IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-615

DANIEL OWEN CONAHAN, JR.

Appellant,
v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Conahan’s motion for postconviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.851. The following symbols will be used to designate references to the record in this appeal:

"R" - record on direct appeal to this Court;

"PCR" records on prior 3.850 appeals to this Court;

“T” indicates the transcript of the postconviction evidentiary hearing

REQUEST FOR ORAL ARGUMENT

Mr. Conahan has been sentenced to death. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Conahan through counsel, accordingly urges that the Court permit oral argument.

STATEMENT OF THE CASE

The Circuit Court for the Twentieth Judicial Circuit, in and for Charlotte County, Florida entered the judgments of convictions and death sentences at issue. On February 25, 1997, Mr. Conahan was indicted on one count of first-degree premeditated murder, one count of felony first degree murder during the commission of or attempt to commit kidnapping; one count of kidnapping with intent to commit or facilitate the commission of sexual battery, and one count of sexual battery. On August 9, 1999, Mr. Conahan waived his right to a jury trial for the determination of his guilt, and the case went to trial before Twentieth Circuit Judge William Blackwell, who appointed himself on August 5, 1999, following the disqualification of Circuit Court Judge Ellis on August 2, 1999. Although Judge Blackwell granted trial counsel's motion for judgment of acquittal on the sexual battery charge, the trial court found Mr. Conahan guilty on the three other counts. The trial court then considered and granted trial counsel's motion for change of venue from Charlotte County to Collier County for purposes of the penalty phase, which was conducted on November 1-3, 1999 in Naples, Florida. The jury impaneled for the penalty phase returned a unanimous recommendation of death. The trial court conducted a Spencer hearing on November 5, 1999. At that hearing victim Montgomery's brother and mother read victim impact statements to the court. Mr. Conahan also testified and both parties subsequently provided

sentencing memorandums to the trial court.

On December 10, 1999, the trial court sentenced Mr. Conahan to death on Count I, first-degree premeditated murder, and to fifteen years in prison for Count three, kidnapping. The State entered a nolle prosequi as to Count II, first degree felony murder. The trial court found three aggravating circumstances: (1) the murder was committed during the commission of a kidnapping; (2) the murder was cold, calculated, and premeditated (CCP); and (3) the murder was heinous, atrocious, or cruel (HAC). The court failed to find the only statutory mitigation argued, that the victim was a participant in the defendant's conduct or consented to the act. The trial court did find four non-statutory mitigating circumstances under the catchall section 921.141(6)(h): (1) Mr. Conahan was a loving son who displayed loyalty, affection, and service to his parents; (2) he worked to improve himself by enrolling in nursing school; (3) he had good, helpful relationships with his aunt Betty Wilson and the members of the Linde family; (4) he is hard working. Mr. Conahan subsequently appealed the decision of the trial court to the Supreme Court of Florida. His initial brief raised five issues. The Court denied relief after oral argument. See *Conahan v. State*, 844 So. 2d 629 (Fla. 2003). A petition for certiorari to the United States Supreme Court was denied on October 6, 2004. Mr Conahan filed his initial motion for postconviction relief in this court on October 1, 2004. An amended motion for postconviction relief was filed on July

17, 2009 and on October 21, 2009. An evidentiary hearing was held and the circuit court entered an order denying relief. This appeal follows.

STATEMENT OF THE FACTS

During the trial, Mary Montgomery, Richard Montgomery's mother, testified emphatically that she had told police during her sworn statement that her son had mentioned he had a new friend. According to her trial testimony her son's new friend was named Conahan or Carnahan, was a nurse, lived in Punta Gorda Isles, used to be in the Navy and was much older than her son. (R. 1109-1110). She also went on to testify that that someone offered her son $200 to pose nude for pictures and that only a psychopath who would want to kill her son would do so. (R. 1110). When confronted on cross-examination with the fact that this information was not in the transcript of her sworn statement to the police, she proclaimed that she said those things where the transcript identified it as "inaudible." (R. 1113). Mrs. Montgomery claimed repeatedly that she told this information to the police in the portions of her sworn statement that indicate it was inaudible. (R. 1113, 1116-1117). Mrs. Montgomery stated, "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." (R. 1113). Further referencing the portions where it said inaudible Mrs. Montgomery said "It was a long time I was talking and it was right in there that I would have described that. And I -- **the reason I remember it so well** is because my mom was from Boston and she'd always leave out her Rs, and I remember the name Carnahan and he says, No, it

doesn't have an R in it." (R. 1117)(emphasis added).

During the postconcivtion evidentiary hearing, Barry Dickey, a forensic audio expert reviewed the tape recording of Mrs. Montgomery's sworn statement. Upon his expert review he concluded that Mary Montgomery did not utter the word "Conahan" or "Carnahan" in her sworn taped interview with Agent Gaconi. (T. 44-45). Indeed, the state stipulated at the evidentiary hearing that Mary Montgomery never said Conahan or Carnahan on the audio taped statement to the police. (T. 53).

Mrs. Montgomery, in her trial testimony, unequivocally said that she "remembered" telling the police additional information but it was inexplicably not in the recording of the sworn statement. (R. 1107). She even went so far as to point to the designated inaudible sections of the transcript of her statement and proclaim that she said it "where it said inaudible." (R. 1113). For instance, Mrs. Montgomery says, "I remember telling them that. There is a lot in my statement that I remember saying that isn't on the tape." (T. 682; R. 1107). Tellingly, in the original transcript of the statement, Mrs. Montgomery is asked if "other than Bobby … do you know of any other male that he [her son Richard] would have been having a relationship with …" (Transcript of Mrs. Montgomery's Statement, p. 23). Her response in the original transcript was inaudible. However, upon Mr. Dickey's analysis it was determined that her response was simply "no." (Def. Ex.

B, p. 23).

Agent Gaconi, who administered the sworn statement to Mrs. Montgomery, testified that she never told him that her son knew someone with the name Conahan or Carnahan nor did she ever mention her son knew someone who was a nurse or had been in the Navy. (T. 319) Agent Gaconi testified that if a witness were to mention a name it would be important to record that name in a report. Specifically, Agent Gaconi stated that if a witness mentioned the name of someone that name would be documented. (T. 304). Indeed, Agent Gaconi's report includes references to the names of people named Brad, Bobby, Tim and Scott. (T. 322). His report also mentions that Scott's mother is named Kim. Agent Gaconi's report even goes so far as to make note of the name, Denise Tartis, who was Richard Montgomery's camp counselor when he was sixteen years old. (T. 315-316). Missing entirely from his notes and reports, is the mention of the name Conahan or Carnahan. According to Gaconi, if a witness had "relevant information of something, we would do a sworn, taped statement from them." (T. 304)

The instant investigation was a large multi-agencey task force that generated more that 6,000 pages of police notes and investigation. Those reports indicated definitively that Mr. Conahan's name does not appear anywhere in the vast investigation until May 8, 1996. (T. 388). Detective Ricky Hobbs testified that he

first heard of Mr. Conahan on May 8, 1996 after he received a phone call from an officer at Glades Correctional Institution in Moore Haven, Florida regarding an inmate there. (T. 388-389; 391). According to Hobbs' report there was no mention of Mr. Conahan prior to May 8. (T. 392). Sergeant Goff also testified that the first mention of Mr. Conahan was in relation to an inmate in Moore Haven. (T. 377). Buttressing this fact is a memo from a meeting of the Task Force dated May 8, 1996 that indicated Detective Hobbs discussed a "new lead from Moore Haven" and related that lead at the meeting. (T. 388). Additionally, according to Detective Columbia, the first appearance of Mr. Conahan's name was May 10, 1996. (T. 349)

Assistant State Attorney Robert Lee testified that Mrs. Montgomery gave only one sworn statement taken April 18, 1996. (T. 684). Mr. Lee claimed that Mrs. Montgomery gave a statement to him directly but he never recorded or otherwise documented the conversation. The lack of documentation of this alleged statement was presumably so Mr. Lee would not be obligated to disclose the conversation. (T. 685). Nonetheless Mr. Lee disclosed for the very first time during the postconviction evidentiary hearing that he himself elicited from Mrs. Montgomery her damaging testimony on the "date of her deposition." (T. 685). At the evidentiary hearing, Mr. Lee testified as follows:

> Q: The statement was made to you?
> A: I talked –

> Q: What was the – what was the date of that statement?
> A: It was the date of her deposition.
> Q: Do you recall the date or –
> A: I'd have to look at her deposition to tell you the date. But I can tell you precisely the circumstances and what she told me.

(T. 684-685).

The record indicates, however, that Mrs. Montgomery was never, in fact, deposed. Indeed, at the beginning of the cross-examination, trial counsel, Mr. Ahlbrand, says to Mrs. Montgomery, "Ma'am, you and I have never met before." (R. 1103).

During the investigation, several undercover operations were conducted which were recorded. On May 29, 1996, an operation was conducted which police reports indicated it was recorded but the recording was never disclosed to the defense. According to Detective Weir he was wired during the May 29, 1996 surveillance as he had been in other undercover operations. When asked if the operation was being recorded Weir responded by saying "In this operation, uh, as far as I was concerned, that's why I had a bug, I though they were going to be recorded." (T. 363). Additionally, according to police reports of the surveillance, Weir testified that he was wired "[t]o record any conversations that may take place" and he believed he was being recorded. (T. 364-365). Although Weir has never seen a tape of the May 29th operation, he believed a recording was done. (T.

367). Although Sergeant Goff was not aware of a tape recording being made on May 29th, he testified that "somebody usually has a recording device, I should say." (T. 375) Detective Hobbs testified that Weir was wearing a UNITEL device as standard operating procedure and that the Sherriff's Office generally recorded undercover operations. (T. 394). In fact, Detective Hobbs' report reflects the conversations between Weir and Mr. Conahan were recorded. (T. 396). Detective Columbia's report also reflects that he was told Investigator Padula and Sergeant Goff made a recording of the undercover operation. (T. 358). Columbia makes this assertion in his report because "otherwise I would not have wrote [sic] it down." (T. 358). Finally, Detective Clemons testified that he wore recording devices in his undercover dealing with Mr. Conahan and all interactions were recorded. (T. 409).

Paul Sullivan, second chair counsel, testified on June 21-22, 2010 (T. 61-285). He stated that Mark Ahlbrand, lead trial counsel, called him to ask him to work on the Conahan case (T. 62-63). He further testified that he was working on the "Jimbo" Ford capital murder case during the same time period as the Conahan case and that he used mitigation specialists Roy Mathews and Laura Blankman on both cases (T. 64). He identified Exhibits C, D, F, and G which established that Ahlbrand entered his appearance on March 5, 1997, filed a motion for co-counsel on April 11, 1997 and that Sullivan was appointed to the Conahan case on June 11,

1997 (T. 66). Sullivan testified that generally he was going to be more responsible for working on "the mitigation side of the case" (T. 67). Defendant's Exh. E was introduced to show that Bill Clement was appointed on April 28, 1997 at Ahlbrand's request, prior to Sullivan's appointment. (T. 69). Exhibits K, L, and N were introduced and admitted to show that psychiatric expert Dr. Keown was requested by Ahlbrand and appointed to the Conahan case on April 28, 1997, prior to Sullivan's appointment on June 11, and that Dr. Keown's evaluation was begun on June 4, 1997 and completed on July 22, 1997 (T. 70).

Mr. Sullivan testified he did not recall much about Dr. Gunder, the first defense expert appointed before he was on the Conahan case (Exh. I). Gunder produced a psycho-sexual evaluation report that was later provided to Dr. Keown. (Exh. J)(T. 72-81). Two years later, on September 24, 1999, Mr. Sullivan sent Dr. Charles Golden copies of the reports of Dr. Keown and Dr. Gunder after Dr. Golden was appointed on September 9, 1999 at Roy Mathews recommendation as a penalty phase neuropsychological expert (T. 74; 82-83); (Exh. T)(R. 2818). Sullivan testified that he moved for a new expert after the guilt phase because Dr. Keown had examined Mr. Conahan and had not found any particular psychiatric difficulties with Mr. Conahan (T. 74); Dr. Gunder was a clinical sexologist with only a masters degree (T. 76); Ahlbrand had hired Gunder to get his opinion about whether Mr. Conahan "fit some sort of profile as [a] sexual sadist" (T. 78); and

Dr. Keown's job had not been to help with mitigation but only "to tell us if there was something psychiatrically wrong with our client" (T. 87).

Mitigation specialist Roy Mathews later testified that he was unaware of the prior appointment of the two experts appointed in 1997 or of their reports, Exhs. J and N, until July 1999 (T. 553). He testified that when he reviewed the reports he noticed that both evaluations were conducted with deputies present in the room and he did not believe either report was helpful for mitigation and he advised Paul Sullivan "that we should have our own evaluation done as we got further into the case, gathered more history and records. . . And I thought there were issues that we want[ed] to look into, separate and apart from these evaluations" (T. 556-57). Mathews testified that he recommended neuropsychologist Dr. Charles Golden, and later a psychiatrist, Dr. Fred Berlin (T. 560). He testified that the neuropsychologist would look at entirely different issues than the two earlier experts, "[c]ognitive impairments; how the brain would function and how it might manifest in certain behaviors. Essentially the functioning of the brain" (T. 560). And he testified that Dr. Golden would administer a battery of neuropsychological tests (T. 561). Dr. Golden was appointed for 12 hours of work at $150 an hour (T. 82-83)(Exh. R, S). Mathews testified that his own notes indicated that Dr. Golden never did the evaluation of Mr. Conahan (T. 562-63)(Exh. FFF).

Sullivan testified that his complete failure to have Dr. Golden do the

neuropsychological testing and to followup the denial without prejudice of the motion to appoint psychiatrist Dr. Fred Berlin was because: "I had absolutely zero inkling that my client had a mental disorder, had psychiatric disorders, had psychiatric problems that qualified as mitigation" *See* Exh. P&Q (T. 133). Sullivan did not think that the prior mental health evaluations, essentially exhibiting his client's normality, were useful: "I did not have, that I could see, a psychiatric problem, or defense, or syndrome, or something that I could latch onto and use through an expert" (T. 117).

Mathews identified a detailed interview he had with Mr. Conahan on September 4, 1999 (T. 585-86)(Eh. KK). He testified that he and Laura Blankman also prepared a witness contact sheet for Sullivan only a week before the penalty phase (T. 577-78)(Exh EEE). Sullivan testified that in the Ford case he tried, there were three mental health professionals working on the penalty phase, including two who ended up testifying: Dr. Greer, a psychiatrist from the University of Florida, and a psychologist recruited by Roy Mathews named Dr. Mastin (T. 95). Sullivan's view of the role of the appointed mitigation specialists in both the Conahan and Ford cases was that they were consultants. (T. 96). They did not take part in the penalty phase in the Conahan case (T. 97).

