ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-2504

DANIEL OWEN CONAHAN, JR.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

REPLY TO RESPONDENT'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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ARGUMENT IN REPLY TO RESPONDENT"S RESPONSE

(1) Failing to argue for exclusion of the Williams rule evidence on fundamental error grounds

The State's Response says "[A]s the prosecutor properly noted when arguing in favor of admitting the *Williams* rule evidence, there were a substantial number of similarities between the *Williams* rule evidence regarding Conahan's pattern of attempting to lure young men into the woods to tie them up to a tree and forcibly have sexual relations with them and the charged crime." Response at 14. The State also mentions Hal Linde's testimony concerning a bondage fantasy that Mr. Conahan had related to him many years before which was transmuted into a dark homosexual fantasy of rape and murder by the prosecutor in this same context. The alleged similarities put forward by the State were theories at best and the testimony that the State put forward to support the theories did not meet the clear and convincing evidence standard.

The trial court in Mr. Conahan's case failed to make a determination that there was clear and convincing evidence that Mr. Conahan committed the collateral crimes at issue, including the Burden assault, which was the threshold inquiry required prior to admission of the *Williams* rule evidence as proof of identity. The trial court's actions constituted impermissible bootstrapping where it impermissibly conflated the two separate requirements necessary for admission of

the *Williams* rule evidence: (1) that there was clear and convincing evidence that Mr. Conahan committed the collateral Burden crime; and (2) that the collateral crime meets the similarity requirements necessary to be relevant. In a dissenting opinion Justice Pariente has outlined the implicit problems with the type of evidence used to convict and sentence Mr. Conahan to death:

> The State concedes that clear and convincing evidence must establish that the defendant committed the collateral crime. However, the State asserts that in cases of "serial murderers," it needs to rely on the similarities between the crimes as proof that the defendant committed the collateral crime. However, this conflation of the requirements for admission of the evidence is in essence an attempt to "bootstrap" similarities between crimes to prove that the defendant committed the collateral crime—which is impermissible because the collateral crime must be proven independent of its similarity to the crime for which the defendant is being tried ("[T]he State's attempt to bootstrap the similarities of the 1995 fire to those of the 1971 fire in order to prove that the defendant started the 1971 fire was equally inappropriate."). 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.The danger of admitting collateral crime evidence is that "the jury will convict the defendant based on prior crimes because these unrelated crimes would 'go far to convince [individuals] of ordinary intelligence that the defendant was probably guilty of the crime charged. But, the criminal law departs from the standard of the ordinary in that it requires proof of a particular crime.'. Here, the trial judge admitted evidence of collateral crimes without first determining that Durousseau committed those crimes. The danger is that the jury convicted Durousseau because it heard evidence of multiple similar crimes of which he was accused and not because the evidence proved that he committed any of them, let alone the charged crime beyond a reasonable doubt. Therefore, it is absolutely essential that the trial judge—and this Court—carefully examine the evidence of

> Durousseau's guilt as to each prior crime before concluding that it can be used as evidence in this case.

Durousseau v. State, 55 So. 3d 543, 566 (Fla. 2010); Pariente, J., dissenting. The State used Stanley Burden as a similar fact evidence witness under the *Williams* rule during the Montgomery trial. Prior to doing so, the same prosecutor, Robert A. Lee, violated Defendant's Due Process rights and right to a speedy trial in the Burden case in Ft. Myers. This due process violation also constituted prosecutorial misconduct.

When the State wanted to present *Williams* rule evidence in Mr. Conahan's case, the State first had to prove that Mr. Conahan committed the uncharged collateral crime against Mr. Burden by the clear and convincing evidence standard. See *Denmark v. State*, 646 So. 2nd 754 (Fla. 2nd DCA 1994) ("The State is required to prove by clear and convincing evidence that the defendant on trial committed the uncharged crime"); *Audano v. State*, 641 So. 2nd 1356 (Fla. 2nd DCA 1994) ("Before evidence of a collateral offense can be admitted under *Williams* rule, there must be clear and convincing evidence that the former offense was actually committed by the defendant"); *Phillips v. State*, 591 So. 2nd 987 (Fla. 1st DCA 1991) (The prosecution must establish that the defendant committed the prior act by clear and convincing evidence).

