ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-615

DANIEL OWEN CONAHAN, JR.
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT,
IN AND FOR CHARLOTTE COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

The State's Answer Brief quotes four pages of this Court's summary of the facts from the opinion issued following direct appeal. *Conahan v. State*, 844 So. 2d 629, 632-34 (Fla. 2003). For purposes of clarification, Appellant offers the following.

The facts as stated by this Court indicate that Mrs. Montgomery's surprise testimony at trial was material in regards to her identification of Mr. Conahan as a "new friend" of her son that she first heard about a few weeks before his murder in a conversation where he also told his mother that someone had offered him money to pose for nude pictures. The entire conversation as reported by Mrs. Montgomery never directly connected the new friend with the alleged offer.

The summary says that rope was found on top of a near by trash pile at the crime scene. This fact is irrelevant because this rope was found tied to carpet padding and was never offered into evidence at trial as being the ligatures that were used in the killing of victim Montgomery. The medical examiner, Dr. Imami, testified at trial that the ligatures used on Montgomery were ¼" in width and were some kind of rope or other like material. No trace evidence presented at trial (fibres, etc.) from the crime scene or body were produced to show what the alleged ligatures were made of. There are many kinds of rope, including cotton, silk, hemp, plastic, etc. And there are many types of ligatures.

The references to Deputy Todd Terrell and his K-9 dog at the crime scene do not include any references to his testimony at trial. The Deputy testified that the K-9 dog would alert to anyone dead or alive who had leaned up against the sabal palm tree at any time. There was no trace evidence of any kind found on the sabal palm or any other tree at the crime scene. At trial the State did not introduce any blood stain evidence, fiber evidence, hair, skin or rope related to that tree or any tree that the State implied the victim had been tied to. The State simply had a theory that the victim had been tied to a tree. The medical examiner's testimony did not support the State's theory. The scrapes and scratches on the victim's buttocks were post-mortem, as were the ligature marks on the wrists, lower legs, knees and ankles.

All of the summary of the facts on page 2 of the Answer Brief refers to the similar fact evidence presented by the State pursuant to the *Williams* rule regarding the testimony and the case of Stanley Burden. Likewise, the section regarding the undercover operation involving Detective Clemens outlines the offer by Mr. Conahan of money for sexual favors and a subsequent offer of money in return for posing for nude pictures. The facts fail to mention that the State never offered any evidence that Montgomery had been offered money for sexual favors by anyone at anytime nor did the State offer any evidence or proof that victim Montgomery had ever engaged in sexual favors in exchange for money at trial. The only witness that

says anything about the victim getting offered money to pose for nude pictures is Mrs. Montgomery. That testimony and its connection to Detective Clemens testimony supports the materiality of her testimony.

Finally, as to the admission of the Stanley Burden evidence by the trial court pursuant to the *Williams* rule, this Court's summary of the facts, as quoted by the State at length, reflects that the trial court found the Burden evidence sufficiently similar to the evidence leading up to the death of victim Montgomery so as to constitute a unique modus operandi sufficient to establish that Mr. Conahan was Burden's attacker and Montgomery's murderer. During the trial the lower court failed to find that Mr. Conahan had committed the Burden crime by clear and convincing evidence or by any other evidentiary standard. This was true at the time the court admitted the evidence. The trial court only used similarities between the Burden assault and evidentiary determinations on the State's theories of facts and theories of M.O. and theories of motive in the charged offenses presented at trial based on the Burden assault to determine the similar facts, similar M.O. and similar motive in the charged offenses in the Montgomery crime.

ARGUMENT IN REPLY

ARGUMENT I

INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE

A. Failure to request a *Richardson* hearing

The State contends that trial counsel did not render deficient performance by failing to request a *Richardson* hearing after the victim's mother, Mrs. Montgomery, testified that her son had told her that he knew a man named "Carnahan". Answer Brief at 26. The State contends that since the oral statement of Mrs. Montgomery at issue was never reduced to writing, no discovery violation occurred, and therefore any request for a *Richardson* hearing at trial would have been "frivolous". Answer Brief at 30. However the State's argument fails to address the fact that Mrs. Montgomery's trial testimony was materially different from the transcript of her recorded statement that was provided to defense counsel prior to trial. Defense counsel never obtained the original tape at the time of the trial. Detective Hobbs, who was the case agent for all the John Doe cases and a special agent for the state attorney's office related to the Montgomery murder, personally wrote the details of investigation as he testified at the evidentiary hearing. He refused to provide the original tape of the Mrs. Montgomery police interview to trial counsel's agent, defense investigator Bill Clement, as he testified at the evidentiary hearing. Detective Hobbs knowledge is imputed to the state

attorney as to the Montgomery interview and the issue of the missing tape(s) related to the undercover investigation of Detectives Weir and Clemens.

Mrs. Montgomery's false testimony at trial was material and requires relief. Contrary to the State's assertions, her testimony not only linked Mr. Conahan directly to the victim, her son Richard Montgomery, but it was also the basis for the trial court admitting the plethora of *Williams* rule evidence against Mr. Conahan. The *Williams* rule evidence was undeniably critical in this case and the State could never have secured a conviction without it. Contrary to the State's assertion, Mrs. Montgomery's false testimony did prejudice Mr. Conahan.

