IN THE SUPREME COURT OF FLORIDA

DANIEL O. CONAHAN, JR.

Appellant,

vs. **CASE NO. SC00-170**

STATE OF FLORIDA,

Appellee.

_____/

**ON APPEAL FROM THE TWENTIETH JUDICIAL CIRCUIT,
IN AND FOR CHARLOTTE COUNTY, FLORIDA**

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

A. Guilt Phase

Appellant was charged by indictment with premeditated murder of Richard Montgomery, felony-murder, kidnapping and sexual battery (Vol. 1, R1-2). Prior to the scheduled jury trial, Conahan waived trial by jury in the guilt phase and requested that the trial court, Judge Blackwell, be the trier of fact (Vol. 25, R647-665). State witnesses Thomas Edward Reese and Michael Tish observed an item of evidence (depicted in photo exhibit 1) in a secluded, heavily wooded area alerting them to a possible crime in the area and notified deputy sheriffs Mark Bala and Kelly Cosgrove (Vol. 26, R750-778). Deputy Sheriff Michael Gandy was called to the scene about 1:00 or 1:30 on April 17, 1996. He observed the suspicious item (later described as a human skull, the head of someone other than homicide victim Richard Montgomery-R797). Gandy continued to search around the area and observed some discarded carpeting; he lifted the carpet and they observed a deceased human being in it. Gandy noticed trauma to the neck, waist and wrist areas (R791-92). Photographs of the body and carpeting were introduced into evidence and Gandy testified that the identification of the victim was made by fingerprints (R797-99). Deputy Todd Gibson Terrell was directed to go to the crime scene with his K-9 dog Houston, trained to locate human remains or locations where

human remains had been (the dog was able to detect specific human enzymes and proteins with its olfactory sense) and the dog showed interest in a tree, a Sabal Palm about eight to ten feet high, on the side that was flattened or altered (R819-21). Forensic scientist Nancy Ludwigsen assisted in the crime scene investigation and collected hair and fibers there for subsequent analysis (as well as the skull and body parts of a different victim Smith that was found at the scene) (Vol. 26, R827-845). Additionally, the witness stated that exhibit 93 A was a coat found at the scene (Vol. 27, R881). The District Medical Examiner Dr. Imami performed an autopsy on Richard Montgomery on April 18, 1996 and described his age, weight, height, and physical appearance (Vol. 27, R911-918). The expert was shown a series of photographs, exhibits 19-32, and described a skin scrape on the left side of the face, two well-depressed grooves under the skin made by some rope or similar type of material (ligature marks), the lower portion of the chest also showed a groove or rope-like mark. The significance of not seeing any grooves on the mid-back of Montgomery was that it was consistent with an individual tied to a tree with quarter inch ropes around the mid-chest area. There were horizontal grooves present on the abdomen about an inch apart, and photos depicting the cris-cross type of injuries or abrasions on the back were introduced into evidence. The cris-cross injuries on the posterior aspect

of the body, lumbar area were consistent with injuries caused when the victim was tied to a tree. The right upper back and left buttock showed cris-cross type of scratches. The wrists also showed abrasions and grooves. The external genitalia were missing, they had been excised completely and any sharplike knife could have been used. It was done very precisely with a sharp blade, as opposed to a haphazard act. The anal canal was dilated more than normal (about one inch), consistent with a sexual assault to the anus . Dr. Imami also found hemorrhage of blood oozing out within the muscle sheets under the grooved area of the neck and these injuries were done before death. There were hemorrhages (petechiae) within the apex of the lungs, consistent with a person who died as a result of asphyxiation or strangulation. There was a minimum amount of blood and foreign material at the internal area of the amputated genitalia - the amputation was postmortem (after death). The injuries to the chest were antemortem (before death). The cause of death was asphyxiation secondary to strangulation. Postmortem wounds to the wrists were consistent with having the body weight placed against ropes tied to the wrists as the victim was being strangled (Vol. 27, R911-941). Although the witness saw no physical sign of trauma to the rectum and found no sperm, if there had been prior anal intercourse there would not necessarily be evidence of trauma (R944-947).

Montgomery's former brother-in-law Jeffrey Whisenant testified Montgomery had lived with them for four or five years, used alcohol regularly, and had difficulty holding down a steady job. Montgomery did not own a vehicle. Whisenant saw the victim on Tuesday afternoon, April 16, 1996 about or shortly after 4:30 p.m. on Royal Road (R949-68) . Gary Maston knew Montgomery and first saw him at Whittaker's house on Royal Road a couple of weeks before he was killed. On April 16, the day of the disappearance, he saw him at Whittaker's house but was not sure of the time (R970-71,980). Montgomery said he was going to make some money and would be back in a half hour. Whittaker asked him if it were legal and Montgomery answered if it wasn't legal he would tell him and just smiled. Maston never saw him again (R972-75). Robert James Whittaker knew the victim through his sister, then became his roommate and knew him for about six months before he was killed. In April of 1996 Montgomery was living with his sister, described him as slower than normal people mentally, outgoing and caring but not really able to hold down a job for very long. He abused alcohol a little and didn't own a car. Whittaker met Conahan through his friend Jeff Dingman and had seen appellant at his trailer home about three times. The first time appellant came to his house looking for Montgomery (he asked for Richie and said his sister Carla told him he was back in the trailer) about two and a half or three

months before the murder. Whittaker also saw Montgomery the evening of the 16th (the day of his disappearance). Montgomery said he was going to be gone for a couple of hours, that he was going to make some money, about two hundred dollars. When Whittaker asked if it was legal, Montgomery gave him a smirk, a smile and left it at that. Montgomery never returned (R981-990).

The prosecutor used Wal-Mart witnesses Carol Wise Powell and bank employees Edward McLoughlin, Joyce Allen and Jacqueline Knutson to establish that appellant made a purchase at the Punta Gorda store on April 16, 1996, for a package of clothesline, Polaroid film, pliers and a utility knife totaling $31.08 at 6:07 p.m. and that he made another purchase at the time of the Burden incident on August 15, 1994 (Vol. 28, R1017-29, R1041-45) and that Conahan withdrew $40 from the bank at 6:12 p.m. on April 16, 1996 (R1046-64, R1083). Cellmate John Cecil Newman testified that he shared a cell with appellant for seven or eight months. Originally, Conahan said he didn't know Montgomery at all, but finally admitted that he did know Montgomery and they went on a few beer runs, that Montgomery was a "mistake", that he had been to Montgomery's house on several occasions and knew his sister, and went to the bank with Montgomery (R1072-74).

Harold Linde who had had a gay relationship with Conahan in

Chicago when they lived together from 1988 through 1992 testified that appellant had mentioned to him a fantasy he had: “he’d like to pick up a boy hitchhiking, go in the woods, tie him to a tree and fuck him” (Vol. 28, R1087). The mother of the victim, Mary Ellen Montgomery West, stated that Montgomery had a problem staying employed, had struggles in school, was emotionally handicapped. He had admitted to her he had been sexually abused, he didn’t own a home, have valuables or have any savings. He didn’t have a vehicle in April 1996 because he wasn’t very responsible and she took away the truck she had purchased for him. He would be trusting after drinking alcohol (R1100-03). She recalled that her son had mentioned to her a new friend named Conahan who lived in Punta Gorda Isles, that he had been in the Navy, was discharged and that he was a nurse who worked at the Medical Center where she had worked for many years. Montgomery told her someone had offered to pay him $200 to pose nude for photographs but he refused to tell her who. He did not believe anyone would kill him, that he would kill them first (R1106-1111).

Detective Pedro Soto assisted in this 1996 investigation and recalled a similar investigation in 1994 involving Stanley Burden. He met Burden at the Lee Memorial Hospital and observed injuries including reddish ligature marks on the neck. Burden gave him a small set of pliers (Vol. 28, R1119-24). Lee

Memorial Hospital emergency medical technician Suzanne Hartwig examined and treated Burden at the emergency room on August 15, 1994. He had two abrasions around his neck, scrapes on his back and chest, abrasions around his wrists and ankles and a little bit of a mark by his lip. Burden told her that fifteen minutes earlier he was assaulted by a man named Dan who tried to kill and rape him (Vol. 29, R1133-41). Stanley Burden testified, and like Montgomery he occasionally used alcohol, had been sexually abused as a child, had difficulty keeping a steady job and owned no substantial belongings or valuables.(R1149-50). Burden came into contact with appellant on August 15, 1994 at a restroom and had further contact with him at a Checkers hamburger restaurant. Conahan was driving a light colored Plymouth Dodge Aries wagon with dark tinted windows. Conahan started talking about photos that he wanted, he took pictures of people for money and claimed he generally paid in the area of $100-150, and looked at him as to whether he'd be interested. They were going to be nude photos and Burden decided to try to get some money to help with the common expenses (with a friend he was traveling with from Ohio). Conahan first offered to perform oral sex on him for $20 and do photos on the following day, but then decided to take the photos then (R1155-59). They stepped back into the woods fifteen to thirty feet, Conahan laid a tarp on the ground, told Burden to take off his shirt and "show a little bit of hip".

Appellant started taking photos with a Polaroid, asked him to take his pants further down to his knees, told him he wanted to try some bondage photos and to step over by the trees. The area was grassy, secluded with a bunch of melaleuca trees. Conahan had brand new clotheslines right out of the bag and used red-handled clippers to cut the rope (R1160-62). Appellant cut the rope in pieces and draped them over Burden, then got behind him, snapped the rope and they tightened up. Burden's hands were behind the tree. This was unexpected. While he was tied to the tree, Conahan tried to shift him to one side or the other and committed oral sex on him. Conahan attempted to shift him for anal sex (R1163-66). Burden resisted by trying to position himself in the middle of the tree and appellant was unable to penetrate him anally. Conahan snapped the rope against the back of his neck hard with his foot up against the back of the tree, hitting him in the back of the head and asking him why he wouldn't die. There were two strands of rope around his neck and he was strangling him. Burden was able to slide around the tree, appellant tugged at the ropes for a good half hour and gave up when Burden turned his neck to the side to avoid having the wind cut off. Burden was able to breathe, used his feet to pull the clippers to the tree, was able to pick them up and get himself loose, cutting the rope off. Conahan gathered his stuff, asked if he still wanted his $100 and took off. Burden

completed freeing himself after appellant left, came out of the wooded area, and an old man drove him to the hospital. After his hospital treatment, he attempted to go with police to find the scene where this occurred but was unable to find it - but he was able to locate it the next day(R1166-71). He gave the plier-type cutters to personnel at the hospital, exhibit 55 (R1174). He stated Conahan offered him $100 afterwards not to say anything (R1214).

Ft. Myers detective Timothy Gershner observed the ligature markings on Burden's neck on August 16th and confirmed that they were able to locate the crime scene where this assault occurred in the morning (R1224-25). Theresa Richardson identified an exhibit showing a purchase at Wal-Mart on August 15, 1994 in the amount of $10.56.(R1238-39).

Deputy Sheriff Scott Clemons and Deputy Raymond Wier testified as to contacts they made with appellant while acting in an undercover capacity on May 23 through May 25 and May 17th and 18th respectively. Conahan discussed with both the subject of nude modeling for which he'd pay $150. He mentioned to Wier there would be progressive bondage (Vol. 29, R1260-74; Vol. 30, R1302-09).

Deputy Sheriff Kuchar testified as to the discovery of a gray coat found near a drainage ditch at the scene of the homicide (Vol. 30, R1348). Deputy Whitehead, crime lab analyst

Karen Cooper and FDLE agent Jim Myers described their efforts in the retrieval of evidence at the scene and the evidence obtained from the execution of the search warrants on appellant's two cars and at his residence (Vol.30, R1363-71; Vol.31, R1383-1415, R1416-40, R1441-67). FDLE agent Sharon Fiola packaged items for shipment to the crime lab (R1469). Crime lab analyst Christopher Hendry described the processing for trace evidence and turned the exhibits over to Paula Sauer (Vol.31, R1481-96; Vol.32, R1500-1517). Lab analyst Christine Nicoson described certain exhibits recovered and processed (Vol. 32, R1518-58). Deputy Michael Gandy interviewed appellant on May 31, 1996; Conahan was not in custody. Gandy asked him about his access to and use of a Mercury Capri that was at his house and Conahan admitted that he did have access to that vehicle and claimed he had last driven it a month to a month and a half prior to May 31. The Capri was registered to his father and the Plymouth was registered to him (Vol.32, R1567-71). Fiola, Robert Rowl and James C. Wilson testified regarding the evidence pertaining to the Kenneth Smith body parts (Vol.32, R1583-90, R1600-19).

