IN THE SUPREME COURT OF FLORIDA

DANIEL OWEN CONAHAN, JR.

Appellant,

v.

CASE NO. SC11-615
DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

This Court summarized the relevant facts in its opinion affirming Defendant'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). 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, Appellant filed his initial motion for postconviction relief pursuant to Florida Rule of Criminal Procedure. After years of public records litigation, Defendant was granted permission to file an amended postconviction motion. On October 31, 2009, Defendant filed an amended motion raising twenty claims. (PCR V2:358-433). After reviewing the State's response and conducting a case management conference, the trial court entered an order denying Appellant's legal claims and granting an evidentiary hearing on Appellant's claims requiring factual development. (PCR V3:508-25).

At the evidentiary hearing, collateral counsel presented testimony from fourteen witnesses in support of his claims. Collateral counsel first presented the testimony of Barry Dickey, a forensic audio expert, to testify regarding his review of a taped statement made by Mary Ellen Montgomery West,[1] the victim's mother, to law enforcement officials two days after her

[1] As Appellant refers to this witness in his brief as Mary Montgomery, the State will also utilize this name for the sake of clarity.

son's murder. At trial, Mrs. Montgomery testified on direct examination to general information concerning her son's physical appearance and his lifestyle. (DAR V28:1097-1103). On cross-examination, she testified that, on March 23, [1996], she was trying to pay bills and her son was interrupting her and trying to tell her about a new friend he had met. She thought her son said it was an older man named Carnahan, but her son corrected her and said it was Conahan. (DAR V28:1105-06). When defense counsel asked her why she never told the police this information, Mrs. Montgomery responded:

> I ***thought*** I did the night I made my statement. . . . I remember telling them that – ***there's a lot in my statement that I remember saying that isn't on the tape.*** . . .

(DAR V28:1106-07) (emphasis added). On redirect examination by the State, Mrs. Montgomery testified that her son told her his new friend Conahan was much older and lived in Punta Gorda Isles, had been discharged from the Navy, and was a nurse who worked at the medical center where she had worked for many years. (DAR V28:1109-10). During this same conversation, her son also mentioned that an unidentified person had offered him $200 to pose nude for photographs. (DAR V28:1110). On re-cross, defense counsel showed Mrs. Montgomery a copy of her transcribed statement to law enforcement officers dated April 18, 1996, two days after her son's murder. (DAR V28:1112). Defense counsel

asked Mrs. Montgomery where in the statement she mentioned her son having contact with Conahan. (DAR V28:1113). Mrs. Montgomery replied:

> That's because it isn't here. It was the part that wasn't and I can find – if I can find it here where I ***think*** is where I said it. . . . It's on page 24 of 28. . . . And it's right in here where I start talking and I ***think*** it was in the part where it said inaudible, inaudible. And there's - - a lot of what I said isn't there.

(DAR V28:1113) (emphasis added).

At the postconviction evidentiary hearing, Appellant's forensic audio expert, Barry Dickey, testified that he analyzed the original audio tape obtained from the Charlotte County Sheriff's Office (hereafter "CCSO") containing Mrs. Montgomery's interview. (PCR V13:24). Mr. Dickey testified that the original tape recording was of poor quality and he was able to filter out the noise and enhance the audio to fill in some of the numerous "inaudibles" in the transcript of the original tape. (PCR V13:33-54; V3:579-606). After reviewing the expert's enhanced transcript, the State stipulated that Mrs. Montgomery did not mention the names "Conahan" or "Carnahan" on the tape. (PCR V13:53-54).

Florida Department of Law Enforcement Agent John Gaconi, working as part of multi-agency task force, testified that he and CCSO Officer John Schmidt interviewed the victim's mother on

April 18, 1996. (PCR V14:305-15). Agent Gaconi testified that if Mrs. Montgomery had mentioned a name, he possibly would have written it in his report. (PCR V14:315). Collateral counsel showed the witness one of his reports, dated May 18, 1996, which mentioned Conahan as a suspect. (PCR V14:334). Agent Gaconi acknowledged that Mrs. Montgomery may have spoken to other police officers during the investigation. (PCR V14:341).

CCSO Detective John Columbia testified that he was a member of the task force investigating Richard Montgomery's murder and he first became aware of Daniel Conahan's name on May 10, 1996, but he acknowledged that Conahan may have come to the attention of the task force at an earlier time. (PCR V14:349-50). CCSO Detective Rickey Hobbs, the case agent in charge of the investigation, testified that he recalled Daniel Conahan's name surfacing sometime in mid-April. (PCR V14:387). The task force became aware of Conahan from an inmate housed at Glades Correctional Institution in Moore Haven, Florida.[2] (PCR V14:387). Detective Hobbs reviewed a report summarizing a May 8, 1996 task force meeting that mentioned him discussing the new lead regarding Conahan obtained after a correctional officer from

[2] Inmate Patent came forward with information identifying Daniel Conahan as someone who had tried to pick up Patent at Lion's Park in Ft. Myers and had offered Patent money to pose nude. While driving to the location, Patent became frightened because he feared Conahan had put some kind of drug in Patent's drink. (PCR V14:673-74).

Moore Haven had faxed the information obtained from an inmate. (PCR V14:387-92).

Collateral counsel called Assistant State Attorney Robert Lee, the lead prosecuting attorney in Conahan's case, and he testified that he reviewed Detective Hobbs' case summary and the voluminous attachments to the summary containing various witnesses' sworn statements. The entire packet and discovery material consisted of over 6,500 pages of documents. (PCR V16:672). Mr. Lee recalled speaking with the victim's mother, Mary Montgomery, on several occasions and also recalled reading a transcript of her taped statement to detectives.[3] (PCR V16:663-66). Mr. Lee recalled Conahan becoming a potential suspect after inmate Patent alerted the task force, but Mr. Lee could not recall whether that was the first time Conahan's name had surfaced during the investigation. (PCR V16:674-75). Mr. Lee noted that there were hundreds of different law enforcement officers from numerous agencies working on the task force investigating this case and it was difficult to keep all of the information obtained from these various officers in a centralized location. (PCR V16:675-77).

Collateral counsel asked the prosecutor if Mary Montgomery had testified falsely when she stated at trial that she told law

[3] Mr. Lee could not recall if he had listened to the actual tape recording of Mary Montgomery's statement. (PCR V16:672).

enforcement officers the name Conahan, and the prosecutor noted that the witness's testimony indicated that she *thought* she told this information to law enforcement officers on the taped portion of her interview. As the prosecutor testified, Mary Montgomery made other statements that were not tape recorded, including talking to a number of law enforcement officers and to him. (PCR V16:682-85). Mr. Lee recalled that Mary Montgomery made an oral statement to him "on the date of her deposition,"[4] but he did not provide this oral statement to the defense as it was not required pursuant to the rules of discovery. (PCR V16:685). Mr. Lee indicated that he would be glad to explain the circumstances surrounding the statement to counsel, but counsel did not pursue this line of questioning. (PCR V16:685).

On cross examination, Mr. Lee noted that the transcript of Mary Montgomery's statement clearly indicated that she spoke

[4] Collateral counsel asserts without any record citation that "[t]he record indicates, however, that Mrs. Montgomery was never, in fact, deposed." Initial Brief of Appellant at 8. In support of this assertion, collateral counsel relies solely on a statement made by trial counsel at trial that he had never *met* Mrs. Montgomery in person before. Such reliance is misplaced and insufficient to establish that the witness was never deposed. The *only* evidence regarding this fact was the testimony elicited by collateral counsel from the prosecuting attorney that he spoke with Mrs. Montgomery "on the date of her deposition." Certainly, if the witness had not been deposed as alleged by collateral counsel, he had the opportunity to establish this fact at the evidentiary hearing, but clearly failed to do so. Collateral counsel never asked either of Conahan's attorneys if Montgomery gave a deposition, and he never called Montgomery as a witness.

with the officers prior to giving her taped statement. (PCR V16:689-91). Mr. Lee also indicated that Mrs. Montgomery's statements to him were oral statements that were not recorded or reduced to writing. (PCR V16:690-91). Finally, he testified that at no time during the trial did he believe that Mrs. Montgomery gave false testimony. (PCR V16:691).

Appellant presented a number of witnesses regarding his claim that the State failed to turn over an audio recording of an undercover operation involving Appellant. CCSO Detective John Columbia testified that he wrote in a report that he was part of a task force surveillance incident on May 29, 1996, and indicated that State Attorney investigator Anthony Padula or CCSO Sergeant Goff made "recordings" of their conversation with Appellant. (PCR V14:357). CCSO Detective Raymond Weir testified that he was involved in four undercover operations involving contact with Appellant and he wore a UNITEL listening device in the last three operations. (PCR V14:361-67). He testified that he thought the three operations were recorded, but he was unsure because the listening device was also used only to monitor officers' safety. Regarding the May 29, 1996 encounter, Detective Weir testified that he did not know if it was tape-recorded because he never saw a recording from that date. (PCR V14:364-67). CCSO Officer Richard Goff testified that he was

involved in the May 29th undercover surveillance and he testified that he had a listening device, but it was not recording. (PCR V14:373-74). CCSO Detective Ricky Hobbs, the case agent in charge of the investigation, testified that he authorized the undercover operations and he did not specify that they be recorded. (PCR V14:394). Detective Hobbs noted that undercover detective Weir would have been wearing a UNITEL monitoring device during the operation as standard operating procedure, but he did not order that any conversations be recorded. (PCR V14:394-95). Detective Hobbs did not know whether a recording was made of the May 29, 1996 incident. (PCR V14:397). CCSO Officer Scott Clemens testified that he worked undercover on May 23-25, 1996, and wore a monitoring device and, to his knowledge, the conversations with Appellant on those dates were recorded. (PCR V15:407-10).

Appellant's two trial attorneys, Mark Ahlbrand and Paul Sullivan, both testified at the evidentiary hearing regarding their investigation and presentation of evidence in this case. Mark Ahlbrand testified that he was appointed to represent Appellant and was primarily responsible for the guilt phase.[5]

[5] Ahlbrand had previously worked as a prosecuting attorney and had taken two capital cases to trial and sat second chair on other capital cases. Although he had been in private practice for about eight or nine years, Appellant's case was his first capital case as a defense attorney. (PCR V15:468-76).

Ahlbrand had previously worked another first-degree murder case with Paul Sullivan and investigator William Clement, and he sought their appointment in Appellant's case. (PCR V15:476-77). According to Ahlbrand, he would primarily be responsible for the guilt phase and Sullivan would handle the penalty phase, but each person would work with any witnesses that they had established a rapport.

