IN THE SUPREME COURT OF FLORIDA

RORY ENRIQUE CONDE,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

_____/

CASE NO. SC 00,789

T.C. 95-19816

APPELLEE'S SUPPLEMENTAL ANSWER BRIEF TO APPELLANT'S REPLY BRIEF

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

RICHARD E. DORAN
ATTORNEY GENERAL
Tallahassee, Florida

DEBRA RESCIGNO
ASSISTANT ATTORNEY GENERAL

Florida Bar No. 0836907
1515 N. Flagler Drive
9th Floor
West Palm Beach, FL. 33401

Telephone: (561) 837-5000

Counsel for Appellee

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AUTHORITIES CITED

PRELIMINARY STATEMENT

Appellant, defendant in the trial court below, will be referred to as “Appellant”, “Defendant”, or “Conde”. Appellee, the State of Florida, will be referred to as the “State”. References to the record will be by the symbol “R”, to the transcript will be by the symbol “T”, to any supplemental record or transcript will be by the symbols “SR” or “ST”, and to Conde’s Reply Brief will be by the symbol “RB”, followed by the appropriate page numbers.

STATEMENT OF THE CASE AND FACTS

Appellee accepts Appellant's statements of the case and facts for purposes of this appeal, subject to the additions, corrections, and/or clarifications set out in the Argument section.

SUMMARY OF THE ARGUMENT

SUPPLEMENTAL POINT I- The trial court properly denied Conde’s “for cause” challenge to juror Loida Hernandez.

POINT I

THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S CAUSE CHALLENGES TO JURORS WHO DEMONSTRATED IMPARTIALITY AND THE ABILITY TO RENDER A VERDICT BASED UPON EVIDENCE PRESENTED (Restated).

The trial court did not commit manifest error by denying defense counsel's cause challenge to prospective juror Loida Hernandez. See Looney v. State, 803 So.2d 656, 665 (Fla. 2001)("[i]t is within a trial court's province to determine whether a challenge for cause is proper, and the trial court's determination of juror competency will not be overturned absent **manifest error**."); Fernandez v. State, 730 So. 2d 277, 281 (Fla. 1999)(same); Mendoza v. State, 700 So.2d 670, 675 (Fla. 1997).

The standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in

accordance with his instructions and his oath.'" Wainwright v. Witt, 469 U.S. 412, 424-26 (1985) (quoting Adams v. Texas, 448 U.S. 38 (1980)). See Morrison v. State, 27 Fla.L.Weekly S253, S257 (Fla. March 21, 2002); Looney, at 665. Whether or not a juror should be stricken for cause is a question for the trial judge and this Court "must give deference to the judge's determination of a prospective juror's qualifications." Looney, at 665, citing Castro v. State, 644 So.2d 987, 989 (Fla. 1994). The decision is "based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." Witt, 469 U.S. at 428. "A trial court has latitude in ruling upon a challenge for cause because the court has a better vantage point from which to evaluate prospective jurors' answers than does this Court in [its] review of the cold record." Mendoza, at 675. See also Gore v. State, 706 So.2d 1328, 1332 (Fla. 1997)("a trial court has great discretion when deciding whether to grant or deny a challenge for cause based on juror incompetency"); Wainwright, at 424-26 ("because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism . . . deference must be paid to the trial judge who sees and hears the juror").

The trial court did not commit manifest error by denying

defense counsel's cause challenge to prospective juror Loida Hernandez because the record shows that she possessed an impartial state of mind and the ability to follow the law.

The trial court began the questioning of Loida Hernandez by asking whether she understood that the charge in the case was first-degree murder, which carries the penalty of death or life imprisonment if the jury returns a verdict of guilty (T 4161). Ms. Hernandez agreed that she understood that and also that the State of Florida has the burden of proof beyond and to the exclusion of every reasonable doubt before a verdict of guilty may be returned (T 4161). The trial court continued:

> THE COURT: All right. Now, let me just ask you, do you have any moral, religious, or philosophical views against the use of the death penalty here in the State of Florida?
>
> MS. HERNANDEZ: I don't .
>
> THE COURT: All right. Now, one of the things that the law requires you do as well as the other jurors or jury members is to, if you return a verdict of guilty as to first degree murder, you must wait until that second part of the trial where you are going to hear aggravating evidence, that is things that suggest death may be appropriate and weigh it along with the mitigating evidence, those things that suggest that life imprisonment might be appropriate and then make your appropriate recommendation as to the penalty in this matter to the Court. Do you understand that?
>
> MS. HERNANDEZ: Yes, sir.

THE COURT: Can you do that?

MS. HERNANDEZ: Yes, sir, I would think so.

(T 4161-62). The Court then asked the question another way–if the defendant was proven guilty of first degree murder at the first part, was it a done deal at that time for her as to what the penalty was going to be? Would she just recommend life or just recommend death? (T 4162). Was she thinking that way or was she saying "Look, I can follow the Judge's instructions, wait until I hear that evidence and make a recommendation?" (T 4162-63). She responded that she thought she could do the latter and noted that she thought "that is the way it should be." (T 4163).

