

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-___

DANIEL OWEN CONAHAN, JR.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

**NEAL A. DUPREE
CCRC-SOUTH
Florida Bar No. 311545**

**WILLIAM M. HENNIS III
Litigation Director
Florida Bar No. 0066850**

**CRAIG TROCINO
Assistant CCRC-South
Florida Bar No. 996270**

**CAPITAL COLLATERAL REGIONAL
COUNSEL - SOUTH
101 N.E. 3rd Avenue, Suite 400
Fort Lauderdale, Florida 33301
(954) 713-1284**

COUNSEL FOR PETITIONER

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INTRODUCTION

This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth amendments to the United States Constitution, claims demonstrating that Mr. Conahan was deprived of the effective assistance of counsel on direct appeal and that the proceedings that resulted in his conviction and death sentence violated fundamental constitutional guarantees.

Citations to the Record on the Direct Appeal shall be:

(R.) -- Record on Direct appeal;

(PCR) -- Record of Post-Conviction Appeal (where necessary)

(T.) -- Evidentiary Hearing transcripts (where necessary)

All other citations shall be self-explanatory.

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030(a)(3) and Article V, § 3(b)(9), Fla. Const. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const.

REQUEST FOR ORAL ARGUMENT

Mr. Conahan requests oral argument on this petition which is being filed along with his Initial Brief in Case No. SC11-615.

PROCEDURAL HISTORY

BRIEF STATEMENT OF THE CASE AND FACTS

The Circuit Court for the Twentieth Judicial Circuit, in and for Charlotte County, Florida entered the judgments of convictions and death sentence at issue. On February 25, 1997, Mr. Conahan was indicted on one count of first-degree premeditated murder, one count of felony first degree murder during the commission of or attempt to commit kidnapping; one count of kidnapping with intent to commit or facilitate the commission of sexual battery, and one count of sexual battery.

On August 9, 1999, Mr. Conahan waived his right to a jury trial for the determination of his guilt, and the case went to trial before Twentieth Circuit Judge William Blackwell, who appointed himself on August 5, 1999, following the disqualification of Circuit Court Judge Ellis on August 2, 1999. Although Judge Blackwell granted trial counsel's motion for judgment of acquittal on the sexual battery charge, the trial court found Mr. Conahan guilty on the three other counts.

The trial court then considered and granted trial counsel's motion for change of venue from Charlotte County to Collier County for purposes of the penalty phase, which was conducted on November 1-3, 1999 in Naples, Florida. The jury impaneled for the penalty phase returned a unanimous recommendation of death.

The trial court conducted a Spencer hearing on November 5, 1999.¹ At that hearing victim Montgomery's brother and mother read victim impact statements to the court. Mr. Conahan also testified and both parties subsequently provided sentencing memorandums to the trial court.

On December 10, 1999, the trial court sentenced Mr. Conahan to death on Count I, first-degree premeditated murder, and to fifteen years in prison for Count three, kidnapping. The State entered a nolle prosequi as to Count II, first degree felony murder. The trial court found three aggravating circumstances: (1) the murder was committed during the commission of a kidnapping; (2) the murder was cold, calculated, and premeditated (CCP); and (3) the murder was heinous, atrocious, or cruel (HAC).

The court failed to find the only statutory mitigation argued, that the victim was a participant in the defendant's conduct or consented to the act. The trial court did find four non-statutory mitigating circumstances under the catchall section 921.141(6)(h): (1) Mr. Conahan was a loving son who displayed loyalty, affection, and service to his parents; (2) he worked to improve himself by enrolling in nursing school; (3) he had good, helpful relationships with his aunt Betty Wilson and the members of the Linde family; (4) he is hard working.² Mr. Conahan subsequently appealed the decision of the trial court to the Supreme Court of Florida. His initial

¹*Spencer v. State*, 615 So. 2d 688, 690-91 (Fla. 1993).

²The trial court's written order is found at R. 3287-91.

brief raised five issues.³ The Court denied relief after oral argument. See *Conahan v. State*, 844 So. 2d 629 (Fla. 2003). A petition for certiorari to the United States Supreme Court was denied on October 6, 2004.

³ISSUE 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 it 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,

Mr Conahan filed an initial motion for postconviction relief in the circuit court of Charlotte County on October 1, 2004 and subsequently amended it. The lower court entered an order granting an evidentiary hearing on some claims and denying a hearing on others. (PCR 508-25). The hearing was held on June 21 through June 24, 2010, and the lower court thereafter entered an order denying

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 resented 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 mis-stated 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 judge. 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 prosecutor'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. *Initial Brief of Appellant*, pp. 37-40.

relief. (PCR. 1678-1726). Mr. Conahan subsequently appealed the decision of the lower court to the Supreme Court of Florida. In light of the fact that Mr. Conahan's initial brief is being filed along with the instant petition, he will rely on the more comprehensive statement of the case and facts in that simultaneous pleading.