Paula Sauer, an analyst in the microanalysis section of FDLE at the Tallahassee Crime Laboratory was recognized as an expert in the area of fiber analysis and identification (Vol. 32, R1621-24). She described the several levels of examination (visually with microscope, comparison microscope using

transmitted light, subjecting the fibers to fluorescent light, generic identification tests, use of a microscopic photometer) (R1630-36). She was able to identify sixteen different fiber types (pink polypropylene, blue split film, blue polyester, black cotton, purple/brown acetate, yellow rayon, blue nylon, tan acrylic, acrylic fibers that have both gold and black coloring, green acrylic, red nylon [one type a carpet type and a second type used for upholstery], black acrylic, cotton fibers with black overdye, green wool, and black polyester) (Vol. 33, R1683). The fibers were recovered from the body of Montgomery or nearby debris or on the sheet used to transport the Smith torso at the scene. The source appeared to be the Conahan bedroom carpet or the Conahan automobile or his backpack (Vol.33, R1688-1705).

Janice Taylor, a senior crime lab analyst for FDLE, recognized as an expert in microanalysis with respect to paint, opined that a paint chip recovered from the pubic area combings of Montgomery was indistinguishable from the sample collected from Conahan's 1984 Mercury Capri (Vol. 33, R1760-86).

The trial court heard argument on the Williams-Rule evidence (Vol. 34, R1805-41) and ruled that the testimony relating to the Burden incident and the solicitation to Detectives Clemons and Wier would be admissible, but that the evidence relating to the Smith body parts found at the crime scene would be inadmissible

and the court would not consider it in determining the defendant's guilt or innocence (R1842-48). The court entered a written order on this matter (Vol. 13, R2496-99). After hearing arguments on a motion for judgment of acquittal, the court granted the motion as to the sexual battery count but denied the motion as to the murder and kidnapping counts (Vol. 34, R1873-74).

Appellant Conahan took the stand in his defense. He admitted having had a sexual encounter with Stanley Burden sometime during the summer of 1994 but claimed he was in nursing class on August 15 (Vol. 35, R1905). Appellant claimed he offered Burden $20 to perform oral sex on Conahan, Burden accepted, and they had oral sex (R1911-12). Conahan mentioned the prospect of photography with him, asked him to pose for some nude photos and mentioned ropes or bondage. Burden was not responsive but gave the name of someone who might be interested. Appellant denied taking Burden out into the woods, or tying him up or trying to kill him (R1912-14). Conahan testified that he met Jeff Dingaman in early 1995, and shortly afterwards Dingaman moved in with Whittaker. Conahan claimed he never met or saw Montgomery (R1915-22). On cross-examination he initially asserted that he was honest with law enforcement officers (R1927) but then admitted that he didn't tell them the truth (R1947). Conahan recalled having fantasized about bondage and

admitted having a fantasy about tying individuals up in the woods (R1931). He reiterated that he never saw or met Montgomery (R1937). He denied going to the trailer looking for Montgomery and meeting Whittaker instead (R1938). Conahan testified on direct that he went to the Whittaker trailer ten to fifteen times where Dingaman and Whittaker lived between April and December of 1995 (R1920), but told officers he had been there a total of two or three times and hadn't been there for a year and a half or two years (R1940-41). Following closing argument, the trial court ruled that "the evidence admits of no reasonable hypothesis but that of guilt" (Vol.35, R2015). The court further elucidated that with respect to conflicts between the testimony of the defendant and Whittaker, Whittaker was more credible; that with respect to conflicts between the testimony of the defendant and Mary Montgomery West, she was more credible; that with respect to conflicts between the testimony of the defendant and Burden, Burden was more credible; with respect to conflicts between the testimony of the defendant and John Cecil Newman, Newman was more credible. The court found appellant guilty of first degree premeditated murder and kidnapping and adjudicated him guilty of both crimes (R2015-16).

B. Penalty Phase

Deputy Sheriff Michael Gandy interviewed appellant on May 31, 1996 at a Holiday Inn motel room in Punta Gorda. Conahan

admitted having a fantasy of bondage, of tying someone up and having sex with them (Vol. 37, R2333, 2338). Appellant admitted that he offered and engaged in sexual acts and tying individuals up in a sexual situation (R2339). The state then introduced a portion of appellant's trial testimony of August 17, 1999 in which appellant admitted having told officers that he had fantasized about bondage and that his fantasy includes tying individuals up in the woods (R2346).

Detective Pedro Soto testified that the homicide where an individual had been tied to a tree and strangled to death with ropes reminded him of an earlier 1994 case (R2348). The court sustained a defense objection to the incident involving Stanley Burden on the basis that prejudice outweighed relevance (R2350).

Robert Whittaker was a roommate and friend of homicide victim Richard Montgomery and testified the victim was a little slow who occasionally had a job but not a steady one. Montgomery did not have any money and lived with his sister or parents or Whittaker (R2352-53). On that day between 6:30 and 7:30 p.m. Montgomery came to his trailer and talked. He said he was going to make some quick money, around $200.00 and it would take about two hours. When Whittaker asked if it were legal, Montgomery smiled and said he would be safe. Montgomery was not working at the time, he did not return and Whittaker never saw him alive again (R2354-55).

The state introduced Exhibits 44 and 38, Wal-Mart bill and receipt showing appellant's purchase, at 6:06 on the date of the killing, of the clothesline, wire and utility knife (R2361).

Detective Robert Brown went to Wal-Mart to purchase the identical items that appellant purchased according to the receipt, Exhibits 40 and 41. Exhibit 40 is a package of 600 Polaroid film and Exhibit 41 is a set of pliers. The SKU number or the bar code on the back of the items matched the SKU numbers from a credit card receipt from Conahan where he made purchases of those particular items at different times (R2364-65).

Detective Gary Ellsworth also went to Wal-Mart to purchase items identical to those on appellant's receipt. State's Exhibit 39 (the clothesline) and Exhibit 42 (the knife) were introduced into evidence (Vol. 38, R2369-70). The state also introduced previously admitted Exhibits 46 and 54 (R2374).

The defense objected to photos Exhibits 10, 11 and 12 which depicted rope burns on the victim's neck urging that they show flies on the victim's face and Exhibits 8 and 9 since they depicted that the victim's genitalia were removed (R2375-76). The defense had no objection to Exhibits 2 through 7 (R2377). The prosecutor responded that the jury was entitled to see the condition of the body when found in the woods by law enforcement, that it links up to the medical examiner testimony on the injuries and that if the jury did not see the body at the

scene the description of the medical examiner does not have the same authenticity since the jury will not know the condition of the body at the scene versus that at the medical examiner's office. The prosecutor urged it was important for the jury to be aware of the injuries at the scene including the visible rope marks. Further, the photos regarding the removed genitals were relevant to the CCP issue, following appellant's purchase of the knife at Wal-Mart. The knife showed his planning the murder (R2378-79). The court allowed the jury to see Exhibits 8-12 (R2380, 2385).

Michael Gandy was recalled and testified he was present when Montgomery's body was discovered in the heavily wooded area and identified Exhibits 2-12 (R2383). On the neck area there were two ligature marks (R2385).

Dr. Carol Huser, the District Medical Examiner, an expert in forensic pathology (R2393) reviewed the autopsy findings of Dr. Imami who conducted the autopsy on Richard Montgomery on April 18, 1996 and viewed Exhibits 18-32 (R2395). She identified on a photo ligature grooves of the neck, parallel marks which were scraped and depressed (R2399). There were rope or ligature marks also on the right side of the victim's body (R2402-03). There were cris cross scrapes on the back, consistent with someone struggling who has been tied to a tree. Other photos depicted the victim's upper thigh, hip and buttocks

(R2404). The witness further explained that Exhibit 27 was a photo of the lateral left hip and thigh, Exhibit 28 showed scrapes on the buttock area, and Exhibits 29 and 30 showed scratches and abrasions on the back of the hand and wrist (R2407). The defense objected to the admission of Exhibits 31 and 32 and the state answered they were relevant to CCP along with the purchase of the knife and the witness's testimony that this was a precise malicious incision of the genitals with an extremely sharp instrument, not a frenzied hacking (R2408). The court allowed the exhibits and testimony. Exhibit 31 showed that the penis, scrotum and testicles were cut off with a very sharp instrument in a very precise manner, Exhibit 32 was similar but from the back area (R2410-11). The witness opined the ligature marks were there before death and reflect the cause of death (R2412). The amputation or castration occurred after death. The cause of death was ligature strangulation (R2413). Montgomery was rendered unconscious during the strangulation but it would take continued ongoing strangulation to complete the killing. The victim would know he was being killed (R2415-16). It would be terrifying (R2416). She did not think this was an autoerotic asphyxiation death (R2441).

Defense witness Betty Wilson, appellant's aunt, testified that she did not know Conahan intimately until the last couple of years (R2444). He came from Chicago where he had been living

to help out with his mother who was very sick (R2445). Appellant got a degree as a licensed practical nurse (R2447). His interaction with the family was great at a family reunion (R2451). Conahan's parents have died while he has been in jail on this charge (R2454). On cross-examination the witness conceded she did not know a great deal about appellant since he has been an adult (R2456). She did not know that he was homosexual (R2457). She had no knowledge of him when he lived in Chicago. His parents gave him everything he needed, he was not abused by anyone in any way (R2463-64). Appellant told her he did not commit this crime (R2466).

At a jury instruction conference, the defense objected to the sufficiency of the evidence to support an HAC instruction (R2472) but the court agreed to give the instruction (R2474). The defense objected to the sufficiency of the evidence for a CCP instruction (R2474) but the court agreed that the instruction should be given (R2476).

Robert Linde[1] had known appellant for twelve to fifteen years - Conahan was a good friend of his son Hal - and testified that appellant was a joy to be around (R2498). Conahan was a waiter in Chicago but he thought he became a computer operator (R2499). He was regarded as a second son (R2500). Conahan and

[1]Although the court reporter spells the name Lindy, apparently the correct spelling as indicated in the deposition (Vol. 17, R3165) is Linde.

Linde's son Hal were lovers for a while (R2504). Hal suffered from alcoholism and drug abuse and Conahan helped him to stay sober (R2505-06). Eventually appellant and Hal had a parting of the ways (R2507). On cross-examination the witness stated he had not seen appellant since the latter came to Florida since 1991 or 1992 (R2514).

Nancy Thorson, daughter of Robert Linde, testified that appellant had a good impact on her brother's life (R2520). She too was an alcoholic but quit drinking and went to a treatment center (R2523). Appellant told her his social life in Punta Gorda was pretty much non-existent (R2530). Since he moved to Florida in 1992 she had not had an opportunity to come and visit him (R2534-35). What she has known about him from when he left Chicago to his 1996 arrest is what he has chosen to share with her (R2535).

The jury recommended death by a unanimous twelve to nothing vote (Vol. 39, R2646-48; Vol. 17, R3235).

SUMMARY OF THE ARGUMENT

ISSUE I. The evidence adduced at trial is sufficient to support the trial court's determination that the instant killing was of a premeditated nature. Additionally, notwithstanding appellant's contention, the evidence also supports a felony-murder. Consequently, this Court must affirm.

ISSUE II. The evidence submitted to the court below is sufficient to support the conviction for kidnapping. Appellant's current specific claim was not argued below and thus is procedurally barred. In any event the claim is meritless and no fundamental error is present.

ISSUE III. The lower court committed no error either in instructing the jury upon the applicability of the commission of a kidnapping and CCP aggravating factors or in finding their presence as articulated in his written findings. Any appellate challenge now to the giving of the during a kidnapping aggravator instruction to the jury is also procedurally barred and may not be renewed now because of Conahan's failure to object below contemporaneously as required by state law.

Finally, even if this Court were to conclude that giving the instruction or making a finding on either or both of these aggravators was erroneous, the presence of the third and most serious aggravator - HAC - unchallenged her, alone is sufficient to warrant the imposition of the sentence of death, especially

given the insubstantiality of the mitigation submitted. See Blackwood v. State, ___ So. 2d ___, 25 Fla. L. Weekly S1148 (Fla. 2000); Cardona v. State, 641 So. 2d 361 (Fla. 1994).

ISSUE IV. With respect to appellant's argument that the prosecutor in his penalty phase opening statement had blatantly disregarded a pre-trial motion in limine appellee answers that there was no such blatant disregard of the ruling (and the trial court certainly did not suggest there had been any such conduct). When the trial court indicated that it wanted to have a discussion about the Burden testimony outside the jury's presence before the prosecutor introduced it (Vol. 37, R2336), the prosecutor complied (R2349-51) and the defense sought no additional relief. Moreover, the trial court instructed the jury they must make their decision based upon the testimony of the witnesses, the exhibits and the instructions (Vol. 39, R2634-2636). Thus, any error was cured by the trial judge.

With respect to appellant's complaint about excerpts of the prosecutor's penalty phase argument most of the challenged statements were unobjected to and thus barred from appellate review. No fundamental error is present. Even as to the two remarks that were adequately preserved by objection below, none of them either singly or in combination merit reversal and only amounted to the prosecutor's legitimate argument regarding the evidence and he correctly argued that a review of the entire

case demonstrated the appropriateness of the death penalty.

Appellant's claim is meritless.

