DOCKET NO. _____

OCTOBER TERM 2024

IN THE

SUPREME COURT OF THE UNITED STATES

DANIEL OWEN CONAHAN, JR.
Petitioner,

vs.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS
AND FLORIDA ATTORNEY GENERAL.
Respondent.

On Petition For A Writ of Certiorari To
The United States Court of Appeals For The Eleventh Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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COUNSEL FOR PETITIONER

December 18, 2024

INDEX TO APPENDIX

DOCKET NO. _____

OCTOBER TERM 2024

IN THE

SUPREME COURT OF THE UNITED STATES

DANIEL OWEN CONAHAN, JR.
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On Petition For A Writ of Certiorari To
The United States Court of Appeals For The Eleventh Circuit

APPENDIX A

Conahan v. Sec'y, Dep't of Corr., No. 24-10844, 2024 WL 2950845
(11th Cir. May 31, 2024)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

May 31, 2024

Brittney Nicole Lacy
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110 SE 6TH ST STE 701
FORT LAUDERDALE, FL 33301

Appeal Number: 24-10844-P
Case Style: Daniel O. Conahan, Jr. v. Secretary, Department of Corrections, et al
District Court Docket No: 2:13-cv-00428-JES-KCD

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Any pending motions are now rendered moot in light of the attached order.

Clerk's Office Phone Numbers

General Information:	404-335-6100	Attorney Admissions:	404-335-6122
Case Administration:	404-335-6135	Capital Cases:	404-335-6200
CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

In the

United States Court of Appeals

For the Eleventh Circuit

No. 24-10844

DANIEL O. CONAHAN, JR.,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 2:13-cv-00428-JES-KCD

ORDER:

Appellant's motion for certificate of appealability is DENIED.

/s/ Britt C. Grant

UNITED STATES CIRCUIT JUDGE

DOCKET NO. _____

OCTOBER TERM 2024

IN THE

SUPREME COURT OF THE UNITED STATES

DANIEL OWEN CONAHAN, JR.
Petitioner,

vs.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS
AND FLORIDA ATTORNEY GENERAL.
Respondent.

On Petition For A Writ of Certiorari To
The United States Court of Appeals For The Eleventh Circuit

APPENDIX B

Conahan v. Sec'y, Dep't of Corr., No. 24-10844 (11th Cir. Aug. 20, 2024)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

August 20, 2024

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Appeal Number: 24-10844-P
Case Style: Daniel O. Conahan, Jr. v. Secretary, Department of Corrections, et al
District Court Docket No: 2:13-cv-00428-JES-KCD

The enclosed order has been ENTERED.

Electronic Filing
All counsel must file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Although not required, non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing are available on the Court's website.

Clerk's Office Phone Numbers

General Information:	404-335-6100	Attorney Admissions:	404-335-6122
Case Administration:	404-335-6135	Capital Cases:	404-335-6200
CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

MOT-2 Notice of Court Action

In the

United States Court of Appeals

For the Eleventh Circuit

No. 24-10844

DANIEL O. CONAHAN, JR.,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 2:13-cv-00428-JES-KCD

Before NEWSOM, GRANT, and BRASHER, Circuit Judges.

BY THE COURT:

Appellant's motion for reconsideration of the May 31, 2024, order denying motion for certificate of appealability is DENIED.

DOCKET NO. _____

OCTOBER TERM 2024

IN THE

SUPREME COURT OF THE UNITED STATES

DANIEL OWEN CONAHAN, JR.
Petitioner,

vs.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS
AND FLORIDA ATTORNEY GENERAL.
Respondent.

On Petition For A Writ of Certiorari To
The United States Court of Appeals For The Eleventh Circuit

APPENDIX C

Conahan v. Sec'y, Dep't of Corr., No. 2:13-cv-428-JES-KCD, 2023 WL 2648168 (M.D. Fla. Mar. 27, 2023)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

DANIEL O. CONAHAN, JR.,

Petitioner,

v. Case No: 2:13-cv-428-JES-KCD

SECRETARY, DEPARTMENT OF CORRECTIONS and FLORIDA ATTORNEY GENERAL,

Respondents.

OPINION AND ORDER

Before the Court are Daniel O. Conahan's Amended Petition for Writ of Habeas Corpus (Doc. #26), supporting memorandum (Doc. #27), and two supplements (Docs. #56 and #62), the Secretary's responses (Docs. #29 and #65), and Conahan's replies (Docs. #38 and #68). For the reasons set forth below, the Amended Petition is denied.

I. Background

Conahan was convicted of the kidnapping and murder of Richard Alan Montgomery and sentenced to death. The Supreme Court of Florida summarized the factual and procedural background in its opinion affirming the conviction and sentence:

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

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

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

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

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

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

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

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

On February 25, 1997, Conahan was indicted for first-degree premeditated murder, first-degree felony murder, kidnapping, and sexual battery of Richard Montgomery. In

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

The trial court permitted the State to introduce Williams[1] rule evidence of Burden's attempted murder and sexual battery, ruling that the evidence was sufficiently similar to the evidence leading up to Montgomery's death so as to constitute a unique modus operandi sufficient to establish the identity of Montgomery's murderer. After the guilt phase of the trial was completed, the trial court found and adjudicated Conahan guilty of first-degree premeditated murder and kidnapping.

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

The medical examiner, Dr. Carol Huser, testified regarding the autopsy report prepared by Dr. Imami.[2] After examining Dr. Imami's report and viewing the autopsy photographs, Dr. Huser concluded that Montgomery died by ligature strangulation. The autopsy photographs were published to the jury. Dr. Huser also testified that being killed in such a manner required applying pressure for a length of time notwithstanding the fact that the victim loses consciousness after only a few

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

[2] Dr. Imami, the medical examiner who conducted the autopsy of Richard Montgomery, was out of the country and unavailable to testify at the penalty phase.

> seconds. She further opined that to be killed by strangulation would be terrifying.
>
> Conahan's aunt, Betty Wilson, testified on behalf of the defense that Conahan was a jovial, personable individual who participated in family activities and cared for his ailing mother before she died. Robert Lindy and his daughter Nancy Thomson, the father and sister of Hal Lindy, who was Conahan's roommate and lover when he lived in Chicago, testified that Conahan was like another son and brother to them. Conahan was instrumental in helping Hal and Nancy overcome alcoholism, was considered one of the family, and was included in many family functions. Thereafter, the defense rested its case.
>
> Before the jury deliberated, the trial court gave instructions relative to the following aggravators: (1) the murder was heinous, atrocious, or cruel (HAC); (2) the murder was cold, calculated, and premeditated (CCP); and (3) the murder was committed during the course of a kidnapping. By a vote of twelve to zero, the jury recommended the death penalty. A Spencer[3] hearing was held on November 5, 1999, and on December 10, 1999, Conahan was sentenced to death for the first-degree murder of Richard Montgomery and to fifteen years' imprisonment for kidnapping.

Conahan v. State, 844 So. 2d 629, 632 (Fla. 2003).

The Florida Supreme Court went on to find: (1) the trial court did not err in denying Conahan's motions for acquittal; (2) the trial court correctly instructed the sentencing jury on aggravating factors; (3) the prosecutor made an improper comment during the State's opening statement, but allowing it was harmless error; (4) the trial court correctly overruled two objections during the State's closing argument; (5) the trial court properly admitted autopsy photos and photos of the crime scene; and (6) the

[3] Spencer v. State, 615 So. 2d 688 (Fla. 1993).

death penalty here is a proportionate punishment when compared with other death-penalty cases. Id. at 638-43. The United States Supreme Court denied certiorari. Conahan v. Florida, 540 U.S. 895 (2003).

Conahan sought postconviction relief in state court by filing a motion under Florida Rule of Criminal Procedure 3.851. The postconviction court denied the motion after an evidentiary hearing, and the Florida Supreme Court affirmed. Conahan v. State, 118 So. 3d 718 (Fla. 2013).

Conahan then filed the petition that commenced this action, raising seven grounds. (Doc. #1). On February 2, 2016, Conahan filed another state postconviction motion and sought a stay of this federal case. (Doc. #43). The Court obliged, granting the stay. (Docs. #46, 58). The state postconviction court denied the successive Rule 3.851 motion, and the Florida Supreme Court affirmed. Conahan v. State, No. SC16-1153, 2017 WL 656306 (Fla. Feb. 17, 2017); Conahan v. State, 258 So. 3d 1237 (Fla. 2018).

The stay was lifted (Doc. #64), and Conahan filed two supplements to his federal habeas petition, each adding a new ground. (Docs. #57 and #62). All grounds have been fully briefed and are ripe for review.

II. Applicable Habeas Law

a. AEDPA

The Antiterrorism Effective Death Penalty Act (AEDPA) governs

a state prisoner's petition for habeas corpus relief. 28 U.S.C. § 2254. Relief may only be granted on a claim adjudicated on the merits in state court if the adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). This standard is both mandatory and difficult to meet. White v. Woodall, 134 S. Ct. 1697, 1702 (2014). A state court's violation of state law is not enough to show that a petitioner is in custody in violation of the "Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); Wilson v. Corcoran, 562 U.S. 1, 16 (2010).

"Clearly established federal law" consists of the governing legal principles set forth in the decisions of the United States Supreme Court when the state court issued its decision. White, 134 S. Ct. at 1702; Casey v. Musladin, 549 U.S. 70, 74 (2006) (citing Williams v. Taylor, 529 U.S. 362, 412 (2000)). Habeas relief is appropriate only if the state court decision was "contrary to, or an unreasonable application of," that federal law. 28 U.S.C. § 2254(d)(1). A decision is "contrary to" clearly established federal law if the state court either: (1) applied a rule that contradicts the governing law set forth by

Supreme Court case law; or (2) reached a different result from the Supreme Court when faced with materially indistinguishable facts. Ward v. Hall, 592 F.3d 1144, 1155 (11th Cir. 2010); Mitchell v. Esparza, 540 U.S. 12, 16 (2003).

A state court decision involves an "unreasonable application" of Supreme Court precedent if the state court correctly identifies the governing legal principle, but applies it to the facts of the petitioner's case in an objectively unreasonable manner, Brown v. Payton, 544 U.S. 133, 134 (2005); Bottoson v. Moore, 234 F.3d 526, 531 (11th Cir. 2000), or "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Bottoson, 234 F.3d at 531 (quoting Williams, 529 U.S. at 406).

When reviewing a claim under 28 U.S.C. § 2254(d), a federal court must remember that any "determination of a factual issue made by a State court shall be presumed to be correct[,]" and the petitioner bears "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); Burt v. Titlow, 134 S. Ct. 10, 15 (2013) ("[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance."). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fair-

minded jurists could disagree on the correctness of the state court's decision." Harrington v. Richter, 562 U.S. 86, 101 (2011). "[T]his standard is difficult to meet because it was meant to be." Sexton v. Beaudreaux, 138 S. Ct. 2555, 2558 (2018).

b. Exhaustion and Procedural Default

AEDPA precludes federal courts, absent exceptional circumstances, from granting habeas relief unless a petitioner has exhausted all means of relief available under state law. Failure to exhaust occurs "when a petitioner has not 'fairly presented' every issue raised in his federal petition to the state's highest court, either on direct appeal or on collateral review." Pope v. Sec'y for Dep't of Corr., 680 F.3d 1271, 1284 (11th Cir. 2012) (quoting Mason v. Allen, 605 F.3d 1114, 1119 (11th Cir. 2010)). The petitioner must apprise the state court of the federal constitutional issue, not just the underlying facts of the claim or a similar state law claim. Snowden v. Singletary, 135 F.3d 732, 735 (11th Cir. 1998).

Procedural defaults generally arise in two ways:

> (1) where the state court correctly applies a procedural default principle of state law to arrive at the conclusion that the petitioner's federal claims are barred; or (2) where the petitioner never raised the claim in state court, and it is obvious that the state court would hold it to be procedurally barred if it were raised now.

Cortes v. Gladish, 216 F. App'x 897, 899 (11th Cir. 2007). A federal habeas court may consider a procedurally barred claim if

(1) petitioner shows "adequate cause and actual prejudice," or (2) "the failure to consider the claim would result in a fundamental miscarriage of justice." Id. (citing Coleman v. Thompson, 501 U.S. 722, 749-50 (1991)).

c. Ineffective Assistance of Counsel

In Strickland v. Washington, the Supreme Court established a two-part test for determining whether a convicted person may have relief for ineffective assistance of counsel. 466 U.S. 668, 687-88 (1984). A petitioner must establish: (1) counsel's performance was deficient and fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced the defense. Id.

When considering the first prong, "courts must 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" Sealey v. Warden, 954 F.3d 1338, 1354 (11th Cir. 2020) (quoting Strickland, 466 U.S. at 689). And "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." Franks v. GDCP Warden, 975 F.3d 1165, 1176 (11th Cir. 2020) (quoting Richter, 562 U.S. at 101). Thus, a habeas petitioner must "show that no reasonable jurist could find that his counsel's performance fell within the wide range of reasonable professional conduct." Id. This is a "doubly deferential"

standard of review that gives both the state court and the petitioner's attorney the benefit of the doubt. Burt, 134 S. Ct. at 13 (citing Cullen v. Pinholster, 131 S. Ct. 1388, 1403 (2011)).

The second prong requires the petitioner to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Sealey, 954 F.3d at 1355 (quoting Strickand, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. The critical question on federal habeas review is not whether this Court can see a substantial likelihood of a different result had defense counsel taken a different approach. Mays v. Hines, 141 S. Ct. 1145, 1149 (2021). All that matters is whether the state court, "notwithstanding its substantial 'latitude to reasonably determine that a defendant has not [shown prejudice],' still managed to blunder so badly that every fairminded jurist would disagree." Id. (quoting Knowles v. Mirazayance, 556 U.S. 111, 123 (2009)).

"An ineffective-assistance claim can be decided on either the deficiency or prejudice prong." Sealey, 954 F.3d at 1355. And "[w]hile the Strickland standard is itself hard to meet, 'establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult.'" Id. (quoting Richter, 562 U.S. at 105).

III. Analysis of Issues

a. Ground 1: Trial counsel failed to adequately investigate and prepare a defense

Attorneys Mark W. Ahlbrand and Paul Sullivan represented Conahan at the trial level. Ahlbrand led the effort on the guilt phase, and Sullivan primarily handled the sentencing phase. Conahan argues Ahlbrand provided ineffective assistance of counsel in the guilt phase, which renders the death sentence unreliable. Conahan asserts four sub-grounds, each raising an alleged deficiency in Ahlbrand's performance. The Court denies three of the sub-grounds, and Conahan has withdrawn the fourth.

i. Richardson[4] hearing

The victim's mother, Mary Montgomery-West[5] surprised Ahlbrand on cross-examination with testimony that her son had told her about meeting Conahan. (Doc. #89-3 at 787-88). The testimony—which is relevant to several habeas grounds—was as follows:

> Q Did your son ever tell you that he had met a man named Danny or that there was a man that was going to offer money for anything? Did he ever confide in you that there was –
>
> A He told me the last time I saw him, which was on March 23rd, it was a Saturday, and I was trying to do bills. And Jeff's truck had broken down at out house, so Danny and his wife, Terri, and Carla and Jeff and Richard were all over there that Saturday.

---

[4] Richardson v. State, 246 So. 2d 771 (Fla. 1971).

[5] The state court record alternatingly refers to the victim's mother as Mary Montgomery, Mary West, and Mary Montgomery-West. This Court will use "Montgomery-West."

Q Now, when you saw Danny, you're not referring to Mr. Conahan, are you?

A No; my son. My son. Anyway, he had come in and he was wanting to talk to me and I was trying to do my bills and he was interrupting. It was just like when he was a child. I said, Let me do this and then we'll talk. But anyway, it ended up being we were talking. He wanted to tell me about a new friend he had made.

Q How did he describe him?

A I remember him telling me his name and I said that sounds like - I knew people with the name of Carnahan in North Fairfield, Ohio. That's where I grew up. He said, No, it's a name that - like that. I said, You sound like Nana because you're leaving the R out. He said, No, Mom. It's Conahan.

Q Why would you have never told this to the police?

A I thought I did the night I made my statement.

Q But you didn't?

A I remember telling them that - there's a lot in my statement that I remember saying that isn't on the tape.

Q Okay. So you believe at this point in light of the fact that Mr. Conahan is on trial that you told the police that your son had met Mr. Conahan, or a Mr. Conahan?

A A Mr. Conahan.

Q Did you pursue that with him? I mean, I'm in for a penny and for a pound now. I might as well go ahead. I mean, did you ask him -

A Nobody called me or anything. I remember I told Mr. Hobbs - I called him up and I said, How come nobody's asked me about anything because of the name that I had said and he said he remembers something about friends and he went back and looked. I never heard from

> him again. I found out just recently when I got my deposition that's not in there. It says, inaudible, inaudible. I'm sure I was crying.
>
> Q When you told Mr. Hobbs about this, had Mr. Conahan already been arrested and in the paper?
>
> A Yes, he had been.

(Doc. #89-3 at 786-88). The State elicited more details on redirect (that testimony is block-quoted below in the section discussing Ground 2). Ahlbrand attempted to impeach Montgomery-West on re-cross with a transcript of the statement she gave police two days after her son's death. Montgomery-West acknowledged the transcript did not include any mention that the victim had contact with Conahan, but she pointed to page 24 of the document: "And it's right in here where I start talking and I think it was in the part where it said inaudible, inaudible. And there's – a lot of what I said isn't there." (Id. at 794).

In his Rule 3.851 motion, Conahan argued Ahlbrand should have requested a Richardson hearing. A Florida trial court may hold a Richardson hearing to determine whether the State committed a discovery violation and, if so, whether the violation prejudiced the defendant's ability to prepare for trial. Richardson, 246 So. 2d at 774-75. The postconviction court heard extensive evidence on the issue and found no discovery violation, and therefore no cause for a Richardson hearing. (Doc. #89-5 at 1096). The

Florida Supreme Court determined that Conahan failed to satisfy either prong of Strickland:

> First, Conahan claims that trial counsel was ineffective for failing to demand a Richardson hearing when Mrs. Montgomery, the victim's mother, testified to a matter that was not in the transcript of the recorded statement she gave to law enforcement. Specifically, during cross-examination, Mrs. Montgomery testified that her son had told her he had met a man named Conahan and on re-direct stated that her son had told her that Conahan lived in Punta Gorda Isles, was a nurse, and had been in the Navy. When asked why she had never told this information to police she stated that she "thought" she had when she gave her recorded statement, proposing that the information was described as "inaudible" in the transcript. Because Conahan has failed to establish deficiency or prejudice, we affirm the circuit court's denial of this claim.
>
> Specifically, Conahan has failed to demonstrate how counsel's actions were not reasonable given the facts of the case and counsel's perspective at the time. Trial counsel testified at the evidentiary hearing that he did not object to the testimony because it was elicited as a result of a direct question on cross-examination and he could not figure out a way to "unring the bell." Instead, trial counsel attempted to impeach Mrs. Montgomery's testimony. This Court has held that counsel will not be held ineffective if "alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." Occhicone v. State, 768 So.2d 1037, 1048 (Fla.2000).
>
> Additionally, Conahan failed to establish prejudice. Even if Mrs. Montgomery's testimony was stricken after a Richardson hearing, the outcome would have been the same and confidence is not undermined because there was other evidence linking the victim and Conahan, such as the testimony of Whitaker and Newman.[6] Newman had been Conahan's cellmate at one time and testified at trial that Conahan had told him he knew the victim, Mr.

[6] The jailhouse witness in this case is named John Cecil Neuman. The trial transcript and subsequent state court records and opinions misspelled his name as "Newman."

> Montgomery. Specifically, Newman testified that Conahan had said he had been on beer runs with Montgomery, had been to Montgomery's house, and that "Montgomery was a mistake." And Whitaker and the victim were roommates at one time, and Whitaker testified that Conahan had come to his home looking for Montgomery.