CLAIM I

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL ISSUES WHICH WARRANT REVERSAL THAT WERE EITHER PRESERVED BY OBJECTIONS ENTERED BY COUNSEL AT TRIAL, OR, IN THE ALTERNATIVE, COUNSEL FAILED TO RAISE UNPRESERVED ISSUES BASED ON THE FUNDAMENTAL ERROR DOCTRINE.

A. Introduction

Mr. Conahan had the constitutional right to the effective assistance of counsel for purposes of presenting his direct appeal to this Court. *Strickland v. Washington*, 466 U.S. 668 (1984). "A first appeal as of right [] is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). The *Strickland* test applies equally to ineffectiveness allegations of trial counsel and appellate counsel. *See Orazio v. Dugger*, 876 F. 2d 1508 (11th Cir. 1989).

Because the constitutional violations which occurred during Mr. Conahan's resentencing were "obvious on the record" and "leaped out upon even a casual reading of transcript," it cannot be said that the "adversarial testing process worked in [Mr. Conahan's] direct appeal." *Matire v. Wainwright*, 811 F. 2d 1430, 1438 (11th Cir. 1987). The lack of appellate

advocacy on Mr. Conahan's behalf is identical to the lack of advocacy present in other cases in which this Court has granted habeas corpus relief. *Wilson v. Wainwright*, 474 So.2d 1162 (Fla. 1985).

B. Failure to raise the following issues on direct appeal.

Trial counsel made several objections below that were also included and preserved in his motion for new trial and that were not carried forward by appellate counsel. This failure on the part of appellate counsel prejudiced Mr. Conahan. Where counsel failed to make the proper objections below, appellate counsel was required to raise appropriate claims based on the fundamental error doctrine, if applicable, and where that was not done there was ineffective assistance of appellate counsel.

1. Failure to argue for exclusion of the *Williams* rule evidence on fundamental error grounds.

On direct appeal appellate counsel Paul Helm failed to raise the issue of the *Williams* rule evidence, which was heard and considered at the bench guilt trial before Judge Strickland, becoming a feature of the trial. In the circumstances explained herein, the admission of that evidence by the trial court was fundamental error. *Williams* rule evidence presented by the State that has become a feature of the trial has been found to be fundamental error. *Bush v. State*, 690 So. 2d 670, 673 (Fla. 1st DCA 1997) ("Unfair prejudice results where the state makes a collateral offense a feature, instead of an incident, of a trial. *State v. Richardson*, 621 So. 2d 752 (Fla. 5th DCA 1993). The state's presentation of evidence of collateral offenses

must not transcend the bounds of relevancy to the offenses being tried. *Id.* A similar offense becomes a feature instead of an incident of the trial on the charged offense where it can be said that the similar fact evidence has so overwhelmed the evidence of the charged crime as to be considered an impermissible attack on the defendant's character or propensity to commit crimes. *Snowden v. State*, 537 So. 2d 1383 (Fla. 3d DCA), *rev. denied*, 547 So. 2d 1210 (Fla. 1989). The admission of excessive evidence of other crimes to the extent that it becomes a feature of the trial has been recognized as fundamental error. See *Travers v. State*, 578 So. 2d 793 (Fla. 1st DCA), *rev. denied*, 584 So. 2d 1000 (Fla. 1991”).

Mr. Conahan was prejudiced where “the danger is that evidence that the defendant committed a similar crime will frequently prompt a more ready belief by the [finder of fact] that the defendant might have committed the charged offense, thereby pre-disposing the mind of the [finder of fact] to believe the defendant guilty.” *Bush v. State*, 690 So. 2d at 673. When the presiding judge below, Judge Blackwell, made that determination after the State had presented its case for guilt at trial along with the *Williams* rule proffer before the defense had presented its case at trial, the trial court violated Mr. Conahan's substantive and procedural due process rights, his right to a fair trial, his right to the presumption of innocence at all stages of the prosecution, and his right to present a defense at trial before an unbiased trier of facts who would hear all the evidence at trial before making a determination of the defendant's guilt or innocence. There was fundamental error and abuse of

discretion where trial court did make a determination that Mr. Conahan was guilty in the Montgomery case at trial before the defense presented its case.

Neither defense counsel Mark Ahlbrand nor Paul Sullivan objected to the trial court's admission of the *Williams* rule evidence. They also failed to object to the *Williams* rule evidence becoming a feature of the trial after it was admitted orally. They also failed to ask for a mistrial after the court's oral and written rulings. (R. 1808-25). Petitioner has argued elsewhere that the determination of guilt in the Montgomery murder by the trial court before the defense presented its case displayed both judicial bias and presumption of guilt by the trial court. In these circumstances, appellate counsel should have attacked the admission of the *Williams* rule evidence as fundamental error.

