

IN THE SUPREME COURT OF FLORIDA

DANIEL OWEN CONAHAN, JR.,

Petitioner,

v.

CASE NO. SC11-2504

L.T. No. 97-166-CF

KENNETH S. TUCKER,

Secretary, Florida
Department of Corrections, etc.,

Respondents.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

AND

MEMORANDUM OF LAW

COMES NOW, Respondent, Kenneth S. Tucker, Secretary, Florida Department of Corrections, by and through the undersigned counsel, and hereby responds to the Petition for Writ of Habeas Corpus filed in the above-styled case. Respondent respectfully submits that the petition should be denied, and states as grounds therefore:

FACTS AND PROCEDURAL HISTORY

This Court summarized the relevant facts in its opinion affirming Petitioner's judgment and sentence of death:

On April 16, 1996, Richard Montgomery, who lived with his sister, was with Bobby Whitaker, Gary Mason, and other friends when he mentioned that he was going out to make a few hundred dollars and would be back shortly. When asked whether it was legal, he smiled. Montgomery also told his mother that someone had offered to pay him \$200 to pose for nude pictures, but he did not tell her who made the offer. In the same

conversation, Montgomery mentioned that he had recently met the defendant Daniel O. Conahan, Jr., who lived in Punta Gorda Isles and was a nurse at a medical center. The last time friends saw Montgomery alive was on April 16 between 4 p.m. and 7 p.m.

The next day, April 17, Thomas Reese and Michael Tish, who were storm utility engineers for Charlotte County, discovered a human skull in a remote, heavily wooded area off of Highway 41 and immediately notified the police department. While searching the scene, deputies found the nude body of a young, white male that was later identified as Richard Montgomery. He had visible signs of trauma to the neck, waist, and wrists, and the genitalia had been removed. The forensic lab personnel arrived and collected various items from the scene, including a rope found on the top of a nearby trash pile, carpet padding that covered the victim's body, a skull and a torso (neither of which belonged to the victim), a gray coat, and various combings from the victim's arms, hands, chest, pubic area, and thighs. On the following day, Deputy Todd Terrell arrived on the scene with a K-9 dog which showed significant interest in a sabal palm tree, specifically the side of the tree which was somewhat flattened and damaged.

An autopsy revealed that Montgomery died as a result of strangulation. He had two ligature marks on the front of his neck, two horizontal marks on the right side of his chest, and abraded grooves around his wrists. All of the grooves were of similar width, did not extend to Montgomery's back, and were consistent with marks that would be left on an individual who had been tied to a tree.

Due to the unique nature of the homicide (being tied to a tree naked and then strangled), police reviewed a similar assault reported on August 15, 1994. The victim, Stanley Burden, was a high school drop-out who, like Montgomery, had difficulty keeping a steady job and had physical features similar to those of Montgomery. The report indicated that Burden met Conahan, who offered to pay him \$100 to \$150 to pose for nude photographs. Burden agreed and Conahan drove him to a rocky dirt road in a secluded area

where Conahan pulled out a duffle bag with a tarp and a Polaroid camera. The two men headed into the woods where Conahan laid the tarp out and asked Burden to take off his shirt and show a little hip. After taking numerous pictures of Burden, Conahan then took out a new package of clothesline so he could get some bondage pictures. He asked Burden to step close to a nearby tree and then clipped the clothesline in several pieces, draping them over Burden to make it look like bondage. Conahan moved behind Burden, snapped the rope tightly around him, pulled his hands behind the tree, placed ropes around his legs and chest, and wrapped the rope twice around Burden's neck. Conahan then performed oral sex on Burden and attempted to sodomize him. Burden fought to position himself in the middle of the tree while Conahan tried to pull him to the side to have anal sex. After many unsuccessful attempts, Conahan snapped the rope around Burden's neck, placed his foot against the tree, and pulled on the rope in an attempt to strangle Burden, who tried to slide around the tree to keep his windpipe open. Conahan hit Burden in the head and unsuccessfully attempted to strangle him for thirty minutes. Conahan asked Burden why he would not die and finally gave up, gathered his possessions, and left. Burden freed himself, went to a local hospital, and received treatment for his injuries. The police located the crime scene and found that one of the melaleuca trees had ligature indentions that corresponded with Burden's injuries.