Conahan v. State, 118 So. 3d 718, 727 (Fla. 2013).

The Florida Supreme Court reasonably applied Strickland. A Richardson hearing would have given Conahan an opportunity to explore whether the State violated discovery rules and whether there was any resulting prejudice. But Montgomery-West's testimony did not show the State withheld any discovery. She believed the relevant part of her statement was inaudible because she was crying, so her testimony did not suggest the existence of a separate document the government withheld. Moreover, the postconviction heard the evidence Conahan could have proffered in a Richardson hearing and found no discovery violation. Thus, a Richardson hearing would have been futile.

Federal habeas courts "must defer to the state's construction of its own law" when an attorney's alleged failure turns on state law. Pinkney v. Sec'y, DOC, 876 F.3d 1290, 1295 (11th Cir. 2017) (quoting Alvord v. Wainwright, 725 F.2d 1282, 1291 (11th Cir. 1984)). Such deference is especially important when considering Strickland claims because they can "drag federal courts into resolving questions of state law." Shinn v. Kayer, 141 S. Ct. 517, 523 (2020). This Court accepts as correct the state courts'

determination that the prosecution did not violate state discovery rules, so Conahan was not entitled to relief under Richardson. Conahan was not prejudiced by Ahlbrand's failure to request a futile Richardson hearing. The Florida Supreme Court's denial of this sub-ground was a reasonable application of Strickland.

ii. Forensic audio expert

Conahan next argues Ahlbrand should have retained an audio expert to analyze the tape of Montgomery-West's statement to the police. Conahan's postconviction counsel did hire such an expert, and he testified that Montgomery-West did not utter Conahan's name in the recorded interview, even during the parts described as inaudible in the original transcript. (Doc. #89-6 at 356-58). The State stipulated that Montgomery-West's recorded statements did not contain Conahan's name. The postconviction court found—based on the testimony of prosecutor Robert A. Lee—that Montgomery-West could have provided Conahan's name in an unrecorded statement, and it held that Conahan failed to establish either prong of Strickland. (Doc. #89-5 at 1097).

The Florida Supreme Court affirmed because Conahan failed to show prejudice:

> In this case, even if counsel had obtained an audio expert to analyze the statement, it would not have changed the nature of Mrs. Montgomery's testimony that she "thought" she had told officers this information during the interview in which the recorded statement was made. Moreover, having a more accurate transcript would not have broken the evidentiary link between Conahan and

> the victim because there were two other witnesses, Whitaker and Newman, who established that Conahan and the victim knew each other. Therefore, there is not a reasonable probability of a different outcome. Our confidence in the outcome is not undermined.

Conahan v. State, 118 So. 3d 718, 728 (Fla. 2013). Conahan attacks the Florida Supreme Court's decision because (1) an expert could have impeached Montgomery-West and (2) Whitaker and Neuman were unreliable witnesses.

Federal habeas courts must give state courts substantial latitude when evaluating the prejudice prong of Strickland claims. Mays, 141 S. Ct. at 1149. The Florida Supreme Court reasonably found that Whitaker and Neuman established a link between Conahan and the victim, and that impeaching Montgomery-West would not have broken that link. Despite his attacks on the reliability of Whitaker and Neuman, Conahan fails to establish that the Florida Supreme Court "blunder[ed] so badly that every fairminded jurist would disagree." Id. What is more, the audio expert's conclusion is consistent with Montgomery-West's trial testimony. She acknowledged the tape did not capture her comments about Conahan: "I remember telling them that – there's a lot in my statement that I remember saying that isn't on the tape." (Doc. #89-3 at 788). Denial of this sub-ground was a reasonable application of Strickland.

iii. Williams rule evidence

Conahan asserts Ahlbrand failed to adequately object to the evidence admitted under Williams v. State, 110 So. 2d 654 (Fla. 1959)—primarily, evidence that Conahan attacked and attempted to kill Stanley Burden in the same manner that Montgomery was murdered. Conahan's argument focuses almost entirely on the trial court's decision to admit the evidence, rather then Ahlbrand's performance. In other words, Conahan attempts to shoehorn non-Strickland arguments into a Strickland claim, the same tactic he used in his state postconviction motion. (See Doc. #89-4 at 1258-60). The postconviction court rejected the ineffective-assistance claim because Ahlbrand objected to the Williams evidence repeatedly, and it denied the non-Strickland arguments because they were procedurally barred. (Doc. #89-5 at 1095; see also Doc. #89-4 at 1520-21).

The Florida Supreme Court found no merit in the Strickland part of this sub-ground:

> The claim is conclusively refuted by the record, which indicates that trial counsel repeatedly objected to the Williams rule evidence and that the trial court treated this as a standing objection. As for Conahan's challenge to the sufficiency and detail of the objections, the record demonstrates that trial counsel went to great lengths to point out differences between the assault on Stanley Burden and the murder of Richard Montgomery and presented detailed arguments as to why the other Williams rule evidence should not be admitted. This Court has repeatedly held that "[c]ounsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions."

> Occicone, 768 So. 2d at 1048; see also Chandler v. State, 848 So. 2d 1031, 1045-46 (Fla. 2003) (holding that disagreeing with trial counsel's strategy of not vigorously challenging the Williams rule evidence did not mean that trial counsel was ineffective).

Conahan, 118 So. 3d at 728. The Florida Supreme Court also agreed that Conahan's non-Strickland sub-claims were procedurally barred:

> We do not discuss in detail Conahan's claim that the trial court erred in summarily denying his ineffectiveness of trial counsel claim that the Williams rule evidence was not established by clear and convincing evidence, was not sufficiently similar to the charged offense, and became a "feature of the trial" because we find the circuit court properly determined that this claim was procedurally barred. Conahan should have and could have raised this issue on direct appeal. See Connor v. State, 979 So. 2d 852, 868 (Fla. 2007); Franqui v. State, 965 So. 2d 22, 35 (Fla. 2007); Spencer v. State, 842 So. 2d 52, 60-61 (Fla. 2003). Moreover, as explained when addressing his habeas petition, Conahan failed to establish that the admission of the Williams rule evidence amounted to fundamental error.

Id. at 728 n.6.

The Florida Supreme Court's denial of Conahan's ineffective-assistance claim was a reasonable application of Strickland. See Strickland, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."). The underlying issue here is the application of the Williams rule, a Florida evidentiary rule. The Florida Supreme Court is the final arbiter of Florida law, see Pinkney, supra, and it found Ahlbrand's objections to the

Williams rule evidence reasonable. The record supports that finding. Ahlbrand made a thorough and lengthy argument against admission of the Williams rule evidence. (Doc. #89-3 at 1548-65).

The rest of this sub-ground challenges the trial court's admission of Williams rule evidence, not Ahlbrand's performance. Florida law required Conahan to raise those arguments on direct appeal. See Spencer v. State, 842 So. 2d 52, 60 (Fla. 2003). The Florida Supreme Court correctly applied a state procedural default principle to find the sub-claims barred. As a result, they are procedurally barred in federal court. See Cortes, supra.

iv. Conclusions of FDLE witnesses

Conahan next faults Ahlbrand for failing to investigate or present any evidence to undermine the scientific conclusions of two witnesses from the Florida Department of Law Enforcement. In his Reply, Conahan concedes that he failed to exhaust this sub-ground and withdraws it. (Doc. #38 at 11).

b. Ground 2: The victim's mother gave false material testimony

Conahan claims the State violated Giglio v. United States, 405 U.S. 150 (1972) by knowingly using false testimony of Montgomery-West. The testimony at issue began in Ahlbrand's cross-examination of Montgomery-West, block-quoted above. The State elicited more details on redirect:

> Q Mrs. West, this conversation that you had with your son that you were just asked about where he mentioned

the name Conahan and you thought at first he said Carnahan, did he give you any information about this individual Conahan as to where he worked or his background?

A I remember him telling me that his new friend lived in Punta Gorda Isles, that he had been in the Navy discharge and he was a nurse who worked at Medical Center where I had worked for many years.

Q All right. And did he tell you – did you mention anything to him about, in turn, whether it was – let me rephrase it.

Was anything said about the age of Mr. Conahan?

A I remember him being much older. I said, Why are you hanging around with somebody so much older than you are?

Q Okay. Now, in that same conversation, did your son mention to you anything about nude photographs?

A He told me somebody had offered him $200 to pose for nude pictures.

Q Okay.

A He didn't tell me who. He refused to tell me who.

Q He did not specifically say it was Mr. Conahan, but it was in the same conversation?

A It was in the same conversation.

Q And in response to that, what did you tell your son?

A I told him about a psychopathic personality that would lure somebody like my son, who is trusting and naïve, because he was naive, out; somebody that he didn't know very well and do things to him, sexually abuse him, kill him.

THE DEFENDANT: You're a liar.

THE WITNESS: He didn't believe me. He says, No one will kill me. I'll kill him first, like that, and –

MR. AHLBRAND: Judge, we're going to ask for a five-minute recess.

THE COURT: For what reason?

MR. AHLBRAND: I need to converse with my client. We can do it in place. Three minutes, please.

MR. LEE: I only have one or two more questions, Your Honor. I prefer that we finish the testimony.

THE COURT: All right. Let's finish.

BY MR. LEE:

Q And what was Richard's response when you warned him about this?

A He says, Nobody will kill me. I'll kill them first. He didn't believe it could happen.

Q Did not believe it could happen?

A (Nodded head.)

(Doc. #89-3 at 790-92).

The postconviction court rejected Conahan's Giglio claim, and the Florida Supreme Court affirmed:

> To establish a Giglio violation, three prongs must be shown: (1) the testimony was false; (2) the prosecutor knew it was false; and (3) the testimony was material. Guzman v. State, 868 So.2d 498, 505 (Fla. 2003) (citing Ventura v. State, 794 So.2d 553, 562 (Fla. 2001)). If the defendant successfully establishes the first two prongs, then the State bears the burden of proving that the testimony was not material by showing that there is no reasonable possibility that it could have affected the verdict because it was harmless beyond a reasonable doubt. See Johnson v. State, 44 So. 3d 51, 64-65 (Fla. 2010); Guzman, 868 So. 2d at 506-07. In evaluating Giglio claims, this Court applies a mixed standard of review,

deferring to the trial court's factual findings that are supported by competent, substantial evidence and reviewing the application of the law to those facts de novo. Suggs v. State, 923 So.2d 419, 426 (Fla. 2005) (citing Sochor, 883 So.2d at 785).

In this case, Conahan has failed to establish that Mrs. Montgomery's testimony was false. Mrs. Montgomery qualified her testimony, stating that she "thought" she told law enforcement this information when she gave her recorded statement. However, the State stipulated at the evidentiary hearing that the name Conahan does not appear in the recorded statement, which tends to show that her self-qualified "thought" was mistaken, not necessarily that her testimony was false. Additionally, the transcript of the recorded statement indicates that Mrs. Montgomery provided the officers taking her statement with some information prior to the tape being turned on. Perhaps Mrs. Montgomery relayed the information at that point. Furthermore, there was additional testimony presented at the evidentiary hearing that indicates Mrs. Montgomery had interactions with other law enforcement officers and made an oral statement to the prosecutor concerning this matter, the circumstances and contents of which collateral counsel did not pursue at the evidentiary hearing. Therefore, Conahan has failed to establish that Mrs. Montgomery's testimony was false.

Additionally, the State has established that the testimony was immaterial because there was no reasonable possibility of a different verdict as it was harmless beyond a reasonable doubt. See Johnson, 44 So.3d at 64-65; Guzman, 868 So.2d at 506-07 (defendant is not entitled to relief if State can prove that presentation of false testimony was harmless beyond a reasonable doubt). As the State demonstrates, the testimony from Newman and Whitaker established that the victim and the defendant knew one another. Moreover, the admission of the Williams Rule evidence was not contingent upon Mrs. Montgomery's testimony. As we noted on direct appeal, Conahan killed Montgomery in the same manner in which he attempted to kill Stanley Burden. Montgomery and Burden were similar physically; neither one completed high school; both had difficulty in maintaining employment and were in need of money when Conahan solicited them to pose nude for money in a secluded wooded area. Both were

> tied to a tree and suffered similar abrasions and ligature wounds. Conahan, 844 So.2d at 635.
>
> Accordingly, Conahan has failed to establish that a Giglio violation occurred, and we affirm the circuit court's denial of relief.

Conahan, 118 So. 3d at 728-29.

The Florida Supreme Court reasonably applied Giglio to the facts in the record. Conahan offered no evidence challenging the truth of Montgomery-West's testimony describing a conversation she had with Montgomery about Conahan. Rather, Conahan presented evidence contrary to Montgomery-West's testimony about when she reported the conversation to police. But that testimony had been equivocal. Montgomery-West made it clear she thought she told police about the conversation during her recorded statement. Additionally, the Florida Supreme Court identified other times Montgomery-West might have relayed the information to police, and those findings are consistent with the record.

Conahan also failed to demonstrate that prosecutor Lee knew of any false testimony. Lee testified that Montgomery-West told him about the conversation before trial (though it is not clear when that occurred). (Doc. #89-6 at 1006-07). And he denied having any belief or indication that Montgomery-West testified falsely. (Id. at 1013). There is no evidence that Lee disbelieved Montgomery-West.

Conahan only offers evidence challenging Montgomery-West's testimony about when she reported the conversation to police, not her testimony about the conversation itself. The Florida Supreme Court nonetheless considered the materiality of the conversation itself and found it duplicative of other evidence linking Conahan and Montgomery—namely, the testimony of Neuman and Whitaker. The Court finds that fair-minded jurists could come to these conclusions, which precludes habeas relief. See, Harrington, supra.

The Florida Supreme Court reasonably applied the correct legal principles to Conahan's Giglio claim. Ground 2 is denied.

c. Ground 3: The State withheld material and exculpatory evidence and presented misleading evidence

Conahan accuses the State of violating Brady and Giglio when it failed to disclose a recording made between Detective Weir and Conahan during a May 29, 1996 sting operation. Conahan claims, "In that conversation, Detective Weir offered to be photographed in bondage by Mr. Conahan, who refused the offer and instead proposed performing consensual sexual acts on Weir." (Doc. #26 at 37). Conahan argues the recording is exculpatory and would have impacted the admissibility of Weir's testimony.

The post-conviction court denied this ground, and the Florida Supreme Court affirmed:

> In order to establish a Brady violation, three elements must be shown: (1) the evidence at issue was favorable

to the defendant, either because it is exculpatory or is impeaching; (2) the evidence was suppressed, willfully or inadvertently, by the State; and (3) because the evidence was material, its suppression resulted in prejudice. Strickler v. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); see also Johnson v. State, 921 So.2d 490, 507 (Fla. 2005); Rogers v. State, 782 So.2d 373, 378 (Fla. 2001). To establish the materiality element of Brady, the defendant must demonstrate "'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" Guzman, 868 So.2d at 506 (quoting United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Id. (quoting Bagley, 473 U.S. at 682, 105 S.Ct. 3375).

When addressing Brady claims, this Court utilizes a mixed standard of review, "'defer[ring] to the factual findings made by the trial court to the extent they are supported by competent, substantial evidence, but review[ing] de novo the application of those facts to the law.'" Sochor, 883 So.2d at 785 (quoting Lightbourne v. State, 841 So.2d 431, 437-38 (Fla. 2003)).

First, Conahan has failed to establish that the recording at issue actually exists and that the State suppressed this evidence. None of the witnesses at the evidentiary hearing could conclusively say whether or not a tape had been made of the May 29, 1996, undercover operation, and no one had ever seen or heard a recording from that day. Testimony or evidence that recordings were made on other days or in other operations has no bearing on whether a recording was made on May 29. Furthermore, Conahan has not presented any evidence that the State suppressed the alleged recording. Therefore, his Brady claim was properly denied on this basis alone. See Wyatt v. State, 71 So.3d 86, 106 (Fla. 2011) (denying defendant's Brady claim because he failed to establish "the existence of evidence [for the State] to withhold").

Second, Conahan has failed to establish that the evidence is either exculpatory or impeaching. Conahan claims that the contents of the tape would have shown that he was interested in seeking sex for money and was

> not interested in soliciting men for nude photographs. However, this very contention is refuted by the record. The testimony from the undercover officers demonstrates that on separate occasions Conahan solicited the officers for sex acts and to pose in nude bondage photographs. Additionally, Conahan admitted during his testimony at trial that he solicited Mr. Burden to pose in nude bondage photographs, who was the victim of the similar assault that was admitted as Williams Rule evidence. Finally, Mr. Burden's independent testimony of his encounter with Conahan also refutes the argument that Conahan did not solicit men for nude photographs. Therefore, if this recording exists, it would not have the exculpatory effect claimed by the defendant because other evidence demonstrated the defendant's solicitation of men for photographs.

Conahan, 118 So. 3d at 729.

Conahan argues the Florida Supreme Court's findings about the existence (or non-existence) of the alleged recording were unreasonable, based on the post-conviction testimony of several police officers. But none of that evidence contradicts the state court's opinion.

- Officer Weir testified that he wore a "transmitting device" during the May 29, 1996 undercover operation. He knew his backup team was monitoring the audio, and while he assumed it was being recorded, he never saw a tape. (Doc. #89-6 at 678-80). Weir was only certain that one of his four undercover operations was recorded. (Id. at 683).
- Officer Richard Goff was also involved in the May 29, 1996 operation. He had a listening device, but not a

recorder. He testified that somebody usually has a recording device, but he did not know if another officer recorded on May 29. (Id. at 689-91).

- Deputy Sheriff Ricky Lee Hobbs authorized the undercover operations. He testified that the sheriff's office "generally recorded, when possible[,]" but he did not give specific direction to record in this case. (Id. at 710). Hobbs wrote in a report that the conversations between Conahan and Wier were recorded, but that was not based on personal knowledge, and Hobbs did not know for a fact whether the May 29, 1996 operation was recorded. (Id. at 710-13).
- Detective John Columbia heard from someone that officers Padula and Goff made recordings. (Id. at 674).
- Detective Scott Clemens testified he wore a "bug" each time he interacted with Conahan undercover. He assumed the conversations were recorded, but he did not do any recording himself. (Id. at 727-29).

Conahan did not present any direct evidence that his May 29, 1996 conversation with Wier was recorded. None of the officers questioned had personal knowledge of a recording. The Florida Supreme Court thus reasonably found that Conahan failed to prove a recording existed.

Even if a recording did exist, the state court reasonably found the purported contents would not have been exculpatory. There was ample evidence at trial that Conahan solicited men for nude photo shoots, including Conahan's own admission that he asked Burden to pose nude. (See Doc. #89-3 at 1913). Evidence that Conahan declined Weir's offer on May 29, 1996 would not have meaningfully helped Conahan's case. Ground 3 is denied.

d. Ground 4: The State committed persistent prosecutorial misconduct

Conahan accuses prosecutor Lee of the following alleged misconduct: (1) delay and dismissal of trial charges stemming from the Burden attack to preserve Williams rule evidence; (2) use of testimony from Hal Linde to show Conahan's bad character and propensity to violence; (3) failure to disclose a recording of the May 29, 1996 conversation between Conahan and Weir; (4) use of Montgomery-West's false testimony; (5) improper Williams rule argument about Kenneth Smith; (6) misrepresentation of John Neuman's testimony; (7) improper argument about Montgomery-West's testimony; and (8) improper argument that Conahan removed Montgomery's genitals. Conahan argues the cumulative effect of this conduct violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

Conahan asserted different claims of prosecutorial misconduct on direct appeal. The Florida Supreme Court found the State made

improper comments during its opening statement, but concluded this was harmless error. Conahan v. State, 844 So. 2d 629, 638-40 (Fla. 2003). Conahan raised additional claims of prosecutorial misconduct in his Rule 3.851 motion, but the Florida Supreme Court found them procedurally barred:

> Conahan's additional prosecutorial misconduct claims should have or could have been raised on direct appeal. See Franqui v. State, 965 So. 2d at 35 (holding the defendant's claim that improper prosecutorial comments constituted fundamental error was procedurally barred because it could have been raised as fundamental error on direct appeal); Spencer, 842 So. 2d at 68 (holding that "[i]ssues which either were or could have been litigated…upon direct appeal are not cognizable through collateral attack") (quoting Smith v. State, 445 So. 2d 323, 325 (Fla. 1983)). Therefore, Conahan's claims are procedurally barred, and we affirm the circuit court's denial.