Judge Blackwell made oral rulings at Mr. Conahan's trial after a hearing on the proffered *Williams* Rule witnesses and evidence regarding Stanley Burden, Ray Weir, Scott Clemens, and Kenneth Smith. The Court's rulings were that: (1) The injuries sustained by both victims (Burden and Montgomery) are similar; the exhibits 19 and 20, showing the marks on Montgomery and exhibits 56 and 57, showing the marks on Burden, are very similar; (2) Both victims were very similar; (3) The methodology of the crimes were similar; (4) Weir and Clemens are relevant to show motive and identity; (5) the Smith evidence is inadmissible since there is insufficient evidence to link it to Conahan; (6) The yellow rayon fiber found on the sheet

used to transport the pelvis of Smith is also inadmissible; (7) the fiber found on the coat is the only evidence of Conahan's presence at the scene; (8) the fiber found on the skull of Smith is inadmissible (R. 1842-48).

Regarding *Williams* rule witness Stanley Burden, Judge Blackwell found:

The evidence is consistent with an offer of remuneration to the victim, Montgomery, although we are without knowledge as to whether it was specifically with respect to posing for nude photos although it is notable that the Defendant made a purchase of Polaroid film on the day in question near the time of the crime.

(See T. 1845). The hearing before the court on the proffered *Williams* Rule witnesses and evidence was conducted after the State had rested its case in chief but before the defense had presented its case. Thus, at the time the trial court made its oral determination concerning the admissibility and relevance of all the State's proffered *Williams* Rule witnesses and evidence to the material fact in issue, identity and motive, the State had failed to prove its theory of the case that victim Montgomery left on April 16, 1996 to make money posing for nude pictures or "bondage pictures" involving being tied to a tree like Burden. The oral findings by the court reveal that at the time the court made its determination on the admissibility and relevance concerning the State's proffered *Williams* rule witnesses and evidence, the court actually had no knowledge as to whether Montgomery had actually been last seen by

Whitaker while embarking on a project to make money posing for nude pictures.

The victim's mother, Mrs. Mary Montgomery West, presented surprise testimony on cross-examination at trial to the effect that her son had told her during a conversation some three weeks before his death, on March 23, 1996, "that somebody offered him \$200.00 to pose for nude pictures." (R. 1077-1119; 1955-62). At no point did she testify at trial that her son ever told her anything about pictures being taken in the woods, or that someone offered him money to pose for nude pictures in the woods. No other witnesses were offered by the State at trial to testify that Montgomery had ever been offered money to pose for any kind of pictures nude or otherwise, whether in the woods or any place else. At no time did Mrs. Montgomery testify at trial that her son told her he had been offered money to pose for any kind of bondage pictures nude or otherwise, tied to a tree or anything else.

The points of similarity found by the trial court were made by only through purposeful misrepresentations by the State before the court at the *Williams* rule admissibility hearing with regards to the testimonies of their own witnesses, including Detective Weir, Detective Clemens, and Mrs. Montgomery. The State falsely told the court at the *Williams* rule hearing that the Defendant had offered both Weir and Clemens money to pose for photographs in the woods and the State told the court at the same hearing that

Mrs. Montgomery testified at trial that her son told her somebody had offered him \$200.00 to pose for nude pictures in the woods. The true facts are not relevant points of similarity regarding the admissibility of Weir and Clemens as *Williams* rule witnesses with the Montgomery case at trial since at no time did either testify at trial that the Defendant offered them money to pose for pictures in the woods nor did the secretly taped conversations heard by the court show that the Defendant offered either money to pose for pictures in the woods. Mrs. Montgomery never testified at trial that her son told her that somebody had offered him money to pose for nude photographs in the woods. There were no other witnesses offered by the State at trial showing that Montgomery had ever been offered money to pose for any kind of photographs, in the woods or anywhere else. The State's misrepresentations confused the court as to what these witnesses testified to at trial and attempted to conform the testimonies of Weir, Clemens and Mrs. Montgomery to the State's theory of guilt. The State's misrepresentations created the requisite unique and strikingly similar points of similarity needed to have the trial court to find the *Williams* rule witnesses relevant to prove identity and motive.

There is no relevant point of similarity as to the posing for nude pictures with regards to the proffered *Williams* rule testimony and tapes of Mr. Conahan's conversations with Weir and Clemens and the charged offenses at the Montgomery trial. The evidence presented was simply

insufficient to prove that Montgomery, when last seen on April 16, 1996, was going to meet with Mr. Conahan to make \$200 or any amount of money posing for nude pictures. Therefore the court wrongly admitted Detective Weir and Detective Clemens as *Williams* rule witnesses to prove identity and motive. Mrs. Montgomery's materially changed trial testimony regarding the alleged content of the alleged conversation between her and her son was the basis of the admission of the bad act testimony of Detectives Clemens and Weir into the Montgomery murder case under the *Williams* rule.

