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

# REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

PAUL C. HELM
Assistant Public Defender
FLORIDA BAR NUMBER O229687

Public Defender's Office
Polk County Courthouse

P. O. Box 9000--Drawer PD
Bartow, FL  33831
(863) 534-4200

ATTORNEYS FOR APPELLANT

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## PRELIMINARY STATEMENT

This brief is filed in reply to the Answer Brief of the Appellee, the State of Florida. Appellant will rely upon the arguments presented in his Initial Brief with regard to Issues IV and V.

References to the record on appeal are designated by the volume number followed by the page number(s).

## ARGUMENT

### ISSUE I

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

Appellee argues that if this Court finds the evidence insufficient for premeditation, the judgment of guilt for first-degree murder should be affirmed because Conahan is guilty of first-degree felony murder committed in the course of a kidnapping. Answer Brief, at 33-40. However, appellee bases this argument primarily on case law that does not apply to this case.

It is true that when the indictment charges only premeditated first-degree murder, the state is permitted to proceed on theories of both premeditation and felony murder, and no special verdict is required. Young v. State, 579 So. 2d 721, 724 (Fla. 1991), cert. denied, 502 U.S. 1105 (1992). But that is not what happened in this case. The grand jury indicted Conahan in Count I with first-degree premeditated murder and separately indicted him in Count II with first-degree felony murder during a kidnapping; it also indicted Conahan in Count III for kidnapping and in Count IV for sexual battery. [V1 1-2] Conahan waived his right to a jury trial for the determination of guilt or innocence, so the case proceeded as a bench trial. [V12 2249-50; V25 647-65] The court granted a judgment of acquittal on Count IV, sexual battery. [V34 1849-74] Following

closing arguments, the court made express findings of guilt on Count I, first-degree premeditated murder, and Count III, kidnapping. The court made no express finding of either guilt or innocence on Count II, first-degree felony murder. [V35 2016]

Under these unusual circumstances Young does not apply and a different rule governs the outcome of the case. When the jury returns a guilty verdict on one count of an indictment or information and fails to make any finding on a second count, the failure to return a verdict on the second count operates as an acquittal on that count. Barrington v. State, 145 Fla. 61, 62, 199 So. 320, 321 (1941); Martinez v. State, 76 Fla. 159, 161, 79 So. 751 (1918); Lowe v. State, 116 So. 2d 254, 255 (Fla. 2d DCA 1959); see also, Bennett v. United States, 89 F. 2d 52 (5th Cir. 1937) (guilty verdicts on five of seven counts resulted in implied acquittals on two remaining counts); State v. Henley, 774 S.W. 2d 908, 916 (Tenn. 1989) (by failing to respond to two counts of indictment, jury found defendant not guilty on those counts).

In a bench trial, the court acts as trier of fact instead of a jury, so the court's findings of guilt or innocence take the place of the jury's verdict. There is no reason to apply a different rule to the court's findings of guilt or innocence on each count than would be applied to the verdicts of a jury. Thus, when the trial court found Conahan guilty on Count I, first-degree premeditated murder,

and made no finding of guilt or innocence on Count II, first-degree felony murder, the failure to make an express finding of guilt on Count II operated as an acquittal on Count II as a matter of law.

It does not matter whether this was the result intended by the trial court. The Double Jeopardy Clause bars appellate review of an acquittal even when the acquittal is "egregiously erroneous."[1] Sanabria v. United States, 437 U.S. 54, 64 (1978); see U.S. Const. amends. V and XIV; Art. I, § 9, Fla. Const. "[T]he Double Jeopardy Clause attaches special weight to a judgment of acquittal. A verdict of not guilty, whether rendered by the jury or directed by the trial judge, absolutely shields the defendant from retrial." Tibbs v. Florida, 427 U.S. 31, 41 (1982). "That judgment of acquittal, however erroneous, bars further prosecution on any aspect of that count . . . ." Sanabria, at 69. "A verdict of acquittal on the issue of guilt or innocence is, of course, absolutely final." Bullington v. Missouri, 451 U.S. 430, 445 (1981).