Prior to the appointment of co-counsel Sullivan, trial counsel Ahlbrand filed a motion to appoint two mental health experts, Drs. Gunder and Keown. (PCR V15:483; V3:612-20). Trial counsel had previously worked with Dr. Gunder and selected him because he was the most knowledgeable expert he knew on matters involving human sexuality. (PCR V15:484). Trial counsel was hopeful that Dr. Gunder's evaluation of Appellant would lead to information that would be beneficial for his defense. (PCR V15:488-89). Trial counsel provided Dr. Gunder's report to psychiatrist Dr. Keown and indicated that Dr. Keown was initially requested to determine whether Appellant was competent and to determine if he had any mental illnesses. (PCR V15:489–91). Dr. Keown evaluated Appellant on two occasions and administered two personality tests and concluded that, "from a psychological standpoint, [he] was fairly healthy." Neither doctor found Appellant to be a sexual sadist. (PCR V15:491;

V4:639-58). Trial counsel Ahlbrand provided the two experts' information to co-counsel Paul Sullivan and their mitigation investigators so they could determine whether to use this information in the penalty phase.[6] (PCR V15:491-95).

Trial counsel Ahlbrand was primarily responsible for the guilt phase and recalled handling the forensic evidence aspect of the case as well as the argument before the trial judge regarding the State's intent to utilize Williams[7] rule evidence. (PCR V15:495-97). Trial counsel testified that there was no problem with the argument against the Williams rule evidence even though this was an unusual situation because it was a bench trial. (PCR V15:496). Trial counsel did not feel that the Williams rule evidence became a feature of the trial because the prosecution balanced their presentation of the evidence. Trial counsel objected to the introduction of the Williams rule evidence, and the trial judge gave him a standing objection for the evidence. (PCR V15:496-501).

Trial counsel Ahlbrand testified that he conducted the cross-examination of the victim's mother, Mary Montgomery, and that she testified to new information that he had never heard

[6] Ahlbrand testified that co-counsel Sullivan handled the bulk of the penalty phase interaction with experts and he did not recall speaking with any other experts. (PCR V15:513-14).

[7] Williams v. State, 110 So. 2d 654 (Fla. 1959).

regarding her son's involvement with a man named "Dan" with a phonetically similar last name to Conahan. (PCR V15:508-09). Trial counsel Ahlbrand testified that when he attempted to impeach Montgomery, she attempted to utilize the inaudible portions of her transcribed statement to law enforcement officers to claim that was when she told law enforcement officers the information about Conahan. (PCR V15:511). Counsel indicated that he was briefly frustrated with the witness's testimony, but he did not know whether the information was helpful to the State. (PCR V15:511-12).

Paul Sullivan testified that he had worked with Mark Ahlbrand before and was asked by Ahlbrand to be co-counsel in Appellant's case.[8] (PCR V13:62-63). The attorneys utilized an investigator, Bill Clement, and mitigation investigators Roy Mathews and Laura Blankman, all of whom they had worked with in prior cases. (PCR V13:63-64). Prior to Sullivan's appointment, the defense had Drs. Gunder and Keown appointed to evaluate Appellant. Because Dr. Keown had not found any particular

[8] Ahlbrand filed a notice of appearance on March 5, 1997, and filed a motion to appoint co-counsel the following month. Sullivan was appointed on June 11, 1997. (PCR V13:66). Appellant proceeded to a bench trial in August, 1999, before the Honorable Judge William Blackwell. After being convicted of murder and kidnapping, the trial court granted Appellant's motion to change venue from Charlotte County to Collier County for the purpose of the penalty phase. Subsequently, after hearing the evidence at the penalty phase on November 1-3, 1999, the jury unanimously recommended the death penalty.

psychiatric difficulties with Appellant, mitigation specialist Roy Mathews suggested that the attorneys use Dr. Golden, a neuropsychologist, as an expert. (PCR V13:74). Sullivan provided Dr. Golden with the evaluation reports from Drs. Gunder and Keown for his review. (PCR V13:74). Sullivan explained that he provided the other experts' reports to Dr. Golden because, in a prior capital case he was involved with, his psychologist had been eviscerated on cross-examination by the same prosecuting attorney because the psychologist had not been provided with other reports in existence, and Sullivan vowed that he would never again present a mental health expert to the jury without providing him with all the pertinent information. (PCR V13:79-80).

Sullivan indicated that the retained mitigation investigators would act as consultants and find background information on Appellant, assist with selecting experts, and interview potential mitigation witnesses. Both Sullivan and investigator Laura Blackman spoke to Appellant and his family and friends, including travelling to Chicago to interview witnesses. (PCR V13:113-16). However, after trial counsel provided Drs. Gunder's and Keown's reports to Dr. Golden, Sullivan testified that mitigation investigator Roy Mathews essentially ceased working on the case and thought trial counsel

had “ruined” Dr. Golden by providing him with the information. (PCR V13:93-97, 109-14). Although the mitigation investigator recommended obtaining another mental health expert, Dr. Fred Berlin, the court denied the request for additional funds.[9] (PCR V13:128-31).

Trial counsel Sullivan testified that his theory for the penalty phase was to present evidence establishing that Conahan was a nice, well-adjusted person.[10] He did not consider presenting any of the appointed mental health experts at the penalty phase because he did not want Dr. Gunder talking about Conahan possibly being a sexual sadist, and Dr. Keown’s testimony was that Conahan was well-adjusted and would not have been compelling. (PCR V13:116-18, 133). Counsel did not consider presenting the mitigation investigators as witnesses because they were not involved with the case by that time. (PCR V13:119-20).

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[9] Mitigation investigator Roy Mathews testified at a hearing for additional funds and trial counsel Sullivan testified that Mathews’ testimony did not come across very well as he seemed to indicate that the defense was unprepared for the penalty phase – an opinion that trial counsel Sullivan disagreed with. (PCR V13:110; V14:183-85). After this hearing, Mathews expressed concern that his fees would not be paid and he essentially quit working on the case. (PCR V14:182-84, 238-39).

[10] As argued by Sullivan at the penalty phase, Conahan “grew up with his parents, sister, had a nice upbringing. They weren’t rich. They weren’t poor. They had loving parents. They had a comfortable household. Mr. Conahan did all right in school in high school.” (DAR V37:2319).

Trial counsel testified that it was Conahan's idea and insistence to waive the jury for the guilt phase and to seek a bench trial. Sullivan testified that he tried to talk Conahan out of that decision, but Conahan could not be dissuaded. (PCR V13:121-22). For the penalty phase, the defense moved for a change of venue and the case was moved to Naples. Trial counsel Sullivan was responsible for jury selection at the penalty phase and he could not recall whether he discussed with co-counsel whether he would inquire of the jury regarding their views on homosexuality. Sullivan indicated that it was a mistake not to inquire about the jurors' view on homosexuality. (PCR V13:123-24). Counsel felt that jury selection was too brief and noted that the trial judge denied his motion for individual voir dire. (PCR V13:124).

Sullivan testified that he spent a substantial amount of time working on Appellant's case, including visiting Conahan at the jail at least 25 times. (PCR V14:253). Collateral counsel questioned Sullivan at length regarding his billing, as well as the billing of his investigator and mitigation investigators. Sullivan had previously worked with these members of the defense team in the James "Jimbo" Ford capital case, and the billing was much higher in the Ford case because Ford had low intelligence, a substantial amount of mental health issues, and had a large

group of local friends testify at his proceedings. (PCR V14:270-71). Mitigation investigators Roy Mathews and Laura Blankman assisted Sullivan during the Ford penalty phase, but they were not present during Conahan's penalty phase due to their fear they would not be paid.

Trial counsel Sullivan testified at the evidentiary hearing that, at the time of the penalty phase, Conahan's sister and some of his local friends did not want to cooperate and assist the defense in the penalty phase. (PCR V14:217-18, 267-68). Collateral counsel questioned Sullivan about a memorandum by Mathews and Blankman regarding an interview with Conahan's sister, Shawn Ludeke. Sullivan testified that Ludeke was not called as a witness because she did not want to be involved, and Conahan did not want her involved. (PCR V14:217-18). Counsel also wanted to avoid Conahan's background in the Navy as he had been accused of assaulting another sailor off-base, and Sullivan thought this was not "helpful for the jury to hear." (PCR V14:268).

SUMMARY OF THE ARGUMENT

Issue I: The postconviction court properly denied Conahan's claim that his guilt phase counsel was ineffective. The court rejected Conahan's claim that trial counsel was ineffective for failing to request a Richardson hearing based on an alleged discovery violation after the victim's mother testified, in response to defense counsel's question, that the victim mentioned Conahan's name to her. The victim's mother thought she told this information to officers during her taped statement, but she may have given this information prior to the tape recorder being turned on, or she may have told other officers this information. The prosecutor also testified that the victim's mother told him this same information in an unrecorded, oral statement. As the court properly noted when denying this sub-claim, trial counsel did not perform deficiently because there was no discovery violation in the instant case. Additionally, even had defense counsel objected and requested a Richardson hearing, there was no reasonable probability of a different outcome. Likewise, trial counsel was not constitutionally deficient for failing to hire an audio expert to examine the inaudible sections of Mrs. Montgomery's statement. Even assuming that counsel was deficient in this regard, he could not establish prejudice as Mrs. Montgomery

equivocally testified that she thought she gave this information during her taped statement. The lower court properly denied Conahan's claim that trial counsel was allegedly ineffective for failing to object to the State's use of Williams rule evidence. The record clearly supports the lower court's finding that trial counsel objected to and argued extensively against the admissibility of this evidence. To the extent that Conahan challenged the admissibility of the Williams rule evidence in his postconviction proceedings, the court properly summarily denied these claims as procedurally barred. Finally, Conahan also failed to show that his counsel was deficient during voir dire for failing to inquire regarding the jurors' views on homosexuality or that he suffered prejudice as a result.

Issue II: Conahan failed to establish that the State knowingly presented false testimony from the victim's mother at trial, or failed to correct her false testimony. As the postconviction court properly noted, Conahan failed to establish that Mrs. Montgomery testified falsely. Appellant also failed to establish that the State knew the testimony was false. Finally, even assuming that the victim's mother had testified falsely, her testimony was not material as there is no reasonable possibility that it affected the judge's ruling admitting the

Williams rule evidence or in finding Appellant guilty of the instant murder.

Issue III: The lower court properly denied Conahan's claim that the State violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to provide defense counsel with an alleged audiotape of an undercover incident involving Conahan and Detective Weir. Based on the evidence presented at the hearing, the lower court made a factual finding that an audiotape was never made of this incident. Additionally, the court properly noted that, even if such a tape existed, Conahan was unable to establish that there was a reasonable probability of a different result if the undisclosed evidence had been made available.

