IN THE SUPREME COURT OF FLORIDA

DANIEL O. CONAHAN, JR., :

Appellant, :

vs. : Case No. SC00-170

STATE OF FLORIDA, :

Appellee. :

_____:

APPEAL FROM THE CIRCUIT COURT
IN AND FOR CHARLOTTE COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF TYPE USED

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STATEMENT OF THE CASE

On February 25, 1997, the Charlotte County Grand Jury indicted the appellant, Daniel O. Conahan, Jr., for four offenses allegedly committed upon Richard Montgomery on April 16, 1997: Count I, first-degree premeditated murder; Count II, first-degree felony murder during the commission of or attempt to commit kidnapping; Count III, kidnapping with intent to commit or facilitate the commission of sexual battery; and Count IV, sexual battery. [V1 1-2][1]

On August 9, 1999, Conahan waived his right to a jury trial for the determination of his guilt, and the case proceeded to trial before Twentieth Circuit Judge William L. Blackwell. [V12 2249-50; V25 647-65] At the close of the state's case, the court granted defense counsel's motion for judgment of acquittal on Count IV, sexual battery. The court denied defense counsel's motion for judgment of acquittal on the other three counts. [V34 1849-74] Following closing arguments, the court found Conahan guilty of Count I, first-degree premeditated murder, and Count III, kidnapping. [V35 2016]

The court granted defense counsel's motion for change of venue to Collier County for the penalty phase jury trial, which was conducted on

[1] References to the record on appeal are designated by V and the volume number, followed by the page number(s). References to the appendix to this brief are designated by A and the page number.

November 1-3, 1999. [V13 2518-21; V15 2817; V37 2166] The jury recommended a death sentence by a unanimous vote. [V17 3235; V39 2646]

The court conducted a Spencer[2] hearing on November 5, 1999. [V39 2652] When defense counsel explained that there were several factual inaccuracies in the Presentence Investigation Report, the court said it had reviewed the PSI, but would not consider anything in the report in imposing sentence. [V17 3231; V39 2654-58] Montgomery's brother and mother read victim impact statements to the court. [V39 2659-68] Conahan told the court that he did not know or kill Montgomery, alleged misconduct by the police and prosecutor, and claimed an alibi for the collateral offense involving Burden. [V39 2669-81] Counsel for both parties provided the court with sentencing memoranda. [V17 3250-69; V39 2682-83]

On December 10, 1999, the court sentenced Conahan to death for Count I, first-degree premeditated murder, and to fifteen years in prison for Count III, kidnapping. [V18 3282-91, 3297-3303; V39 2685-97; A 1-5] The State nol prossed Count II, first-degree felony murder. [V18 3283] The sentencing guidelines provided a sentencing range of 48 to 80 months for kidnapping, but the court gave no written reason for a departure sentence. [V18 3293-96]

In support of the death sentence, the court found three aggravating circumstances: (1) the murder was committed during the commission

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[2] Spencer v. State, 615 So. 2d 688, 690-91 (Fla. 1993).

of a kidnapping; (2) the murder was cold, calculated, and premeditated (CCP); and (3) the murder was heinous, atrocious, or cruel (HAC). [V18 3287-89; V39 2688-92; A 1-3] The court rejected the statutory mitigating circumstance that the victim was a participant in the defendant's conduct or consented to the act.[3] [V18 3289; V39 2692-93; A 3] The court found four nonstatutory[4] mitigating circumstances by combining circumstances proposed by the defense: (1) Conahan was a loving son who displayed loyalty, affection, and service to his parents (some weight); (2) he worked to improve himself by enrolling in nursing school (some weight); (3) he had good, helpful relationships with his aunt Betty Wilson and the members of the Linde family (some weight); (4) he is hard working (little weight). [V18 3289-90; V39 2693-95; A 3-4] The court rejected the nonstatutory mitigating circumstance that Conahan had an open, unselfish, polite personality on the ground that he used these traits to his own purposes and to lure Montgomery to his fate. [V18 3290; V39 2695; A 4]

On December 17, 1999, the court granted defense counsel's motion to correct sentence and reduced the kidnapping sentence to 80 months. [V17 3276-81; V18 3307] On January 7, 2000, defense counsel filed

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[3] Section 921.141(6)(c), Fla. Stat. (1995).

[4] These "nonstatutory" mitigating circumstances were considered pursuant to section 921.141(6)(h), Fla. Stat. (1995), so they are actually statutory circumstances.

Conahan's notice of appeal. [V18 3333] This Court has jurisdiction pursuant to article V, section 3(b)(1), Florida Constitution.

STATEMENT OF THE FACTS

THE GUILT PHASE TRIAL

The State's Case

On April 17, 1996, two Charlotte County engineers discovered a human skull, later identified as Kenneth Smith, in a remote wooded area used as a dumping ground. They notified two sheriff's deputies. [V26 750-77, 794-97, 802, 832-33; V30 1358] Officers who responded to the scene searched the area and discovered the body of Richard Montgomery covered with a piece of discarded carpet padding. [V26 787-92, 797-99, 803-04, 808-09, 847-53]

A police dog trained to detect human scents alerted to a 10 foot sable palm tree which appeared to be flattened on one side. [V26 817-22] Investigators collected Smith's torso and body parts, wrapping them in sheets, from which fibers were later collected. [V26 834-46; V27 874-75; V30 1356-57, 1361, 1367, 1370; V31 1384, 1390-91, 1394, 1397-1400] They collected a piece of rope lying on top of some carpet pad in a trash pile, [V26 853-860, 901; V31 1389, 1410] the carpet pad from Montgomery's body, [V27 872, 901; V31 1388, 1394] the sheet used to transport Montgomery's body to the morgue, [V27 872-73; V31 1389, 1395-96] combings from Montgomery's arms, hands, arm pits, chest, abdomen, pubic area, thighs, and legs, [V27 875-76, 899-900; V31 1391-92, 1404-05] fibers found on Montgomery's head, [V27, 876, 895] fibers found on Montgomery's right hand, [V27 898] known pubic and head hairs

from Montgomery, [V27 899] fibers found on Smith's skull, [V27 877; V31 1391-92, 1402-04] known hairs from Smith's skull, [V27 899-900, 903-04; V31 1391-92, 1405] fiber from lumbar spine, hair sample from Smith's body, [V27 900] and a gray coat found in the water at the scene. [V27 880-81, 890; V30 1347-53; V31 1391, 1400-01]

Dr. R. H. Imami, the District 22 Medical Examiner, examined Montgomery's body at the scene and performed the autopsy. [V27 907-15] The body was a nude white male, about 21 years old, 5 feet 10 inches tall, weighing 138 pounds, with slightly long brown hair, blue eyes, normal body hair, no facial hair, a flat abdomen, and average body fat. [V27 914-18] There were two ligature marks on the neck, 1/4 inch grooves in the skin caused by rope. [V 921-24, 939] Hemorrhage within the underlying tissue showed that these neck injuries occurred before death. Internal examination of the lungs revealed additional evidence of death by asphyxiation. [V27 937] Dr. Imami concluded that the cause of death was asphyxiation secondary to strangulation. [V27 939]

Additional injuries included a small scrape on the left side of the face. [V27 919] There were two 1/4 inch grooves on the lower chest and sides, but not on the back, which could be consistent with being tied to a tree or post. [V27 923-25] These were antemortem (before death) injuries. [V27 938-39] There were two grooves on the abdomen. [V27 925] There were crisscrossed skin abrasions on the lower back, which Dr. Imami believed to be postmortem (after death)

injuries, but they could have been made at the time of death. [V27 926-27] These scrapes could have been caused by the body moving against a tree or post. [V27 928] There were three scratches on the lower chest. [V27 928-29] There were crisscross scratches on the upper back and the left buttock. [V27 929-31] There were abrasions on the right hand, and ligature marks on the wrists and lower legs. [V27 933-34] The external genitalia had been cut off with a sharp knife after death. [V27 934-36, 938] The anus was dilated one inch more than normal, which was consistent with a sexual assault. [V27 936] However, Dr. Imami did not think there had been recent anal intercourse. [V27 946-47] There was no recent physical trauma to the rectal opening. [V27 944-45, 947] No sperm were found in the rectal area, nor in the mouth. [V27 945] There is some dilation of the sphincter in any postmortem case, and dilation could also be caused by constipation or the frequent insertion of objects. [V27 943-45] Matthews had a slightly elevated blood alcohol level of .06 at the time of the autopsy. [V27 942] Officers collected a white towel that had been placed over Montgomery's face when the body was transported, the sheets used to wrap the body, [V30 1368-39; V31 1392, 1409] and two vials of Montgomery's blood. [V31 1413]

Mary West was a nurse and Richard Montgomery's mother. Montgomery lived with his sister Carla and her husband Jeff in April, 1996. Before that, he had lived with West, her father, and her other son

Danny; he also lived in his own apartment or trailer for awhile, and with Mr. Whittaker. [V28 1097, 1103-05] Montgomery was 21 years old; he was born on March 6, 1975, in Willard Ohio. [V28 1098, 1102] He was almost six feet tall and weighed between 150 and 160 pounds; he was muscular, wiry, and thin. [V28 1098] Montgomery had a fair complexion, a suntan, and little body hair; he was trying to grow a mustache. He had a problem being employed and had quit a job with a roofing company. [V28 1099] He was fired from other jobs for partying and missing work. He was arrested as a juvenile. [V28 1101] He had struggled with school work. [V28 1099-1100] He was emotionally handicapped and had been in and out of therapy. He was often truant from school and quit when he was 18 without receiving a high school diploma. [V28 1100] He had trouble with alcohol and smoked marijuana. [V28 1100-01] Montgomery told West on January 6, 1993, that he had been sexually abused. At other times he denied it. [V28 1101] His only substantial possessions were a gold necklace and a stereo. He had a happy-go-lucky attitude. West bought him a truck, but she took it away because he had numerous speeding tickets. [V28 1102] Montgomery got around by riding his bicycle or by getting rides with friends. He was a trusting person after drinking alcohol. [V28 1103] Whittaker came to Montgomery's funeral and appeared to be emotionally upset. [V28 1107-09] Montgomery had told West he did not like the way Whittaker stared at him, he felt uncomfortable. [V28 1109]

West never met Conahan. [V28 1105] The last time West saw Montgomery, on March 23, he told her he had a new friend named Conahan, who lived in Punta Gorda Isles, had been in the Navy, was a nurse at a medical center where West had worked, and was much older than Montgomery. [V28 1106, 1109-10] In the same conversation, Montgomery said someone had offered him $200.00 to pose for nude pictures, but he refused to tell her who. She told him that a person with a psychopathic personality would lure out someone like him, who is trusting and naive, and sexually abuse and kill him. Conahan interrupted West's testimony and accused her of being a liar. [V28 1110] West said her son did not believe her; he said no one would kill him, he would kill them first. [V28 1111] West thought she told the police about the conversation about Conahan in her statement on April 18, 1996, but a transcript indicated that part of her statement was inaudible. [V28 1106-07, 1112-17]

Jeff Whisenant had been married to Richard Montgomery's sister Carla. Montgomery lived with them in a trailer park on Royal Road for four to six months in 1995 and 1996. [V27 950-53, 956] Montgomery liked to party -- to drink beer and have a good time with his buddies. He used alcohol regularly. [V27 952] He also used drugs. Whisenant helped Montgomery get a couple of jobs, but he had difficulty holding a steady job. He did not have a car, so he either walked or got rides from Whisenant or Carla. Sometimes Montgomery stayed with his mother.