ISSUE V. The lower court did not abuse its discretion in admitting into evidence at penalty phase a number of exhibits depicting the injuries to murder victim Montgomery as they were relevant to show the nature of the crime, § 921.141(1), Fla. Stat. (1995). Henyard v. State, 689 So. 2d 239 (Fla. 1996). They were relevant to the HAC, CCP and kidnapping aggravating factors, they were limited in number compared to the guilt phase and the jury, which had not participated in the guilt phase, had to be informed of some of the facts of the case. Teffeteller v. State, 495 So. 2d 744 (Fla. 1986). Any error was harmless.

ARGUMENT

ISSUE I

WHETHER THE EVIDENCE WAS SUFFICIENT TO PROVE PREMEDITATION.

The standard of review for the denial of a motion for judgment of acquittal is whether the verdict is supported by substantial, competent evidence. See, Crump v. State, 622 So. 2d 963, 971 (Fla. 1993) (question of whether evidence fails to exclude any reasonable hypothesis of innocence is for jury to determine, and if there is substantial, competent evidence to support jury verdict, verdict will not be reversed on appeal); Tibbs v. State, 397 So. 2d 1120 (Fla. 1981), aff'd., 457 U.S. 31 (1982) (concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment). In a case where the evidence is totally circumstantial, the evidence must be inconsistent with any other reasonable hypothesis of innocence. Orme v. State, 677 So. 2d 258 (Fla. 1996).

C. Premeditation

In one of the latest pronouncements in this area, this Court stated in Blackwood v. State, ___ So. 2d ___, 25 Fla. L. Weekly S1148 (Fla. 2000):

Premeditation is defined as "a fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which an act of killing ensues." *Sireci v. State,* 399 So. 2d 964, 967 (Fla. 1981). Premeditation 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.'" *DeAngelo v. State*, 616 So. 2d 440, 441 (Fla. 1993)(quoting *Asay v. State*, 580 So. 2d 610, 612 (Fla. 1991)). Premeditation can be established by circumstantial evidence. *See Sireci*, 399 So. 2d at 067. As this Court has stated:

> Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted.

Sochor v. State, 619 So. 2d 285, 288 (Fla. 1993)(quoting *Larry v. State*, 104 So. 2d 352, 354 (Fla. 1958)). Where, as here, the State seeks to establish premeditation by circumstantial evidence, the evidence relied upon must be inconsistent with every other reasonable inference. *See Wilson v. State*, 493 So. 2d 1019, 1022 (Fla. 1986). If the State's proof fails to exclude a reasonable hypothesis that the murder occurred other than by premeditated design, a verdict of first-degree murder cannot be sustained. *See Fisher v. State*, 715 So. 2d 950, 952 (Fla. 1998); *Kirkland v. State*, 684 So. 2d 732, 734 (Fla. 1996); *Hoefert v. State*, 617 So. 2d 1046 (Fla. 1993).

In *Holton v. State*, 573 So. 2d 284 (Fla. 1990), a case involving circumstantial evidence, this Court held that the evidence was sufficient to support the jury verdict for premeditated murder. The victim had

> been found with a ligature securely tied around her neck and her house had been burned, presumably to conceal the crime. The medical examiner determined that death was caused by strangulation. Scratch marks on the defendant's chest indicated the victim had struggled during the attack. Although the defendant had claimed that he did not intend to kill the victim and that the murder was an accident, we concluded that based on the State's evidence to the contrary, the jury chose not to believe the defendant's version of events. *See id.* at 289-90.
>
> We find the evidence of premeditation in this case sufficient to support the jury's verdict. The circumstances of the crime, including the physical evidence, the nature of the victim's injuries, and the manner of death, provide a sufficient basis for a jury to conclude that appellant acted with a purpose to inflict death. That there was no evidence that appellant had formed a criminal intent in the days or weeks prior to the murder does not preclude the conclusion that the appellant formed the necessary intent while inside the victim's house on the day of and at the time of the murder. Thus, we find that the manner of death in this case belies appellant's argument that he did not intend to kill the victim; the jury obviously believed the State's evidence rather than the defense's theory that death was unintended. *See Wilson; see also DeAngelo*, 616 So. 2d at 442 (rejecting appellant's contention that he strangled victim in blind rage during an argument where evidence indicated victim was choked manually and with ligature and appellant would have had to choke victim five to ten minutes to kill her). Accordingly, we find no error in the trial court's denial of appellant's motion for judgment of acquittal.

(Id. at 1150)

Accord, Beasley v. State, ___ So. 2d ___, 25 Fla. L. Weekly

S915, 917-918 (Fla. 2000); Miller v. State, 770 So. 2d 1144, 1148 (Fla. 2000); DeAngelo v. State, 616 So. 2d 440, 442 (Fla. 1993); Taylor v. State, 583 So. 2d 323, 328-329 (Fla. 1991); Cochran v. State, 547 So. 2d 928, 930 (Fla. 1989); Orme v. State, 677 So. 2d 258, 261-262 (Fla. 1996).

The instant case involved a strangulation murder, like Blackwood, supra, DeAngelo, supra, and Orme, supra.

Premeditation may be established by circumstantial evidence. Woods v. State, 733 So. 2d 980 (Fla. 1999); Spencer v. State, 645 So. 2d 377 (Fla. 1994); Esty v. State, 642 So. 2d 1074 (Fla. 1994); Provenzano v. State, 497 So. 2d 1177 (Fla. 1986).

The evidence in the instant case was not entirely circumstantial; it was a combination of direct and circumstantial evidence and included: (1) testimony of Stanley Burden and Detectives Wier and Clemons regarding appellant's identity, methods and motives; (2) testimony of former cell mate John Newman regarding appellant's having admitted knowing victim Montgomery (after first denying it) and having taken him for beer runs and describing Montgomery as his one mistake; (3) the testimony of Whittaker that appellant knew the victim and came to the house and asked for Richard Montgomery and victim's mother Mrs. West concerning Richard's telling her about his new friend Conahan who was a nurse and had been in the Navy; (4) appellant's admission to Hal Linde - and Conahan's admission to

officers - of his fantasy of bondage and tying individuals up in the woods; (5) the testimony of fiber expert Paula Sauer concerning the sixteen different types of fibers found at or near the scene of the homicide or on the victim's body which also connect with the appellant's property and the testimony of expert Janice Taylor regarding the paint chip recovered from the pubic hair combings of Montgomery originating from the 1984 Mercury Capri which appellant had access to; and (6) the evidence of appellant's Wal-Mart purchases of the rope, knife and pliers shortly before and on the day of the disappearance and murder of Montgomery.

Similarly, in Orme, supra, this Court noted that the evidence presented "cannot be deemed entirely circumstantial" 677 So. 2d at 262, but the Court nonetheless assumed arguendo that it was and concluded that the State's theory of the evidence was more plausible than that presented in the defense theory:

> "Put another way, competent substantial evidence supports the conclusion that the state had presented adequate evidence refuting Orme's theory, creating inconsistency between the state and defense theories. Accordingly, we may not reverse the trial court's determination in this regard."

(Id. at 262)

Appellant argues in support of his now-asserted reasonable hypothesis of innocence theory that - and appellee wants to get

this exactly right - “Conahan was not actually trying to kill Burden” (Appellant’s Brief, p. 48). As to this remarkable - and preposterous - assertion understandably not urged to the trial judge or to the penalty phase recommending jury since it ostensibly might conflict with the Conahan testimony that he and Burden merely had oral sex together and that he did not strangle Burden (Vol. 35, R1912), it will undoubtedly come as welcome news and a complete surprise to Mr. Burden who for some reason thought appellant was trying to kill him and near-contemporaneously told Lee Memorial Hospital emergency medical technician Suzanne Hartwig that:

> “...approximately 15 minutes before he came in the door that he was assaulted by a man named Dan, who tried to kill and rape him...”
>
> (emphasis supplied)(Vol. 29, R1141)

It should be noted that appellate courts are at a disadvantage in gauging the testimony of witnesses they do not see or hear. See Guzman v. State, 721 So. 2d 1155, 1159 (Fla. 1998) (“It is the province of the trier of fact to determine the credibility of witnesses and resolve conflicts [citations omitted]. Sitting as the trier of fact in this case, the trial judge had the superior vantage point to see and hear the witnesses and judge their credibility....Secondly this Court will not reweigh the evidence when the record contains sufficient evidence to prove

the defendant's guilt beyond a reasonable doubt."); State v. Spaziano, 692 So. 2d 174, 178 (Fla. 1997); Wainwright v. Witt, 469 U.S. 412, 434, 83 L.Ed.2d 841, 858 (1995) (quoting from an earlier case that "face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded"). Suffice it to say the fact finder heard and decided which witnesses were credible. See also Creamer v. Bivert, 214 Mo. 473, 113 S.W. 1118, 1120-121 (Mo. 1908):

> "We well know there are things of pith that cannot be preserved in or shown by the written page of a bill of exceptions. Truth does not always stalk boldly forth naked, but modest withal, in a printed abstract in a court of last resort. She oft hides in nooks and crannies visible only to the mind's eye of the judge who tries the case. To him appears the furtive glance, the blush of conscious shame, the hesitation, the sincere or the flippant or sneering tone, the heat, the calmness, the yawn, the sigh, the candor or lack of it, the scant or full realization of the solemnity of an oath, the carriage and mien. The brazen face of the liar, the glibness of the schooled witness in reciting a lesson, or the itching overeagerness of the swift witness, as well as honest face of the truthful one, are alone seen by him. In short, one witness, may give testimony that reads in print, here, as if falling from the lips of an angel of light, and yet not a soul who heard it, nisi, believed a word of it; and another witness may testify so that it reads brokenly and obscurely in print, and yet there was that about the witness that carried conviction of truth to every soul who heard him testify."

Since the trial court has specifically noted that it found "that Burden is more credible" than appellant (Vol. 35, R2016), it would make even less sense to accord great weight to the appellate afterthought now suggested by Conahan that appellant did not try to kill Burden. In short, the assertion that Conahan was not trying to kill Burden is preposterous and this Court need not accept it.

Although both the prosecutor and the defense below argued that the issue in the case "is a question of identity" (Vol. 35, R1965, R1977), in this appeal Conahan appears not to challenge the fact that he perpetrated the murder of Richard Montgomery ("...he followed the same pattern of behavior in successfully killing Montgomery in 1996" - Appellant's Brief, p. 48) but only that the state failed to meet its burden on the premeditation issue.

As to the additional assertion now presented that Conahan inadvertently strangled Montgomery to death, then cut off his genitals as an afterthought (Brief, p. 50), the afterthought argument, this Court has noted in Beasley v. State, ___ So. 2d ___, 25 Fla. L. Weekly S915, 918 (Fla. 2000):

> Where an "afterthought" argument is raised, the defendant's theory is carefully analyzed in light of the entire circumstances of the incident.

The "taking as an afterthought" argument is frequently advanced

by the defense to challenge a robbery conviction or use of the during the course of a robbery aggravator, § 921.141(5)(d), Fla. Stat. Here, the state was not urging any robbery and appellant does not explain the purpose of Conahan's "afterthought" - it did not aid in his flight from the scene, nor could it provide additional funds by sale or pawning.

Appellant contends that his case is similar to Hoeffert v. State, 617 So. 2d 1046 (Fla. 1993) and Randall v. State, 760 So. 2d 892 (Fla. 2000). Neither requires relief to Conahan; the dissimilarities require a different result. In Hoeffert, supra,

> "...the state was unable to prove the manner in which the homicide was committed and the nature and manner of any wounds inflicted. The medical examiner only established the cause of death as "probably asphyxiation" based upon "the lack of finding something [else]". There was no medical evidence of physical trauma to Hunt's neck, no evidence of sexual activity, and no evidence of genital injuries."
>
> (617 So. 2d at 1048-1049)

Unlike Hoeffert we know the manner in which the homicide was committed and the nature and manner of any wounds inflicted (see Dr. Imami testimony regarding ligature marks to neck, back, torso, etc., as well as the photographic exhibits eloquently attesting to the injuries); we know that the victim struggled (witness the cris-cross markings on the back and Dr. Imami testimony) and in short the instant murder was totally unlike

the possible choking of victim June Hunt during a consensual sexual encounter hypothesized in Hoeffert (no physical trauma to Hunt's neck, no evidence of genital injuries). There can be no reasonable suggestion that the murder of victim Montgomery in the instant case might have been the result of a quasi-accidental sexual escapade (Conahan prepared for this as he did with Burden by the same day Wal-Mart purchase of knife, pliers, rope and he subsequently amputated the victim's genitals, prepared for by the knife purchase). Moreover even the similar fact evidence introduced in Hoeffert dealt only with victims who were choked for the derivation of sexual gratification - unlike the case sub judice where Conahan had earlier attempted to strangle victim Burden to death before giving up his unsuccessful effort.