The only possible way the court could have found Weir and Clemens to be admissible and relevant as *Williams* rule witnesses was to also use the proffered *Williams* Rule testimony and evidence of the encounters between the two of them and the Defendant to find the requisite relevant points of similarity needed for admission. This is simply not the purpose of Statute 90.404(2)(a), Other Crimes, Wrongs or Acts, and such a finding goes against the use of the Statute as set forth by this Court . See *Williams v. State*, 110 So. 2nd 654 (Fla. 1959); *Thompson v. State*, 494 So. 2nd 203 (Fla. 1986); *Drake v. State*, 400 So. 2nd 1217 (Fla. 1981); *Lewis v. State*, 654 So. 2nd 617. 619 (Fla. 4th DCA 1995).

Judge Blackwell thereafter entered a written order on August 16, 1999 (amended on August 17, 1999) concerning the Admission of the *Williams* Rule evidence As follows:

“1. The State sought to introduce evidence of Deendant’s alleged collateral acts including the attempted strangulation of Stanley Burden, the solicitation of Detective Scott Clemens, the solicitation of Detective Ray Weir and the murder of Kenneth Smith.

2. The State proffered testimony from Detective Pedro J. Soto, Suzanne Hartwig, an emergency room technician, Detective Tim Gerstner and Stanley Burden, and proffered photographs of ligature marks around Burden’s neck with regard to the Stanley Burden incident; testimony from Detective Clemens with regard to his contact with the defendant, and testimony from Detective Weir with regard to his contact with the Defendant.

3. Pursuant to *Williams v. State*, 110 So.2d 654 (Fla. 1959), evidence of similar facts are admissible if relevant to any material issue, other than propensity or bad character. The State offers the instant similar fact evidence for the purpose of establishing identity, motive and/or modus operandi.

4. The Court recognizes that the focus of the *Williams* rule evidence is whether there are identifiable points of similarity which pervase the compared factual situations. *Drake v. State*, 400 So. 2d 1217 (Fla. 1981). If there are startling similarities in the facts of each crime and the uniqueness of modus operandi, then the collateral crime evidence will be admissible. *Chandler v. State*, 702 So. 2d 186 (Fla. 1997).

5. The Court makes the following findings of similarities for each *Williams* Rule proffers:

a. **Stanley Burden incident:** The State provided the Court with lists containing 64 alleged similarities. The Court considered the following similarities in determining the relevance and resultant admissibility of the proffered evidence. Bodies of victim Burden and victim Montgomery: (1) both victims were young (early twenties) white males of medium height, light weight and fair complexion; (2) while the State listed as part of its 64 similarities certain body parts such as abdomen, neck, wrists, ankles and body fat, the Court considers these factors as one included in the similar build or physique of the victims; (3) the victims were unemployed; (4) the victims had problems with alcohol; (5) the victims did not own homes or substantial belongings; (6) the victims did not have financial resources; (7) the victims were both easy going, cooperative with average to below average intelligence; (8) the victims had a history of mental health needs. Crime scene: (1) the victims were both taken to a remote, secluded and wooded area not visible from a nearby road; (2) the areas were accessible only by foot; (3) a suitable tree was

available for use in tying the victims. The court does not find any relevance in time of day or time of month of the incidents. Methods used in crime: (1) clothesline-like rope used on both victims; (2) placement of two rope strands and the resultant strangulation caused grooved abrasions of skin on the neck approximately one inch apart on both victims in the area of the Adam's Apple; (3) victims sustained superficial injuries to similar areas of the body (face, back, wrists); (4) victims both naked; (5) rope placed tightly on wrists of victims; (6) scrapes on victims' backs consistent with being tied to a tree; (7) victims were offered money to pose for photos; (8) the defendant purchased cutting pliers at Walmart near the time of each crime – used in the Burden incident and recovered there. The Court finds that the noted similarities between the two crimes establishes an unusual modus operandi which tends to identify the Defendant as the perpetrator and establishes the evidence's admissibility.

b. **Detective Scott Clemens incident:** The State proffered the testimony of Detective Scott Clemens who testifies that he was undercover when the Defendant propositioned him by asking the Detective if he was interested in posing for pictures for money. The Court finds the proffered evidence relevant to prove motive and identity and is admissible as *Williams* Rule evidence.

c. **Detective Ray Weir incident:** The State proffered the testimony of Detective Ray Weir who testified that he was working undercover portraying himself as a vagrant when the defendant drove up to the spot he was standing, spoke to him and eventually told the Detective that he would pay him money to do some naked and kinky modeling which included "progressive bondage." The Court finds the proffered evidence relevant to prove motive and identity and is admissible *Williams* Rule evidence.

d. **Kenneth Smith murder:** The Court heard evidence of other body parts being found at the crime scene which consisted of a skull, torso and leg. To the extent that this evidence can be separated from the evidence of the Montgomery murder, and to the extent that the State has proffered such evidence subject to a *Williams* rule ruling, the Court finds that there is insufficient evidence and insufficient similarities to link this crime with the Defendant. Accordingly, evidence regarding the murder of Kenneth Smith is deemed inadmissible and the Court will not consider it in determining Defendant's innocence or guilt. Accordingly it is

ORDERED AND ADJUDGED that the evidence proffered by the State relating to Stanley Burden, Detective Scott Clemens and Detective Ray Weir is hereby admitted as proper *Williams* Rule

evidence, and the evidence's probative value is not outweighed by its prejudicial effect. Evidence relating to the apparent murder of Kenneth Smith is inadmissible.