First, her testimony was critical in connecting Mr. Conahan to Richard Montgomery. Notwithstanding their protestations otherwise, the State did indeed trumpet defense counsel's effectiveness for being "able to have Mr. Whitaker back off on the identification of Mr. Montgomery with Mr. Conahan." (E.H. 2 64). Second, Mrs. Montgomery also testified falsely when she testified that her son was offered money to pose for pictures. Although she said he did not say that Mr. Conahan was the person who made the offer, the clear implication of her comment to the State's case against Mr. Conahan was that Conahan was the person making the offer of money for pictures to her son. This testimony also bolstered witness Whitaker's testimony that the last time he saw Richard Montgomery, Montgomery told him that he was going out to make $200. Mrs. Montgomery exacerbated this

by stating that she told her son that anyone who would make such an offer was a sociopath who would kill him, a conversation that fit the State's theories about Mr. Conahan as neatly as a glove. Her description of the conversation with her son was critical to the *Williams* rule admission because the court allowed Detective Weir to testify about working uncover as an agent for the task force, and Mr. Conahan offering him money to pose for nude pictures. Thus, the main connection between Detective Weir's testimony and victim Montgomery is Mrs. Montgomery's false testimony about the offer of money by somebody for nude pictures.

Certainly if Mrs. Montgomery had mentioned something prior to her testimony about her son being offered $200 for nude pictures, one of the many conscientious officers on the task force would have noted it in a report and then investigated Mr. Conahan. The stark fact that such a statement exists nowhere in the more than 6,000 pages of reports is strong evidence of her false testimony and the State's knowledge thereof. And as Ricky Hobbs testified at the evidentiary hearing, Mr. Conahan was only identified as suspect after Stanley Burden came to the attention of the task force, weeks after Mrs. Montgomery's recorded statement was made.

The materiality of Mrs. Montgomery's false testimony was even acknowledged by the State in its closing argument at trial. While arguing for Mr. Conahan's conviction the State repeatedly argued that Mrs. Montgomery was

credible and that her testimony was truthful and should be believed. (R. 1970-1972). The State argued her testimony was credible and that she "only repeated truthfully what her son told her." (R. 1972). Making such an argument based on known false testimony is a grave violation of constitutional rights. *See DeMarco v. United States*, 928 F.2d. 1074 (11th Cir. 1991). There, the Court held that it is incompatible with the rudimentary demands of justice for the State to allow false evidence to go uncorrected. Id., at 1076. The impact of the State's reliance and argument upon Mrs. Montgomery's false testimony is that it convinced the court, as the trier of fact, to rely on her testimony in finding Mr. Conahan guilty. The court specifically found Mrs. Montgomery to be credible and, indeed, more credible than Mr. Conahan. (R. 2015). The State's use of Mrs. Montgomery's testimony at trial cannot, in any fair judicial process, be consistent with the safeguards enumerated in the Fifth, Sixth, Eighth and Fourteenth Amendments. As such Mr. Conahan is entitled to relief.

Assistant State Attorney Lee prosecuted both the Stanley Burden case and the Richard Montgomery case. After Montgomery was killed on or about April 16, 1996, law enforcement interviewed and recorded a statement from the victim's mother on April 18, 1996. Mr. Conahan was thereafter charged in the Burden case in Lee County on July 3, 1996 and taken into custody and finally charged in the Montgomery case on February 28, 1997, the same day that the State entered a nolle

prosse in the Burden case. Early in the discovery process of the instant case, the State provided a list of 132 witnesses that included a brief statement of the anticipated testimony of each witness. The anticipated testimony of Mary Montgomery West, AKA, Mrs Montgomery was described as follows:

> Will testify she was interviewed on April 18, 1996 at approximately 19:36 by special agent John Grconi and Det. John Schmidt regarding Richard Montgomery. That she will testify that she is the natural mother of Richard Montgomery. That she last saw Richard Montgomery around Easter but has spoken to him on the telephone in the past two weeks. Mrs Montgomery will testify to Richard's personal history including medical, mental, and substance abuse problems. She will testify to some of Richard's associates and places of residence. Montgomery will further she has seen him a "Homes Bait Shop" on numerous occasions. That on Wednesday April 17, 1996 she went to the Bait Shop and spoke to Mrs. Homes who admitted knowing Richard, but had not seen him in a while.

Discovery at 53. Nothing is noted therein concerning either Mr. Conahan or somebody offering money for nude pictures in the wood or anywhere else. Neither was there any such reference in the transcript of Mrs. Montgomery's April 18, 1996 police statement provided to the defense through discovery. Defense counsel chose not to interview or depose Mrs. Montgomery prior to the trial. It was only when defense counsel asked Mrs. Montgomery on cross examination if her son had ever mentioned Daniel Conahan or if he had ever mentioned anyone offering him money for anything that she stated to the complete shock of the defense that she

and her late son had had a conversation on March 23, 1996, about two and a half weeks prior to his murder, during which he described a new friend named "Carnahan". On redirect, Mr. Lee obtained further information about that alleged conversation from Mrs. Montgomery: that the new friend lived in Punta Gorda Isles, that he had been in the Navy, and that he was a nurse. She also stated that in that same conversation with her late son, he had told her that an unidentified someone had offered him $200 to pose for nude pictures, and she had responded to him warning that a person making such an offer must have a psychopathic personality and that he was a risk of being sexually abused and/or killed.