In Randall, supra, this Court stated:

> Randall argues here that the State's circumstantial evidence is consistent with the reasonable hypothesis that Randall began forcefully choking the murder victims during consensual sex and then when they struggled more than his girlfriend or ex-wife would have struggled, Randall became enraged and continued to choke them. This is consistent with the episodes described by both Howard and Randall's former wife. In view of the fact that the other women that Randall choked during sexual activity did not die, it is reasonable to infer that Randall intended for his choking behavior to lead only to sexual gratification, not to the deaths of his sexual partners.
>
> (760 So. 2d at 902)

Further, this Court reasoned:

> As in *Kirkland*, there was no suggestion here that Randall exhibited, mentioned, or possessed an intent to kill the victims at any time prior to the homicides. Moreover, there was no evidence that either of the two murders was committed according to a preconceived plan.
>
> (emphasis supplied)(Id. at 902)[2]

Unlike Randall, and Hoeffert, the evidence in the instant case shows that Conahan possessed an intent to kill victims prior to the homicide (starting with the inchoate Burden effort in which appellant asked the hapless survivor why he wouldn't die - Vol. 29, R1166-67 and his thirty minute effort to strangle him to death - R1168) and his planning included efforts on the very day of the Montgomery murder (the withdrawal of "flash money" at his bank and purchase at Wal-Mart of the items needed to accomplish Conahan's mission). Conahan fails in his attempt to fit the Randall-Hoeffert precedents on his Procrustean bed.

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[2]In Kirkland v. State, 684 So. 2d 732, 735 (Fla. 1996) the Court found the premeditation lacking in the slashing death of the victim since there was no suggestion Kirkland possessed an intent to kill the victim at any time prior to the actual homicide, no evidence suggesting he had made special arrangements to obtain a murder weapon in advance of the homicide, and scant if any evidence to indicate he committed the homicide according to a preconceived plan - it was unrefuted Kirkland's IQ measured in the sixties. In contrast, Conahan procured the knife and rope shortly before executing his plan to lure Montgomery to the secluded site to murder him, as he almost had succeeded in doing earlier with Burden.

The instant case is more comparable to Crump v. State, 622 So. 2d 963 (Fla. 1993) where this Court approved the first degree murder conviction in a case including as evidence a restraining device found in Crump's vehicle, ligature marks on the victim's wrists, hair found in his trunk consistent with the victim's head hair and Williams-rule evidence. Both murder victim Clark and Williams'-rule victim Smith had been strangled with ligature marks on the wrists and the evidence "showed that Crump killed both Clark and Smith in a criminal pattern in which he picked up prostitutes, bound them, strangled them, and discarded their nude bodies near cemeteries". 622 So. 2d at 971. And:

> "Because the circumstantial evidence standard does not require the jury to believe the defense's version of the facts on which the state has produced conflicting evidence, the jury properly could have concluded that Crump's hypothesis of innocence was untrue."
>
> (Id. at 971)

Similarly, here, since the fact finder could believe the version supported by the testimony of the state witnesses which contradicted that offered by appellant, the appellate court is not required to accept yet another - and even more implausible - defense version not presented below but urged ab initio here and still inconsistent with the state's evidence. See Orme, supra; Holton v. State, 573 So. 2d 284, 290 (Fla. 1990); DeAngelo v.

State, 616 So. 2d 440, 442 (Fla. 1993).

While appellant confessed to cell mate Newman that Montgomery was his "mistake" in retrospect it is also clear that Burden was also his mistake since the latter witness - upon survival - was able to attest to Conahan's identity and to appellant's dark intent to use the nude photo session merely as a ploy and a prelude to premeditated murder.

B. Felony-murder

Finally, even if this Court were to conclude that the evidence was insufficient for premeditation, the judgment of guilt should be affirmed since Conahan is guilty of first-degree felony-murder, committed in the course of a kidnapping. See G. W. Brown v, State, 644 So. 2d 52 (Fla. 1994); Mungin v. State, 689 So. 2d 1026 (Fla. 1995); Jackson v. State, 498 So. 2d 406 (Fla. 1986); Kimbrough v. State, 700 So. 2d 285 (Fla. 1997); Sochor v. State, 619 So. 2d 285 (Fla. 1993). See Issue II, infra. Any contention that the felony-murder rule is inapplicable is meritless, as explained, infra.

Following the presentation of evidence and argument by the prosecution and the defense, the trial court sitting also as the finder of fact determined (Vol. 35, R2014-16):

> THE COURT: Mr. Conahan and counsel for the State and the defense, I will summarize very quickly my findings. The Williams' Rule evidence in the case regarding the seduction of Mr. Burden, his tying, choking with rope, the attempted seduction of

Detectives Clemens and Wier, the similarities of the Burden and Montgomery crime scenes including the implements used without limitation, rope, side cutters and the nudity of the victims, the similarities of the victims Burden and Montgomery, the similarities of injuries to Burden and Montgomery, specifically the double wrap ligatures to the throat and neck areas, have established not nearly [sic] by a preponderance of the evidence or clear and convincing evidence, as is the requirement of law, but are established beyond a reasonable doubt.

The paint chip and fiber evidence show contact between Montgomery and the Defendant. The paint chip itself shows recent contact; that is to say, it must be, if not simultaneous, contemporaneous with the events leading to the death of Montgomery given the location for which the paint chip was recovered, and the fiber comparisons in each category overwhelmingly identify Mr. Conahan as being a common factor with respect to each item shared in common with Montgomery; that is to say, the shared fibers bear the same microcharacteristics, chemical characteristics and other physical characteristics. And the evidence admits of no reasonable hypothesis but that of guilt.

With respect to conflicts between the testimony of the Defendant and Mr. Whitaker, I find that Mr. Whitaker is more credible. With respect to conflicts between the testimony of the Defendant and Mary Montgomery West, I find that Miss West is more credible. With respect to conflicts between the testimony of the Defendant and Burden, I find that Burden is more credible. With respect to conflicts between the testimony of the Defendant and John Cecil Newman, I find that John Cecil Newman is the more credible.

Accordingly, Mr. Conahan, it is the judgment of this Court that you are guilty of first degree premeditated murder of Richard Montgomery and the kidnapping of

> Richard Montgomery as charged in the Indictment. I will, therefore, adjudicate you guilty of both these crimes and order you remanded to the custody of the sheriff of this county to be held without bond pending a sentencing hearing.

Conahan notes that the trial judge did not specifically allude to felony-murder when he found him guilty of premeditated murder and kidnapping and that the prosecutor subsequently entered a "nolle pros" on felony-murder.

As to the first contention, the trial court sitting as the finder of fact in a bench trial is not required to articulate all the theories supporting his conclusion. When the state proceeds on theories of both premeditated and felony murder, a special verdict form demonstrating which theory the jury based its verdict on is not required. Young v. State, 579 So. 2d 721 (Fla. 1991). A defendant is not entitled to a special verdict to determine whether defendant's first degree murder conviction was based upon premeditated or felony murder. Haliburton v. State, 561 So. 2d 248 (Fla. 1990); Buford v. State, 492 So. 2d 355 (Fla. 1986). The jury does not need to agree on the precise theory of first degree murder to return a general guilty verdict, only the offense itself. See Sims v. Singletary, 155 F.3d 1297, 1313 (11th Cir. 1998), cert. den., 527 U.S. 1025, 144 L.Ed.2d 777 (1999). Obviously when the trial court acts as the finder of fact in a bench trial - as the prosecutor explained

below - it likewise need not indicate or announce which of the two theories the court finds applicable - it suffices merely to announce that the court is finding the defendant guilty of first degree murder. (Vol. 35, R1965-1966). Here, we know at the very least that the court found Conahan guilty of first degree premeditated murder and of kidnapping (Vol. 35, R2016). Appellee would submit that it was unnecessary to add the mere surplusage of felony-murder. It was unnecessary for the trial judge to say more since a defendant may not be adjudicated guilty of both premeditated and felony-murder for a single death. Gaskin v. State, 591 So. 2d 917, 920 (Fla. 1991), vacated on other grounds, 505 U.S. 1216, 120 L.Ed.2d 894 (1992), affirmed on remand, 615 So. 2d 679 (Fla. 1993), cert. den., 510 U.S. 925, 126 L.Ed.2d 274 (1993); Lamb v. State, 532 So. 2d 1051 (Fla. 1988).

Further, it is clear that the trial judge decided also the presence of felony-murder since he found Conahan guilty of kidnapping (Appellant's argument would have substance had Judge Blackwell found him not guilty of kidnappping, as he had earlier granted a judgment of acquittal on the sexual battery count). Obviously, the trial court well understood that since there was only one murder, i.e. the homicide of victim Richard Montgomery, it was not important to mention also the felony-murder theory supporting his ruling after finding both premeditated murder and

kidnapping.

As to appellant's second factor - the alleged nolle pros - it is helpful to look at the record. The judge stated he was adjudicating appellant guilty "of both these crimes" (i.e. first degree murder and kidnapping) at the conclusion of the trial on August 17, 1999 (Vol. 35, R2016; Vol. 14, R2720). The penalty phase proceedings occurred over two months later from November 1 through November 3, 1999 (Vol. 37, R2169-2366; Vol. 38, R2367-2567; Vol. 39, R2568-2650). At the sentencing hearing on December 10, 1999 the court reiterated that it had previously found Conahan guilty of first degree murder and kidnapping and granted judgment of acquittal as to a sexual battery charge (Vol. 39, R2687). After enumerating the three aggravating factors found and the mitigating evidence proffered, the court imposed a sentence of death for the murder and a fifteen year sentence for the kidnapping (Vol. 39, R2696).[3] After this sentence was imposed, the prosecutor stated:

> MR. LEE: If I may, the Clerk has requested that in order that the record is clear, the State will nolle pros Count 2 of the indictment, which is the alternative of first degree count dealing with felony murder. Since the Court found the Defendant guilty of Count 1, I believe it is, which was the premeditated murder, then at this time we will nolle pros Count 2 as unnecessary for this purpose.

[3]The kidnapping sentence was later reduced (Vol. 18, R3307).

(Vol. 39, R2697)

Under the appellant's reasoning this post-hoc act by the prosecutor on December 10 amounted to an abandonment or waiver of felony-murder. He is clearly wrong and significantly cites no supporting case law. As stated in Vol. 14B, Florida Jur. 2d, Criminal Law § 2046 (1993):

> Time when nolle prosequi may be taken - Under the common law, the prosecuting attorney controls the entry of a nolle prosequi up to the time that the jury is sworn to try the cause. The state attorney may enter a nolle prosequi of a count in an information at any time before defendant's plea of guilty is accepted by the court.

See also State v. Jogan, 388 So. 2d 322 (Fla. 3d DCA 1980) (discretion to either prosecute or nolle prosequi a defendant [conditioned upon his entry into the military forces] is a pre-trial posture vested solely in the state); Wilson v. Renfroe, 91 So. 2d 857, 859 (Fla. 1956) (There can be no doubt that under the common law the Prosecuting Attorney controlled the entry of a nolle prosequi, up to the time that the jury is sworn to try the case. The words "nolle prosequi" are a Latin expression which translated literally mean "to be unwilling to prosecute"); State v. Kahmke, 468 So. 2d 284 (Fla. 1st DCA 1985) (A nolle prosequi may be filed at any time prior to the swearing in of the jury); State v. Bloom, 497 So. 2d 2, 3 (Fla. 1986) (approvingly citing State v. Jogan, 388 So. 2d 322 (Fla. 3d DCA

1980) that the pre-trial decision to prosecute or nol-pros is a responsibility vested solely in the state attorney).

The prosecutor's remarks in context merely demonstrate that he was informing the court that in light of the judgment and sentence imposed on Count 1, there was nothing more for the court to do. To read it otherwise makes it meaningless. Conahan had just concluded a trial for the first degree murder of Montgomery. Whether he was convicted or whether he was acquitted there could be no further trial or continued prosecution by virtue of the Double Jeopardy Clause. Since appellant's interpretation is legally meaningless, it must be rejected.

If appellant's version were accurate - that the trial judge determined felony-murder to be inapplicable or unsupported by the evidence - obviously the judge would have remarked at the prosecutor's "nolle pros" statement that it was inappropriate since he had returned an acquittal on that count. The judge did not so interject because he had not so ruled earlier.

Additionally, in the more expansive findings in the sentencing order, Judge Blackwell specifically found the homicide was committed "while the defendant was engaged in the commission of kidnapping" explaining:

> "...it is ludicrous to conclude that he consented to the lethal form of bondage made apparent by the wounds to his body prior to his death. The pre-mortem wounds to his

> body reflect a struggle for his life. His wrists and lower body all bore ligature wounds; his back bore cris-cross scratching produced by his struggle while being tied to a tree or other such rough surface. It is obvious that during this ordeal he was confined or imprisoned against his will."
>
> (Vol. 18, R3287-88)

Appellant's challenge to felony-murder is meritless and must be rejected.

ISSUE II

WHETHER THE STATE'S EVIDENCE WAS INSUFFICIENT TO PROVE KIDNAPPING BECAUSE IT ALLEGEDLY DID NOT PROVE THE CONFINEMENT WAS AGAINST VICTIM MONTGOMERY'S WILL.