Issue IV: Conahan failed to establish that his penalty phase counsel was ineffective for failing to investigate or present mitigating evidence. Conahan's counsel did a thorough investigation into mitigation and obtained Conahan's school and military records, spoke to Conahan and his family and friends, and had Conahan evaluated by two mental health professionals. Because the investigation into mitigation did not produce any compelling mitigating evidence, penalty phase counsel made the strategic decision to present evidence to the jury in an attempt to humanize Conahan and show that he was a good and normal person who took care of his elderly parents. As the lower court

properly found, Conahan failed to carry his burden of establishing that his counsel performed deficiently in investigating or presenting mitigating evidence and also failed to establish any prejudice as a result.

Issue V: Conahan's claim of cumulative error based on alleged prosecutorial misconduct is procedurally barred and without merit. As the lower court noted, Conahan failed to establish any individual errors based on his procedurally barred and meritless claims, and as such, his cumulative error claim is without merit.

ARGUMENT

ISSUE I

THE POSTCONVICTION COURT PROPERLY DENIED CONAHAN'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE.

In his first issue on appeal, Conahan asserts four sub-claims involving alleged ineffectiveness of counsel at the guilt phase.[11] The postconviction court granted an evidentiary hearing on these claims, and subsequently denied each claim based on a finding that Conahan had failed to establish both deficient performance and prejudice as required by Strickland v. Washington, 466 U.S. 668 (1984). (PCR V9:1706-08, 1713-15). The State submits that the lower court properly concluded that Appellant was not entitled to relief on his ineffective assistance of counsel claims based on his failure to establish deficient performance and prejudice as required by Strickland.

In order for a defendant to prevail on a claim of ineffective assistance of counsel pursuant to the United States Supreme Court's decision in Strickland, a defendant must establish two general components.

> First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance

[11] Appellant's fourth sub-claim under this issue, involving an allegation of ineffectiveness at voir dire, is directed to the effectiveness of his counsel at the penalty phase as Conahan's guilt phase was conducted before the trial judge only.

> under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.

Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986). Furthermore, as the Strickland Court noted, there is a strong presumption that counsel's performance was not ineffective. Id. at 690. A fair assessment of an attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight and to evaluate the conduct from counsel's perspective at the time. Id. at 689. The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id.

On appeal, when reviewing a trial court's ruling on an ineffectiveness claim, this Court must defer to the trial court's findings on factual issues, but reviews the trial court's ultimate conclusions on the deficiency and prejudice prongs *de novo*. Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001). In this case, the lower court properly identified the applicable law in analyzing Conahan's claims, correctly applied this law to the facts as presented in the trial and postconviction proceedings, and concluded that Conahan was not entitled to postconviction relief.

In his first sub-claim, Conahan alleges that his trial counsel was ineffective for failing to request a Richardson[12] hearing after the victim's mother, Mary Montgomery, testified on cross-examination that her son told her that he knew a man named Conahan, and that she thought she gave this information to law enforcement during her recorded statement. In rejecting this claim, the lower court stated:

> As to sub-issue (e), Defendant argues that counsel failed to demand a Richardson hearing regarding Mrs. Montgomery's recorded statement. At trial, Mrs. Montgomery testified on cross-examination that the victim had mentioned Defendant's name as a new friend, and that she believed she had told law enforcement this information in her recorded statement (Record pp. 1106-1107). It was stipulated at the evidentiary hearing that Defendant's name does not appear in Mrs. Montgomery's recorded statement (Evidentiary Hearing transcript pp. 53-54). Mr. Sullivan testified at the evidentiary hearing that they did not object to Mrs. Montgomery's testimony because he "tried to figure out what we could do to unring the bell ... But I couldn't think of a way to strike her testimony, because it was in direct response to a question asked by our side on cross-examination" (Evidentiary Hearing transcript pp. 227-229). Mr. Ahlbrand testified at the evidentiary hearing that he tried to impeach Mrs. Montgomery (Evidentiary Hearing transcript p. 509). The record reflects that counsel did attempt to impeach Mrs. Montgomery (Record pp. 1113, 1116-1117). Prosecutor Robert Lee testified at the evidentiary hearing that Mrs. Montgomery "talked to a number of officers ..." and that her recorded statement was "not necessarily every contact that she had" with law enforcement (Evidentiary Hearing transcript p. 683). He further testified that an officer might not write a name down in a formal report in order to check the name out

[12] Richardson v. State, 246 So. 2d 771 (Fla. 1976).

> first, because "... unless a name necessarily triggers something, it might not be noted ..." (Evidentiary Hearing transcript pp. 670; 677). No authority requires law enforcement conducting an investigation to record every interview or conversation with a victim's family, nor to memorialize every piece of information in a formal report. Defendant has not pointed to any such authority. Fla. R. Crim. P. 3.220(b)(1)(B) requires only recorded statements to be disclosed, not any other unrecorded, informal, interviews. The extensive details in Mrs. Montgomery's recollection of the conversation she had with the victim lends her statement credibility. As there was no discovery violation, there was no basis for a Richardson hearing. Johnson v. State, 545 So. 2d 411, 412 (Fla. 3d DCA 1989); Whitfield v. State, 479 So. 2d 208, 215-216 (Fla. 4th DCA 1985). Even if counsel's performance was in some way deficient, Defendant could not prove prejudice. Even had a Richardson hearing been held, there is no reasonable probability of a different outcome. While Mrs. Montgomery testified at trial that she believed she had provided the name in her recorded statement, she could have been mistaken and instead told an officer during one of her numerous informal interviews with them, and the name did not get memorialized in a formal report at the time. In addition, even had this portion of her testimony been stricken, there was still sufficient other evidence presented at trial to find Defendant guilty. Therefore, sub-issue (e) is DENIED.

(PCR V9:1713-15).

The postconviction court properly denied Conahan's claim that his trial counsel was ineffective for failing to request a Richardson hearing based on an alleged discovery violation. As the court noted, trial counsel Sullivan testified that he was unsure how to "unring" the bell given that trial counsel was responsible for eliciting this information from the victim's mother when questioning her during cross-examination. (DAR

V28:1105-06). When defense counsel attempted to impeach Montgomery on when she told law enforcement officers this information, she indicated that she *thought* she told them this information when she gave her taped statement. (DAR V28:1106-07). Defense counsel showed Mrs. Montgomery a copy of her transcribed statement to law enforcement officers dated April 18, 1996, and asked her where in the statement she mentioned her son having contact with Conahan, and Mrs. Montgomery replied that she thought it was in the "inaudible" sections of the transcript. (DAR V28:1112-13).

At the evidentiary hearing, the prosecutor testified that Mrs. Montgomery made other statements to law enforcement officers which were not recorded, including oral statements to him. The prosecutor did not disclose these oral statements in discovery because such a disclosure was not required by Florida Rule of Criminal Procedure 3.220(b)(1)(B). (PCR V14:682-91).

Conahan's allegation that his trial counsel was ineffective for failing to move for a Richardson hearing is simply without merit because, as the postconviction court properly noted, "there was no discovery violation" in the instant case, and thus, "there was no basis for a Richardson hearing." Florida Rule of Criminal Procedure 3.220(b)(1)(B) requires the State to disclose to the defendant "the statement of any person" who is a

witness as defined by rule 3.220(b)(1)(A). The types of statements subject to disclosure are defined as follows:

> The term "statement" as used herein includes a written statement made by the person and signed or otherwise adopted or approved by the person and also includes any statement of any kind or manner made by the person and written or recorded or summarized in any writing or recording. The term "statement" is specifically intended to include all police and investigative reports of any kind prepared for or in connection with the case, but shall not include the notes from which those reports are compiled[.]

Fla. R. Crim. P. 3.220(b)(1)(B). As this Court noted in State v. Evans, 770 So. 2d 1174, 1180 (Fla. 2000) (emphasis added), "[c]ourts construing rule 3.220(b)(1)(B) have determined that *the State is not required to disclose to the defendant a witness's oral statement when such statement has not been reduced to writing or recorded in a manner prescribed by the rule.*" See also Olson v. State, 705 So. 2d 687, 690–91 (Fla. 5th DCA 1998) (stating that the clear implication of rule 3.220(b)(1)(B) is that a witnesses' statements "if not written or recorded, are not discoverable"); Johnson v. State, 545 So. 2d 411, 412 (Fla. 3d DCA 1989) (determining that State was not required to disclose to the defendant an oral, unrecorded statement made by a state witness to the prosecutor); Whitfield v. State, 479 So. 2d 208, 215–16 (Fla. 4th DCA 1985) (determining that witness's oral statements to prosecutor after suppression hearing were not discoverable, in part because such

statements were not written or recorded); Watson v. State, 651 So. 2d 1159, 1163–64 (Fla. 1994) (determining that oral statement made by State's expert witness was not discoverable, as it was not a "statement" as defined in rule 3.220).

Based on Evans and its progeny, Conahan's trial counsel had no valid legal basis to raise an alleged discovery violation after he elicited a statement from the victim's mother that her son had told her he knew a man named Conahan. Accordingly, Conahan cannot establish deficient performance based on trial counsel's failure to raise a frivolous objection. See Ferrell v. State, 29 So. 3d 959, 975 (Fla. 2010) ("Counsel cannot be deemed ineffective for failing to pursue a meritless claim."); Teffeteller v. Dugger, 734 So. 2d 1009, 1023 (Fla. 1999).

Relying on Evans, Conahan asserts that trial counsel should have raised a discovery violation because Mrs. Montgomery's testimony was "materially different" than the recorded statement disclosed by the State prior to trial. Evans, 770 So. 2d at 1180 (stating that an exception to rule 3.220(b)(1)(B) applies when "the oral statement materially alters prior written or recorded statement previously provided by the State to the defendant."). Prior to trial, the State turned over Montgomery's taped statement to law enforcement and a transcript was prepared of

her statement which reflected numerous inaudible sections.[13] In her statement, Mrs. Montgomery was asked whether "other than Bobby, do you know of any other male that [your son] would have been having a relationship with," to which the reply indicated "inaudible."[14] (PCR V5:922). Mrs. Montgomery testified at trial that on March 23, 1996, the last time she saw her son, he told her he had met a man named "Conahan." On re-direct, Mrs. Montgomery stated that her son told her his new friend Conahan was much older and lived in Punta Gorda Isles, had been discharged from the Navy, and was a nurse who worked at the medical center where she had worked for many years. (DAR V28:1109-10). Mrs. Montgomery never claimed that her son was in a "relationship" with Conahan, merely that he had recently met him. Thus, contrary to Conahan's assertions, Mrs. Montgomery's trial testimony was not "materially different" or inconsistent with her recorded statement. See State v. McFadden, 50 So. 3d 1131, 1133-34 (Fla. 2010) (finding that Evans exception was not applicable when witness's statement was not a "material departure" from her recorded statement or a "radical change" in

[13] During the postconviction proceedings, Conahan had a forensic audio expert examine the taped statement and he was able to decipher a number of the inaudible sections of the tape. After reviewing the expert's report, the State stipulated that the transcript did not contain Appellant's name.