Both the Burden and Montgomery cases had the same prosecutor, Mr. Lee, and were in the same circuit court. Thus the prosecution in the Burden case knew

that if the defendant was acquitted in the Burden case, that the Burden case would be barred as *Williams* rule evidence in the Montgomery case with regards to the issues of ultimate facts. The State purposefully delayed the Burden trial in bad faith by the use of a nolle prosse as an intentional devise to gain a tactical advantage in both the Burden and Montgomery cases to harm and oppress Mr. Conahan. The tactical advantages gained by the State purposefully entering a nolle prosse in the Burden case were to avoid a trial in the Burden case where the State had a weak case with an impeachable victim in order to avoid an acquittal of the defendant on all charges at trial in the Burden case and to preserve Burden as a similar fact evidence witness in the Montgomery trial. The tactical advantage gained by the State in the Montgomery trial by preventing any trial in the Burden case was that the State preserved Burden for use as a similar fact evidence witness in the Montgomery trial thus greatly increasing their chances of gaining a conviction of the defendant in the Montgomery trial.

Burden's testimony of his assault and what led up to his assault was used by the State as the basis for the State's theory of guilt in the Montgomery case and to show "identity" of Mr. Conahan as the person who killed Montgomery. The Burden case was nolle prossed by the State on February 28, 1997, the same day Mr. Conahan had first appearance in the Montgomery case.[1] In *Dickey v. Fla.*, 90

[1] It is settled law that any undue delay after charges are dismissed, like any

S. Ct. 1564 (1970), the United States Supreme Court found that a deliberate attempt by the government to delay that is purposeful or oppressive is unjustifiable and constitutes abuse of the criminal process. The State's purposeful delay in the Burden case to gain tactical advantage over the defendant to harm and oppress the defendant to avoid a trial in the Burden case and certainly to avoid a speedy trial in the Burden case was an intentional denial of the defendant's rights to a speedy trial pursuant to Fla. R. Crim. P. 3.191 and a violation of Mr. Conahan's 6th amendment right to a speedy trial. Petitioner argues the violation that occurred in the Montgomery trial by the State using Burden as a *Williams* rule witness as a due process violation purposefully cause by the State.

Ultimately the only trial in the Burden case was the mini-trial within the Montgomery trial before Judge Blackwell where the State's burden of proof concerning the Burden evidence was reduced from beyond a reasonable doubt to clear and convincing evidence. Any open minded review of the record in Mr. Conahan's case will reveal that the Burden case and the undercover operation that included Detectives Weir and Clemens was the feature of the Montgomery trial. The State's Response argues that the *Williams* rule evidence did not become a

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delay before any charges are filed, must be scrutinized under the due process clause not the speedy trial clause. See *U.S. v. MacDonald*, 102 S. Ct. 1497 (1982). However, *State v. Agee*, 622 So. 2d 473 (Fla. 1993) makes it clear that the State cannot circumvent the intent of the speedy trial rule by suspending or continuing the charge or by entering a nol-pros and later refiling charges.

feature of the bench trial and that the lower court's decision was a discretionary decision and thus was a meritless issue on direct appeal. Response at 15. See *Groover v. Singletary,* 656 So. 2d 424, 425 (Fla. 1995) and *Chandlerv. Dugger,* 634 So. 2d 1066, 1068 (Fla. 1994). However, in Mr. Conahan's case, the State purposely delayed the Burden trial indefinitely in bad faith. See *Foxman v. U.S.*, 87 F. 3d 1220 (11th Circ. 1996) (which concerns a pre-indictment delay as a due process violation). In Mr. Conahan's case there was a post-accusational delay violation of due process. The 11th Circuit stated in *Foxman*:

> But substantial prejudice from delay, standing alone does not violate due process. The delay must also be the produce of a deliberate act by the government designed to gain tactical advantage. The 11th Circuit Court continues, "We have said that delay which is the produce of "bad faith" will satisfy this test. (See *Stoner*, 751 F. 2d at 1541 and *Benson*, 846 F. 2d at 1343. In context we think those cases used the word "bad faith" to mean that the government acted to delay an indictment hoping the delay in and of itself would prejudice the defense. In "bad faith" cases the government intentionally acts to delay; and the tactical advantage sought is the prejudice to the defendant which the government anticipates will flow from the delay…" "The main point is showing acts done intentionally in pursuit of a particular tactical advantage: delay (and the prejudice directly caused by the delay need not necessarily be the tactical advantage sought.