[V27 953] He stayed with a friend, Bobby Whittaker, for about two weeks. [V27 953, 957] Montgomery complained that Whittaker watched him in the shower and asked him to have oral sex, so Whisenant told him to come home. [V27 958, 961] Around 4:30 p.m. or later on Tuesday, April 16, 1996, Whisenant was returning home from work with Ray when he saw Montgomery walking towards Cox Lumber at the corner of Royal Road and Taylor Road. Ray honked the horn. Montgomery waived his hand and kept walking. [V27 954-55, 967-68]

Gary Maston met Richard Montgomery at Bobby Whittaker's trailer about two weeks before he was killed. [V27 969-71] On Tuesday, April 16, 1996, Maston saw Montgomery at Whittaker's trailer between one and four in the afternoon. Montgomery said he was going out to make some money and would return in about half an hour. Whittaker asked if it was legal. Montgomery responded that if it wasn't legal he would tell him, then smiled. [V27 971-75, 977-78, 980] Montgomery might have been under the influence of alcohol, but he walked fine. [V27 979]

Robert Whittaker met Richard Montgomery about six months before he was killed. Montgomery lived with him for about a month and a half. In April, 1996, Montgomery was living with his sister at the front of the trailer park. [V27 981-83] Montgomery was outgoing and caring, but mentally slow. He could not keep a job for very long. Montgomery drank on a daily basis if he could get alcohol from someone. He did not own a car. [V27 983-85] Whittaker met Daniel Conahan through a

friend named Jeff Dingman about two years before he met Montgomery. Conahan came to Whittaker's trailer to see Dingman about three times. Conahan came to the trailer to see Montgomery one time while Montgomery was living with Whittaker, about two and a half to three months before he was killed. Conahan said Carla told him he was there. [V27 985-88, 991-93] Whittaker saw Montgomery at his trailer while Maston was there around 7:00 to 8:00 p.m. on April 16, 1996. Montgomery said he was going to go make some money, about $200, and he would be back in two hours. Whittaker asked if it was legal. Montgomery smiled and said he would be safe. He never returned. [V27 988-90] In a statement to the police on April 18, 1996, Whittaker said Montgomery left at 6:30 p.m. on April 16. [V27 1007]

Business records from the Wal-Mart store on U.S. Highway 41 in Punta Gorda showed a purchase at 6:07 p.m. on April 16, 1996, of a package of clothesline, Polaroid film, pliers, and a utility knife for a total of $31.08 using credit card number 4428-1350-1436-8591. [V28 1017-25] City Bank Choice Visa records showed that this purchase was made on Daniel O. Conahan's account. [V28 1040-44] Law enforcement officers used the UPC codes from the receipt to purchase samples of the same merchandise. [V28 1025-27] Another receipt showed that Daniel O. Conahan made a $10.56 credit card purchase at the same store at 3:41 p.m. on August 15, 1994. [V28 1027-32]

Nations Bank records showed a $40.00 ATM cash withdrawal from Daniel O. Conahan's account on April 16, 1996, at the bank located at 100 Madrid Boulevard, Punta Gorda. [V28 1046-50] The bank was on the corner of Madrid and 41 by Juicy Lucy and a Mobil station. The Wal-Mart store was nearby, just north of the bank. [V28 1057-58] Still photographs taken from the ATM video surveillance film showed Conahan making the withdrawal at 6:12 p.m. on April 16, 1996. [V28 1058-66, 1069, 1082-83]

Bank records also showed a May 6, 1996, payment of $105.00 to Conahan's City Bank Choice Visa account by a check drawn on Conahan's Nations Bank checking account. [V28 1043, 1051-52] Nations Bank records also showed a check for $20.00 paid to Bank One Visa account number 4332-1691-4012-6966 from Conahan's account in 1994, and a check for $30.00 to the same Bank One Visa account between 8/22/94 and 9/23/94. [V28 1053-55] Bank One Visa records for Daniel Conahan's account, which had the same number, showed a $10.56 purchase at Wal-Mart on August 15, 1994, and a payment on the account on September 8, 1994. [V29 1235-39]

Florida State Prison inmate John Newman, who was serving sentences for manslaughter and marijuana at the time of trial, met Daniel Conahan while sharing a cell in the Lee County Jail for seven or eight months. [V28 1072-73] Conahan was being held on kidnapping and sexual battery charges from a Fort Myers case. He kept most of his discovery and

other papers concerning his case in the cell. [V28 1076-77] Newman had been indicted for first-degree murder. [V28 1077] He negotiated a deal for a 12 year sentence to run concurrently with a previously imposed 10 year sentence in exchange for his testimony against Conahan. [V28 1074-75, 1077-79] Newman testified that Conahan originally said he did not know Richard Montgomery. Later, Conahan said he did know Montgomery, that they went on a few beer runs. [V28 1073] He said he had been to Montgomery's house on several occasions and knew his sister. He said he and Montgomery went to the bank. He said, "Montgomery was a mistake." [V28 1074]

Harold Linde met Conahan in a bar in Chicago. They had a gay relationship and lived together in Chicago from 1988 through 1992. [V28 1084-86] Conahan told Linde about a sexual fantasy -- that he would "like to pick up a boy hitchhiking, go in the woods, tie him to a tree and fuck him." [V28 1086-87] Linde accused the prosecution of making a big thing out of nothing; he did not believe Conahan was guilty. [V28 1088] Conahan never asked Linde to go out in the woods to tie him up and have sex, and never told him he had done this with someone else. [V28 1089-90] Conahan mentioned the fantasy only one time. [V28 1090-91] Their relationship did not involve any type of bondage. Each of them went their separate ways and dated other people. [V28 1090] Conahan did not discuss any other sexual fantasies. [V28

1091] Linde was still in love with Conahan at the time of trial. [V28 1092]

On the evening of August 15, 1994, Suzanne Hartwig, an emergency department technician at Lee Memorial Hospital, examined and treated Stanley Burden. Burden had two abrasions around the neck, scrapes on his back and chest, and abrasions around his wrists and ankles. [V29 1133-37] Burden said he was assaulted by a man named Dan, who tried to kill and rape him. [V29 1141] Fort Myers Police Detective Pedro Soto met with Burden at the hospital that evening. Burden had a raw, bloody ligature mark on his neck. Burden gave Soto a small pair of red-handled pliers. Soto felt that Burden did not tell him the whole story of what had happened. They attempted to find the place where it happened, but they were unable to find it in the dark. [V28 1119-28]

At the time of trial, Stanley Burden was serving prison sentences for two felony convictions in Ohio. He was born on March 18, 1970, was five feet ten inches tall, weighed around 140 to 145 pounds, had blond hair and blue eyes, not much body hair, a light mustache, a flat abdomen, and a tan complexion. In 1994, he was an unemployed high school drop-out who had difficulty keeping a steady job. He occasionally used alcohol. As a juvenile he had been arrested for riding a moped without a license. He was raised by his grandmother in Ohio. He was bisexual. In 1994, he broke a bone in his foot while working, had

to wear an orthopedic shoe, and was unable to work except for a "sit-down type job." [V29 1145-54]

On August 15, 1994, Burden met Daniel Conahan while leaving a restroom at Lions Park in Fort Myers. Later, Burden walked to a street corner by a hamburger restaurant and encountered Conahan in a light-colored Plymouth or Dodge station wagon with a red and green interior and dark-tinted windows. [V29 1154-55, 1189-96] Burden accepted Conahan's invitation to get in the car. Burden also accepted Conahan's offer to pay him $100.00 to $150.00 to pose for nude photographs. [V29 1155-57, 1195-96] Conahan drove past a trucking company to a rocky dirt road at the end of Edison Street. He stopped and offered to pay $20.00 for allowing him to perform oral sex on Burden. When Burden agreed, Conahan parked by a pile of rubbish. They got out in a secluded grassy area with melaleuca trees. [V29 1157-59, 1195, 1198-99] Conahan took out a duffle bag containing a tarp and camera. They went 15 to 30 feet into the woods. Conahan spread the tarp on the ground and told Burden to remove his shirt and "show a little bit of hip." Conahan took Polaroid photos while directing Burden to pose. Burden took his pants down to his knees. [V29 1160-61, 1199]

Conahan took out some new clothesline-type rope, said he wanted to take some bondage photos, and directed Burden to stand by a tree. He used red-handled wire cutters to cut the rope. He draped pieces of rope around Burden. Conahan went behind Burden and "snapped" the rope,

causing it to tighten around Burden so that he was tied to the tree. [V29 1162-64, 1181, 1213] Conahan performed oral sex on Burden and attempted anal penetration. Burden resisted by shifting his body against the tree. [V29 1164-66] Conahan then put his foot against the back of the tree and snapped the rope around Burden's neck. Conahan hit the back of Burden's head, asking him why he wouldn't die. [V29 1166-67, 1181, 1214-15] Conahan tugged at the ropes for a half hour, then gave up. He gathered up everything except the wire cutters, which Burden picked up and used to cut himself loose. Conahan asked if Burden still wanted the $100.00, then left. [V29 1168-69, 1213-16] Burden went to the trucking company. An old man drove him to the hospital in a truck. The police came to the hospital. They were unable to locate the scene that night, but they found it the next day. [V29 1170-71] Burden lied to the police and told them Conahan took him out to the woods to clear out melaleuca trees, then hit him in the face and tied him to a tree. [V29 1200-01] Burden also told the police he was an habitual liar and believed he could pass a polygraph. [V29 1218-19]

Fort Myers Police Detective Timothy Gershner met with Burden at 8:30 a.m. on August 16, 1994. Burden led Gershner to a stand of melaleuca trees in a wooded area off of Rockville Road. They found some rope and bark at the base of a melaleuca tree with ligature

indentions in the tree. [V29 1222-27] Gershner was unable to determine who committed the offense. [V29 1227-28]

On the afternoon of May 17, 1996, Charlotte County Sheriff's Deputy Raymond Wier posed as a homeless vagrant holding a sign that said "disabled vet" on the corner of Kings Highway and U.S. 41 in Port Charlotte as part of the police surveillance of Daniel Conahan. [V30 1302-05, 1330-34] Conahan drove up in a gray station wagon with dark tinted windows, shown in state's exhibit 64. Conahan handed Wier a dollar bill and asked if he was interested in work. Wier replied that he had a bad back, but he would be interested if it was not too hard. Conahan said he might see him tomorrow and drove away. [V30 1305-07, 1335] The next afternoon, May 18, Wier was at the same location wearing a transmitter. Conahan drove up in the same car and gave Wier a dollar in change. He asked if Wier did any modeling and said it paid $150.00. The light changed, and Conahan drove around the block. He said it was "kinky" nude modeling with a progressive bondage scene. Conahan noticed a police car and arranged to meet Wier around 3:00 p.m. the next day. [V30 1307-09, 1325-27, 1329, 1335-40]

Around 3:30 p.m. on May 23, 1996, Charlotte County Sheriff's Deputy Scott Clemens went to Kiwanis Park to attempt to contact Conahan. He was dressed in shorts, a tank top, and boots. He had an undercover transmitter. [V29 1260-62; V30 1284-88] Clemens walked down a trail and became involved in a conversation with a man named

Rick. Conahan walked up, began talking to Rick, then walked away on the trail. [V29 1262-63; V30 1288-90] Five minutes later, Clemens walked to the bathroom at the center of the park. As Clemens left the bathroom, Conahan approached him and began a conversation. Conahan offered Clemens $7.00 to show him his penis, then offered to go to an ATM to get $20.00 if Clemens would allow him to suck his penis. Clemens acted reluctant and said he wanted the money up front. [V29 1263-64; V30 1291-96] They walked to Conahan's vehicle. Conahan gave Clemens his phone number and asked him to call. [V29 1265; V30 1296] A tape recording of the conversation, state exhibit 65, was admitted into evidence, but was not played. [V29 1265-68] Clemens identified a photo of Conahan's vehicle, state exhibit 102. [V29 1268]

At 2:00 p.m. on Friday May 24, 1996, Clemens returned to Kiwanis Park. He saw an unknown white male walk out of a trail with Conahan behind him. The man stormed into the bathroom, struck something, yelled an obscene word, then went to his vehicle. Conahan walked up and sat beside Clemens. [V29 1269-70; V30 1296-98] Conahan asked Clemens to model for some nude photos at a beach or in a hotel room for $150.00. He would use a Polaroid camera. [V29 1270; V30 1299-1300] Conahan also offered Clemens $5.00 to show him his penis. Clemens refused. They walked to his vehicle, and Conahan repeated the $5.00 offer. [V29 1271-72] A tape recording of this conversation, state

exhibit 66, was admitted in evidence but was not played. The court listened to the recordings at home. [V29 1272-74; V30 1280]

FDLE analyst Karen Cooper helped to search Conahan's residence, a condominium he shared with his parents, pursuant to a warrant on May 31, 1996. [V31 1417-19, 1437-38, 1454] Photos taken during the search showed Conahan's bedroom, [V31 1418-19] a black backpack, [V31 1420] an open closet, [V31 1421] a silver Plymouth station wagon (state's exhibit 102), [V31 1422, 1430] and a blue Mercury Capri automobile (state's exhibit 106). [V31 1422, 1431] Cooper collected vacuum sweepings from the floor of the bedroom and the bedroom furniture, [V31 1423-25, 1469] the backpack, [V31 1425, 1449] vacuum sweepings from the Plymouth station wagon, [V31 1426-29, 1469] carpet and upholstery samples from the Plymouth station wagon, [V31 1429-31, 1470] vacuum sweepings from the Mercury Capri, [V31 1431-32] and paint samples from the Mercury Capri. [V31 1433-34, 1469-70] Photos of the Mercury Capri showed that the paint was peeling off. [V31 1434-35] Hair, blood, and saliva samples were taken from Conahan and sent to the FDLE laboratory on July 16, 1996. [V31 1472-74]

Also on May 31, 1996, Lt. Michael Gandy of the Charlotte County Sheriff's Department interviewed Daniel Conahan.[5] Conahan indicated that he had access to the blue Mercury Capri and had last driven it about a month or a month and a half before the interview. [V32 1567-

[5] Conahan was not in custody at the time. [V32 1568]

70] The Capri was registered to Conahan's father, and the Plymouth was registered to Conahan. [V31 1453; V32 1570-71]

FDLE Agent James Myers searched the cars again after they were impounded. He collected a blue and yellow beach towel, a green tool box, and some rope from the Plymouth station wagon. He collected a blue tarp and a blue baseball cap from the Mercury Capri. [V31 1441-48, 1456-60, 1477-79] During the course of the investigation Myers had observed Conahan driving the Plymouth station wagon. [V31 1453]

FDLE analyst Christopher Hendry recovered trace evidence from the carpet pad, [V31 1482-87; V32 1508] the white towel used to cover Montgomery's face, [V32 1500-03, 1508-09] the sheet used to transport Montgomery's body, [V32 1503-04, 1509, 1513] and the sheets and plastic bags used to transport Smith's dismembered body parts. [V32 1504-07, 1509-10]

FDLE analyst Christine Nicoson recovered trace evidence from the coat found at the scene, [V32 1518-23, 1543-45] the blue ball cap, [V32 1523-25, 1552-53] the backpack, [V32 1525-26, 1553-54] the yellow and blue beach towel, [V32 1528-29, 1554] and the blue tarp. [V32 1529, 1554-55] She collected fiber samples from the backpack [V32 1526-27, 1550] and the blue tarp. [V32 1529, 1555] She collected a hair sample from Smith's dismembered body. [V32 1556]