(PCR. 1737-1730). Most of the similar facts that the trial court used in the oral and written rulings on the admission of the Burden proffered collateral offense evidence into the evidence supporting the charged offenses in the Montgomery case in chief under the *Williams* Rule, were presented at trial by the State as theories of facts. The trial court was therefore required to make evidentiary determinations concerning these numerous theories of facts presented by the State in the charged offenses at trial before the court could use the theories of facts as actual facts to compare to the facts in the proffered Burden collateral offense in order to find the strikingly similar facts in each offense (the charged offenses and the uncharged collateral offenses pertaining to Burden) as required by *Drake v. State* and *Chandler v. State*.

As noted **supra** in postconviction, counsel argued that the lower court should grant further evidentiary development on this issue or grant relief based on a finding of fundamental error. There is ample case law to support the proposition that fundamental error can be the basis for evidentiary development pursuant to a Fla. R. Crim. P. 3.851 motion. See *Sochor v. State*, 580 So. 2d 595 (Fla. 1991); *Ray v. State*, 403 So. 2d 956 (Fla. 1981); *Willie v. State*, 600 So. 2d 479 (Fla. 1st DCA 1992); *Bell v. State*, 585 So. 2d 1125 (Fla. 2nd DCA 1991); *Johnson v. State*, 460 So. 2d 954 (Fla. 5th DCA 1984), approved, 483 So. 2d 420 (Fla. 1986); *Waggy v.*

State, 935 So. 2d (Fla. 1st DCA 2006)(“Questions of fundamental error may be presented for the first time in a post-conviction motion. See *State v. Florida*, 894 So. 2d 894 So. 2d 941, 945 (Fla. 2005); *Haliburton v. State*, 7 So. 3d 601 (Fla. 4th DCA 2009).

Appellate counsel did argue on direct appeal that the State’s evidence, including the *Williams* Rule evidence, was legally insufficient to prove premeditation and guilt beyond a reasonable doubt in violation of *In re Winship*, 397 U.S. 358, 375 (1970) and *Long v. State*, 689 So. 2d 1055, 1057 (Fla. 1997). Initial Brief, p. 41-52, December 20, 2000. Helm argued that the facts of Mr. Conahan’s case were similar to *Hoefert v. State*, 617 So. 2d 1046 (Fla. 1993) and *Randall v. State*, 760 So. 2d 892 (Fla. 2000)(“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”)(“[T]he 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 not actually trying to kill Burden. This behavior was simply part of his bondage and sex fantasy”).

Yet neither the Appellant’s or Appellee’s briefs cite directly to *Williams*. In its opinion denying relief, this Court noted that “the trial court permitted the State to introduce *Williams* rule evidence of Burden’s attempted murder and sexual battery,

ruling that the evidence was sufficiently similar to the evidence leading up to Montgomery's death so as to constitute a unique modus operandi sufficient to establish the identity of Montgomery's murderer. After the guilt phase of the trial was completed, the trial court found and adjudicated Conahan guilty of first-degree premeditated murder and kidnapping." *Conahan v. State* at 634.

On the issue of premeditation, this Court held that "[t]he State's *Williams* rule evidence demonstrated that Conahan killed Montgomery in the same manner in which he attempted to kill Stanley Burden. Montgomery and Burden were similar physically; neither one completed high school; both had difficulty in maintaining employment and were in need of money when Conahan solicited them to pose nude for money in a secluded wooded area. Both were tied to a tree and suffered similar abrasions and ligature wounds. Because the circumstantial evidence standard does not require the factfinder to believe the defense's version of the facts on which the State has produced conflicting evidence, the factfinder, in this case the trial judge, properly concluded that Conahan's hypothesis of innocence was rebutted by competent, substantial evidence. See *Woods v. State*, 733 So. 2d 980, 986 (Fla. 1999); *Crump v. State*, 622 So. 2d 963, 971 (Fla. 1993). Based on the manner of Montgomery's death, his antemortem injuries, and the *Williams* rule evidence relative to the attempted sexual battery and attempted murder of Stanley Burden, the State presented sufficient evidence to prove premeditation.

Accordingly, we affirm the trial court's denial of the motion for judgment of acquittal." *Conahan v. State*, 844 So.2d at 635-36.

This Court also found that Burden's *Williams* rule testimony "established a common scheme of luring young men into a secluded wooded area for sexual pleasure and murdering them under the guise of posing for nude bondage pictures. See *Commonwealth v. Miller*, 664 A.2d 1310, 1318 n. 14 (Pa. 1995) (finding that circumstantial evidence of prior kidnapping established pattern of behavior constituting a common scheme). *Conahan v. State*, at 637.