[14] The postconviction expert's analysis indicated that her response was "No." (PCR V3:601).

testimony). Because Conahan failed to establish any deficient performance based on trial counsel's failure to request a Richardson hearing, this Court should affirm the postconviction court's denial of this claim.

Although this Court need not even address the prejudice prong based on Conahan's failure to establish deficient performance, the State submits that the record supports the lower court's finding that Conahan failed to establish prejudice as required by Strickland. See Waterhouse v. State, 792 So. 2d 1176, 1182 (Fla. 2001) ("When a defendant fails to make a showing as to one prong [under Strickland], it is not necessary to delve into whether he has made a showing as to the other prong."). As the postconviction court noted, even if trial counsel had immediately requested a Richardson hearing after he elicited the testimony from Mrs. Montgomery on cross-examination, the court would not have found a discovery violation based on Montgomery's other oral statements to law enforcement and the prosecutor. Finally, even assuming *arguendo* that trial counsel moved for a Richardson hearing and the trial court found a discovery violation and struck this portion of Montgomery's testimony, it would not have affected the result of the proceedings in any manner as there was testimony from two

other witnesses who, like the victim's mother, testified that the victim knew Conahan. (DAR V27:987-88; V28:1072-74).

In his next sub-claim, Conahan asserts that trial counsel was ineffective for failing to secure a forensic audio expert to examine the tape of Mary Montgomery's statement in order to determine what was said during the "inaudible" portions. As the postconviction court properly noted when denying this sub-claim, Mrs. Montgomery qualified her testimony and indicated that she *thought* she provided Conahan's name to law enforcement in her taped statement. As the audiotape indicates, however, Mrs. Montgomery spoke to the officers prior to the tape recorder being turned on, and as the prosecutor indicated, Mrs. Montgomery also spoke to numerous other law enforcement personnel during the investigation. (PCR V9:1715).

Trial counsel did not perform outside the broad range of competent performance under prevailing professional standards when he 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. See Atkins v. Dugger, 541 So. 2d 1165, 1166 (Fla. 1989) (noting that trial counsel are not required to retain an expert on every issue). Trial counsel had a substantially verbatim transcribed statement of the witness. There was simply no reason to expend finite judicial resources

in seeking a forensic expert to examine the inaudible sections of the witness's taped statement.

Although a more complete transcription was obtained by collateral counsel's forensic audio expert during the postconviction proceedings, it would not have resulted in a material change to Montgomery's testimony that she thought she provided law enforcement with Conahan's name during her taped statement. As trial counsel Ahlbrand conceded, he did not know whether this information from Montgomery was prejudicial in any manner to the defense. (PCR V15:511-12). Contrary to Conahan's assertions, a more accurate transcript of the tape would not have prevented Montgomery from testifying that she thought she gave this information to law enforcement, nor would it have "broken the evidentiary link" between Conahan and the victim. Two other witnesses, Robert Whittaker and John Newman, both testified that Conahan knew the victim. (DAR V27:987-88; V28:1072-74). Thus, because Conahan failed to establish deficient performance and prejudice based on trial counsel's failure to retain a forensic audio expert, this Court should affirm the lower court's denial of this sub-claim.

Conahan's next sub-claim alleges that trial counsel was ineffective for failing to object to and challenge the State's use of Williams rule evidence. Although Conahan raises this

ineffective assistance of counsel claim in the heading of his sub-claim, the argument section only addresses the alleged error by the postconviction court in summarily denying his claim that the Williams rule evidence (1) was not established by clear and convincing evidence; (2) was not sufficiently similar to the charged offense; and (3) became a feature of the trial.[15]

The postconviction court granted an evidentiary hearing on Conahan's allegation of ineffective assistance of counsel for failing to object and challenge the admissibility of the Williams rule evidence. Trial counsel Ahlbrand testified that he objected to the Williams rule evidence prior to trial. Judge Ellis conducted a hearing on his motion and indicated that she would reserve ruling on the admissibility of the evidence until the trial, at which time the jury could be removed and the evidence could be proffered. Subsequently, however, Conahan waived a jury trial and the case proceeded to trial before a different judge. Trial counsel noted the unusual situation this presented where the judge would have to hear all of the evidence and then make a determination as to what was admissible. Counsel

[15] Conahan raised this substantive Williams rule claim under Claim XVIII of his amended postconviction motion. (PCR V2:424-27). The lower court properly denied this claim as procedurally barred without an evidentiary hearing as it was a claim that could or should have been raised on direct appeal. (PCR V3:521-22).

noted that he argued against the evidence and the judge gave him a standing objection on the evidence. (PCR V15:496-505).

In denying Conahan's claim of ineffective assistance of counsel, the court found that trial counsel "repeatedly" objected to the Williams rule evidence and received a standing objection, and thus, the record refuted his claim that counsel failed to challenge the evidence (PCR V9:1713). The court's factual findings are clearly supported by the record. Prior to trial, Judge Ellis conducted a lengthy hearing on the State's notice to introduce similar fact evidence and Conahan's 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. (DAR V25:667-69, 714-15; V29:1240-60; V34:1804-48). Accordingly, as the lower court properly found, the record establishes that trial counsel objected to and challenged the admissibility of the Williams rule evidence. Because 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.

To the extent that Conahan asserts that the lower court erred in summarily denying his substantive claim regarding the Williams rule evidence, his claim is without merit. Conahan asserted in his postconviction motion that the trial court erred in admitting the Williams rule evidence regarding Conahan's attempted murder and sexual battery on victim Stanley Burden and Conahan's attempt to solicit undercover officers Clemens and Weir to pose for nude photographs because the evidence was not established by clear and convincing evidence and was not sufficiently similar to the charged crime. Conahan further argued that the Williams rule evidence became a feature of the trial. As the lower court properly found, these substantive claims were procedurally barred in his postconviction proceedings as claims that should have been, and could have been, raised on direct appeal. The law in Florida is well established that postconviction motions may not be utilized as a second appeal. Torres Arboleda v. Dugger, 636 So. 2d 1321, 1323 (Fla. 1994); Johnson v. State, 593 So. 2d 206 (Fla. 1992). An express finding by this Court affirming this procedural bar is important so that any federal courts asked to consider Conahan's claims in the future will be able to discern the parameters of their federal habeas review. See Harris v. Reed, 489 U.S. 255 (1989); Wainwright v. Sykes, 433 U.S. 72 (1977). Appellant

attempts to avoid this procedural bar by arguing that he can properly raise his claim in the instant postconviction proceedings as a claim of "fundamental error," but notes that, in an abundance of caution, he is raising a related claim of ineffective assistance of appellate counsel in his state habeas petition based on counsel's failure to raise this issue on direct appeal. The State submits that the lower court properly denied his substantive claims as procedurally barred, and Appellant's effort to avoid this procedural bar by arguing that appellate counsel was ineffective is an issue that is properly raised in his state habeas petition. Accordingly, the State will rely on the arguments contained in its Response to Petition for Writ of Habeas Corpus regarding the allegations of ineffective assistance of appellate counsel.

Although there is no reason to address the merits of Conahan's procedurally barred claims regarding the admissibility of the Williams rule evidence, Appellee would briefly note that the record clearly establishes that the claims lack merit as the Williams rule evidence was properly admitted at trial. See Parker v. State, 904 So. 2d 370, 376 (Fla. 2005) (stating that that a defendant is entitled to an evidentiary hearing on a postconviction relief motion unless the motion, files, and records in the case conclusively show that he is entitled to no

relief). Contrary to Conahan's allegations, the Williams rule evidence was established by clear and convincing evidence and was not a feature of the trial. Conahan has never alleged that the State failed to meet this standard in regards to the Weir/Clemens undercover evidence, but alleges that the State failed to prove that Conahan committed the Stanley Burden attempted murder/sexual assault by clear and convincing evidence. At trial, the unrebutted testimony of Stanley Burden established that Conahan took him into the woods, took nude photographs of him, and then tied him to a tree and attempted to rape and kill him. (DAR V29:1145-1222). As the prosecutor summarized to the court, there were a substantial number of similarities between the Burden attack and the charged crime. (DAR V29:1252-59; 1825-38); see also Conahan v. State, 844 So. 2d 629, 635 (Fla. 2003) (noting 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.").

Likewise, Conahan's claim that the Weir/Clemens undercover evidence was not sufficiently similar to the charged crime is

without merit. Although admissible as relevant evidence rather than Williams rule evidence, the testimony from Weir and Clemens was also properly admitted as similar fact evidence. Conahan approached the two undercover officers while they were disguised as vagrants and propositioned them to pose for nude Polaroid photographs. (DAR V29:1260-1337). A review of their testimony clearly shows that Conahan's method of operation was similar to how he lured Montgomery to his death. The victim's mother testified that her son told her someone was going to pay him $200 for nude photographs, and 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); see also Conahan, 844 So. 2d at 635.

Because of the numerous unique similarities between the Williams rule evidence and the charged crime, the trial court properly admitted the Williams rule evidence over defense counsel's objections. 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). Because Conahan's substantive claim is procedurally barred and without merit, this Court should affirm the lower court's summary denial of this claim.

In his final sub-claim, Conahan asserts that his counsel was ineffective during the jury selection at the penalty phase. At the evidentiary hearing, trial counsel Paul Sullivan testified that he was responsible for jury selection and he could not recall whether he discussed with co-counsel whether he would inquire of the jury regarding their views on homosexuality. Sullivan indicated that, in hindsight, it was a mistake not to inquire about the potential jurors' view on homosexuality. (PCR V13:123-24). Counsel felt that jury

selection process was too brief and noted that the trial judge denied his motion for individual voir dire. (PCR V13:124).

In his brief, Conahan claims that "[s]ince counsel himself admitted to deficient performance, the next question to be determined is prejudice." Initial Brief at 40. First, trial counsel did not testify that he performed deficiently, but expressed frustration with the time limitations placed on voir dire and offered the hindsight view that he probably should have asked the jurors questions regarding their views on homosexuality. Trial counsel did not opine that he performed outside the broad range of reasonably competent performance under prevailing professional standards. Second, even assuming that trial counsel had opined that he rendered constitutionally deficient performance, his hindsight viewpoint is not dispositive of the issue. It is well established that an attorney's own admission of ineffectiveness is of little consequence, particularly when that assessment has been made with the benefit of hindsight. See Routly v. State, 590 So. 2d 397, 401 n.4 (Fla. 1991); Kelley v. State, 569 So. 2d 754 (Fla. 1990).

As the lower court properly found when denying this claim, trial counsel's performance was not deficient.