Charlotte County Sheriff's Detective Robert Rowl transported Kenneth Smith's body parts from the Charlotte County Medical Examiner's

Office to the Sarasota Medical Examiner's Office. [V32 1600-03] FDLE Agent Michael Rafferty went to the Sarasota Medical Examiner's Office where Associate Medical Examiner James Wilson collected known hair and bone samples from Smith's body parts. Rafferty then transported the samples to the Fort Myers crime lab. He turned them over to Agent Sharon Feola who turned them over to Detective Lehrman for transport to the Tampa crime lab. [V32 1603-18]

FDLE analyst Paula Sauer examined the hair and fiber evidence collected in this case. [V32 1621-77; V33 1683-1704] While examining the combings from Montgomery's pubic and thigh area, she discovered a paint chip which she sent to the Orlando lab for further analysis. [V32 1653-55] Sauer found 16 different types of fibers:

(1) pink propylene --
43 from carpet pad covering Montgomery's body, the possible source;
3 from towel used to cover Montgomery's face;
9 from sheet used to transport Montgomery's body;
3 from sheets used to transport Smith's body parts;
3 from debris found on trash pile;
2 from Montgomery's body;
2 from debris;

(2) purple/brown acetate --
1 from carpet pad covering Montgomery's body;
396 from coat found at the scene;
6 from vacuuming of the Mercury;
11 from vacuuming of Conahan's bedroom;

(3) gold and black acrylic --
1 from carpet pad covering Montgomery's body;
31 from vacuuming of the Mercury;

1 from debris from the Mercury;
3 from vacuuming of Conahan's bedroom;
(4) red nylon carpet --
1 from towel used to cover Montgomery's face;
2 from vacuuming of the Mercury;
-- these three fibers had identical characteristics but were slightly different from the carpet in the Plymouth, which could not be ruled out as the possible source;
(5) blue split film polyethylene --
1 from towel used to cover Montgomery's face;
1 from vacuuming of Plymouth;
(6) yellow rayon --
2 in fiber pill found in sheet used to transport Smith's pelvis;
2 found in backpack;
7 from vacuuming of Plymouth;
7 from vacuuming of Mercury;
1 from cap found in Mercury;
393 from vacuuming of Conahan's bedroom;
(7) green acrylic --
18 in fiber pill from sheet used to transport Smith's pelvis;
1 in debris from coat found at scene;
10 from vacuuming of Plymouth;
4 in debris from towel found in Plymouth;
17 from vacuuming of Mercury;
102 from vacuuming of Conahan's bedroom;
(8) red and black cotton --
1 in fiber pill from sheet used to transport Smith's pelvis;
7 from coat found at scene;
65 from vacuuming of Mercury;
1 from cap found in Mercury;
100 from vacuuming of Conahan's bedroom;
(9) blue polyester --
1 from coat found at scene consistent with fabric of backpack;
(10) blue nylon --
1 from coat found at scene consistent with fabric of blue tarp;
(11) red nylon --

1 from hair sample from Smith's skull consistent with upholstery fabric of Plymouth;

(12) green wool --
4 in debris from rope found at scene of Burden assault;
1 from vacuuming of Mercury;

(13) black cotton --
1 from vacuuming of Mercury consistent with fabric of coat found at scene;

(14) tan acrylic --
1 from cap found in Mercury;
1 from vacuuming of Conahan's bedroom;

(15) black acrylic --
1 from vacuuming of Conahan's bedroom consistent with fabric of coat;

(16) black polyester --
2 from vacuuming of Conahan's bedroom consistent with fabric of coat.

[V33 1683-1704]

FDLE analyst Janice Taylor determined that the paint chip found in the combings from Montgomery's pubic and thigh area consisted of four layers. The outermost layer was a weathered, dull, cracked, dark blue metallic finish coat. The second layer was medium green/gray primer. The third layer was a clear, colorless finish coat. The fourth layer was a dark blue metallic finish coat. The paint chip was indistinguishable from a sample of paint from the Mercury Capri. [V33 1761-85]

At the conclusion of the state's evidence, the court heard argument from counsel for both parties concerning the relevancy and admissibility of the evidence concerning Stanley Burden, Deputy Wier, Deputy Clemens, and Kenneth Smith. [V34 1807-41] The court ruled that

the evidence concerning Burden was admissible because it was sufficiently similar to the evidence concerning Montgomery to establish an unusual modus operandi which tends to establish Conahan's identity as the perpetrator. [V34 1842-44] The court ruled that the evidence concerning Deputies Wier and Clemens was relevant and admissible to prove motive and identity. [V34 1845-46] However, the court ruled that the evidence concerning Kenneth Smith, including fibers found on his body parts, was inadmissible and would not be considered in determining Conahan's innocence or guilt. [V34 1846-48]

Defense Evidence

Carla Montgomery, Richard Montgomery's sister, testified that she and her former husband Jeff moved into the trailer park on Royal Road in early 1996. [V32 1572] Her brother was living with them. Her mother made arrangements for Richard to have his own trailer for a month or less. Richard then moved in with Bobby Whittaker. He felt uncomfortable with Whittaker and moved back in with Carla and Jeff, but he continued to hang out with Whittaker. [V32 1573, 1576-77] Richard's other friends included J.J. Runner, John Jacoud, Jr. (aka Slim), Alicia, and a large girl from New York who may have been intimate with Richard. [V32 1577-79] The police showed her photos of suspects, but she did not recognize anyone. [V32 1574] She had never seen Conahan before his picture was in the paper and on TV. [V32 1580-81]

FDLE DNA analyst Robin Ragsdale conducted PCR analysis on DNA from a hair found on the sheet used to transport Montgomery's body. She found a major component of the DNA which was consistent with Montgomery but could not have come from Conahan. She also found a minor component of the DNA which could not have come from either Montgomery or Conahan. She could not determine the origin of the minor component. It could have been semen, sweat, spit, or skin cells. It could have come from one out of every two caucasians, or one out of every eleven African-Americans. It was possible that it had been present for several days. [V34 1875-94]

Daniel Conahan, Jr., testified that he moved to Florida in January, 1993, and lived with his parents in Punta Gorda Isles. Initially, he did not have a job. He did the cooking and cleaning for his parents. In April, 1993, he enrolled in a three month certified nursing assistant training program at Charlotte Votech. In July, 1993, he became employed as a nursing assistant for a quadriplegic. In February, 1994, he enrolled in a ten month LPN course at Charlotte Votech. [V35 1902-04]

Conahan had a sexual encounter with Stanley Burden in Fort Myers during the summer of 1994. He did not remember the date of the encounter. It was not August 15 because on that date Conahan was in a clinical class for the LPN program in Port Charlotte from about 5:45 a.m. until about 1:30 p.m. [V35 1905-08, 1924-25] On the day of the

encounter, Conahan arrived in Fort Myers on Highway 41 around 11:00 to 11:30 a.m. and saw Burden walking south, preparing to cross a street that bordered Lions Park. As Conahan drove by in his Plymouth station wagon, he tapped his car horn. Burden put his thumb out and grabbed his crotch. Conahan turned around and went back. Burden got into the car. Conahan offered him $20.00 for mutual oral sex, and Burden accepted. He directed Conahan to a semi-wooded area about two miles away where they engaged in mutual oral sex, and Conahan paid him the $20.00. Conahan complied with Burden's request to take him back to Lions Park so he could make some more money. Conahan asked Burden if he would pose for nude bondage photos. Burden did not want to do it, but he said he had a friend who would be interested. Conahan denied tying Burden up and trying to kill him. He did not see Burden again. [V35 1908-15, 1926-27]

Conahan agreed that he found Burden's physical appearance sexually attractive, but denied that Burden's personality and the fact that he was hitchhiking were part of the attraction. [V35 1928-29] Conahan did not remember telling Linde that he had a fantasy of picking up a hitchhiker, taking him out in the woods, tying him to a tree, and having sex with him. [V35 1929] He admitted that he had a fantasy about bondage, tying someone up out in the woods. [V35 1931] Conahan had back spasms and saw Dr. Casanova several times, but he did not remember the dates. [V35 1933-35]

In March or April, 1995, Conahan met Jeff Dingman by picking him up when he was hitchhiking on Highway 41. Conahan drove Dingman to the place where Dingman's wife had left his personal belongings. Conahan gave Dingman his phone number. Dingman called later that night. Conahan picked him up and returned home, where they drank beer and watched TV. Dingman spent the night. [V35 1915-19] Dingman moved into Robert Whittaker's trailer in April, 1995. Conahan went there to see Dingman ten or fifteen times between April and December. Conahan and Whittaker did not like each other. [V35 1919-21, 1936] The last time Conahan went to the trailer was when Dingman moved out in December, 1995. [V35 1943-44, 1946] In a statement to police on May 31, 1996, Conahan said he went to Whittaker's trailer two or three times, and that he had not been there for a year, a year and a half, or two years. [V35 1939-41, 1944-45] Conahan said he did not tell the officers the truth because he knew he was being accused of murder. [V35 1946-47] At some time, Conahan may have offered Dingman money to pose for nude bondage photos. [V35 1936] Conahan never met Richard Montgomery. [V35 1922, 1937]

In April, 1996, Conahan still lived with his parents in Punta Gorda Isles, a couple of miles from Highway 41. Wal-Mart was another mile south on 41. Nations Bank was half a mile further south on 41. Cox Lumber was a couple of miles further south on 41. [V35 1922-23]

On April 14, 1999, Charlotte County Deputy Jack Collins investigated a burglary at the home of an elderly couple, Mr. and Mrs. Sheetz. Mrs. Sheetz turned over Richard Montgomery's driver's license, which was found at the scene. [V35 1950-55]

The State's Rebuttal Evidence

Montgomery's mother, Mary West, testified that her son lost his driver's license several years ago when they lived on Harvey Street in Punta Gorda. To her knowledge, he never recovered the license. [V35 1955-57] On October 22, 1994, Montgomery notified the police that his wallet was stolen. [V35 1957] He found the wallet within a day or two, but it was empty; his driver's license, Social Security card, and birth certificate were missing. [V35 1958]

Defense Surrebuttal

Punta Gorda Police Officer Phillip Robinson met with Richard Montgomery at a house on Harvey Street on October 29, 1994. Montgomery reported that his wallet was found next to the stairs of the apartment building where he lived. He said his birth certificate and Social Security card were missing, nothing else. [V35 1962-65]

THE PENALTY PHASE

The State's Evidence

Defense counsel filed a motion in limine to exclude evidence of the 1994 assault on Stanley Burden. [V14 2579-81] The court reserved ruling on the motion, "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 on [sic] of the proffered Williams Rule evidence." [V36 2158-59]

In his opening statement, the prosecutor began to tell the jury about the Burden assault. Defense counsel objected that the admissibility of the evidence concerning Burden was subject to the court's pending decision on the defense motion in limine to exclude it. The prosecutor argued that the evidence was relevant to the cold, calculated, and premeditated (CCP) aggravating circumstance. The court overruled the objection, while reserving ruling on the admissibility of the evidence. [V37 2304-06] The prosecutor proceeded to tell the jury that Conahan attempted to kill Burden in 1994 by tying him to a tree and strangling him. [V37 2306-07]

At the state's request, the court took judicial notice of the judgments of guilt of first-degree murder and kidnapping from the guilt phase of trial and instructed the jury that Conahan was guilty of those offenses. [V37 2328-32]

Lieutenant Michael Gandy of the Charlotte County Sheriff's Department testified that he interviewed Conahan in a motel room in Punta Gorda on May 31, 1996. Conahan was not under arrest. [V37 2332-34] When the prosecutor asked whether Gandy asked Conahan about any fantasies, defense counsel objected that Conahan's fantasies about

bondage were irrelevant to any issue concerning the death penalty. The prosecutor argued that the evidence was relevant to the CCP aggravating circumstance. The court overruled the objection but noted that it was still reserving ruling on the admissibility of Burden's testimony. [V37 2334-36] Defense counsel also objected to Gandy summarizing Conahan's statement instead of playing the videotape of the statement. The prosecutor responded that the entire tape was three hours long and contained discussion of many irrelevant and prejudicial matters. The court overruled the objection but told defense counsel he was entitled to cross-examination about anything Gandy omitted or mischaracterized, and that the tape might become relevant. [V37 2336-38] Gandy testified that Conahan said he had a fantasy of bondage, of tying someone up and having sex with them. [V37 2338-39, 2341-42] Conahan did not say that the fantasy included killing or trying to strangle the person. [V37 2342]

When the prosecutor asked permission to publish a portion of Conahan's guilt phase testimony, defense counsel renewed his objection to this entire line of questioning on the ground that it was not relevant to the CCP circumstance. The court overruled the objection. [V37 2343-44] The prosecutor then read a portion of Conahan's prior testimony to the jury in which Conahan admitted that he fantasized about bondage, about tying people up in the woods. Conahan denied that

picking up a hitchhiker was his fantasy and said that bondage was not his only fantasy. [V37 2345-46]

The state called Fort Myers Police Detective Pedro Soto to testify about the injuries suffered by Burden. Defense counsel objected that this testimony was not relevant to any aggravating circumstance. The court sustained the objection on the ground that the relevance of the evidence was outweighed by its prejudicial effects. The state inquired whether this ruling would also apply to testimony by the nurse who examined Burden and Conahan's trial testimony admitting a sexual encounter with Burden. The court again ruled that the prejudice outweighed the probative value. [V37 2347-51]