The standard of review for the denial of a motion for judgment of acquittal is whether the verdict is supported by substantial, competent evidence. See, Crump v. State, 622 So. 2d 963, 971 (Fla. 1993) (question of whether evidence fails to exclude any reasonable hypothesis of innocence is for jury to determine, and if there is substantial, competent evidence to support jury verdict, verdict will not be reversed on appeal); Tibbs v. State, 397 So. 2d 1120 (Fla. 1981), aff'd., 457 U.S. 31 (1982) (concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment). In a case where the evidence is totally circumstantial, the evidence must be inconsistent with any other reasonable hypothesis of innocence. Orme v. State, 677 So. 2d 258 (Fla. 1996).

Conahan was charged in Count III of the indictment with kidnapping, that he:

> "did without lawful authority, forcibly, secretly, or by threat, confine, abduct, or imprison another person, to wit: Richard Alan Montgomery, against said person's will,

> with the intent to commit or facilitate the commission of a felony, to wit: sexual battery."
>
> (Vol. 1, R1-2)

This Court has explained that to be kidnapping the resulting movement or confinement:

(a) Must not be slight, inconsequential and merely incidental to the other crime;

(b) Must not be of the kind inherent in the nature of the other crime; and

(c) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detention.

See Faison v. State, 426 So. 2d 963 (Fla. 1983); Sochor v. State, 619 So. 2d 285 (Fla. 1993); Berry v. State, 668 So. 2d 967 (Fla. 1996). See also Harkins v. State, 380 So. 2d 524 (Fla. 5th DCA 1980) (approving kidnapping where the murder victim was confined to a motel bed by restraining ropes - the only article of clothing was a scarf tied around the neck - since the roped confinement was neither inconsequential nor inherent in the felonies of sexual battery and murder); Sanborn v. State, 513 So. 2d 1380 (Fla. 3d DCA 1987) (kidnapping victims tied and left in bed); Lawson v. State, 720 So. 2d 558 (Fla. 4th DCA 1998) (kidnapping approved where victim was left tied up

following sexual batteries).

Appellant maintains that the evidence does not sufficiently establish that Conahan's confinement of Montgomery was against his will (Montgomery's). He acknowledges that indeed the victim was confined as described in Berry v. State, 668 So. 2d 967 (Fla. 1996) but urges that a reasonable hypothesis is that Montgomery consented to being tied up against a tree - just as surviving victim Burden allowed Conahan to tie him to a tree and did not resist until Conahan attempted anal penetration (Appellant's Brief, p. 56). After observing that no sperm was found on the homicide victim's body, Conahan continues "Thus, the circumstantial evidence is consistent with the absence of any sexual battery or any effort to resist" (Brief, p. 59). Appellant does not entirely enlighten us and it is unclear whether he also suggests that the surgical removal of Montgomery's genitalia is a continuation of the process of a consensual tryst with Conahan. The appellee would respectfully submit that the injuries apparent on the body - as depicted in the photographs and as described in the testimony of Dr. Imami (skin scrape on the left side of the face, Vol. 27, R919; ligature marks under the skin, R922; the groove or rope like mark on the lower chest, R923; the grooves present on the abdomen, R925-926; the cris-cross type of injuries or abrasions on the back, R925-929; the abrasion and cris-cross type of

scratches on the left buttock, R929; the grooves and abrasions on the wrists, R931-933; the dilated anal canal consistent with a sexual assault to the anus, R936; the ante-mortem injuries to the chest, R938) all demonstrate the fact of a struggle and the non-consensual nature of the confrontation. As the lower court observed in the sentencing findings:

> While the victim apparently went willingly with the defendant to the crime scene to participate in something of a nude photographic bondage session, it is ludicrous to conclude that he consented to the lethal form of bondage made apparent by the wounds to his body prior to his death. The pre-mortem wounds to his body reflect a struggle for his life. His wrists and lower body all bore ligature wounds; his back bore cris-cross scratching produced by his struggle while being tied to a tree or other such rough surface. It is obvious that during this ordeal he was confined or imprisoned against his will....
>
> (emphasis supplied)(Vol. 18, R3287-88)

It is not fatal to the state's case, as Conahan implies, that the prosecution did not demonstrate the exact moment when Montgomery's consent to being with appellant ended. As this Court observed in Sochor v. State, 619 So. 2d 285, 289 (Fla. 1993):

> "The evidence adduced at trial shows that, although the victim may have entered the truck voluntarily, at some point she was held unwillingly. Her removal from the lounge parking lot to a secluded area facilitated Sochor's acts, avoided

> detection, and was not merely incidental to, or inherent in, the crime. Thus, the evidence supports the underlying felony of kidnapping as well as Sochor's separate conviction of kidnapping." (emphasis supplied)

See also Bedford v. State, 589 So. 2d 245, 251 (Fla. 1991) rejecting defendant's contention that the victim willingly accompanied the two men as there was evidence the victim was found bound and transported to the Everglades, supporting a finding the confinement was against her will.

Also in Gore v. State, 599 So. 2d 978, 985 (Fla. 1992) the Court stated:

> Gore notes that testimony from Roark's friends indicated that at the time Roark left the party to take Gore home she accompanied him voluntarily, that she did not ask any of her friends to go along with her when she left, and that her friends would have been willing to go along had she asked. However, other evidence indicated that at some point Roark's accompaniment of Gore ceased to be voluntary. Roark planned to return to her friend's home to spend the night. She called her grandmother that evening and told her she would be home in time for church the next morning. When her body was found in Florida, there was a shoestring tied around her wrist, suggesting that at some point she had been bound... We find that there was substantial, competent evidence to support the jury's verdict of guilt as to the kidnapping charge, and we therefore reject Gore's argument that the trial judge should have granted his motion for judgment of acquittal." (emphasis supplied)

Finally, in Harkins, supra, at 528 the appellate court

similarly rejected a challenge to the kidnapping conviction, finding that the defense argument that the procedure of confining the victim to the motel bed by restraining ropes "had less to do with detention than with the sexual fantasies of the perpetrator" is unconvincing.

Appellant acknowledges that his current claim may not have been preserved by argument below (Brief, p. 59) but suggests the error was fundamental. Appellee responds that there is no fundamental error and the claim is meritless as argued, supra. Appellee adds that the argument now being advanced was not asserted below and is thus procedurally barred. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982); Occhicone v. State, 570 So. 2d 902 (Fla. 1990); see also Woods v. State, 733 So. 2d 980, 984 (Fla. 1999) ("To preserve an argument for appeal, it must be asserted as the legal ground for the objection, exception, or motion below [citations omitted]"). The Woods Court added that "He did not bring to the attention of the trial court any of the specific grounds he now urges this Court to consider". Id. at 985. See also Archer v. State, 613 So. 2d 446, 448 (Fla. 1993) ("Archer did not make the instant argument in the trial court [pertaining to his JOA], and, therefore, this issue has not been preserved for appellate review."). In the instant case at the Motion for Judgment of Acquittal Conahan merely contended with regard to the kidnapping count that the injuries were post-

mortem and that therefore the victim was bound after death not before (Vol. 34, R1851)[4]. It is understandable that trial counsel would not advance the argument currently put forward. In addition to its insubstantiality, Conahan had testified denying meeting or seeing Montgomery (Vol. 35, R1922, 1937) and to repudiate that testimony by asserting consensual binding of the victim would likely have violated the teachings of Nixon v. Singletary, 758 So. 2d 618 (Fla. 2000)[5] (counsel may violate the Sixth Amendment if he concedes guilt without obtaining the consent and approval of the client).

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[4]Cf. Bradley v. State, ___ So. 2d ___, 26 Fla. L. Weekly S 136 (Fla. Case No. 93,373, opinion filed March 1, 2001) (defendant barred from challenging burglary under felony murder rule for failure to preserve in the lower court).

[5]While it is true that this Court has an obligation under the rule and decisional law - see Jennings v. State, 718 So. 2d 144, 154 (Fla. 1998); Parker v. Dugger, 660 So. 2d 1386, 1390 (Fla. 1995); Tibbs v. State, 397 So. 2d 1120, 1126 (Fla. 1981); Fla. R. App. P. 9.140(h); Mansfield v. State, 758 So. 2d 636, 649 (Fla. 2000); Trease v. State, 768 So. 2d 1050, 1055 n. 5 (Fla. 2000) - to consider the sufficiency of the evidence to convict of first degree murder, whether raised on appeal or not, that does not apply to this, a mere kidnapping count, unless the Court determines that the evidence of premeditation is lacking and that affirmance can only rest on a felony-murder theory.

ISSUE III

WHETHER THE LOWER COURT ERRED BY INSTRUCTING THE JURY ON AND FINDING THE CCP AND IN THE COMMISSION OF A KIDNAPPING AGGRAVATORS.

The standard of review on whether the lower court correctly found aggravating circumstances is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent, substantial evidence supports its finding. Willacy v. State, 696 So. 2d 693, 695 (Fla.), cert. denied, 522 U.S. 970 (1997). It is not this Court's function to reweigh the evidence to determine whether the state proved each aggravating circumstance beyond a reasonable doubt - - that is the trial court's job. Willacy, supra; Alston v. State, 723 So. 2d 148, 160 (Fla. 1998); G. Rogers v. State, ___ So. 2d ___, 26 Fla. L. Weekly S115 (Fla. Case No. 91,384, opinion filed March 1, 2001).

In his sentencing findings Judge Blackwell found (Vol. 18, R3287-3288):

> 1. The crime was committed while the defendant was engaged in the commission of kidnapping. The indictment in this case charged the defendant with kidnapping the victim as well as the first degree murder of the victim. As noted above, the Court found the defendant guilty of both offenses. While the victim apparently went willingly with the defendant to the crime scene to participate in something of a nude photographic bondage session, it is ludicrous to conclude that he consented to the lethal form of bondage made apparent by

the wounds to his body prior to his death. The pre-mortem wounds to his body reflect a struggle for his life. His wrists and lower body all bore ligature wounds; his back bore cris-cross scratching produced by his struggle while being tied to a tree or other such rough surface. It is obvious that during this ordeal he was confined or imprisoned against his will. Such confinement against his will was for the obvious purpose of inflicting bodily harm upon the victim or terrorizing him.

The state has proven this aggravating factor beyond a reasonable doubt. See ***Schwab v. State***, 636 So. 2d 3 (Fla. 1994); ***Sochor v. State***, 619 So. 2d 285 (Fla. 1993); ***Bedford v. State***, 589 So. 2d 245 (Fla. 1991).

2. <u>The crime was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification</u>. Shortly before picking up the victim, the defendant purchased rope, side-cutter pliers, and a sharp utility knife. The rope was the same type and size as that used to strangle Richard Montgomery; it was remarkably similar to the type used roughly two years earlier by the defendant in his attempt to strangle Stanley Burden. The evidence of the attempted strangulation of Burden was admitted in the guilt phase trial before the court as ***Williams*** Rule evidence —***Williams v. State***, 110 So. 2d 654 (Fla. 1959)—but it was not admitted in the penalty phase trial before the jury. The implements of bondage, strangulation, and cutting were the same in both instances; the pretense of posing for bondage photos was the same; the ligature wounds to the neck and throat of Stanley Burden, who managed to survive, and Richard Montgomery, who did not, were strikingly similar. The court discusses these similarities in the context of the sentencing issue only because of the relevance to this aggravator. The method, techniques, and other similarities evidence a cold, calculated, systematic approach to

> luring Richard Montgomery to the area where he was killed after being tricked into a bondage situation, from which he could not escape. The purchases and methodology employed by the defendant in preparing for this crime manifest the same type of heightened premeditation found in *Jennings v. State*, 718 So. 2d 144 (Fla. 1998) and *Bell v. State*, 699 So. 2d 674 (Fla. 1997), *cert. den.* 118 S.Ct. 1067 (1998).
>
> The State has proven this aggravating factor beyond a reasonable doubt.

The lower court also found a third aggravator - especially heinous, atrocious or cruel (R3288) - which is unchallenged in this appeal.[6]

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[6]The lower court's finding recites:

> 3. <u>The crime was especially heinous, atrocious, and cruel</u>. Two different medical examiners testified in this case. Dr. Amami [sic] testified in the guilt phase, and Dr. Husier testified in the penalty phase. Both described many of the wounds as having occurred prior to Montgomery's death. Specifically, these pre-mortem wounds included the cris-cross scrapes and abrasions on Montgomery's back, the ligature wounds on his wrists, neck and throat, and the injury to his left lower thorax. That Montgomery struggled for his life is manifest from these wounds; that he knew he was being killed is unquestionable. *Strangulation, when perpetrated on a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and this method of killing is one to which the factor of heinousness is applicable. Sochor v. State*, 619 So.2d 285, 292 (Fla. 1993); *Tompkins v. State*, 502 So. 2d 415, 421 (Fla. 1986), *cert. den.*, 483 U.S. 1033 (1987). NOTE: The cutting away of the victim's

Under this point appellant argues that since he has urged in Issue I, supra, that the evidence of premeditation was insufficient that it follows the heightened premeditation requirement of Jackson v. State, 648 So. 2d 85 (Fla. 1994) for CCP cannot be satisfied. Appellee would submit that premeditation has been established - see Issue I - and as the trial court articulated in its sentencing findings the purchases and methodology employed by the defendant in preparing for this crime manifest the same type of heightened premeditation found in Jennings v. State, 718 So. 2d 144 (Fla. 1998) and Bell v. State, 699 So. 2d 674 (Fla. 1997)(R3288).