Laura Blankman testified that she was the field worker on the mitigation team who did interviews of lay witnesses (T. 603). She testified that she met with

their client's sister, with the Chicago-based family of the client's former boyfriend, Hal Linde, and with Mr. Conahan's "Aunt" Betty Wilson in Ft. Lauderdale. She also testified that she did telephone interviews with Mr. Conahan's half brother in New York and with his ex-wife in Miami Beach but "at the stage we were when we left the case, all of my interview memos were not complete" (T. 606-10, 622)(Exh. NN).

Blankman testified that she and Mathews did not attend or testify at the Conahan trial (T. 613). She testified that trial counsel Sullivan was negligent and uninvolved in the preparation of the penalty phase case: "In the Conahan case, Mr. Sullivan was not as involved [as in Ford]. Not talking with us, not returning our calls, not consulting with us, and leaving us without guidance" (T. 616).

STANDARD OF REVIEW

Ineffective assistance of counsel claims present mixed questions of law and fact subject to plenary review. *Occhicone v. State,* 768 So. 2d 1037, 1045 (Fla. 2000). This Court independently reviews the trial court's legal conclusions and defers to the trial court's findings of fact.

A postconviction court's decision whether to grant an evidentiary hearing is subject to *de novo* review. *State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003).

SUMMARY OF THE ARGUMENT

Mr. Conahan is entitled to relief for several reasons. First, he was denied the effective assistance of counsel during the guilt phase of the trail. Counsel failed to challenge *Williams* Rule evidence, failed to request a *Richardson* hearing based on the state's discover violation and failed to request the assistance of a forensic audio expert. All these deficiencies operated to Mr. Conahan's substantial prejudice requiring a new trial.

Relief is also warranted where the state committed a *Giglio* violation where it presented the known false and misleading testimony of a key witness, Mrs. Montgomery. Her testimony at trial differed markedly from her recorded statement to the police and was at minimum misleading. The state was required to clarify and correct her misleading testimony. Instead the state exacerbated the harm and prejudice entitling Mr. Conahan to relief.

The state also violated *Brady* in that it recorded an undercover surveillance and failed to turn over a copy of the recording. There was significant testimony and evidence presented at the evidentiary hearing indicating a recording was made. That it was never turned over is manifest of a *Brady* violation.

Mr. Conahan also received ineffective assistance of counsel during his penalty phase where trial counsel failed to adequately investigate and present mitigation evidence. The mitigation specialist appointed were never called to

testify at trial scant forensic evidence was presented which failed to present the jury with an adequate picture of Mr. Conahan in mitigation.

Finally, the state's persistent prosecutorial misconduct from the *Giglio* violation, the *Brady* violation, the *nolle prosiqui* of the Burden case, the testimony of Hal Linde, and numerous prejudicial comments all conspired to deny Mr. Conahan a fair trial in violation of the Sixth, Eighth and Fourteenth Amendments.

ARGUMENT I

MR. CONAHAN WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE, IN VIOLATION OF THE SIXTH, EIGHT, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY THE ACTIONS OF THE TRIAL COURT AND THE STATE. TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE A DEFENSE OR CHALLENGE THE STATE'S CASE. AS A RESULT, THE DEATH SENTENCE IS UNRELIABLE.

A. COUNSEL WAS INEFFECTIVE FOR FAILING TO DEMAND A *RICHARDSON* HEARING WHEN IT BECAME CLEAR THAT THE STATE FAILED TO PROVIDE MRS. MONTGOMERY'S COMPLETE STATEMENT.

At trial, Mrs. Montgomery testified on cross-examination that her son, the victim, told her Mr. Conahan was his new friend. When asked why she did not tell the police this information she indicated that she did tell them during the sworn statement. On re-direct examination the state elicited more testimony from Mrs. Montgomery that indicated that her son had told her he knew Mr. Conahan. Thus, the state must have known of Mrs. Montgomery testimony before trial. This makes the fact that the state never disclosed to Mr. Conahan the existence of Mrs. Montgomery's statement regarding her son's acquaintance with Mr. Conahan even more egregious. When Mary Montgomery testified that she had made statements

to the police, the State had the obligation of informing the defense of that statement. This information being completely new to Mr. Conahan, counsel should have objected on the grounds that the state did not meet its discovery obligation. *Richardson v. State,* 246 So.2d 771 (Fla.1971). *See also, Evans v. State,* 770 So. 2d 1174 (Fla. 2000)(holding the State's nondisclosure of the changes in witnesses testimony from her original police statement was tantamount to failing to name a witness at all); *Jones v. State*, 514 So. 2d 432 (Fla. 4th DCA 1987)(once discovery has been made to defendant, State has continuing duty to notify defense of substantial and material change in report or witness statement containing important factual scenario). Failing to so object was deficient performance that prejudiced Mr. Conhahan. *See Strickland v. Washington*, 466 U.S. 668, 696 (1984).

Rule 3.220 requires the state to deliver to the defense the complete statements of listed witnesses. Such statements include, "any statement of any kind or manner made by the person and written or recorded or summarized in any writing or recording." Fla. R. Crim. P. 3.220(b)(1)(B). Here, the state had knowledge of Mrs. Montgomery's claimed statement that her son knew Mr. Conahan which is contrary to the discovery provided to the defense. As such the plain violation of Rule 3.220 should have been brought to the court's attention. Had that been properly done, the court would have been obligated to conduct an

inquiry into discovery violations and determine the effects of non-disclosure and the extent of any prejudice to the defense. *Richardson v. State,* 246 So.2d 771 (Fla.1971) In *Scipio v. State,* 928 So.2d 1138 (Fla.2006), the court explained:

> This Court has held that the chief purpose of our discovery rules is to assist the truth-finding function of our justice system and to avoid trial by surprise or ambush.
> Because full and fair discovery is essential to these important goals, <u>we have repeatedly emphasized not only compliance with the technical provisions of the discovery rules, but also adherence to the purpose and spirit of those rules</u> in both the criminal and civil context. This Court has explained that the rules of discovery are intended to avoid surprise and 'trial by ambush.'

928 So.2d at 1144 (internal citations omitted)(emphasis added).

The State had a duty to inform the defense of what Mrs Montgomery had said, when the State knew that the tape was, for the most part, not clear enough to be heard, and consequently, the transcript was incomplete and did not include any such statement by Mrs. Montgomery. Prior to opening statements at the trial Judge Blackwell made it clear that he would hold a *Richardson* hearing if the defense challenged any late disclosures by the State. (R. 714). Specifically he stated "[a]ll right, since my history for this case is rather limited, meaning less than one week, there is a whole lot of your evidentiary issues I am unable to comprehend…." (R. 714). He then informed counsel that he would allow the Defense to challenge any offers of proof that State made based on alleged

prejudice, late disclosure and the like, with a *Richardson* hearing to follow. Thus, the court gave counsel a clear roadmap that counsel failed to follow and was therefore ineffective for failing to demand a *Richardson* when Mrs. Montgomery surprised everyone with her new testimony. In other words, counsel's ineffectiveness allowed the state to ambush Mr. Conahan at trial to his great prejudice.

Counsel's ineffectiveness for failing to demand a *Richardson* hearing with regard to Mrs. Montgomery's testimony is highlighted by Barry Dickey's analysis which uncovered the true nature of the recorded statement. Florida Rule of Criminal Procedure 3.220 requires the state to turn over to the defense complete statements of listed witnesses. Here, as is evident from Mr. Dickey's analysis and the State's stipulation, Mrs. Montgomery's statement that was provided was decidedly incomplete with respect to her trial testimony. Had a *Richardson* hearing been demanded then the trial court would have had the opportunity to safeguard the truth finding function and prohibit the State's ambush. See *Scipio v. State,* 928 So.2d 1138, 1144 (Fla. 2006). If during a *Richardson* hearing the State asserted, as it did in the circuit court, that Mrs. Montgomery made no other statements when she plainly testified that she did tell the police, then her testimony would have been revealed to the court as the misstatement and half-truth that it was.

The circuit court concluded that there was no discovery violation regarding Mrs. Montgomery's trial testimony because it accepted Mr. Lee's testimony that she conveniently told him in an oral statement that was not reduced to writing. Specifically, the circuit court stated that "Mr. Lee recalled Mrs. Montgomery providing that information to him the day her deposition. Under the rules of discovery, he was not required to disclose it, as it was not a recorded or written statement. (Order at 28). However, the State is obligated to disclose an oral statement that is materially different from a recorded statement previously provided to the defense. *Evans v. State,* 770 So. 2d 1174 (Fla. 2000). Here, the state produced Mrs. Montgomery's prior recorded statement and then for the first time at the evidentiary hearing proclaimed she provided materially different information orally directly to the prosecutor. Therefore, under the Florida Supreme Court's analysis of Rule 3.220 the state was obligated to inform Mr. Conahan of Mrs. Montgomery's change in testimony. *See Evans v. State,* 770 So. 2d 1174 (Fla. 2000)(holding the State's nondisclosure of the changes in witnesses testimony from her original police statement was tantamount to failing to name a witness at all). *See also, Jones v. State*, 514 So. 2d 432 (Fla. 4th DCA 1987)(once discovery has been made to defendant, State has continuing duty to notify defense of substantial and material change in report or witness statement containing important factual scenario). Thus, once the State provides a witnesses statement

through discovery, it is obligated to inform the defendant that a witness will testify differently that her previously provided statement.

In accordance with Florida Rules of Criminal Procedure 3.220(j) the prosecution has a continuing duty to disclose the discovery of any additional witnesses or materials that the party would have been under a duty to disclose or produce at the time of the previous compliance. At trial, Mrs. Montgomery testified on cross-examination that the victim had mentioned Mr. Conahan'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 Mr. Conahan's name does not appear in Mrs. Montgomery's recorded statement (Evidentiary Hearing transcript pp. 53-54). Prosecutor Robert Lee testified 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). Since it is promulgated that Mrs. Montgomery had made statements to officers which went unrecorded and unwritten, including the one at issue, the prosecution argues that such undocumented statements are not required to be passed on to the defense. Specifically, Fla. R. Crim. P. 3.220(a)(1)(ii) states that a prosecutor's obligation consists only of disclosing those statements which are "written… and made by said person and signed or otherwise adopted or approved by him, or a stenographic,

mechanical, electrical, or other recording, or a transcript thereof, or which is a substantially verbatim recital of an oral statement made by said person to an officer or agent of the State and recorded contemporaneously with the making of such oral statement....” Case law interpreting the State’s obligations under 3.220 differ from the circuit court’s conclusions.

In *Casica v. State*, 24 So.3d 1236 (Fla. 4th DCA 2009) the defendant was convicted in a jury trial in the Circuit Court of armed sexual battery, kidnapping, and tampering with a witness or victim. On appeal, the District Court reversed and remanded, holding that the defendant was procedurally prejudiced by the State’s discovery violation, thus warranting a new trial. “When the State's failure to comply with the rules of discovery is brought to the court's attention, the court must conduct a *Richardson* hearing to determine if that failure has prejudiced the defendant.” *Barrett v. State,* 649 So.2d 219, 221-22 (Fla. 1994). The inquiry at that hearing is “whether there is a reasonable possibility that the discovery violation ‘materially hindered the defendant's trial preparation or strategy.’ ” *Scipio v. State,* 928 So.2d 1138, 1150 (Fla. 2006) (quoting *State v. Schopp,* 653 So.2d 1016, 1020 (Fla. 1995)). An analysis of procedural prejudice “considers how the defense might have responded had it known about the undisclosed piece of evidence and contemplates the possibility that the defense could have acted to counter the harmful effects of the discovery violation.” *Scipio,* 928 So.2d at 1149. It is

immaterial whether the discovery violation would have made a difference to the fact finder in arriving at the verdict. *Id.* at 1150. In *Casica,* the State's failure to disclose a change in the witness testimony did in fact materially hinder the defendant's trial preparation. *Id.* at 1241. The Defendant argued that his trial strategy with regard to the witness at issue would have been materially different had he known of the change in testimony. *Id.* at 1241. For instance, instead of moving to strike the testimony, defense counsel would have hired an expert to rebut the testimony. *Id* at 1241. Similarly in the case at present, had the defense counsel known that Mrs. Montgomery would recall and testify that the victim had mentioned Defendant's name as a new friend, and that she believed she had told law enforcement of this information in her recorded statement, defense counsel would have used a materially different trial strategy by obtaining an expert to analyze her recorded statement to law enforcement prior to trial. This would have prevented her false testimony from being entered onto the Record and perhaps provided a stronger argument towards her impeachment as a witness.

In *Scipio v. State,* 928 So.2d 1138 (Fla. 2006), the Defendant was convicted by jury in the Circuit Court of first degree murder, for which he was sentenced to life in prison without the possibility of parole. The District Court of Appeal, held both that the state had an obligation under the discovery rule to disclose any material change in a statement provided by the investigator for the medical

examiner's office, and that the state's failure to advise the defense of the material change in the deposition testimony of the medical examiner's investigator constituted a violation of the discovery rule which imposes on the state a continuing duty to disclose. *Id.* at 1138. "As soon as the prosecutor began questioning about the Johnson case, she asked Walker to explain his deposition testimony and why he had lied. The fact that Walker's recantation of his deposition testimony was not reduced to writing did not relieve the State of its continuing discovery obligation as to this witness. The State committed a discovery violation when it failed to disclose to [Smith] a material change in the State [witness's] deposition statement." *Id.* at 1145. Therefore in the case at present, a discovery violation existed when the State did not disclose the material change in Mrs. Montgomery's recorded statement. Her trial testimony changed from her original statement "to such an extent that the witness was transformed from a witness who 'didn't see anything' into an eyewitness who observed the material aspects of the crime charged." *State v. Evans,* 770 So.2d 1174, 1182 (Fla. 2000). Mrs. Montgomery provided a key link between the Victim and the Defendant. Though other corroborating evidence may exist, as the Victim's mother, a figure having the most sincere and frequent contact with the Victim, her testimony is paramount to others.

Here, the state provided Mr. Conahan with Mrs. Montgomery's recorded

sworn statement. Barry Dickey's uncontested hearing testimony was that Mary Montgomery did not utter the word "Conahan" or "Carnahan" in her sworn taped interview with Agent Gaconi. (T. 44-45). Indeed, the state stipulated at the hearing that Mary Montgomery never said Conahan or Carnahan on the audio taped statement to the police. (T. 53). Furthermore, Agent Gaconi testified that Mrs. Montgomery never told him that her son knew someone with the name Conahan or Carnahan nor did she ever mention her son knew someone who was a nurse or had been in the Navy and that someone had offered him $200 to take pictures. She solidified the prejudicial impact of her testimony by stating she told her son someone who would offer money for pictures was a psychopath who would want to kill him. (R. 1110). Mrs. Montgomery claimed repeatedly that she told this information to the police in the portions of her sworn statement that indicate it was inaudible. (R. 1113, 1116-1117) This definitive testimony is in stark contradiction to her testimony at trial where she unequivocally said that she "remembered" telling the police that information. (R. 1107). She even went so far as to point to the designated inaudible sections of the transcript of her statement and proclaim that she said it "where it said inaudible" and then gave a detailed explanation as to why she "remember[s] it so well." (R. 1113; 1117).