Id. at 1223. The State filed a nolle-pros in the Burden case without ever providing a valid reason for doing so. The record in the Montgomery case reveals that the State's action in filing a nolle-prosse was an "intentional device to gain tactical advantages" in both the Burden case and in the Montgomery case. It

served to avoid a trial in the Burden case where the evidence would have been a battle of credibility between the testimony of Mr. Conahan and Mr. Burden. Given Mr. Burden's criminal history and Mr. Conahan's lack of any, and the fact that law enforcement did not believe Burden's story at the time he initially reported it, an acquittal of Mr. Conahan was a reasonable possibility. This action also allowed Mr. Lee to use Burden under a lesser burden of proof as a *Williams* rule witness in the Montgomery bench trial setting.

(4) Failing to raise issues of prosecutorial misconduct

The State's Response neglects to recall that on direct appeal Mr. Conahan's counsel did make several arguments based on trial counsel's limited objections preserved below 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 and found:

> Even though the State is entitled to present its version of the facts in its opening statement, see *Rhodes v. State*, 638 So.2d 920 (Fla.1994), we find that the trial court abused its discretion, when it allowed the State to comment upon Conahan's attempted murder and attempted sexual battery of Stanley Burden in its opening statement to the penalty phase jury. The trial court had the admissibility of that very evidence under advisement. Accordingly, 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 v. State, 844 So. 2d 629, 639 (Fla. 2003). Thus 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, a wealth of other misconduct was never preserved or argued on direct appeal. Id. at 640.

As was noted in the petition, this Court has held that alleged prosecutorial misconduct is not cognizable on appeal absent a contemporaneous objection. *Urbin v. State*,, 714 So .2d 411 (Fla 1998). The only exception to this doctrine is when the actions of the prosecutor constitute fundamental error. *Kilgore v State*, 688 So.2d 895, 898 (Fla 1996). The errors enumerated in the petition and the instant reply that were made by the prosecution in Mr. Conahan's case are so egregious as to constitute fundamental error and a review of Mr. Conahan's entire case including the *Williams* rule evidence that was the Burden case, could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. *See Kyles v Whitley*, 514 U.S. 419 at 435 (1995).

One fundamental example of prosecutorial misconduct is the State's misrepresentations concerning the testimony of medical examiner Dr. Imani regarding signs that victim Montgomery had been sexually assaulted due to findings of dilation of the anal canal. Response at 19, fn. 4. On cross examination Dr. Imani directly answered the state's speculation about signs of any sexual assault of Montgomery, stating instead that as far as the anal dilation being a sign

of sexual assault, "So if you are thinking that my answer was that a recent intercourse was done, anal intercourse, I really don't think so." V 27 946. Dr. Imami also testified that he found no evidence of sexual assault to the victim's rectum and he further testified that testing for sperm and ejaculate in the victims mouth, rectum and body were all negative. V 27 944-46.

Likewise, the State's comments in the Response concerning the injuries to victim Montgomery and "the medical examiner's testimony that the victim's genitalia had been excised with a sharp blade" misrepresent the testimony at trial. Dr. Imami did testify that the external genitalia "had been excised completely" and that the excision could have been made with "any sharp like knife." V 27 934-36. Beyond those brief comments he also opined that the amputation had occurred "postmortem" or after the victim's death. V 27 938. Although the State speculated at trial that the victim's genitalia had been removed to eliminate possible DNA evidence and argued that Mr. Conahan's nursing training somehow made him a likely candidate as the amputator, and then argued this theory to the court, this theory was not grounded in any testimony by the medical examiner or anyone else. The medical examiner simply did not say anything about a sexual basis for the murder of Montgomery, completely at odds with the State's entire theory of the case.

The condition of the victim's body was arguably more indicative of a

homophobic hate crime than anything related to the State's "dark fantasy" theory of the crime. Defense investigator William Clement testified at the evidentiary hearing that the defense was actually investigating the possibility of a connection to a prior case independent of the Montgomery case in the local area that involved genital dismemberment.