Robert Whittaker testified that Richard Montgomery was his roommate for two or three months and his friend. He described Montgomery as a little slow, but a nice guy with a drinking problem, who did not keep a steady job, did not have any money, and relied on friends, a bike, or walking for transportation. [V37 2352-53] On April 16, 1996, Montgomery was living with his sister. When Whittaker came home from work that day, Montgomery came over to his trailer. Montgomery had been drinking. Before leaving the trailer, Montgomery said he was going to make some quick money, around $200.00, and it would take about two hours. Whittaker asked if it was legal. Montgomery smiled and said he would be safe. He never returned. [V37 2353-58]

The court allowed the state to publish state's exhibit 38, the Wal-Mart receipt showing Conahan's purchases, and exhibit 44, showing Conahan's payment on the bill. [V37 2361] Charlotte County Sheriff's Detective Robert Brown used the SKU numbers from the Wal-Mart receipt to purchase a package of Polaroid film and a pair of pliers. [V37 2362-65] Detective Gary Ellsworth also used the receipt to purchase a clothesline and a utility steak knife. [V38 2368-70, 2373-74] The court overruled defense counsel's relevancy objection to the knife after the prosecutor argued that it was relevant to CCP. [V38 2370-72]

Defense counsel objected to the relevancy of crime scene photos which showed Montgomery's body covered with flies and that his genitals had been removed. The prosecutor argued that the jury was entitled to see the body at the scene and that the removal of the genitals was relevant to CCP. The court overruled the objection and admitted the photos. [V38 2375-80] Lt. Gandy testified that Montgomery's body was found covered with carpet padding in a wooded area. There were two ligature marks around his neck. The photos showed the body as it was found. The officers did not find any of his clothing or identification. [V38 2381-86]

Dr. Jane Huser, the 21st District Medical Examiner, reviewed Dr. Imami's autopsy findings, photographs, medical examiner's summary, death certificate, body diagram, toxicology report, depositions, and trial testimony. [V38 2388-95, 2420-21] She identified a photo of

Richard Montgomery, state's exhibit 18. Montgomery was 5 feet 10 inches tall and weighed 138 pounds. [V38 2395] State's exhibit 19 was a photo which showed a very small abrasion on the left side of Montgomery's face. State's exhibits 20, 21, and 22 showed the ligature marks on Montgomery's neck. These marks were one quarter of an inch wide. [V38 2396-2401] State's exhibit 23 showed one quarter inch ligature marks on Montgomery's right side. [V38 2402-03] State's exhibits 24, 25, and 26 showed crisscross scrapes on Montgomery's back, which were consistent with someone tied to a tree and struggling. [V38 2401-04, 2429] State's exhibit 27 showed the left side of his upper thigh and hip. The court overruled defense counsel's objection that 27 was inflammatory because it appeared to depict the amputation of the genitals. Dr. Huser said it showed some scrapes and scratches on the lateral buttocks and some dried fluid. [V38 2404-06] State's exhibit 28 showed crisscross scrapes on Montgomery's buttocks. [V38 2404-07] State's exhibit 29 showed scratches and abrasions on the right hand. State's exhibit 30 showed ligature marks on the left wrist. Dr. Huser found that there were ligature marks on both the wrists and ankles. [V38 2407-08] The court overruled defense counsel's relevancy and inflammatory objections to state's exhibits 32, which showed Montgomery's anus and that the genitals had been cut off, and 31 which showed that the genitals had been cut off with a sharp instrument. [V38 2408-12]

In Dr. Huser's opinion, the ligature marks on the neck were made before death and reflected the cause of death, ligature strangulation. The ligature marks on the wrists, ankles, and abdomen were also made before death. The amputation of the genitals occurred after death. [V38 2412-13, 2427-28, 2430-32, 2436] The crisscross scratches on the back could have been made before or after the time of death. [V38 2427-28, 2432] Montgomery lost consciousness before he died. Loss of consciousness could occur in as little as ten seconds. Death would occur in one to five minutes. Montgomery probably knew he was being killed. [V38 2414-16, 2424-25] A certified copy of the death certificate for Montgomery was published for the jury. [V38 2416-27] Montgomery had a blood alcohol level of .06 percent. [V38 2439-40] Autoerotic asphyxiation occurs when a person limits his breathing, by placing a bag over his head or tying a rope or towel around his neck, to enhance his sexual pleasure while masturbating. Two people may engage in bondage play for the same reason. [V38 2437-38] In Dr. Huser's opinion, Montgomery's death was not caused by autoerotic asphyxiation. [V38 2441]

Defense Evidence

Conahan's aunt, Betty Wilson, testified that his mother, Alice Conahan, died on January 24, 1997, while he was in jail. [V38 2443-44] His father, Dan Conahan, Sr., died in May, 1997. [V38 2445] They had lived in a condo in Punta Gorda for ten or fifteen years. [V38 2446]

Conahan moved from Chicago and lived with his parents to help take care of his mother, who was very ill, while she was in the hospital, then while she was in a nursing home. [V38 2445, 2447-48, 2453] Conahan went to school to become a licensed practical nurse. [V38 2447] In 1995 the family had a reunion in St. Augustine, including Wilson, Conahan, his parents, his sister Sandy Ludke, and Ludke's husband, daughter, father-in-law, and brother-in-law. Conahan interacted well with the family, laughing and joking. [V38 2449-51] Wilson described Conahan as friendly, jovial, and honest. [V38 2453, 2456] Since Conahan had been in jail, he called Wilson twice a month and wrote to her twice a month. She wrote to him every week and planned to continue writing to him after he was sentenced. [V38 2454-55] Wilson admitted that she did not know a great deal about Conahan. She had not known he was homosexual, but it did not make any difference. She knew he had been in the Navy for a short time. [V38 2456-57, 2466-67] She had no knowledge of his life in Chicago. He was a good son with devoted parents and had never been abused. [V38 2463-64] Conahan told Wilson he did not commit the present crime after he was convicted. [V38 2466]

Robert Linde, a retired hospital counselor and college professor, had known Conahan for 12 to 15 years. [V38 2495-97] Conahan was a very good friend of Linde's son Hal. [V38 2497] Linde liked him very much. [V38 2498] He knew Conahan while he lived in Chicago for four or five years. [V38 2499] Hal is homosexual. Conahan and Hal were

roommates and lovers. Conahan helped Hal with his alcohol and drug abuse problems. Hal relapsed after they broke up. [V38 2504-07] Conahan had been a waiter in a restaurant and a computer operator for a hospital in Chicago. [V38 2499-2500] Linde and his wife regarded Conahan as a second son. [V38 2500-01, 2509] Conahan participated in family holiday gatherings. [V38 2501-02, 2511-12] When Linde's granddaughter was born, the Lindes invited Conahan to visit and paid for his airline ticket from Punta Gorda to Chicago. [V38 2507-09] Conahan discussed his parents and his concern about his mother's illness with them. [V38 2509-10] Linde and his wife stayed in touch with Conahan after he moved to Florida and while he was in jail. [V38 2502-04, 2512-13, 2515-16]

Nancy Thorson, Robert Linde's daughter, had known Conahan for 13 or 14 years. [V38 2517-18, 2533] She saw Conahan with her brother Hal at family dinners and holidays. [V38 2519-20] Conahan loved Hal and had a very good impact on his life, helping him to overcome his alcoholism and stay sober. [V38 2520-22] Conahan also helped Thorson to overcome her own alcoholism and stay sober. [V38 2522-25, 2534] Conahan moved to Florida to help take care of his parents. [V38 2531] She and her parents paid for Conahan to fly to Chicago to visit after her daughter was born. [V38 2527-29] She corresponded with Conahan on a regular basis after his arrest and would continue to do so. [V38 2526-27, 2535] She regarded Conahan as a brother. [V38 2527, 2533]

Closing Argument

During his closing argument, the prosecutor made the following remarks:

> 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 [sic] on the matter of guilt of the Defendant.

[V39 2580] Defense counsel did not object. [V39 2580]

The prosecutor further argued:

> 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.

[V39 2580-81] Defense counsel did not object. [V39 2581]

The prosecutor said:

> Clearly, early in his life, he [Conahan] 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--

[V39 2581] Defense counsel objected that it was improper for the prosecutor to argue mitigating factors that have not been proven. The

court overruled the objection on the ground that the prosecutor "gets to argue all the evidence." [V39 2582]

The prosecutor stated:

> 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.

[V39 2585] Defense counsel did not object. [V39 2585]

The prosecutor commented:

> 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.

[V39 2586] Defense counsel did not object. [V39 2586]

The prosecutor further stated:

> 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--

[V39 2603] Defense counsel objected that "justice to a victim" is not contained in the statutes or jury instructions and that it is improper to appeal to the sympathies of the jurors and to attempt to inflame the jury. The court overruled the objection on the ground that it was fair

argument. The court denied defense counsel's motion for mistrial and request for a curative instruction. [V39 2604-05] The prosecutor repeated the objected to remarks. [V39 2605]

The prosecutor concluded his argument by stating:

> 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.

[V39 2606] Defense counsel did not object. [V39 2606]

Jury Instructions

The court overruled defense counsel's objection to instructing the jury on the CCP aggravating circumstance on the ground that it was not supported by the evidence. [V38 2474-76; V39 2576] The court gave the standard CCP jury instruction. [V39 2637-38] Defense counsel renewed his objection at the conclusion of the court's instructions. [V39 2644]

SUMMARY OF THE ARGUMENT

ISSUE I Due process of law under the United States and Florida Constitutions requires proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. The trial court violated Conahan's right to due process by denying his motion for judgment of acquittal for Count I, premeditated first-degree murder. The state's proof of premeditation was circumstantial, and it was consistent with a reasonable hypothesis of innocence: Conahan fantasized about taking a young man into the woods, tying him to a tree, and having sex with him. He carried out this fantasy with Stanley Burden, luring him into a remote wooded area with the promise of money in exchange for posing for nude bondage photos, tying him to a tree, having oral sex with him and attempting anal sex, choking him with a rope tied around his neck, then allowing Burden to live and to cut himself free from the ropes. Conahan attempted to repeat the same behavior with Richard Montgomery, but he inadvertently choked Montgomery to death with the ropes tied around his neck. The conviction and death sentence for premeditated first-degree murder must be reversed, and the case must be remanded for entry of a judgment and sentence for second-degree murder.

ISSUE II The trial court also violated Conahan's right to due process by denying his motion for judgment of acquittal for kidnapping. The state's circumstantial evidence did not establish the essential element that Montgomery was confined against his will beyond a

reasonable doubt. The state's evidence was consistent with the reasonable hypothesis that Conahan obtained Montgomery's consent to go to the remote wooded area and to be tied to a tree to pose for nude bondage photos. The conviction and sentence for kidnapping must be reversed, and Conahan must be discharged for that offense.

ISSUE III Aggravating circumstances must be proved beyond a reasonable doubt. Because the state's evidence in the guilt phase of trial was insufficient to prove either premeditation or kidnapping, and the state offered no additional evidence of premeditation or kidnapping in the penalty phase, the court erred by instructing the jury upon and finding the aggravating circumstances of cold, calculated, and premeditated and murder committed during the course of a kidnapping. Since there was only one valid aggravating circumstance, heinous, atrocious, or cruel, and the court found four nonstatutory mitigating circumstances, the court's error requires vacating the death sentence and remanding for a new penalty proceeding with a new jury.

ISSUE IV The prosecutor violated Conahan's right to a fair trial by making improper comments in both his opening statement and closing argument in the penalty phase of trial. In opening statement, over defense counsel's objection, the prosecutor commented on facts later excluded from the evidence presented to the jury, by telling the jury that Conahan tied Burden to a tree and tried to strangle him. In closing argument, the prosecutor misled the jury on both the law and

the facts by twice commenting, without objection, that he was not permitted to present all of the evidence of Conahan's guilt in the penalty phase. The prosecutor further requested the jury to disregard the law requiring the consideration of mitigating circumstances by requesting the jury, without objection, to disregard the mitigating circumstances presented by the defense. Over defense counsel's objection, the prosecutor was allowed to comment on the absence of mitigating circumstances which were never suggested or proved by the defense, in violation of Conahan's right to individualized sentencing. The prosecutor misstated the law, without objection, by arguing that certain aggravating circumstances require the imposition of the death penalty. Over defense counsel's objection, the prosecutor was allowed to argue that the law balances mercy to the defendant with justice for the victim. Without objection, the prosecutor concluded his argument by asserting that justice and fairness required the imposition of the death penalty. These comments about justice for the victim, and justice and fairness requiring the death penalty misstated the law. Consideration of both the remarks to which defense counsel objected and the remarks to which defense counsel failed to object, especially when considered with the court's errors in admitting inflammatory photos not relevant to any disputed issue, as argued in Issue V, establishes that the prosecutor's misconduct was not harmless. The death sentence must

be vacated, and the case must be remanded for a new penalty proceeding with a new jury.

ISSUE V The trial court violated Conahan's right to a fair trial by admitting inflammatory photos showing Montgomery's face covered with flies at the crime scene and showing that Montgomery's genitals had been cut off after death. Neither the condition of the body at the scene, nor the amputation of the genitals was a disputed fact in issue, so the photos served no valid purpose. This error, especially when considered together with the prosecu-tor's improper remarks in opening and closing argument, as argued in Issue IV, was not harmless. The death sentence must be vacated, and the case must be remanded for a new penalty proceeding with a new jury.