In Jennings this Court found the presence of the four elements of the CCP aggravator: (1) the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or fit of rage, (2) careful plan or prearranged design to commit the murder before the fatal incident (3) heightened premeditation and (4)no pretense of moral or legal justification. The Jennings Court noted the methodic succession of events and ruthless efficiency with which the murders were

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> genitals occurred after death, and the court expressly avoids consideration of this with respect to this aggravator, either of the previous two aggravators, or any other aspect of this case.
>
> The state has proven this aggravating factor beyond a reasonsble doubt.

carried out. Id. at 152. In Bell the Court explained that CCP can be indicated by the circumstances showing such facts as advance procurement of a weapon (the rope and knife in the instant case), lack of resistance or provocation and the appearance of a killing carried out as a matter of course. Id. at 677. See also Cruse v. State, 588 So. 2d 983 (Fla. 1991); Koon v. State, 513 So. 2d 1253 (Fla. 1987). The instant case satisfies these requirements.

Similarly, appellant argues that since he is now contesting the sufficiency of the evidence to support the kidnapping conviction (Issue II, supra), the trial court must have erred both in instructing the jury on the aggravator (§ 921.141(5)(d), Fla. Stat. (1995)) and in finding the presence of this aggravator. Unfortunately, this claim has not been preserved for appellate review. Conahan acknowledges that he failed to object to the giving of this instruction at the jury charge conference (Vol. 38, R2472-82; Vol. 39, R2576) or at the conclusion of the instructions given to the jury (Vol. 39, R2636-2644). Thus, the failure to object to the trial court contemporaneously precludes his challenge now to the jury having been instructed on the kidnapping conviction. See generally Steinhorst v. State, 412 So. 2d 332 (Fla. 1982); Occhicone v. State, 570 So. 2d 902 (Fla. 1990); Mordenti v. State, 630 So. 2d 1080 (Fla. 1994); San Martin v. State, 705 So. 2d 1337, 1345

(Fla. 1997); Hazen v. State, 700 So. 2d 1207 (Fla. 1997); Lindsey v. State, 636 So. 2d 1327, 1328 (Fla. 1994); Correll v. State, 523 So. 2d 562, 566 (Fla. 1988); Hardwick v. Dugger, 648 So. 2d 100 (Fla. 1994); Chandler v. State, 702 So. 2d 186 (Fla. 1997).

With respect to the trial court's finding of the presence of this aggravator, appellee submits that the evidence was sufficient to support the finding of a kidnapping (Issue II, supra) and the trial court correctly found this as an aggravator (R3287-88). See Sochor v. State, 619 So. 2d 285, 289 (Fla. 1993) (although victim may have entered truck voluntarily, at some point she was held unwillingly and removal to a secluded area facilitated Sochor's acts, avoided detection and was not merely incidental to or inherent in the crime); Schwab v. State, 636 So. 2d 3, 7 (Fla. 1994); Bedford v. State, 589 So. 2d 245, 251 (Fla. 1991).

Finally, even assuming arguendo that Conahan were to prevail on the instant argument, relief should be denied since the presence of the unchallenged third aggravator - HAC - is sufficiently strong alone to support the death penalty in light of the insubstantial mitigating evidence found. See Blackwood v. State, ___ So. 2d ___, 25 Fla. L. Weekly S1148 (Fla. 2000); Cardona v. State, 641 So. 2d 361 (Fla. 1994); Arango v. State, 411 So. 2d 172 (Fla. 1982); Leduc v. State, 365 So. 2d 149 (Fla.

1978).

ISSUE IV

WHETHER ALLEGED IMPROPER REMARKS BY THE PROSECUTOR IN OPENING STATEMENT AND CLOSING ARGUMENT OF THE PENALTY PHASE CONSTITUTE REVERSIBLE ERROR.

A trial court's ruling on a motion for mistrial is subject to an abuse of discretion standard of review. Goodwin v. State, 751 So. 2d 537, 546 (Fla. 1999); Thomas v. State, 748 So. 2d 970, 980 (Fla. 1999); Hamilton v. State, 703 So. 2d 1038, 1041 (Fla. 1997). It is within the judge's discretion to control the comments made to a jury and the appellate court will not interfere unless an abuse of discretion is shown. Moore v. State, 701 So. 2d 545, 551 (Fla. 1997); Occhicone v. State, 570 So. 2d 902, 904 (Fla. 1990); Breedlove v. State, 413 So. 2d 1, 8 (Fla. 1982). Wide latitude is permitted in arguing to the jury.

Appellant contends that the prosecutor made an improper comment in his penalty phase opening statement and several improper comments in his closing argument, most of which were made without objection or complaint by appellant below - and hence should be deemed barred on this appeal.

III. The Opening Statement

Opening remarks are not evidence and the purpose of opening argument is to outline what the attorney expects to be established by evidence. Occhicone v. State, 570 So. 2d 902

(Fla. 1990). The trial court has discretion in controlling opening statements which are not evidence and appellate court will not interfere unless an abuse of discretion is shown. Fernandez v. State, 730 So. 2d 277 (Fla. 1999).

During the prosecutor's opening statement, the defense complained that the prosecutor should have approached the bench and sought permission to mention the 1994 incident with Burden. The court noted this was just an opening statement and asked what aggravators the state sought to use. The prosecutor answered they included in the course of a kidnapping, HAC, and CCP and that the Burden incident in 1994 was relevant to CCP. The court determined that the state was entitled to make a case of CCP but indicated it was undecided on whether to admit Burden's testimony (Vol. 37, R2304-06). Subsequently the court ruled that it would not allow Detective Soto to testify about the similar case involving Stanley Burden, noting:

> "I think it has some relevance, but at this juncture my belief is outweighed by the prejudice so I'm going to sustain the objection."
>
> (Vol. 37, R2350)

When the prosecutor mentioned his intent to introduce the testimony of the nurse who examined Burden at the hospital and the previous testimony of Conahan admitting to having a sexual encounter with Burden in the woods, the court indicated its

ruling would be the same:

> "Yeah, without more, I think it was relevant to guilt. It's clearly Williams Rule evidence. But in this context that we're here today, I believe it's little better relevant on the calculating issue. It's prejudicial, so I'm going to sustain the objection."
>
> (Vol. 37, R2351)

Appellant contends that the instant case is similar to Gore v. State, 719 So. 2d 1197 (Fla. 1998) and requires reversal. Appellee disagrees. In Gore, in a pretrial ruling on the admissibility of Williams-rule evidence the trial court permitted the state to introduce evidence of similar crimes against Corolis and Roark to establish Gore's identity as Novick's murderer but explicitly precluded the state from introducing details of what occurred after Gore left Tina Corolis for dead (he left the two year old child naked and locked in the pantry of a burned and abandoned house in freezing temperatures). The trial court's pre-trial ruling found the reference to details concerning the child would be prejudicial and outweigh any probative value. Thereafter, while cross-examining Gore and without first seeking the court's permission, the prosecutor asked inflammatory questions about the child's treatment, and again at closing argument referred to the child's kidnapping and abandonment as one of the reasons to disbelieve his testimony.

This Court found the prosecutor had blatantly disregarded the trial court's specific pre-trial ruling and that if the prosecutor believed the door had been opened he should first have requested the court to modify its earlier ruling. In light of the prejudicial evidence, as well as other improper questions and comments by the prosecutor, this Court reversed and remanded for a new trial.[7]

In the instant case, first of all, there was no blatant disregard of an earlier court ruling. In March of 1999 appellant filed a pretrial motion in limine urging in Paragraph 1 that the state introduce only relevant and material evidence relating to testimony of an alleged sexual contact between defendant and Stanley Burden (Vol. 10, R1935). The court denied the motion in limine subject to a proffer during trial in an order dated April 7, 1999 by Judge Cynthia Ellis (Vol. 10, R1971-72).

At the beginning of the bench trial on August 9, 1999 after a discussion on other matters, Judge Blackwell indicated he could not try the case piecemeal but since appellant had waived jury trial the defense could bring these things up rather freely

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[7]This Court has noted that relief is unavailable where the prosecutor's arguments are less severe than those present in Gore. See Freeman v. State, 761 So. 2d 1055, 1070, n. 14 (Fla. 2000)(rejecting claim of ineffective appellate counsel for failure to argue alleged improper prosecutorial argument referring to defense counsel's "gall" and "nerve").

(Vol. 25, R714). Subsequently the court permitted testimony about the Burden incident including testimony by Detective Soto (Vol. 28, R1119-28), Suzanne Hartwig and Stanley Burden (Vol. 29, R1133-45, R1145-1221). See also ruling on Williams- rule evidence of Burden (Vol. 34, R1843; Vol. 13, R2496-99). After Judge Blackwell determined that appellant was guilty of first degree murder and kidnapping, the parties convened again on November 1, 1999 to select a jury for penalty phase (Vol. 37, R2169-2295). While the prosecutor was making his opening statement, the defense complained that the prosecutor had not approached the bench for permission to discuss unruled upon matters in the Motion in Limine (R2304).

Quite unlike Gore where the prosecutor blatantly disregarded a specific pre-trial ruling concerning extremely prejudicial information, here the prosecutor had every reason to believe that testimony by and about the victim in the Burden incident would be admissible as it had been allowed following the trial court's admission of it in the guilt phase. There was no specific prior adverse ruling.[8]

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[8]The trial court certainly did not react as if there had been a blatant disregard of an earlier ruling (R2305), and in fact there was not. At a hearing prior to the penalty phase proceeding the trial court reserved ruling on Williams-Rule evidence "by requiring the state before it makes an offer or asks a question that would elicit Williams Rule testimony to approach the bench with defense counsel and let us argue at that point the admissibility of the proffered Williams-Rule evidence." (Vol. 36, R2159)(emphasis supplied). The trial court

Secondly, after the opening statement by both sides, the trial court indicated a concern about the Burden testimony - that the court was not ruling it in or out - and wanted to have a discussion about it outside the jury's presence before the prosecutor went into it (Vol. 37, R2336). Thereafter, pursuant to the court's instructions, the prosecutor approached the bench and after a discussion the court determined that the prejudice outweighed the probative value in the penalty phase context (R2349-51). The prosecutor complied with the trial court's ruling, unlike in Gore. The defense sought no additional relief.

Finally, the trial court instructed the jury and informed them they must make a decision based upon the testimony of the witnesses, the exhibits and the instructions (Vol. 39, R2634-2636). Thus, even if there had been error, the court cured it.

IV. The Closing Argument

Conahan complains about the following seven excerpts of the prosecutor's argument, most of which were not objected to:

> (1) And remember from the very beginning, the State told you, I told you, that it was not our intention to produce all the evidence that we have and, in fact, we are prohibited by law at this point in presenting all of the evidence being on the matter of guilt of the Defendant.
>
> (Vol. 39, R2580)

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did not state nor intend to so limit opening statements.

The prosecutor was obviously referring to his opening statement (which like this comment in argument was unobjected to) where he informed the jury that appellant had already been convicted of premeditated first degree murder and kidnapping of Richard Montgomery, that this case "comes to you in a very unique way" because the guilt phase had already been completed - the defendant had already been found guilty and "you will not concern yourself with the question of his guilt" (Vol. 37, R2298-99). The trial court had similarly informed the jury both during the voir dire selection process and prior to their hearing evidence that the guilt of the defendant had already been determined and that they were not to concern themselves with that (Vol. 37, R2179, R2294-95).

> (2) Now, the Court told you right at the beginning that the Defendant had been, in fact, convicted of First-degree Murder and Kidnapping. But it may be difficult since you're not permitted to see all of the evidence and see the entire picture to understand how the kidnapping bears on this particular murder.
>
> (Vol. 39, R2586)

This too was unaccompanied by any defense objection.

> (3) This weighing process that we have at this phase of the trial is weighing the aggravating factors against mitigating circumstances, so I'm going to first talk briefly about the mitigating circumstances.
>
> The reason I'm going to do that is because I'm going to encourage you to disregard those right up front. I'm going to ask you to disregard the mitigation that

you heard.

(Vol. 39, R2580-81)

There was no defense objection.

> (4) Clearly, early in his life, he was capable of and did do some good and commendable things. And yet, he makes this choice to do evil later in his life so hard to understand. He wasn't abused. He wasn't mistreated. There was no evidence of mental difficulties or substance abuse or drug abuse. No financial - -
>
> (Vol. 39, R2582)

The defense objected that it was improper for the prosecutor to argue mitigating factors that were not proven and the court overruled the objection noting the prosecutor could argue "all the evidence" (R2582).