Conahan, 118 So. 3d at 732.

Conahan also argued in a state habeas petition that his appellate counsel should have asserted five prosecutorial-misconduct claims. The Florida Supreme Court found two of those claims procedurally barred by state law because Conahan raised them in his Rule 3.851 motion. Id. at 735. The court rejected the others as procedurally barred because they were not preserved at trial, and found them meritless:

> Because the remaining claims were not properly preserved at trial by objection, appellate counsel cannot be deficient for failing to raise these claims on appeal unless the claims constitute fundamental error. See Valle, 837 So.2d at 909. As previously explained, in order to be a fundamental error, " 'the error must reach 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.'" Jaimes, 51 So.3d at 448 (quoting Delva, 575 So.2d at 644-45).

Conahan first claims that the State committed prosecutorial misconduct by filing a nolle prosequi in the Burden case in order to gain a tactical advantage. However, Conahan provides no support for this assertion. Furthermore, there was no improper delay because as the circuit court found the State never re-filed charges in the Burden case. Thus, this claim is without merit.

Next, Conahan claims that the State misrepresented the testimony of Newman in the arguments opposing Conahan's motion for judgment of acquittal. However, this claim is refuted by the record. Specifically, the prosecutor argued that Newman had testified that Conahan initially denied knowing Montgomery, but then admitted he did know Montgomery and characterized Montgomery as a mistake. This is indeed the testimony that Newman provided at trial. Thus, the prosecution presented an accurate summary of Newman's testimony, and there was no misconduct.

Additionally, Conahan claims that the State misrepresented the testimony of Mrs. Montgomery in arguments opposing Conahan's motion for judgment of acquittal. However, this claim is also refuted by the record. Specifically, the prosecutor argued that Mrs. Montgomery had testified that her son told her that he had met a man named Conahan who was a nurse and had been in the Navy and that someone had offered her son $200 to pose in nude photographs. This is an accurate summary of Mrs. Montgomery's trial testimony. Therefore, this argument was not improper.

Next, Conahan claims that the State made improper arguments while opposing his motion for judgment of acquittal by implying that the reason the victim's genitals had been removed was to eliminate DNA evidence and that the genitals had been removed by a sharp knife, the same kind that Conahan had purchased that day. However, Conahan is not entitled to relief. The alleged improper statements were made as part of the prosecutor's specific argument opposing the judgment of acquittal on the sexual battery charge, but the trial court granted Conahan's motion for judgment of acquittal

on the sexual battery charge. Therefore, even if these arguments were misleading or improper, the error was not fundamental, and appellate counsel cannot be held deficient for failing to raise a meritless issue. Schoenwetter v. State, 46 So.3d 535, 563 (Fla.2010) (citing Rutherford v. Moore, 774 So.2d 637, 643 (Fla.2000)).

Finally, Conahan claims that the State made improper comments during the closing arguments of the guilt phase by (1) implying that Hal Linde held back in his testimony as to the full extent of Conahan's fantasy; (2) by arguing that Conahan admitted to having a dark, sexual fantasy; and (3) by arguing in conflict with the medical examiner's testimony that Conahan used a razor sharp knife to remove the genitals of Montgomery and stating there was some foreign material left behind in the genital area. Again, Conahan is not entitled to relief.

During closing arguments in the guilt phase, the prosecutor argued that Hal Linde, Conahan's former lover, had testified to Conahan's bondage fantasy that involved "picking up hitchhikers, taking them out in the woods, tying them up and having sex with them." He then stated that it was obvious that Mr. Linde still cared for Conahan and that Mr. Linde held back the ultimate culmination of the fantasy, which was to murder the men after tying them up and having sex with them. These comments were not improper misrepresentations as the record shows that Mr. Linde did in fact testify about Conahan's sexual bondage fantasy and did admit on the record that he was still in love with Conahan. Implying that the culmination of the fantasy was murder was reasonable given other evidence in the case. Conahan had seemingly acted out this same fantasy with Burden, and, as Burden testified at trial, Conahan attempted to kill Burden by trying to strangle him. Additionally, the record supports the prosecutor's statement that Conahan admitted during his testimony to having a sexual bondage fantasy that included tying individuals up in the woods.

Furthermore, the medical examiner testified at trial that the genitals had been removed "very precisely with a sharp knife, ... or a scalpel blade, very sharp" and that upon examination of the area "some foreign material was there." Therefore, the prosecutor's comments that Conahan removed the victim's genitals with a razor sharp

> knife and that there was foreign material left behind was an accurate summary of all of the testimony and evidence that had been presented.
>
> Accordingly, because appellate counsel cannot be deemed deficient for failing to raise meritless or procedurally barred issues, we deny relief.

Id. at 735-37.

Conahan argues the Florida Supreme Court was wrong when it held there was no fundamental error. That argument fails because "the fundamental error question is an issue of state law, and state law is what the state courts say it is." Pinkney v. Sec'y, DOC, 876 F.3d 1290, 1299 (11th Cir. 2017) ("As the Supreme Court and this Court have repeatedly acknowledged, it is not a federal court's role to examine the propriety of a state court's determination of state law.").

Conahan also attempts to excuse his failure to raise the Burden issue on direct appeal because the appellate record was incomplete. (Doc. #27 at 22-25). But he does not identify any particular documents that were omitted from the record, nor does he explain how any such omission caused his default. This conclusory, unsupported claim of an incomplete record does not overcome the procedural default.

Each claim in Ground 4 is denied.

e. Ground 5: Trial counsel was ineffective in the sentencing phase

Attorney Paul Sullivan led the defense team in the sentencing phase of Conahan's trial. Conahan argues Sullivan failed to investigate and present certain mitigation evidence and failed to adequately question prospective jurors.

i. Mitigation evidence

Conahan claims Sullivan failed to adequately prepare and present a mitigation case during the sentencing phase. Conahan raised this ground in his Rule 3.851 motion. After an evidentiary hearing, the postconviction court found no deficiency or prejudice and denied both claims. The Florida Supreme Court affirmed:

> Conahan claims that trial counsel was ineffective for failing to adequately investigate and present mitigation evidence in the penalty phase. Specifically, he claims trial counsel was ineffective for failing to present the mental health and competency evaluations of Doctor Gunder and Doctor Keown, failing to have a neuropsychologist evaluate him, and failing to present the testimony of the mitigation specialists, the investigator, and his sister. We affirm the circuit court's denial of relief.
>
> As explained earlier, this Court has described the two prongs of Strickland as follows:
>
> > First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.

Bolin, 41 So.3d at 155 (quoting Maxwell, 490 So.2d at 932).

Regarding the second prong,

> [the defendant] must show that but for his counsel's deficiency, there is a reasonable probability he would have received a different sentence. To assess that probability, we consider "the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the [postconviction] proceeding"—and "reweigh it against the evidence in aggravation."

Porter v. McCollum, 558 U.S. 30, 130 S. Ct. 447, 453-54, 175 L. Ed.2d 398 (2009) (quoting Williams v. Taylor, 529 U.S. 362, 397-98, 120 S. Ct. 1495, 146 L. Ed.2d 389 (2000)). "A reasonable probability is a 'probability sufficient to undermine confidence in the outcome.'" Henry, 948 So. 2d at 617 (quoting Strickland, 466 U.S. at 694, 104 S.Ct. 2052).

Here, Conahan has failed to demonstrate that trial counsel's performance resulted in prejudice. At the evidentiary hearing, Conahan did not present any additional statutory or non-statutory mitigation evidence, experts, or witnesses that would have been available at trial and that trial counsel failed to present. Additionally, Conahan did not present his sister's testimony at the evidentiary hearing, so it is unknown how it could possibly have aided him.

Thus, Conahan has not demonstrated prejudice because "the mitigating evidence adduced at the evidentiary hearing combined with the mitigation evidence presented at the penalty phase would not outweigh the evidence in aggravation." Tanzi v. State, 94 So.3d 482, 491 (Fla. 2012); see also Porter, 130 S.Ct. at 453-54. In other words, Conahan did not demonstrate that calling any of these individuals as witnesses would have resulted in mitigation that would "undermine this Court's confidence in the sentence of death when viewed in the context of the penalty phase evidence and the mitigators and aggravators found by the trial court." Hurst v. State, 18 So.3d 975, 1013 (Fla. 2009). Accordingly, we affirm the circuit court's denial of relief.

Conahan, 118 So. 3d at 730.

Conahan attacks the postconviction court's determination that Sullivan's performance was not deficient, but he does not meaningfully challenge the Florida Supreme Court's finding that he failed to establish prejudice. And indeed, the record supports the state court's determination that Conahan failed to identify any mitigation evidence that Sullivan unreasonably failed to present.

In his habeas petition, Conahan points to the following omissions by Sullivan: he did not arrange a neuropsychological evaluation of Conahan or present any expert mental health testimony; he did not present testimony from Shawn Luedke (Conahan's sister) or investigator Laura Blankman; and he did not introduce the mental health and competency evaluations that indicated Conahan was neither mentally ill nor a sexual sadist.

Conahan failed to prove that any of these omissions prejudiced him. The mental health and competency evaluations did not include any mitigating findings, and even now, Conahan does not identify any mitigation theory those reports could have supported. Conahan also failed to produce any evidence that a neuropsychological evaluation or other mental health testimony would have been mitigating. He did not present any such testimony at the postconviction hearing. Sullivan did not call Shawn Luedke

because she did not want to testify, and Conahan did not want to involve her. (Doc. #89-6 at 533). Luedke did not testify at the evidentiary hearing, so Conahan can only speculate about what she might have said. Sullivan testified he did not call Blankman because he did not think she could give any non-duplicative testimony. (Id. at 432). At the postconviction hearing, Blankman recounted the investigative work she did for the case, but she did not describe any mitigation testimony she could have contributed at sentencing. Nor did she testify she was available to testify—she had not attended either phase of the trial. (Id. at 915-57).

The record supports the Florida Supreme Court's finding that Conahan failed to prove the existence of any available mitigating evidence that Sullivan failed to present. Because Conahan failed to show prejudice, the Florida Supreme Court correctly applied Strickland by denying this sub-ground.

ii. Jury selection

Conahan also argues Sullivan should have questioned the jury venire about their feelings or opinions concerning mitigation, homosexuality, sexual fantasies, bondage, or drug use. The postconviction court found that Conahan failed to establish either prong of Strickland. On appeal, Conahan only argued the homosexuality issue, so the other issues are unexhausted and procedurally barred. The Florida Supreme Court found that Conahan failed to prove this claim:

> Specifically, Conahan has failed to establish prejudice under Strickland. This Court has previously held that a defendant must demonstrate that an unqualified or biased juror actually served on his jury in order to demonstrate prejudice in a postconviction ineffective assistance of counsel claim. See Davis v. State, 928 So. 2d 1089, 1117 (Fla. 2005). Conahan has not presented any evidence that a juror who was biased because of his or her personal views regarding homosexuality actually served on his jury. Therefore, there is not a reasonable probability of a different sentence, and our confidence in the outcome is not undermined.

Conahan, 118 So. 3d at 731.

The Florida Supreme Court correctly applied Strickland here. Conahan presented no evidence that any juror was biased against homosexuality. In his appeal brief, Conahan asked the court to presume prejudice "because when it comes to homosexuality in modern society, few issues are as polarizing and cause such heated rhetoric." (Doc. #89-6 at 1120). The court correctly rejected that presumption. See Fennell v. Sec'y, Fla. Dep't of Corr., 582 F. App'x 828, 834 (11th Cir. 2014) (rejecting a jury-selection Strickland claim because the petitioner "did not show that [the juror] was actually biased against him").

Conahan presents a new factual basis in his federal habeas petition. During the sentencing phase, the bailiff found newspaper articles about two unrelated murders in the jury room. One described a murder case in Wyoming, in which the prosecution emphasized homosexual relations as a motivation for the killing. Conahan did not develop this argument in state court, so it is

unexhausted. See McNair v. Campbell, 416 F.3d 1291, 1302 (11th Cir. 2005) ("While we do not require a verbatim restatement of the claims brought in state court, we do require that a petitioner presented his claims to the state court such that a reasonable reader would understand each claim's particular legal basis and specific factual foundation." (internal quotation marks and citations omitted)). And even if Conahan had properly exhausted this specific factual foundation in state court, this sub-ground would still be too speculative to prove prejudice under Strickland.

Ground 5 is denied.

f. Ground 6: Admission of Williams rule evidence was fundamental error

Conahan argues the trial court misapplied Florida law when it admitted evidence of certain extrinsic acts under the Williams rule, including the aborted attack on Burden and the solicitations of Detectives Weir and Clemens. Conahan did not raise this claim on direct appeal. But the state court had an opportunity to consider the issue when Conahan argued in his state habeas petition that his appellate counsel was ineffective for failing to raise the claim on direct appeal. The Florida Supreme Court found the trial court properly admitted the evidence under Florida law:

> In this case, the admission of the Williams rule evidence was not error, let alone fundamental error. First, the Williams rule evidence was established by clear and convincing evidence. Mr. Burden gave unrebutted testimony at trial detailing his encounter with Conahan and the assault. Furthermore, the undercover detectives

testified at trial regarding their interactions with Conahan and how Conahan had solicited them to pose in nude bondage photographs. Additionally, there were recordings of some of these operations that confirmed the detectives' testimony.

Second, the evidence was sufficiently similar and properly admitted because as the trial court found, there were various points of similarity that were relevant to prove a common scheme or plan and an unusual modus operandi. We have previously held that the collateral crime does not have to be identical to the crime charged in order to be admitted as Williams rule evidence. See Gore v. State, 599 So.2d 978, 984 (Fla. 1992) (noting that the collateral crime does not have to be identical to the crime charged and finding that the collateral crime in Gore was properly admitted and the dissimilarities seemed to be the result of differences in opportunity rather than differences in modus operandi); see also Durousseau v. State, 55 So.3d 543, 551-52 (Fla. 2010) (holding that evidence that the defendant committed substantially similar crimes on other occasions was properly admitted as Williams rule evidence because it was relevant to material issues such as identify and premeditation), cert. denied, --- U.S. ---, 132 S.Ct. 149, 181 L.Ed.2d 66 (2011).

Specifically, the trial court found multiple similarities between the victims, Burden and Montgomery, namely age, race, height, weight, and complexion. There were similarities between the crime scenes, including that they were both remote, secluded, wooded areas, accessible only by feet, and the victims were tied to a tree. In addition, the crimes were conducted in a similar manner. Clothesline-like rope was used, placement of rope and the strangulation caused grooved abrasions on the neck in the same area, both victims were naked, ropes were placed tightly on the wrists of the victims, the victims were offered money to pose in nude photos, and Conahan had purchased cutting pliers near the time of each crime.

Furthermore, although the Williams rule evidence was helpful in establishing a common scheme or plan and a unique modus operandi, it did not become a feature of the trial. The State produced other evidence that established Conahan's guilt, including testimony from

> other witnesses that the victim and Conahan knew each other, testimony from the victim's friends that Montgomery stated he was going to do something to make $200 on the night he was killed, evidence that Conahan withdrew a similar amount of cash from an ATM that evening, and a Walmart receipt showing that on the evening Conahan bought a rope identical to the one that the victim was tied up with, as well as a pair of pliers, polaroid film, and a knife. There was also testimony from the victim's mother that her son had told her he had met a man named Conahan and that someone had offered him money to pose in nude photographs. Conahan's former lover testified that Conahan had a bondage fantasy, and Conahan himself admitted that he had a bondage fantasy. Moreover, there was other forensic evidence.
>
> Accordingly, the Williams rule evidence was properly admitted and did not become an improper feature of the trial. Because it was properly admitted, there was no fundamental error. And appellate counsel cannot be deemed deficient for failing to raise this meritless issue.

Conahan, 118 So. 3d at 733-34.

Conahan's claim that the Florida courts misapplied Florida law—namely, the Williams rule and the fundamental error doctrine—is not cognizable in a federal habeas case. "[I]t is only noncompliance with *federal* law that renders a State's criminal judgment susceptible to collateral attack in federal courts." Wilson, 562 U.S. at 5; see also Estelle v. McGuire, 502 U.S. 62, 63 (1991) ("It was also improper for the Court of Appeals to base its holding on its conclusion that the evidence was incorrectly admitted under state law, since it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.").

Conahan asserts that admission of the Williams rule evidence violated his due process rights. While a federal habeas case generally will not review a state court's decisions on the admissibility of evidence, "where a state court's ruling is claimed to have deprived a defendant of his right to due process, a federal court should then inquire only to determine whether the error was of such magnitude as to deny fundamental fairness to the criminal trial." Tidwell v. Butler, 415 F. App'x 979, 980 (11th Cir. 2011) (citation omitted). Conahan has not shown the Williams rule evidence denied him a fundamentally fair trial. As the Florida Supreme Court explained, the Williams rule evidence was relevant to establish a scheme and modus operandi similar to the murder of Montgomery. See id. at 980 n.2. Though Conahan claimed the Williams rule evidence violated "clearly applicable United States Supreme Court precedent[,]" he did not identify a single relevant Supreme Court case. Ground 6 is denied.

g. Ground 7: Defective search warrants

Conahan claims, "If the search warrants were unconstitutional, a number of items and objects were illegally seized by the police" because "many items listed as objects of the search in the affidavit were described with no more particularity than were in the search warrants." (Doc. #26 at 88). Conahan made a similar argument as part of an ineffective-assistance-of-

appellate-counsel claim in his state habeas petition. The Florida Supreme Court rejected it:

> Conahan also claims that appellate counsel was ineffective for failing to argue on direct appeal that there was a flawed search. However, Conahan is not entitled to habeas relief because this claim is facially insufficient. A habeas petition must plead specific facts that entitle the defendant to relief. Conclusory allegations have repeatedly been held insufficient by this Court because they do not permit the court to examine the specific allegations against the record. Bradley v. State, 33 So.3d 664, 685 (Fla. 2010) (citing Doorbal v. State, 983 So.2d 464, 482 (Fla. 2008)); Patton v. State, 878 So.2d 368, 380 (Fla. 2004) (citing Ragsdale v. State, 720 So.2d 203, 207 (Fla. 1998) (finding that conclusory allegations are also not sufficient for appellate purposes in habeas proceedings)). Because Conahan fails to plead specific facts as to how the search warrants and supporting affidavits were deficient, his claim is merely conclusory and speculative. Therefore, he is not entitled to relief.

Conahan, 118 So. 3d at 734.

This ground fails for the same reason—it is facially insufficient. Conahan merely speculates—without any supporting facts—that some search warrants might have been unconstitutional. He does not allege any specific deficiencies in the warrants or affidavits. And because Conahan failed to develop any factual basis for this claim in state court, the warrants and affidavits are not in the record, and Conahan may not introduce them now. See 28 U.S.C. § 2254(e)(2); see also Shinn v. Ramirez, 142 S. Ct. 1718, 1728 (2022). Conahan also fails to allege a violation of any federal law. Ground 7 is denied.

h. Ground 8: The State failed to disclose promises of assistance made to Burden in return for his testimony

In a 2018 supplement to his federal habeas petition, Conahan raised a new Brady/Giglio claim. At the time of Conahan's trial, Burden was in the early years of a maximum 25-year prison sentence in Ohio. Conahan's counsel received a letter Burden wrote to a man named Ken Karnig that claimed prosecutor Lee told Burden he would help with the Ohio parole board. Burden repeated that claim in interviews and an affidavit. (Doc. #57-1). A handwritten line at the bottom of the affidavit claims Lee told Burden not to disclose the promise. (Id. at 15). Burden testified at trial that no one offered him anything in exchange for testifying. (Doc. #89-3 at 873).