ARGUMENT

ISSUE I

THE STATE'S EVIDENCE WAS LEGALLY INSUFFICIENT TO PROVE PREMEDITATION.

The due process clauses of the United States and Florida constitutions required the State to prove Daniel Conahan's guilt beyond a reasonable doubt. See U.S. Const. amends. V and XIV; Art. I, § 9, Fla. Const. "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 375 (1970). "The state bears the responsibility of proving a defendant's guilt beyond and to the exclusion of a reasonable doubt." Long v. State, 689 So. 2d 1055, 1057 (Fla. 1997).

In this case, the trial court erred by denying defense counsel's motion for judgment of acquittal on premeditated murder because the state's circumstantial evidence was legally insufficient to establish premeditation. [V34 1857-60, 1874] "Premeditation is the essential element that distinguishes first-degree murder from second-degree murder." Green v. State, 715 So. 2d 940, 943 (Fla. 1998); Coolen v. State, 696 So. 2d 738, 741 (Fla. 1997). Premeditation is defined as

> more than a mere intent to kill; it is a fully formed conscious purpose to kill. This purpose to kill may be formed a moment before the act but must exist for a sufficient length of time to

> permit reflection as to the nature of the act to be committed and the probable result of that act.

Id. (quoting Wilson v. State, 493 So. 2d 1019, 1021 (Fla. 1986)); accord Green, at 943-44; Norton v. State, 709 So. 2d 87, 92 (Fla. 1997).

> While premeditation may be proven by circumstantial evidence, the evidence relied upon by the State must be inconsistent with every other reasonable inference. Hoefert v. State, 617 So. 2d 1046 (Fla. 1993). Where the State's proof fails to exclude a reasonable hypothesis that the homicide occurred other than by premeditated design, a verdict of first-degree murder cannot be sustained. Hall v. State, 403 So. 2d 1319 (Fla. 1981).

Coolen, at 741; accord Green, at 944; Norton, at 92; Kormondy v. State, 703 So. 2d 454, 459 (Fla. 1997); Kirkland v. State, 684 So. 2d 732, 734 (Fla. 1996).

> 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.

Holton v. State, 573 So. 2d 284, 289 (Fla. 1990) (quoting Larry v. State, 104 So. 2d 352, 354 (Fla. 1958)); accord Green, at 944; Norton, at 92; Kormondy, at 459.

In this case, the state's evidence established that Harold Linde met Conahan in a bar in Chicago. They had a gay relationship and lived together in Chicago from 1988 through 1992. [V28 1084-86] Conahan

told Linde about a sexual fantasy -- that he would "like to pick up a boy hitchhiking, go in the woods, tie him to a tree and fuck him." [V28 1086-87]

On August 15, 1994, Stanley Burden met Daniel Conahan while leaving a restroom at Lions Park in Fort Myers. Later, Burden walked to a street corner by a hamburger restaurant and encountered Conahan in a light-colored Plymouth or Dodge station wagon. [V29 1154-55, 1189-96] Burden accepted Conahan's invitation to get in the car. Burden also accepted Conahan's offer to pay him $100.00 to $150.00 to pose for nude photographs. [V29 1155-57, 1195-96] Conahan drove past a trucking company to a rocky dirt road at the end of Edison Street. He stopped and offered to pay $20.00 for allowing him to perform oral sex on Burden. When Burden agreed, Conahan parked by a pile of rubbish. They got out in a secluded grassy area with melaleuca trees. [V29 1157-59, 1195, 1198-99] Conahan took out a duffle bag containing a tarp and camera. They went 15 to 30 feet into the woods. Conahan spread the tarp on the ground and told Burden to remove his shirt and "show a little bit of hip." Conahan took Polaroid photos while directing Burden to pose. Burden took his pants down to his knees. [V29 1160-61, 1199]

Conahan took out some new clothesline-type rope, said he wanted to take some bondage photos, and directed Burden to stand by a tree. He used red-handled wire cutters to cut the rope. He draped pieces of

rope around Burden. Conahan went behind Burden and "snapped" the rope, causing it to tighten around Burden so that he was tied to the tree. [V29 1162-64, 1181, 1213] Conahan performed oral sex on Burden and attempted anal penetration. Burden resisted by shifting his body against the tree. [V29 1164-66] Conahan then put his foot against the back of the tree and snapped the rope around Burden's neck. Conahan hit the back of Burden's head, asking him why he wouldn't die. [V29 1166-67, 1181, 1214-15] Conahan tugged at the ropes for a half hour, then gave up. He gathered up everything except the wire cutters, which Burden picked up and used to cut himself loose. Conahan asked if Burden still wanted the $100.00, then left. [V29 1168-69, 1213-16]

In 1996, while Richard Montgomery was living with Robert Whittaker about two and a half to three months before his death, Daniel Conahan came to Whittaker's trailer to see Montgomery, but he was not there. [V27 987-88, 992-93] On March 23, 1996, Montgomery told his mother that he had a new friend named Conahan and that someone had offered Montgomery $200.00 to pose for nude photographs. [V28 1106, 1109-10]

On Tuesday, April 16, 1996, Gary Maston saw Montgomery at Whittaker's trailer between 1:00 and 4:00 p.m. Montgomery said he was going out to make some money and would return in about half an hour. Whittaker asked if it was legal. Montgomery responded that if it wasn't legal he would tell him, then smiled. [V27 971-75, 977-78, 980] Whittaker testified that this incident occurred around 7:00 to 8:00

p.m. Montgomery said he was going to go make some money, about $200, and he would be back in two hours. Whittaker asked if it was legal. Montgomery smiled and said he would be safe. He never returned. [V27 988-90] In a statement to the police on April 18, 1996, Whittaker said Montgomery left at 6:30 p.m. on April 16. [V27 1007] Around 4:30 p.m. or later on Tuesday, April 16, 1996, Jeff Whisenant was returning home from work with Ray when he saw Montgomery walking towards Cox Lumber at the corner of Royal Road and Taylor Road. Ray honked the horn. Montgomery waived his hand and kept walking. [V27 954-55, 967-68]

At 6:07 p.m. on April 16, 1996, Conahan purchased a package of clothesline, Polaroid film, a pair of pliers, and a utility knife at the Wal-Mart store on U.S. Highway 41. [V28 1017-25, 1040-44] At 6:12 p.m. that evening, Conahan withdrew $40.00 from the ATM machine at the Nations Bank on Highway 41 near Wal-Mart. [V28 1046-50, 1057-66, 1069, 1082-83]

On April 17, 1996, two Charlotte County engineers discovered a human skull, later identified as Kenneth Smith, in a remote wooded area used as a dumping ground. They notified two sheriff's deputies. [V26 750-77, 794-97, 802, 832-33; V30 1358] Officers who responded to the scene searched the area and discovered the body of Richard Montgomery covered with a piece of discarded carpet padding. [V26 787-92, 797-99, 803-04, 808-09, 847-53] A police dog trained to detect human scents alerted to a 10 foot sable palm tree which appeared to be flattened on

one side. [V26 817-22] Dr. R. H. Imami, the District 22 Medical Examiner, examined Montgomery's body at the scene and performed the autopsy. [V27 907-15] The body was nude. [V27 914] There were two ligature marks on the neck, 1/4 inch grooves in the skin caused by rope. [V 921-24, 939] Hemorrhage within the underlying tissue showed that these neck injuries occurred before death. Internal examination of the lungs revealed additional evidence of death by asphyxiation. [V27 937] Dr. Imami concluded that the cause of death was asphyxiation secondary to strangulation. [V27 939]

Additional injuries included a small scrape on the left side of the face. [V27 919] There were two 1/4 inch grooves on the lower chest and sides, but not on the back, which could be consistent with being tied to a tree or post. [V27 923-25] These were antemortem (before death) injuries. [V27 938-39] There were two grooves on the abdomen. [V27 925] There were crisscrossed skin abrasions on the lower back, which Dr. Imami believed to be postmortem (after death) injuries, but they could have been made at the time of death. [V27 926-27] These scrapes could have been caused by the body moving against a tree or post. [V27 928] There were three scratches on the lower chest. [V27 928-29] There were crisscross scratches on the upper back and the left buttock. [V27 929-31] There were abrasions on the right hand, and ligature marks on the wrists and lower legs. [V27 933-34] The external genitalia had been cut off with a sharp knife

after death. [V27 934-36, 938] The anus was dilated one inch more than normal, which was consistent with a sexual assault. [V27 936] However, Dr. Imami did not think there had been recent anal intercourse. [V27 946-47] There was no recent physical trauma to the rectal opening. [V27 944-45, 947] No sperm were found in the rectal area, nor in the mouth. [V27 945] There is some dilation of the sphincter in any postmortem case, and dilation could also be caused by constipation or the frequent insertion of objects. [V27 943-45]

On the afternoon of May 17, 1996, Charlotte County Sheriff's Deputy Raymond Wier posed as a homeless vagrant holding a sign that said "disabled vet" on the corner of Kings Highway and U.S. 41 in Port Charlotte. [V30 1302-05, 1330-34] Conahan drove up in a gray station wagon. Conahan handed Wier a dollar bill and asked if he was interested in work. Wier replied that he had a bad back, but he would be interested if it was not too hard. Conahan said he might see him tomorrow and drove away. [V30 1305-07, 1335] The next afternoon, May 18, Wier was at the same location wearing a transmitter. Conahan drove up in the same car and gave Wier a dollar in change. He asked if Wier did any modeling and said it paid $150.00. The light changed, and Conahan drove around the block. He said it was "kinky" nude modeling with a progressive bondage scene. Conahan noticed a police car and arranged to meet Wier around 3:00 p.m. the next day. [V30 1307-09, 1325-27, 1329, 1335-40]

Around 3:30 p.m. on May 23, 1996, Charlotte County Sheriff's Deputy Scott Clemens went to Kiwanis Park to attempt to contact Conahan. He had an undercover transmitter. [V29 1260-62; V30 1284-88] As Clemens left a bathroom in the park, Conahan approached him and offered Clemens $7.00 to show him his penis, then offered to go to an ATM to get $20.00 if Clemens would allow him to suck his penis. Clemens acted reluctant and said he wanted the money up front. [V29 1263-64; V30 1291-96] They walked to Conahan's vehicle. Conahan gave Clemens his phone number and asked him to call. [V29 1265; V30 1296] At 2:00 p.m. on May 24, 1996, Clemens returned to Kiwanis Park. [V29 1269-70] Conahan asked Clemens to model for some nude photos at a beach or in a hotel room for $150.00. He would use a Polaroid camera. [V29 1270; V30 1299-1300] Conahan also offered Clemens $5.00 to show him his penis. Clemens refused. They walked to his vehicle, and Conahan repeated the $5.00 offer. [V29 1271-72]

Florida State Prison inmate John Newman, who was serving sentences for manslaughter and marijuana at the time of trial, met Daniel Conahan while sharing a cell in the Lee County Jail for seven or eight months. [V28 1072-73] Newman testified that Conahan originally said he did not know Richard Montgomery. Later, Conahan said he did know Montgomery, that they went on a few beer runs. [V28 1073] He said he had been to Montgomery's house on several occasions and knew his sister. He said

he and Montgomery went to the bank. He said, "Montgomery was a mistake." [V28 1074]

Counsel for appellant concedes that the state's evidence was consistent with a reasonable hypothesis of premeditated murder: Conahan had tried but failed to kill Burden in 1994, and he followed the same pattern of behavior in successfully killing Montgomery in 1996.

However, the evidence is also consistent with a reasonable hypothesis that the killing of Montgomery was not premeditated: Conahan's fantasy included bondage and sex, but not murder. Conahan was acting out his fantasy with Burden by luring him to a remote wooded area with the promise of money for posing for nude bondage photos, tying him to a tree, having oral sex with him, and attempting anal sex. Although he pulled on the ropes to choke Burden for half an hour, hit him in the head, and asked him why he didn't die, Conahan was not actually trying to kill Burden. This behavior was simply part of his bondage and sex fantasy. Ultimately, Conahan allowed Burden to live and to cut himself free from the ropes; he even offered to pay Burden the money he had promised. When Conahan attempted to act out the same fantasy in the same way with Montgomery, Conahan inadvertently strangled Montgomery to death, then cut off his genitals as an afterthought. Conahan later told Newman that "Montgomery was a mistake." The mistake was that Montgomery died.

This case is similar to Hoefert v. State, 617 So. 2d 1046 (Fla. 1993). In Hoefert, the state proved that Hunt accompanied Hoefert to his apartment and was found dead in the apartment several days later. Asphyxiation was the cause of her death. Hoefert had strangled several other women while either raping or assaulting them; this testimony established that Hoefert's motive in Hunt's asphyxiation was to obtain sexual gratification by engaging in sex while choking her. Hoefert attempted to conceal his crime by failing to report Hunt's death to the authorities, digging a hole in his yard where he planned to bury Hunt, and fleeing to Texas. This Court concluded that the circumstantial evidence was consistent with an unlawful killing, but it was not sufficient to prove premeditation. Id., at 1049. This Court reversed the conviction for first-degree murder, vacated the death sentence, found the evidence sufficient for second-degree murder, and remanded for the trial court to enter a judgment and sentence for second-degree murder. Id., at 1049-50.