Additionally, in the original transcript of the statement, Mrs. Montgomery is asked if "other than Bobby … do you know of any other male that he [her son

Richard] would have been having a relationship with …" (Transcript of Mrs. Montgomery's Statement, p. 23). Her response in the original transcript was inaudible. However, upon Mr. Dickey's analysis it was determined that her response was "no." (Def. Ex. B, p. 23). Thus, she was given ample opportunity to describe the name Conahan to the police as she claims she did at trial but failed to do so. Interestingly, it took great effort on the part of Mr. Conahan during postconviction to uncover the truth of what Mrs. Montgomery said in her sworn statement. Agents of the State, however, were there at the time of the statement and have known the truth from the beginning but have consistently and continually engaged in obfuscation. Thus, the actual truth is that Mrs. Montgomery was asked "other that Bobby did your son have a relationship with any other man," to which the truth discloses she answered "no." By declaring that her son told her of a man named Conahan or Carnahan and that he was as a nurse at the medical center where she used to work, who was in the navy and was much older, she materially altered her previous recorded statement and the State's failure to disclose it was a discovery violation. *See Evans v. State,* 770 So. 2d 1174 (Fla. 2000); *Jones v. State*, 514 So. 2d 432 (Fla. 4th DCA 1987).

Certainly, given the extent of the investigations employed in this case, had she mentioned that her son knew a man named Conahan who worked at the medical center there would be investigative notes indicating that an officer was

sent to the medical center to obtain information on this lead. Indeed, the state argued in closing argument that Mr. Conahan was the perpetrator because he was a nurse and the victim's genitals were "surgically" removed and only Mr. Conahan, as a nurse, could do that. Given that the state knew of the victim's condition, had Mrs. Montgomery truly stated her son knew a nurse that information most definitely would have been noted and investigated long before Mr. Payton mentioned Mr. Conahan's name nearly a month after Mrs. Montgomery's statement.

Confronted with this evidence of Mrs. Montgomery's falsity, the State blithely suggested in the circuit court that she made those statements orally to prosecutor Lee, and only to prosecutor Lee, at the time of her depositions. The record firmly established that Lee's testimony is impossible because Mrs. Montgomery was never deposed. Nonetheless, the circuit court concluded that since the statements were alleged to be oral, the State was not required to disclose this information under Rule 3.220. Consequently the circuit court dismissed to irrelevance copious evidence that Mrs. Montgomery never spoke to anyone other than Gaconi during her sworn statement in favor of Lee's never before uttered self-serving testimony. Such a reading of the record is an unreasonable application of the facts presented and is entitled to no deference by this Court. *Porter v. McCollum*, 130 S. Ct. 447 (2009).

Additionally, Mrs. Montgomery's material change in testimony was indeed discoverable and the state was obligated to inform Mr. Conahan. In *Jones v. State,* 514 So.2d 432, 435 (Fla. 4th DCA 1987) for example, the Fourth District Court of Appeal concluded that when a witness informs the State of his intention to materially alter information provided in a sworn statement, Fla. R. Crim. P. 3.220(j) imposes a continuing duty upon the State to disclose such information to the defense. In actuality, Mrs. Montgomery was never deposed and thus Lee's statement at the Evidentiary Hearing that indicated the time frame in which she disclosed the pertinent information to him is incorrect. It is conceivable that the State had no prior knowledge of the information Mrs. Montgomery provided in her testimony, yet without investigating such information the State should have been aware that the probability of its inaccuracy was great. "When it should be obvious to the Government that the witness's answer, although made in good faith, is untrue, the Government's obligation to correct that statement is as compelling as it is in a situation where the Government knows that the witness is intentionally committing perjury" *U.S. v. Harris,* 498 F.2d 1164, 1169 (3d Cir. 1974). Hiding behind a myopic reading of Florida's discovery rules is inconsistent with the proper administration of justice as well as the "purpose and spirit of those rules." *Scipio v. State*, 928 So. 2d 1138, 1144 (Fla. 2006). Since the origin of Mrs. Montgomery's material statements is unknown and potentially fabricated, a new

trial is appropriate. "If there is a reasonable probability that the false evidence presented or allowed by the prosecutor could have affected the jury's judgment, then the defendant is entitled to a new trial." *Spencer v. State,* 842 So.2d 52 (Fla. 2003).

Furthermore, it is irrelevant that Mr. Lee actively failed to record the information. This is because the statement provided to the defense never had the term Conahan in it and definitively stated that she did not know if her son had a relationship with any man other than Bobby. The revelation that she was now identifying Mr. Conahan in association with Mr. Montgomery, amounts to a material change in her testimony and the State was obligated to inform the defense. *Jones v. State*, 514 So. 2d 432 (Fla. 4th DCA 1987). Thus, defense counsel was ineffective for failing to demand a *Richardson* hearing in the face of the state's discover violation.

B. COUNSEL WAS INEFFECTIVE FOR FAILING TO SECURE A FORENSIC AUDIO EXPERT.

The circuit court concluded counsel was not ineffective in this regard because Mrs. Montgomery qualified her testimony about the sworn statement by stating she believed she told police about Mr. Conahan. However, this misapprehends the import of counsel's ineffectiveness. Faced with Mrs. Montgomery's sworn statement transcript that was littered with "inaudible" sections, counsel should have endeavored to determine what was said in those

sections. Such action would have prevented Mrs. Montgomery from surprising counsel at trial with her new revelations of hearing about Mr. Conahan from her son. Armed with a full transcript, of the like obtained by postconviction counsel, trial counsel could have effectively impeached Mrs. Montgomery and broken the evidentiary link between Mr. Conahan and Mr. Montgomery. Failing to conduct such an investigation was deficient and allowing Mrs. Montgomery to testify with impunity was extremely prejudicial requiring a new trial.

C. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO AND CHALLENGE THE STATE'S WILLIAMS RULE EVIDENCE.

In his final amended Rule 3.851 motion, in Claim 28, Mr. Conahan claimed that the *Williams* Rule evidence admitted pursuant to the oral and written orders of Judge Blackwell became a feature of the trial below, to the extreme prejudice of the defendant (PCR. 295-97) ("The trial court made it very clear in both oral findings and written rulings on the verdict of guilt in the Montgomery case that it relied on the *Williams* Rule evidence relating to detective Weir, detective Clemens, and Stanley Burden in its determination of the defendant's guilt in the Montgomery case. (R. 2014-2015). By so doing, the trial court violated the defendant's substantive and/or procedural due process rights and right to a fair trial under the United States Constitution. Allowing a conviction to stand under such circumstances is fundamentally erroneous"). The claim specifically stated that the *Williams* rule evidence was not established by clear and convincing evidence; the

State's *Williams* rule Evidence was not sufficiently similar to the charged offense; and that The State's *Williams* rule evidence became the "feature of the trial."

The postconviction trial court held that this claim was procedurally barred because it could and should have been raised as fundamental error in direct appeal, pursuant to *Hughes v. State*, 34 Fla. L. Weekly D2346 (Fla. 2d DCA November 13, 2009). PCR. 523. The lower court should have allowed complete evidentiary development on this issue, as fundamental error can be grounds for raising a claim at any point in the post-trial process. *See Fike v. State*, 4 So. 3d 734 (Fla. 5th DCA 2009)(holding that *Williams* rule evidence that was improperly admitted was fundamental error). *See also, Haliburton v. State*, 7 So. 3d 601, 605 (Fla. App. 4 Dist. 2009)("A fundamental error has been described as "error which reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Gudinas v. State*, 693 So.2d 953, 961 (Fla. 1997). Also, a fundamental error is described as one "where the interests of justice present a compelling demand for its application." *Sochor v. State*, 619 So.2d 285, 290 (Fla. 1993). Or, "error which goes to the foundation of the case or goes to the merits of the cause of action." *Sanford v. Rubin*, 237 So.2d 134 (Fla. 1970).) In an abundance of caution counsel is raising a related claim in the state habeas petition being filed along with this instant initial brief.

At the trial below defense counsel Ahlbrand began his argument opposing admission of the *Williams* Rule evidence offered by the State by explaining that it included three areas: (1) the Stanley Burden similar crime evidence and related testimony; (2) the fiber evidence and testimony relating to the Smith body parts, and (3) the testimony and solicitations made by law enforcement to Conahan. The State argued for admissibility based on motive and identity. Ahlbrand noted that the State had conceded that the evidence going towards motive was not as strong as the evidence toward identity. He thereafter focused on disproving the testimony as relevant to identity arguing that even if the trial court found Burden to be a credible witness and accepted his version of what Mr. Conahan did to him, there was still no link as to identity between what happened to Burden and what happened to Montgomery.

Ahlbrand noted that medical examiner had testified that Montgomery was tied up postmortem while Burden testified that he had been tied up while alive, offered money and was fearful that he was about to be the victim of a sexual assault. Burden's testimony did not indicate that Conahan was in a position that would suggest sexual penetration. Burden testified that he was asked and did pose nude for money. Ahlbrand argued that the State's position was that because Burden thought he was about to be sexually assaulted, Montgomery must have also been assaulted. Yet the medical examiner specifically discounted any evidence of

sexual trauma in his testimony. Ahlbrand conceded only that the Burden testimony and the theories about Montgomery's death had some of the same physical characteristics. (R. 1808-11).

In response the State argued that there are more characteristics relating to work status, education, intelligence, childhood experiences, and background, that were similar between Burden and Montgomery. Burden's testimony never established that he had a conversation with Conahan about such issues. The State argued that both Burden and Montgomery had a transient lifestyle, had similar physical characteristics and they both had ligature wounds, one postmortem and one antemortem. Trial counsel argued in opposition that only one piece of evidence, a Walmart receipt for a package of Polaroid film, supported the State's theory that Conahan was with Montgomery out in the woods to take pictures. He argued there was no conclusive evidence that there was someone tied to the tree and that evidence does not support the State's suggestion of a similarity between the time of month and day between the Burden and Montgomery cases. He also argued that the evidence does not support the contention that the anus of victim Montgomery was enlarged due to forcible sodomy. There was no evidence presented that indicates that Conahan solicited Montgomery to take nude photos or enticed him with money. There is no evidence linking the items purchased by Mr. Conahan at Walmart to the crime scene. (R. 1812-17).

Sullivan also argued that the fibers that were found on the coat at the crime scene were not linked with Montgomery or Conahan. Two-thirds of the State's presentation had to do with victim Smith, which the Judge ultimately kept out. The State brought a cooler to court with the body parts of Smith. There was no evidence brought that Conahan was going to kill Weir and Clemens, as the State alleged. Ahlbrand argued that the focus of this case is the fiber evidence. He said that even assuming that Conahan did what Burden alleged, at the very best it was a case of sexual assault, not attempted murder. There are no photos or ligature marks that would link the Burden and Montgomery cases. Ahlbrand asked the court not to consider anything related to Burden, the fiber evidence that Sauer testified to, or anything related to the Smith body parts. Ahlbrand noted the *Long v. State* case that dealt more with the burden of proof on circumstantial evidence rather than *Williams* rule evidence. He attempted to argue that the Florida Supreme Court has already held as improperly considered, fiber evidence not directly linked to the Defendant. (R. 1818-25). *See Long v. State* 689 So. 2d 1055 (Fla. 1997)("Evidence that creates nothing more than a strong suspicion that a defendant committed the crime is not sufficient to support a conviction").

The State's argument in support of the proffer coming in as evidence began with some background on the pretrial notice of intention to offer similar fact evidence that was filed and Judge Ellis' corresponding ruling to wait until the trial

to rule based on the entire context of the trial. That is why the order says "subject to the proffer". The assistant state attorney explained his "fantasy theory" of the case as a reference point as to why the Burden case is similar: Conahan was unsuccessful with Burden but fulfilled his fantasy with Montgomery. The State said the Burden evidence shows Conahan's motive. (R. 1825-38).

Ahlbrand only briefly attempted to rebut the State's argument, stating that for the Court to consider the fibers found at the scene, based on their location as depicted in the diagram of the crime scene, is ludicrous. State Attorney Lee clarified that the diagram Ahlbrand was just referring to was the original one they intended to show that was changed to reflect the actual body parts. The Court stated that it wanted to take some time to review these materials before making a ruling. (R. 1839-41).

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

insufficient evidence to link it to Conahan; (6) The yellow rayon fiber found on the sheet used to transport Smith's pelvis is also inadmissible; (7) Fiber on the coat only evidence of Conahan's presence at the scene; (8) Fiber found on the skull inadmissible (R. 1842-48

Regarding Stanley Burden, Judge Blackwell stated:

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

(See T. 1845). The hearing before the court on the proffered *Williams* Rule witnesses and evidence was conducted after the State had rested its case in chief but before the defense had presented its case. Thus, at the time the trial court made its oral determination concerning the admissibility and relevance of all the State's proffered *Williams* rule witnesses and evidence to the material fact in issue, identity and motive, the State had failed to prove its theory of the case that victim Montgomery left on April 16, 1996 to make said money posing for nude pictures or "bondage pictures" involving being tied to a tree like Burden. See *Durousseau v. State*, 55 So. 3d 543, 566 (Fla. 1010)(Pariente, J., dissenting, in which Quince, J., concurs).

Neither defense counsel Mark Ahlbrand nor Paul Sullivan objected to the trial court's admission of the *Williams* rule evidence. They also failed to object to

the *Williams* rule evidence becoming a feature of the trial after it was admitted orally. They also failed to ask for a mistrial after the court's oral and written rulings. Judge Blackwell thereafter entered a written order on August 16, 1999 (amended on August 17, 1999) concerning the admission of the *William*s Rule evidence (PCR. 1737-1730). This order attempted to cleanup some of the deficiencies of the prior oral pronouncement.

The determination of guilt in the Montgomery murder by the trial court before the defense presented its case displayed both judicial bias and presumption of guilt by the trial court. Postconviction counsel argued that the lower court should grant further evidentiary development on this issue or grant relief based on a finding of fundamental error. There is ample case law to support the proposition that fundamental error can be the basis for evidentiary development pursuant to a Fla. R. Crim. P. 3.851 motion. See *Sochor v. State*, 580 So. 2d 595 (Fla. 1991); *Ray v. State*, 403 So. 2d 956 (Fla. 1981); *Willie v. State*, 600 So. 2d 479 (Fla. 1st DCA 1992); *Bell v. State*, 585 So. 2d 1125 (Fla. 2nd DCA 1991); *Johnson v. State*, 460 So. 2d 954 (Fla. 5th DCA 1984), approved, 483 So. 2d 420 (Fla. 1986); *Waggy v. State*, 935 So. 2d (Fla. 1st DCA 2006)("Questions of fundamental error may be presented for the first time in a post-conviction motion. See *State v. Florida*, 894 So. 2d 894 So. 2d 941, 945 (Fla. 2005); *Haliburton v. State,* 7 So. 3d 601 (Fla. 4th DCA 2009). Even if appellate counsel exhibited deficient performance by failing

to raise a feature of a trial claim on direct appeal, that fact alone does not negate the fact that "some errors, which have also been referred to as "fundamental errors," are so serious that they amount to a denial of substantive due process and may be raised *at any time* including for the first time in a postconviction motion." *Haliburton* at 606. In the postconviction context, the inquiry by this Court should be whether a manifest injustice will occur here if the error, admission of the *Williams* rule evidence as a feature of the trial, remains uncorrected. *Id.* The necessity of a full and fair hearing can hardly be clearer in circumstances where 25 of the State's 38 witnesses at trial were related to the *Williams* rule evidence, thus subject to a lesser burden of proof. Since the record does not conclusively establish Mr. Conahan is entitled to no relief evidentiary development should have been allowed by the lower court.