The numerous material aspects of Mrs. Montgomery's changed testimony were skillfully used by the State in its presentation of a theory of theory of guilt and modus operandi at the trial. This is detailed in the initial brief's discussion of the *Brady/Giglio* claim which is incorporated by reference. Mrs. Montgomery's materially changed testimony concerning Mr. Conahan's identity gave great support and credibility to the numerous theories of facts the state presented at trial which the trial court thereafter used to make the evidentiary determination that the theories of facts concerning the Montgomery homicide were actual facts related to the charged offenses that could be compared to the facts of the Burden case that were proffered under the *Williams* Rule.

The inquiry by this Court should be whether a manifest injustice will occur here if the fundamental error outlined herein, the admission of the *Williams* rule evidence as a feature of the trial, remains uncorrected.

Appellate counsel was on notice where a simple review of the record reveals that 25 of the State's 38 witnesses at trial were related to the *Williams* rule evidence, thus subject to a lesser burden of proof. Members of this Court have recently recognized the inherent danger:

Allowing a trial court to admit collateral crime evidence solely on the basis of the similarity of the crimes makes it possible to admit the evidence without first connecting the defendant to the collateral crime through the presentation of clear and convincing evidence – a violation of our case law and due process. . . [t]he danger is that the [finder of fact] convicted Durousseau because it heard evidence of multiple similar crimes of which he was accused and not because the evidence proved that he had committed any of them, let alone the charged crime beyond a reasonable doubt.

Durousseau v. State, 55 So. 3d 543, 566 (Fla. 2010)(Pariente, J., dissenting, in which Quince, J., concurs). In *Durousseau*, the trial court permitted the State to introduce *Williams*⁴ rule evidence of two other murders. A review of the trial court's oral pronouncement and the written order in Mr. Conahan's case admitting the Burden collateral offense evidence at (R. 2496-99), the detective Weir collateral acts evidence, and the detective Clemens collateral act evidence into the Montgomery case at trial under the *Williams* rule, all provide examples of how the trial court abused its discretion by finding the defendant guilty of the charges in the Montgomery case at trial before the defense had presented its case at trial. In other words, the trial court, unwittingly or not, and perhaps unduly prejudiced by the state's voluminous *Williams* Rule evidence, prejudged Mr. Conahan's guilt before hearing all the evidence to be presented. Such findings by the trier of fact are an

⁴ *Williams v. State*, 110 So. 2d 654 (Fla. 1959).

abuse of discretion, antithetical to the notion of a fair trial conducted with the cold impartiality of a neutral magistrate, and constituted fundamental error.⁵

Mr. Conahan filed a *pro se* Motion to Dismiss (Appellate) Counsel based on disagreements about the apparent concessions of guilt in the direct appeal brief in Arguments I & II. This resulted in appellate counsel Helm serving a motion to withdraw as counsel on August 29, 2001 during the pendency of the direct appeal on ethical grounds based on Mr. Conahan's attached *Pro se* Motion to Dismiss Counsel. This Court struck the *pro se* motion by Order dated August 29, 2001. On February 25, 2001, Helm filed a motion for leave to file an attached supplemental brief based on the recent cert grant in *Ring v. Arizona*. The June 24, 2002 United States Supreme Court opinion in *Ring* was thereafter filed as supplemental authority on July 8, 2002. This Court held that Mr. Conahan was not entitled to relief pursuant to *Apprendi v. New Jersey*, 530 U.S. 466 (2000) or *Ring v. Arizona*, 122 S. Ct. 2428 (2002). *Conahan v. State* at 642, fn.9. Mr. Conahan does not waive any *Ring* argument preserved below.

The arguments in support of relief herein present federal and state constitutional issues and are predicated on the violation of Petitioner's protected federal rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, supported by applicable

⁵ The lower court entered oral findings on August 17, 1999, finding witnesses Whitaker, Mary Montgomery West, Burden and Newman all more credible than Mr. Conahan where their testimony conflicted. He then found Mr. Conahan guilty. R. 2720. Mr Conahan testified before the court on August 11, 1999. R. 2666-2716.

federal law and associated rights under the Florida Constitution and applicable state law. This Court should grant a new trial in these circumstances.

C. Other issues

1. Abuse of discretion

The trial court below wrongly found the defendant guilty of the specific intent offense of kidnapping with the intent to commit sexual battery and in doing so the trial court violated the defendant's substantive and/or procedural right to due process and to a fair trial. The evidence presented by the State at the Montgomery case at trial did not prove beyond a reasonable doubt that the special *mens rea*, the mental state of intent to commit sexual battery, actually co-existed with the prescribed act of kidnapping, where Mr. Conahan was acquitted on the charge of sexual battery by the trial court in the Montgomery trial. Appellate counsel failed to raise this issue on direct appeal. Trial counsel had questioned the legality of the sentence for kidnapping on other grounds by motion (R. 3276).