Conahan's case is also similar to Randall v. State, 760 So. 2d 892 (Fla. 2000). Randall was convicted and sentenced to death for the first-degree murders of Wendy Evans and Cynthia Pugh. Both Evans and Pugh were prostitutes who were killed by manual strangulation. At the times of their deaths, Randall lived with Terry Jo Howard, but Howard was out of town visiting her mother. Both Howard and Randall's ex-wife testified that Randall derived sexual stimulation from choking them

during sexual activity and that Randall had injured them during the choking. Id., at 894-96. On appeal, Randall argued that the state's circumstantial evidence was consistent with the reasonable hypothesis that Randall began choking the murder victims during consensual sex, he became enraged when they struggled more than his ex-wife or girlfriend, and he continued choking them. Because the other women he choked did not die, it was reasonable to infer that Randall intended for his choking behavior to lead only to sexual gratification, not to the deaths of his sexual partners. This Court agreed that the circumstantial evidence did not support premeditated murder to the exclusion of a reasonable doubt. This Court reversed the first-degree murder convictions, vacated the death sentences, and remanded for the entry of second-degree murder convictions and sentences. Id., at 902.

As in Hoefert and Randall, the state's circumstantial evidence failed to exclude a reasonable hypothesis that the strangulation death of Richard Montgomery was not premeditated. The similar fact evidence concerning Conahan's strangulation of Stanley Burden without killing him reasonably demonstrates that Conahan's intent in tying up his sexual partners was to obtain sexual gratification by acting out his bondage and sex fantasy, not to kill them. Thus, Conahan's conviction for premeditated murder must be reversed.

Although the trial court, as finder of fact during the guilt phase trial, also found Conahan guilty of kidnapping, his first-degree murder

conviction and death sentence cannot be sustained on a felony murder theory under the unusual circumstances of this case. First, the state's evidence was legally insufficient to support the kidnapping conviction. See Issue II, infra. Second, the grand jury indicted Conahan for four distinct offenses: Count I, first-degree premeditated murder; Count II, first-degree felony murder during the commission of or attempt to commit kidnapping; Count III, kidnapping with intent to commit or facilitate the commission of sexual battery; and Count IV, sexual battery. [V1 1-2] The trial court granted a motion for judgment of acquittal as to Count IV, sexual battery. [V34 1873-74] The court found Conahan guilty of Count I, first-degree premeditated murder, and Count III, kidnapping, but the court made no finding of guilt or innocence on Count II, first-degree felony murder. [V35 2016] The State nol prossed Count II, first-degree felony murder. [V18 3283] Because first-degree felony murder was charged in a separate count of the indictment, the court made no finding of guilt or innocence on that count, and the state chose to nol pros the first-degree felony murder charge, that charge is no longer available as an alternative to first-degree premeditated murder.

Because the evidence was legally insufficient for premeditation, the evidence was legally insufficient for kidnapping, and the charge of first-degree felony murder was eliminated by the actions of the court and state, this Court must reverse Conahan's conviction for first-

degree premeditated murder under Count I of the indictment and remand for entry of a judgment and sentence for second-degree murder, as in Hoefert and Randall.

ISSUE II

THE STATE'S EVIDENCE WAS LEGALLY INSUFFICIENT TO PROVE KIDNAPPING BECAUSE IT DID NOT PROVE THAT THE CONFINEMENT WAS AGAINST MONTGOMERY'S WILL.

Due process of law under the United States and Florida Constitutions requires proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. See In re Winship, 397 U.S. 358, 375 (1970); Long v. State, 689 So. 2d 1055, 1057 (Fla. 1997); U.S. Const. amends. V and XIV; Art. I, § 9, Fla. Const.

Count III of the indictment charged Conahan with kidnapping Richard Montgomery with intent to commit or facilitate the commission of sexual battery. [V1 1-2] Section 787.01(1)(a), Florida Statutes (1995), defines kidnapping:

> The term "kidnapping" means forcibly, secretly, or by threat confining, abducting, or imprisoning another person against his will and without lawful authority, with intent to:
>
> * * *
>
> 2. Commit or facilitate commission of any felony....

In this case, the state's evidence of the kidnapping of Montgomery was entirely circumstantial. A special standard of review applies to determine whether circumstantial evidence is sufficient to support a conviction. "Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable

hypothesis of innocence." State v. Law, 559 So. 2d 187, 188 (Fla. 1989); Jaramillo v. State, 417 So. 2d 257 (Fla. 1982).

The question of whether the evidence is inconsistent with a reasonable hypothesis of innocence is for the jury to determine. Long, at 1058; Law, at 188. However, that does not mean that the trial and appellate courts have no role in determining the legal sufficiency of the circumstantial evidence. "A motion for judgment of acquittal should be granted in a circumstantial evidence case if the state fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt." Law, at 188. Thus, the trial court must "review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences." Law, at 189. On appeal, the jury's verdict must be reversed if it is not supported by competent, substantial evidence. Long, at 1058.

In Conahan's case, the circumstantial evidence was sufficient to prove that Montgomery was confined, but it was not sufficient to prove that the confinement was against Montgomery's will. This Court has ruled that "the act of tying someone up constitutes 'confinement' within the meaning of section 787.01." Berry v. State, 668 So. 2d 967, 969 (Fla. 1996). The testimony of Dr. Imami, the Medical Examiner, established that Montgomery had been tied up against a tree or post before he died. There were two ligature marks on the neck, 1/4 inch

grooves in the skin caused by rope. [V 921-24, 939] Hemorrhage within the underlying tissue showed that these neck injuries occurred before death. [V27 937] There were two 1/4 inch grooves on the lower chest and sides, but not on the back, which could be consistent with being tied to a tree or post. [V27 923-25] These were antemortem (before death) injuries. [V27 938-39] There were two grooves on the abdomen. [V27 925] There were crisscrossed skin abrasions on the lower back, which Dr. Imami believed to be postmortem (after death) injuries, but they could have been made at the time of death. [V27 926-27] These scrapes could have been caused by the body moving against a tree or post. [V27 928] There were three scratches on the lower chest. [V27 928-29] There were crisscross scratches on the upper back and the left buttock. [V27 929-31] There were abrasions on the right hand, and ligature marks on the wrists and lower legs. [V27 933-34]

The state's circumstantial evidence was consistent with a reasonable hypothesis that Montgomery consented to being tied up against a tree. Montgomery's statements to his mother and Robert Whittaker indicated that Montgomery willingly accompanied Conahan to pose for photos. On March 23, 1996, Montgomery told his mother, Mary West, that he had a new friend named Conahan, who lived in Punta Gorda Isles, had been in the Navy, was a nurse at a medical center where West had worked, and was much older than Montgomery. [V28 1106, 1109-10] In the same conversation, Montgomery said someone had offered him

$200.00 to pose for nude pictures, but he refused to tell her who. She told him that a person with a psychopathic personality would lure out someone like him, who is trusting and naive, and sexually abuse and kill him. [V28 1110] West said her son did not believe her; he said no one would kill him, he would kill them first. [V28 1111]

On April 16, 1996, the day Montgomery disappeared after leaving Robert Whittaker's trailer, Montgomery told Whittaker he was going to go make some money, about $200, and he would be back in two hours. Whittaker asked if it was legal. Montgomery smiled and said he would be safe. [V27 988-90] According to Gary Maston, who was present during this conversation, Montgomery told Whittaker he was going out to make some money and would return in about half an hour. Whittaker asked if it was legal. Montgomery responded that if it wasn't legal he would tell him, then smiled. [V27 971-75, 977-78, 980]

Moreover, the state's evidence of the incident with Stanley Burden showed that Burden willingly accompanied Conahan, allowed Conahan to tie him to a tree, and did not resist until Conahan attempted anal penetration. On August 15, 1994, Burden met Daniel Conahan while leaving a restroom at Lions Park in Fort Myers. Later, Burden walked to a street corner and encountered Conahan in a station wagon. [V29 1154-55, 1189-96] Burden accepted Conahan's invitation to get in the car. Burden also accepted Conahan's offer to pay him $100.00 to $150.00 to pose for nude photographs. [V29 1155-57, 1195-96] Conahan

drove passed a trucking company to a rocky dirt road at the end of Edison Street. He stopped and offered to pay $20.00 for allowing him to perform oral sex on Burden. When Burden agreed, Conahan parked by a pile of rubbish. They got out in a secluded grassy area with melaleuca trees. [V29 1157-59, 1195, 1198-99] Conahan took out a duffle bag containing a tarp and camera. They went 15 to 30 feet into the woods. Conahan spread the tarp on the ground and told Burden to remove his shirt and "show a little bit of hip." Conahan took Polaroid photos while directing Burden to pose. Burden took his pants down to his knees. [V29 1160-61, 1199] Conahan took out some new clothesline-type rope, said he wanted to take some bondage photos, and directed Burden to stand by a tree. He used red-handled wire cutters to cut the rope. He draped pieces of rope around Burden. Conahan went behind Burden and "snapped" the rope, causing it to tighten around Burden so that he was tied to the tree. [V29 1162-64, 1181, 1213] Conahan performed oral sex on Burden and attempted anal penetration. Burden then resisted by shifting his body against the tree. [V29 1164-66]

Furthermore, the state proved that Conahan sought the consent of two undercover officers to pose for nude photos. On the afternoon of May 17, 1996, Charlotte County Sheriff's Deputy Raymond Wier posed as a homeless vagrant on the corner of Kings Highway and U.S. 41 in Port Charlotte. [V30 1302-05, 1330-34] Conahan drove up in a gray station wagon. Conahan handed Wier a dollar bill and asked if he was inter-

ested in work. Wier replied that he had a bad back, but he would be interested if it was not too hard. Conahan said he might see him tomorrow and drove away. [V30 1305-07, 1335] The next afternoon, May 18, Wier was at the same location wearing a transmitter. Conahan drove up in the same car and gave Wier a dollar in change. He asked if Wier did any modeling and said it paid $150.00. The light changed, and Conahan drove around the block. He said it was "kinky" nude modeling with a progressive bondage scene. [V30 1307-09, 1325-27, 1329, 1335-40]

Around 3:30 p.m. on May 23, 1996, Charlotte County Sheriff's Deputy Scott Clemens went to Kiwanis Park to attempt to contact Conahan. [V29 1260-62; V30 1284-88] As Clemens left the park bathroom, Conahan approached him and began a conversation. Conahan offered Clemens $7.00 to show him his penis, then offered to go to an ATM to get $20.00 if Clemens would allow him to suck his penis. Clemens acted reluctant and said he wanted the money up front. [V29 1263-64; V30 1291-96] They walked to Conahan's vehicle. Conahan gave Clemens his phone number and asked him to call. [V29 1265; V30 1296] At 2:00 p.m. on May 24, Clemens returned to Kiwanis Park. Conahan walked up and sat beside Clemens. [V29 1269-70] Conahan asked Clemens to model for some nude photos at a beach or in a hotel room for $150.00. He would use a Polaroid camera. [V29 1270; V30 1299-1300] Conahan also offered Clemens $5.00 to show him his penis. Clemens

refused. They walked to his vehicle, and Conahan repeated the $5.00 offer. [V29 1271-72]

Thus, the state's circumstantial evidence showed that Conahan engaged in a pattern of approaching men and attempting to obtain their consent to pose for nude bondage photos. Assuming Conahan followed that pattern with Montgomery, it is very likely that Montgomery consented to being tied to a tree for nude bondage photos.

Although Burden testified that he began resisting Conahan's attempts at anal penetration by shifting his body against the tree, there is no direct evidence that Montgomery made similar efforts to resist. Dr. Imami found crisscross abrasions on Montgomery's back which could have been made at the time of death, but Dr. Imami believed that these injuries occurred after death. [V27 926-31] Moreover, Dr. Imami did not think there had been recent anal intercourse. [V27 946-47] There was no recent physical trauma to the rectal opening. [V27 944-45, 947] No sperm were found in the rectal area, nor in the mouth. [V27 945] Thus, the circumstantial evidence is consistent with the absence of any sexual battery or any effort to resist.

Because the evidence is consistent with a reasonable hypothesis that Montgomery consented to being confined by being tied to a tree, it is legally insufficient to establish the "confining ... against his will" element of the kidnapping charge. In his motion for judgment of acquittal on the kidnapping charge, defense counsel argued, in part,

that there was no evidence that Montgomery left the trailer park "unconsensually," an "unconsensual" sexual encounter had not been established, and Conahan never demonstrated the type of force and violence necessary to kidnapping in his encounters with the undercover detectives. [V34 1851-53] The court denied the motion. [V34 1873-74]

If this Court were to find that defense counsel's motion for judgment of acquittal was insufficient to preserve the issue of failure to prove the confining against his will element of the kidnapping charge, this Court should find fundamental error occurred. This Court has held that "a conviction imposed upon a crime totally unsupported by evidence constitutes fundamental error." Troedel v. State, 462 So. 2d 392, 399 (Fla. 1984); Vance v. State, 472 So. 2d 734, 735 (Fla. 1985); accord Stanton v. State, 746 So. 2d 1229, 1230 (Fla. 3d DCA 1999); see O'Connor v. State, 590 So. 2d 1018, 1019 (Fla. 5th DCA 1991) ("[T]he lack of any proof to support the charge constitutes fundamental error."). "The courts of this state have consistently held that a conviction in the absence of a prima facie showing of the crime charged is fundamental error that may be addressed by the appellate court even though not urged below." K.A.N. v. State, 582 So. 2d 57, 59 (Fla. 1st DCA 1991). "[I]t is fundamental error to convict a defendant of a crime whose essential elements are not prima facie established by the evidence." Johnson v. State, 569 So. 2d 872, 874 (Fla. 2d DCA 1990). In Griffin v. State, 705 So. 2d 572, 574-75 (Fla. 4th DCA 1998), the

district court reversed the defendant's conviction for kidnapping a child by confining her in an unlocked closet and an unlocked room during the course of a robbery, holding:

> We find that appellant's conviction for kidnapping Victoria Linn is fundamentally erroneous because it is a conviction for a crime that did not take place. A conviction is fundamentally erroneous when the facts affirmatively proven by the State simply do not constitute the charged offense as a matter of law.