D. TRIAL COUNSEL'S INEFFECTIVENESS DURING JURY SELECTION

Trial counsel admitted during the evidentiary hearing that he should have conducted the voir dire differently. With regard to this claim, this Court concluded that counsel was not ineffective. In particular, when counsel was asked if questioning the jury about homosexuality would have been important he responded,

> Especially in this case, yes, I do. And why I didn't, I don't know why. I think that it was a mistake that I

> made, not to inquire of the jury panel how they felt about gay people -- gay males.
>
> I probably would have asked them, if I had it to do over again now, 12 years later, I would have asked them more questions about Mr. Conahan's alleged lifestyle, picking up guys and homeless people, and all that sort of thing. I think I should have done all that and I did not.

(E.H. 123-124).

Since counsel himself admitted to his deficient performance, the next question to be determined in prejudice. The prejudice is on the face of this record because when it comes to homosexuality in modern society, few issues are as polarizing and cause such heated rhetoric. Thus, 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. Given counsel's acknowledged deficiency and the sensitive nature of homosexuality in his case, under facts presented prejudice is apparent on the face of the record. *See Jenkins v. State*, 824 So. 2d 977 (Fla. 4th DCA 2002).

Additionally, it was clear that there was widespread confusion among several jurors regarding why they were not participating in the guilt phase. A confused jury is not able to properly follow the law especially when the State actively misstates it as it did here.

ARGUMENT II

MR. CONAHAN IS ENTITLED TO A NEW TRIAL WHERE THE STATE PRESENTED FALSE MATERIAL TESTIMONY FROM THE VICTIM'S MOTHER WHICH VIOLATED MR. CONAHAN'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH SIXTH AND FOURTEENTH AMENDMENTS AND HIS RIGHTS UNDER THE EIGHTH AMENDMENT.

During the trial, Mary Montgomery testified emphatically that she had told police during her sworn statement that her son had mentioned he had a new friend named Conahan or Carnahan, that he was a nurse and used to be in the Navy. When confronted on cross-examination with the fact that this information was not in the transcript of her sworn statement to the police, she proclaimed that she said those things where the transcript identified it as "inaudible." (R. 1113). The established and uncontested evidence at the evidentiary hearing reveals that Mrs. Montgomery's trial testimony was false and that Mr. Conahan is entitled to relief. Barry Dickey's uncontested hearing testimony was that Mary Montgomery did not utter the word "Conahan" or "Carnahan" in her sworn taped interview with Agent Gaconi. (T. 44-45). Indeed, the state stipulated at the hearing that Mary Montgomery never said Conahan or Carnahan on the audio taped statement to the police. (T. 53).

Furthermore, Agent Gaconi testified that Mrs. Montgomery never told him that her son knew someone with the name Conahan or Carnahan nor did she ever

mention her son knew someone who was a nurse or had been in the Navy. This definitive testimony is in stark contradiction to her testimony at trial where she unequivocally said that she "remembered" telling the police that information. (R. 1107). She even went so far as to point to the designated inaudible sections of the transcript of her statement and proclaim that she said it "where it said inaudible." (R. 1113). Additionally, in the original transcript of the statement, Mrs. Montgomery is asked if "other than Bobby … do you know of any other male that he [her son Richard] would have been having a relationship with …" (Transcript of Mrs. Montgomery's Statement, p. 23). Her response in the original transcript was inaudible. However, upon Mr. Dickey's analysis it was determined that her response was "no." (Def. Ex. B, p. 23). Thus, she was given ample opportunity to describe the name Conahan to the police as she claims she did at trial but failed to do so.

Mrs. Montgomery gave her only recorded statement to police on April 18, 1996. There is no documentation of any other sworn statement to any other police officer. There is no police record or report indicating that she spoke to any officer or investigator at any other time than April 18, 1996. Additionally, there is no documentation by any other police officer that she ever said her son knew a person named Conahan or Carnahan or knew someone who was a nurse or was in the Navy as she claimed at trial. Likewise, there is no police record of Mr. Conahan's

name in conjunction with Mrs. Montgomery anywhere. With a police investigative file encompassing over 6,000 pages of police reports compiled by a multi-agency taskforce, it is inconceivable that such a statement would have been made without documentation.

Agent Gaconi testified that if a witness were to mention a name it would be important to record that name in a report. Specifically, Agent Gaconi stated that if a witness mentioned the name of someone that name would be documented. (T. 304). According to Gaconi, if a witness had "relevant information of something, we would do a sworn, taped statement from them." (T. 304) Presumably this is why Agent Gaconi conducted a sworn taped statement of Mrs. Montgomery, because she had relevant information regarding the names of people her son knew. Following his own advice about interviewing witnesses, Agent Gaconi's detailed notes and report of Mrs. Montgomery's statement includes numerous names that she mentioned during the interview. The stark conclusion from Gaconi's meticulous notations is that had Mrs. Montgomery mentioned the name Conahan or Carnahan as she claimed, Gaconi would have noted it in his report. Indeed, Agent Gaconi's report includes references to the names of people named Brad, Bobby, Tim and Scott. (T. 322). His report also mentions that Scott's mother is named Kim. Agent Gaconi's report even goes so far as to make note of the name, Denise Tartis, who was Richard Montgomery's camp counselor when he was

sixteen years old. (T. 315-316). Missing entirely from his notes and reports, is the mention of the name Conahan or Carnahan.

The fact that numerous ancillary names appeared in Agent Gaconi's report and Mr. Conahan's does not, indicates that Mrs. Montgomery's trial testimony was false and misleading. This is buttressed by the incontrovertible fact that Mr. Conahan's name does not appear anywhere in the vast investigation until May 8, 1996. (T. 388). Detective Ricky Hobbs testified that he first heard of Mr. Conahan on May 8, 1996 after he received a phone call from an officer at Glades Correctional Institution in Moore Haven, Florida regarding an inmate there. (T. 388-389; 391). According to Hobbs' report there was no mention of Mr. Conahan prior to May 8. (T. 392). Sergeant Goff also testified that the first mention of Mr. Conahan was in relation to an inmate in Moore Haven. (T. 377). Buttressing this fact is a memo from a meeting of the Task Force dated May 8, 1996 that indicated Detective Hobbs discussed a "new lead from Moore Haven" and related that lead at the meeting. (T. 388). Additionally, according to Detective Columbia, the first appearance of Mr. Conahan's name was May 10, 1996. (T. 349) This is more than twenty days after Mrs. Montgomery claims she mentioned detailed information about Mr. Conahan in her sworn testimony to the police. Had the name Conahan been mentioned by a witness before May 8 it would most certainly have been in a report. The fact the name Conahan does not appear until May 8th indicates that

Mrs. Montgomery's claim that she mentioned him to the police in her statement is demonstrably false.

The State also elicited from Mrs. Montgomery statements never previously disclosed and exacerbated the prejudice of her false testimony. She testified that her son said his new friend "Conahan" lived in Punta Gorda Isles, was in the Navy and was a nurse. (R. 1109-1110). She also went on to testify that Conahan was much older and that someone offered her son $200 to pose nude for pictures. She solidified the prejudicial impact of her testimony by stating that only a psychopath who would want to kill her son would offer money for pictures. (R. 1110). Mrs. Montgomery claimed repeatedly that she told this information to the police in the portions of her sworn statement that indicate it was inaudible. (R. 1113, 1116-1117). However, this watershed information is also conveniently missing from Agent Gaconi's report or any other police report for that matter.

Furthermore, at trial, Mrs. Montgomery claims to have told the police that her son told her his new friend named Conahan was a nurse at the medical center where she used to work. (R. 1110). Certainly, given the extent of the investigations employed in this case, had she mentioned that her son knew a man named Conahan who worked at the medical center there would be investigative notes indicating that an officer was sent to the medical center to obtain information on this lead. In fact, reviewing the police reports with this in mind, one concludes

that they are deafening in their silence regarding any attempt to investigate a person named Conahan at the medical center shortly after Mrs. Montgomery's statement to the police on April 18, 1996. Indeed, as mentioned before there is absolutely no mention of Mr. Conahan before May 8, 1996.

More disturbing than Mr. Montgomery's false and misleading testimony is the State's attempt to cover it up and minimize it after exacerbating it at trial. During the evidentiary hearing, the State's cross-examinations of police officers attempted to suggest that it had knowledge of additional statements that Mrs. Montgomery made to other police officers. The State repeatedly suggested that Mrs. Montgomery could have told some other police officer the story she testified to at trial. In the thousands of pages of documents and police reports disclosed during the litigation of this case there has never been evidence that Mrs. Montgomery gave a statement to any other police officers besides Agent Gaconi and Detective Schmidt on April 18, 1996. Nonetheless, the State attempted to cloud this issue by suggesting evidence that does not exist.

The State, quite tellingly, did not present one police officer or report in rebuttal that even remotely suggested that Mrs. Montgomery gave a statement to any officers other than Gaconi or Schmidt. The State also disingenuously suggested in the circuit court that Mrs. Montgomery did not claim at trial that she told the police the name Conahan and that her son knew an older man who was a

nurse and was in the Navy. In formulating this attempt, the state relied on one sentence uttered by Mrs. Montgomery where she was asked why she never told the police of her testimony and she said, “I thought I did the night I made the statement.” (T. 682). However, the State conveniently neglects numerous pieces of her trial testimony that belie that notion. For instance, the very next statement after the one upon which the state relies, Mrs. Montgomery says, “I remember telling them that. There is a lot in my statement that I remember saying that isn’t on the tape.” (T. 682; R. 1107). Thus, she is saying that she remembers telling these things to the police in her sworn statement and they are not there as she recalled it. She also claims she told these things to Detective Hobbs but there is no record in Hobbs’ report that she had done so. The state further ignores Mrs. Montgomery’s testimony where she points to the inaudible portions of the taped statement and proclaims that she said things.

During recross-examination, counsel was inquiring about where she said the things she claimed at trial in her statement. Mrs. Montgomery stated, “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.” (R. 1113). Further referencing the portions where it said inaudible Mrs. Montgomery said “It was a long time I was talking and it was right in there that I would have described that. And I -- **the reason I remember it so well** is because my mom was from Boston

and she'd always leave out her Rs, and I remember the name Carnahan and he says, No, it doesn't have an R in it." (R. 1117)(emphasis added). Thus, the ciurcuit court unreasonably relied on an isolated colloquial statement that "I thought I did" and dismissed to irrelevance the evidence Mrs. Montgomery's declaration that she did make the statements because there was a "reason I remember it so well." *Porter v. McCollum.* Contrary to the State's assertions, Mrs. Montgomery repeatedly points to the inaudible sections of the recorded statements as proof that she told the police the things she claimed at trial. Barry Dickey's forensic analysis of the taped statement of Mrs. Montgomery resulted in his expert opinion that Mrs. Montgomery's claim that "there is a lot in my statement that I remember saying that isn't on the tape" is not accurate because "based upon the contextual evaluation of the questions and responses, there would be no appropriate … opportunity for the word Conahan, or that reference, to have appeared." (T. 44-45)

Assistant State Attorney Robert Lee testified he was not aware of any other recorded statements by Mrs. Montgomery (T. 684). Mr. Lee claimed that Mrs. Montgomery spoke to him but he never recorded or otherwise documented the conversation. The lack of documentation of this alleged statement was presumably so Mr. Lee would not be obligated to disclose the conversation. (T. 685) In isolation such a claim may be unremarkable. However, in conjunction with the

record facts of this case, such a claim is disturbing in the extreme.

There are grave and troubling inconsistencies in Mr. Lee's testimony. Mr. Lee testified that "without any question, I have read all the discovery on numerous occasions." (T. 667). If such discovery was indeed reviewed, he would have known that Agent Gaconi, who conducted the interview with Mrs. Montgomery, never noted in his report that she mentioned the name Conahan or Carnahan or that her son knew a person who was a nurse that had been in the Navy. (T. 321-323). Mr. Lee would also have been aware that Agent Gaconi noted the mention of at least six names including the name of Richard Montgomery's camp counselor when he was sixteen years old. Furthermore, Detective Hobbs, the lead detective in the investigation testified that the first time Mr. Conahan's name became known to police was on May 8, 1996. The State did not dispute Hobbs' testimony. Indeed, Mr. Lee testified that there was nothing in Detective Hobbs' report that caused him any concern. (T. 663). Mr. Lee, along with Agent Gaconi, also testified that it is important to write down the name of a person a witness gives during investigations. (T. 304; 668). This is precisely what Agent Gaconi was doing when he recorded the names that Mrs. Montgomery mentioned to him. He noted the names Tim, Bobby, Scott, the name of Scott's mother Kim and even a camp counselor from when Mr. Montgomery was sixteen years old. Given that all names are important and that the report contains numerous names, some of

obviously questionable import, it is very telling that that Mr. Conahan's name does not exist anywhere in relation to Mrs. Montgomery. Thus, the only possible conclusion is that she never mentioned Conahan or Carnahan to the police at any point.

Certainly an experienced prosecutor who has reviewed the entire discovery in the case would come to that same inescapable conclusion. Having come to that conclusion, any reasonable prosecutor would have concluded that Mrs. Montgomery's trial testimony was false. Faced with the misleading or false testimony of a state witness, the prosecution was required to rectify her testimony. *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)(justice and due process are offended where the prosecution allows false and misleading testimony it to go uncorrected). Instead of doing the constitutionally mandated and appropriate thing, Mr. Lee chose to exacerbate Mrs. Montgomery's damaging testimony by eliciting more false and misleading information from her.

Mr. Lee unequivocally testified that, regarding written or recorded statements of Mrs. Montgomery, he is only aware of the one taken April 18, 1996. (T. 684). Then in an attempt to justify Mrs. Montgomery's trial testimony, claimed that she gave him a statement on "the date of her deposition." (T. 685). Two things are troubling about this testimony. First, it is abundantly clear from Mrs. Montgomery's trial testimony that she claimed to have said these things to a police

officer while under oath. Assuming, arguendo, that she did indeed say them to Mr. Lee on the day of her deposition as he now claims, he is not a police officer and thus, knew Mrs. Montgomery's testimony at trial was misleading. This testimony is misleading because it allowed the court to believe she made statements to the police while she was under oath. Such a belief on the court's part gives an aura of legitimacy and credibility to her otherwise illegitimate incredible statements. Instead of correcting her misleading testimony by refreshing her memory of his claimed conversation with her on the day of her deposition, Mr. Lee exacerbated the misrepresentation in her testimony and elicited further damaging testimony. This ambushed the defense by allowing the court to conclude Mrs. Montgomery made the statements under oath and that those statements would be in the transcript but for the fact that it was inaudible on the tape recording. The impact of this cannot be overstated. Leaving the court with the impression that Mrs. Montgomery made the statements while under oath to the police officers gives her statements credibility in the court's eyes that a mere unrecorded, undocumented and unsworn statement to a prosecutor in preparation of a deposition does not have. Thus, Mr. Lee unconstitutionally allowed the court to assess Mrs. Montgomery's testimony in an entirely false light. *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)(justice and due process are offended where the prosecution allows false and misleading testimony it to go uncorrected).