> Paul Sullivan, co-counsel, testified at the evidentiary hearing that, while he did not know why he

> did not ask the jurors about homosexuality, in his opinion, the trial judge did not give them much time for jury selection. He felt that the trial judge was strict, and they were expected to question all 60 people at one time and make their selections. Mr. Sullivan indicated that he had filed a motion for individual voir dire, but it had been denied. The Court finds that while voir dire may not have been conducted as Defendant may now wish, with all the possible questions Defendant now wishes were asked, counsel did the best in the situation he was in. Given the time the trial court allowed for jury selection, the Court cannot find counsel ineffective for focusing his questions on the death penalty, since this was the sentencing phase of the trial. Even if counsel's performance were in some way deficient, Defendant could not prove prejudice pursuant to Jenkins, as there is no patent bias apparent on the record and no indications a biased juror actually served.

(PCR V9:1707-08; citing Jenkins v. State, 824 So. 2d 977 (Fla. 4th DCA 2002) (record citations omitted)). The lower court properly found that Conahan had failed to establish deficient performance or prejudice regarding this claim. In support of his prejudice argument, Conahan speculates that "the possibility that at least one of the jurors was a staunch opponent of all things homosexual is extraordinarily high and infected the entire jury in this trial." Initial Brief at 40. Conahan has failed to identify any juror who, with more extensive questioning, would have been found to be either unqualified for the penalty phase or biased against Conahan because of his homosexuality. See Davis v. State, 928 So. 2d 1089, 1118 (Fla. 2005) (rejecting claim of ineffective assistance based on trial

counsel's failure to question the jurors about their views concerning drugs, alcohol abuse, and mental illness because the defendant failed to demonstrate that any unqualified juror served in the case or that any juror was biased).

Conahan also briefly argues in his brief that jurors were confused as to why they were not participating in the guilt phase. Although collateral counsel has not adequately briefed any claim of alleged ineffective assistance of counsel regarding this allegation based on his bare-boned assertions and failure to identify any acts or omissions by counsel, the State would note that the lower court properly denied Conahan's claim that counsel was ineffective for failing to allow alleged unqualified jurors to serve on the jury:

> As it relates to juror confusion about not participating in the guilt phase, the record indicates several jurors expressed confusion and did not understand what their purpose was, if Defendant had already been found guilty. When a juror questioned the change in venue, the trial court explained it was due to media attention. **There is no indication of patent bias apparent on the face of the record. Regardless of the confusion of the jurors, Defendant cannot prove prejudice pursuant to Jenkins on this portion of his claim.**

(PCR V9:1707) (record citations omitted) (emphasis added). Because Conahan failed to establish deficient performance and prejudice regarding any of his claims of ineffective assistance

of counsel, this Court should affirm the postconviction court's denial of these claims.

ISSUE II

CONAHAN'S CLAIM THAT THE STATE PRESENTED FALSE EVIDENCE FROM THE VICTIM'S MOTHER IS WITHOUT MERIT AND WAS PROPERLY DENIED BY THE LOWER COURT.

In his second issue, Conahan claims that the State violated Giglio v. United States, 405 U.S. 150 (1972), by failing to correct Mary Montgomery's "false" testimony during the guilt phase.[16] As the taped transcript of Mrs. Montgomery's statement establishes, detectives spoke with her for an unknown period of time prior to recording her statement. FDLE Agent Jon Gaconi, one of the two law enforcement officers involved in taking Montgomery's statement, testified at the evidentiary hearing that he "possibly" would have written down a name given to him by the victim's mother, and he also indicated that it was possible that Montgomery spoke with other law enforcement officers. (PCR V14:315, 341). Additionally, prosecutor Robert Lee testified that the victim's mother had spoken to numerous members of law enforcement, including making unrecorded, oral statements to him.

In order for Conahan to prevail on his Giglio claim, he must establish that the prosecutor knowingly used perjured

[16] As noted in the discussion of Issue I, supra, Conahan has also alleged that trial counsel was ineffective for failing to request a Richardson hearing during counsel's cross-examination of Mrs. Montgomery and that counsel was ineffective for failing to hire a forensic audio expert to examine the tape of her statement.

testimony, or failed to correct what he subsequently learned was false testimony, and that the falsehood was material. Ventura v. State, 794 So. 2d 553 (Fla. 2001). In Giglio, the Supreme Court stated that such errors do not require automatic reversal, but held that a new trial is required under the materiality inquiry if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the [trier of fact]." Giglio, 405 U.S. at 154 (quoting Napue v. Illinois, 360 U.S. 264, 271 (1959)).

In this case, the lower court properly denied this claim and found that Conahan failed to establish that Mrs. Montgomery's testimony was false or that the State knew the testimony was false. The court also found that Mrs. Montgomery's testimony was not material.[17] (PCR V9:1715-16). According to Montgomery's testimony, she informed law enforcement officers that her son mentioned to her that he had a friend named Conahan. However, it is clear from a review of her entire testimony that she never unequivocally stated that her transcribed statement contained her entire conversation with law enforcement officers, and she could not recall with specificity

[17] This Court applies a mixed standard of review to Giglio claims and defers to the court's factual findings to the extent they are supported by competent, substantial evidence, but reviews the application of the law to the facts de novo. Guzman v. State, 941 So. 2d 1045, 1049-50 (Fla. 2006).

when she told the law enforcement officers this information. She testified that she "thought" it was where the "inaudibles" were located on page 24 of her 28-paged transcribed statement. As the lower court noted, the record does not support Conahan's allegations that Montgomery gave "false" testimony when she testified that she thought her son mentioned his friend Conahan at some point during her taped statement. (PCR V9:1715-16).

In addition to failing to establish that Montgomery's testimony was false, Conahan also failed to establish that the State knowingly presented false testimony or failed to correct it after learning of its falsity. Montgomery testified at trial that her son told her he had a friend named Conahan who lived in Punta Gorda Isles, had been in the Navy, and was a nurse. Montgomery further testified that she thought she gave this information to detectives, and when confronted with her transcribed statement, she believed she mentioned it in the inaudible sections.

In order for Conahan to prevail on his Giglio claim, he had to establish that the State "knew" Montgomery testified falsely or that the State failed to correct this testimony after learning of its falsity. Conahan has failed to carry his burden. The transcribed taped statement clearly indicates that the detectives and Montgomery spoke prior to taping her statement.

(PCR V3:580). Furthermore, prosecutor Lee testified at the evidentiary hearing that Montgomery spoke to law enforcement officers a number of times, and she also informed him of this information regarding her son's knowledge of Conahan. (PCR V16:683-85). 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. In her taped statement to detectives on April 18, 1996, she indicates that she spoke to detectives *prior* to the tape being turned on and, given the overall poor quality of the recorded statement and the numerous "inaudible" sections, the prosecutor also could not have known whether she ever gave this information to law enforcement *during* the taped portion. Furthermore, as the unrebutted postconviction testimony established,[18] Mrs. Montgomery orally informed the prosecutor of this same information prior to trial and also spoke to a number of other law enforcement personnel. Thus, when she testified at trial regarding her son's statements to her, the prosecutor knew she

[18] In his brief, collateral counsel continually attacks the veracity of the prosecutor's testimony without any factual or legal support. As noted in footnote 4, supra, collateral counsel had a full and fair opportunity to carry his burden of proof and establish his allegations at the evidentiary hearing, and despite the prosecutor repeatedly volunteering to "tell you precisely the circumstances and what she told me," and "tell you the circumstances of it," collateral counsel chose to forego this line of questioning. (PCR V16:685).

had earlier informed him of this information and he had no way of conclusively knowing whether she had ever given this information to any of the other law enforcement personnel she spoke with during the investigation.

Because Conahan has failed to establish either of the first two prongs of his Giglio claim, this Court need not even address the materiality prong of the analysis. See Tompkins v. State, 994 So. 2d 1072, 1091 (2008) (stating that once the first two prongs are established by the defendant, the false evidence is deemed material if there is any reasonable possibility that it could have affected the jury's verdict). Even assuming *arguendo* that Conahan could establish that the State knowingly presented false testimony from Mrs. Montgomery, the trial court properly concluded that the false testimony was not material because it was harmless beyond a reasonable doubt. Id.; see also Guzman v. State, 941 So. 2d 1045 (Fla. 2006).

Although Mrs. Montgomery's testimony indicated that her son knew Conahan, it was cumulative to other evidence linking Conahan to the victim. As previously noted in Issue I, supra, two others witnesses linked Conahan to Montgomery. Robert Whittaker testified that Conahan came to his trailer about three times; on one occasion about two to three months before the

murder looking for the victim.[19] (DAR V27:987-88). Additionally, John Newman testified that Conahan confessed to knowing the victim and claimed that "Montgomery was a mistake." (DAR V28:1072-74).

Finally, contrary to collateral counsel's assertions, Mary Montgomery's alleged false testimony was not material to the trial court's ruling on the admissibility of the Williams rule evidence. The Williams rule evidence would have been admissible regardless of Montgomery's testimony. As noted by the prosecutor, there were approximately 64 points of similarities between the Williams rule evidence surrounding the Stanley Burden crime and the facts of the Montgomery murder such that the lower court would have admitted the Williams rule evidence even if Mary Montgomery had never testified to the one similarity of her son being offered money to pose for nude photographs. See DAR V29:1252-59. Although Mary Montgomery

[19] The lower court erroneously stated in its order that Conahan "admitted in his trial testimony that he had told the police he had been to see the victim about three times." (PCR V9:1716; DAR V35:1940). Conahan informed the police that he had been to Whittaker's trailer about three times, and testified at trial that he had been there about 10-15 times. The victim in this case lived with Mr. Whittaker for a period of time, but Conahan denied going to Whittaker's trailer to see victim Montgomery. In fact, Conahan denied ever meeting Montgomery. (DAR V35:1921-22, 1937-43). Although the lower court erred in finding that Conahan admitted to going to see the victim, this error is harmless because two other independent witnesses testified that Conahan knew the victim.

testified that her son told her an unnamed person had offered to pay him $200 for nude photographs, this was not the only evidence surrounding this aspect of the case. In addition to Stanley Burden's testimony regarding Appellant's method of luring him into the woods to pose for nude Polaroid photographs prior to attempting to rape and kill him (DAR V29:1155-70), the State also introduced evidence from law enforcement officers working undercover that Appellant would offer to pay them money to pose for nude Polaroid photographs. (DAR V29:1270, V30:1308-09). Appellant's purchases from the nearby Walmart immediately prior to the murder included Polaroid film, clothesline, pliers, and a utility knife.[20] (DAR V28:1023-28). Finally, Robert Whittaker and Gary Matson both testified that on the day of the murder, Richard Montgomery told them he was going to make about $200 and would be back shortly, and when asked if it was legal, Montgomery simply smirked and walked away and never returned. (DAR V27:972-75; 988-90). Thus, contrary to Conahan's assertion, the testimony from Mrs. Montgomery on cross-examination regarding her son informing her that he was going to pose for nude photographs was not material to the trial court's ruling on

[20] Conahan also made purchases at Walmart prior to the Burden incident on August 15, 1994. (DAR V28:1028-29). During the attack on Burden, Conahan used new clothesline from a bag and had red-handled clippers or pliers. (DAR V28:1124; V29:1160-62).

the Williams rule evidence given the other substantial evidence linking the offenses.