Conahan raised this claim in state court in a successive Rule 3.851 motion. The state postconviction court summarily rejected it. The Florida Supreme Court affirmed because Conahan failed to satisfy Florida's standard for a new trial based on newly discovered evidence, and because the new evidence was not material under the Giglio and Brady standards:

> To obtain a new trial based on newly discovered evidence, the second prong requires that "the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial." Johnston v. State 27, So.3d 11, 18 (Fla. 2010) (quoting Jones v. State, 709 SO. 2d 512, 521 (Fla. 1998)). "If the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence." Id. at 18-19 (quoting Marek v. State, 14 So. 3d 985, 990 (Fla. 2009)).

> Evidence is material under Giglio "if there is any reasonable possibility that it could have affected the verdict, and the State bears the burden of proving the false testimony was not material by demonstrating it was harmless beyond a reasonable doubt." Rivera v. State, 187 So. 3d 822, 835 (Fla. 2015). Under Brady, "[t]o establish the materiality prong, a defendant must demonstrate a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. In other words, evidence is material under Brady only if it undermines confidence in the verdict." Id. at 838 (citation omitted).
>
> Here, in Burden's November 2015 affidavit, Burden explained that he would not have testified voluntarily but for a promise from the prosecutor to write a letter to the parole board on Burden's behalf. Burden did not recant his testimony that Conahan tied him to a tree and attempted to sodomize and strangle him. Moreover, there was physical evidence corroborating Burden's testimony, including scars around Burden's neck and indentations around the tree from the rope that Conahan used to restrain and to attempt to strangle Burden. Additionally, the trier-of-fact was already aware from Burden's testimony that Burden hoped that by testifying he would get documentation illustrating his cooperation that he could contribute to his court file and prison record and that he planned to inform the parole board about his cooperation in the Montgomery case.
>
> Accordingly, we affirm the denial of Conahan's first claim because the alleged newly discovered evidence would not probably produce an acquittal or a less severe sentence, there is not a reasonable possibility that it could have affected the result, and our confidence in the outcome is not undermined. See Kormondy v. State, 154 So. 3d 341, 352–53 (Fla. 2015); State v. Woodel, 145 So. 3d 782, 806–07 (Fla. 2014); Ponticelli v. State, 941 So. 2d 1073, 1085–86, 1088–89 (Fla. 2006).

Conahan, 2017 WL 656306 at *1.

The Florida Supreme Court reasonably applied the federal standard for Giglio/Brady claims. It correctly recognized that

the State must prove the materiality prong beyond a reasonable doubt, and its determination that the State carried its burden was reasonable. Burden did not claim Lee's promise influenced the substance of his testimony. Rather, his affidavit states, "If Prosecutor Lee had not promised that he would write the letter to the Parole Board, I would have come back to Ohio without testifying or cooperating."[7] (Doc. #57-1 at 14). If the affidavit left any uncertainty about when Lee allegedly made the promise, Burden's letter to Karnig cleared it up. He wrote, "After we land [sic] we drove to Desoto County Jail where I stayed during the trial. I ask Mr. Lee if he would give me a little help with the parole board and he tells me he'll go to bat for me!" (Id. at 3). The timing eliminates any implication that Burden concocted a story about Conahan because of the alleged promise. Burden identified Conahan as his attacker and described the attack multiple times years earlier—the record contains a detailed account of the attack Burden gave in a deposition about two years before trial. (Doc. #89-7 at 150-203). Burden has not recanted any of that testimony.

The newly discovered evidence is relevant to Burden's credibility. But it would not have made a significant impact on the trial judge—the guilt-phase factfinder in this case—who already questioned Burden's credibility. (Doc. #89-3 at 1583 ("I

[7] The postconviction court noted that Burden was subject to a subpoena. (Doc. #89-6).

would agree with the Defendant's argument that had Burden simply testified his testimony might be subject to some questionable credibility")). The court credited Burden's testimony about the attack because it was corroborated by physical evidence, including scars on Burden's neck and pictures police took during their investigation. (Id.) Thus, the newly discovered evidence did not undermine Burden's inculpatory testimony, nor would it have impacted the admissibility of Burden's testimony under the Williams rule.

There is no reasonable probability that evidence of Lee's alleged secret promise to write the Ohio parole board a letter on Burden's behalf would change the outcome of the proceedings. Ground 8 is denied.

i. Ground 9: The Florida Supreme Court misapplied Hurst v. Florida

In Hurst v. Florida, 577 U.S. 92 (2016), the Supreme Court held that Florida's capital sentencing scheme violated the Sixth Amendment. The Hurst Court summarized the pre-Hurst sentencing procedure Florida courts used after a defendant was convicted of a capital crime:

> The additional sentencing proceeding Florida employs is a "hybrid" proceeding in which a jury renders an advisory verdict but the judge makes the ultimate sentencing determinations. First, the sentencing judge conducts an evidentiary hearing before a jury. Next, the jury renders an advisory sentence of life or death without specifying the factual basis of its recommendation. Notwithstanding the recommendation of a majority of the

> jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death. If the court imposes death, it must set forth in writing its findings upon which the sentence of death is based. Although the judge must give the jury recommendation great weight, the sentencing order must reflect the trial judge's independent judgment about the existence of aggravating and mitigating factors.

Hurst v. Florida, 577 U.S. 92 at 95-96 (2016) (internal quotation marks and citations omitted). This procedure was in effect when Conahan was sentenced. The Supreme Court found it unconstitutional because it requires a judge—not a jury—to make the critical factual findings necessary to impose the death penalty. Id. at 98. The Court declined to address the State's assertion that any error was harmless and remanded the case. Id. at 102-03.

On remand, the Florida Supreme Court went a step further. Along with the existence of aggravating circumstances, it held that a "jury must also unanimously find that the aggravating factors are *sufficient* for the imposition of death and unanimously find that the aggravating factors *outweigh* the mitigation before a sentence of death may be considered by the judge." Hurst v. State, 202 So. 3d 40, 54 (Fla. 2016). The court based its heightened protection in part on Florida law and in part on its understanding that "Hurst v. Florida mandates that all the findings necessary for imposition of a death sentence are 'elements' that must be found by a jury[.]" Id. at 57.

The Florida legislature codified Hurst v. State's heightened standard in 2017. Under Florida Statute § 921.141, a court may only impose the death penalty if a jury unanimously (1) finds at least one aggravating factor and (2) determines the defendant should be sentenced to death. The Florida Supreme Court has since recognized that it "erred in Hurst v. State when [it] held that the Eighth Amendment requires a unanimous jury recommendation of death." State v. Poole, 297 So. 3d 487, 504 (Fla. 2020) (citing Spaziano v. Florida, 468 U.S. 447 (1984)). The court receded from Hurst v. State "except to the extent that it held that a jury must unanimously find the existence of a statutory aggravating circumstance beyond a reasonable doubt." Id. at 491.

Conahan argued in a successive Rule 3.851 motion that his sentence must be vacated in light of Hurst, Caldwell v. Mississippi,[8] and the amended Florida Statute § 921.141. The Florida Supreme Court agreed that Hurst retroactively applies to Conahan's case, but denied relief:

> [B]ecause we find that the Hurst error in this case is harmless beyond a reasonable doubt, we affirm the denial of Hurst relief. See Davis v. State, 207 So. 3d 142, 175 (Fla. 2016) ("The unanimous recommendations here are precisely what we determined in Hurst to be constitutionally necessary to impose a sentence of death."), cert. denied, --- U.S. ----, 137 S.Ct. 2218, 198 L.Ed.2d 663 (2017). We also reject Conahan's Hurst-induced Caldwell claim. See Reynolds v. State, 251 So. 3d 811, 824-25 (Fla. 2018) petition for cert. filed, No. 18-5181 (U.S. July 3, 2018). Finally, we reject

[8] Caldwell v. Mississippi, 472 U.S. 320 (1985)

> Conahan's contention that he is entitled to application of chapter 2017-1, Laws of Florida. See Taylor v. State, 246 So. 3d 231, 240 (Fla. 2018) ("[W]e rejected as without merit the claim that chapter 2017-1, Laws of Florida, created a substantive right that must be retroactively applied.").

Conahan v. State, 258 So. 3d 1237, 1238 (Fla. 2018). In a supplement to his federal habeas petition, Conahan challenges the state court's rejection of his three Hurst-related claims.

i. Harmless error

Conahan argues the Florida Supreme Court did not conduct a proper harmless-error review, but rather applies a per se rule of denying Hurst claims when a jury unanimously recommended the death penalty. The Florida Supreme Court explained in a different case how it determines when a Hurst error is harmless:

> Preliminarily, we look to whether the jury recommendation was unanimous…Yet a unanimous recommendation is not sufficient alone; rather, it begins a foundation for us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors. Hence, we look to other factors such as the jury instructions…Next, we review the aggravators and mitigators…[W]e have stated that it must be clear beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravating factors that outweighed the mitigating circumstances…Finally, we look at the facts of the case.

Reynolds v. State, 251 So. 3d 811, 815-18 (Fla. 2018) (cleaned up).

Conahan fails to show that the Florida Supreme Court's harmless-error analysis was contrary to any federal law. First,

the Supreme Court's Hurst opinion suggests harmless error is an issue for state courts to decide. The Florida Supreme Court's method of review shows why. It is built around Florida law, which is more protective than federal law. As explained above, the Constitution permits a Florida court to impose the death penalty only if a jury unanimously finds the existence of an aggravating factor. Florida law also requires the jury to unanimously recommend death after considering mitigating factors.

The jury in this case unanimously recommended the death sentence. Under both federal and Florida law, a jury is presumed to follow the trial court's instructions. United States v. Perry, 14 F.4th 1253, 1276 (11th Cir. 2021); Carter v. Brown & Williamson Tobacco Corp., 778 So.2d 932, 942 (Fla. 2000). Reviewing courts can draw inferences about a jury's findings from the jury instructions. The trial court in Conahan's case gave the following instruction:

> [I]t is your duty to follow the law that will now be given to you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist…If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without parole. Should you find sufficient aggravating circumstances do exist it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

(Doc. #89-4 at 483-86). Conahan's jury could not have recommended the death penalty without first finding at least one aggravating factor. That is what the Constitution requires. Conahan argues there is a reasonable probability that at least one juror might have weighed the aggravating and mitigating factors differently absent the Hurst error, but that argument arises from state law protections and is not reviewable here.

ii. Caldwell

Conahan's next claim is based on Caldwell and Hurst. He argues the pre-Hurst jury instructions violated Caldwell because they did not inform the jury that a death recommendation must be unanimous. The Supreme Court explained the reach of Caldwell in Romero v. Oklahoma:

> [W]e have since read Caldwell as relevant only to certain types of comment—those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision. Thus, to establish a Caldwell violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law.

512 U.S. 1, 9 (1994) (cleaned up).

Conahan fails to identify any part of the trial court's instructions that mischaracterized the jury's role in sentencing. Nor did he identify any comment from the trial court or prosecutor that invited the jury to feel less responsible than it should. Conahan presents no precedent suggesting that Florida's pre-Hurst

jury instructions violated Caldwell. Conahan instead relies on Justice Breyer's explanatory statement and Justice Sotomayor's dissent in the Supreme Court's denial of certiorari in Reynolds v. Florida, 139 S. Ct. 27 (2018), both of which are based on reasoning not adopted by a majority of justices. This Court cannot grant habeas relief based on dissenting opinions. See Purcell v. BankAtlantic Fin. Corp., 85 F.3d 1508, 1513 (11th Cir. 1996) ("a dissenting Supreme Court opinion is not binding precedent").

For these reasons, Conahan's Caldwell claim lacks merit. See Davis v. Singletary, 119 F.3d 1471, 1482 (11th Cir. 1997) ("[I]t is clear that references to and descriptions of the jury's sentencing verdict as an advisory one, as a recommendation to the judge, and of the judge as the final sentencing authority are not error under Caldwell…because they accurately characterize the jury's and judge's sentencing roles under Florida law.").

iii. Revised sentencing statute

Finally, Conahan argues the Florida Supreme Court should have retroactively applied the 2017 amendments to Florida's capital sentencing scheme to Conahan's case. The changes to Florida law prompted by Hurst and codified in Florida Statute § 921.141 are procedural, not substantive. Knight v. Fla. Dep't of Corr., 936 F.3d 1322, 1336-67 (11th Cir. 2019). And the Supreme Court has held, "New rules of procedure…generally do not apply retroactively." Schriro v. Summerlin, 542 U.S. 348, 352 (2004).

The Court recognized exceptions for "a small set of watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." Id. (internal quotations marks and citations omitted). The amendment of Florida Statute 921.141 does not meet that stringent standard, so federal law does not require its retroactive application. See id. (declining to require retroactive application of Ring v. Arizona, 536 U.S. 584 (2002), which established the right to a jury determination of aggravating circumstances in capital cases).

IV. Certificate of Appealability

A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253(c)(1). Rather, a district court must first issue a certificate of appealability (COA). "A [COA] may issue…only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, a petitioner must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," Tennard v. Dretke, 542 U.S. 274, 282 (2004) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)), or that "the issues presented were adequate to deserve encouragement to proceed further," Miller-El v. Cockrell, 537 U.S. 322, 335-36 (2003) (citations omitted). Conahan has not made the requisite

showing here and may not have a certificate of appealability on any ground of his original or supplemental petitions.

Accordingly, it is hereby

ORDERED:

(1) Daniel O. Conahan's Amended Petition for Writ of Habeas Corpus (Doc. #26) and two supplements (Docs. #56 and #62) are **DENIED.**

(2) Conahan is not entitled to a certificate of appealability.

(3) The Clerk is **DIRECTED** to terminate any pending motions and deadlines, enter judgment, and close this case.

DONE and ORDERED at Fort Myers, Florida, this 27th day of March 2023.

JOHN E. STEELE
SENIOR UNITED STATES DISTRICT JUDGE

Copies:
Counsel of Record

DOCKET NO. _____

OCTOBER TERM 2024

IN THE

SUPREME COURT OF THE UNITED STATES

DANIEL OWEN CONAHAN, JR.
Petitioner,

vs.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS
AND FLORIDA ATTORNEY GENERAL.
Respondent.

On Petition For A Writ of Certiorari To
The United States Court of Appeals For The Eleventh Circuit

APPENDIX D

Conahan v. Sec'y, Dep't of Corr., No. 2:13-cv-428-JES-KCD
(M.D. Fla. Feb. 13, 2024)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

DANIEL O. CONAHAN, JR.,

Petitioner,

v. Case No: 2:13-cv-428-JES-KCD

SECRETARY, DEPARTMENT OF CORRECTIONS and FLORIDA ATTORNEY GENERAL,

Respondents.

ORDER

This matter comes before the Court on Petitioner Daniel O. Conahan, Jr.'s Motion to Alter or Amend Judgment Pursuant to Federal Rule of Civil Procedure 59(e) (Doc. #95). Conahan was convicted of the kidnapping and murder of Richard Alan Montgomery, and he is sentenced to death. The Court denied Conahan's Amended Petition for Writ of Habeas Corpus. (Doc. #92.)

Conahan now asks the Court to reconsider the rejection of his Giglio[1] claims, Grounds 2 and 8 in the Amended Petition. In Ground 2, Conahan argued the State violated Giglio by knowingly using false testimony of the victim's mother, Mary Montgomery-West. Montgomery-West testified about the last conversation she had with her son, during which he talked about a new friend named Daniel Conahan. That testimony remains unrefuted. The disputed part of Montgomery-West's testimony came during cross-examination. She

[1] Giglio v. United States, 405 U.S. 150 (1972).

said she thought she told police about the conversation during a recorded statement, but the State stipulated the that the name Conahan did not appear in the recorded statement. The Florida Supreme Court rejected this claim because Conahan failed to prove the testimony false, and because the State proved the testimony was immaterial. This Court found the Florida Supreme Court's decision to be a reasonable application of federal law.

Ground 8 centers on the testimony of Stanley Burden, who was serving a prison sentence in Ohio at the time of trial. Burden testified that Conahan attempted to kill him in the same way he killed Montgomery. Burden also testified that no one offered him anything in exchange for testifying. In post-conviction proceedings, Conahan presented evidence that the prosecutor said he would help Burden with the Ohio parole board. The Florida Supreme Court rejected this claim because Burden did not recant his testimony describing Conahan's attempt to kill him, physical evidence corroborated that testimony, and the trial judge (the trier-of-fact in Conahan's criminal trial) was aware that Burden hoped documentation of his cooperation would help him win parole. Thus, there was no reasonable probability the newly discovered evidence would have changed the outcome of Conahan's trial. Again, this Court found the Florida Supreme Court's decision to be a reasonable application of federal law.

Conahan now asks the Court to alter or amend its judgment under Federal Rule of Civil Procedure 59(e). "The only grounds

for granting a Rule 59 motion are newly-discovered evidence or manifest errors of law or fact." Arthur v. King, 500 F.3d 1335, 1343 (11th Cir. 2007) (quoting In re Kellogg, 197 F.3d 1116, 1119 (11th Cir. 1999)). "A Rule 59(e) motion cannot be used to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." Id. (quoting Michael Linet, Inc. v. Vill. Of Wellington, Fla., 408 F.3d 757, 763 (11th Cir. 2005)).

The Court finds no good cause for reconsideration here. First, Conahan states no valid ground for Rule 59(e) relief. Rather, Conahan merely seeks to relitigate issues the Court already decided. He argues the Court erred in denying Grounds 2 and 8 because the Florida Supreme Court failed to consider the cumulative effect of (1) the State's concealment of Montgomery-West's claim that her son identified Conahan by name and (2) Burden's willingness to lie. Conahan had a fair opportunity to challenge the Florida Supreme Court's rejection of his Giglio claims, and this Court considered Conahan's challenges and found that the state court reasonably applied federal law.

Second, Conahan's argument lacks merit. His claim that the Florida Supreme Court failed to consider the cumulative effect of the Giglio claims is entirely conclusory. Conahan points to nothing in the record suggesting the Florida Supreme Court failed to consider the materiality of his Giglio claims "in the context of the entire record," as required by Supreme Court precedence.

See Turner v. United States, 582 U.S. 313, 324-25 (2017). In fact, the state court's analyses of Conahan's claims—which are block-quoted in this Court's prior Opinion and Order (Doc. #92)—show the court considered the totality of the circumstances in its analysis of both claims. And the court's findings of immateriality were reasonable in the context of the entire record. Montgomery-West's testimony was cumulative with other evidence linking Conahan and the victim. (See Doc. #92 at 26.) As for Burden's "willingness to lie," the trial judge already questioned his credibility. The court credited Burden's testimony because it was corroborated by physical evidence. (See id. at 91-92.) As this Court has already held, the Florida Supreme Court reasonably rejected both of Conahan's Giglio claims.

Accordingly, it is hereby

ORDERED:

Petitioner's Motion to Alter or Amend Judgment Pursuant to Federal Rule of Civil Procedure 59(e) (Doc. #95) is **DENIED.**

DONE and ORDERED at Fort Myers, Florida, this 13th day of February 2024.

JOHN E. STEELE
SENIOR UNITED STATES DISTRICT JUDGE

Copies:
Counsel of Record

DOCKET NO. _____

OCTOBER TERM 2024

IN THE

SUPREME COURT OF THE UNITED STATES

DANIEL OWEN CONAHAN, JR.
Petitioner,

vs.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS
AND FLORIDA ATTORNEY GENERAL.
Respondent.

On Petition For A Writ of Certiorari To
The United States Court of Appeals For The Eleventh Circuit

APPENDIX E

Petitioner-Appellant's Application for Certificate of Appealability, filed in the Eleventh Circuit Court of Appeals, No.24-10844, April 4, 2024

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 24-10844

DANIEL O. CONAHAN, JR.