Second, and most troubling, is Mr. Lee's unequivocal evidentiary hearing revelation that he himself elicited this information from Mrs. Montgomery on the "date of her deposition." (T. 685). At the evidentiary hearing, Mr. Lee testified as follows:

> Q: The statement was made to you?
> A: I talked –
> Q: What was the – what was the date of that statement?
> A: It was the date of her deposition.
> Q: Do you recall the date or –
> A: I'd have to look at her deposition to tell you the date. But I can tell you precisely the circumstances and what she told me.

(T. 684-685).

This is an astonishing revelation for two reasons. First, it was made for the very first time in the long history of this litigation during the evidentiary hearing. The State never argued previously that Mrs. Montgomery made any statements germane to this claim to Mr. Lee at any point during the years this case has been litigated. The State, in its written pleadings and through its questions at the evidentiary hearing, has always presented the claim that Mrs. Montgomery talked to other police officers, albeit without any factual support thereof. If this were a legitimate claim, certainly the state would have advanced it before the eleventh hour of the evidentiary hearing. Secondly, Mr. Lee's claim that Mrs. Montgomery told him these things "the day of her deposition" and that it was so ingrained in his

memory he could describe "precisely the circumstances and what she told [him]" is astonishing and troubling because Mrs. Montgomery was never deposed in this case. Notwithstanding Mr. Lee's protestations of specific facts to the contrary, there is no trial record of any deposition of Mary Montgomery. Also, Mrs. Montgomery's cross-examination at trial reveals that there was no deposition before the guilt phase. At the beginning of the cross-examination, trial counsel, Mr. Ahlbrand, says to Mrs. Montgomery, "Ma'am, you and I have never met before." (R. 1103). If there had been a deposition, Mr. Ahlbrand most certainly would have met Mrs. Montgomery at that deposition. Since they had not met before trial, it is easy to conclude that a deposition never happened. Thus, it is impossible for Mrs. Montgomery to have told Mr. Lee things the day of her deposition as he claimed because such deposition never occurred.

Mr. Lee's attempt at explaining Mrs. Montgomery's testimony is wholly inconsistent with the cold record facts in this case. It is disturbingly convenient for the State to have this revelation of Mrs. Montgomery's statement be disclosed for the first time in all the litigation of this case at the evidentiary hearing. It is even more disturbing that her statement is claimed to have been given to a prosecutor, instead of the police she claimed at trial, where there were no documentation or witnesses to corroborate the claim. It cannot be emphasized enough that the veracity of Mr. Lee's testimony in this regard is questionable since the record

indicates that Mrs. Montgomery was never deposed. Given the fact that he testified he know the precise circumstances of the "conversation" with Mrs. Montgomery one would think he would also have known there was never a deposition. Armed with record knowledge that no deposition took place, Lee's testimony appears to be the self-serving embellishment that it is and is entitled to no weight whatsoever. Given the record evidence before this Court, there is no question that Mr. Lee knew that Mrs. Montgomery's trial testimony was misleading and false contrary to the State's hollow protestations otherwise.

It has long been held that deliberate deception of a court by the presentation of false evidence is incompatible with the "rudimentary demands of justice." *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935). *See also, Pyle v. Kansas*, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942). The same offense to justice and due process is done where the prosecution, while not eliciting false testimony, allows it to go uncorrected. *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). It is for this reason that new trial is required where the false testimony could in any reasonable likelihood have affected outcome of trial *Giglio v. United States,* 405 U.S. at 154 citing *Napue v. Illinois,* 360 U.S. at 271.

In addition to Mr. Lee's incredible testimony, there is further evidence that Mrs. Montgomery never mentioned Mr. Conahan to the police at any time. For

instance, in all police reports discussing what Mrs. Montgomery said when asked about her son's friends and associates she used first names. She used first names of people in her taped interview. She mentions Eddie, Bobby, Debbie, Kyle, Brad and Tim. In fact after stating she did not know Tim's last name she told the police that her son "would never tell me people's last names." (Sworn Statement, p. 11). It is totally inconsistent with her mode of describing someone and her son's mode of telling her about people to use a last name. Thus, her claim at trial that her son mentioned someone named Conahan or Carnahan is out of character with how she spoke about her son's friends and how he spoke of them to his mother. Tellingly, she only claims that her son knew a man with a last name Conahan or Carnahan. She never claimed he mentioned the first name Dan or Daniel. Therefore, in context of all of the police reports regarding her statements to the police, her testimony that her son told her about a friend named Conahan is entirely incredible.

The evidence developed at the hearing mandates relief. There is no question that Mrs. Montgomery testified that she told police her son knew a person named Conahan or Carnahan who was a nurse and was in the Navy. There is no question that she did not utter those words in her sworn taped statement as she claimed at trial that she did. There is no question, that other names she mentioned in that statement were noted by Agent Gaconi. There is no question that Agent Gaconi

never noted the name Conahan or Carnahan or any information about a nurse or a person being in the Navy. There is no question that the only recorded statement Mrs. Montgomery made was to Gaconi and Detective Schmidt on April 18, 1996. There is no question that in the more than 6,000 pages of police reports Mr. Conahan's name does not get mentioned until May 8, 1996. There is no question that Mrs. Montgomery's testimony was material at trial because it connected Mr. Conahan to the victim, Richard Montgomery, and it formed a basis of the trial judge's admission of the Williams Rule evidence, without which the State would not have had a case to prosecute.

Without Mrs. Montgomery's false and misleading testimony there would be little support for the admission of the *Williams* Rule evidence and virtually no connection between Mr. Conahan and Mr. Montgomery. To the extent that the State has argued in the past that there was other testimony linking Mr. Montgomery to Mr. Conahan, such is not the case. The State has previously argued that Mr. Whitaker, who was a friend of Mr. Montgomery's, was able to place Mr. Conahan and Mr. Montgomery together. In the State's response to Mr. Conahan's motion, it alleged that Whitaker's testimony solidly placed Mr. Conahan with Mr. Montgomery. (State's Response at 27). However, such a characterization simply does not have record support. (R. 987-88; 1940). In fact, during the evidentiary hearing, the State, in an attempt to argue that Mr. Ahlbrand

was not ineffective, actually trumpeted Ahlbrand's lawyering for being "able to have Mr. Whitaker back off on the identification of Mr. Montgomery with Mr. Conahan." (T. 264). The State, by its own admission and questioning, successfully established that it has no basis for concluding Mrs. Montgomery's false testimony was not material. In other words, since Ahlbrand was successful in discrediting Whitaker's testimony through deposition, the only evidence remaining placing Mr. Montgomery with Mr. Conahan was Mrs. Montgomery's false trial testimony that was claimed to have been previously elicited before a deposition that never took place. Ahlbrand also failed to use the deposition and multiple statements of Whitaker to impeach him at trial.

Mrs. Montgomery's testimony was also critical in the eyes of the prosecution. Indeed, it was such important evidence that the state must have known that Mrs. Montgomery's testimony was uncorroborated, yet Mr. Lee relied on that testimony during the *Williams* rule hearing, the hearing on the motion for acquittal, the trial itself and in closing argument. (R. 1243-60; 1966-2020). Given that Mr. Lee stated he had read all the discovery and was familiar with the evidence to presented at trial, there is no question that a reasonable prosecutor in his position would have concluded that Mrs. Montgomery's testimony was false and required correction. *Napue v. Illinois*, 360 U.S. 264 (1959). However, rather than correct her misstatements, Mr. Lee exacerbated them in a classic trial by

ambush fashion that requires a new trial. *Giglio v. United States,* 405 U.S. at 154 citing *Napue v. Illinois,* 360 U.S. at 271.

As mentioned above, Mr. Conahan took great pains during postconviction to obtain the first true and accurate rendition of Mrs. Montgomery's sworn statement to the police. Mr. Conahan was required to do this as all he was provided with was a transcript littered with "inaudible" sections. In so doing, Mr. Conahan uncovered what was hidden in those "inaudible" sections that he was previously unaware of. In particular it was determined that Mrs. Montgomery, in stark contrast to her trial testimony, never uttered the name Conahan or Carnahan as she claimed. Furthermore, when asked if her son had a relationship with any man "other than Bobby," it was determined that she responded "no."

Mr. Conahan was forced to go through the pains of reconstructing the audio of Mrs. Montgomery's statement because, obviously, neither he nor his counsel was present at the time she gave it to police. The only entity that had the full, complete picture of her statement was the State, through the police. Thus, the State know that she never said Conahan in the statement and that she never said her son knew an older man who was a nurse and had been in the navy and worked at a hospital. The state also knew that when asked by the police if her son had a relationship with a man other than Bobby, she responded by saying, "no." At trial, the State was the only party who was fully apprised of these facts. Thus, when

Mrs. Montgomery testified differently than her sworn statement, it was incumbent upon the State to correct her misleading testimony. *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)(justice and due process are offended where the prosecution allows false and misleading testimony it to go uncorrected). Instead of doing so, however, the State galloped through the barn door opened by Mrs. Montgomery's false statements and proceeded to elicit more damaging and unsubstantiated "facts" from her.

The circuit court took solace in Mr. Lee's testimony that Mrs. Montgomery told him, in an oral statement conveniently neither recorded nor documented, the information to which she testified. The circuit court accepted Mr. Lee's testimony that Mrs. Montgomery told him this information "the day of her deposition" and dismissed to irrelevance all contrary evidence. (T. 684-685). However, the court overlooks and misapprehends critical facts negating Mr. Lee's assertions. For instance, when asked what the date of his conversation with Mrs. Montgomery was, he stated he would "have to look at her deposition" to determine the date but added that he could describe "precisely the circumstances and what she told me." (T. 685). In accepting Lee's questionable testimony the circuit court unreasonably dismissed substantial record facts contradicting him, such as the stark fact the Mrs. Montgomery was never deposed.

Contrary to the circuit court's conclusion in this case, Mr. Conahan is not

required to establish that Mr. Lee believed Mrs. Montgomery to be guilty of perjury in order to prevail in his *Giglio* claim. As the Third Circuit Court of Appeals has stated,

> Regardless of the lack of intent to lie on the part of the witness, *Giglio* and *Napue* require that the prosecutor apprise the court when he knows that his witness is giving testimony that is substantially misleading. This is not to say that the prosecutor must play the role of defense counsel, and ferret out ambiguities in his witness's responses on cross-examination. However, <u>when it should be obvious to the Government that the witness's answer, although made in good faith, is untrue, the Government's obligation to correct that statement is as compelling as it is in a situation where the Government knows that the witness is intentionally committing perjury</u>"

U.S. v. Harris, 498 F.2d 1164, 1169 (3d Cir. 1974)(emphasis added).

It has long been held that deliberate deception of a court by the presentation of false evidence is incompatible with the "rudimentary demands of justice." *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935). *See also, Pyle v. Kansas*, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942). The same offense to justice and due process is done where the prosecution, while not eliciting false testimony, allows it to go uncorrected. *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). It is for this reason that new trial is required where the false testimony could in any reasonable likelihood have affected outcome of trial *Giglio v. United States,* 405 U.S. at 154 citing *Napue v.*

Illinois, 360 U.S. at 271. As the Florida Supreme Court stated,

> This case law is based on the principle that society's search for the truth is the polestar that guides all judicial inquiry, and when the State knowingly presents false testimony or misleading argument to the court, the State casts an impenetrable cloud over that polestar. The United States Supreme Court explained as follows: "[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair ... [for it] involve[s] a corruption of the truth-seeking function of the trial process." *United States v. Agurs,* 427 U.S. 97, 103-04, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). The rationale underlying this principle is timeless:
>
> > [I]f a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured[,] [s]uch a contrivance by a State to procure the conviction and imprisonment of a defendant is ... inconsistent with the rudimentary demands of justice....
>
> *Mooney v. Holohan,* 294 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed. 791 (1935). "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction [is] implicit in any concept of ordered liberty...." *Napue v. Illinois,* 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). In other words, whenever the State seeks to obfuscate the truth-seeking function of a court by knowingly using false testimony or misleading argument, the integrity of the judicial proceeding is placed in jeopardy

Johnson v. State, 44 So. 3d 51, 53-54 (Fla. 2010)(footnote omitted)

Given Mrs. Montgomery's failure to state anything like her trial testimony in her sworn statement, it should have been obvious to Mr. Lee that her testimony

was misleading and a complete shock to Mr. Conahan. Thus, he was obligated to correct her statements. The fact that Mr. Lee did no such thing and waited until the proverbial eleventh hour of the postconviction evidentiary hearing to, for the very first time, suggest he spoke to Mrs. Montgomery and elicited her trial testimony is evidence that he was aware of her attempts at obfuscation. Such conduct entitles Mr. Conahan to relief under *Giglio*. The Florida Supreme Court recently stated that the

> United States Supreme Court in *Giglio v. United States,* 405 U.S. 150, 153-54, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), held that a prosecutor cannot knowingly use false testimony against a defendant. To establish a *Giglio* violation, a defendant must show the following: (1) the prosecutor presented false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material. *Guzman v. State,* 941 So.2d 1045, 1050 (Fla. 2006). Once the first two prongs are established, the State bears the burden of showing that the false evidence was immaterial by showing that its use was harmless beyond a reasonable doubt. *Id.* To do this, the State must show that "there is no reasonable possibility that the error contributed to the conviction." *Id.* (quoting *State v. DiGuilio,* 491 So.2d 1129, 1138 (Fla.1986)).

Johnson v. State, 44 So. 3d at 64-65.

Here, Mr. Conahan established that Mrs. Montgomery's testimony was false. It is undisputed that she never uttered the name Conahan or Carnahan in her sworn statement. It has also been established that she never said in her sworn statement that her son knew and older man who was a nurse and had been in the navy. It has

also been established that Mr. Lee's contention that she told him this information "the day of her deposition" is at best misleading since the record clearly indicates that no deposition had been taken. Therefore, the first prong in establishing a *Giglio* violation has been met. The second prong, that the prosecutor knew the testimony was false, has also been established. Mrs. Montgomery clearly stated, on cross-examination, that she said those things in her sworn statement, "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." (R. 1113). Thus, even if she did not have the intent to lie, it must have been obvious to Mr. Lee that she was misleading and his failure to correct her misleading testimony is tantamount to knowledge of the lie. *See U.S. v. Harris,* 498 F.2d at 1169.