Nor does it matter that the acquittal on Count II, the felony murder charge, is inconsistent with the trial court's finding of guilt on Count III, kidnapping. "Consistency in the verdict[s] is not necessary. Each count in an indictment is regarded as if it was

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[1] There is one exception to this rule. An order granting a motion for judgment of acquittal after a jury verdict of guilt is reviewable under Florida Rule of Appellate Procedure 9.140(c)(1)-(E), and such review is not barred by double jeopardy. State v. Gaines, 770 So. 2d 1221, 1229 n. 9 (Fla. 2000).

a separate indictment." United States v. Powell, 469 U.S. 57, 62 (1984) (quoting Dunn v. United States, 284 U.S. 390, 393 (1932)); Streeter v. State, 416 So. 2d 1203, 1206 (Fla. 3d DCA 1982).[2] Inconsistent verdicts are permitted in Florida with only one exception. State v. Powell, 674 So. 2d 731, 732-33 (Fla. 1996). The exception applies when an acquittal on one count negates a necessary element for conviction on another count. Id., at 733. Thus, if the trial court had acquitted Conahan of kidnapping, it could not have convicted him of felony murder because kidnapping was a necessary element of the felony murder as charged in Count II. This exception does not apply to Conahan because the acquittal on felony murder did not negate a necessary element for conviction on Count III, kidnapping.

The trial court's failure to make an express finding of guilt or innocence on Count II, felony murder, acquitted Conahan of that charge as a matter of law. That acquittal is not reviewable on appeal. Therefore, if this Court finds that the state's evidence at trial was legally insufficient to establish premeditation, Conahan's conviction for first-degree premeditated murder under Count I must be reversed and cannot be affirmed on the state's felony murder theory.

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[2] The Dunn rule is based upon the United States Supreme Court's interpretation of common law, not federal constitutional law.

## 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.

Appellee's reliance on Faison v. State, 426 So. 2d 963 (Fla. 1983); Berry v. State, 668 So. 2d 967 (Fla. 1996); Harkins v. State, 380 So. 2d 524 (Fla. 5th DCA 1980); Sanborn v. State, 513 So. 2d 1380 (Fla. 3d DCA 1987), affirmed, 533 So. 2d 1169 (Fla. 1988); and Lawson v. State, 720 So. 2d 558 (Fla. 4th DCA 1998), Answer Brief, at 42, is misplaced because none of those cases involved an appellate claim that the evidence was insufficient to prove that the movement or confinement in question was against the victim's will.

Sochor v. State, 619 So. 2d 285 (Fla.), cert. denied, 510 U.S. 1025 (1993), Answer Brief, at 42, 44, included this Court's express finding, "The evidence adduced at trial shows that, although the victim may have entered the truck voluntarily, at some point she was held unwillingly." Id., at 251. However, this Court did not merely assume that she was held unwillingly. The state's evidence in Sochor proved that she was held unwillingly. Sochor's brother Gary testified that Sochor drove to a secluded spot where Gary remembered the victim screaming for help and seeing Sochor on top of her with her hands pinned down on the ground. Gary yelled at him and threw a rock over his head. Sochor stopped assaulting the victim, turned and

looked at Gary, told him to get back in the truck, then resumed his assault. Id., at 287-88. Conahan's case is different from Sochor because the state did not present any such direct eyewitness testimony that Montgomery was confined against his will.

Appellee relies upon the nature of the injuries suffered by Montgomery to establish that there was a struggle and that the confinement of Montgomery was non-consensual. Answer Brief, 43-44. However, those injuries are, at best, only circumstantial evidence of Montgomery's unwillingness to be confined and they are not inconsistent with a reasonable hypothesis that Montgomery consented to be tied to a tree. The state's own expert, Dr. Imami, the medical examiner who performed the autopsy, [V27 907-15] testified that the external genitalia had been cut off with a sharp knife after death. [V27 946-47] An injury occurring after death does not establish that there was a struggle before death nor that the confinement prior to death was non-consensual.