Because Conahan failed to establish that Mary Montgomery testified falsely at trial, and further failed to establish that the State knowingly presented the false testimony or failed to correct it, the lower court properly rejected his Giglio claim. Furthermore, even assuming Conahan satisfied these two requirements, Mrs. Montgomery's testimony was not material because there is no reasonable possibility of a different outcome had her statement been stricken. Accordingly, this Court should affirm the lower court's order denying the instant claim.

ISSUE III

APPELLANT'S CLAIM THAT THE STATE VIOLATED BRADY V. MARYLAND, 373 U.S. 83 (1963), BY FAILING TO DISCLOSE AN AUDIOTAPE OF AN UNDERCOVER OPERATION IS WITHOUT MERIT.

Conahan alleges that the State violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to turn over an alleged audio recording made when Detective Weir spoke with Conahan during an undercover operation on May 29, 1996. Appellant asserts in his brief that "[t]here was no evidence presented at the evidentiary hearing that a tape recording of the Weir operation was not made," but fails to acknowledge that there also was no evidence presented at the hearing that a tape was made. The lower court denied the instant claim based on a finding that Appellant "failed to establish that the recording of this specific alleged incident existed." (PCR V9:1718). The court additionally found that even had such a tape existed, Conahan had failed to show that it was material. (PCR V9:1718). The evidence supports the court's factual findings and conclusion that Conahan failed to meet the requirements of establishing his Brady claim.[21]

[21] This Court has noted that Brady claims present mixed questions of law and fact. Sochor v. State, 883 So. 2d 766, 785 (Fla. 2004). As to findings of fact, this Court defers to the lower court's findings if they are supported by competent, substantial evidence, and reviews the trial court's application of the law to the facts *de novo*. Hurst v. State, 18 So. 3d 975, 988 (Fla. 2009).

In order to establish a Brady violation, a defendant must establish three elements: (1) the evidence at issue was favorable to the defendant, because it was either exculpatory or impeaching; (2) the evidence was suppressed by the State; and (3) the suppression resulted in prejudice. Johnson v. State, 921 So. 2d 490 (Fla. 2005). Under the Brady standard of materiality, the undisclosed evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667 (1985). A criminal defendant alleging a Brady violation bears the burden to show prejudice, i.e., to show a reasonable probability that the undisclosed evidence would have produced a different verdict. Strickler v. Greene, 527 U.S. 263, 281 n.20 (1999).

At the evidentiary hearing, Charlotte County Sheriff's Office (hereafter "CCSO") Detective John Columbia testified that he wrote in a report that he was part of a task force surveillance incident on May 29, 1996, and indicated that, based on information he obtained from others, State Attorney investigator Anthony Padula or CCSO Sergeant Goff made "recordings" of their conversation with Appellant. (PCR V14:357-

58). CCSO Detective Raymond Weir testified that he was involved in four undercover operations involving contact with Appellant and he wore a UNITEL listening device in the last three operations. (PCR V14:361-67). He testified that he thought the three operations were recorded, but he was unsure because the listening device was also used only for officer safety. Regarding the May 29, 1996 encounter, Detective Weir testified that he did not know if it was tape-recorded because he never saw a recording from that date. (PCR V14:364-67). CCSO Officer Richard Goff testified that he was involved in the May 29th undercover surveillance and he testified that he had a listening device, but it was not recording. (PCR V14:373-74). CCSO Detective Ricky Hobbs, the case agent in charge of the investigation, testified that he authorized the undercover operations and he did not specify that they be recorded. (PCR V14:394). Detective Hobbs noted that undercover detective Weir would have been wearing a UNITEL monitoring device during the operation as standard operating procedure, but he did not order that any conversations be recorded. (PCR V14:394-95). Despite the fact that his police report indicated that a recording had been made, Detective Hobbs did not know whether one was actually done of the May 29, 1996 incident. (PCR V14:396-97). CCSO Officer Scott Clemens testified that he worked undercover on May

23-25, 1996, and wore a monitoring device and, to his knowledge, the conversations with Appellant on those dates were recorded.[22] (PCR V15:407-10).

In addressing this claim and the testimony at the postconviction evidentiary hearing, the court noted, "the officers appeared to use the words 'recorded' and 'monitored' interchangeably." (PCR V9:1717). The testimony from the officers involved in the undercover task force operations did not establish that an actual audio recording was made of the May 29, 1996, encounter with Appellant. Rather, the testimony indicated that the officers were wearing UNITEL monitoring equipment on this date and their conversations with Conahan were monitored for officers' safety, but were not recorded. Clearly, the record supports the lower court's factual finding that Appellant failed to establish that a tape recording actually existed.

Additionally, even assuming that Conahan could establish that the State "suppressed" the tape, he has made no showing that the evidence on the tape was exculpatory or impeaching, or that it was material. Conahan devotes the majority of his argument on this claim to his contention that a tape actually existed, but was not turned over to the defense. Conahan's

[22] At trial, the State introduced taped recordings from encounters with officer Clemens and Appellant on May 23, 1996, and May 24, 1996. (DAR V29:1260-75).

entire argument regarding the alleged exculpatory nature of the tape or its materiality consists of two sentences in his brief:

> This evidence is material and favorable to Mr. Conahan because the contents of the tape stand in contrast to the picture the prosecution sought to paint him. The contents of the tape would indicate Mr. Conahan was not interested in the salacious things the prosecution claimed.

Initial Brief of Appellant at 67. Conahan does not explain in *any* detail what the contents of the tape would have contained, much less how the contents would have "contrasted" with the State's evidence or been material to his defense theory.

At trial, CCSO Deputy Scott Clemens testified that he was operating in an undercover capacity on May 23 and May 24, 1996, at Kiwanis Park and posing as a homeless person. On May 23, Officer Clemens encountered Appellant and he offered the officer money to perform sexual acts. The officer denied the request and Conahan gave him his phone number and indicated he might see him again the next day. (DAR V29:1260-64). The next day, Appellant again contacted the undercover officer at the park and discussed the possibility of Clemens posing for nude Polaroid photos for $150. (DAR V29:1268-74).

The State also introduced testimony at Conahan's trial regarding CCSO Detective Weir's actions in this case. Weir testified that, like Clemens, he posed as a homeless person and encountered Conahan on May 17 and 18, 1996. (DAR V30:1302-18).

On the first encounter, Wier was not wearing a transmittal device, but officers were actively doing surveillance of him. The following day, Wier was equipped with a transmitter and his conversation was recorded. This audiotape was introduced into evidence. On this occasion, Conahan offered Weir $150 to pose nude for photographs involving a progressive bondage scene. (DAR V30:1307-09). There was no testimony at trial regarding any encounter between Wier and Conahan on May 29, 1996.

Conahan has failed to establish how any audiotape of undercover officers' encounter with him on May 29, 1996 was exculpatory or impeaching in nature. Conahan has not directed this Court to any statements made during this encounter, nor has he explained how these statements would have been material. Conahan's only assertion in his brief is that the tape would have indicated that he "was not interested in the salacious things the prosecution claimed." As noted, however, the State introduced taped statements wherein Appellant was offering undercover officers money to pose for nude photographs involving bondage. Additionally, as has been previously discussed, Stanley Burden testified in detail to Conahan's similar acts, ultimately leading to his attack on Burden in the woods. Finally, Conahan testified at his trial and admitted to soliciting Burden for sex acts and seeking people to pose for nude photographs involving

bondage. (DAR V34:1910-13, 1936). Conahan also admitted that he told law enforcement officers about his fantasy of picking up a hitchhiker and tying him up in the woods. (DAR V34:1931). Thus, even assuming that Conahan did not express an interest in obtaining nude photographs of undercover officer Weir on May 29, 1996,[23] this would not have been exculpatory or material given the substantial evidence establishing Conahan's actions of seeking such services on other dates in May, 1996. Certainly there is no reasonable probability that had a recording of this encounter existed, the results of the proceedings would have been different. Because the lower court properly found that Conahan failed to establish any of the three necessary requirements for a Brady claim, this Court should affirm the lower court's order.

[23] Conahan alleged in his state postconviction motion that on May 29, 1996, Weir offered to pose for nude bondage photographs, but Conahan indicated that he was only interested in sex. (PCR V2:396).

ISSUE IV

THE POSTCONVICTION COURT PROPERLY DENIED CONAHAN'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE.

In his fourth issue, Conahan claims that the lower court erred in denying his claim that his counsel was ineffective at the penalty phase for failing to investigate and present mitigating evidence. After hearing the testimony from Conahan's trial attorneys and their mitigation investigators, the lower court denied Conahan's claim based on a finding that he failed to establish deficient performance and prejudice as required by Strickland v. Washington, 466 U.S. 668 (1984). The State submits that competent, substantial evidence supports the court's factual findings and that the court properly applied Strickland and found that Conahan failed to carry his burden of establishing deficient performance and prejudice.

In order for a defendant to prevail on a claim of ineffective assistance of counsel pursuant to the United States Supreme Court's decision in Strickland, a defendant must establish two general components.

> First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.

Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986). When addressing the prejudice prong of a claim directed at penalty phase counsel's performance, the defendant "must demonstrate that there is a reasonable probability that, absent trial counsel's error, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Cherry v. State, 781 So. 2d 1040, 1048 (Fla. 2000). Furthermore, as the Strickland Court noted, there is a strong presumption that counsel's performance was not ineffective. Id. at 690. A fair assessment of an attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight and to evaluate the conduct from counsel's perspective at the time. Id. at 689. The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id.

When reviewing a trial court's ruling on an ineffectiveness claim, this Court defers to the trial court's findings on factual issues, but reviews the trial court's ultimate conclusions on the deficiency and prejudice prongs *de novo*. Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001). In this case, the lower court properly identified the applicable law in analyzing Appellant's claim, correctly applied this law to the facts as

presented in the trial and postconviction proceedings, and concluded that Conahan was not entitled to postconviction relief.