All this testimony constituted a material change in Mrs. Montgomery's stature as a witness for the State. Her new account became the central device for pulling together the circumstantial evidence presented by the State at the trial. This included making up the elements of the charged offenses, including capital murder; supporting the State's theory of guilt and modus operandi; providing support for the State's theory of motive for the Montgomery murder; support for admission pursuant to the *Williams* rule of the proffered collateral evidence of the facts of the nolle prossed Stanley Burden case and the undercover contacts of Detectives Weir and Clemens with Mr. Conahan. All this information taken together served as a bridge for the admission of that collateral evidence into the Montgomery case in chief at trial as proof of identity of Mr. Conahan as Montgomery's killer, proof of

his motive and proof of modus operandi.

Mrs. Montgomery's testimony about her son's account of his "new friend" also provided the key link between Mr. Conahan and victim Montgomery. Her testimony about the conversation with her son was a substitute for the victim testifying from his grave. See T. 1097-1119. ASA Lee's goal was to convince the trial court through Mrs. Montgomery's testimony about the conversation with her son that her account was credible and that the "somebody" that she testified that her son told her had offered him $200 to pose for nude pictures was the new friend that he had mentioned in the same conversation, Dan Carnahan/Conahan. Mr. Lee made this argument in support of the admission of the proffered Williams rule evidence regarding Burden, Weir and Clemens. T. 1833. He made a similar argument on three other occasions in opposition to Mr. Conahan's Motion for Acquittal. T. 1861, 1864 & 1873. He made this argument at closing, extensively focusing on the credibility of Mrs. Montgomery's materially changed testimony, claiming she had truthfully repeated what her son had told her. T. 1970-72. The State used Mrs. Montgomery's testimony as a basis and as support for their theory of guilt and modus operandi in the offenses charged in the Montgomery case. In light of the *Brady/Giglio* claims herein, assuming that Mrs. Montgomery testified before the grand jury, it is interesting that the State has never moved to introduce her grand jury testimony to support her testimony pursuant to Florida Statutes

905.27(1)(a). *See State v. Tillet*, 111 So. 2d 716 (2 DCA 1959).

The State's theory of guilt and modus operandi was that the Montgomery murder was a sexually motivated crime that Mr. Conahan committed in order to fulfill a dark homosexual fantasy of sexual assault combined with a culminating act of murder and dismemberment.[1] The State's theory was that the new friend, Mr. Conahan, lured Montgomery out to an isolated wooded area using a ploy of offering him $200 to pose for nude pictures depicting bondage. The trusting and naïve Montgomery accepted the offer and was thereafter tied nude to a tree by

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[1] One of the great ironies of this theory is that one of the most important *Williams* rule witnesses, who was not so listed, was used to put forward and support the fantasy theory, Mr. Conahan's former lover Hal Linde. While he acknowledged the fantasy, he denied any belief in Mr. Conahan's guilt or proclivity for violence or likely acting out of the fantasy. Hal Linde's testimony was not relevant to the facts at issue in Mr. Conahan's case. *See Green v. State*. The alleged discussion about Mr. Conahan's fantasy was too remote in time, perhaps as long as eleven years before the Linde testimony. *See Tally v. State*, 36 So. 2d 201 (Fla. 1948). Linde never testified that the alleged fantasy was violent or that it included forced sex. Rather it was a fantasy that included picking up a hitchhiker and going into a wooded area for consensual sex that involved bondage while tied to a tree. The fantasy related by Linde did not include a description about how the person would be tied and it did not include incapacitation. There was no mention of pictures being taken as part of the fantasy related by Hal Linde. And there was no mention of any offer of money or money being paid for sex or nude photos of any kind in the Hal Linde testimony. *See also Conley v. State*, 599 So. 2d 237, 237 (Fla. DCA 4 1992). Both witnesses Whitaker and Wisenant testified at trial that Montgomery did not hitchhike. The Linde testimony was inadmissible, irrelevant and prejudicial.

Conahan, who used knots that he had learned in the Navy. Once the victim was rendered helpless, Conahan sexually assaulted him orally and anally and killed him. Then after death, Conahan removed the victim's genitals in order to eliminate any DNA evidence, using skills that he had learned in his nursing training. See State's closing, T. 1966-67. The State's arguments were grounded in the aspects of Mrs. Montgomery's testimony that were materially different from her statement to law enforcement. The State's closing started with Hal Linde's account of Mr. Conahan's bondage fantasy and Mr. Lee built that bondage story from 11 years before into a dark homosexual murder plan. The State's closing argument started with an inaccurate account that conflicted at most every turn with Hal Linde's actual testimony. T. 1966-1977.

Those same material aspects of the Montgomery testimony relating to solicitation for nude pictures for money provided the content and basis for the trial court's admission of the collateral bad act evidence grounded in the testimony of undercover Detectives Weir and Clemens into the case at trial pursuant to the *Williams* rule. In its written order allowing admission of the *Williams* rule evidence concerning the undercover agents, Discovery pages 002496-002499, the trial court relied on their testimony about money for photos:

> Detective Scott Clemens Incident: The State proffered the testimony of Detective Scott Clemens who testified he was undercover when the defendant propositioned him by asking detective Clemens 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. 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 Detective Weir that he would pay him money to do some kinky modeling which included progressive bondage. The court finds the proffered evidence to prove motive and identity and is admissible under the Williams rule.