Direct appeal counsel Paul Helm was certainly aware of the prosecutorial misconduct, including what he did not argue concerning the closing argument at the guilt phase before Judge Blackwell. This includes the prosecutor's misuse of Dr. Imani's testimony based on his equivocal answers to hypothetical questions used to improperly support the State's theory of the case at closing argument at the guilt phase. In a motion for rehearing served on January 24, 2003 after the issuance on January 16, 2003 of the direct appeal opinion by this Court, direct appeal counsel Paul Helm noted the following facts:[2]

> As this Court observed in its opinion [slip op. at 12] there were differences between the testimony of Dr. Imami during the guilt phase and the testimony of Dr. Huser in the penalty phase: Dr. Imami testified that there were crisscrossed skin abrasions on Montgomery's lower back, which he believed were postmortem (after death) injuries, although he conceded that the abrasions could have been made at the time of death [V 27 926-27]; he further testified that these scrapes might be caused if an individual was tied to a tree and "the body was moved or squirming . . ." [V 27 928] In contrast, Dr. Huser testified

[2] The motion for rehearing was based on this Court's consideration of Dr. Huser's penalty phase testimony "to support the denial of the motion for judgment of acquittal and the trial court's ruling at the close of all the guilt phase evidence that Conahan was guilty of premeditated murder."

that the crisscrossed scrapes on Montgomery's back were consistent with someone who was tied to a tree and struggling. [V 38 2404] Obviously, if the scrapes were after death injuries, as Dr. Imami believed, they could not have been made while Montgomery was tied to the tree and struggling; instead, the scrapes could have been caused by movement of the body against the tree when the body was removed from the tree. Further, Dr. Imami testified that some of the grooves located on the wrists and ankles were postmortem and were consistent with the weight of the body against the ropes after Montgomery died. [V 27 940] In contrast, Dr. Huser testified that in her opinion the ligature marks on the wrists and ankles occurred before death. [V 38 2412-13].

Motion for Rehearing at 2. The prosecutors' closing arguments can be found at R. 1965-77; 2004-14. Mr. Lee embellishes and plays havoc with the facts. He argues a complete fabrication: that Mr. Conahan's former lover Hal Linde held back in his testimony and did not tell the court the culmination of Mr. Conahan's fantasy was rape and murder. R. 1967. He argues untruthfully that Mr. Conahan himself admitted to having a "dark sexual fantasy." R. 1977. He argues, in conflict with the medical examiner's testimony that Mr. Conahan used "a razor sharp knife; a knife that he will use to surgically and precisely remove the genitals of Richard Montgomery". R. 1975. The ME did not describe a "surgical" removal. He even described some "foreign material" being left behind. Lee also argues that the fiber evidence is definitive: "'[T]here are so many, literally hundreds and hundreds, of those fibers. At some point between a dozen and a hundred, common sense tells us that there is no longer any reasonable doubt about it." R. 1976.

There was structural error at trial that should have been raised on direct appeal in circumstances where the *Williams* rule evidence was allowed in. A due process violation resulted from the failure by trial counsel in the Burden and Montgomery cases to work to obtain a speedy trial in the Burden case. Trial counsel in the Montgomery case made very few objections to prosecutorial misconduct during the guilt phase of Mr. Conahan's trial. Prior to her recusal a week before trial began on August 9, 1999, Judge Ellis had been working for approximately two years on the case.

As Chief Judge, Judge Blackwell assigned himself to cover the case and on the opening day of the trial oversaw Mr. Conahan's waiver of a jury at the innocence phase of his trial. (R. 649-65). This was a bench trial at the guilt phase. Judge Blackwell made it clear that because of that, the motion in limine to preclude the State from making references to the John Doe cases would not be enforced because there would be no jury present. (R. 666-79; 714). This Court has held that when a judge is the trier of fact, then the judge is presumed to have disregarded any inadmissible evidence or improper arguments by the State. *See First Atlantic National Bank of Daytona v Cobbett*, 82 So. 2d 870, 871 (Fla 1955). In addition. The Florida courts have held that if a judge erroneously admits improper evidence, the judge as the finder of fact is presumed to have disregarded it. *See State v Arroy,o* 422 So.2d 50, 51 (Fla 3rd DCA 1982). This doctrine should not apply here

because of the unique facts of Mr. Conahan's case where numerous, persistent and premeditated instances of misconduct made it impossible for even a well-seasoned senior judge like Judge Blackwell to identify, recognize and consider all of them. Judge Blackwell's limited knowledge about the case left him more susceptible to the prosecutorial misconduct argued herein.