Based on this information, the police began an undercover investigation of Conahan. On May 24, 1996, Deputy Scott Clemens was approached by Conahan at Kiwanis Park, and Conahan offered Clemens \$7 to show his penis or \$20 if Clemens would allow Conahan to perform fellatio. Clemens refused the offer and the next day returned to the park where he again encountered Conahan, who offered him \$150 to pose for nude photos.

On May 31, 1996, pursuant to a warrant, the police searched Conahan's residence and vehicles and obtained paint samples from his father's Mercury Capri, which Conahan occasionally used. The police then compared paint samples from the Capri with a

paint chip from the victim's body and found that they were indistinguishable.

On February 25, 1997, Conahan was indicted for first-degree premeditated murder, first-degree felony murder, kidnapping, and sexual battery of Richard Montgomery. In the guilt phase of his trial, Conahan waived his right to trial by jury. The State presented evidence of the manner in which the victim's body was found and evidence obtained from the autopsy and the searches of Conahan's residence and vehicles. The State also presented evidence that on the day of Montgomery's disappearance, April 16, 1996, at 6:07 p.m., Conahan's credit card was used to purchase clothesline, Polaroid film, pliers, and a utility knife from a Wal-Mart store in Punta Gorda. Still photos showed that minutes later, at 6:12 p.m., Conahan withdrew funds from an ATM which was located close to the Wal-Mart.

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.

On November 1, 1999, the penalty phase of Conahan's trial was conducted before a jury at which time photos taken at the crime scene of the victim's body were published, and Deputy Gandy testified relative to the crime scene and how the body was found. Gandy further testified that during an interview Conahan told him that he had a fantasy involving bondage and sex.

The medical examiner, Dr. Carol Huser, testified regarding the autopsy report prepared by Dr. Imami. After examining Dr. Imami's report and viewing the autopsy photographs, Dr. Huser concluded that Montgomery died by ligature strangulation. The autopsy photographs were published to the jury. Dr. Huser also

testified that being killed in such a manner required applying pressure for a length of time notwithstanding the fact that the victim loses consciousness after only a few seconds. She further opined that to be killed by strangulation would be terrifying.

Conahan's aunt, Betty Wilson, testified on behalf of the defense that Conahan was a jovial, personable individual who participated in family activities and cared for his ailing mother before she died. Robert Lindy and his daughter Nancy Thomson, the father and sister of Hal Lindy, who was Conahan's roommate and lover when he lived in Chicago, testified that Conahan was like another son and brother to them. Conahan was instrumental in helping Hal and Nancy overcome alcoholism, was considered one of the family, and was included in many family functions. Thereafter, the defense rested its case.

Before the jury deliberated, the trial court gave instructions relative to the following aggravators: (1) the murder was heinous, atrocious, or cruel (HAC); (2) the murder was cold, calculated, and premeditated (CCP); and (3) the murder was committed during the course of a kidnapping. By a vote of twelve to zero, the jury recommended the death penalty. A Spencer hearing was held on November 5, 1999, and on December 10, 1999, Conahan was sentenced to death for the first-degree murder of Richard Montgomery and to fifteen years' imprisonment for kidnapping.

Conahan v. State, 844 So. 2d 629, 632-34 (Fla. 2003) (footnotes omitted). On direct appeal to this Court, Conahan raised five issues for review:

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

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.

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

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

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

(Initial Brief of Appellant).

After this court affirmed the convictions and sentences, Conahan petitioned the United States Supreme Court for certiorari review, but this was denied. Conahan v. Florida, 540 U.S. 895, 124 S. Ct. 240 (2003).

On October 1, 2004, Petitioner filed his initial motion for postconviction relief pursuant to Florida Rule of Criminal Procedure. After years of public records litigation, Petitioner was granted permission to file an amended postconviction motion. On October 31, 2009, Petitioner filed an amended motion raising twenty claims: (1) application of the new rule 3.851 violates due process and equal protection; (2) denial of access to files and records in violation of Fla. R. Crim. P. 3.852; (3) inaccuracies and omissions in the record on appeal; (4) ineffectiveness of counsel during penalty phase jury selection of his trial by allowing an unqualified juror to serve on the jury and for allowing "better suited" venire persons to be