At the evidentiary hearing, Appellant's two trial attorneys, Mark Ahlbrand and Paul Sullivan, testified regarding their investigation and presentation of mitigating evidence in this case. Mark Ahlbrand testified that after he was appointed, he sought the appointment of co-counsel Paul Sullivan and a private investigator, William Clement. (PCR V15:476-77). Prior to the appointment of Sullivan, trial counsel Ahlbrand filed a motion to appoint two mental health experts, Drs. Gunder and Keown. (PCR V15:483; V3:612-20). Trial counsel had previously worked with Dr. Gunder and utilized him in this case because he was the most knowledgeable expert he knew on matters involving human sexuality. (PCR V15:484). Trial counsel provided Dr. Gunder's report to psychiatrist Dr. Keown, and after evaluating Conahan on two occasions and administering personality tests, Dr. Keown concluded that, "from a psychological standpoint, [Conahan] was fairly healthy." Neither doctor found Appellant to be a sexual sadist. (PCR V15:491; V4:639-58). Trial counsel provided the two experts' information to co-counsel Sullivan and their retained mitigation investigators so they could determine

whether to use this information in the penalty phase. (PCR V15:491-95).

Paul Sullivan testified that he utilized investigator Bill Clement and mitigation investigators Roy Mathews and Laura Blankman, all of whom he had worked with in prior cases. (PCR V13:63-64). Because Dr. Keown had not found any particular psychiatric difficulties with Appellant, mitigation investigator Roy Mathews suggested that the attorneys use Dr. Golden, a neuropsychologist, as an expert. (PCR V13:74). Sullivan provided Dr. Golden with the evaluation reports from Drs. Gunder and Keown for his review. (PCR V13:74). Sullivan explained that he provided the other experts' reports to Dr. Golden because, in a prior case, the prosecutor had eviscerated his expert for failing to review other available reports and Sullivan vowed that he would never again present a mental health expert to the jury without providing him with all the pertinent information. (PCR V13:79-80). Sullivan testified that he did not use Dr. Golden because mitigation investigator Roy Mathews thought trial counsel had "ruined" Dr. Golden by providing him with the reports from Drs. Gunder and Keown. (PCR V13:93-94).

Although the mitigation investigator had recommended obtaining yet another mental health expert, Dr. Fred Berlin, the trial court denied the request for additional funds. (PCR

V13:128-31). Mitigation investigator Roy Mathews testified at the hearing for additional funds and Sullivan noted that Mathews' testimony did not come across very well as Mathews indicated that the defense was unprepared for the penalty phase – an opinion that trial counsel Sullivan disagreed with. (PCR V13:110; V14:183-85). Trial counsel noted that two mental health experts had examined Conahan and found him normal, and despite his mitigation investigator's desire to hire yet another expert (Dr. Berlin),[24] counsel did not see the need:

> The reason was, I had absolutely zero inkling that my client had a mental disorder, had psychiatric disorders, had psychiatric problems that qualified as mitigation, was mentally retarded, was sexual sadist, or fell into any of the other [DSM] categories that we traditionally looked for in order to show to the jury.
>
> I understand that, in a perfect world, we would have said, here's Dan Conahan, he's as crazy as can be. Here's this fancy expert I flew in from Maryland to say that he's crazy as can be.
>
> But you know what? I couldn't find that person. All the information I had, regrettably, was that he

[24] Despite having already had Conahan examined by psychiatrist Dr. Keown, and having a "psychosexual evaluation" performed by clinical sexologist Dr. Gunder (PCR V4:639-58), the mitigation investigator suggested seeking additional funds for the appointment of Maryland psychiatrist Dr. Berlin. (PCR V4:661-62). As noted, the investigator's testimony did not come across very well and the trial judge denied the request to appoint Dr. Berlin without prejudice and indicated that "Defendant may renew the motion with a showing of relevance or materiality to mitigation evidence; and by showing further that there is no available, competent psychiatrist in Florida with similar or related experience at a rate somewhat less than [Dr. Berland's] $350 per hour." (PCR V4:688).

> was normal. I'm sorry about that. I wish I had better information. I wish I could have had a knock 'em dead expert to come in here and say Dan Conahan is crazy. I hope you found someone to come in and say he's crazy and that I missed something.

(PCR V13:133).

Sullivan testified that the mitigation investigators also assisted him by finding background information on Conahan and interviewing potential mitigation witnesses. Both Sullivan and investigator Laura Blackman spoke to Conahan and his family and friends, including travelling to Chicago to interview witnesses. (PCR V13:113-16). Trial counsel testified that Conahan did not have many friends or family members. Conahan's sister, Shawn Luedke, was deposed prior to the penalty phase, but she did not want to testify and Conahan did not want her involved so she was ultimately not called as a witness at the penalty phase.[25] (PCR V5:986; V14:217-18). Trial counsel also spoke with a group of friends Conahan played poker with regularly, but at least one of them did not want to testify because he believed Conahan was guilty. (PCR V14:267-68).

Trial counsel obtained Conahan's school and Navy records. In researching his military records, trial counsel learned that

[25] At her deposition, Luedke indicated that Conahan had never been abused as a child, had very supportive parents, and she was unaware of any mental health issues with him. (PCR V5:977-80). She indicated that Conahan was upset with her after their parents passed away because he thought she had not given him a fair share of the estate. (PCR 5:983).

Conahan had received a less-than-honorable discharge from the Navy after having committed an assault on another sailor and counsel did not want to present this negative information to the jury. (PCR V14:266-68). As the lower court noted, trial counsel cannot be faulted for refusing to open the door to such damaging evidence. See Johnson v. State, 921 So. 2d 490, 501 (Fla. 2005) (finding that trial counsel was not deficient for failing to present a mental health expert who found that defendant had no serious mental health disorders, and the introduction of testimony concerning his alleged adjustment disorder and sexual disorder would have opened the door to discussion of his antisocial features or traits).

After conducting a thorough investigation into Conahan's background, trial counsel made the strategic decision that the only possible defense to utilize during the penalty phase was the strategy of humanizing Conahan and trying to show that he was a good and normal person who took care of his elderly parents.[26] Trial attorney Sullivan testified that he would have preferred to have presented mental mitigation showing that

[26] As argued by penalty phase counsel Sullivan in his penalty phase opening statement, Conahan "grew up with his parents, sister, had a nice upbringing. They weren't rich. They weren't poor. They had loving parents. They had a comfortable household. Mr. Conahan did all right in school in high school." (DAR V37:2319).

Conahan had mental problems, but his investigation into mitigation did not uncover this type of information. Sullivan testified that he would have had to find someone who "would have ignored what Dr. Keown and Dr. Gunder said, and ignored what . . . Dan Conahan said about his own self, and ignored all the family history." (PCR V13:131).

Similar to trial counsel, collateral counsel also failed to discover any compelling mitigation to present on Conahan's behalf. Despite being granted an evidentiary hearing on this claim, collateral counsel failed to present any evidence of mitigating evidence that was undiscovered by trial counsel, either statutory mental mitigation or non-statutory mitigation.[27]

[27] Collateral counsel attempts to avoid this pitfall by arguing that trial counsel should have presented the hearsay testimony of Roy Mathews or Laura Blackman, his two retained mitigation investigators, to testify regarding their "work product." Such an argument is meritless. Trial counsel did not consider utilizing his investigators as mitigation witnesses because Mathews was "out of the case" by that time. (PCR V3:118-19). Additionally, trial counsel was aware of all the information obtained by his investigators and utilized some of this in support of his penalty phase strategy of humanizing Conahan. Trial counsel presented the testimony from witnesses interviewed by Laura Blackman at the penalty phase: Betty Wilson (Conahan's aunt), Robert Linde and Nancy Thompson (two Chicago family members of Conahan's former lover, Hal Linde). (DAR V38:2443-536). Based on this testimony, the trial court found as nonstatutory mitigation that: Conahan was a loving and devoted caregiver who displayed loyalty and affection to his elderly parents; he worked to improve himself by enrolling in nursing school; he had good, helpful relationships with his aunt Betty Wilson and the members of the Linde family; and he was hard working. (DAR V18:3287-91).

Rather, in arguing that trial counsel was deficient, collateral counsel relies on Sullivan's work in an unrelated capital case (James "Jimbo" Ford) and asserts that counsel was deficient in the instant case because he spent a greater amount of time in the Ford case.[28] As Sullivan explained, however, the Ford case was factually different as the defendant had a great deal of mental mitigation and nonstatutory mitigation to investigate and present. See Ford v. State, 802 So. 2d 1121, 1126-27 (Fla. 2001) (noting that trial counsel Sullivan presented over two dozen witnesses including two mental health experts and several family members and friends). As Sullivan explained, both he and his mitigation investigators billed far greater hours in the Ford case because there was a need for such work given Ford's background, whereas in Conahan's case, Conahan did not have any mental health issues and had very few friends or family. Clearly, the record supports the lower court's finding that Conahan failed to establish that his trial counsel was deficient in the investigation and presentation of mitigating evidence in this case.

[28] Collateral counsel cites to the billing statements utilized by the attorneys and mitigation investigators, and while certainly these provide a written report of definitive actions taken by the parties, it should be noted that attorney Sullivan testified that he cheated himself out of *hundreds* of hours of work on this case by not submitting a bill for all the work he performed. (PCR V13:100-04).

Although not required to address the prejudice prong of Strickland given Conahan's failure to establish deficient performance, this Court should also find that the lower court properly found that Conahan failed to establish that he was prejudiced. See Waterhouse v. State, 792 So. 2d 1176, 1182 (Fla. 2001) (noting that "[w]hen a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong"); Zakrzewski v. State, 866 So. 2d 688, 692 (Fla. 2003). Even if Conahan were able to establish that trial counsels' performance fell below the norms for professional conduct regarding this claim, he failed to establish that there was a reasonable probability that he would have received a life sentence had they performed as alleged.

As trial counsel noted at the evidentiary hearing, and as confirmed by the complete lack of evidence at the postconviction proceedings, there simply is not much beneficial information available to assist Conahan in the penalty phase. Collateral counsel has failed to identify any compelling mitigating evidence that trial counsel should have presented. Although collateral counsel faults trial counsel for failing to have Conahan examined by Drs. Golden or Berlin, he failed to present these witnesses or any similar mental health experts at the evidentiary hearing. Compare Asay v. State, 769 So. 2d 974, 986

(Fla. 2000) (stating that trial counsel's reasonable investigation is not rendered incompetent merely because the defendant has now secured the testimony of a more favorable expert in postconviction). Here, trial counsel had the benefit of two mental health experts' evaluations prior to trial and these experts did not find any noteworthy mental health issues. As this Court recently noted in Hurst v. State, 18 So. 3d 975 (Fla. 2009):

> In assessing prejudice, we reweigh the evidence in aggravation against the totality of the mental health mitigation presented during the postconviction evidentiary hearing to determine if our confidence in the outcome of the penalty phase trial is undermined.