The trial court also expanded on this finding in a prior oral ruling on the record: "With respect to the Detective Clemens incident and the Detective Weir inciden, the Court heard the tapes, finds that both tapes involve what might be described as a homosexual solicitation or a solicitation for homosexual activity. There some money in each instance for posing for pictures, in one case the discussion of nude modeling, including a reference to progressive bondage. The Court finds this evidence to be relevant to prove motive and identity, and if it is indeed *Williams* Rule evidence, it is admissible." T. 1845-46.

The State failed to present any evidence at trial showing that victim Montgomery was a hitchhiker, a pan handler, a vagrant, or that he had any history of providing sexual favors in exchange for money. The only evidence that Montgomery was offered money to pose for nude pictures was Mrs. Montgomery's materially changed testimony on cross and re-direct at the trial based on her alleged conversation with her son a few weeks before his death. That same

testimony provided the basis for the admission of the Weir and Clemens testimony under the *Williams* rule.

Those aspects of Mrs. Montgomery's testimony that concerned her alleged conversation with her son were relied on by the trial court when it admitted the proffered Burden case collateral evidence into the Montgomery case under the *Williams* rule. The trial court relied on case law in admitting the Burden, Weir and Clemens testimony, including *Drake v. State*, 400 So. 2d 1217, 1219 (Fla. 1981) ("There must be identifiable points of similarity which pervade the compared factual situations"); and *Chandler v. State*, 702 So. 2d 186 (Fla. 1997) ("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"). In the instant case the arguments by the State and the defense for admission of the *Williams* rule evidence concerning the collateral offense (the Burden case) and the collateral bad act evidence (the Weir and Clemens undercover testimony) took place only after the State had presented its case pertaining to the charged offenses in the Montgomery case and the *Williams* rule evidence but before the defense presented its case in chief.

Most of the similar facts that the court relied on in its oral and written rulings on the admission of the *Williams* rule evidence were presented by the State in the form of theories of facts. For that reason the trial court made evidentiary

determinations concerning the numerous theories of facts presented by the State in the charged offenses in the Montgomery case so that the court could then use the theories of facts as actual found facts that were then compared to the facts in the proffer. That was necessary in order for the court to find that the respective facts were strikingly similar pursuant to *Drake* and *Chandler*.

It was Mrs. Montgomery's testimony that provided the State with the support and credibility necessary to transform the state's theories into facts that were accepted for the necessary comparison by the trial court - a comparison that resulted in the evidentiary determinations allowing the proffered *Williams* rule evidence to be admitted into the Montgomery case as proof that Mr. Conahan was Montgomery's killer, that he killed Montgomery because of his dark homosexual murderous fantasy, and that his assault on Burden was a botched attempt to rape and kill that he learned from.

Thus the Montgomery testimony was key material evidence in the State's circumstantial case at trial. The only evidence presented by the State that Mr. Montgomery, the victim, had been offered money to pose for nude pictures shortly before he was found murdered was his mother's testimony at the trial. The State presented no independent evidence that the victim had ever been offered money to pose for nude pictures, bondage pictures or, for that matter, for sexual favors or acts of any kind. A most telling example in support of the materiality of Mrs.

Montgomery's testimony can be found in the state attorney's argument concerning the Williams Rule at T. 1833:

> And the *Williams* rule statute talks about evidence that is offered solely for the purpose of propensity. It is relevant to link up and corroborate other evidence in the case, and prove the defendant's identity as the person who offered the victim, Mr. Montgomery, money to pose nude in the woods which we know happened because Mrs. West, his mother, testified that he had been offered $200 to pose nude in the woods.

Actually, Mrs. Montgomery never so testified. Rather, she testified that her son told her during the conversation she allegedly had with him several weeks before his death that somebody offered him $200 to pose for nude pictures. She never said anything about "in the woods" and never stated that her son had done so. That was simply prosecutorial misconduct and an embellishment by the State intended to further prejudice Mr. Conahan.

The prejudice in the instant case was not dependent on the potential impact of Mrs. Montgomery's testimony on the judge, who was the fact finder in the instant case, but rather upon its impact on Mr. Conahan's counsel's ability to prepare for the trial without any discovery of what she testified to, in contrast to her police statement. *See State v. Schopp*, 653 So. 2d 1019 (Fla. 1995); *Scipio v. State*, 928 So. 2d 1139, 1149 (Fla. 2006). An analysis of procedural prejudice does not ask how the undisclosed evidence affected the case as it was actually presented to the fact finder, instead it must consider how the defense would have responded

if it had known about the undisclosed evidence. Such an analysis must also include an evaluation of how the defense could have acted to counter the harmful impact of the discovery violation. In the instant case the discovery violation has continued into the postconviction evidentiary hearing. This Court can only find the discovery violation here to be harmless error if it finds beyond a reasonable doubt that Mr. Conahan's defense was not prejudiced.

Had defense counsel been aware of Mrs. Montgomery's testimony regarding her alleged conversation with her son, the defense strategy would have been different. They would have deposed her just as they deposed Whitaker concerning his different accounts of Mr. Conahan's alleged contacts with Mr. Montgomery. They would have asked her about who else she told about her conversation, and if she provided names, they would have questioned and then deposed those persons as well for impeachment purposes. The defense may have chosen not to open the door on cross examination to questions about whether her son had ever mentioned knowing Mr. Conahan. And, as noted elsewhere, the defense would have insisted on an analysis of the original tape of Mrs. Montgomery's interview with law enforcement in order to find out, as did counsel in postconviction, what was contained in the inaudible portions of the tape. Specifically, nothing of any consequence except for a few stray syllables and certainly no mention of Daniel Conahan.