The testimony of defendant's former lover/boyfriend Hal Linde presented at the Montgomery trial about Mr. Conahan's "fantasy" about picking up young men from many years before was neither relevant nor admissible with regards to any of the material facts or charges in the Montgomery case. It functioned in exactly the same manner as the *Williams* rule evidence to prejudice Mr. Conahan. The collateral offense evidence relating to the alleged assault against Stanley Burden and the collateral acts evidence relating to detective Weir and detective Clemens

were not offered by the State under the *Williams* rule nor admitted by the trial court under the *Williams* rule in the Montgomery case at trial to show or as proof of intent of any kind with regards to any of the charges in the Montgomery case, and therefore were not relevant to such. Mr. Conahan should not have been found guilty of the specific intent offense of kidnapping with the intent to commit sexual battery by the trial court where the special *mens rea* of intent to commit sexual battery must be proven beyond a reasonable doubt by the State at trial. Direct appeal counsel argued that the State's circumstantial evidence of kidnapping was legally insufficient to establish that there was not consent for being tied to a tree by the victim. This Court affirmed the trial court's denial of Mr. Conahan's motion for judgment of acquittal on those grounds. *Conahan* at 636. Although this Court did not mention Linde's testimony in regards to the kidnapping charge, it did cite the Burden testimony "relative to his nearly fatal encounter with the defendant [which] established a common scheme of luring young men into a secluded, wooded area for sexual pleasure, and murdering them under the guise of posing for male bondage pictures." *Id.* at 637. Relief should issue upon a finding of fundamental error.

2. Flawed search: The supporting affidavits to the search warrants in the Montgomery case failed to cure the deficiencies of the search warrants because many items listed as objects of the search in the affidavits were described with no more particularity than were in the search warrants. *See State v. Nelson*, 542 So. 2d

1043 (Fla. 5th DCA 1989). No objection was made below to introduction of the fruits of these searches. The warrant may be found to be defective if the original source upon which the warrant relies is too general and too vague and depends on terms of generic references. *See Polakoff v. State*, 586 So. 2d 385, 392(Fla. 5th DCA 1991)(“Warrants attempting to authorize a search for, and seizure of, a class or group of objects, such as “documents” are too general and do not describe the thing or things to be seized with the particularity that the constitution requires. If the original source of information upon which the search warrant affidavit relies cannot describe existing objects or things other than in terms of generic reference such as “papers”, “documents”, the information is too vague and indefinite upon which to organize a search”); *Green v. State*, 688 So. 2d 301, 303 (Fla. 1996); *Bloom v. State*, 283 So. 2d 134 (Fla. 4th DCA 1973); *Gildrie v. State*, 94 Fla. 704 (1927). If the warrants were unconstitutional, a number of items and objects were illegally seized by the police during the execution of the search warrants on the defendant’s residence and the two cars on May 31, 1996, as well as the execution of the search warrants on July 9, 1996 on the two cars again. These include but are not limited to fiber evidence, rope, kitchen knives, paint samples, and any DNA samples.

The arguments in support of relief herein present federal and state constitutional issues and are predicated on the violation of Petitioner’s protected federal rights under the Fifth, Sixth, Eighth and Fourteenth

Amendments of the United States Constitution, supported by applicable federal law and associated rights under the Florida Constitution and applicable state law. This Court should grant a new trial in these circumstances.

3. Prosecutorial misconduct

On direct appeal Defendant's counsel made several claims based on trial counsel's limited objections to prosecutorial misconduct. This Court considered several claims of prosecutorial misconduct on direct appeal related to alleged improper comments in both the opening and closing statements to the jury at the penalty phase. In fact, this Court did find "it was improper for the State to comment in its opening statement upon evidence that was under advisement and which was ultimately inadmissible in the penalty phase of the trial." *Conahan* 844 So. 2d at 639.

Prosecutorial misconduct has already been found to exist in Mr. Conahan's case. While this Court ultimately determined that the prosecutor's comments regarding the *Williams* rule evidence in penalty phase constituted harmless error, circumstances are now ripe for a review of all misconduct that was never preserved or argued on direct appeal.

This Court has held that alleged prosecutorial misconduct is not cognizable on appeal absent a contemporaneous objection except when the actions of the prosecutor constitute fundamental error. *Kilgore v State*, 688 So.2d 895, 898 (Fla 1996). In *Kilgore*, the prosecutor's closing remarks to

the jury were found to “fall well short of constituting fundamental error” where the prosecutor’s comments “simply elaborate[d] on the heat of passion as it is described by the standard jury instruction.” *Id.* at 898. (Fundamental error is therefore error that goes down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error).