> (5) The laws of the State of Florida provide that when certain aggravating circumstances characterize a particular murder and people are to be fairly and justly held accountable to their actions, only the highest form of punishment, the death penalty, will truly produce a sense of justice when these aggravating circumstances are present.
>
> (Vol. 39, R2585)

There was no defense objection.

> (6) I'll close with this: Mercy for a Defendant means nothing if we do not also honor justice for the victim. The statutory scheme in Florida attempts to strike a balance between the equally important values in our society of mercy to a defendant and justice to a victim.
>
> It attempts - -

(Vol. 39, R2603)

A bench conference followed. When the defense complained that this was an improper appeal to sympathies the prosecutor explained to the court:

> Where I'm going with this is the fact that the death penalty should not be applied in every case, nor should life in prison in every case, but rather in those cases where following the law the aggravating outweighs the mitigating. That's where I'm going with this. I think that's fair comment on the law.

(Vol. 39, R2604)

The court overruled the defense objection and denied a mistrial request (R2605).

> (7) The scales of justice in this country are kept in balance by the weight of fairness. By the weight of fairness. And fairness and justice in this case requires the highest penalty that the law would allow.

(Vol. 39, R2606)

There was no defense objection.

A. Procedural Bar

The excerpts quoted in (1), (2), (3), (5) and (7), supra, as indicated were not preserved by objection below and thus are procedurally barred. See, e.g. Rogers v. State, ___ So. 2d ___, 26 Fla. L. Weekly S115 (Fla. 2001); Mordenti v. State, 630 So. 2d 1080, 1084 (Fla. 1994); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982); Occhicone v. State, 570 So. 2d 902 (Fla. 1990);

Chandler v. State, 702 So. 2d 186, 195 (Fla. 1997); Zack v. State, 753 So. 2d 9, 22 (Fla. 2000); Goodwin v. State, 751 So. 2d 537, 544 (Fla. 1999) ("Our appellate cases are filled with examples of errors that are unpreserved either because no objection was made or because the objection was not specific. If the error is 'invited' or the defendant 'opens the door', the appellate court will not consider the error a basis for reversal").

Since the excerpts in (1), (2), (3), (5) and (7), supra, were not preserved for appellate review, Conahan can prevail only upon a showing that they (or any one of them) constitute fundamental error. McDonald v. State, 743 So. 2d 501, 505 (Fla. 1999) ("Fundamental error is defined as the type of error which reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error"); Mordenti, supra at 1084 ("For an error to be so fundamental that it can be raised for the first time on appeal the error must be basic to the judicial decision under review and equivalent to a denial of due process", quoting from State v. Johnson, 616 So. 2d 1, 3 (Fla. 1993)); Ashford v. State, 274 So. 2d 517, 518 (Fla. 1973) ("The appellate court should exercise its discretion under the doctrine of fundamental error very guardedly" quoting from Sanford v. Rubin, 237 So. 2d 134, 137 (Fla. 1970); Hopkins v.

State, 632 So. 2d 1372, 1374 (Fla. 1994). Moreover, to constitute fundamental error, improper comments made in the closing arguments of a penalty phase must be so prejudicial as to taint the jury's recommended sentence. Thomas v. State, 748 So. 2d 970, 985, n. 10 (Fla. 1999); Wyatt v. State, 641 So. 2d 355, 360 (Fla. 1994).

In McDonald v. State, 743 So. 2d 501 (Fla. 1999) this Court determined that several unobjected to statements by the prosecutor in the penalty phase closing argument did not rise to the level of fundamental error requiring the setting aside of the penalty phase proceeding. The statements challenged on appeal included asserted improper appeals to the emotions and fears of the jury to send a message to foreign citizens "not versed in the 'American' way of life," asserted "golden rule" comments forcing the jury to place themselves in the shoes of the victim. Id. at 504. Although this Court concluded the prosecutor's embellishment was without factual support in the record and thus an improper appeal to the emotions of the jurors and some comments came close to a golden rule violation, since they came during a discussion of the applicability of the HAC aggravator and thus appeared more to be a description of the heinousness of the crime, the Court merely admonished counsel to refrain from making argument asking the jury to consider what the victim must have felt. Id. at 505, n. 9. The Court added

that the defense argument about the "American way of life" was meritless. Id. at n. 10.

No fundamental error is present in the prosecutor's closing argument. As to excerpts (1) and (2), supra, appellee would submit that this Court has recognized that in the resentencing context:

> One of the problems inherent in holding a resentencing proceeding is that the jury is required to render an advisory sentence of life or death without the benefit of having heard and seen all of the evidence presented during the guilt determination phase. This problem manifested itself sub judice when one of the jurors, during voir dire, expressed concern to the court about his ability to decide a proper advisory sentence without having heard all of the evidence of appellant's guilt.

Teffeteller v. State, 495 So. 2d 744, 745 (Fla. 1986). The Teffeteller Court then explained the reason for rejecting the defense argument that the admission of a photograph of the victim into evidence was improper as it did not prove an aggravating circumstance:

> The issue, however, is broader than that framed by appellant. Section 921.141(1), Florida Statutes (1985), provides in pertinent part that in capital sentencing proceedings, "evidence may be presented as to any matter that the court deems relevant to the nature of the crime." We find that the photograph in question here clearly comes within the purview of the statute. We hold that it is within the sound discretion of the trial court during resentencing proceedings to allow the jury to hear or see

> probative evidence which will aid it in understanding the facts of the case in order that it may render an appropriate advisory sentence. We cannot expect jurors empaneled for capital sentencing proceedings to make wise and reasonable decisions in a vacuum. (emphasis supplied)

Id. at 745.

Accord, Valle v. State, 581 So. 2d 40, 45 (Fla. 1991); Way v. State, 760 So. 2d 903, 917 (Fla. 2000); Bonifay v. State, 680 So. 2d 413, 419 (Fla. 1996); Wike v. State, 698 So. 2d 817, 821 (Fla. 1997) (noting importance of familiarizing jury with the facts).

While the instant case is not a resentencing proceeding, the problem presented is identical where, as here, the initial jury selected only participated in the penalty phase and had not been exposed to the facts and circumstances of the crime in the guilt phase (because appellant chose a bench trial for guilt phase but a jury for penalty phase). Indeed, the instant record reflects the same frustration as in Teffeteller when at voir dire several prospective jurors expressed the view that it would be difficult or impossible to determine penalty since they had not participated in the guilt phase (Vol. 37, R2223, 2225, 2227, 2231, 2233, 2241, 2244, 2246, 2247, 2249, 2252, 2256, 2259, 2266-67, 2274, 2276).

In short - while it is certainly true in a different context when a jury is being asked initially to determine guilt or

innocence that it is improper for a prosecutor to urge conviction based on extra-record matters not presented at trial - there is no fundamental error in the instant situation (and appellee would submit no error at all) where the prosecutor is merely repeating the axiom that the court and jurors repeatedly had acknowledged more unfamiliarity with the case since they had not sat originally in the guilt phase. See Teffeteller, supra.

As to excerpt (3), supra, there is no fundamental error in the prosecutor's suggesting the jury disregard the mitigation they have heard because as the context makes clear he was suggesting only a momentary setting aside, that the only local person to see him recently (Betty Wilson) testified that he had a loving family and seemed to have the benefit of everything (R2581-82), that the jury should first consider whether one or more aggravating circumstances were established and then in turn consider any evidence tending to establish mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed (R2583)(emphasis supplied). The prosecutor then clarified his earlier remark: "Ladies and gentlemen, I encourage you to do just that. Give the weight that you feel it should receive. I suggest it should receive none." (R2583).

The state may properly argue that the defense has failed to

establish a mitigating death penalty factor and that the jury should not be swayed by sympathy. Valle v. State, 581 So. 2d 40, 47 (Fla. 1991). That is what the prosecutor did here.

As to excerpt (5), supra, there is no fundamental error. Appellant chooses to interpret the remark as the prosecutor suggesting the jury was required or compelled to recommend death because of the aggravators present citing Brooks v. State, 762 So. 2d 879, 902 (Fla. 2000). But the prosecutor's statement does not tell the jury they were required or compelled to recommend death; rather, he argued the presence of these three strong aggravators "should be your starting point as you look at the evidence" (R2585) and as he had stated earlier the jury should give the mitigating evidence "the weight that you feel it should receive" (R2583). When the prosecutor's comments are reviewed in context it is clear the Brooks error is not present (and helps explain why trial counsel did not object). Conahan's attempt on appeal to parse each statement and to consider each in isolation should result in a rejection of his fundamental error claim. A prosecutor's argument should be examined in context. Davis v. State, 698 So. 2d 1182, 1189 (Fla. 1997); Craig v. State, 510 So. 2d 857, 865 (Fla. 1987).

In excerpt (7), supra, there is no fundamental error, only a permissible argument that under the facts of this case fairness and justice call for the imposition of death. There is

no violation of Brooks. The prosecutor properly acted within his role as an advocate in explaining that death was the appropriate sanction.

B. The Comments Preserved for Appellate Review by Appropriate Objection.

Only two of the prosecutor's comments challenged here were preserved by objection below and neither considered singly or cumulatively merit reversal. As to excerpt (4), supra at R2582, the court overruled the defense objection that it would be improper for the state to argue mitigating factors which were not proven since the prosecutor could argue "all the evidence". Appellant mentions that the Eighth Amendment requires individualized consideration of the character and record of the defendant. The prosecutor did not deviate from that concern, but rather explained the nature and limitation of the mitigation offered and presented, and his comment was supported by the testimony presented to the jury (defense witness Betty Wilson testified without objection that appellant's parents gave him virtually everything he needed, they devoted a lot of time to him, active in the scouts; he had never been abused - he'd had the best family - (R2463-64)). In short, the prosecutor merely argued what the evidence in the case revealed. In closing arguments, logical inferences may be drawn and counsel is allowed to advance all legitimate arguments. Thomas v. State,

748 So. 2d 970 (Fla. 1999); Monlyn v. State, 705 So. 2d 1, 5 (Fla. 1997). His argument was based on the evidence presented. Hamilton v. State, 703 So. 2d 1038 (Fla. 1997).

As to excerpt (6), supra, the prosecutor explained that where he was going in his argument was to urge that the death penalty should not be applied in every case and that life imprisonment should not be applied in every case but rather death was appropriate where "the aggravating outweighs the mitigating" (R2604). Appellant merely recites in his brief that it is improper to appeal to the sympathies of the jurors and to attempt to inflame the jury. Appellee has no quarrel with that rather unexceptionable statement, only with the suggestion that the prosecutor's effort to explain the statutory scheme here constituted an attempt to inflame the jury. Rather than being inflammatory, the prosecutor correctly argued that:

> "....each case must be evaluated on the facts of that case as we look to what the law says in terms of aggravating circumstances and mitigating circumstances" (R2606).

Rather than urging that the jury was mandated or compelled to return a death recommendation, he merely urged that a review of the entire case - both aggravated and mitigated - made the imposition of the sentence of death the appropriate sanction in this case.

Even if any of the prosecutor's comments were now deemed

improper, such an isolated instance was not egregious enough to warrant voiding of the entire sentencing proceeding in a capital murder prosecution. Knight v. State, 746 So. 2d 423 (Fla. 1998).

Appellant's contention that reversible error appears is meritless. The lower court did not abuse its discretion.

ISSUE V

WHETHER THE TRIAL COURT ERRED REVERSIBLY BY ADMITTING ALLEGEDLY INFLAMMATORY PHOTOGRAPHS.

Admission of photographic evidence is within the sound discretion of the trial court and its ruling will not be disturbed on appeal absent abuse. Gudinas v. State, 693 So. 2d 953 (Fla. 1997). Further, the test for admissibility of such a photo is relevancy, not necessity. Pope v. State, 679 So. 2d 710 (Fla. 1996). Discretion is abused only when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court. Trease v. State, 768 So. 2d 1050, 1053, n. 2 (Fla. 2000) citing Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990).

Appellant next complains that at penalty phase the trial court committed error by admitting into evidence over defense objection state's exhibits 8-12, 27 and 31. The defense objected that exhibits 10-12 show rope burns on the victim's neck and flies on the body and that exhibits 8 and 9 depict that the victim's genitalia were removed (Vol. 38, R2375-76).[9] The prosecutor responded that the state was keeping the issues very

[9]The exhibits had previously been introduced in guilt phase. As the Court can note, only a limited number of exhibits were introduced at penalty phase, in contrast to the guilt phase.

narrow and they were showing the jury “precious little” of what happened to the victim, that the jury was entitled to view the condition of the body when found by law enforcement in the woods since the description by the medical examiner did not have the same authenticity, that the bruising of the body from rope marks was visible at the crime scene (not merely at the autopsy scene), and that the photographs of the removed genitalia were relevant to show the CCP aggravator - along with the purchase of the knife at Wal-Mart - that it was a planned killing not merely a bondage photo session (R2377-78). The careful excision of the genitals - as opposed to a frenzied emotional attack - also related to the CCP factor. The court allowed the jury to see photo exhibits 8-12 (R2380, 2385). The court overruled the defense objection that exhibit 27 was highly inflammatory (R2405) and Dr. Huser explained that the photo depicted Montgomery’s lateral left hip and thigh. There were marks, some scrapes and scratches on the lateral buttocks (R2406). Appellee would submit that the defense objection to exhibit 27 is not well taken, as it does not inflammatorily depict amputation. As to exhibit 31 the prosecutor explained the purpose of its introduction was twofold - the CCP factor as it relates to the purchase of the knife and also that the doctor would testify it was done with an extremely sharp instrument and it was not a frenzied hacking but rather a precise, malicious incision and

thus showed heightened premeditation. The court permitted the exhibit and testimony (R2409-11). Additionally, it would appear that Conahan abandoned his prior objection to exhibits 10-12 and 27 when, following the court's instructions to the jury, appellant renewed his objection to sending to the jury only the previously objected to exhibits 8, 9, 31 and 32 (Vol. 39, R2645).