Defense counsel then inquired about her questionnaire where she said that she believed in the death penalty to serve justice (T 4163). He asked her to explain what she meant:

> MS. HERNANDEZ: Well, I think to get justice to certain cases, you know, like in one– well, I think I explained in my reply what was the reason and sometimes that I think it deserves when the victim doesn't have any opportunity to say anything is not right. So I think that would be the justice served.
>
> DEFENSE COUNSEL: All right. In other words, you believe that there are certain types of crimes.
>
> MS. HERNANDEZ: Exactly. That is what I said there.

(T 4164). Defense counsel asked "[s]o what you are saying is

that there are certain types of crimes that you think require the death penalty?" Ms. Hernandez replied that she didn't say require, she said it could be or it is something that will lead to it. Ms. Hernandez was not aware that the jury makes a sentencing recommendation in a capital case and defense counsel explained the process (T 4165-67). He also informed her that Conde was charged with premeditated murder and asked:

> DEFENSE COUNSEL: Now, if you are on the jury and you decide during the first part of the trial that Mr. Conde is guilty beyond every reasonable doubt of the strangulation of Rhonda Dunn, will you feel that he automatically should get the death penalty?
>
> MS. HERNANDEZ: I don't think so. I think we need to prove the evidence and present all the evidence to the case.

(T 4168). Defense counsel noted that they needed to make a distinction between the finding of guilt and what happens after a finding of guilt (T 4168). Defense counsel asked Ms. Hernandez to make believe that she had decided Conde was guilty, and then asked whether based on her beliefs, having found him guilty, she would believe that he automatically deserved the death penalty? Ms. Hernandez initially responded, "if he is guilty of that, yes." (T 4168-69). However, when asked immediately after that whether mitigating factors would make a difference to her, she agreed that they might– "I don't know. I guess I would have to go through and find out . . . I cannot

make a decision right now, without knowing (T 4169).

Defense counsel pressured her, stating that they needed to know whether she was all the way at one end or all the way at another end-- if she believed that Conde killed Rhonda Dunn and that he did it with premeditation, did she think that she could listen to things about his life and say, well, even though he killed Rhonda Dunn and even though he strangled her that he shouldn't get the electric chair? (T 4169). Ms. Hernandez responded **"I don't know. I would have to go through it and listen to what he has to say."** (T 4170).

Ms. Hernandez adhered to her position, telling defense counsel she would have to evaluate the evidence presented when he asked whether there was a possibility she would vote for life, even if she found him guilty (T 4170). She would not say whether it was a possibility, she would have to make that decision later (T 4170). Further, when asked whether she could consider the mitigating factors if she believed Conde was guilty not only of Rhonda's death but also the other five, Ms. Hernandez again stated that she could not make a decision until she heard. (T 4172). "I think that is what the jury is for, if that is what the trial is for, to present evidence." (T 4172). "I am going to have to wait and evaluate it at that time what the evidence is that you present." (T 4173).

Ms. Hernandez not only said that she could follow the court's instructions and wait to hear all the evidence prior to making a determination, but believed "that is the way it should be." (T 4163). Her adherence to that, repeatedly stating that she would wait and listen to all of the evidence before making a recommendation, despite defense counsel's attempts to confuse her, serves as a strong indication of a unbiased potential juror. Clearly, Ms. Hernandez possessed the state of mind necessary to render an impartial verdict. See Barnhill v. State, 27 Fla.L.Weekly S850 (Fla. Oct. 10, 2002) (affirming denial of cause challenge to juror who said that she favored the death penalty in murder cases, but would be more than willing to listen to the evidence); Kearse v. State, 770 So.2d 1119, 1128-29 (Fla. 2000)(affirming denial of cause challenge to juror who initially expressed belief in death penalty and frustrations with justice system, but, after further instruction, unequivocally stated he would follow law); Johnson v. State, 660 So.2d 637, 644 (Fla. 1995)(upholding trial court's denial of cause challenge to juror who strongly favored death penalty, but later noted she could follow sentencing instructions); Castro v. State, 644 So.2d 987, 990 (Fla. 1994) (same); Reaves v. State, 639 So.2d 1, 4 (Fla. 1994)(same).

The cases relied upon by Appellant are inapposite. Miles

v. State, 826 So.2d 492 (Fla. 3d DCA 2002), Brown v. State, 728 So.2d 758 (Fla. 3d DCA 1999), and Gill v. State, 683 So.2d 158 (Fla. 3d DCA 1996), all involved jurors who gave equivocal responses as to whether they could be fair and impartial regarding the defendants' **guilt** and are not death penalty cases. In Miles, the Third District held that a prospective juror, who had been a medical social worker (dealing with children who had been sexually abused in the emergency room), should have been excused for cause in a capital sexual battery case because when asked whether anything about her job experience would make it difficult for her to be fair and impartial in the case, she responded, "[a]gain, that's a difficult question. I don't think so." The juror was not questioned any further. See also Gill (holding that responses of two prospective jurors who were victims of home burglaries, that they "would like to try" to be fair and impartial and that it would be "hard for them but they would try," raised a reasonable doubt as to their ability); Brown (holding that juror's responses, including "yeah, I think so" to question whether he could follow the trial court's instructions, are equivocations, which raise reasonable doubt as to his ability to serve).