Since the first two prongs of a *Giglio* violation have been established, it is the State's burden to show the evidence "was immaterial by showing that its use was harmless beyond a reasonable doubt" by showing "there is no reasonable possibility that the error contributed to the conviction." *Johnson v. State*, 44 So. 3d at 64-65 (quoting *State v. DiGuilio,* 491 So.2d 1129, 1138 (Fla. 1986). The State simply has not carried its burden. Nonetheless, the State cannot meet its burden and Mr. Conahan is entitled to a new trial. Prejudiced is manifest in this case.

The circuit court mischaracterized the record when it stated that Mr. Conahan admitted to telling the police he had been to see Mr. Montgomery three

times. (Order, p. 39). This is not the case. Mr. Conahan specifically testified that he never saw or met the victim, Richard Montgomery. (R. 1937). His testimony was that he went to Mr. Whitaker's trailer, where Montgomery later lived, to visit Jeff Dingman ten to fifteen times before Montgomery became Whitaker's new roommate. (R. 1942, 1944). Any reliance on the mistaken notion that Mr. Conahan testified that he knew or met the victim is an abuse of discretion and an unreasonable application of the facts. To deny relief based on a misreading of the trial record is unreasonable. Furthermore, the trial court's order allowing the *Williams* rule evidence indicates that Mrs. Montgomery's testimony was used as a basis for its admission. Specifically, the trial court discussed the notion that Mr. Conahan offered money to Mr. Montgomery. The only place that notion could have come from was Mrs. Montgomery's testimony. Thus, her credibility had a huge impact on the court's rulings in this case. The State, therefore cannot establish that there is no reasonable probability Mrs. Montgomery's false statements contributed to the verdict.

ARGUMENT III

MR. CONAHAN WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND PRESENTED MISLEADING EVIDENCE. SUCH OMISSIONS RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE AND PREVENTED A FULL ADVERSARIAL TESTING OF THE EVIDENCE.

In this case there was an extensive and detailed investigation. The investigation was done through a Task Force comprised of multiple officers from multiple agencies and jurisdictions. The record keeping of the investigation was fastidious and comprised over 6,000 pages of reports notes and documents. There was no evidence presented at the evidentiary hearing that a tape recording of the Weir operation was not made. It is inconceivable that such a meticulous investigation retained absolutely everything with the exception of the recording of this one undercover operation.

The evidence presented at the evidentiary hearing did establish conclusively that Detective Weir was equipped with a microphone and listening device during three of the four undercover operations with Mr. Conahan. According to Weir he was wired during the May 29, 1996 surveillance as he had been in other

undercover operations. When asked if the operation was being recorded Weir responded by saying “In this operation, uh, as far as I was concerned, that’s why I had a bug, I though they were going to be recorded.” (T. 363). Additionally, according to police reports of the surveillance, Weir testified that he was wired “[t]o record any conversations that may take place” and he believed he was being recorded. (T. 364-365). Although Weir has never seen a tape of the May 29th operation, he believed a recording was done. (T. 367). Although Sergeant Goff was not aware of a tape recording being made on May 29th, he testified that “somebody usually has a recording device, I should say.” (T. 375) Detective Hobbs testified that Weir was wearing a UNITEL device as standard operating procedure and that the Sherriff’s Office generally recorded undercover operations. (T. 394). In fact, Detective Hobbs’ report reflects the conversations between Weir and Mr. Conahan were recorded. (T. 396). Detective Columbia’s report also reflects that he was told Investigator Padula and Sergeant Goff made a recording of the undercover operation. (T. 358). Columbia makes this assertion in his report because “otherwise I would not have wrote [sic] it down.” (T. 358). Finally, Detective Clemons testified that he wore recording devices in his undercover dealing with Mr. Conahan and all interactions were recorded. (T. 409).

During the evidentiary hearing, substantial testimony was presented indicating that the undercover operation was recorded. There appears to be no

testimony of a definitive nature that a recording was not made. The only conclusion that can be made under the evidence presented is that the tape was either lost or destroyed. Either way, Mr. Conahan's constitutional rights have been violated by the State's handling of that piece of evidence. *Brady v. Maryland*, 373 U.S. 83 (1963)(holding that suppression by the State of material evidence favorable to a defendant violates due process); *California v. Trombetta*, 467 U.S. 479 (1985)(applying the *Brady* principle to lost or destroyed evidence). 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 of him. The contents of the tape would indicate Mr. Conahan was not interested in the salacious things the prosecution claimed.

Mr. Conahan has presented sufficient evidence to establish that a recording was made. The evidence presented at the evidentiary hearing did establish conclusively that Detective Weir was equipped with a microphone and listening device during three of the four undercover operations with Mr. Conahan. According to Weir he was wired during the May 29, 1996 surveillance as he had been in other undercover operations.

The Court takes issue with the evidentiary hearing concluding that Mr. Conahan did not specify which date the surveillance recording was made that is at issue in this claim. However, a review of the transcripts of the evidentiary hearing

indicates that it was made quite clear that the May 29 surveillance was the one at issue. During questioning of John Columbia the State objected to him being questioned about the May 29 surveillance. In response to that objection counsel made it clear that it was the May 29 surveillance that was at issue. (T. 355-57). In fact the State was mistaken that the operative surveillance was May 30 which spawned the objection. After clarification of the correct date, May 29, the State responded that it stood corrected. (T. 356). Counsel then made clear that the only surveillance date that mattered for the purposes of this claim was May 29 and proceeded to confine the examinations to that date. (T. 357). Thus, the Court's conclusion that Mr. Conahan was speculating as to the date of the lost tape is not borne out by the record.

Furthermore, the conclusion that the recording was not made because Hobbs testified that he did not order it does not account for the fact that Hobbs also testified that he testified that his report specifically states that the surveillance was recorded. (T. 396). He made this entry in his report in reliance of information given to him by other officers. Specifically, Hobbs stated in his Details of Investigation that when Mr. Conahan conversed with Detective Weir on May 29, 1996 "the entire conversation was recorded and monitored." (Def. Ex. SS, p. 127-128). The Court misconstrued the facts of the instant claim and justifies denial because at the evidentiary hearing Hobbs could not definitively state that there was

a recording made. However, much nearer the time of the event he wrote in his report that a recording was definitively made. To discount his more contemporaneous report with the foggy memory twelve years hence in unreasonable and relief should be granted.

ARGUMENT IV

MR. CONAHAN WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL DURING HIS PENALTY PHASE WHERE HIS LAWYERS FAILED TO ADEQUATELY INVESTIGATE AND PRESENT MITIGATION EVIDENCE

Mr. Conahan alleged that trial counsel was ineffective at the penalty phase pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984). Co-trial counsels Paul Sullivan and Mark Ahlbrand, defense investigator William Clement, and mitigation specialists Roy Mathews and Laura Blankman were all called as witnesses at the evidentiary hearing in support of the penalty phase claims below, Claim IX and aspects of Claim X.

Paul Sullivan testified on June 21-22, 2010 (T. 61-285). He stated that Mark Ahlbrand called him to ask him to work on the Conahan case (T. 62-63). He further testified that he was working on the "Jimbo" Ford capital murder case during the same time period as the Conahan case and that he used mitigation specialists Roy Mathews and Laura Blankman on both cases (T. 64). He identified Exhibits C, D, F, and G which established that Ahlbrand entered his

appearance on March 5, 1997, filed a motion for co-counsel on April 11, 1997 and that Sullivan was appointed to the Conahan case on June 11, 1997 (T. 66). Sullivan testified that generally he was going to be more responsible for working on "the mitigation side of the case" (T. 67). Defendant's Exh. E was introduced to show that Bill Clement was appointed on April 28, 1997 at Ahlbrand's request, prior to Sullivan's appointment. (T. 69). Exhibits K, L, and N were introduced and admitted to show that psychiatric expert Dr. Keown was requested by Ahlbrand and appointed to the Conahan case on April 28, 1997, prior to Sullivan's appointment on June 11, and that Dr. Keown's evaluation was begun on June 4, 1997 and completed on July 22, 1997 (T. 70).

Mark Ahlbrand testified that he filed the motions for appointment of Dr. Gunder and Dr. Keown prior to Mr. Sullivan coming on the case (T. 482-83). He knew Dr. Gunder through the State Attorney's office and his work with the child protection team and "he was the most knowledgeable guy I knew about matters involving human sexuality, within the context of – those cases that ended up in the courtroom" (T. 483-84). He was aware of a memo from FDLE profiler Porter entitled "Behavior analysis of the sexual sadist" that had been provided in the Conahan discovery (T. 484-88)(Exh. YY).

Ahlbrand testified that Gunder's evaluation of Mr. Conahan "didn't tell me a lot more than what I already, as a layman, kind of thought about" (T. 489). He

testified as to his purpose in getting psychiatrist Keown to see Mr. Conahan: to eliminate any concern that he suffered from any readily detectable form of mental illness and to affirm that he was competent and could meet the criteria for sanity (T. 490). After reviewing Dr. Keown's report, his conclusion was that Mr. Conahan "from a psychological standpoint, was fairly healthy" and that neither Dr. Gunder nor Dr. Keown found Mr. Conahan to be a sexual sadist (T. 491). He admitted that it was not his expectation when he moved for the appointment of Dr. Gunder and Dr. Keown that they would be the penalty phase experts (T. 492). He testified that he recalled one telephone conversation with one of the two experts in Paul Sullivan's office "simply to tell them that the mitigation people were going to be made aware of the reports." (T. 493). Roy Mathews later testified that he was unsure if her had ever met Ahlbrand (T. 545). Ahlbrand testified that Sullivan was the primary contact person for the mitigation people. (T. 493). Ahlbrand also testified that he did not recall contact with Dr. Golden or Dr. Berlin (T. 514).

Mr. Sullivan testified he did not recall much about Dr. Gunder, the first defense expert appointed before he was on the Conahan case (Exh. I). Gunder produced a psycho-sexual evaluation report that was later provided to Dr. Keown. (Exh. J)(T. 72-81). Two years later, on September 24, 1999, Mr. Sullivan sent Dr. Charles Golden copies of the reports of Dr. Keown and Dr. Gunder after Dr. Golden was appointed on September 9, 1999 at Roy Mathews recommendation as

a penalty phase neuropsychological expert (T. 74; 82-83); (Exh. T)(R. 2818). Sullivan testified that he moved for a new expert after the guilt phase because Dr. Keown had examined Mr. Conahan and had not found any particular psychiatric difficulties with Mr. Conahan (T. 74); Dr. Gunder was a clinical sexologist with only a masters degree (T. 76); Ahlbrand had hired Gunder to get his opinion about whether Mr. Conahan "fit some sort of profile as [a] sexual sadist" (T. 78); and Dr. Keown's job had not been to help with mitigation but only "to tell us if there was something psychiatrically wrong with our client" (T. 87).

Mitigation specialist Roy Mathews later testified that he was unaware of the prior appointment of the two experts appointed in 1997 or of their reports, Exhs. J and N, until July 1999 (T. 553). He testified that when he reviewed the reports he noticed that both evaluations were conducted with deputies present in the room and he did not believe either report was helpful for mitigation and he advised Paul Sullivan "that we should have our own evaluation done as we got further into the case, gathered more history and records. . . And I thought there were issues that we want[ed] to look into, separate and apart from these evaluations" (T. 556-57). Mathews testified that he recommended neuropsychologist Dr. Charles Golden, and later a psychiatrist, Dr. Fred Berlin (T. 560). He testified that the neuropsychologist would look at entirely different issues than the two earlier experts, "[c]ognitive impairments; how the brain would function and how it might

manifest in certain behaviors. Essentially the functioning of the brain" (T. 560). And he testified that Dr. Golden would administer a battery of neuropsychological tests (T. 561). Dr. Golden was appointed for 12 hours of work at $150 an hour (T. 82-83)(Exh. R, S). Mathews testified that his own notes indicated that Dr. Golden never did the evaluation of Mr. Conahan (T. 562-63)(Exh. FFF).

Sullivan testified that he wanted Dr. Golden, who became by default the only penalty phase expert, "to have the advantage of all the reports that I could give him" (T. 81). Sullivan testified that he did not believe that Dr. Golden ever saw or evaluated Mr. Conahan because Roy Mathews "seemed to think that I had ruined Golden as a witness by giving Golden Keown's evaluation and the other evaluation" (T. 93). Mathews himself testified that he did not have a specific memory of opposing Sullivan providing Dr. Golden with the two 1997 evaluations (T. 575). He testified that the more records that can be provided to an expert like Dr. Golden, the better, including "any other evaluations that might have been done" (T. 575). Mathews testified that after the conclusion of the Ford case his "working relationship with him became more difficult in communication and in being able to get responses from Mr. Sullivan on case related issues" (T. 566). Sullivan ultimately testified, "Well, if I didn't have it done, I should have had Mr. Conahan tested for – by a psychologist for mental functioning. I think that's standard to do" (T. 93).

Sullivan testified that his complete failure to have Dr. Golden do the neuropsychological testing and to follow-up the denial without prejudice of the motion to appoint psychiatrist Dr. Fred Berlin was because: ”I had absolutely zero inkling that my client had a mental disorder, had psychiatric disorders, had psychiatric problems that qualified as mitigation” See Exh. P&Q (T. 133). Sullivan did not think that the prior mental health evaluations, essentially exhibiting his client's normality, were useful: "I did not have, that I could see, a psychiatric problem, or defense, or syndrome, or something that I could latch onto and use through an expert" (T. 117). This was a classic example of failing to find what you don't look for. The failure by counsel to have any neuropsychological evaluation done by Dr. Golden or anyone else was deficient performance and a failure to investigate, especially when the appointment had been made, the funds were available and the expert and the mitigation team tried to get Sullivan to facilitate Dr. Golden seeing Mr. Conahan.

Mathews testified that Mr. Conahan never expressed opposition "to any suggestion that he was mentally ill" nor did he tell him that he was opposed to any negative portrayal of his adoptive family (T. 592). Conahan did not waive mitigation or refuse to see experts. Mathews further testified that at that time of his last billed hours on the Conahan case in late October 1999 he was unaware of any mitigation theory of the case that had been developed by Sullivan, Ahlbrand and

the mitigation team because they were still trying to assemble the client's social history (T. 580). Mathews testified that the elements of a mitigation presentation that they were working on included (1) the level of dysfunction of Mr. Conahan's adoptive family, (2) his history of seizures, (3) his relationship with his two siblings, (4) parental abuse and alcoholism, (5) his educational background, and (6) obtaining many other records, including Conahan's adoption records from North Carolina, recorded in Mathews's memo introduced as Exh. LL (T. 580-85).

Mathews identified a detailed interview he had with Mr. Conahan on September 4, 1999 (T. 585-86)(Eh. KK). He testified that he and Laura Blankman also prepared a witness contact sheet for Sullivan only a week before the penalty phase (T. 577-78)(Exh EEE). Sullivan testified that in the Ford case with Sullivan, there were three mental health professionals working on the penalty phase, including two who ended up testifying: Dr. Greer, a psychiatrist from the University of Florida, and a psychologist recruited by Roy Mathews named Dr. Mastin (T. 95). Sullivan's view of the role of the appointed mitigation specialists in both the Conahan and Ford cases was that they were consultants. (T. 96). They did not take part in the penalty phase in the Conahan case (T. 97).