The conduct of the State prevented the defense at trial from considering any of these potential options. Defendants are allowed under our laws an adequate opportunity to investigate and to prepare applicable defense strategies in circumstances like those in Mr. Conahan's case. *Cook v. State*, 595 So. 2d 994, 996 (Fla. 3d DCA 1992). The State purposefully violated both the spirit and the letter of the discovery rules in Mr. Conahan's case at trial, and he is entitled to relief.

B. Failure to secure a forensic audio expert

The State's Answer contends that trial counsel "did not perform outside the broad range of competent performance under prevailing professional standards when [they] failed to seek appointment of yet another expert in this case for the sole purpose of examining a taped statement of the victim's mother." Answer Brief at 33. The State cites to *Atkins v. Dugger*, 541 So. 2d 1165 (Fla. 1989), for the proposition that "trial counsel are not required to obtain an expert on every issue." *Atkins* involved a postconviction claim concerning the failure of trial counsel to seek expert opinion concerning voluntary intoxication as a defense. This Court held in *Atkins* that defense counsel's performance was not deficient where "trial counsel presented substantial evidence of *Atkins* intoxication and competently argued this point to the jury during closing argument." *Id.* at 1166. The circumstances involved with the necessity for trial counsel in Mr. Conahan's case to investigate the Montgomery tape are entirely distinguishable. *Atkins* does not

apply to Mr. Conahan's instant argument where trial counsel's failure to investigate was not a mere tactical decision.

The State contends that since trial counsel for Mr. Conahan had a "substantially verbatim" statement from Mrs. Montgomery available in transcription form, there was therefore no reason for trial counsel to expend "finite judicial resources" to hire an expert to examine the inaudible sections of the witness's taped statement. Answer Brief at 34. Howeve r the State completely ignores the plethora of law that requires counsel to engage in a "diligent" investigation, the extent of which will obviously vary according to the individual facts of the individual case. Counsel in a capital case has a duty to conduct a "requisite, diligent investigation" into his client's background for potential mitigation evidence. *Williams v. Taylor*, 529 U.S. 362, 415 (2000). While an attorney is not required to investigate every conceivable avenue of potential mitigation, the Supreme Court has emphasized that "In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of known evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v.* Smith, 539 U.S. 510, 527. Furthermore. "Strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgment supports the limitations on investigation." *Id.* at 2539, citing

Strickland, 466 U.S. at 690-691.

Trial counsel knew or should have known based on the transcript itself that the tape of Mrs. Montgomery's interview with law enforcement was inaudible in places. As part of their duty to investigate they should have ascertained whether the inaudible sections could have been interpreted, how long any gaps on the tape were, and how accurate the transcription was. As defense investigator Bill Clement testified at the evidentiary hearing, counsel did recognize after her testimony that there was a problem with Mrs. Montgomery's statement. Following her guilt phase testimony indicating that her comments about Mr. "Carnahan" had been made during inaudible portions of her taped interview, Clement at the evidentiary hearing testified that trial counsel asked him to obtain the original tape of Mrs. Montgomery's interview from task force leader Detective Ricky Hobbs after Mr. Conahan was convicted but before the penalty phase. Clement testified that Hobbs refused to provide the original tape. The State must have known that her testimony was not reflected by the contents of the tape.

The State also contends in their Answer that Mr. Conahan cannot show prejudice from counsel's failure to secure a forensic audio expert to review the tape. This is because the State contends that a professional analysis of the tape would not have changed Mrs. Montgomery's testimony that she thought she had provided Conahan's name to law enforcement sometime during her taped

interview. Answer Brief at 34. Here the State simply ignores the substantial impeachment value that such investigation and a report like that introduced into evidence at the evidentiary hearing would have uncovered. The fact that the word "Conahan" never appeared on the tape could have been used to impeach Montgomery's memory. The momentary gaps that the tape analysis revealed were insufficient for even full words to have been uttered, much less accounts like those referred to by Mrs. Montgomery during her trial testimony. This substantial impeachment based on hard scientific evidence was available to trial counsel, if counsel had only sought it out through a diligent investigation and use of appropriate experts. Mr. Conahan has established prejudice.

C. Failure to challenge Williams Rule evidence effectively

The State's Answer contends that trial counsel was not ineffective with regard to the *Williams* rule evidence. Answer Brief at 34. The State further contends that the lower court properly denied this claim without evidentiary development. Answer Brief at 35. The State trumpets the lower court's summary denial of this claim, based on a claimed procedural bar because it should have been raised on direct appeal. However the State ignores the plethora of case law that supports 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. 1 DCA 1992); *Bell v. State*, 585 So. 2d 1125 (Fla. 2 DCA 1991); *Johnson v. State*, 460 So. 2d 954 (Fla. 5 DCA 1984), approved, 483 So. 2d 420 (Fla. 1986); *Waggy v. State*, 935 So. 2d (Fla. 1 DCA 2006)("Questions of fundamental error may be presented for the first time in a post-conviction motion. *See Haliburton v. State*, 7 So. 3d 601 (Fla. 4 DCA 2009).