Here, there was nothing about Ms. Hernandez's work that would make it difficult for her to be fair and impartial and she

unequivocally stated that she could follow the court's instructions and wait to hear all the evidence prior to making a determination. (T 4163).

Further, contrary to Appellant's assertions Hill v. State, 477 So.2d 553, 555 (Fla. 1985), and Bryant v. State, 601 So.2d 529 (Fla. 1992), are not persuasive in this case.[1] In Hill, the prospective juror, Mr. Johnson, was about two blocks away from the crime (a bank robbery which resulted in the death of a police officer), at the time it occurred. He noticed the commotion, turned on the radio and heard a news report concerning the event. Although he did not go to the scene, he discussed the case at length with his wife, who is a former bank teller, and with a fellow employee whose husband is a police officer. Mr. Johnson also followed media reports concerning the case, but he did not recall specific facts. Based on what he read and heard, Mr. Johnson had formed an opinion as to the guilt or innocence of those charged with the crimes, but he believed he could set the opinion aside and listen to the case presented in court.

He was asked whether he would let his prior opinion enter

[1] The State notes that, contrary to Appellant's assertion in footnote 9, (RB), all of the violations he alleges are limited to death penalty bias and would only affect the penalty phase. He has not argued or demonstrated that any juror had a preconceived idea about his guilt.

into his decision and replied: "That's a hard decision to make right now. I think I can say I can. I don't know for sure." Hill, at 555. The transcript also reveals the following colloquy:

> PROSECUTOR: Have you ever thought about what type of case would deserve a death sentence?
> JOHNSON: Yes, sir, premeditated murder, and felony murder.
>
> When asked by defense counsel how he was going to keep his preconceived opinion from affecting his deliberations, Mr. Johnson answered as follows:
> Well, basically, like I said, I have not associated that opinion with Mr. Hill. It was just a blank feeling that ... someone that shoots someone else should be punished.
> ....
> I feel anyone that shoots anyone else in the type of incident as much as I know about it now, *the death penalty should be imposed upon them.* That's basically what I felt at the time.
>
> Later in the inquiry, with regard to the imposition of the death penalty, defense counsel asked:
> Do you feel like from under the facts that you know now, do you feel like this might be an appropriate case?
> JOHNSON: I don't feel I have really been given any more facts than I have before coming into the courtroom.
> DEFENSE COUNSEL: You formed an opinion before though?
> JOHNSON: Yes, sir.
> DEFENSE COUNSEL: Have you discarded that opinion?
> JOHNSON: Not necessarily.
> DEFENSE COUNSEL: Do you feel that in all cases of premeditated murder that the death

> penalty should be applied?
> JOHNSON: It's a hard question to answer.
> DEFENSE COUNSEL: Yes, sir, sure is.
> JOHNSON: I'm not saying in all cases, dependent upon the evidence.
> DEFENSE COUNSEL: *Are you still inclined towards the death penalty in this case if in fact there is a conviction?*
> JOHNSON: *Yes, sir.* DEFENSE COUNSEL: *That's the presumption that you came into this court with?*
> JOHNSON: *Yes, sir.*

Hill, at 555.

Finding the case indistinguishable from Singer v. State, 109 So.2d 7 (Fla. 1959), where the prospective juror revealed preconceived ideas regarding the defendant's guilt, this Court held that Mr. Johnson should have been excused for cause because he possessed a preconceived opinion or presumption concerning the appropriate punishment for the defendant in that case. Conversely, here, Ms. Hernandez did not have a preconceived opinion that the defendant deserved the death penalty. While she believed the death penalty could be applied in certain cases, she stressed that it depended upon the evidence presented and was not something she could decide until presented with all the evidence. Bryant is likewise distinguishable because the jurors in that case adhered to their beliefs that the death penalty should be automatically applied if the defendant was found guilty of premeditated murder. The trial court did not

commit manifest error by denying Appellant's cause challenge.

CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court AFFIRM Appellant's conviction and sentence.

Respectfully submitted,
RICHARD E. DORAN,
ATTORNEY GENERAL

DEBRA RESCIGNO
ASSISTANT ATTORNEY GENERAL
Fla. Bar. No. 0836907
1515 North Flagler Drive
9th Floor
West Palm Beach, Fl. 33401
(561) 837-5000
(561) 837-5099

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Supplemental Answer Brief" has been furnished by facsimile (305) 858-7491 on December 7, 2002 and by United States mail December 9, 2002, to BENJAMIN WAXMAN, Robbins, Tunkey, Ross, Amsel, Raben, Waxman & Eiglarsh, P.A., 2250 Southwest Third Avenue, Miami, Fl. 33129.

DEBRA RESCIGNO

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY the size and style of type used in this brief is 12 point Courier New, a font that is not proportionally spaced.

_____
DEBRA RESCIGNO