Petitioner-Appellant,

vs.

RICKY D. DIXON, SECRETARY,
Florida Department of Corrections,

Respondent -Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

PETITIONER-APPELLANT'S APPLICATION FOR CERTIFICATE OF APPEALABILITY

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APPLICATION FOR CERTIFICATE OF APPEALABILITY

COMES NOW THE PETITIONER–APPELLANT, DANIEL O. CONAHAN, JR., by and through his undersigned counsel and herein respectfully moves this Court for the issuance of a Certificate of Appealability (hereinafter "COA"). In support thereof, Petitioner–Appellant states:

Petitioner–Appellant is an indigent death–sentenced Florida inmate who seeks to appeal the district court's denial of his petition for writ of habeas corpus.

In its order denying relief the district court specifically declined to issue a COA. Petitioner–Appellant requests that this Court grant him a COA on the basis of the arguments set out below.

Standards Governing the Granting a COA

A timely notice of appeal from the final order denying habeas corpus relief has been filed in the above-captioned case, and pursuant to 28 U.S.C. § 2253 as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA), a COA is a prerequisite to an appeal.

A prisoner seeking a COA need only demonstrate a "substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(C)(2). A prisoner is capable of satisfying this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed

further. *See Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Even if a claim is denied on procedural grounds a COA is still grantable when jurists of reason would find it debatable "whether the petition states a valid claim of the denial of a constitutional right" and "whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

While a court faced with a determination as to which claims a COA should be granted is required to conduct an "overview" of the claims and a "general assessment of their merits," *Miller-El*, 537 U.S. at 336, the threshold requirement for the issuance of a COA "does not require full consideration of the factual or legal bases adduced in support of the claims. The statute forbids it." *Id*. A petitioner need not show—nor must the Court be convinced—that the "appeal will succeed" in order for a COA to issue; nor should a court decline to issue a COA merely because the Court "believes the applicant will not demonstrate an entitlement to relief." *Id*. at 337. A petitioner is not required to demonstrate that "some jurists would grant the petition for habeas corpus" in order for a COA to properly issue. *Id*. at 338. And while the severity of the penalty is not by itself sufficient to warrant the automatic issuance of a COA, "[i]n a capital case, the nature of the penalty is a proper consideration in determining whether to issue a certificate of probable cause." *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983).

Under the applicable standard as outlined above, Conahan is entitled to the

issuance of a COA with respect to the claims highlighted in this application to the Court.

Procedural Background and Facts Relevant To This Appeal

On February 27, 1997, Conahan was indicted by the Twentieth Judicial Circuit in and for Charlotte County, Florida, on one count of first-degree 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, all in relation to the murder of Richard Montgomery. (R-1.)

Montgomery left his home on April 16, 1996. His nude body was found the following day in a remote, heavily wooded area, and had ligature and tie marks on his neck, wrists, abdomen, and legs, and his genitals had been removed. In the days and weeks following his death, police spoke to family, friends, roommates, and an ex-girlfriend, developing many leads, many of which were never thoroughly investigated.

The State built a circumstantial case against Conahan, there was no direct evidence linking him to the gruesome crime. At trial, the State presented circumstantial "scientific forensic" evidence purporting to identify a similarity in a single paint chip from a car and five fibers linking Conahan to the crime.[1] The

[1] On February 23, 2023, Conahan filed a successive postconviction motion

State also established that Conahan had purchased items: polaroid film, a utility knife and clothesline, from a Walmart in Punta Gorda, Florida on the day of the crime. However, these items were never directly linked to the crime scene or Montgomery's death.

Conahan waived his right to a jury trial for the determination of guilt and Judge William Blackwell, who appointed himself just four days earlier following the disqualification of Judge Cynthia A. Ellis, heard the case. (T-649.)[2] In part because Montgomery's body contained ligature marks, the State's theory was that Conahan, who is gay, had lured Montgomery, another gay man, to the wooded area under a pretense of photographing Montgomery in nude bondage themes, and strangled him.

Judge Blackwell, over Defense objection, allowed the State to introduce *Williams*[3] rule evidence including allowing Stanley Burden to testify that two years

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in state court challenging the reliability of this forensic evidence. That motion remains pending. Upon filing, Conahan sought a stay of his habeas proceedings from the district court to resolve this claim in state court, but the district court denied his motion.

[2] Citations to the record:

(R-__.) Record on Appeal; (T-__.) Trial Transcripts;
(PCR-__.) Postconviction Record; (EH-__.) Evidentiary Hearing Transcripts,
(PCR2-__.) Successive Postconviction Record, (Doc. __.) District Court Docket. All other citations will be self-explanatory.

[3] *Williams v. State*, 110 So. 2d 654, 662 (Fla. 1959) ("[E]vidence revealing

earlier, Conahan had lured him into the woods under similar pretenses, tried to strangle him, and then simply gave up. The trial court made a finding that Burden's testimony was indicative of a modus operandi that identified Conahan as the perpetrator in Montgomery's death. (T-2499.) Judge Blackwell declined to address the *Williams* rule in advance of trial and instead allowed the State to proffer the evidence as it presented its entire case. Comingling the *Williams* rule evidence artificially inflated the weight and veracity of the circumstantial evidence.

The State also presented the testimony of Montgomery's mother, Mary Montgomery-West. Montgomery-West had given a recorded statement to the Florida Department of Law Enforcement (FDLE) just two days after her son was murdered, in which she provided candid details about her son's life. (PCR-900.) At trial, Montgomery-West repeated much of what she told police in that statement. (T-1099-1101.)

On cross examination, for the first time ever, Montgomery-West claimed that her son had spoken of Conahan by name and that her son had described Conahan to her as his new friend. (T-1103-06.) Surprised by this revelation,

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other crimes is admissible if it casts light upon the character of the act under investigation by showing motive, intent, absence of mistake, common scheme, identity or a system or general pattern of criminality so that the evidence of the prior offenses would have a relevant or a material bearing on some essential aspect of the offense being tried.")

counsel asked Montgomery-West why she did not provide this information to police. She first claimed that she told police during her recorded statement, but that many things she said were not in the transcript. (T-1107.) She later changed her testimony and claimed that the "inaudible" entries throughout her statement were actually where she told police about the conversation. (T-1114.)

At the conclusion of the State's case, Judge Blackwell granted trial counsel's motion for a judgment of acquittal on the sexual battery, but found Conahan guilty on the first-degree murder and kidnapping charges. (T-1873, 2016.) The State entered a nolle prosequi on the first-degree felony murder count. (T-2697.)

After moving for a change of venue, the court conducted Conahan's penalty phase in Naples, Florida, located in Collier County, November 1-3, 1999. (T-2688.) Conahan elected to have a jury for the penalty phase, for which the entire selection occurred on the morning of the first day. Without making any factual findings regarding mitigation or aggravation, the jury "advise[d] and recommende[d]" death by a vote of 12-to-0. (T-2688, R. 3235.) On November 5, 1999, the Court held a *Spencer*[4] hearing where Conahan maintained his innocence. (T-2652, 2669.)

The court found three aggravators: (1) the crime was committed while the

[4] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

defendant was engaged in a kidnapping; (2) the crime was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification; and (3) the crime was especially heinous, atrocious, and cruel. (R-3287.) The court did not find any statutory mitigation but did find four non-statutory mitigators: (1) Conahan was a loving son and devoted caregiver to his mother; (2) he worked to improve himself by enrolling in nursing school; (3) he maintained good familial relationships; and (4) he is hardworking. (R-3289.)

On December 10, 1999, the court sentenced Conahan to death for first-degree murder and 15 years in prison for kidnapping. (T-2696.) The Florida Supreme Court affirmed. *Conahan v. State*, 844 So. 2d 629 (Fla. 2003). The United States Supreme Court denied Conahan's petition for writ of certiorari. *Conahan v. Florida*, 540 U.S. 895 (2003).

Conahan timely filed his state postconviction motion, which he subsequently amended with leave of the court. (PCR-11, 15, 358.) The state postconviction court held an evidentiary hearing on several claims, including Conahan's claim of *Giglio*[5] violations arising from the State's failure to correct Montgomery-West's false testimony. Following the hearing, the court entered a final ruling on the merits and denied Conahan's motion for postconviction relief. (PCR-1678.) The

[5] *Giglio v. United States*, 405 U.S. 150 (1972).

Florida Supreme Court affirmed the postconviction court's denial of relief and denied a writ of habeas corpus, finding that Conahan did not meet the *Giglio* standard. *Conahan v. State*, 118 So. 3d 718 (Fla. 2013).

Conahan timely petitioned for a writ of habeas corpus in the United States District Court, Middle District of Florida, including Ground II alleging a *Giglio* violation for allowing Montgomery-West to testify falsely. (Doc. 1.) While his petition was pending, Conahan filed a successive postconviction motion in state court predicated on newly discovered evidence that the State committed a *Brady*[6] violation when it failed to disclose promises made in exchange for Burden's testimony and a *Giglio* violation when it failed to correct Burden's false testimony at Conahan's trial denying the promises.[7] (PCR2-1.) The district court granted Conahan's motion to stay his habeas proceedings while he exhausted these new claims in state court. (Doc. 46.)

The postconviction court summarily denied Conahan's newly discovered evidence claim, (PCR2-391), and the Florida Supreme Court affirmed on appeal. *Conahan v. State*, No. SC16-1153, 2017 WL 656306, at *1 (Fla. Feb. 17, 2017). Both courts found that Conahan could not establish that the evidence was newly

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[6] *Brady v. Maryland*, 373 U.S. 83 (1963).

[7] Claim II challenged the constitutionality of his convictions and sentence in light of *Hurst v. Florida*, 577 U.S. 92 (2016).

discovered, nor could he establish that the evidence is material under both *Giglio* and *Brady* standards. *Id*.

Upon leave of the district court, Conahan amended his petition to include the now-exhausted claim, Ground VIII, alleging *Brady* and *Giglio* violations concerning Burden's testimony. (Doc. 56.) The district court summarily denied all relief and denied a certificate of appealability. As to Ground II, the court ruled that the state court reasonably applied *Giglio* and Conahan failed to meet all three prongs of the standard. (Doc. 92 at 25-26.) As to Ground VIII, the court ruled that the court below reasonably applied *Brady* and *Giglio* as Conahan failed to establish Burden's testimony was material under either standard. (Doc. 92 at 47-48.)

Conahan moved to alter and amend the district court's denial of his petition for a writ of habeas corpus (Doc. 95), which was also denied. (Doc. 76.) This motion for certificate of appealability follows.

Claims For Which A Certificate of Appealability Should Issue

Conahan Should be Granted A COA on the Claims Concerning the State's Presentation of False Testimony of Montgomery-West and Burden.

A. Introduction

The Supreme Court has long recognized that the knowing, deliberate presentation of false evidence to a court or jury is incompatible with "rudimentary demands of justice." *Mooney v. Holohan,* 294 U.S. 103 (1935). Twenty-five years

later, the Court held that "the same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue v. Illinois,* 360 U.S. 264, 269 (1959). Four years later in *Brady v. Maryland,* 373 U.S. 83, 87 (1963), the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution."

"When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule." *Giglio v. United States*, 405 U.S. 150, 154 (1972) (citing *Napue,* 360 U.S. at 269). A "prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995). The prosecutor's "responsibility for failing to disclose known, favorable evidence . . . is inescapable." *Id*.

Defendants raising a *Brady* or *Giglio* violation must also show "materiality." But the materiality analysis for *Brady* and *Giglio* violations are different. To prevail on a *Brady* claim, e.g. the suppression of favorable evidence, a habeas petitioner must show "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley,* 473 U.S. 667, 682, 685 (1985) (internal quotation marks

omitted); *see also Kyles,* 514 U.S. at 433. A "reasonable probability" of a different result exists when the government's evidentiary suppressions, viewed cumulatively, undermine confidence in the guilty verdict. *Kyles,* 514 U.S. at 434, 436-37 n.10.

To prevail on a *Giglio* claim, a habeas petitioner must prove: "(1) the prosecutor knowingly used perjured testimony or failed to correct what he subsequently learned was false testimony; and (2) such use was material, i.e., that there is any reasonable likelihood that the false testimony could … have affected the judgment." *Ford v. Hall,* 546 F.3d 1326, 1332 (11th Cir. 2008) (quotation marks omitted). When a prosecutor commits a *Giglio* violation, the defendant is entitled to a new trial "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *U.S. v. Agurs*, 427 U.S. 97, 103 (1976). "The 'could have' standard requires a new trial unless the prosecution persuades the court that the false testimony was 'harmless beyond a reasonable doubt.' [The *Giglio*] standard favors granting relief." *Smith v. Sec'y, Dep't of Corr.*, 572 F.3d 1327, 1333-34 (11th Cir. 2009) (citations omitted).

With both types of *Brady* claims, "[w]e evaluate the tendency and force of the undisclosed evidence item by item; there is no other way. We evaluate its cumulative effect for purposes of materiality separately." *Kyles*, 514 U.S.at 436-37 n.10; *Maharaj v. Sec'y, Dep't of Corr.,* 432 F.3d 1292, 1310 (11th Cir. 2005)

(explaining that the "appropriate methodology [involves] considering each *Brady* item individually, and only then making a determination about the cumulative impact"). "Considering the undisclosed evidence cumulatively means adding up the force of it all and weighing it against the totality of the evidence that was introduced at the trial. That is the way a court decides if its confidence in the guilty verdict is undermined where a suppressed-evidence type of *Brady* claim is involved, or if the suppression was harmless beyond a reasonable doubt where a *Giglio* type of *Brady* claim is involved." *Smith*, 572 F.3d at 1334.

The *Giglio/Napue* "materiality" standard is equivalent to the harmless-error standard articulated in *Chapman v. California*, 386 U.S. 18, 24, (1967) (requiring the State to demonstrate the error was harmless beyond a reasonable doubt), *see Bagley*, 473 U.S. at 680 n.9. In *Brecht v. Abrahamson*, the Court imposed an actual-prejudice standard on constitutional trial errors raised in habeas proceedings, as opposed to on direct review, holding that a petitioner is generally entitled to relief only if he can show "actual prejudice." 507 U.S. 619, 631 (1993). *Brecht* error is met when the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Id*. (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). "[I]f a judge has 'grave doubt' about whether an error affected a jury in this way, the judge must treat the error as if it did so." *O'Neal v. McAninch*, 513 U.S. 432, 438 (1995) (internal quotation marks omitted).

This Circuit's binding precedent holds that "when a *Giglio* claim arises on collateral review, a petitioner must satisfy the more onerous standard set forth in *Brecht*." *Rodriguez v. Sec'y, Fla. Dep't of Corr*. 756 F.3d 1277, 1302 (11th Cir. 2014) (citing *Brecht*, 507 U.S. at 637)." [8]

Because the Florida Supreme Court unreasonably applied clearly established federal law (CEFL) and made unreasonable determinations of facts in light of the state court record as to both of Conahan's claims, AEDPA deference does not apply and the court reviews the claims de novo. S*ee Cooper v. Sec'y Dep't. Of Corrections*, 646 F.3d 1328 (11th Cir. 2011); *Jones v. Walker*, 540 F. 3d 1277, 1288 n.5 (11th Cir. 2008) (en banc) ("[W]hen a state court's adjudication of a habeas claim results in a decision that is based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding, this Court is not bound to defer to unreasonably-found facts or to the legal conclusions that flow from them.")

[8] *But see Dickey v. Davis*, 69 F.4th 624, 645 n. 11 (9th Cir. 2023) (identifying a circuit split on the application of *Brecht* to *Giglio* claims raised in habeas petitions). This Court is bound by a prior panel opinion, even if it was wrongly decided, until the opinion's holding is overruled by the Supreme Court or the Court sitting *en banc*. *See United States v. Golden*, 854 F.3d 1256, 1257 (11th Cir. 2017).

B. The State Failed to Correct Mary Montgomery-West's False Testimony Elicited on Cross Examination and Elicited Further False Testimony on Redirect. The District Court's Resolution of this Claim is Debatable among Jurists of Reason.

In Ground II of his habeas petition, Conahan argued that he is entitled to a new trial because the State presented false testimony from the victim's mother, Mary Montgomery-West, which violated Conahan's right to due process of law under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution. *See Giglio,* 405 U.S. 150. In rejecting Conahan's claim, the district court agreed with the Florida Supreme Court's determination that Conahan failed to meet all three *Giglio* prongs, (Doc. 92 at 25), however, the district court failed to recognize that the Florida Supreme Court misapplied the *Giglio* materiality standard and made findings premised on unreasonable determinations of the facts in light of the state court record. Conahan submits that jurists of reason could disagree with the district court's resolution of this claim and a COA should issue.

1. Montgomery-West's Testimony Was False and Material.

The State built a purely circumstantial case against Conahan, relying heavily on the testimony of *Williams* rule witness Burden. At trial, the State presented Montgomery's mother to testify about her son's appearance and his life circumstances in an effort to establish a likeness between the incidents involving Montgomery and Burden.

On direct examination, Montgomery-West testified consistently with the recorded statement she gave approximately two years earlier on April 18, 1996 to Field Investigator John Gaconi and Detective John Schmidt, in which she provided detail about her son's life. (T-1097-1103.)

She described difficulties he had maintaining employment and housing, prior sexual abuse, his sexuality, drug and alcohol use, his mental health and previous hospitalizations. (PCR-900.) She was asked direct questions whether the she knew who Montgomery hung out with, and Montgomery-West gave several names to police, including details about the backgrounds of people her son had come into contact with over the years. (PCR-908.) She did not identify or name Conahan in any way in her statement.

On cross examination, for the first time ever, Montgomery-West claimed that her son had spoken of Conahan:

> Q. Did you son ever tell you that he had met a man named Danny or that there was a man that was going to offer money for anything? Did he ever confide in you that there was—
>
> A. He told me that last time I saw him, which was on March 23rd, it as a Saturday, and I was trying to do bills. And Jeff's truck had broken down at our house, so Danny and his wife Terri, and Carla and Jeff and Richard were all over there that Saturday.
>
> Q. Now, when you say Danny, you're not referring to Conahan, are you?

> A. No; my son. My son. Anyway, he had come in and he was wanting to talk to me and I was trying to do my bills and he was interrupting. It was just like when he was a child. I said, Let me do this and then we'll talk. But anyway, it ended up being we were talking. He wanted to tell me about a new friend he had made.
>
> Q. How did he describe him?
>
> A. I remember him telling me his name and I said that sounds like—I knew people with the name of Carnahan in North Fairfield, Ohio. That's where I grew up. He said, No, it's a name that—like that. I said, You sound like Nana because you're leaving the R out. He said, No, Mom. It's Conahan.

(T-1105-06.) Caught off guard by this surprise revelation, counsel asked Montgomery-West why she did not provide this information to the police. She first told the court she *thought* she told the officers the night she gave her recorded statement. As counsel pressed on, she changed her story and claimed that *she did* tell the lead detective Ricky Hobbs, after Conahan had been arrested and his name was in the newspaper,

> I remember I told Mr. Hobbs—I called him up and I said, How come nobody's asked me about anything because of the name that I had said and he said he remembers something about friends and he went back and looked. I never heard from him again. I found out just recently when I got my deposition that's not in there. It says, inaudible, inaudible.

(T-1107.)

The State, on redirect examination, proceeded to elicit additional testimony

from Montgomery-West about Conahan through leading questions, tying her testimony to the State's theory of the case. Lee asked if she knew any details about Conahan's job or background, and Montgomery West claimed Montgomery told her Conahan "lived in Punta Gorda Isles, that he had been in the Navy [sic] discharge, and he was a nurse who worked at Medical Center. . ." (T 1109 10.) These specific details were included in news articles in the days leading up to Montgomery-West's testimony. (R-2810, 2539.)Lee then asked Montgomery-West if her son mentioned "anything about nude photographs?" (T-1110.) Montgomery-West, *for the first time*, claimed her son told her that someone had offered him $200 to pose nude but he would not tell her who. (T-1110.) She then said that she told her son that a person with a "psychopathic personality [...] would lure somebody like [her] son . . . and do things to him, sexually abuse him, kill him." (T-1110.) Montgomery-West claimed her son replied, "He says no, Nobody will kill me. I'll kill them first." (T-1111.)