Moreover, in Dr. Imami's opinion, the crisscrossed skin abrasions on Montgomery's back occurred after death, although he conceded that they may have occurred at the time of death. [V27 926-27] Dr. Imami said the scrapes could have been caused by the body moving against a tree or post. [V 27 928] Such movement of the body against the tree or post could have occurred after death when the body was removed from the tree or post. Again, the state's own

evidence makes it more likely than not that the injuries occurred after death and therefore prove nothing about a struggle or consent to the confinement.

Although Dr. Imami found that the dilation of the anus was consistent with a sexual assault, [V27 936] he also made it clear that he did not think there had actually been any recent anal intercourse because there was no recent physical trauma to the rectal opening and no sperm were found in the rectal area. [V 27 944-47] Moreover, the trial court granted appellant's motion for judgment of acquittal on Count IV, sexual battery. [V34 1849-74] Because of that acquittal, double jeopardy barred further prosecution of Conahan for the alleged sexual assault. See Sanabria v. United States, 437 U.S. 54, 69 (1978). Therefore, the state cannot rely upon any allegation of sexual assault to support its claims that a struggle occurred and that the confinement was non-consensual.

The only injuries which Dr. Imami expressly found to have occurred before death were the ligature marks, the 1/4 inch grooves in the skin of the neck and on the lower chest and sides. [V 921-25, 937-39] These injuries establish that the ropes were tied tightly enough to leave marks in the skin, and they contributed to Dr. Imami's conclusion that the cause of death was asphyxiation secondary to strangulation. [V27 939] However, the ligature marks do not establish that there was a struggle nor that the confinement was non-

consensual as claimed by appellee. It cannot be presumed that Montgomery did not consent to being tied up just because the bindings ultimately caused his death. Due process of law required the state to prove beyond a reasonable doubt that Montgomery was unwilling to be confined as an essential element of the offense of kidnapping. See In re Winship, 397 U.S. 358, 375 (1970); Long v. State, 689 So. 2d 1055, 1057 (Fla. 1997).

Appellee's reliance on Gore v. State, 599 So. 2d 978 (Fla.), cert. denied, 506 U.S. 1003 (1992), Answer Brief, at 45, is also misplaced. Gore met Roark in Cleveland, Tennessee, and accompanied her to her friend's house where she planned to spend the night. Id., at 980. Roark called her grandmother that evening and told her she would be home in time for church the next morning. Id., at 985. She was last seen driving away from the party to take Gore home, and her body was found in Florida. Id., at 980. When the body was found there was a shoestring tied around her wrist, which suggested that she had been bound. Id., at 985. These facts supported this Court's conclusion that "at some point Roark's accompaniment of Gore ceased to be voluntary." Id., at 985. Evidence that Roark intended to be home in time to go to church the next morning was clearly inconsistent with any claim that she voluntarily accompanied Gore on a drive from Tennessee to Florida. Also, there was no evidence to suggest that she consented to being bound.

Conahan's case is readily distinguished from Gore. Although Montgomery told Whittaker that he would be back in two hours when he left Whittaker's trailer to go earn about $200, [V27 988-90] Montgomery did not accompany Conahan out of state. Montgomery's body was found in a wooded area of Charlotte County, [V26 750-77, 789-99, 803-04, 847-53] and Whittaker's trailer was also located in Charlotte County. [V27 981] Thus, Montgomery's intent to return to Whittaker's trailer that evening was not inconsistent with his having consented to go with Conahan to the wooded area and allowing Conahan to tie him to a tree. Moreover, Montgomery's stated intent to earn about $200 was consistent with having consented to be tied to the tree because it was consistent with having accepted an offer from Conahan to pose for nude bondage photos. When Montgomery told his mother that he met Conahan, he also told her that someone had offered him $200 to pose for nude pictures. [V 28 11106, 1110] This was consistent with the state's evidence showing that Conahan engaged in a pattern of offering to pay young men to pose for nude photos, including bondage scenes. Stanley Burden testified that Conahan offered to pay him $100 to $150 to pose for nude photographs, [V29 1155-57, 1195-96] Conahan wanted to take bondage photos, and Conahan tied him to a tree. [V 29 1162-64, 1181, 1213]. Conahan offered $150 to Deputy Wier to pose for kinky nude modeling with a progressive bondage scene. [V30 1307-09, 1325-27, 1329, 1335-40] Conahan

offered $150 to Deputy Clemens to model for nude photos. [V 29 1270; V30 1299-1300]

Since the state's evidence in this case is consistent with Montgomery having consented to accompany Conahan and to be tied to a tree, it is not sufficient to establish the confinement against his will element of kidnapping. The kidnapping conviction should be vacated with directions to discharge Conahan 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.