excused; (5) ineffective assistance of counsel at the guilt phase of trial for failure to investigate and prepare an adequate defense; (6) the State presented false evidence in violation of Giglio v. United States, 405 U.S. 150 (1972); (7) the State withheld material and exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963); (8) ineffective assistance of trial counsel for failure to challenge the admissibility of scientific evidence (fiber and paint chip evidence); (9) ineffective assistance of counsel at sentencing phase for failure to adequately investigate and prepare available mitigating evidence and failure to adequately obtain and prepare defense experts; (10) Conahan was denied his right to expert mental health assistance in accordance with Ake v. Oklahoma, 470 U.S. 68 (1985); (11) Florida Rule of Professional Responsibility 4-(d)(4) is unconstitutional as it prohibits juror interviews; (12) death sentence is unconstitutional because the burden is shifted to defendant to prove that death was inappropriate and the trial court employed a presumption of death in sentencing him; (13) Defendant may be insane at time of execution; (14) hearsay evidence introduced at guilt phase of trial denied Conahan the right to a fair trial and to confront witnesses against him; (15) State's argument to the jury on the cold, calculated and premeditated aggravating factor (CCP) was

vague and overbroad; (16) cumulative error; (17) newly discovered evidence regarding a 2009 report by the National Academy of Sciences discussing fiber and paint chip evidence; (18) the trial court erred in allowing Williams rule evidence; (19) the prosecution engaged in misconduct by delaying Conahan's prosecution in the Stanley Burden case to gain a tactical advantage in the instant case; (20) additional allegations regarding judicial bias, prosecutorial misconduct, abuse of discretion regarding the kidnapping conviction, flawed search warrants and Hal Linde's testimony. (PCR V2:358-433). After reviewing the State's response and conducting a case management conference, the trial court entered an order denying Petitioner's legal claims and granting an evidentiary hearing on Petitioner's claims requiring factual development. (PCR V3:508-25).

The trial court conducted an evidentiary hearing on Conahan's motion on June 21-24, 2010, and on January 31, 2011, the postconviction court entered an order denying relief. (PCR V9:1678-1726). The appeal from the denial of postconviction relief is currently pending before this Court in Conahan v. State, SC11-615.

ARGUMENT IN OPPOSITION TO CLAIMS RAISED

Petitioner alleges that extraordinary relief is warranted because he was denied the effective assistance of appellate counsel. The standard of review applicable to ineffective assistance of appellate counsel claims mirrors the Strickland v. Washington, 466 U.S. 668 (1984), standard for claims of trial counsel ineffectiveness. Valle v. Moore, 837 So. 2d 905 (Fla. 2002). To prevail on a claim of ineffective assistance of appellate counsel in a habeas petition, a criminal defendant must show (1) specific errors or omissions by appellate counsel that "constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance," and (2) that the "deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." Dufour v. State, 905 So. 2d 42, 70 (Fla. 2005) (quoting Pope v. Wainwright, 496 So. 2d 798, 800 (Fla. 1986)). Moreover, the appellate court must presume that counsel's performance falls within the wide range of reasonable professional assistance. Finally, habeas corpus "is not a second appeal and cannot be used to litigate or relitigate issues which could have been . . . or were raised on direct appeal." See Breedlove v. Singletary, 595 So. 2d 8, 10 (Fla. 1992). In the instant case, a review of

the record demonstrates that Conahan has failed to establish deficient performance or prejudice.

Petitioner's argument is also based on appellate counsel's alleged failure to raise issues that would not have been successful if argued in his direct appeal. As this Court has noted, however, appellate counsel is not ineffective for failing to present meritless claims on appeal. Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995); Chandler v. Dugger, 634 So. 2d 1066, 1068 (Fla. 1994). The United States Supreme Court has recognized that "since time beyond memory" experienced advocates "have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52 (1983). The failure of appellate counsel to brief an issue which is without merit is not a deficient performance which falls measurably outside the range of professionally acceptable performance. See Card v. State, 497 So. 2d 1169, 1177 (Fla. 1986). Moreover, an appellate attorney will not be considered ineffective for failing to raise issues that "might have had some possibility of success; effective appellate counsel need not raise every conceivable nonfrivolous issue." Valle v. Moore, 837 So. 2d 905, 908 (Fla. 2002).