Conahan is entitled to raise fundamental error for the first time on appeal. See § 924.051(3), Fla. Stat. (1997). This Court has defined fundamental error as

> "error which goes to the foundation of the case or goes to the merits of the cause of action." Sanford v. Rubin, 237 So. 2d 134, 137 (Fla. 1970).... "[F]or 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." State v. Johnson, 616 So. 2d 1, 3 (Fla. 1993).

Hopkins v. State, 632 So. 2d 1372, 1374 (Fla. 1994). Failure to prove an essential element of a charged offense is certainly error which goes to the foundation of the case and the merits of the cause of action. Convicting the accused in the absence of proof beyond a reasonable doubt of every fact necessary to constitute the crime charged is a violation of his right to due process of law. See In re Winship, 397 U.S. 358, 375 (1970). Therefore, failure to prove an essential element of the offense beyond a reasonable doubt must be fundamental error.

Other than the execution of an innocent man, it is hard to conceive of an error more fundamentally unjust than to convict and sentence the accused for an unproven crime.

Because the state's evidence in Conahan's case failed to prove beyond a reasonable doubt an essential element of kidnapping, that the confinement was against Montgomery's will, it was a violation of due process of law under the United States and Florida Constitutions for the trial judge to find him guilty of the kidnapping, and this violation of Conahan's essential constitutional rights was fundamental error. The conviction and sentence for kidnapping must be vacated, and Conahan must be discharged for that offense.

ISSUE III

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON AND FINDING AGGRAVATING CIRCUMSTANCES WHICH WERE NOT PROVED BEYOND A REASONABLE DOUBT.

The State has the burden of proving aggravating circumstances beyond a reasonable doubt. Robertson v. State, 611 So. 2d 1228, 1232 (Fla. 1993). When the State relies on circumstantial evidence to support an aggravating factor, "the circumstantial evidence must be inconsistent with any reasonable hypothesis which might negate the aggravating factor." Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992); accord Woods v. State, 733 So. 2d 980, 991 (Fla. 1999). "Moreover, even the trial court may not draw 'logical inferences to support a finding of a particular aggravating circumstance when the State has not met its burden." Robertson, at 1232. As a matter of state law, it is error to instruct the jury on aggravating factors which are not supported by the evidence. Padilla v. State, 618 So. 2d 165, 170 (Fla. 1993); White v. State, 616 So. 2d 21, 25 (Fla. 1993); Archer v. State, 613 So. 2d 446, 448 (Fla. 1993).

In this case, the court overruled defense counsel's objection to instructing the jury on the cold, calculated, and premeditated (CCP) aggravating circumstance[6] on the ground that it was not supported by the evidence. [V38 2474-76; V39 2576] The court gave the standard CCP

[6] § 921.141(5)(i), Fla. Stat. (1995).

jury instruction. [V39 2637-38] Defense counsel renewed his objection at the conclusion of the court's instructions. [V39 2644] Defense counsel did not object to instructing the jury on the aggravating circumstance that the murder was committed during the commission of a kidnapping (felony murder).[7]

In support of the death sentence, the court found three aggravating circumstances: (1) the murder was committed during the commission of a kidnapping; (2) the murder was cold, calculated, and premeditated; and (3) the murder was heinous, atrocious, or cruel (HAC).[8] [V18 3287-89; V39 2688-92; A 1-3]

In Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994), this Court ruled,

> in order to find the CCP aggravating factor under our case law, the jury must determine that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold) ...; and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated) ...; and that the defendant exhibited heightened premeditation (premeditated) ...; and that the defendant had no pretense of moral or legal justification. [Citations omitted.]

Accord Woods, at 991.

As argued in Issue I, supra, the state's circumstantial evidence in the guilt phase of trial was legally insufficient to establish that

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[7] § 921.141(5)(d), Fla. Stat. (1995).

[8] § 921.141(5)(h), Fla. Stat. (1995).

the killing of Montgomery was premeditated. The state offered no additional evidence of premeditation in the penalty phase of trial. In the absence of legally sufficient evidence of premeditation, there can be no heightened premeditation as required to support a finding of the CCP aggravating factor. Therefore, the court erred in instructing the jury upon and finding the CCP aggravating factor.

Moreover, although defense counsel failed to object to the instruction on felony murder, the state's evidence in the guilt phase of trial was also legally insufficient to find that Conahan committed a kidnapping, as argued in Issue II, supra. Again, the state offered no additional evidence of kidnapping in the penalty phase of trial. Thus, it was also error for the court to instruct the jury upon and find the felony murder aggravating circumstance. While the error concerning the giving of the felony murder jury instruction was not properly preserved for appeal, this error should be considered in conjunction with the preserved error of instructing the jury on the unproven CCP aggravator and the court's errors in finding both the unproven CCP aggravator and the unproven felony murder aggravator.[9] This Court has ruled that "it is appropriate to consider both the preserved and unpreserved errors in determining whether the preserved

[9] Counsel for appellant is unaware of any precedent of this Court requiring preservation of the court's error in finding unproven aggravating circumstances in the court's sentencing order.

error was harmless beyond a reasonable doubt." Martinez v. State, 761 So. 2d 1074, 1082-83 (Fla. 2000).

Because two out of three of the aggravating circumstances instructed upon and found by the court were not proved by the state, the court's errors cannot be deemed harmless. In Padilla, at 170, upon finding that the trial court erred by instructing the jury upon and finding the CCP aggravator, reducing the number of valid aggravating factors to two, with one mitigating factor, this court found it necessary to remand the case for a new sentencing proceeding before a new jury. Similarly, in Archer, at 448, this Court found that the trial court erred by instructing the jury upon and finding the HAC aggravator, vacated the death sentence, and directed the trial court to empanel a jury and conduct a new sentencing proceeding. In Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993), this Court found that there was insufficient evidence of one out of four aggravators, HAC, vacated the death sentence, and remanded for a new sentencing proceeding with a new jury. In Conahan's case, the court instructed upon and found two unproven aggravators, leaving HAC as the only valid aggravator, the prosecutor argued the unproven aggravators to the jury, [V39 2584-89, 2591-2603] and the trial court found four nonstatutory mitigating factors,[10] [V18 3289-90; V39 2693-95; A 3-4] so the death sentence must

[10] (1) Conahan was a loving son who displayed loyalty, affection, and service to his parents (some weight); (2) he worked to improve himself by enrolling in nursing school (some weight); (3) he had good,

be vacated, and this case must be remanded for a new penalty proceeding with a new jury.

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helpful relationships with his aunt Betty Wilson and the members of the Linde family (some weight); (4) he is hard working (little weight). [V18 3289-90; V39 2693-95; A 3-4]

ISSUE IV

THE PROSECUTOR'S IMPROPER REMARKS DURING OPENING AND CLOSING ARGUMENT VIOLATED APPELLANT'S DUE PROCESS RIGHT TO A FAIR TRIAL.

In Stewart v. State, 51 So. 2d 494 (Fla. 1951), this Court explained the special duty owed by a prosecutor in a criminal trial:

> Under our system of jurisprudence, prosecuting officers are clothed with quasi judicial powers and it is consonant with the oath they take to conduct a fair and impartial trial. The trial of one charged with crime is the last place to parade prejudicial emotions or exhibit punitive or vindictive exhibitions of temperament.

Id., at 495; accord Gore v. State, 719 So. 2d 1197, 1202 (Fla. 1998).

In Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985), this Court condemned improper arguments by prosecutors, stating, "It ill becomes those who represent the state in the application of its lawful penalties to themselves ignore the precepts of their profession and their office." In Ruiz v. State, 743 So. 2d 1, 4 (Fla. 1999), this Court explained,

> A criminal trial is a neutral arena wherein both sides place evidence for the jury's consideration; the role of counsel in closing argument is to assist the jury in analyzing that evidence, not to obscure the jury's view with personal opinion, emotion, and nonrecord evidence.

Further, in Gore v. State, 719 So. 2d at 1202, this Court declared:

> While prosecutors should be encouraged to prosecute cases with earnestness and vigor, they should not be at liberty to strike "foul blows." See Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935). As the United States Supreme Court observed over sixty years ago, "It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Id.

In the present case, the prosecutor made a number of improper comments in both his opening statement and his closing argument. Defense counsel objected to some of the comments, but failed to object to others. This Court has determined that "it is appropriate to consider both the preserved and unpreserved errors in determining whether the preserved error was harmless beyond a reasonable doubt." Martinez v. State, 761 So. 2d 1074, 1082-83 (Fla. 2000); see also Brooks v. State, 762 So. 2d 879, 899 (Fla. 2000); Ruiz, at 7; Gore, at 1202.

Defense counsel filed a motion in limine to exclude evidence of the 1994 assault on Stanley Burden from the penalty phase proceeding. [V14 2579-81] The court reserved ruling on the motion, "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 on [sic] of the proffered Williams Rule evidence." [V36 2158-59]

In his opening statement, without obtaining the court's permission, the prosecutor began to tell the jury about the Burden assault. Defense counsel objected that the admissibility of the evidence concerning Burden was subject to the court's pending decision on the defense motion in limine to exclude it. The prosecutor argued that the evidence was relevant to the cold, calculated, and premeditated (CCP) aggravating circumstance. The court overruled the objection, while reserving ruling on the admissibility of the evidence. [V37 2304-06] The prosecutor proceeded to tell the jury that Conahan attempted to kill Burden in 1994 by tying him to a tree and strangling him. [V37 2306-07]

The state called Fort Myers Police Detective Pedro Soto to testify about the injuries suffered by Burden. Defense counsel objected that this testimony was not relevant to any aggravating circumstance. The court sustained the objection on the ground that the relevance of the evidence was outweighed by its prejudicial effects. The state inquired whether this ruling would also apply to testimony by the nurse who examined Burden and Conahan's trial testimony admitting a sexual encounter with Burden. The court again ruled that the prejudice outweighed the probative value. [V37 2347-51]

The first impropriety in this sequence of events was the prosecutor's failure in his opening statement to respect the court's pretrial ruling requiring him to approach the bench to argue the

admissibility of the Burden evidence before "making an offer" or asking a question about the evidence. In Gore, the trial court made a pretrial ruling excluding state evidence concerning Gore's kidnapping and abandonment of the two year old son of a victim of a collateral crime. Nonetheless, the prosecutor cross-examined Gore about this incident without first obtaining the court's permission, and the court overruled defense counsel's objection. Gore, at 1198-99. This Court expressed its concern "with the State's blatant disregard of the trial court's specific pretrial ruling." Id., at 1199. This Court ruled that "the proper method of proceeding would have been to first inquire of the trial court whether it would modify its earlier ruling, thus giving defense counsel an opportunity to respond fully." Similarly, the prosecutor in the present case should have asked the trial court to rule on whether he could comment on the Burden evidence and given defense counsel the opportunity to respond before he began discussing it in his opening statement.

Moreover, the trial court erred by overruling defense counsel's objection to the prosecutor informing the jury of the Burden evidence in opening statement since the court had not yet ruled on the admissibility of that evidence. Because the court later excluded the evidence of the Burden incident from the penalty phase trial, the prosecutor should not have been permitted to tell the jury about the incident in opening statement. The prosecutor's remarks about the Burden incident

were comments on facts never placed in evidence before the jury. It is legally improper to argue facts not in evidence. Ruiz, at 4; Knight v. State, 672 So. 2d 590, 591 (Fla. 4th DCA 1996); Pacifico v. State, 642 So. 2d 1178, 1184 (Fla. 1st DCA 1994). No lawyer is permitted to "allude to any matter ... that will not be supported by admissible evidence, [or] assert personal knowledge of facts in issue except when testifying as a witness ...." Fla. Bar Rule 4-3.4(e). "The law has long recognized that 'counsel is not under oath to speak the truth ....'" Eure v. State, 764 So. 2d 798, 799-800 (Fla. 2d DCA 2000) (quoting Tyson v. State, 87 Fla. 392, 394, 100 So. 254, 255 (1924)).

The prosecutor's act of telling the jury about inadmissible collateral crime evidence in opening statement was extremely prejudicial to Conahan. "The improper admission of collateral crimes evidence is 'presumed harmful' because the jury might consider the bad character thus demonstrated as evidence of guilt of the crime charged." Gore, at 1199; Czubak v. State, 570 So. 2d 925, 928 (Fla. 1990). The court's reason for excluding the Burden evidence from the jury's consideration was that its prejudicial nature outweighed its probative value. See Sexton v. State, 697 So. 2d 833, 837 (Fla. 1997); § 90.403, Fla. Stat. (1999).

During his closing argument, the prosecutor made the following remarks:

> 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 [sic] on the matter of guilt of the Defendant.

[V39 2580] Defense counsel did not object. [V39 2580] The prosecutor further commented:

> 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.