When pressed on re-cross examination why none of these crucial revelatory statements were contained in the transcript of her statement to the police, Montgomery-West testified that her statements *weren't* in the interview she gave police on April 18th. (T-1113.) Moments later she changed her testimony and insisted that they *were* and that she could locate them in the transcript. (T-1113.) Trial counsel gave her a copy of the transcript of her statement, and after

reviewing, Montgomery-West pointed to the words "inaudible" on the page and proclaimed,

> 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.

(T-111.) Seeking to clarify Montgomery-West's answer, trial counsel asked,

> Q. -- that you believe that you told the case agent that your son told you that he had met a man by the name of Conahan. Mr. Conahan had offered him money, that he described Mr. Conahan, and all of that was relayed during that portion where there are four inaudibles that all that came out?
>
> A. It was a long time I was talking and it was right in there that I would have described that. . .

(T-1117.)

The State knew or should have known that Montgomery-West's testimony—about the contents and substance of her statement— was false. Montgomery-West had never previously mentioned Conahan or any of the critical details she now had to offer, specifically bolstering the *Williams* rule evidence and linking Conahan to the crime.

In postconviction, Conahan established that Montgomery-West did not tell police on April 18th that her son told her about Conahan. Audio Evidence Lab analyzed the recorded statement, conducting authenticity and phonetic content analyses revealing that the "recording was consistent with the original and did not

contain any abnormalities," and that "contrary to her trial testimony, Montgomery-West never mentioned 'Conahan' or 'Carnahan' in that recorded statement, even in the portion that had been labeled 'inaudible' in the original transcript." (PCR-1682-83.) The lab confirmed that the tape was not stopped or interrupted. (PCR-1682.)

The State conceded that Conahan's name (or "Carnahan") did not exist in the recording; however, at the evidentiary hearing, Lee testified that Montgomery-West spoke to other officers throughout the investigation suggesting she could have told one of them her son knew Conahan. (EH-683.) Because records were devoid of any mention of Conahan or these new details from Montgomery-West, counsel asked whether an officer would have written down information or a name in these others conversations. Lee testified that ". . . unless a name necessarily triggers something, it might not be noted." (EH-677.) When asked directly, "Are you telling the Court that she told somebody else the name Carnahan or Conahan. Is that your testimony?" Lee ultimately conceded, "*No sir*." (EH-683.)

Montgomery-West's testimony was paramount to the State's case, so much so that the Florida Supreme Court's opinion on direct appeal led with her testimony:

> Montgomery also told his mother that someone had offered to pay him $200 to pose for nude pictures, but he

> did not tell her who made the offer. In the same conversation, Montgomery mentioned that he had recently met the defendant Daniel O. Conahan, Jr., who lived in Punta Gorda Isles and was a nurse at a medical center.

Conahan, 884 So. 2d 629 (Fla. 2003).

The information Montgomery-West offered at trial connected the pieces of the State's circumstantial case. Aside from the *Williams* rule evidence presented at trial, there was scant direct evidence. Montgomery-West's testimony was the most credible testimony connecting Conahan to Montgomery. The only other testimony that suggested that Conahan *may* have known Montgomery was that of Robert James Whittaker, who changed his story several times,[9] and the testimony of the snitch witness Neuman.[10] Montgomery-West testified after these witnesses and when she suddenly mentioned Conahan by name on cross-examination, the State used that to bolster the weak testimony of Whitaker and Neuman.

Her additional claims that she had told her son that a person offering to take nude photos "would lure somebody like [Montgomery]," "and do things to him, sexually abuse him, kill him," further bolstered the State's argument for the

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[9] Montgomery's sister, Carla Whisenant, testified at trial that her brother felt uncomfortable living with Whittaker, another gay man. (T-1574.)

[10] Neuman testified as a witness for the State on August 11, 1999. (T-1072-82.) Neuman had been sentenced to 12-18 years on a 1992 case; however, he was released less than three years after he testified against Conahan.

introduction of *Williams* rule evidence. (T-1109-11.) In support of admitting the *Williams* rule evidence, the prosecution argued that Montgomery-West's testimony established that it was Conahan who offered Montgomery $200 to pose for pictures, thereby using Montgomery-West's false testimony to link the evidence from the Burden case. The State emphasized Montgomery-West's testimony in closing, demonstrating the materiality of the false evidence.

> Richard tells his mother about a new friend. And she says, as he tells her, is the name Carnahan, because they had friends up in North Fairfield, Ohio, of the name Carnahan. And Mr. Montgomery corrects her, says . No, Mom. It's Conahan.
>
> And he tells her some specifics about him, specifics which we see later coming up in this trial.
>
> . . .
>
> And then in the same conversation, Mrs. West said that her son told her that someone had offered Richard $200 to pose for nude photographs. And yet Mrs. West did not claim that her son told her that it was the Defendant who did this, even though it was in the same conversation. And she testified that, in fact, he refused to tell me who it was.
>
> Now, Your Honor, this is very important, because it goes to her credibility. If she was making the story up, it would be very easy for her to go all the way and say that her son named Mr. Conahan as the one who made the offer. If she's going to dream up a story, she could've dreamed up a better one than this.

(T-1970-71.)

2. The Florida Supreme Court's Decision is Contrary to and/or an Unreasonable Application of *Giglio* and Premised on Unreasonable Determinations of Fact in Light of the State Court Record. The District Court's Determination of Conahan's claim is debatable among jurists of reason.

The Florida Supreme Court ruled that Conahan failed to establish Montgomery-West's statement was false because "her self-qualified thought'" that she had told police about her conversation with her son during her recorded interview "was mistaken" and did not necessarily show that her testimony was false. *Conahan*, 118 So. 3d at 729. The court found that Montgomery-West "perhaps" told police prior to the start of the recording of her April 18th interview, and that the postconviction testimony "indicates [she] had interactions with other law enforcement officers and made an oral statement to the prosecutor concerning this matter." *Id*. The Florida Supreme Court did not address the State's knowledge that the testimony that her statement was in the transcript was demonstrably false.

The court further held that the State "established that the testimony was immaterial because there was no reasonable possibility of a different verdict as it was harmless beyond a reasonable doubt," because witnesses "Newman and Whittaker established that the victim and defendant knew each other," and the *Williams* rule evidence was "not contingent upon Mrs. Montgomery's testimony." *Id*. at 729.

In finding the state court's application of *Giglio* reasonable, the district court

ruled that Conahan didn't offer evidence challenging the "truth of Montgomery-West's testimony describing a conversation she had with Montgomery about Conahan," and instead focused on when she reported the conversation. (Doc. 92 at 25.) The court noted Montgomery-West's testimony about when she told police about the conversation was "equivocal," and that the state court "identified other times [she] might have relayed the information to police, and those findings are consistent with the record." (Doc. 92 at 25.)

The district court rejected Conahan's claim that the State knew the testimony was false, finding that the prosecutor testified that she "told him about the conversation before trial. . ." and that "he denied having any belief or indication Montgomery-West testified falsely." (Doc. 92 at 25.) The district court further found fair-minded jurists could find that the conversation is "duplicative of other evidence linking Conahan and Montgomery-namely, the testimony of Neuman and Whit[t]aker." (Doc. 92 at 26.)

These holdings are debatable among jurists of reason.

a. The Florida Supreme Court misapplied *Giglio v. United States*.

In rejecting Conahan's claim, the Florida Supreme Court focused on its perceived belief that a witness must knowingly perjure herself in order for the testimony to be false; the district court adopted this finding. Whether a statement is false for purposes of *Giglio* is not reliant on the witness's state of mind or whether the witness was mistaken. *Giglio*, and the Due Process clause, concern themselves with the integrity and fundamental fairness of the trial, and whether the testimony and evidence presented by the State to the finder of fact is true and accurate.

The United States Supreme Court "has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Agurs*, 427 U.S. at 103.

The "knowing" element in this case concerns the prosecutor's knowledge, not the mindset of a witness. *Giglio* does not provide an exception for prosecutors to allow witnesses to equivocate as a means to present false testimony to the court; the prosecutor cannot be relieved of his duty to correct false information by claiming after the fact that the witness was mistaken.

While this court has held that a witness's mistaken testimony does not violate *Giglio* in *United States v. Horner*, 853 F.3d 1201 (11th Cir. 2017), this case is distinguishable, and *Horner's* reasoning can be called into question in that

Horner's determination of what constitutes false testimony for purposes of *Giglio*, is premised on a federal criminal case addressing a defendant's criminal liability for perjury. *United States v. Singh*, 291 F.3d 756 (11th Cir. 2002) (addressing the knowing element to sustain a perjury conviction).

b. The record establishes Montgomery-West Was Not Mistaken.

The state court's determination that Montgomery-West's testimony was equivocal and that she was mistaken when she testified that she told police about the disclosure during her April 18th recorded interview was an unreasonable determination of the facts in light of the state court record. Montgomery-West's statements are demonstrably false. The district court's conclusions here are debatable among jurists of reason. Conahan respectfully asserts that the district court misapprehended or misconstrued Conahan's argument. Conahan asserted Montgomery-West fabricated her claims that Montgomery spoke to her about Conahan and that she had previously disclosed that information to police. The details surrounding her alleged disclosure to police undermine her claim that the conversation happened at all.

She did not equivocate in her testimony, she deliberately changed her story in an effort to circumvent defense counsel's impeachment. Montgomery-West was adamant she told the two officers during her recorded interview that her son told

her he knew Conahan, but was made to admit that Conahan's name was nowhere to be found in the transcript. (T-1113.) When confronted by defense counsel on this contradiction, Montgomery-West then pointed at the "inaudible" entries and claimed they represented when she spoke of Conahan—a fact which the prosecutor knew or should have known was patently false— and then tried to claim she told a different officer about Conahan. (T-1114.)

Montgomery-West fabricated the statement so as to bolster the State's theory. The district court focused on her use of the phrase, "I think," but failed to take into account the extensive re-direct examination by the State setting out details of the conversation in a manner that suggested Montgomery-West had told these details in her statement to police.

It's not the presence of details that is instructive here, it's the lack thereof that demonstrates how unreasonable the court's findings are. Montgomery-West's interview transcript spanned 27 pages and is chock-full of details about Montgomery's life and several of his associates—including a group of homeless people that hung out at his house. (PCR-911.) Montgomery-West gave police the names Kyle, Brad, Tim, Derin, among others, and provided details, relevant or not, about each of their lives as well as many others that she didn't know the names of. (PCR-900-27.)

Forensic analysis revealed that one of inaudible entries was actually

Montgomery-West telling police that she could not provide last names of all the friends and acquaintances she gave to police because "*he would never tell me people's last names*." (PCR-909.)

She did tell police her son had come over weeks prior, and she offered great detail of the interaction, noting who was present and topics discussed. She made it a point to tell police how difficult the interaction was because her son was not welcome at her home. *She did not mention Conahan by name or any of the other details about Conahan that she offered at trial* because that conversation didn't happen. Indeed, following the forensic analysis completed in postconviction, the State *conceded the inaudible portions of her testimony are not what the State presented they were at trial through Montgomery-West's testimony.*

i. Montgomery-West Did Not Disclose Her Conversation to Police Before the Recording Began.

The Florida Supreme Court determined that Montgomery-West was not lying because "perhaps" she relayed the information prior to the beginning of her recorded interview. *Conahan*, 118 So. 3d at 729. This finding is premised on an unreasonable determination of the facts in light of the state court record, and reasonable jurists could agree or disagree as to the district court's resolution of this issue. The transcript reflects that prior to recording, Montgomery-West was telling police facts about her son as an infant,

> Schmidt: What we'd like to do at this time is just trying to get a little bit of background (inaudible) his, I would say teenage years, since you've been here in FL while he was living with (inaudible). Okay?
>
> Gaconi: Any objection to this interview being taped?
>
> Montgomery-West: No I don't.
>
> Gaconi: Okay. *Prior to going on tape you had given us some information about your son and since he was approximately 2 years old in FL.*
>
> Montgomery-West: That's correct.
>
> Gaconi: Was it in the Charlotte County area or....
>
> Montgomery-West: (Inaudible). When he turned two in March 6th, 1977 and my divorce from his father was April 25. (Inaudible) . . .

(PCR-901.)

The State knew Montgomery-West did not disclose this alleged conversation to police the day of her recorded interview. Gaconi testified on direct that he was tasked with obtaining contact information for known associates and possible suspects, a list he included in a report drafted on April 20, 1996. (EH-329, 331.) Gaconi confirmed that Conahan's name was not listed. Hobbs testified that police first learned of Conahan's name in May of 1996. (EH-388.)

When given the opportunity to clarify the record, the State steered clear from asking Gaconi whether Montgomery-West brought up the information to him at any point the day of the interview. Instead, the State asked one question, "is it possible that Mrs. Montgomery talked to other police officers during the course of

the investigation, other than you?" (PCR-341.)

ii. Montgomery-West Did Not tell Other Law Enforcement About her Conversation with Her Son.

Montgomery-West did in-fact speak to other officers during the investigation. Details of her statements to police are included in police reports written between April 18, 1996 and March 25, 1997, including a case package compiled by Hobbs comprised of numerous reports drafted by the members of the task force created to investigate Montgomery's murder. (PCR-383.) Montgomery-West did provide an additional name—Howard Heller— to police after her recorded interview. She told police that Montgomery hung around Heller and that Heller threatened to kill her son years prior. This information is detailed in the investigation, along with an entry that police visited Montgomery-West in June of 1996 to administer a photo array that included Conahan, and she did not identify him as anyone who resembled her son's associates.

iii. Montgomery-West Did Not Tell the Prosecutor Directly Prior to Trial.

Jurists of reason could differ as to the outcome of the district court's determination of the state court's finding that Montgomery-West spoke with Lee about Conahan prior to trial was reasonable.

Lee testified at the postconviction hearing that he reviewed

Montgomery-West's recorded statement in advance of trial and spoke to her several times. (EH-666.) He also testified that "without any question, [he had] read all the discovery on numerous occasions," which included the various police reports that reference conversations with Montgomery-West. (EH-667.) Yet, the State didn't ask one question about Montgomery-West's conversation with her son on direct. This glaring omission establishes that the prosecutor had never heard Montgomery-West claim her son knew Conahan or that she knew her son had been offered to take nude photos for money.

While Lee said for the first time at the postconviction hearing that he had a conversation with Montgomery-West sometime prior to her testimony at trial, he did not testify that it included a discussion about Conahan.[11]

> Q. Is there another statement of Mrs. Montgomery, independent of the taped one?
>
> A. Mrs. Montgomery talked to a number of officers, and talked to me about this. Some of that -- I mean we have recorded statement. But that's not necessarily every contact that she had, as the mother of the victim, with law

[11] The State argued that Lee testified Montgomery-West told him that her son knew Conahan. He remembered because it occurred the day of her deposition. (EH-685) However, the record does not support a determination that Montgomery-West was deposed. There is no transcript of a deposition in the record; nor is there a subpoena for deposition or a notice of taking deposition. Her daughter, Carla, was deposed by trial counsel telephonically on July 27, 1999. *See* (T-1572.) Trial counsel was in his office in Fort Myers, and Lee, Carla Montgomery and her mother were all present in Kissimmee, Florida at the court reporting office. The guilt phase of Conahan's trial began two weeks later.

enforcement or with our office.

Q. Are you telling the Court that she told somebody else the name Carnahan or Conahan. Is that your testimony?

A. *No, sir*. I'm trying to answer your question, which dealt with what she said during the trial.

Q. Okay. So, independent of that question -- I'm moving on to a new question.

A. All right, sir.

Q. Is there another statement that she made to anybody else?

A. Would you clarify what you mean by statement. Do you mean a recorded or a written statement?

Q. Either.

A. I'm not aware of another recorded or written statement.

Q. Okay. So, this is the only statement we have of Mrs. Montgomery?

A. Well, we have this transcript, if that's what you mean. Again, you're going to need to clarify what you mean by 'only statement'.

Q. I'm talking pretrial statements. Statements and investigations pretrial. Is -- is there one pretrial, other than the tape-recorded statement that she gave to Agent Gaconi and Detective Schmidt?

A. As to a written or a recorded statement, I'm only aware of the one.

Q. As to a statement that was neither written nor recorded, are you aware of any?

A. Yes, sir, I am.

Q. And when were those taken?

A. That statement was made to me. Okay.

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.

Q. Did you -- this is a witness that you planned on calling to testify?

A. Yes, sir.

Q. And she made a statement to you?

A. I talked to her, yes.

Q. Correct. Did you disclose that statement to the defense?

A. Under the rules of discovery, because it was not recorded or written, I had no obligation to do so. Again, I'll be glad to tell you the circumstances of it, if you would like.

(EH-685.)

As is evident from this dialogue, Lee testified that Montgomery-West gave statements, but not that she spoke to him about Conahan. The State had a clear opportunity to explicitly establish that Montgomery-West told police prior to trial that her son knew Conahan, but did not do so. Further, the prosecutor's statements about talking to Montgomery-West at deposition is unsupported by the record because the record contains no evidence that Montgomery-West was deposed—an event which would have been documented in the state court file through filing of a notice of deposition and a return of service had it happened.

Lee was counsel of record during the entire pendency of Conahan's trial and postconviction proceedings. In none of the State's filings during postconviction

was there any indication or report of his alleged pre-trial conversation or Montgomery-West's deposition. The information from Montgomery-West's surprise testimony dovetailed with the State's *Williams* rule evidence supporting their theory connecting the Burden case with Montgomery-West's son's death. The false testimony enhanced the State's circumstantial evidence case.

Conahan attempted below to discover whether Montgomery-West gave additional testimony, for example at the grand jury, which would either support or impeach her surprise testimony at trial. The State opposed that attempt and the requests to relinquish jurisdiction back to the state postconviction court were denied by the Florida Supreme Court. *See Dennis v. U.S.*, 86 S. Ct. 1840 (1966) (there is an "ends of justice" requirement where the information suppressed was necessary for impeachment or to test the credibility of a witness). Also, grand jury secrecy can be trumped by the particularized need. *See State ex. rel. Brown v. Dewell*, 167 So. 687 (Fla. 1936) (indication that the secrecy rules are "not for the protection of witnesses" but rather are "material for the protection of justice."

The state courts never fully addressed the argument that the record supports a finding that the prosecutor knew that Montgomery-West had not previously stated that her son had specifically stated Conahan's name. Had she provided Conahan's name or any details about him, there would be an indication in the records. It is implausible that had Montgomery-West given a name as someone

who she claims offered to take pictures of her son, and she maintained would lure him and harm him, would not have been documented—especially when that person is in fact the suspect in the actual murder. Yet, in postconviction Lee testified that ". . . unless a name necessarily triggers something, it might not be noted." (EH-677.)

The State's testimony and the court's findings are also an unreasonable determination of the facts in light of the state court record and in light of Florida's broad criminal discovery rules. "Florida's criminal discovery rules are designed to prevent surprise by either the prosecution or the defense." *Kilpatrick v. State,* 376 So. 2d 386, 388 (Fla. 1979). "[T]he chief purpose of [Florida criminal] discovery rules is to assist the truth-finding function of our justice system and to avoid trial by surprise or ambush." *Scipio v. State*, 928 So. 2d 1138, 1144 (Fla. 2006). The prosecutor maintains an ongoing duty to promptly advise defense counsel of a dramatic change in a witness's testimony. *Id.* at 1145-46 ("The State's calculated failure to inform the defense of the important and dramatic change in testimony of its medical examiner's investigator not only violated the prosecutor's duty not to strike 'foul' blows, but undermined the very purpose of the discovery rules as set out by this Court[.]"