Id. at 1013 (quoting Hannon v. State, 941 So. 2d 1109, 1134 (Fla. 2006) (citations omitted)). Clearly, Conahan has failed to offer any mitigating evidence that would result in a life sentence in light of the three aggravating factors in this case: (1) the murder was heinous, atrocious, or cruel (HAC); the murder was cold, calculated, and premeditated (CCP); and (3) the murder was committed during the course of a kidnapping.[29] Because Conahan failed to meet his burden of proof under Strickland by introducing any mitigating evidence which undermines confidence

[29] This Court has previously noted that HAC and CCP are two of the strongest aggravating circumstances set forth in Florida's capital statutory scheme. See Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999).

in the outcome of the proceedings, this Court should affirm the lower court's finding that Conahan failed to establish any prejudice based on trial counsel's alleged deficient performance.

ISSUE V

CONAHAN'S CLAIM REGARDING PROSECUTORIAL MISCONDUCT IS PROCEDURALLY BARRED AND WITHOUT MERIT.

In his final claim, Conahan argues that prosecutorial misconduct constitutes fundamental error entitling him to a new trial. On direct appeal, Conahan's appellate counsel raised an issue regarding prosecutorial misconduct during the penalty phase opening and closing arguments and this Court found that only one of the objected-to comments was improper, but concluded that the prosecutor's comment in opening statements regarding the Williams rule evidence was harmless error. See Conahan v. State, 844 So. 2d 629, 638-40 (Fla. 2003). Regarding the other preserved allegations of prosecutorial misconduct, this Court found that the comments were not improper. Id. at 639-41. Conahan also raised allegations of prosecutorial misconduct where trial counsel had not objected, and this Court found that the unobjected-to comments did not constitute fundamental error, and when viewed cumulatively with the objected-to comments, did not deprive Conahan of a fair penalty phase hearing. Id.

In his postconviction motion, Conahan argued that these instances of alleged prosecutorial misconduct, along with other alleged instances of prosecutorial misconduct, constituted fundamental error entitling him to postconviction relief. The lower court found that Appellant's claim was procedurally barred

as it was a claim which could or should have been raised on direct appeal. (PCR V9:1710-12). As the court properly noted, Conahan's attempt to evade the procedural bar by couching his claim in terms of ineffective assistance of counsel is unavailing and misplaced. This Court has consistently recognized that "[a]llegations of ineffective assistance cannot be used to circumvent the rule that post conviction proceedings cannot serve as a second appeal." Medina v. State, 573 So. 2d 293, 295 (Fla. 1990); Cherry v. State, 659 So. 2d 1069, 1072 (Fla. 1995).

In addition to finding Conahan's claims procedurally barred, the lower court also addressed the merits of the claims. In his first sub-claim, Conahan argued that the State improperly delayed the prosecution of the case in which Stanley Burden was the victim so that the State could utilize this as Williams rule evidence in the instant case, and also argued that trial counsel was ineffective for failing to object to this alleged prosecutorial misconduct.[30] The lower court summarily denied Conahan's claim and noted that collateral counsel's allegations in support of this sub-claim "are conclusory and pure speculation" and postconviction relief cannot be based on his speculative assertions. (PCR V13:1710-11). The court further stated:

[30] Conahan asserted this argument in two separate claims in his postconviction motion. (PCR V2:377-83, 427-29).

Defendant argues in claim XIX that his constitutional rights were violated when the prosecution engaged in misconduct by delaying his prosecution in the Burden case in order to gain a tactical advantage in the instant case. He claims the prosecution engaged in practices designed to deprive him of his speedy trial and due process rights in the Burden case, thereby depriving him of the right to challenge the Williams rule evidence in the instant case. Defendant explains that, if he had been acquitted in the Burden case, the doctrine of collateral estoppel would have prevented the State from using the Burden facts as Williams rule evidence in the instant case. He argues that the prosecution indefinitely delayed the Burden trial by its nolle prosse in order to secure the Burden evidence for use as Williams rule evidence in the instant case. Defendant argues that the due process violation in the Burden case resulted in a due process violation in the instant case. Finally, Defendant also claims that his trial counsel was ineffective for failing to raise this argument before the trial court.

The Court notes that Defendant admits in his motion that his speedy trial rights in the Burden case were waived by his attorney. The decision to file a nolle prosse is within the sole discretion of the State. State v. M.J.B., 576 So. 2d 966 (Fla. 5th DCA 1991). Furthermore, pursuant to State v. Agee, 622 So. 2d 473, 475 (Fla. 1993), "when the State enters a nol pros, the speedy trial period [under Fla. R. Crim. P. 3.191] continues to run and the State may not refile charges based on the same conduct after the period has expired." Thus, contrary to Defendant's assertion, the State did not indefinitely delay the Burden case by entering a nolle prosse. In fact, prosecution was never "delayed" in the Burden case because the State never refiled the charges. The Court finds that the State's decision to nolle prosse the Burden case and later introduce the Burden evidence as Williams rule evidence in the instant case did not violate Defendant's rights and did not constitute misconduct. In light of this finding, the Court further finds that Defendant's trial counsel was not ineffective for failing to raise this argument before the trial court. Trial counsel cannot be deemed ineffective for failing

> to raise meritless claims. Teffeteller v. Dugger, 734 So. 2d 1009 [Fla. 1999]. Accordingly, claim XIX is denied.

(PCR V3:521-23).

This Court has stated that a "defendant is entitled to an evidentiary hearing on a postconviction relief motion unless (1) the motion, files, and records in the case conclusively show that the prisoner is entitled to no relief, or (2) the motion or a particular claim is legally insufficient." Freeman v. State, 761 So. 2d 1055, 1061 (Fla. 2000); see also Parker v. State, 904 So. 2d 370, 376 (Fla. 2005). "The defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden." Griffin v. State, 866 So. 2d 1, 9 (Fla. 2003). Where the postconviction motion lacks sufficient factual allegations, or where the alleged facts do not render the judgment vulnerable to collateral attack, the motion may be summarily denied. Hamilton v. State, 875 So. 2d 586, 591 (Fla. 2004).

A defendant is entitled to an evidentiary hearing on a claim of ineffective assistance of counsel if he alleges specific "facts which are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced the defendant." Hamilton v. State, 875 So. 2d 586,

591 (Fla. 2004). However, a "defendant may not simply file a motion for postconviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing." State v. Coney, 845 So. 2d 120, 135 (Fla. 2003). In order for a motion to be facially sufficient, the defendant must allege specific legal and factual grounds that demonstrate a cognizable claim for relief. If a defendant's conclusory allegations are not supported by a properly pled factual basis, the claim is facially insufficient and should be summarily denied. See Davis v. State, 875 So. 2d 359, 368 (Fla. 2003). Thus, an evidentiary hearing is warranted on an ineffective assistance of trial counsel claim only where a defendant alleges specific facts, not conclusively rebutted by the record, which demonstrate a deficiency in performance that prejudiced the defendant. Cherry v. State, 659 So. 2d 1069, 1072 (Fla. 1995).

In the instant case, as the lower court properly found, Conahan's claim that the State engaged in misconduct by delaying the prosecution of the case in which Stanley Burden was a victim is without merit as the State filed a nol pros, Conahan's trial counsel waived his speedy trial rights, and the State never refiled the charges. Likewise, his claim that trial counsel was ineffective for failing to object to this alleged misconduct was

properly summarily denied because trial counsel had no legal basis to object to the State's filing of a nol pros in the Burden case. Finally, contrary to Conahan's assertion, the Williams rule evidence regarding the Burden case was properly admitted by the trial judge at Conahan's bench trial as the State proved by clear and convincing evidence that Conahan committed the crimes against Burden. Because the record supports the trial court's summary denial of this claim, this Court should affirm the court's order denying this sub-claim.

Conahan alleges in his next sub-claim that the State engaged in misconduct by admitting evidence from Conahan's former lover, Hal Linde, that Conahan discussed a sexual fantasy with him involving Conahan picking up a hitchhiker and taking him to the woods, tying him to a tree and having sex with him. Conahan alleges that this testimony constituted fundamental error because it was admitted solely to show Conahan's bad character. Contrary to Conahan's assertion, this testimony was admissible as it was clearly relevant to Conahan's motive in the instant case and was not offered simply to show bad character. The evidence surrounding the victim's murder, as well as the Williams rule evidence, all showed that Conahan focused on picking up hitchhiker-type males to take to the woods and tie up in an attempt to have sex with them. Furthermore, even if the

trial court erred in admitting this evidence at the bench trial, it was harmless error given the other properly-admitted evidence surrounding Conahan's actions of attempting to sexually assault Stanley Burden by tying him to a tree and to solicit other males to engage in sexual bondage scenes. Conahan also testified that he admitted to officers that he fantasized about tying people up in the woods. Because the testimony from Hal Linde was properly admitted, Conahan has failed to establish any fundamental error regarding this claim.

Finally, Conahan claims that the State made improper comments during the argument on his motion for judgment of acquittal and during closing arguments,[31] and repeats his meritless claims regarding the alleged recording of a conversation between Detective Weir and Conahan during an undercover operation and Mary Montgomery allegedly giving false testimony and argues that, cumulatively, these instances of

[31] Conahan claims that the State "misrepresented" the testimony of John Newman during the argument on Conahan's motion for judgment of acquittal. (DAR V34:1860-61). As the lower court properly noted when denying this allegation, the fact that Conahan does not like the State's argument does not make it "improper." (PCR V9:1711-12). During the argument on the judgment of acquittal, the State properly summarized Newman's testimony and noted that Newman testified regarding Conahan's statement that Montgomery was his one mistake. The lower court rejected Conahan's claim regarding the prosecutor's comments during the argument on the judgment of acquittal or in closing arguments, and found the comments proper. Likewise, because there was no prosecutorial misconduct, trial counsel could not be ineffective for failing to raise a meritless objection.

alleged prosecutorial misconduct, ineffective assistance of counsel, or Brady/Giglio violations entitle him to relief.[32] As the lower court properly found, because Conahan failed to establish any individual errors regarding these meritless or procedurally barred claims, his cumulative error argument is without merit. (PCR V9:1725); see Occhicone v. State, 768 So. 2d 1037, 1040 n.3 (Fla. 2000) (finding claim that the cumulative impact of errors at trial was an issue which must be raised on direct appeal and is procedurally barred in postconviction litigation); 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); Melendez v. State, 718 So. 2d 746, 749 (Fla. 1998) (reasoning that where each claim is either meritless or procedurally barred, cumulative error cannot be considered). Accordingly, this Court should affirm the lower court's denial of Conahan's cumulative error claim of prosecutorial misconduct.

[32] The issues involving the alleged audiotape of the Weir undercover incident on May 29, 1996 and Mary Montgomery's testimony have been argued extensively in this brief in Issues I-III, supra.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the lower court's order denying Appellant postconviction relief.

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, Ft. Lauderdale, Florida 33301-1162, this 2nd day of April, 2012.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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