PETITIONER HAS FAILED TO ESTABLISH THAT HIS APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE MERITLESS ISSUES ON APPEAL BASED ON PRESERVED ERROR, AND HAS ALSO FAILED TO SHOW THAT THERE WAS ANY FUNDAMENTAL ERROR.

In his petition, Conahan raises a number of sub-claims regarding alleged ineffective assistance of counsel. Conahan asserts that appellate counsel was ineffective for: (1) failing to argue for exclusion of the Williams rule evidence on fundamental error grounds; (2) failing to argue that Conahan was wrongfully convicted of kidnapping; (3) failing to raise an issue on the sufficiency of the search warrants; and (4) failing to raise issues of prosecutorial misconduct.

Conahan first argues that appellate counsel was ineffective for failing to challenge the admissibility of the Williams rule evidence on direct appeal and asserts that the admission of this evidence constituted fundamental error.¹ Petitioner erroneously claims that trial counsel did not object to the introduction of the Williams rule evidence. Petition at 8. As trial counsel Mark Ahlbrand testified at the postconviction evidentiary hearing, and as the direct appeal record indicates, trial counsel

¹ Petitioner raised related claims in his state postconviction proceedings, and the State has addressed these claims in its Answer Brief filed simultaneously with this Response. See Answer Brief of Appellee, Issue I, at 34-41, Conahan v. State, Case No. SC11-615.

repeatedly objected to the introduction of the Williams rule evidence. Prior to trial, Judge Ellis conducted a lengthy hearing on the State's notice to introduce similar fact evidence and Conahan's related motion in limine. (DAR V10:1820-23, 1833-36, 1935-39; V23:379-479). Once the case proceeded to the bench trial before Judge Blackwell, trial counsel informed the judge of the nature of the motion and the prior ruling, received a standing objection, and subsequently gave lengthy arguments to Judge Blackwell concerning the admissibility of the Williams rule evidence.² (DAR V25:667-69, 714-15; V29:1240-60; V34:1804-48).

Appellate counsel did not perform deficiently by failing to raise a meritless issue on appeal regarding the trial court's discretionary decision to admit the Williams rule evidence. Conahan asserts that the trial court erred in admitting the Williams rule evidence regarding Conahan's attempted murder and sexual battery on victim Stanley Burden and his attempt to

² Petitioner argues that the court violated his constitutional rights by ruling on the admissibility of the Williams rule evidence after the State presented its case in chief, but fails to acknowledge that defense counsel repeatedly requested the court to address the admissibility of the evidence after the State rested its case in chief. (DAR V29:1241-43, 1259-60). Furthermore, trial courts traditionally rule on the admissibility of Williams rule prior to trial, but because this was a bench trial, the court and the parties agreed that it would be easier for the court to simply hear the evidence and then determine its admissibility.

solicit undercover officers Clemens and Weir to pose for nude Polaroid photographs because the evidence was not established by clear and convincing evidence, was not sufficiently similar to the charged crime, and became a feature of the trial.

In support of his argument, Conahan claims that the State "misrepresented" the trial testimony and "confused" the court in arguing in support of the Williams rule evidence. Petition at 10-11. Conahan asserts that the State falsely told the court that Conahan had offered victim Richard Montgomery and undercover officers money to pose for nude photographs in the woods. At trial, however, the victim's mother testified that Montgomery told her someone was going to pay him \$200 for nude photographs, and two other witnesses testified that shortly before he was murdered, Montgomery stated that he planned to make some money, and when asked if it was legal, he just smiled. (DAR V27:968, 972, 975). Likewise, the record established that Conahan offered two undercover officers money to pose for nude photographs. The two undercover officers testified that, while they were disguised as vagrants, Conahan propositioned them to pose for nude Polaroid photographs, including a "kinky, progressive bondage scene." (DAR V29-30:1270-71, 1306-29). The State also introduced the unrebutted testimony of Stanley Burden establishing that Conahan lured him into the woods with the

offer of money in exchange for nude photographs. Once in the woods, Conahan tied Burden to a tree and attempted to rape and kill him. (DAR V29:1145-1222). Thus, as 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.³ (DAR V29:1252-59; V34:1825-38); see also Conahan v. State, 844 So. 2d 629, 635 (Fla. 2003) (noting 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.").