Under Florida criminal discovery rules, the prosecutor would have been required to disclose, upon learning of the information, the change in substance of

Montgomery-West's statement, including oral statements not reduced to writing. Instead, as happened here, the prosecutor allowed the witness's claim to go uncorrected.

c. The Record Establishes Montgomery-West's Testimony is Material and Could Have Affected the Judgment of the Fact Finder.

The state court unreasonably applied an incorrect materiality analysis. The court found that Montgomery-West's testimony immaterial using a heightened standard—"there is no reasonable possibility of a different verdict as it was harmless beyond a reasonable doubt" *Conahan*, 118 So. 3d at 729. Evidence is material under *Giglio* if there is "any reasonable likelihood that the false testimony could … have affected the judgment." *Ford v. Hall,* 546 F.3d 1326, 1332 (11th Cir. 2008); *see also Kyles*, 514 U.S. at 436. When a state court misapplies a legal standard, or identifies an incorrect standard, AEDPA deference does not apply. *Price v. Vincent*, 538 U.S. 634, 640 (2003).

Moreover, in order to assess the confidence in the outcome of a trial, the court must evaluate the totality of the evidence for its cumulative effect. Here, the court assessed each claim individually, failing to recognize its cumulative effect. The State allowed the presentation of false information of the victim's mother who not only testified falsely that the name Conahan was in the inaudible portions of her recorded statement, but more significantly falsely testified to new and

fabricated facts establishing the State's entire theory. This testimony linked Conahan to Montgomery, and due to the State's *Brady* and *Giglio* violations in allowing Burden to testify falsely, Montgomery-West's testimony linked Montgomery's death to Burden's claimed assault.

The courts at every level of review have viewed and assessed each piece of unreliable and fabricated evidence against the next piece of unreliable and fabricated evidence, creating a cycle of bolstering improper evidence. For example, the postconviction court found Montgomery-West's testimony immaterial because Conahan "himself admitted in his trial testimony that he had told police he had been to see the victim about three times. "(PCR-1716.) This is an unreasonable determination of the facts. Conahan did not testify that he ever went to see Montgomery. Conahan testified that he had become acquainted with Jeff Dingman who lived in Robert Whittaker's trailer, and that he had visited the trailer to see Dingman, but that he never met Montgomery. (T-1940.) The Florida Supreme Court relied on Whittaker's testimony claiming Conahan had come to his home looking for Montgomery. Whittaker testified that Conahan hadn't been to the trailer since December of 1995, (T-992), months before Montgomery-West claimed Conahan became Montgomery's new friend.

In that same statement, Whittaker claimed "from what I remember is that he told—he said that Carla, his sister, told him that he was back there, back in this

trailer." (T-987.) Carla also testified and denied Whittaker's claims. (T-1581.) She clarified that hadn't ever seen Conahan and that he didn't come to her door looking for her brother. (T-1581.)

Even after applying *Brecht* for purposes of Conahan's federal habeas review, reasonable jurists could agree, or disagree for that matter, that the facts demonstrate that Montgomery-West's false testimony was fatal to Conahan's defense. The presentation of Montgomery-West's false testimony—both substantially and going to her credibility—had a substantial and injurious effect or influence on the outcome of his trial. *Brecht,* 507 U.S. at 637. The case against Conahan was purely circumstantial.

Reasonable jurists could agree or disagree with the district court's resolution of Ground II.

C. The State Failed to Disclose Secret Offers of Assistance to Their Star-*Williams* Rule Witness, Burden, and Failed to Correct Burden's False Testimony Elicited on Direct and Cross. The District Court's Resolution of this Claim is Debatable among Jurists of Reason.

In Ground VIII of his petition, Conahan argued that the State's failure to disclose its offer of assistance to Stanley Burden was cumulative to other instances of prosecutorial misconduct and also a violation of *Brady* and *Giglio*, which rendered the proceedings fundamentally in fair in violation of his due process rights. The district court denied relief finding that Conahan failed to meet the

materiality standard because "Burden did not claim Lee's promise influenced the substance of his testimony," and that the evidence only went to Burden's credibility which had already been questioned by the fact-finder. (Doc. 92 at 47-48.) But *Brady* and *Giglio* violations can occur even when the withheld evidence goes only to credibility, and even when the witness has been impeached.

> "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. * * * That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair."

Napue, 360 U.S. 264, 269–70 (quoting *People v. Savvides*, 136 N.E.2d 853, 854-855 (N.Y. 1956).

Conahan submits that jurists of reason could disagree with the district court's resolution of this claim and thus a COA should issue because the Florida Supreme Court's decision upon which the district court's decision relies is contrary to and/or an unreasonable application of *Brady* and *Giglio* and the court's findings are premised on an unreasonable determination of the facts in light of the state court record.

1. Burden's Testimony Was False and the State Knew it Was False.

On August 15, 1994, Stanley Burden reported an assault and battery to the Fort Myers Police Department in Lee County, Florida. It was not pursued because the detectives did not believe Burden's account. (T-1126.) Nearly two years later, Burden's previous report was brought to the attention of the task force investigating Montgomery's death. On June 7, 1996, two detectives from the task force conducted interviews of Burden at an Ohio Prison where he was serving a 15-25-year sentence for the rape of a 12-year-old boy. Shortly thereafter, the State filed charges against Conahan in Lee County, Florida based on Burden's claims. Conahan was held on bond. The State focused almost entirely on their theory that Burden's case was tied to the death of Montgomery.

After being held for eight months on the Burden case, Conahan was transported from the Lee County Jail to Charlotte County Jail to face charges for the death of Montgomery. At this first appearance, the State, without any reason, nolle prossed all charges in the Burden case.[12] Despite this turn of events, Burden testified as a witness against Conahan in Montgomery's case.

The trial court allowed the State to present its *Williams* rule evidence comingled with the other evidence presented, and opted to rule on the admissibility

[12] Conahan asserted a claim challenging the State's tactic, which is included in this COA below.

of the evidence in the middle of trial. It was during this proffer that the prosecutor elicited Burden's false testimony. (PCR2-671-72.) Lee asked Burden directly whether he had "been promised anything in exchange for [his] testimony," and Burden answered "*No*." (PCR2-671-72.) On cross, trial counsel again asked Burden if, "anybody from local law enforcement told you that they're going to send a letter to the parole board about your participation in this case?" Burden again lied and answered "*No*." (PCR2-692.)

Following the State's proffer of Burden's testimony, the court heard argument and admitted Burden's testimony as *Williams* rule evidence. The court relied on Burden's testimony in finding Conahan guilty of the first-degree capital murder of Montgomery.

On February 3, 2015, Conahan's postconviction counsel (CCRC-South) received a package from a third party that included handwritten letters signed "Stan," believed to be written by Burden. One letter included an account of an offer of assistance made to "Stan" by Lee; and the details in the letter appeared to fit the outline of Burden's history as a witness in the Conahan case, including a promise from Lee that "he would go to bat for me!" (PCR2-49-51.)

Until October 2015, Burden had declined to meet with postconviction counsel. (PCR2-53.) After review of the letters, a CCRC-South investigator made another attempt and Burden agreed to a meeting and interview.

Burden met with CCRC-South on October 22, 2015 and again on November 24, 2015 at Marion Correctional Institution, in Marion, Ohio, where he was incarcerated at the time. During the first visit, Burden signed a handwritten declaration, and during the second, he completed and signed a sworn affidavit. (PCR2-55, 59.) In both documents, Burden proclaimed that "prosecutor Lee lied to me, used me and mislead me. I want the truth to be known." (PCR2-60.) The documents also state that a specific offer of assistance was made by Lee to Burden if he agreed to testify for the State of Florida, specifically, Burden stated: "Prosecutor Lee promised me that he would write a letter on my behalf to the Ohio Parole Board." (PCR2-55.) Burden explained that Lee told him that "after I testified for him, he would send the letter of recommendation to the Parole Board." (PCR2-55)

Burden had previously denied that he had been made any promises or inducements in exchange for his testimony both in in his deposition and at Conahan's trial. In postconviction, Burden admitted, "Prosecutor Lee told me if asked that I wasn't promised anything on the stand." (PCR2-60.) The affidavit and declaration establish that Burden lied at Conahan's trial about promises made to him in exchange for his testimony and that the prosecutor was aware of the false testimony.

Conahan included this information in a successive state court postconviction

motion, asserting these statements by Burden constituted newly discovered evidence that directly conflicted with Burden's testimony in his pre-trial deposition and at Conahan's trial. The court denied his claim, without holding a hearing.

2. Burden's Testimony Was Material

Evidence that Burden lied at trial is material because the State's entire case rested on his *Williams* rule testimony. There was no DNA evidence linking Conahan to any murders or to the Burden case. The only DNA testimony at trial related to DNA evidence found on Montgomery's body that failed to match either Conahan or the victim.[13] The similar facts alleged in the State's proffered testimony of Burden was the strongest evidence against Conahan, and it was obtained under false pretenses.

3. The Florida Supreme Court's Decision is Contrary to and/or an Unreasonable Application of *Giglio* and *Brady* and Premised on Unreasonable Determinations of Fact in Light of the State Court Record. The District Court's Determination of Conahan's claim is debatable among jurists of reason.

The district court's rejection of these claims is debatable among jurists because it relied on the Florida Supreme Court's unreasonable application of clearly established federal law and is premised on unreasonable determinations of

[13] As noted *supra* note 1, Conahan filed a successive postconviction motion in state court challenging the forensic evidence. The motion remains pending.

the facts in light of the state court record. The state court denied Conahan's claim, finding that he could not establish the newly discovered evidence was "of such nature that it would probably produce an acquittal on retrial," because Burden's affidavit "explained" he wouldn't have testified but for the prosecutors promise to write a letter to the parole board, but was not a recantation of his testimony at trial. *Conahan*, 2017 WL 656306, at *1 (quoting *Johnston v. State*, 27 So. 3d 11 (Fla. 2010)).

The Florida Supreme Court further determined Conahan did not meet the materiality requirement for *Giglio* and *Brady* claims, finding that the "scars around Burden's neck and indentations around the tree from the rope that Conahan used to restrain and to attempt to strangle Burden," corroborated his testimony at trial. *Id*.

The Florida Supreme Court completely failed to acknowledge Burden's admission that he lied under oath at trial at the direction of the State, but did make it a point to note that the fact-finder was aware "that Burden hoped that by testifying he would get documentation illustrating his cooperation that he could contribute to his court file and prison record and that he planned to inform the parole board about his cooperation in the Montgomery case." *Id*.

The district court determined the Florida Supreme Court's decision was reasonable because Burden "did not claim Lee's promise influenced the substance of the testimony," and that the promises to testify occurred after Burden had

spoken with police and implicated Conahan. (Doc. 92 at 47.) "Burden identified Conahan as his attacker and described the attack multiple times years earlier—the record contains a detailed account of the attack Burden gave in a deposition about two years before trial." (*Id*. at 47.)

The district court further determined that the evidence was relevant to Burden's credibility, but would not have made an impact on the factfinder who, the court noted, "already questioned Burden's credibility." (*Id*. at 48.)

Reasoned jurists could come to a different conclusion.

a. The Court's Determination that the Prosecutor's Promises Did Not Affect the Substance of Burden's Testimony is Unreasonable.

The state court's finding that the State's promise to write Burden a letter for the parole board could not have tainted his testimony because the promise occurred after he implicated Conahan is an unreasonable determination of the facts in light of the state court record, and reasonable jurists could agree or disagree as to the district court's resolution of this issue. Because the postconviction court summarily denied this claim, the court relied on and adopted the State's *argument*, *not evidence*, that "[t]he agreement to write a letter to the Ohio parole board occurred after Burden made his statements to detectives and after Burden testified in his deposition" and that "[b]efore any alleged conversation with Mr. Lee, a statement to law enforcement and a sworn deposition had been taken."

The postconviction court did not hold a hearing or admit testimony establishing that any promise was made *after* Burden's sworn testimony; the record establishes the opposite is true. Burden gave a deposition in November 1997 at which trial counsel and Lee were present at the Ohio correctional facility where Burden was incarcerated. (PCR2-713.) Burden told trial counsel that he met with Lee in Ohio prior to the deposition. (PCR2-715; 174.)

Officers from the task force first interviewed Burden in connection with Montgomery's death in June of 1996. (T-1206.) The officers interviewed Burden twice in one day, taking an hour break in-between. (T-1206.) Burden testified that task force Detective Columbia had told him during the 1996 police interviews at the prison in Marion, Ohio that " [If] you scratch our back and we'll scratch yours." (PCR2-695.) Burden claimed at trial that his interpretation of the "benefit" he would receive was simply a "personal release" based on his status aa a crime victim:

> It will help close some of the pain up that I've been through, maybe help me get some kind of beginning to put my life back together, you know. I've seen a lot of people. They've done a lot of things to me and nobody's ever went nowhere, but every time I reacted, I've always been placed in prison.

(PCR2-695.) We now know Burden was lying and that the State had made an actual promise to assist in his early release from his decades long sentence for child rape.

Moreover, the state court's determination that the trial court was already aware Burden hoped to gain some benefit for testifying is an unreasonable determination of the facts. While Burden testified that he put the subpoena for Montgomery's trial in his master file—along with everything he receives—he explicitly told the court that he would not tell the parole board about his participation in the Montgomery case. (T-1204.)

b. Burden's Propensity to Lie Was Not Limited to His Denial of Promises Made in Exchange for His Testimony.

The Florida Supreme Court's determination that Burden's lies about the promises he received does not affect the veracity of his trial testimony is a misapplication of *Brady* and *Giglio* and an unreasonable in light of the state court record and reasonable jurists could agree or disagree as to the district court's resolution of this issue.

Conahan established that the State committed *Brady* and *Giglio* violations when it suppressed secret promises made to its witness in exchange for his testimony, and failed to correct his false testimony when he lied about those promises at Conahan's trial. The State is not relieved of its responsibility to turn over favorable evidence nor is the violation of Conahan's constitutional rights lessened because the suppressed and false evidence discovered to date concerns the witness's credibility. "When the 'reliability of a given witness may well be

determinative of guilt to innocence,' nondisclosure of evidence affecting credibility falls within this general rule." *Giglio*, 405 U.S. at 154 (citing *Napue,* 360 U.S. at 269). The prosecutor's "responsibility for failing to disclose known, favorable evidence . . . is inescapable." *Kyles*, 514 U.S. at 437-38.

Burden lied to police from the very beginning of his involvement in the Montgomery case. He admitted at trial that he lied during his initial interviews conducted in June of 1996. (T-1206.) After the first interview, police took more than an hour break before conducting the second interview. (T-1206.) When counsel pointed out that he started telling his now-truth after the break, Burden couldn't recall. (T-1206.)

Burden admitted in his deposition that he told the police very different facts in 1994. His statements were devoid of his claims of Conahan soliciting photographs, nude or otherwise, or of Conahan taking photographs of him. Burden's account of his alleged interaction with Conahan changed substantially after the officers "just appeared one day" to interview him in prison in Ohio. (PCR2-812-13.)

During his deposition, Burden's recollection about specific details of his alleged assault by "Dan" were hazy. For example, he responded under oath that "I can't totally remember" in response to the question of whether the man he claimed had assaulted him had tried to sodomize him or perform anal sex. (PCR2-829.)

Burden stated, "I can't remember, I mean – lately I ain't been thinking of the case or anything, you know?" (PCR2-829-30.)

By the time of the Conahan trial his memory cleared considerably. In Burden's *Williams* rule testimony his account materially changed to fit with the State's theory that the Montgomery case had similar facts. These new details provided the State with the *Williams* rule similar facts and modus operandi evidence used to convince the trial judge of Conahan's guilt in both the Burden and Montgomery cases.

During the defense's closing argument to the Judge, counsel for Conahan argued that Burden's acknowledgment of an interest in mutual benefit and his desire for help in obtaining parole indicated that there was a back-door agreement between the State and Burden, but they had no specific evidence to offer.[14] (T-1981-82.)

As the record demonstrates, Burden not only lied about promises made in exchange for his testimony, he also changed the substance of his story throughout the case. The state postconviction court determined Burden is a habitual liar,

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[14] "The U.S. Supreme Court's decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed. Thus defense counsel has no procedural obligation to assert federal constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred." *Brady v. Maryland*, 373 US. 83 (1963).

(PCR2-389), yet subsequently accepted his ever-changing story about Conahan as true. The state court relied on other "physical evidence corroborating Burden's testimony, including scars around Burden's neck and indentations around the tree from the rope that Conahan used to restrain and attempt to strangle Burden." *Conahan*, 2017 WL 656306, at *1. In doing so, the court ignored Burden's prior statements, including details establishing that Conahan would not have attacked Burden.

The court failed to assess the impact on the fact finder if the fact finder had known that Burden was willing to lie under oath at the direction of the State in order to procure a chance at parole on his own 25-year prison sentence for child rape.

Jurists of reason could come to a different resolution on this issue.

c. The Record Establishes Burden's Testimony is Material and Could Have Affected the Judgment of the Fact Finder.

In reaching its finding that the newly discovered evidence, Burden's admissions, was not material and did not undermine the verdict the Florida Supreme Court made unreasonable factual determinations and reasonable jurists could agree or disagree as to the district court's resolution of this issue.

The record establishes a clear pattern of prosecutorial misconduct as the State presented fabricated testimony to craft a case against Conahan. The due

process nature of the intertwined prejudice and materiality tests require a cumulative materiality analysis, one the state court failed to conduct. *See Kyles v. Whitley*, 514 U.S. 419 (1995). In order to assess the confidence in the outcome of a trial, the court must evaluate the totality of the evidence for its cumulative effect. Here, the court assessed each claim individually, failing to recognize its cumulative effect.

Burden's testimony was the crux of the State's case against Conahan, and the police used his claims to craft their entire case. The State's theory was that Conahan had lured Burden into the woods under similar pretenses to Montgomery, tried to strangle him, and then simply gave up. The trial court made a finding that Burden's testimony was indicative of a modus operandi that identified Conahan as the perpetrator in Montgomery's death. (T-2499.)

Conahan waived a jury at the guilt phase of his trial, and Judge Blackwell made the decisions about Conahan's guilt after hearing proffered *Williams* rule evidence. However, because the state had nolle prossed the charges against Conahan for the Burden case, the allegations were never scrutinized under the reasonable doubt standard. Instead, the trial court admitted Burdens *Williams* rule testimony supporting a similar signature crime committed under the clear and convincing evidence standard.

To allow the unadjudicated crime evidence into the trial the trial court first

relied on Burden's false and flawed testimony as proof of Conahan's guilt in the allegation of the attempted murder of Burden. Then the trial court used the same findings, based on the court's finding of the credibility and reliability of Burden's testimony, to admit the testimony under the Williams rule to support its finding of Conahan's guilt in the Montgomery murder. Thereafter Conahan was sentenced to death by the same trial court. The court was unaware while making these decisions that Burden's critical testimony was undermined by a double lie—He was made a secret offer of assistance by the State and was also told to lie about it if asked.

There is no other evidence in this case more important than the testimony of Stanley Burden (and the fabricated testimony of Montgomery-West creating the link between Burden and Montgomery). In its closing argument at trial the State made that crystal clear when they referred to the "Burden event" as "our signature crime," using the alleged assault to establish modus operandi, identity, and motive. (T-2005.) The *Williams* rule evidence, including Burden's testimony and references to other John Doe cases that had nothing to do with Montgomery's death, became the feature of the Conahan's trial.

There was no DNA evidence linking Conahan to any murders or to the Burden case. The only DNA testimony at trial related to DNA evidence found on Montgomery's body that failed to match either Conahan or the victim. The similar facts alleged in the State's proffered testimony of Mr. Burden was the strongest

evidence against Daniel Conahan, and it was obtained under false pretenses. There was a secret promise of favorable treatment, and instructions to lie if asked about any promised benefits.

