, counsel responded: "I don't want you to feel like anybody is saying your beliefs are right or wrong or anything like that." (V99-4163). Later, when counsel again sought to understand Hernandez's position, counsel stated: "I don't mean to misrepresent it." (*Id*. at 4164). When Ms. Hernandez indicated she did not understand the jury's penalty phase responsibilities that had been explained several times before, counsel stated: "Well, let's take a few steps back, then, all right, and let's talk about that." (*Id* at 4165).

The state, again, cites ***Kearse***, ***Johnson***, ***Castro***, and ***Reaves***[3] in support of the trial court's decision. SAB at 7-8. Mr. Conde distinguished these decisions in his primary Reply Brief. RB at 9-10. The state does not challenge these distinctions.

The only new case the state cites here is ***Barnhill v. State***, No. SC00-547, 2002 WL 31259897 (Fla. Oct. 10, 2002). In ***Barnhill***, the defendant claimed that the trial court's failure to strike jurors Cotto and Robinson for cause was erroneous. Although Cotto stated he "strongly agree[d] with the death penalty" and that "if you kill you should be executed," when asked if he could set aside his opinions and follow the law which required him to weight various circumstances, Cotto stated: "Yes, I could." *Id* at 5. When asked if he could do so "[e]ven if it lead (*sic*) you to saying no death penalty in this case," Cotto stated: "Yes, I could." Upholding the trial court's ruling, this court stated: "As for Cotto, there was **no waivering** and **no indication** from his statements that **he was equivocating**. Cotto did not express unyielding conviction and rigidity toward death penalty." *Id*. Regarding Robinson, though she stated she

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[3] ***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).

"tend[ed] to favor the death penalty in murder cases," she also stated she was "more than willing to listen [to the evidence] and [was] not headstrong enough that [she] wouldn't listen to what [was] being said and consider the life imprisonment." *Id*. at 6. However, Robinson subsequently agreed with defense counsel that she "would be inclined to give greater weight . . . to aggravating circumstances . . . than . . . to mitigating circumstances, generally speaking." *Id*. In response to the defendant's argument that the court failed to adequately rehabilitate Robinson, the court pointed to her testimony that "she was more than willing to listen to the evidence and would consider life imprisonment based on what she heard." *Id*.

Hernandez's statements are nothing like those of Cotto and Robinson in ***Barnhill***. Hernandez waivered and equivocated in response to virtually every question about her ability to follow the court's instructions. Her only clear and direct answer was her affirmative response to defense counsel's question whether she would believe Conde automatically deserved the death penalty if she determined that he had murdered Dunn. Likewise, Hernandez never once directly stated that she could consider life imprisonment if she found Mr. Conde guilty. The totality of Hernandez's statements manifestly demonstrated her death-prone bias.

The state asserts that most of the "equivocation" cases cited by Mr. Conde, RB at 9 n.7, are inapposite because they "are not death penalty cases." SAB at 8. Obviously, this is a distinction without a difference. This court in ***Barnhill*** plainly recognized the necessity that a juror's commitment to following the law be unequivocal and not waivering. Just as the responses of the venirepersons in the case, Conde cited, "I don't think so;" "would like to try to be fair and impartial;" and "yeah, I think [I will be able to follow the trial court's instruction]," created intolerable doubt about the jurors' impartiality to require reversal where the trial courts refused to strike them for cause, the equivocation of Hernandez, if not her hardened belief in automatic death, requires a determination that the trial court abused its discretion in failing to strike her for cause.

TABLE OF CITATIONS (continued)

CASE **PAGE(S)**

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 December, 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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BY:_____
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CERTIFICATE OF COMPLIANCE

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

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CASE **PAGE(S)**

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