There are numerous examples of error below based in prosecutorial misconduct that went "to the foundation of the case." *See Clark v. State,* 363 So.2d 331 (Fla 1978) (Fundamental error which can be considered on appeal without objection in lower court is error which goes to the foundation of case or goes to merits of cause of action). As noted *supra*, The State's actions below prior to the Montgomery trial violated Mr. Conahan's right to due process.

In the Initial Brief associated with the instant postconviction appeal, Mr. Conahan has argued that the State committed a *Brady* violation when it failed to disclose that a recording was made of the conversation between Detective Weir and Mr. Conahan at the fake campsite sting operation on May 29, 1996. In that conversation, Detective Weir offered to be photographed in bondage by Mr. Conahan, who refused the offer and instead proposed performing sexual acts on Weir. If compared to the State's theory of the case, this evidence presented by the defense would have been exculpatory as to Mr. Conahan and severely impacted the likelihood of Weir being a *Williams* rule witness at the Montgomery trial. In

addition, if the evidence was accidently or deliberately destroyed by the State, then a claim based on *Arizona v. Youngblood*, 109 S. Ct. 333 (1988), is implicated.

The State's Response simply denied any instances of prosecutorial misconduct during the pendency of the Montgomery trial. Mr Conahan has claimed that the State committed a *Brady/Giglio* violation when it deliberately allowed the victim's mother's trial testimony to remain uncorrected. Mrs. Montgomery was the key non-*Williams* rule witness for the State (R. 1097-1119). This issue has been briefed in the pending postconviction appeal. The State failed at trial to correct Mrs. Montgomery's testimony even though it was its burden to do so. "Prosecutors are responsible for any favorable evidence known to others acting on the government's behalf in the case, including the police." *Banks v. Dretke* ,157 L.Ed 1181 (U.S. 2004). *See also Kyles v. Whitley*, 514 U.S. 419 (1995) and *Strickler v. Green*, 527 U.S. 263 (1999).

The State must have known that Mrs. Mongomery'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 also made unobjected to improper argument at Mr. Conahan's motion for judgement of acquittal, including the State's misrepresentations about the testimony of snitch witness John Cecil Neuman (R. 1072-81); 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); 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 knew one another (R. 1861); and Lee's argument using her testimony to support his arguments that Mr. Conahan used an offer to pay for nude pictures of progressive bondage to entrap both Montgomery and Burden (R. 1864-72).

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 medical examiner Imani demonstrate that deliberate and misleading interpretations of testimony were offered to the lower court by the State. These statements and comments could not be reasonably inferred from the record. *Thompson v. State*, 318 So. 2d 549 (4th DCA Fla. 1975). The comments of prosecutor Lee were not mere summation or a review of the record to assist the trier of fact "in analyzing, evaluating, and applying the evidence. *U.S. v. Morris*, 568 F. 2d 396 (5th Cir. 1978).

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.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND FONT COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing REPLY TO RESPONDENT"S RESPONSE TO PETITION FOR WRIT of HABEAS CORPUS has been furnished by United States Mail, first class postage prepaid, on Wednesday, June 6, 2012, 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.

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June 6, 2012

Supreme Court of Florida
Attention: Tangy Williams
Capital Case Clerk
500 South Duval Street
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BY FEDERAL EXPRESS
(next business afternoon)

RE: Daniel O. Conahan, Jr. v. State (SC11-615)

Dear Ms. Williams,

Enclosed for immediate filing please find the original and seven (7) copies of Petitioner's Reply to Respondent's Response Petition for Writ of Habeas Corpus;

I have also included a copy of the first and last pages of the document. If you would please return the date-stamped copies in the enclosed self-addressed, stamped envelope.

Thank you for your attention to this matter.

Sincerely,

William M. Hennis III

William M. Hennis III
Litigation Director

cc: Stephen D. Ake, Asst. Attorney General