Even if Mr. Conahan's appellate counsel exhibited deficient performance by failing to raise a feature of a trial claim on direct appeal, that fact alone does not negate the fact that "some errors, which have also been referred to as "fundamental errors," are so serious that they amount to a denial of substantive due process and may be raised at any time including for the first time in a postconviction motion." *Haliburton* at 606. In the postconviction context, the inquiry by this Court should be whether a manifest injustice will occur here if the error, the admission of the *Williams* rule evidence as a feature of the trial by the trial court below, remains uncorrected. *Id.*

Mr. Conahan was denied a full and fair hearing on this aspect of his *Strickland* claim. Pursuant to Fla. R. Crim. P. 3.851(f)(5)(A)(i), an evidentiary hearing must be held whenever the movant makes a facially sufficient claim that requires a factual determination. *See also Amendments to Fla. R. Crim. P. 3.851*, 772 So. 2d 488, 491 n.2 (Fla. 2000) (endorsing the proposition that "an evidentiary hearing is mandated on initial motions which assert . . . legally cognizable claims

which allege an ultimate factual basis"). *See also Allen v. Butterworth*, 756 So. 2d 52, 66-67 (2000); *Gonzales v. State*, 990 So. 2d 1017, 1024 (Fla. 2008). To the extent there is any question as to whether the movant has made a facially sufficient claim requiring a factual determination, the Court will presume that an evidentiary hearing is required. *Booker v. State*, 969 So. 2d 186, 195 (Fla. 2007).

"Postconviction claims may be summarily denied when they are legally insufficient, should have been brought on direct appeal, or are positively refuted by the record." *Connor v. State*, 979 So. 2d 852 (Fla. 2007). Factual allegations as to the merits of a constitutional claim as well as to issues of diligence must be accepted as true, and an evidentiary hearing is warranted if the claims involve "disputed issues of fact." *Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996). A court's decision whether to grant an evidentiary hearing is subject to de novo review. *State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003).

The importance of evidentiary development in this regard is magnified by the fact that this Court must consider the cumulative effect of all of Mr. Conahan's claims of ineffectiveness. In analyzing the prejudice to Mr. Conahan caused by trial counsel's errors, this Court must examine and assess the cumulative effect of all counsel's errors. *See State v. Gunsby*, 670 So. 2d 920, 924 (Fla. 1996) (cumulative effect of numerous error by counsel may undermine confidence in the outcome of the original trial); *see also Harris v. Wood*, 64 F.3d 1432 (9th Cir.

1995). This Court's analysis of the prejudice to Mr. Conahan must include an analysis of the prejudice caused not only by counsel's contradictory arguments to the jury, as discussed above, but also the combined effect of the prejudice caused by the additional errors discussed throughout the remainder of the instant appeal.

The State next contends that because Mr. Conahan "does not challenge the lower court's ruling on his ineffective assistance of counsel claim, and the record supports the court's ruling, this court should affirm the denial of relief on this claim' Answer Brief at 36. As noted above, the summary denial was erroneous, and evidentiary development was merited. However Mr. Conahan did in fact make argument as to counsel's ineffectiveness regarding the *Williams* rule evidence. See Initial Brief at 34, arguing that trial counsel failed to adequately respond to the State's assertions of similarities between Burden and Montgomery. Mr. Conahan is not arguing that counsel failed to raise any objections to the *Williams* rule evidence, rather that he failed to raise sufficiently detailed and appropriate objections.

D. Ineffectiveness during jury selection

The State contends that at the evidentiary hearing attorney Sullivan did not testify that he performed deficiently, but was merely expressing "frustration" and that his view was mere "hindsight" Answer Brief at 42. The State ignores the fact that counsel explicitly testified that he thought it was a "mistake." While counsel

certainly said that if he had to do it over again, he would have asked the potential jurors about their attitudes to homosexuality, the fact that he said it was a "mistake" indicates that he should have known better at the time of the trial. Relief is warranted.

ARGUMENT II

The *Giglio* violation

The State contends that the lower court correctly found that Mr. Conahan 'failed to establish that Mrs. Montgomery's testimony was false or that the State knew that the testimony was false". Answer Brief at 47. The State argues that "she never unequivocally stated that her transcribed statement concerned her entire conversation with law enforcement officers and she could not recall with specificity when she told the law enforcement officers this information". Answer Brief at 47-48. The State then concludes that this does not constitute false testimony for *Giglio* purposes

The State's Answer omits to mention that **misleading** evidence is included within the meaning of false evidence under *Giglio*. *Tejada v. Dugger*, 941 F.2d 1551, 1556 (11th Cir. 1991). "Giglio does not require a lie, but is implicated when testimony creates a false impression by conveying 'something other than the truth.' *Tassin v. Cain*, 482 F. Supp. 2d 764, 773 (E.D. La. 2007). Mrs. Montgomery's testimony, hedged with equivocation is certainly misleading and gave the finder of

fact a far more certain idea that victim Montgomery's killer was Mr. Conahan than otherwise would have been the case.

The State next complains that Mr. Conahan has failed to establish that the State knowingly presented false testimony or failed to correct it after learning of its falsity. Answer Brief at 48. The State asserts that "the prosecutor could not have possibly known whether the victim's mother had ever mentioned this information to law enforcement officers as she testified to at trial" Answer Brief at 49. However there are numerous precedents establishing when knowledge may be imputed between two governmental law enforcement entities. In *Moon v. Head*, the Eleventh Circuit held that "there was no per se rule to determine whether information possessed by one government entity should be imputed to another, but rather, required "a case-by-case analysis of the extent of interaction and cooperation between the two governments Thus in *Moon*, the court found that the state investigators essentially "functioned as agents of the federal government under the principles of agency law." *See Moon*, 285 F.3d 1301, 1309 (11th Cir. 2002).