Sullivan testified that he was the primary attorney contact for the mitigation specialists on the Conahan case (T. 106-107). Sullivan agreed that he sent some 5300 pages of discovery in Conahan to Mathews and Blankman to review on

November 6, 1998, about three months after their appointment (T. 111-112). He said Mathews provided him with memos about suggested experts, possible aggravating and mitigating factors and Mathews or Blankman interviewed Mr. Conahan and potential mitigation witnesses including "Aunt Betty", Conahan's former partner Hal Linde, and Chicago relatives of Linde in Chicago (T. 113). Sullivan testified that he never considered using Dr. Gunder, Dr. Keown, Mathews or Blankman as witnesses at the penalty phase. (T. 118-19). He also testified that the attempt to obtain funding for psychiatrist Fred Berlin was for a different purpose than retaining Dr. Golden, appointed for neuropsychological testing (T. 130)(R. 2763-89).

Laura Blankman testified that she was the field worker on the mitigation team who did interviews of lay witnesses (T. 603). She testified that she met with their client's sister, with the Chicago-based family of the client's former boyfriend, Hal Linde, and with Mr. Conahan's "Aunt" Betty Wilson in Ft. Lauderdale. She also testified that she did telephone interviews with Mr. Conahan's half brother in New York and with his ex-wife in Miami Beach but "at the stage we were when we left the case, all of my interview memos were not complete" (T. 606-10, 622)(Exh. NN).

Blankman testified that she and Mathews did not attend or testify at the Conahan trial (T. 613). She testified that trial counsel Sullivan was negligent and

uninvolved in the preparation of the penalty phase case: "In the Conahan case, Mr. Sullivan was not as involved [as in Ford]. Not talking with us, not returning our calls, not consulting with us, and leaving us without guidance" (T. 616). Blankman testified that in her opinion there should have been a much more extensive investigation into Mr. Conahan's years in Chicago and the homosexual lifestyle he was part of there with his lover Hal Linde, and that part of that investigation should have included an expert in AIDS dementia directed to Hal Linde's status (T. 628-30).

During his testimony Sullivan identified the motions for costs containing five billings he filed in behalf of Mathews and Associates in the Conahan case entered as Exh. AA (T. 181, 196). The documents therein reveal billings for 152.6 hours for work by the mitigation specialists at $75/hr. from September 16, 1998 through October 27, 1999 with no billed work during the six month period from January 15, 1999 until July 23, 1999. Sullivan testified that Mathews and Associates billed fewer hours in the Conahan case than in the Ford case. Both Mathews and Blankman were present at the four day presentation of witnesses at the Ford penalty phase (T. 181-82). Mr. Sullivan agreed that his first charged time for contact with Mathews or Blankman was not until January 14, 1999, many months after August 25, 1998, when he reviewed the appointment order entered the day before (T. 171-73).

Sullivan testified that for the period January 4, 1999 through May 1999 his billed work in the Conahan case included only 21.75 hrs. of time that he speculated could have been related to mitigation, including 5 hrs. of meetings or phone calls with Ahlbrand, 12 hours of work on unspecified motions, 2 hrs of meetings with Conahan (including the entry of 4/29/99 noted as "cw Conahan at jail re speedy trial" and the 2.75 hour telephonic meeting with Ahlbrand and Mathews previously noted (T.174-79). Sullivan ultimately agreed that his billing records reflected only minimal contact with the appointed mitigation specialists from August 1998 through June 1999 (T. 179). The guilt phase of the trial took place from August 10–17, 1999, the penalty phase on November 1-3, 1999, and the Spencer hearing on November 5, 1999.

On August 23, 1999, trial counsel filed motions for change of venue for the penalty phase, to continue the penalty phase from the scheduled mid-September date, for appointment of expert Dr. Golden, and a Notice of Defendant's election of jury trial for the penalty phase (R. 2518-26). On September 3, 1999 there was a status/motions hearing before Judge Blackwell including those motions and a motion for $15,000 in additional fees for Roy Mathews and Associates that had been filed on August 3rd (R. 2232-33)(T. 109-110; 696)(R. 2019)(T. 193-94). Mathews testified that at the time of this hearing, where he was a witness in support of additional funding, only a quarter to a third of the necessary work had

been completed towards preparing the Conahan case (T. 569). No additional funds were provided and Sullivan testified that he did not subsequently further pursue funds because Mathews told him "that they were out of it" (T. 110). This testimony is contradicted by the billing records and the testimony of Mathews and Blankman at the evidentiary hearing.

Sullivan admitted that the record reflected the fact that during September 28 - October 11, 1999, when they were, according to Sullivan, "out of it" the mitigation specialists obtained affidavits from attorneys and other professionals to use in support of additional funding, but based on review of his timesheet, Sullivan agreed that he failed to bring up the issue at the subsequent October 15, 1999 hearing before Judge Blackwell, even though he was aware that the judge had reserved ruling at the September 3, 1999 hearing and said they could come back (T. 225-27; 235-40)(Exh. XX)(R. 2812-18). Both the court record and Sullivan's timesheet indicate that there was no other hearing in the case between September 3, 1999 and October 15, 1999.

Mathews testified that he prepared a packet of materials and a strategy memorandum in anticipation of an October status conference where Sullivan was going to revisit the issue of funding which included a number of affidavits which he identified as part of Exh. XX (T. 569-70)(Exh. BBB). He also identified a shipping receipt for affidavits sent from his office to Mr. Sullivan dated October

11, 1999, four days before the scheduled status conference and only three weeks before the penalty phase (T. 578-79)(Exh. AAA).

Although Sullivan denied that he planned to go back to the October 15, 1999 status conference with a more complete presentation about the need for additional funds, he testified that he and his mitigation specialists had a significant disagreement about how to proceed based primarily on whether Mr. Sullivan should request a six month continuance "and tell the judge we were utterly unprepared for a mitigation phase. And somehow put on another presentation as to why we needed psychiatrists and psychologists that we hadn't already had" (T. 184-85). Sullivan testified that at the time he filed the request for additional funds in the Conahan case, he "was thinking of still having Mr. Mathews intimately involved in the day-to-day work of the case. And he was very keen on using Dr. Golden. And I had assumed that we'd be using Dr. Golden" (T. 211).

Sullivan testified that the time necessary for presenting mental health issues in the Ford case was "greater" than in the Conahan case but not necessarily "far greater" though he "tried to be thorough in both cases" (T. 271-72). He agreed that his failure to obtain any further mental health evaluations of Mr. Conahan after his appointment to the case for purposes of preparing the penalty phase was a substantial difference between the two cases (T. 283). Sullivan's billing indicates that on 9/15/99 he had a .3 hr. telephone conversation with mental health expert

Dr. Golden six days after he was appointed (R. 2818; 3327). The State filed a Notice of Taking Deposition of Dr. Golden on October 14, 1999 and issued a subpoena for that deposition on October 25, 1999 (R. 3063-64; 3079-80). The Mathews notes introduced at the evidentiary hearing indicate that after the original evaluation date of September 5, 1999 had to be rescheduled until October 23, Mathews urged Sullivan to assist Dr. Golden in getting to evaluate Mr. Conahan in Punta Gorda without success (Exh. FFF; notes of 9/5/99, 9/7/9910/19/99 & 10/22/99).

Sullivan's billing records reflected his limited contact with the mitigation team after the September 3rd hearing. He billed only 2.25 hrs in contact with them for the remainder of the case: .5 hr tcw with Mathews on 9/15/99, .3 hr tcw with Dr. Golden on the same day, .75 tcw with Mathews on 9/20/99, .2 hr tcw Mathews and .5 hr tcw with Mathews re experts on 9/28/99, and .3 work w/L. Blankman re Chicago witnesses on 9/30/99 (R. 3327-28).

Mathews's subsequent invoices, #10334 dated September 29, 1999 and #10338 dated November 10, 1999, indicate that he and Blankman continued to work until late October 1999. See Exh AA. #10334 includes billing for 14.8 hrs after the 9/3/99 hearing through 9/22/99, including research on experts, phone conference with experts and as late as 9/22/99 "Prepare for hearing re: appointment". Invoice #10338 bills for 35.70 hours covering the period 9/9/99 –

10/27/99, ending days before the penalty phase began on November 1, 1999. So, nearly a third, 50.5 hrs, of the total 152.6 hrs that Mathews and Associates billed in the Conahan case was for time expended after Sullivan testified that Mathews was "pretty much through" with the case. #10338 includes billing for on-going work with an "expert" who must be Dr. Golden on 9/24/99, 9/28/99, 9/30/99, and 10/04/99.

Sullivan's testimony and the court file records confirmed that Judge Ellis appointed Mathews to both the Conahan and Ford cases on August 24, 1998, with same $5,000 cap (R. 1819)(Exh. AA; BB). The total billed by Mathews in the Conahan case was $13,359.90 in costs and travel based on the billing statements, which included $11,445.00 for 152.6 hrs. at $75.00 hr. See Exh. AA; (T. 191). Although Sullivan testified that he was certain that the amount billed for mitigation work in the Ford case was double or triple the Conahan total, actually the Mathews statements in the Ford case indicate that they billed 256.6 hrs. from 10/21/98 - 4/23/99, 104 more hours than in the Conahan case, but 28 of those hrs. were noted as uncharged pro bono work, so the total charged billing was for $17, 137.50, or 228.5 hrs. at $75/hr., only 75.9 hours more than in Conahan See Exh. BB; (T. 198-211) (T. 203-09). Sullivan explained that he had three penalty phase mental health experts appointed in the Ford case, including Dr. Merin on 12/28/98, who did not testify, Dr. Mosman on January 15, 1999 and Dr. Greer on 4/8/99, who

both testified at the penalty phase in late April 1999. (T. 209-10).

Defendant's Disclosure of Potential Mental Mitigation filed on April 15, 1999 indicated that Dr. Greer had not yet evaluated Mr. Ford, but that "the statutory mitigators which may be testify to are extreme mental and emotional disturbance and inability to conform his behavior to the requirements of law" (Exh. BB). This aspect of the Ford case is remarkably similar to the circumstances where Dr. Golden still had not seen Mr. Conahan in late October 1999 but was scheduled to do so eight days before the penalty phase began.

There was a complete absence of any expert mental health testimony at Mr. Conahan's penalty phase. Trial counsel's also failed to call Conahan's sister Shawn, the only surviving Conahan family member who had been interviewed by the mitigation team, listed as a witness by the defense and deposed by the State. These two actions alone represented prejudicial deficient performance. (T.215-18)(Exh GG; HH). Blankman had interviewed Shawn and her notes memorialized that interview in a memorandum to counsel. She testified at the evidentiary hearing that she strongly recommended that Shawn as a penalty phase witness because she would be a "marvelous witness" for Mr. Conahan, a "very truthful and very sincere witness" (T. 625-26)(Exh. NN). Mathews also testified that Mr. Conahan did not express any concerns to him about having issues with his adoptive family investigated (T. 592).

The evidence presented at the evidentiary hearing that should have been presented to the jury at the penalty phase included the testimony and work product of Laura Blankman including her interviews of Mr. Conahan's sister, Shawn Luedke, the relatives of Hal Linde, D. Linde and R. Linde, Mr. Conahan and others. The evidence she was prepared to present at the penalty included the elements of a case in mitigation that Mathews described in his testimony, which included (1) the level of dysfunction of Mr. Conahan's adoptive family, (2) his history of seizures, (3) his relationship with his two siblings, (4) parental abuse and alcoholism, (5) his educational background, and (6) the abundance of records, including Conahan's adoption records from North Carolina, See Exh. LL (T. 580-85).

Mr. Conahan never waived mitigation in the instant case. To the contrary, he cooperated fully with the investigation into his competency and mental status and into social, cultural and mental health mitigation. He met with both the defense experts, Drs. Gunder and Keown, who did the early evaluations requested by Mr. Ahlbrand before Mr. Sullivan was appointed to the case. Then later he met with and cooperated fully with mitigation specialists Mathews and Blankman, based on their testimony.

There was absolutely no evidence presented at the evidentiary hearing that Mr. Conahan refused to meet with Dr. Golden, the neuropsychologist who was

appointed by Judge Blackwell on September 7, 1999 for testing to evaluate the Defendant's mental functioning as it may be influenced by previous trauma or seizures and subsequent testimony. (R. 2818). Mr. Sullivan had argued on September 3, 1999, at a post-guilt phase hearing: "[t]he appointment of a neuropsychologist is routine in these sort of cases. His job would be to search for evidence of mental impairments, brain impairments, brain damage, and/or psychological impairments. He is prepared to come up and do his initial testing of Mr. Conahan soon, but I don't know what that's going to turn up, and I don't know what that's going to show." (R. 2023-24).

In addition, there was no reason for Sullivan's failure to introduce the existing defense mental health and competency evaluations of Mr. Conahan by Dr. Gunder and psychiatrist Dr. Keown that indicated that he was neither mentally ill nor a sexual sadist. He should have presented Dr. Keown's findings even though they were made as a result of a competency evaluation and not in contemplation of mitigation, as both Ahlbrand and Sullivan testified. Keown's report was admitted into evidence at the evidentiary hearing and serves, along with the potential testimony of the mitigation specialists and investigator Clement, as yet another potential source of mitigation which the jury never heard. Dr. Keown's Diagnostic Impressions were contained in his report. On Axis I of the DSM, his impression of Mr. Conahan was AAdjustment Disorder with depressed mood, mostly in

remission. ICD-9 #309.0; Marijuana abuse, ICD-9 #305.20; Poly Substance abuse, ICD-9 #305.90. On Axis II of the DSM, his impression of Mr. Conahan was "No formal personality disorder, but dependent, obsessive compulsive, and narcissistic features are noted." On Axis III of the DSM, his impression of Mr. Conahan was "Lumbar strain with chronic back pain by history. Neck injury with some degenerative changes. Bronchial asthma by history. History of sinusitis. Surgical removal of right testicle in 1992." Report at page 10.

Dr. Keown found that Mr.Conahan was sane at the time of the alleged offense ("there was no mental disease or illness or process that would impair his ability to understand the nature of his acts and the rightfulness or wrongfulness of them"). He also found him to be competent to stand trial, "despite having some depressive symptoms."40 Report at 11-12. Any potential findings by Dr. Golden were lost due to trial counsel's negligent failure to have him evaluate Mr. Conahan. Mitigation specialist Mathews testified that tried to get Mr. Sullivan to assist in arranging an examination of Mr. Conahan by Dr. Golden as late as October 22, 1999. T. 563; 574-575. The testimony of Mathews and Clement could and should have been presented at the penalty phase concerning their impressions based on their multiple interviews of Mr. Conahan, and in Clement's case, many others. If all these witnesses had been called at the penalty phase, the penalty phase evidence would not have been controverted by the limited evidence

presented by the State and, in any event, "'might well have influenced the jury's appraisal' of [Mr. Conahan] moral culpability," *Wiggins v. Smith*, 539 U.S. 510, 525 (2003), had the jury been afforded the opportunity to hear it.