Thus, given the evidence introduced by the State at trial and the trial judge's ruling on the Williams rule evidence (DAR V13:2496-99), any argument on direct appeal that the State

³ Conahan's former lover, Hal Linde, testified that Conahan fantasized about picking up a hitchhiker and taking him into the woods and tying him up to a tree and having sexual relations. (DAR V28:1087).

failed to prove this evidence by clear and convincing evidence or that the evidence was not strikingly similar would have been rejected by this Court. See Gore v. State, 599 So. 2d 978, 984 (Fla. 1992) (noting that the Florida Supreme Court has never required the collateral crime to be absolutely identical to the crime charged and noting that “[t]he few dissimilarities here seem to be a result of differences in the opportunities with which Gore was presented, rather than differences in modus operandi. For example, the most significant difference between the two crimes—that Roark was murdered while Corolis was not—seems to be more of a fortuitous circumstance than a reflection of Gore’s intent in the Corolis crime, since he beat her, stabbed her, and left her for dead in an isolated area.”); Rivera v. State, 561 So. 2d 536 (Fla. 1990) (finding that trial court did not err in admitting prior sexual assault where there were numerous similarities: the age, race, and build of the victims were similar, the abductions were both in the daylight, and within miles of the defendant’s home); Buenoano v. State, 527 So. 2d 194 (Fla. 1988).

Likewise, contrary to Petitioner’s assertions, the Williams rule evidence did not become a feature of the bench trial. As Conahan’s own trial attorney conceded, “the prosecution balanced their quantum of evidence. . . . And I don’t think it became the

feature." (PCR V15:497). Because Conahan would not have obtained any relief from this Court had he challenged the trial judge's discretionary decision admitting the Williams rule evidence at the bench trial, Conahan cannot now establish that he is entitled to habeas relief on a claim of ineffective assistance of counsel for failing to raise this meritless issue. Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995); Chandler v. Dugger, 634 So. 2d 1066, 1068 (Fla. 1994).

Petitioner next argues that appellate counsel was ineffective for failing to argue that the lower court erred in convicting him of kidnapping with the intent to commit sexual battery because he lacked the *mens rea* to commit sexual battery. Petitioner acknowledges that appellate counsel unsuccessfully challenged the kidnapping conviction on the grounds that the State failed to prove that the victim did not consent to being tied to a tree, but asserts that counsel should have argued that the State failed to prove Conahan had the intent to commit sexual battery at the time of the kidnapping. See Conahan v. State, 844 So. 2d 629, 636-37 (Fla. 2003). Petitioner's attempt to relitigate this claim under the guise of ineffective assistance of counsel is unavailing. See Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000) (stating that although habeas petitions are a proper vehicle to advance claims of ineffective

assistance of appellate counsel, such claims may not be used to camouflage issues that should have been raised on direct appeal or in a postconviction motion).

Even if this Court were to address the merits of Conahan's claim, his argument is without merit. As this Court noted when denying his challenge to his kidnapping conviction:

In his second issue, Conahan contends that the trial court erred in denying his motion for judgment of acquittal on the kidnapping charge because the State's circumstantial evidence was legally insufficient to establish that the victim did not consent to being tied to a tree for the purpose of posing for nude bondage photos. We disagree.

On April 17, 1996, the day after Montgomery's death, his body was found in a secluded, wooded area. Dr. Imami, the medical examiner who conducted Montgomery's autopsy, testified during the guilt phase to the following injuries that Montgomery sustained: (1) ligature wounds or well-depressed grooves to the neck which appeared to be caused by some type of rope; (2) ligature wounds to the lower portion of the chest; (3) **crisscrossed abrasions on the back which Dr. Imami believed were inflicted after death or at the time of death;** [FN6] and (4) ligature marks on Montgomery's wrists and lower legs. Dr. Imami opined that the ligature wounds on Montgomery's neck and chest area occurred before death.

FN6. Dr. Imami noted that the ligature marks appeared only on the front portion of Montgomery's body. They did not appear on his back, which was consistent with Montgomery being tied to a tree or post.