As argued in Issue I, supra, the trial court's failure to make any express finding of guilt on Count II of the indictment, alleging first-degree felony murder during the commission of or attempt to commit kidnapping, operated as an acquittal on that charge as a matter of law, regardless of the trial court's intent. See Barrington v. State, 145 Fla. 61, 62, 199 So. 320, 321 (1941). The Double Jeopardy Clauses of the United States and Florida Constitutions bar appellate review of that acquittal even if it was "egregiously erroneous." Sanabria v. United States, 437 U.S. 54, 64 (1978); see U.S. Const. amends. V and XIV; Art. I, §9, Fla. Const. "That judgment of acquittal, however erroneous, bars further prosecution on any aspect of that count . . . ." Id., at 69. Because the court acquitted Conahan of felony murder during the commission of a kidnapping in the guilt phase of trial, double jeopardy barred further prosecution on any aspect of that offense. Thus, the trial court violated the constitutional prohibition of double jeopardy by instructing the jury upon and finding felony murder during the

commission of a kidnapping[3] as an aggravating circumstance in the penalty phase of the trial. [V18 3287-88; V39 2636]

Appellant did not challenge the trial court's finding of the heinous, atrocious, or cruel aggravating circumstance[4] in his initial brief because this Court has approved the HAC finding in virtually all cases involving strangulation of a conscious victim. See Blackwood v. State, 777 So. 2d 399, 409 (Fla. 2000). However, in arguing that HAC alone is sufficient to support the death sentence in Conahan's case, appellee relies on cases in which the HAC circumstance was established by far more egregious facts than strangulation alone. Answer Brief, at 53. In Blackwood, the defendant manually strangled the victim, strangled her with wire, lodged a bar of soap and washcloth in the back of her throat, and smothered her with a pillow. In addition, there was evidence that she struggled for her life during the attack. Id., at 413. In contrast, there is no evidence in this case that Montgomery was strangled in multiple ways, and, as argued in Issue II, supra, Dr. Imami's testimony did not establish that Montgomery struggled for his life.

In Cardona v. State, 641 So. 2d 361 (Fla. 1994), cert. denied, 513 U.S. 1160 (1965), Cardona severely beat her own three year old son with a baseball bat, splitting his head open, then locked him in

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[3] § 921.141(5)(d), Fla. Stat. (1995).

[4] § 921.141(5)(h), Fla. Stat. (1995).

a closet where he had been confined for the preceding two months. In addition, she choked, starved, emotionally abused, and systematically tortured her son. Id., at 362. Cardona may very well be the most heinous, atrocious, and cruel case this Court has ever reviewed. The facts of Montgomery's death pale in comparison.

In Arango v. State, 411 So. 2d 172 (Fla.), cert. denied, 457 U.S. 1140 (1982), vacated on other grounds, 474 U.S. 806 (1985), Arango beat the victim with a blunt instrument many times about the head and body, made deep cuts on his face causing severe hemorrhaging, choked him by wrapping a wire around his neck, stuffed a towel into his mouth to prevent him from breathing, then shot him twice in the head. Again, the facts of Montgomery's death are much less heinous and torturous.

In LeDuc v. State, 365 So. 2d 149 (Fla. 1978), cert. denied, 444 U.S. 885 (1979), the HAC finding appears to have been based upon the sadistic rape and murder of a nine year old girl, but there is no detailed description of the facts in this Court's opinion. Since Conahan was acquitted of sexually battering Montgomery, a young adult male, Conahan's case is less aggravated than LeDuc.

## CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert J. Landry, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of June, 2001.

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Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(863) 534-4200

PAUL C. HELM
Assistant Public Defender
Florida Bar Number 0229687
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

/pch