Paul Sullivan testified that his goal at the penalty phase was to try and humanize Daniel Conahan as much as possible with the witnesses he had available (T. 133). Yet he failed to use the most important potential witnesses he had: Mr. Conahan's sister and brother, the experts that had been appointed to the case, and investigator Clement, and mitigation specialists Mathews and Blankman. Sullivan testified that having Mathews and Blankman working on mitigation "helped a great deal" and "they've got a lot of experience" (T. 134). He utterly failed to take advantage of that experience and apparently forced them out of the case when he failed to advise the court he was unprepared, needed more funds for mitigation, and failed to have Mr. Conahan evaluated by the neuropsychologist appointed specifically for the penalty phase.

Although Sullivan testified that records collection is an important part of the mitigation investigation and he expected that process would include obtaining education records, early childhood records and adoption records, he failed both to obtain the adoption records from North Carolina and to provide Dr. Golden with anything beyond the two 1997 expert reports noted in his letter to Dr. Golden. (T. 119-20).

Florida law requires the sentencers to consider all the available mitigation presented but trial counsels' overt omissions here spoiled the fruits of that promise: "Events that result in a person succumbing to the passions or frailties inherent in the human condition necessarily constitute valid mitigation under the Constitution and must be considered by the sentencing court." *Cheshire v. State*, 568 So. 2d 908, 912 (Fla. 1990) (citing *Lockett v. Ohio*, 438 U.S. 586 (1978)). *See Sears v. Upton*, __ U.S. __, 130 S. Ct 3259, 3265 (2010)(for the proposition that the failure to conduct a proper investigation can itself provide the necessary prejudice component under Strickland). There was a totally inadequate presentation at the penalty phase that was directly due to trial counsel Sullivan's negligence and deficient performance. Whether that was due to discouragement at the results of the Ford case, internal disagreements about how to proceed, concern about returning to Judge Blackwell for more funds and more time to undertake a proper investigation, or physical exhaustion and discouragement makes no difference. Sullivan's investigation and presentation at the penalty phase was unreasonable.

> There are two errors in the state court's analysis of Sears' Sixth Amendment claim. First, the court curtailed a more probing prejudice inquiry because it placed undue reliance on the assumed reasonableness of counsel's mitigation theory. The court's determination that counsel had conducted a constitutionally deficient mitigation investigation, should have, at the very least, called into question the reasonableness of this theory. Cf. *Wiggins v. Smith*, 539 U.S. 510, 522, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (explaining that

> "counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision ... because counsel had not 'fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background' " (quoting *Williams v. Taylor*, 529 U.S. 362, 396, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); alteration in original)). And, more to the point, that a theory might be reasonable, in the abstract, does not obviate the need to analyze whether counsel's failure to conduct an adequate mitigation investigation before arriving at this particular theory prejudiced Sears. The "reasonableness" of counsel's theory was, at this stage in the inquiry, beside the point: Sears might be prejudiced by his counsel's failures, whether his haphazard choice was reasonable or not.

Sears v. Upton at 3265. See also ABA Guideline 10.10.1 (2003) which states in pertinent part that: Counsel should seek a theory that will be effective in connection with both guilt and penalty and should seek to minimize any inconsistencies.

> We certainly have never held that counsel's effort to present some mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant. To the contrary, we have consistently explained that the *Strickland* inquiry requires precisely the type of probing and fact-specific analysis that the state trial court failed to undertake below. In the *Williams* decision, for instance, we categorically rejected the type of truncated prejudice inquiry undertaken by the state court in this case. 529 U.S., at 397-398, 120 S.Ct. 1495. And, in *Porter*, we recently explained: To assess [the] probability [of a different outcome under *Strickland*], we consider the totality of the available mitigation evidence-both that

> adduced at trial, and the evidence adduced in the habeas proceeding-and reweig [h] it against the evidence in aggravation." 558 U.S., at ----[, 130 S.Ct., at 453-54] (internal quotation marks omitted; third alteration in original). That same standard applies-and will necessarily require a court to "speculate" as to the effect of the new evidence-regardless of how much or how little mitigation evidence was presented during the initial penalty phase.

Sears v. Upton at 3266-67. Penalty phase relief is indicated in this case pursuant to *Strickland*.

ARGUMENT V

MR. CONAHAN'S RIGHTS UNDER THE FIFTH SIXTH EIGHTH AND FOURTEENTH AMENDMENTS WERE VIOLATED BY THE STATE'S PERSISTENT PROSECUTORIAL MISCONDUCT.

Prosecutorial misconduct has already been found to exist in Mr. Conahan's case. On direct appeal appellate counsel Helm made several claims based on trial counsel's limited objections below to prosecutorial misconduct. This Court considered several claims of prosecutorial misconduct on direct appeal related to alleged improper comments in both the opening and closing statements to the jury at the penalty phase. In fact, the Court did find that:

> Even though the State is entitled to present its version of the facts in its opening statement, see *Rhodes v. State*, 638 So.2d 920 (Fla.1994), we find that the trial court abused its discretion, when it allowed the State to

> comment upon Conahan's attempted murder and attempted sexual battery of Stanley Burden in its opening statement to the penalty phase jury. The trial court had the admissibility of that very evidence under advisement. Accordingly, it was improper for the State to comment in its opening statement upon evidence that was under advisement and which was ultimately inadmissible in the penalty phase of the trial.

Conahan 844 So. 2d at 639. While this Court ultimately determined that the prosecutor's comments regarding the *Williams* rule evidence in penalty phase constituted harmless error, a wealth of other misconduct was never preserved or argued on direct appeal. Id. at 640.

This Court also affirmed the trial court's ruling regarding the two preserved prosecutorial comments that were challenged on direct appeal concerning the lack of mitigation presented by the defense and the "balancing act between mercy for a defendant and justice for the victim." Id. 640-41. All other prosecutorial comments raised on appeal were found to be unpreserved, not fundamental error, or undeserving of cumulative consideration. Id. To the extent that trial counsel failed to object and appellate counsel failed to raise that failure in the context of fundamental error, Mr. Conahan asks this court to review the substantial examples of prosecutorial misconduct below, especially in light of the newly discovered evidence revealed during the evidentiary hearing below concerning Mrs. Montgomery's taped interview and her subsequent testimony at trial.

The State violated the defendant's U.S. Constitutional rights to Due Process and a fair trial in the Montgomery case when the State used Stanley Burden as a similar fact evidence witness in the Montgomery trial, where the State had first violated the defendant's U.S. Constitutional rights to Due Process in the Burden case when the State purposefully delayed the Burden trial in bad faith some 2 1/2 years after entering a *nolle prosequi* in the Burden case on February 28, 1997, the same day that Mr. Conahan had his first appearance in the Montgomery case. It is settled law that any undue delay after charges are dismissed, like any delay before any charges are filed, must be scrutinized under the due process clause not the speedy trial clause. See *U.S. v. MacDonald*, 102 S. Ct. 1497 (1982). The State cannot circumvent the intent of the speedy trial rule by suspending or continuing the charge or by entering a *nolle prosequi* and later refilling charges. *State v. Agee*, 622 So. 2d 473 (Fla. 1993). Likewise, the State should not be able to circumvent the established concept of collateral estoppel by the same artifice. Such tactics on the part of the State subverted the truth finding function of trials and violated Mr. Conahan's right to speedy trial and due process of law.

The tactical advantages gained by the State purposefully delaying the Burden trial included avoiding an acquittal of the defendant on all charges and ultimate fact issues at trial so as to preserve Burden as a *Williams* rule evidence witness in the Montgomery trial at a lesser burden of proof to advance/prove the

State's theory of guilt by showing "identity" of the defendant as the perpetrator of the crimes against Montgomery.

The lower court denied this claim below without an evidentiary hearing: "The Court finds that the State's decision to enter a nolle prosequi 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 [prosecutorial] 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." (PCR 523). This Court must revisit that finding.

The State needed Burden's testimony in the Montgomery case to prove their theory of guilt and to prove identity of the defendant in their theory as being the murderer of Montgomery. In the State's closing argument Prosecutor Lee states, "Your honor the issue in the case when we boil down everything pure and simple is a question of "identity" (R. 1965). The State used Burden in its closing argument to show identity along with the testimony of Mrs. Montgomery, Detective Weir, and Detective Clemens to support Burden's *Williams* rule testimony and evidence.

The State's first *Williams* Rule argument regarding Burden in the Montgomery trial was to admit Burden as a similar fact evidence witness to prove the identity of the Mr. Conahan in its theory of guilt as Montgomery's murder. (R.

1244-1259). The first *Williams* Rule argument relates to the admission of Burden as a similar fact evidence witness. The State used Burden to prove its theory of guilt and identity of the defendant in their theory that Mr. Conahan was Montgomery's murderer, as shown throughout the State's second *Williams* Rule arguments relating again to Burden as well as Weir, Clemens, and Smith. (See R. 1829-1942).

In the Judge's limited oral ruling on the *Williams* rule evidence regarding Burden, Weir, Clements, and Smith, the trial court stated: "This Williams rule evidence with respect to the victim Burden, is relevant to the issues of 'identity' around motive and modus operandi." (R. 1842-48, at 1843). Likewise, in arguing against the Defendant's Motion for Acquittal, the State said, "We have evidence, submitted from Stanley Burden that from Detectives Weir and Clements, that clearly shows the defendant's identity as the person who committed these crimes, his methods and his motives." (R. 1860)

Because of the manner in which the State entered a nolle prosequi in the Burden case it should have been collaterally estopped from using any evidence in that case against Mr. Conahan in the Montgomery prosecution. See *Ashe v. Swenson*, 397 U.S. 436 (1970); *Wingate v. Wainwright*, 464 F. 2d 209 (1972). When the State wants to present *Williams* rule evidence it must first prove that the defendant on trial committed the uncharged collateral crime by the clear and

convincing evidence standard. See *Denmark v. State*, 646 So. 2d 754 (Fla. 2d DCA 1994)(holding "the State is required to prove by clear and convincing evidence that the defendant on trial committed the uncharged crime."); *Audano v. State*, 641 So. 2d 1356 (Fla. 2d DCA 1994)(Before evidence of a collateral offense can be admitted under Williams rule, there must be clear and convincing evidence that the former offense was actually committed by the defendant); *Phillips v. State*, 591 So. 2d 987 (Fla. 1st DCA 1991)(the state must establish that the defendant committed the prior act by clear and convincing evidence).

Mr. Conahan's Burden and Montgomery cases had the same prosecutor and were in the same circuit court. The prosecutor in the Burden case knew that the doctrine of collateral estoppel would prevent the use of a previously acquitted case as *Williams* rule evidence in another case on the same issues of ultimate facts. Therefore, the prosecution in the Burden case knew that if the defendant was acquitted in the Burden case, that the Burden case would be barred as *Williams* rule evidence in the Montgomery case with regards to the issues of ultimate facts. The State's theory of guilt as to what led up to Montgomery's death and how Montgomery was killed as well as the State's theory of identity as the defendant being Montgomery's killer in the Montgomery case were based on the Burden case which was grounded in the facts of the Burden case. The prosecutorial misconduct at trial and the failure by the trial court to remedy it below was fundamental error

and a violation of Mr. Conahan's substantive and procedural due process rights and his right to a fair trial under the United States and Florida constitutions.

The testimony of Mr. Conahan's former boyfriend, Hal Linde, was presented regarding an alleged sexual fantasy of Mr. Conahan's that Mr. Linde stated Mr. Conahan had told him about during their relationship. (R. 1084-96). This event allegedly happened eight (8) years before the Montgomery murder and eleven (11) years before the instant trial. This testimony had no direct bearing in proof in the Montgomery case and was wholly independent and unconnected with the Montgomery case at trial and therefore Hal Linde's testimonial evidence at trial about the bondage fantasy was neither relevant nor material evidence at trial. Mr. Linde was suffering from the impact of AIDS and the State filed a pre-trial motion to perpetuate his testimony because of concerns that he might expire before the case came to trial.

Linde was called by the State only to show bad character on the part of Mr. Conahan and propensity to violence based on the alleged fantasy. In so doing, the State committed fundamental error when it violated the defendant's United States Constitutional rights to due process and a fair trial. The state compounded this argument in the penalty phase during its opening statement. The prosecutor said to the jury:

> The evidence will further show that the motive, the why that this crime occurred, again, to move from the mind of

> the Defendant Daniel Conahan to actually say that is he began to put it into plan, put the plan into effect in 1994, that is he moved beyond a reasonable doubt thinking about this fantasy to attempting to act it out.

Conahan v. State, 844 So.2d 629, 638 (Fla. 2003). This Court found it was error for the trial court to allow such a comment by the state. Id., at 639. However, the Court found the error to be harmless. Id.

At the evidentiary hearing, and as detailed in Argument III above petitioner claimed that the State committed a *Brady* violation when it failed to disclose that a recording was made of the conversation between *Williams* rule witness Detective Weir and Mr. Conahan at a fake campsite sting operation on May 29, 1996. As detailed above the record indicates by virtually all accounts that a recording was made. The implication is that is was lost or destroyed in violation of the Constitution. This evidence in that tape would refute the State's theory of the case. It demonstrates that Mr. Conahan failed to act in a manner that was consistent with or that supported either the State's theory of Mr. Conahan's guilt in the Montgomery case or that supported the State's *Williams* Rule evidence related to the Stanley Burden evidence and testimony. This evidence also impeaches the *Williams* rule trial testimony of Stanley Burden, Detective Weir and Officer Clement. "When police or prosecutors conceal significant exculpatory or impeaching material in the States possession, it is ordinarily incumbent on the state

to set the record straight." Brady v. Maryland, 373 U.S. 83 (1963). It is material here because it provides additional support for prosecutorial conduct that reaches the level of fundamental error when considered cumulatively. This Court did not have this information on direct appeal.

The instances of prosecutorial misconduct committed by Assistant State Attorney Lee continued during the pendency of the Montgomery trial. Mr Conahan has claimed elsewhere that the State committed a *Brady/Giglio* violation when it deliberately allowed the victim's mother's trial testimony to remain uncorrected. As detailed above, the State had ot have known it was presenting false and misleading testimony of Mrs. Montgomery.

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

Whittaker on the subject of whether Mr. Conahan and Mr. Montgomery knew one another (R. 1861). He also made a similar argument using her testimony to support his arguments that Mr. Conahan used an offer to pay for nude pictures of progressive bondage to entrap both Montgomery and Burden, as Burden had testified, and to argue against an acquittal for sexual battery (R. 1864-72).

It is evident from the record and the facts developed in postconviction that the prosecutorial misconduct in this case rose to the level of a constitutional deprivation entitling Mr. Conahan to relief.

CONCLUSION AND RELIEF SOUGHT

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

CERTIFICATES OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, Stephen Ake, Stephen Ake, Esq., Stephen Ake, Esq., Assistant Attorney General, Department of Legal Affairs, 3507 East Frontage St., Suite 200, Tampa, FL 33607-7013 on this 28th day of December 2011.

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

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