The trial court made the following finding in its sentencing order:

1. The crime was committed while the defendant was engaged in the commission of kidnapping. The

indictment in this case charged the defendant with kidnapping the victim as well as the first-degree murder of the victim. As noted above, the Court found the defendant guilty of both offenses. While the victim apparently went willingly with the defendant to the crime scene to participate in something of a nude photographic bondage session, it is ludicrous to conclude that he consented to the lethal form of bondage made apparent by the wounds to his body prior to his death. The pre-mortem wounds to his body reflect a struggle for his life. His wrists and lower body all bore ligature wounds; his back bore criss-cross scratchings produced by his struggle while being tied to a tree or other such rough surface. It is obvious that during his ordeal he was confined or imprisoned against his will. Such confinement against his will was for the obvious purpose of inflicting bodily harm upon the victim or terrorizing him.

We conclude that the State presented competent, substantial evidence to prove a prima facie case of kidnapping. Based upon the victim's extensive antemortem ligature wounds and abrasions on his back, the victim was confined against his will at some point and apparently struggled for his life. See Sochor v. State, 619 So. 2d 285 (Fla. 1993); Gore v. State, 599 So. 2d 978 (Fla. 1992); Bedford v. State, 589 So. 2d 245 (Fla. 1991); Mines v. State, 390 So. 2d 332 (Fla. 1980). Furthermore, Burden's testimony relative to his nearly fatal encounter with the defendant 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, 541 Pa. 531, 664 A.2d 1310, 1318 n.14 (1995) (finding that circumstantial evidence of prior kidnapping established pattern of behavior constituting a common scheme). Accordingly, we affirm the trial court's denial of Conahan's motion for judgment of acquittal relative to the kidnapping charge.

Conahan, 844 So. 2d at 636-37 (emphasis added) (footnote omitted). Clearly, had appellate counsel raised this specific

argument regarding his kidnapping conviction, this Court would have rejected it based on the victim's injuries⁴ and the testimony establishing Conahan's common scheme of luring men into wooded areas for sexual pleasure. Accordingly, this Court should reject the instant sub-claim.

In his next sub-claim, Petitioner vaguely, and without any record citations, asserts that "[t]he 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." Petition at 22. The direct appeal record does not contain the search warrant or supporting affidavits in this case, thus, Respondent cannot respond in any meaningful manner to Petitioner's conclusory and unsupported allegations. Because Petitioner has failed to carry his burden of establishing that he is entitled to habeas relief based on the instant sub-claim, this Court should deny his vague allegations.

In his final sub-claim, Petitioner asserts that he is entitled to habeas relief based on alleged prosecutorial

⁴ This Court's discussion of the victim's injuries in relation to the sexual nature of the crime did not include the medical examiner's testimony that the victim's genitalia had been excised with a sharp blade and his anal canal was dilated - "most likely" the result of a sexual assault to the anus. (DAR V27:935-36).

misconduct which constituted fundamental error. Conahan repeats the same claims he made in his postconviction proceedings regarding the prosecutor allegedly engaging in misconduct by delaying the prosecution of the case in which Stanley Burden was a victim, allegedly presenting "false" testimony from the victim's mother, and allegedly mischaracterizing the evidence during arguments on Conahan's motion for judgment of acquittal. As the postconviction court noted when rejecting these claims, and as the State noted in its Answer Brief filed in Conahan v. State, Case No. SC11-615, there was no prosecutorial misconduct because the State did not delay the prosecution in the Burden case, did not present "false" testimony from Mary Montgomery, and did not make any improper arguments during the argument on the motion for judgment of acquittal. Because all of Petitioner's claims involving alleged improper prosecutorial misconduct are without merit, his claim of cumulative error must fail. See Downs v. State, 740 So. 2d 506, 509 (Fla. 1999) (finding that where allegations of individual error are found to be without merit, a cumulative error argument based on the asserted errors must likewise fail). Accordingly, this Court should deny the instant petition for writ of habeas corpus.

CONCLUSION

In conclusion, Respondent respectfully requests that this Honorable Court DENY the instant petition for writ of habeas corpus.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to William M. Hennis, III, Litigation Director, Office of the Capital Collateral Regional Counsel - Southern Region, 101 N.E. 3rd Ave., Suite 400, Fort Lauderdale, Florida 33301, this 2nd day of April, 2012.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this response is 12-point Courier New, in compliance with Fla. R. App. P. 9.100(1).

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

STEPHEN D. AKE
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 14087
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
Stephen.Ake@myfloridalegal.com
COUNSEL FOR RESPONDENTS