The errors enumerated herein that were made by the prosecution in Mr. Conahan’s case are so egregious as to constitute fundamental error. The cumulative effect of prosecutorial misconduct below, including actions by Assistant State Attorney Lee during the Burden case in Ft. Myers and pre-trial and during the trial of the Montgomery case in Punta Gorda constituted fundamental error that overcomes the failure by trial counsel to object below. “The cumulative effect of prosecutorial improprieties in [a] capital murder case was so overwhelming as to deprive capital murder defendant a fair trial, requiring reversal of conviction and vacation of death sentence ... The defendant was denied a fair trial by prosecutorial misconduct which permeated the case and which led to irrelevant and deliberately misleading evidence.” *Nowitzki v State* , 572 So.2d 1346 (Fla 1990).

The State must have known that Mrs. Montgomery’s testimony was uncorroborated, yet Mr. Lee relied on that testimony during the *Williams* rule hearing, the hearing on the motion for acquittal, the trial itself and in closing

argument. (R. 1243-60; 1966-2020). The State's conduct in presenting Mrs. Montgomery's testimony as a key element in these areas served: (1) to show that Mr. Conahan knew Richard Montgomery; (2) to support an inference that Mr. Conahan was the person that offered \$200 to Mr. Montgomery to pose nude; (2) to increase the probative value of other testimony and evidence; (3) to increase the probative value of all prosecution's arguments of guilt; (4) to increase the probative force of the state's theory of guilt; and (5) to act as a non-*Williams* Rule evidentiary bridge and point of similarity for the *Williams* rule testimony of Stanley Burden, Officers Weir and Clement, and Hal Linde.

There were also instances of improper argument by the State on display during the hearing on Mr. Conahan's motion for judgment of acquittal, which followed the State's proffer of *Williams* rule witnesses Burden, Weir, and Clemens and the lower court's finding that their testimony was admissible and relevant. They included misrepresentations about the testimony of snitch witness John Cecil Neuman. (R. 1072-81). The State used references to Neuman's trial testimony to imply that Mr. Conahan had confessed to Mr. Neuman that that he knew Montgomery and had killed him. (R. 1860-61). The State also improperly argued aspects of Mrs. Montgomery's uncorrected testimony about her son knowing a "Carnahan" to bolster the testimony of witnesses Neuman and Whittaker on the subject of whether Mr. Conahan and Mr. Montgomery ever met one another (R. 1861). The State made a similar

argument using her testimony to support arguments that Mr. Conahan used an offer to pay for nude pictures of progressive bondage to entrap both Montgomery and Burden, as Burden had testified, and to argue against an acquittal for sexual battery (R. 1864-72).

Mr. Lee also argued that the removal of Montgomery's genitals was an attempt by Mr. Conahan to eliminate possible inculpatory DNA evidence of the defendant's saliva (R. 1872). And he argued improperly that Montgomery's male sexual organ was surgically removed with a sharp knife like a knife that Mr. Conahan purchased the day of the murder at Wal-Mart (R. 1972). All this evidence was little more than conclusory and misleading opining by the prosecutor about the contents of the record. These statements by the State, along with the State's misrepresentation of the testimony of the medical examiner Dr. Imani concerning whether Montgomery had been tied to a tree ("This is possible" was his answer) demonstrate that deliberate and misleading interpretations of testimony were offered to the lower court by the State in opposition to Defendant's motion for judgment of acquittal. (R. 940; 1864). These statements and comments could not be reasonably inferred from the record. *Thompson v. State*, 318 So. 2d 549 (4th DCA Fla. 1975). Summation in this context should be to assist the trier of fact "in analyzing, evaluating, and applying the evidence." *U.S. v. Morris*, 568 F. 2d 396 (5th

Cir. 1978). The actions of the prosecutor in this cumulative appraisal constitute fundamental error.

The arguments in support of relief herein present federal and state constitutional issues and are predicated on the violation of Petitioner's protected federal rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, supported by applicable federal law and associated rights under the Florida Constitution and applicable state law. This Court should grant a new trial in these circumstances.

CONCLUSION

Based upon the foregoing and the record, Mr. Conahan respectfully urges this Court to reverse the lower court order, grant a new trial and/or penalty phase proceeding, and grant such other relief as the Court deems just and proper.

NEAL A. DUPREE
CCRC-SOUTH
Florida Bar No. 311545

WILLIAM M. HENNIS III
Litigation Director
Florida Bar No. 0066850

CRAIG TROCINO
Assistant CCRC-South
Florida Bar No. 996270

CAPITAL COLLATERAL REGIONAL
COUNSEL - SOUTH
101 N.E. 3rd Avenue, Suite 400
Fort Lauderdale, Florida 33301
(954) 713-1284

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE AND FONT COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing PETITION FOR WRIT of HABEAS CORPUS has been furnished by United States Mail, first class postage prepaid, on Wednesday, December 28, 2011, to Stephen D. Ake, Esq., Office of the Attorney General, Department of Legal Affairs, Concourse Center 4, 3507 East Frontage Road, Suite 200, Tampa, FL 33607-7013

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

WILLIAM M. HENNIS III
Litigation Director
Florida Bar No. 0066850