Prior to *Moon*, the Middle District of Florida explained in *United States v. Diecidue* that "the extent to which third party knowledge should be imputed to the Government in a *Brady* or *Giglio* context" is determined by a case-by-case treatment, except where there is evidence that the third party should be considered

a member of the prosecution team and that third party actually testified in the case, in which case knowledge is imputed. *See* 448 F. Supp. 1011, 1017 (M.D. Fla. 1978) (citing *Schneider v. Estelle*, 552 F.2d 593 (5th Cir. 1977); *United States v. Rosner*, 516 F.2d 269 (2d Cir. 1975); *United States v. Trevino*, 556 F.2d 1265, 1272 (5th Cir. 1977)). *Moon* makes clear that a whether an individual is a member of a prosecution team is determined based on the extent to which that individual's organization shared resources or labor with the state and worked together in their investigation and the extent to which the individual acted as an agent of the state or operated autonomously. *See* 285 F.3d at 1310. Detective Hobbs was a linchpin.

Finally the State asserts that Mr. Conahan does not meet the third prong of the *Giglio* test, because "the testimony was not material because it was harmless beyond a reasonable doubt." Answer Brief at 50. The State contends that the evidence was "cumulative" to the testimony of Robert Whittaker. Whitaker's prior statements linking Mr. Conahan to victim Montgomery were all essentially abandoned by the time of his trial testimony. He had, pre-trial, given accounts about Mr. Conahan having direct contact with Montgomery at his trailer three times, including a forty-five minute meeting with Montgomery inside the trailer and twice leaving the area with Montgomery in a car including "beer runs."

The State and the lower court somehow interposed these impeached accounts by Mr. Whitaker that ultimately were never testified to by Whitaker at

trial into admissions by Mr. Conahan (that were never made or testified to) that he knew or had some kind of prior relationship with victim Montgomery. The postconviction court made the same findings based on errors in the State's 3.851 Response and posthearing memorandum. By the time of the trial Mr. Whitaker's claims about direct knowledge of a link between Conahan and Montgomery were reduced to his story that Mr. Conahan had come looking for Mr. Montgomery at Whitaker's trailer, but that Montgomery was not there. Even if this was true, which it was not, it simply would have affirmed that Conahan was one of hundreds of people in the area who knew or had met Montgomery. Although the defense at trial was obviously concerned about Whitaker linking Mr. Conahan with victim Montgomery in any way, the State must have recognized that certain aspects of Whitaker's pre-trial statements would have potentially destroyed the forensic case that the State made out against Mr. Conahan at trial.

If Whitaker had testified that victim Montgomery felt safe with Conahan and had been riding in Conahan's cars on beer runs in the weeks or months prior to his murder, the fiber evidence in the Conahan automobile and at the Conahan parents' condo as well as the paint chip that the State linked to the Mercury Capri, all of which were used to tie Conahan to the murder of Montgomery, would have been much less damaging. The bottom line is that despite Whitaker's multiple changes of position from pre-trial statements to his trial testimony, he did not testify that

Conahan met Montgomery at the trailer. As for the State's contention that snitch witness John Neuman provided independent support for Mrs. Montgomery's testimony, all that Neuman testified about was obtained when he helped Mr. Conahan review the discovery in his case and learned from the naïve Mr. Conahan how to maximize the benefits to himself facing multiple felony charges, as he had done in many other cases. Answer Brief at 51. The record reflects the fact that the detail included in Mrs. Montgomery's testimony to the effect that that Mr. Conahan was older, had been in the Navy, was a nurse, and lived in Punta Gorda Isles was not cumulative. It sprang instead out of nowhere. Her testimony was not only material in and of itself but was crucial to lower court's decision regarding the admissibility of the *Williams* rule evidence. Relief is warranted.

ARGUMENT III

The *Brady* violation

The State contends that the lower court was correct in its denial of Mr. Conahan's *Brady* claim relating to the failure by the state to turn over the audio recording made by Detective Weir during an undercover operation on May 29, 2006. Answer Brief at 54. The State asserts that Mr. Conahan failed to establish that such a tape existed, and further asserts that this failure was material. The State and the lower court both misinterpreted the evidence adduced at the evidentiary hearing.

The evidence presented at the evidentiary hearing did establish conclusively that Detective Weir was equipped with a microphone and listening device during three of the four undercover operations with Mr. Conahan. According to Weir he was wired during the May 29, 1996 surveillance as he had been in other undercover operations. When asked if the operation was being recorded Weir responded by saying "In this operation, uh, as far as I was concerned, that's why I had a bug, I though they were going to be recorded." (E.H. 363). Additionally, according to police reports of the surveillance, Weir testified that he was wired "[t]o record any conversations that may take place" and he believed he was being recorded. (E.H. 364-365). Although Weir has never seen a tape of the May 29 operation, he believed a recording was done. (E.H. 367).

Although Sergeant Goff was not personally aware if a tape recording was being made on May 29, he testified that "somebody usually has a recording device, I should say." (E.H. 375) Detective Hobbs testified that Weir was wearing a UNITEL device as standard operating procedure and that the Sherriff's Office generally recorded undercover operations. (E.H. 394). In fact, Detective Hobbs' written report reflects that the conversations between Weir and Mr. Conahan were recorded. (E.H. 396). Detective Columbia's report also reflects that he was told that Investigator Padula and Sergeant Goff made a recording of the undercover operation. (E.H. 358). Columbia makes this assertion in his report because

"otherwise I would not have wrote [sic] it down." (E.H. 358). Finally, Detective Clemons testified that he wore recording devices in his undercover dealing with Mr. Conahan and all interactions were recorded. (E.H. 409).