The instant case is unlike two of this Court's rulings. In Almeida v. State, 748 So. 2d 922 (Fla. 1999) this Court determined that the medical examiner testified that the autopsy photo of a gutted body cavity was relevant to show the trajectory of the bullet and nature of the injuries but neither point was in dispute and admission of the inflammatory photo was gratuitous, but that the error was harmless. Id. at 930. In Ruiz v. State, 743 So. 2d 1 (Fla. 1999) the Court found it improper to introduce an inflammatory photo of the corpse - a two by three foot blow-up of the victim's upper body revealing in detail the bloody and disfigured head and upper torso - during the penalty phase. The prosecutor provided no relevant basis for submitting the blow-up photo (HAC was not at issue in that gunshot death) and a standard size photo from which the blow up was made had already been shown to the jury during the guilt phase. The Court concluded that the photo was offered simply to inflame the jury and the record showed the trial was

permeated by other egregious and inexcusable prosecutorial misconduct.

This Court has repeatedly stated that the admission of photographic evidence is within the trial judge's discretion and will not be disturbed on appeal unless there is a clear showing of abuse. Gudinas v. State, 693 So. 2d 953, 963 (Fla. 1997); Pangburn v. State, 661 So. 2d 1182, 1187 (Fla. 1995); Wilson v. State, 436 So. 2d 908 (Fla. 1983). And the test for admissibility is relevancy rather than necessity. Pope v. State, 679 So. 2d 710, 713 (Fla. 1996), Unlike Ruiz, supra, the photos challenged here were relevant to a proposed aggravator, CCP, (as well as HAC) for the jury's consideration. See Willacy v. State, 696 So. 2d 693 (Fla. 1997) (penalty phase evidence of photos depicting victim proper to show aggravating factors of HAC and CCP); Henyard v. State, 689 So. 2d 239, 253 (Fla. 1996) (testimony of blood stain pattern analyst concerning close proximity of defendant to victim was relevant to show the "nature of the crime", § 921.141(1), Fla. Stat.); Rutherford v. Moore, ___ So. 2d ___, 25 Fla. L. Weekly S891, 893 (Fla. 2000) (rejecting claim of ineffective assistance of appellate counsel for failure to raise on appeal the improper admission of gruesome photos since the photos introduced at penalty phase were relevant to show the circumstances of the crime and the nature and extent of the victim's injuries, and even if there

were error it would be harmless and there was no showing that any deficiency in counsel's performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result). See also Parsonson v. State, 742 So. 2d 858 (Fla. 2d DCA 1999) (photographs are admissible to explain the nature and location of the victim's wounds and the cause of death); Grey v. State, 727 So. 2d 1063 (Fla. 4th DCA 1999) (photographs were relevant to issues of nature and extent of injuries, nature of force of violence used and premeditation or intent); Engle v. State, 438 So. 2d 803 (Fla. 1983) (that there was no dispute regarding occurrence of crime or cause of death did not preclude admission of photographs of homicide victim since defendant could not, by stipulating as to identity of victim and cause of death, relieve state of its burden of proof beyond a reasonable doubt); U.S. v. Yahweh, 792 F. Supp. 104 (S.D. Fla. 1992) (probative value of photos not outweighed by danger of unfair prejudice even though decapitation, slit throats, removed ears, repeated stabbings and gun shot wounds were disturbing and distasteful); Preston v. State, 607 So. 2d 404 (Fla. 1992) (gruesome nature of photographs does not render them inadmissible); Halliwell v. State, 323 So. 2d 557 (Fla. 1975) (gruesome photos of victim's dismembered body were relevant and properly shown to jury); Peterka v. State, 640 So. 2d 59 (Fla. 1994) (even if photograph of victim's decomposed

skull, which was relevant to medical examiner's testimony that not enough tissue remained in skull to determine proximity of gun to murder victim's head, was erroneously admitted the error was harmless).

In the instant case the photographs were relevant to a material contested issue. The aggravators urged by the prosecutor included HAC, CCP and homicide committed during a kidnapping. The photographs of the body at the crime scene show the nature of the crime, the wounds inflicted including those showing that the victim struggled to resist in this kidnapping murder. Even the photos depicting the body with amputated genitalia were relevant to demonstrating the CCP factor and that this was not a frenzied attack but rather a planned, precise, malicious incision. Conahan has no legitimate complaint. As this Court has reminded the Bench and Bar:

> Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments.

Henderson v. State, 463 So. 2d 196, 200 (Fla. 1985); Teffeteller v. State, 495 So. 2d 744, 745 (Fla. 1986) (The essence of appellant's claim here is that the photograph was not relevant to prove any aggravating or mitigating factor and should, therefore, not have been admitted. The issue, however, is broader than framed by appellant. Section 921.141(1), Fla. Stat. (1985), provides in pertinent part that in capital

sentencing proceedings “evidence may be presented as to any matter that the court deems relevant to the nature of the crime”.). See also Muehleman v. State, 503 So. 2d 310, 317 (Fla. 1987) (“we cannot, however, rewrite on the behalf of the defense the horrible facts of what occurred or make the slaying appear to be less reprehensible than it actually was.”); Halliwell v. State, 323 So. 2d 557, 560 (Fla. 1975) (“Those who create crimes of violence often must face the record of their deeds in court”)[10].

Finally, the claim is meritless - in the sense of the photos being unduly prejudicial (it is harmless error if there is any merit) - since the medical experts were in agreement that this excision was a post-mortem act and therefore adds nothing to the HAC character of the crime. See Halliwell,, supra. If it is urged that an emotional impact on the jury results to return a severe sanction on one who would dismember the body, appellee answers that the unanimous jury recommendation of death was undoubtedly predicated on the brutal, premeditated strangulation death of the young man who was vulnerable and unable to resist because he was tied up and in the absence of any serious and

[10]In Halliwell, while it is true that the Court found the dismemberment of the body hours afterward not the type of misconduct contemplated by the legislature in providing for HAC, the Court added “If mutilation had occurred prior to death or instantly thereafter it would have been more relevant in fixing the death penalty”. 323 So. 2d at 561.

meaningful mitigation presented to the jury (the inconsequential trivia that the defendant was a nice guy has been routinely rejected by this Court even in jury override cases, see Coleman v. State, 610 So. 2d 1283, 1287 (Fla. 1992); Washington v. State, 653 So. 2d 362 (Fla. 1995)), the resultant jury recommendation still would have been unanimous, or perhaps eleven to one, had the questioned photos been excluded. Additionally, the trial court stated in its sentencing findings that it was not considering the photographs in aggravation or for "any other aspect of this case" (Vol. 18, R3288), and three strong, valid aggravators are present; consequently, any error was harmless. See Almeida, supra, Rutherford, supra, Peterka, supra. Relief must be denied.

Proportionality

This Court recently stated in Robinson v. State, 761 So. 2d 269 (Fla. 1999):

> Upon review, we find that death is the appropriate penalty in this case. In reaching this conclusion, we are mindful that this Court must consider the particular circumstances of the instant case in comparison with other capital cases and then decide if death is the appropriate penalty. *See Sliney v. State*, 699 So. 2d 662, 672 (Fla. 1997)(citing *Terry v. State*, 688 So. 2d 954, 965 (Fla. 1996), *cert. denied*, 118 S.Ct. 1079 (1998)); *Livingston v. State*, 565 So. 2d 1288, 1292 (Fla. 1988). Proportionality review is not simply a comparison between the number of aggravating and mitigating circumstances. *Terry*, 668 So. 2d at 965. Following these established

> principles, it appears the death sentence imposed here is not a disproportionate penalty compared to other cases.*9* (footnote omitted) *See Spencer v. State*, 691 So. 2d 1062 (Fla. 1996); *Foster v. State*, 654 So. 2d 112 (Fla. 1995).
>
> (Id. at 277-278)

In performing its proportionality review function the Court must "consider the totality of the circumstances in a case and ... compare it with other capital cases." Nelson v. State, 748 So.2d 237, 246 (Fla. 1999); Proportionality review requires a discrete analysis of the facts entailing a qualitative review by the Court of the underlying basis for each aggravator and mitigator, rather than a quantitative analysis. Urbin v. State, 714 So. 2d 411 (Fla. 1998); Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990); It is not a comparison between the number of aggravating and mitigating circumstances. The Court must consider and compare the circumstances of the case at issue with the circumstances of other decisions to determine if death penalty is appropriate.

Moreover, proportionality review function is "not to reweigh the mitigating factors against the aggravating factors; that is the function of the trial judge." Holland v. State, ___ So. 2d ___, 25 Fla. L. Weekly S796 (Fla. 2000); Bates v. State, 750 So. 2d 6 (Fla. 1999).

As stated in Beasley v. State, 25 Fla. L. Weekly S915, 923

(Fla. 2000):

> In capital cases, "it is this court's responsibility to insure that the trial judge remains faithful to the dictates of Section 921.141, Florida Statutes in the sentencing process." *Randolph v. State*, 463 So. 2d 186, 194 (Fla. 1984)(quoting from *Mikenas v. State*, 367 So. 2d 606, 610 (Fla. 1978)). However, this Court has recognized that its appellate role is sentence review, not sentence imposition. *See Randolph v. State*, 463 So. 2d 186, 193 (Fla. 1984)(citing *Brown v. Wainwright*, 392 So. 2d 1327, 1331 (Fla.), *cert. denied,* 454 U.S. 1000 (1981); *Mikenas v. State*, 367 So. 2d 606, 610 (Fla. 1978)(observing that "[i]t is not the function of this Court to cull through what has been listed as aggravating and mitigating circumstances in the trial court's order, determine which are proper for consideration and which are not, and then impose the proper sentence"; rather, "[i]n accordance with the statute, the culling process must be done by the trial court"). Upon that review, it appears that compared to other cases, the death sentence imposed here is not disproportionate.
>
> As discussed above, the trial court applied the correct rule of law in making its findings regarding the HAC and pecuniary gain/robbery aggravators, and in according weight to those factors. Further, the record supports the trial court's findings regarding aggravating and mitigating factors. Here, the trial court, after carefully considering the aggravating and mitigating factors, concluded that "[t]he mitigating factors, while lengthy, when weighed in their totality, [do] not outweigh the aggravating circumstances. The aggravating circumstances far outweigh the mitigating circumstances presented."

* * *

Lastly, Beasley asserts that his case is similar to *DeAngelo. DeAngelo* involved a

> strangulation death in which the State failed to prove beyond a reasonable doubt that the victim was conscious during the ordeal. In reaching this conclusion, the trial court "focused on the absence of defensive wounds, the lack of any evidence that there was a struggle, the presence of a substantial amount of marijuana in [the victim's] system, and the medical examiner's testimony as to the possibility that, at the time she was strangled, [the victim] was unconscious." 616 So. 2d at 443. On appeal, this Court refused to disturb the trial court's ruling that HAC had not been proven. Here, in contrast, the trial court's finding of HAC was properly accorded "very great weight." Thus, *DeAngelo*, too, is distinguishable. We conclude that the death penalty imposed here for this particularly brutal murder is proportionate when compared with other cases in which a death sentence has been upheld. *See Sliney v. State,* 699 So. 2d 662 (Fla. 1997); *Spencer v. State*, 691 So. 2d 1062 (Fla. 1996); *Foster v. State*, 654 So. 2d 112 (Fla. 1995).

In the instant case the trial court applied the correct rule of law in making its findings on the aggravating and in according weight to those factors; the record supports the trial court's findings regarding aggravating and mitigating factors. And unlike DeAngelo v. State, 616 So. 2d 440 (Fla. 1993), here HAC was established and there is substantial evidence that the victim struggled while bound and was conscious at the time.

The death penalty is proportionate to this strangulation murder, as it was in Blackwood, supra, and Orme, supra.

CONCLUSION

Based on the foregoing arguments and authorities, the judgment and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Paul C. Helm, Assistant Public Defender, P.O. Box 9000–Drawer PD, Bartow, Florida 33831-9000, this _____ day of March, 2001.

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CERTIFICATE OF TYPE SIZE AND STYLE

This brief is presented in 12 point Courier New, a font that is not proportionately spaced.

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