[V39 2586] Defense counsel did not object. [V39 2586]

"An argument suggesting to the jury that there is evidence harmful to the accused that the jury did not hear is highly improper." Ford v. State, 702 So. 2d 279, 281 (Fla. 4th DCA 1997). A prosecutor "may not suggest that evidence which was not presented at trial provides additional grounds for finding defendant guilty." Ruiz, at 4 (quoting United States v. Garza, 608 F.2d 659, 662 (5th Cir. 1979)).

The prosecutor was alluding to the fact that the jury heard only the penalty phase of the trial and not the guilt phase, and the prosecutor did not present all the evidence from the guilt phase during the penalty phase. However, the only guilt phase evidence the court expressly ruled inadmissible in the penalty phase was the collateral crime evidence, which was excluded because the prejudicial effects of the evidence outweighed its probative value.

The remarks were misleading because section 921.141(1), Florida Statutes (1995), permitted the presentation of evidence "as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances ...." In the analogous situation of a resentencing proceeding where the jury did not hear the guilt phase evidence, the trial court has discretion to allow the jury to hear probative evidence that will aid the jury in understanding the facts of the case. Wike v. State, 698 So. 817, 821 (Fla. 1997); Bonifay v. State, 680 So. 2d 413, 419 (Fla. 1996). The test for the admissibility of such evidence is relevancy to the nature of the crime. Wike, at 817. Thus, the prosecutor was legally entitled to present any evidence about the nature of the crime which the court found relevant. It was therefore highly improper for the prosecutor to tell the jury that he was not permitted to present all his evidence of Conahan's guilt because the remark misled the jury about both the law and the evidence.

> The Oath of Admission to the Florida Bar states, in part, that an attorney "will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the Judge or jury by any artifice or false statement of fact or law." Rules of the Supreme Court, 145 Fla. 763, 797 (Fla. 1941). Under these standards, the conduct of the prosecutor here was clearly improper.

Craig v. State, 685 So. 2d 1224, 1229 (Fla. 1996). It is improper for the prosecutor to misstate the law in his argument to the jury. Rhodes v. State, 547 So. 2d 1201, 1206 (Fla. 1989); Garron v. State, 528 So. 2d 353, 359 n. 7 (Fla. 1988) "A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal ...." Fla. Bar Rule 4-3.3(a)(1).

The prosecutor further argued:

> 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.

[V39 2580-81] Defense counsel did not object. [V39 2581]

By asking the jury to disregard Conahan's evidence of mitigating circumstances, the prosecutor was asking the jury to disregard the law. The Eighth Amendment requires individualized consideration of the character and record of the defendant and any circumstances of the offense which may provide a basis for a sentence less than death. Sumner v. Shuman, 483 U.S. 66, 72-76 (1987); Woodson v. North Carolina, 428 U.S. 280, 304 (1976). Thus, the Supreme Court has held that "in capital cases, the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence." Hitchcock v. Dugger, 481 U.S. 393, 394 (1987); Eddings v. Oklahoma, 455 U.S. 104,

113-14 (1982). This requirement is not satisfied solely by allowing the presentation of mitigating evidence. The sentencer is required to "listen" to the evidence and to give it some weight in determining the appropriate sentence. Eddings, 455 U.S. at 113-14 & n. 10.

It is highly improper for the prosecutor to urge the jury to disregard the law. "First and foremost, we are particularly concerned that the prosecutor invited the jury to disregard the law.... This type of 'ignore the law' argument has absolutely no place in a trial, especially when asserted by the State." Urbin v. State, 714 So. 2d 411, 420 (Fla. 1998).

The prosecutor further argued:

> Clearly, early in his life, he [Conahan] 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--

[V39 2581] Defense counsel objected that it was improper for the prosecutor to argue mitigating factors that have not been proven. The court overruled the objection on the ground that the prosecutor "gets to argue all the evidence." [V39 2582] The court erred in overruling the objection because the Eighth Amendment requires individualized consideration of the character and record of the defendant and any circumstances of the offense which may provide a basis for a sentence less than death, Sumner, at 72-76; Woodson, at 304), and the consider-

ation of all relevant mitigating circumstances proposed by the defense. Hitchcock, at 394; Eddings, at 113-14. Mitigating circumstances not proposed by the defense and not supported by the evidence are irrelevant to the determination of the sentence.

The prosecutor stated:

> 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.

[V39 2585] Defense counsel did not object. [V39 2585]

This argument was an improper misstatement of the law because "a jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors." Brooks, at 902 (quoting Henyard v. State, 689 So. 2d 239, 249-50 (Fla. 1996)). The remark in this case is even more egregious than the remark in Brooks because the prosecutor asserted that the presence of certain aggravating circumstances requires the death penalty without regard to the legally mandated weighing of aggravating and mitigating circumstances.

The prosecutor further stated:

> 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--

[V39 2603] Defense counsel objected that "justice to a victim" is not contained in the statutes or jury instructions and that it is improper to appeal to the sympathies of the jurors and to attempt to inflame the jury. The court overruled the objection on the ground that it was fair argument. The court denied defense counsel's motion for mistrial and request for a curative instruction. [V39 2604-05] The prosecutor repeated the objected to remarks. [V39 2605]

The prosecutor concluded his argument by stating:

> 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.

[V39 2606] Defense counsel did not object. [V39 2606]

The prosecutor's argument that justice for the victim and fairness require the death penalty was an improper misstatement of the law. As noted above, the jury is not required to recommend death even when the aggravating circumstances outweigh the mitigating. Brooks, at 902. The prosecutor's argument was equivalent to arguing that the jury has a duty to recommend death, an argument this Court has condemned as a misstatement of the law and "egregiously improper." Id., at 903-904; see Gore, at 6-7; Urbin, at 421.

In Ruiz, this Court considered the prosecutor's improper comments during the guilt and penalty phases of the trial -- both the remarks to which defense counsel objected and the remarks to which defense counsel

failed to object -- together with the trial court's error in admitting an inflammatory photo in the penalty phase and the improper admission of irrelevant testimony about a gun to find that "the integrity of the judicial process has been compromised and the resulting convictions and sentences irreparably tainted." Ruiz, at 7-8. This Court concluded that the conduct of the prosecutors was "both egregious and inexcusable," and "compromised the integrity of the proceeding." Id., at 9-10. This Court reversed Ruiz's murder convictions, vacated his sentences, and remanded for a new trial. Id. , at 10.

Similarly, in Conahan's case, this Court should consider the prosecutor's improper comments in opening statement and closing argument -- both the remarks to which defense counsel objected and the remarks to which defense counsel failed to object -- together with the trial court's abuse of discretion in admitting a number of inflammatory photos of Montgomery's injuries which were not relevant to any material disputed issue in the penalty phase of his trial, as argued in Issue V, infra, to determine that the integrity of Conahan's penalty phase trial was compromised and the resulting death sentence was irreparably tainted. This Court must vacate the death sentence and remand for a new penalty proceeding before a new jury.

ISSUE V

THE TRIAL COURT ERRED BY ADMITTING INFLAMMATORY PHOTOGRAPHS WHICH WERE NOT RELEVANT TO ANY CONTESTED ISSUE.

During the penalty phase, defense counsel objected to the relevancy of crime scene photos, state's exhibits 10, 11, and 12, which showed both the rope burns on Montgomery's neck and that Montgomery's face was covered with flies, arguing that there were autopsy photos to show the neck injuries and that the depiction of the flies on the face was disturbing and not relevant. Defense counsel objected to state's exhibits 8 and 9, photos showing that Montgomery's genitalia had been removed, arguing that the injuries were post mortem and that the photos were grossly inflammatory and not relevant to either the heinous, atrocious, or cruel (HAC) aggravator, nor to the cold, calculated, and premeditated (CCP) aggravator. [V38 2375-76] The prosecutor argued that the jury was entitled to see the condition of the body when it was found in the woods and that the removal of the genitals was relevant to CCP to show Conahan's planning by showing the reason he purchased the knife. [V38 2376-80] The court overruled the objections and admitted the photos. [V38 2380] The photos were published to the jury [V38 2385-86] during the testimony of Detective Michael Gandy describing the wooded crime scene and the discovery of Montgomery's body. [V38 2381-86]

Dr. Huser, the Medical Examiner who testified in the penalty phase after reviewing Dr. Imami's autopsy findings, photographs, medical examiner's summary, death certificate, body diagram, toxicology report, depositions, and trial testimony, [V38 2388-95, 2420-21] did not refer to state's exhibits 8 through 12 during her testimony. [V38 2388-41] Instead, she relied upon other photos of Montgomery's injuries. State's exhibit 27 showed the left side of his upper thigh and hip. The court overruled defense counsel's objection that 27 was inflammatory because it appeared to depict the amputation of the genitals. Dr. Huser said it showed some scrapes and scratches on the lateral buttocks and some dried fluid. [V38 2404-06] Defense counsel objected that state's exhibit 32, which showed Montgomery's anus and that the genitals had been cut off, was inflammatory and would allow the jury to speculate about the sexual battery for which Conahan had been acquitted. He objected that state's exhibit 31, which showed that the genitals had been cut off, was extremely disturbing and inflammatory. [V38 2408-09] The prosecutor argued that the photos were relevant to CCP because the doctor would testify that the cutting was done with an extremely sharp instrument with a precise incision and no hacking or tearing. [V38 2409-10] The court overruled the objections and admitted the photos. [V38 2410-12]

The test for the admissibility of a photo of the murder victim is relevancy, not necessity. Ruiz v. State, 743 So. 2d 1, 8 (Fla. 1999).

The determination of the admissibility of such photos is within the sound discretion of the trial court and will not be disturbed on appeal in the absence of abuse. Id. In Ruiz, this Court found error in the penalty phase admission of a two by three feet blow-up of a photo showing the bloody and disfigured head and upper torso of the victim. Because the prosecutor provided no relevant basis for submitting the blow-up in the penalty phase, this Court concluded that it was offered simply to inflame the jury. Id.

In Almeida v. State, 748 So. 2d 922, 929-30 (Fla. 1999), the state introduced an autopsy photo of the victim that depicted the gutted body cavity, which the medical examiner testified was relevant to show the trajectory of the bullet and nature of the injuries. This Court found that neither of those points was in dispute, and the admission of the photo was gratuitous. This Court ruled, "To be relevant, a photo of a deceased victim must be probative of an issue that is in dispute." Id., at 929. In a footnote, this Court quoted McCormick on Evidence 773 (John William Strong ed., 4th ed. 1992):

> There are two components to relevant evidence: materiality and probative value. Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial. (Footnote omitted.)

Almeida, at 929 n. 17. However, this Court found that the error in admitting the photo was harmless. Id., at 930.

Similarly, in Copertino v. State, 726 So. 2d 330, 334 (Fla. 4th DCA 1999), a manslaughter by culpable negligence case in which five people were killed in a car crash, the Fourth District found that the admission of the autopsy photos of the victims, which gruesomely depicted the extent of their injuries, were irrelevant to any issue in the case. The court found that admission of the photos was improper because it "served no purpose other than to highlight the horror of their injuries and deaths." Id. However, the court found that the error was harmless. Id.

In Conahan's case, the trial court abused its discretion by admitting the crime scene photos of Montgomery's face and neck and the photos showing that his genitals had been removed because they were not relevant to any material disputed issue in the penalty phase. The defense did not dispute that the body was found in a wooded area, that there were flies on Montgomery's face when the body was found, that strangulation was the cause of death, nor that Montgomery's genitals had been removed. The defense did dispute the prosecutor's claim that the CCP aggravator applied under the facts of this case, but that was a dispute about the significance of the injuries to the body, not the nature of the injuries. The photos showed only the nature of the injuries, not whether Conahan had a cold, calculated plan to inflict the injuries. Admission of the photos was improper because they served

no purpose other than to inflame the jury by highlighting the horror of Montgomery's injuries and death.

In Ruiz, this Court considered the trial court's error in admitting an inflammatory photo in the penalty phase along with the prosecutor's improper comments during both the guilt and penalty phases of the trial and the improper admission of irrelevant testimony about a gun to find that "the integrity of the judicial process has been compromised and the resulting convictions and sentences irreparably tainted." Ruiz, at 7-8. This Court concluded that the conduct of the prosecutors was "both egregious and inexcusable," and "compromised the integrity of the proceeding." Id., at 9-10. This Court reversed Ruiz's convictions, vacated his sentences, and remanded for a new trial. Id. , at 10.

Similarly, in Conahan's case, this Court should consider the trial court's abuse of discretion in admitting a number of inflammatory photos of Montgomery's injuries which were not relevant to any material disputed issue in the penalty phase of his trial together with the prosecutor's improper remarks in his penalty phase opening statement and closing argument, as set forth in Issue IV, supra, to determine that the integrity of Conahan's penalty phase trial was compromised and the resulting death sentence was irreparably tainted. This Court must vacate the death sentence and remand for a new penalty proceeding before a new jury.

CONCLUSION

Appellant respectfully requests this Honorable Court to grant the following relief: Issue I, reverse the judgment and death sentence for premeditated first-degree murder and remand for entry of a judgment and sentence for second-degree murder; Issue II, reverse the judgment and sentence for kidnapping and remand with instructions to discharge appellant for that offense; Issues III, IV, and V, vacate the death sentence and remand for a new penalty proceeding with a new jury.

APPENDIX

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance Sabella, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this __ day of December, 2000.

Respectfully submitted,

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