The lower court took issue with the evidentiary hearing testimony. The court concluded that Mr. Conahan did not specify which date the surveillance recording was made that is at issue in this claim. However, a review of the transcripts of the evidentiary hearing indicates that it was made quite clear that the May 29 surveillance date was the one at issue. During questioning of John Columbia the State objected to him being questioned about the May 29 surveillance. In response to that objection, defense counsel made it clear that it was the May 29 surveillance that was at issue. (E.H. 355-57). In fact the State was mistaken that the operative surveillance was May 30, a mistake which spawned their objection. After clarification of the correct date, May 29, the State responded that it stood corrected. (E.H. 356).

Defense counsel then made clear that the only surveillance date that mattered for the purposes of this claim was May 29 and proceeded to confine the examinations to that date. (E.H. 357). Thus, the lower court's conclusion that Mr. Conahan was speculating as to the date of the lost tape is not borne out by the record. Furthermore, the conclusion that the recording was not made because Hobbs testified that he did not order it does not account for the fact that Hobbs also

testified that he testified that his report specifically states that the surveillance was recorded. (E.H. 396). He made this entry in his report in reliance of information given to him by other officers. Specifically, Hobbs stated in his Details of Investigation that when Mr. Conahan conversed with Detective Weir on May 29, 1996 "the entire conversation was recorded and monitored." (Def. Ex. SS, p. 127-128). The lower court misapprehended the facts of the instant claim and justified denial below because at the evidentiary hearing Detective Hobbs was unable to definitively state that there was a recording made. However, much nearer the time of the event he wrote in his report that a recording was definitively made. To discount his more contemporaneous report with the foggy memory twelve years hence in unreasonable and relief should be granted.

The State also complains that Mr. Conanhan does not explain how the contents of the tape would have been material to his defense theory. Answer Brief at 58. It is self evident what the materialty consists of. If the defense had the tape it would support Mr. Conahan's position that what he was after in his contacts with the undercover officers was sex. He was offering money in return for sexual favors, a perfectly common practice in the gay cruising world. Far from soliciting potential murder victims, Mr. Conahan was engaged in the search for gay sex and nothing more. Any mention of photos was part of the feeling out process of making a sexual approach in a homophobic world. In *Cardona v. State*, this Court held that

"[a] showing of materiality 'does not require demonstration by a preponderance that disclosure of the suppressed evidence would have ultimately resulted in the defendant's acquittal.'" This Court further noted that "The materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. Rather, the question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Furthermore, the cumulative effect of the suppressed evidence must be considered when determining materiality." *Cardona*, 826 So. 2d 968, 973-974 (Fla. 2002).

Materiality is established and reversal is required once the reviewing court concludes that there exists "a reasonable probability that had the [withheld] evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 680 (1985). To determine materiality, undisclosed evidence must be considered "collectively, not item-by-item." *Kyles v. Whitley*, 514 U.S. 419 (1995). Such evidence must be disclosed regardless of a request by the defense, and the State has a duty to evaluate the point at which the evidence collectively reaches the level of materiality. *Bagley*, at 682. It is not the defendant's burden to show the nondisclosure "[m]ore likely than not altered the outcome in the case." *Strickland v. Washington*, 466 U.S. 668, 693

(1984). The Supreme Court specifically rejected such standard in favor of a showing of a reasonable probability. A reasonable probability is one that undermines confidence in the outcome. Such a probability undeniably exists here. Had trial counsel gained possession of this material, he would have been able to cast reasonable doubt on the State's theory and impeach the State's witnesses.

This Court must consider the cumulative effect of all the constitutional errors that occurred in this case. *See Gunsby v. State*, 670 So. 2d 920, 924 (Fla. 1996). Counsel's deficient performance as outlines supra must be viewed together the State's *Brady* and *Giglio* violations. When so viewed, confidence in the outcome of Mr. Conahan's trial has been severely undermined. There is a more than reasonable probability of a different outcome. *See Gunsby*, 670 So. 2d at 924. All this evidence must be examined "collectively, not item by item." *Kyles, v. Whitley*, 514 U.S. at 436. "Cumulatively, the total picture in this case" compels this court to grant Mr. Conahan relief. *Mordenti v. State*, 894 So. 2d 161, 175 (Fla. 2004).

CONCLUSION AND RELIEF SOUGHT

As to any other Arguments, Appellant will rely on the argument in the initial Brief. Based upon the foregoing and the record, Mr. Conahan respectfully urges this Court to reverse the lower court, grant a new trial and/or penalty phase proceeding, and grant such other relief as the Court deems just and proper.

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CERTIFICATES OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, Stephen Ake, Stephen Ake, Esq., Stephen Ake, Esq., Assistant Attorney General, Department of Legal Affairs, 3507 East Frontage St., Suite 200, Tampa, FL 33607-7013 on this 5th day of June 2012.

The undersigned counsel further CERTIFIES that this REPLY BRIEF was typed using Times New Roman 14 Point font.

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June 5, 2012

Supreme Court of Florida
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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 Appellant's Reply Brief;

I have also included a copy of the first and last pages of both the Reply Brief. If you would please return the date-stamped copy 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