The disparity of the actual facts as related to the "signature" aspects of Burden's account when compared to the facts of the Montgomery murder are striking. Despite the trial court's reliance on these theories of facts there was no evidence presented that victim Montgomery was tied to a tree. Luminol testing of trees in the area was negative for blood. There were no ligatures found at the Montgomery crime scene. No evidence was presented that Montgomery was sexually assaulted. All the scrapes and scratches on Montgomery's back and buttocks were determined by the state's medical examiner, Dr. Imami, to have been inflicted after death. Without Montgomery-West's fabricated testimony, there would be no belief that Montgomery left the house that day to earn money by taking nude photos, and thus no connection of Conahan to the death of Montgomery. There are many more examples of how Burden's account morphed into evidence of Conahan's guilt in the Montgomery murder.

Even after applying *Brecht* for purposes of Conahan's federal habeas review, reasonable jurists could agree, or disagree for that matter, that the facts demonstrate that Burden's false testimony was fatal to Conahan's defense. The presentation of his false testimony—both substantially and going to his

credibility— had a substantial and injurious effect or influence on the outcome of his trial. *Brecht,* 507 U.S. at 637. The case against Conahan was purely circumstantial.

The state's suppression of Burden's false testimony and failure to correct his fabrications amounted to clear violations of due process and the dictates of *Brady* and *Giglio*. Reasonable jurists could agree or disagree with the district court's resolution of Ground VIII.

D. The State Violated Conahan's Due Process Rights When It Engaged in Persistent Prosecutorial Misconduct in Order to Present the Fabricated Williams Rule Evidence. The District Court's Resolution of this Claim is Debatable among Jurists of Reason.

In his final issue before this Court, Mr. Conahan is determined to argue that additional, intertwined due process violations render his conviction and sentence of death unconstitutional. The Florida Supreme Court considered Conahan's claims of prosecutorial misconduct arising from improper statements in opening and closing to the jury. The court determined the trial court abused its discretion when it allowed the State to comment on the Burden's *William's* rule evidence in its penalty phase opening and closing which was held before a jury, because the court ultimately determined the evidence was inadmissible. *Conahan*, 844 So. 2d 629 (Fla. 2003).

However, other misconduct was never preserved or argued on direct appeal.

The Florida Supreme Court denied Conahan's claim asserting that the State's intentional delay of the Burden case to obtain a tactical advantage as procedurally barred because it should have been raised on direct appeal; however, the court also rejected Conahan's claim that appellate counsel was ineffective for failing to raise the claim at the appropriate stage.

Conahan argued, and the court considered, that appellate counsel's failures, including failing to challenge the undue delay, rose to the level of fundamental error. The court ruled that the claim was without merit, "because the state never refiled charges in the Burden case." *Conahan*, 118 So. 3d at 735.

Conahan raised this issue as Ground IV in his habeas petition. The district court denied relief finding that "the fundamental error in question is a matter of state law. . ." (Doc. 92 at 34) (quoting *Pinkney v. Sec'y, DOC*, 876 F.3d 1290, 1299 (11th Cir. 2017)). Conahan maintains that reasonable jurists can come to a different conclusion on this claim as it is not premised only on independent state grounds, but concerns violations of constitutional protections enumerated by the due process clause, including notions of fundamental fairness.

The State filed a nolle prosequi in the Burden case without ever providing a valid reason for doing so. The record reveals that the State's action in filing a nolle prosequi was an intentional device to gain tactical advantages in both the Burden case and in the Montgomery case. This action also allowed Lee to use Burden

under a lesser burden of proof as a *Williams* rule witness in Montgomery.

In *United States v. Foxman v. U.S.*, 87 F.3d 1220, 1223 (11th Circ. 1996), this Court determined that pre-indictment delay can rise to the level of a due process violation when the delay is "the product of a deliberate act by the government designed to gain tactical advantage." The State delayed, indefinitely, any trial on the Burden charges by its nolle prosequi of that case in order to secure the Burden evidence as *Williams* rule evidence in the Montgomery trial. Florida courts have long held that "it is fundamentally unfair to a defendant to admit evidence of acquitted crimes." *State v. Perkins*, 349 So. 2d 161, 163 (Fla. 1977)

By entering a nolle prosequi of the charges in the Burden case, the State was able to present Burden's statements in the Montgomery case without any risk that Conahan would have been acquitted. Had the State moved forward, the evidence would have been a battle of credibility between the testimony of Conahan and Burden. Given Burden's criminal history and the fact that police did not believe his story at the time he initially reported it, an acquittal of Conahan was a reasonable possibility, thereby barring the use of Burden's testimony as *Williams* rule evidence in Montgomery's case.

This permitted the State to present Burden's *Williams* rule testimony supporting a similar signature crime committed by Conahan into his consideration of guilt in the Montgomery case under the clear and convincing evidence standard

as opposed to having his testimony scrutinized under the strict beyond a reasonable doubt standard as his case moved forward.

This tactic amounted to a clear violation of Conahan's 8th and 14th Amendment rights. The *Williams* rule evidence became a feature of the trial, comprised of twenty-five of the State's thirty-eight witnesses, in whole or in part.

The trial court's improper admission of the *Williams* rule evidence, and the state's flagrant misconduct, constitute fundamental error and further highlights the cumulative effect of the prosecutor's misconduct throughout the trial and undermines the confidence in Conahan's convictions and sentences.

Conclusion

Conahan has shown a denial of his Fifth, Sixth and Fourteenth Amendment rights which rise to the level of materiality in both the guilt and penalty phase portions of his trial sufficient to proceed further. The district court's resolution of his claims is debatable among jurists of reason. This Court should grant a COA.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Petitioner-Appellant certifies that this brief contains 12,983 words, excluding items noted in Rule 32(a)(7) of the Federal Rules of Appellate Procedure and Rule 22-2 of the Eleventh Circuit Rules.

CERTIFICATE OF TYPE SIZE AND STYLE

Petitioner-Appellant certifies that the size and style of type used in this brief is Time New Roman 14-point, in compliance with the requirements of Rule 32.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on April 4, 2024, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which sent a notice of electronic filing to: Timothy A Freeland, Assistant Attorney General, *timothy.freeland@myflorida.legal.com.*

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DOCKET NO. _____

OCTOBER TERM 2024

IN THE

SUPREME COURT OF THE UNITED STATES

DANIEL OWEN CONAHAN, JR.
Petitioner,

vs.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS
AND FLORIDA ATTORNEY GENERAL.
Respondent.

On Petition For A Writ of Certiorari To
The United States Court of Appeals For The Eleventh Circuit

APPENDIX F

Petitioner-Appellant's Amended Motion for Reconsideration of Order Denying Certificate of Appealability, filed in the Eleventh Circuit Court of Appeals, No. 24-10844, July 5, 2024

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 24-10844

DANIEL O. CONAHAN, JR.

Petitioner-Appellant,

vs.

RICKY D. DIXON, SECRETARY,
Florida Department of Corrections,

Respondent -Appellee.

On Appeal From the Denial of Petition for
Writ of habeas Corpus by the United States District Court
for the Middle District of Florida

Petitioner-Appellant's Amended Motion for Reconsideration by Three-Judge Panel to Review Order Denying Application for Certificate of Appealability by Single Judge

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July 5, 2024

CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Circuit Rule 27-1(9), Mr. Conahan includes this certificate of interested persons and corporate disclosure statement:

Ahlbrand, Mark W. – Appointed Defense Counsel (Trial)

Ake, Stephen D. – Assistant Attorney General (Trial)

Blackwell, William – Retired Circuit Court Judge (Trial and Postconviction)

Bondi, Pamela Jo – Former Attorney General of Florida

Brock, Delano – Former Assistant State Attorney, Twentieth Judicial Circuit (Trial)

Casanueva, Darryl C. – Former Circuit Court Judge (Grand Jury Proceedings)

Crews, Michael D. - Former Secretary, Florida Department of Corrections

Crist Jr., Charlie – Former Attorney General of Florida

D'Alessandro, Joseph P. – Former State Attorney of the Twentieth Judicial Circuit

Dixon, Ricky D. – Secretary, Florida Department of Corrections

Dupree, Neal A. - Former Capital Collateral Regional Counsel-South (Postconviction)

Ellis, Cynthia A. – Circuit Court Judge (Trial)

Feinberg, Daniel – Assistant State Attorney, Twentieth Judicial Circuit (Postconviction)

Fordham, C. L. – Assistant State Attorney, Twentieth Judicial Circuit (Grand Jury Proceedings)

Fox, Amira D. – State Attorney of the Twentieth Judicial Circuit

Frazier, Douglas N. – United States District Court Magistrate Judge

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Keffer, Suzanne – Acting Capital Collateral Regional Counsel-South (Postconviction)

Kruszka, Jason – Former CCRC-South Staff Attorney (Postconviction)

Lacy, Brittney N. – Assistant CCRC-South (Postconviction)

Landry, Robert J. – Former Assistant Attorney General (Postconviction)

Lee, Robert A. – Former Assistant State Attorney, Twentieth Judicial Circuit (Trial and Postconviction)

Mason, Donald – Retired Circuit Court Judge (Postconviction)

McCollum, Bill – Former Attorney General of Florida

McCoy, Mac R. – United States District Court Magistrate Judge (Postconviction)

McHugh, Michael T. – Circuit Court Judge (Postconviction)

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Montgomery, Richard Alan – Victim (Deceased)

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Still III, Ira W. – Clemency Counsel (Postconviction)

Sullivan, Paul D. – Appointed Defense Counsel (Trial)

Trocino, Craig J. – Former Assistant CCRC-South (Postconviction)

No publicly traded company or corporation has an interest in the outcome of this appeal.

Amended[1] Motion for Reconsideration by a Three-Judge Panel to Review an Order Denying Application for Certificate of Appealability by Single Judge

COMES NOW THE PETITIONER-APPELLANT, DANIEL O. CONAHAN, JR., by and through undersigned counsel, and pursuant to Federal Rules of Appellate Procedure 22(b)(1) and 27(c) and 11th Circuit Rule 22-1(c), and hereby moves this Court to reconsider the Order by a single judge denying Conahan a Certificate of Appealability (COA). As grounds therefore, Conahan states the following:

On March 27, 2023, the district court summarily denied Conahan's Petition for Writ of Habeas Corpus and denied a certificate of appealability. (Doc. 92).[2] Conahan moved to alter and amend the district court's denial of his petition for a writ of habeas corpus, (Doc. 95), which was also denied. (Doc. 96).

Conahan timely filed a notice of appeal, (Doc. 97), and, on April 4, 2024, Conahan filed an application for COA in this Court, in which he identified three *discrete* issues warranting a COA. (Doc. 10).[3] *See Jones v. Sec'y, Dept. Of Corr.,*

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[1] Petitioner inadvertently filed the instant motion without Attachment A. He refiles now with the Attachment. No other changes were made to the document.

[2] Citations to the record:
(R-__) and (T-__)—Record on Appeal and Trial Transcripts;
(PCR-__) and (EH-__)—Postconviction Record and Hearing Transcripts;
(PCR2-__)—Successive Postconviction Record;
(Doc. __)—District Court Docket.
All other citations will be self-explanatory.

[3] The arguments previously raised in the COA application are herein

607 F.3d 1346 (11th Cir. 2010) (applicant must provide specific grounds for relief with legal support to obtain a COA). On May 31, 2024 a single judge summarily denied Conahan's COA request without any explanation or reasoning. (Doc. 12-2, Attachment A).

Eleventh Circuit Rule 22-1(c) permits a motion for reconsideration by a three-judge panel of a single judge's denial of a COA. This motion for reconsideration follows.

A. The Standard for Issuing a COA is Less Than That Needed to Prevail on Appeal.

The standard for issuing a COA is well-settled. *See Buck v. Davis*, 580 U.S. 100, 115 (2017); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). An Appellant need only demonstrate a "substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(C)(2). "The only question" the Court must answer is whether "jurists of reason could disagree with the district court's resolution of his constitutional claims or . . . could conclude the issues presented are adequate to deserve encouragement to proceed further." *Buck*, 580 U.S. at 115 (2017) (quoting *Miller-El*, 537 U.S. at 336).

Since its inception, the standard has remained a "threshold inquiry," *Slack*,

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expressly incorporated by specific reference.

529 U.S. at 485, requiring the court to conduct only an "overview" of the claims and a "general assessment of their merits." *Miller-El*, 537 U.S. at 336. The threshold inquiry "should be decided *without* 'the full consideration of the factual or legal bases adduced in support of the claims.'" *Buck*, 580 U.S. at 115 (quoting *Miller-El*, 537 U.S. 336) (emphasis added). In fact, the Court has specifically determined that the statute forbids such an inquiry. *Miller-El*, 537 U.S. at 336. Thus, a petitioner need not show–nor must the Court be convinced–that "the appeal will succeed" in order for a COA to issue; nor should a court decline to issue a COA merely because the Court "believes the applicant will not demonstrate an entitlement to relief." *Id*. at 337. "At minimum, the petitioner seeking a COA must prove 'something more than the absence of frivolity or good faith on his part,'" *Mills. v. Comm'r, Alabama Dept. of Corr*., 102 F.4th 1235, 1242 (11th Cir. 2024) (Abudu, J. concurring), not that "some jurists would grant the petition for habeas corpus." *Id*. at 337-38.

Writing for the majority in *Buck*, Justice Roberts reiterated that the appellate court need only answer whether the "claim is reasonably debatable." 580 U.S. at 101. While the determination that a petitioner's claim is not debatable "necessarily means" the claim is not meritorious, "the converse is not true." *Id*. at 116. Just because a petitioner fails to show his claim will win, the Court noted, "does not logically mean he failed to make a preliminary showing that his claim was

debatable." *Id*. Such an inquiry is "too heavy a burden [. . .] at the COA stage." *Id*. at 117. "The COA inquiry, we have emphasized, is not coextensive with a merits analysis." *Id.* at 115.

"[A]ny doubt as to whether a COA should issue in a death-penalty case must be resolved in favor of the petitioner." *Medellin v. Dretke*, 371 F.3d 270, 275 (5th Cir. 2004) (citing *Pippin v. Dretke*, 434 F.3d 782, 787 (5th Cir. 2005)).

B. AEDPA Does not Absolve the Court of All Review of State Court Decisions.

The COA requirement is not meant to foreclose all necessary review. Notwithstanding the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and its requirement of deference to factual findings of state court judges, courts are not permitted to simply rubber stamp state court action. Indeed, "'[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review,' and 'does not by definition preclude relief.'" *Brumfield v. Cain*, 576 U.S. 305 (2015) (quoting *Miller-El*, 537 U.S. at 340).

The Supreme Court has repeatedly recognized that death penalty cases require unique and heightened constitutional protections to ensure that courts reliably identify those defendants who are both guilty of a capital crime and for whom execution is the appropriate punishment. *Hall v. Florida*, 572 U.S. 701, 724 (2014) (Because "the death penalty is the gravest our society may impose," capital defendants must have a fair opportunity to show that the constitution prohibits their

execution."); *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) ("When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint. . . . [T]he Court insists upon confining the instances in which the punishment can be imposed."); *Ring v. Arizona*, 536 U.S. 584, 618 (2002) (Breyer, J., concurring) ("[T]he danger of unwarranted imposition of the penalty cannot be avoided 'unless the decision to impose the death penalty is made by a jury rather than by a single governmental official.'" (citation omitted)); *Ford v. Wainwright*, 477 U.S. 399, 414 (1986) (Court's consideration of capital cases has been characterized by "heightened concern for fairness and accuracy"); *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring) ("[T]his Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake."); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (need for heightened reliability in sentencing determination than in non-capital cases).

While the severity of the penalty is not by itself sufficient to warrant the automatic issuance of a COA, "[i]n a capital case, the nature of the penalty is a proper consideration in determining whether to issue a certificate of probable cause." *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983).

The Supreme Court has recognized that the need for heightened reliability in capital cases remains a concern and AEDPA does not preclude review. Indeed, the Supreme Court has corrected the Fifth Circuit four times for failing to grant a COA in a capital case. Since the reaffirmation of the legal standard in *Slack* in 2000, the Court has criticized and over ruled the Fifth Circuit's denial of a COA in *Miller El*, *Banks v. Dretke*, 540 U.S. 668 (2004), *Tennard v. Dretke*, 542 U.S. 274 (2004), and *Buck*. The Fifth Circuit is an outlier in its application of the COA standard in capital cases.

A review of the applications for COA filed in the Fifth Circuit between January 1, 2020 and present reveals that the circuit is disposing of capital cases via COA denials at a rate of over 65%, numbers drastically higher than in any other time since the reinstatement of the death penalty following *Furman v. Georgia*, 408 U.S. 238 (1972). A review of *this circuit's docket* within the same time frame, indicates that this Court is following suit and becoming an outlier of its own. In the last four years, this circuit has disposed of capital cases via COA denials in approximately 40% of cases.[4] The shift in this Court's review of capital cases over the last fifteen years is remarkable. Between 2008-2019, this circuit disposed of

[4] The data considers applications for COA's in properly filed appeals for which this Court's decision on the COA is dispositive, and does not include State initiated appeals in which a COA is not required, litigation under warrant, interlocutory appeals, cases rendered moot, or improperly filed appeals.

capital cases via COA denials in only approximately 11% of cases.

These numbers are particularly disturbing when viewed in conjunction with data of overall disposition of capital cases in this circuit. Of the approximately 61 capital cases disposed of between January 1, 2020 and present,[5] this Court has granted relief to a capital defendant in only 2. Notably, the decline in this Court's willingness to review state court action is not borne of data or research showing death penalty convictions and sentences are more reliable now. Indeed, the numbers suggest that this Court's jurisprudence has shifted in a manner that trends towards outlier status with the Fifth Circuit.

C. Reasons Why This Court Should Reconsider the Application for COA

In Grounds II and VIII of his habeas petition, Conahan raised claims regarding the application of *Brady* v. *Maryland,* 373 U.S. 83 (1963) and *Giglio* v. *United States,* 405 U.S. 150 (1972) to his case. In Ground IV, Conahan asserted due process violations. Conahan submits that he "made a substantial showing of the denial of a constitutional right" and raised substantial questions of law and fact, which are debatable among jurists of reason or that could be resolved differently. *See* 28 U.S.C. § 2253(c)(2).

[5] This data excludes the same categories noted *supra*, note 4; however, this data also considers cases in which the district court granted relief and the State or Government appealed.

The denial of a COA on the facts and law presented in his habeas is contrary to settled precedent; and while Conahan may not ultimately prevail, Conahan has met the standard for the issuance of a COA. However, without any guidance from this Court's one-line Order,[6] Conahan is left to wonder in what manner his COA has failed and thus must restate the original arguments made in his COA.

1. The District Court's Resolution of Mr. Conahan's *Giglio* Claim in which he Alleges the State Allowed Mrs. Montgomery-West to Testify Falsely is Debatable Among Reasonable Jurists.

In Claim II, Conahan argued that he is entitled to a new trial because the State presented false testimony from the victim's mother, Mary Montgomery-West in violation of *Giglio* and Conahan's right to due process of law under the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution. Conahan's case lacked inculpatory physical evidence, instead the State relied on the testimony of *Williams* rule witness, Stanley Burden, who claimed Conahan had assaulted him in a similar manner two years prior. However, the State's evidence failed to connect Conahan to the victim, Richard Montgomery, or connect Burden's alleged assault to the facts of Montgomery's death. Montgomery-West's false testimony, offered

[6] The court denied Conahan's application 57 days after filing. Conahan's case spans nearly three decades of litigation and the record is voluminous. The direct appeal alone consists of 39 volumes of records and transcripts, and the complete record consists of more than 12,000 pages of records, transcripts, and pleadings.

at trial for the first time, conveniently provided the missing links.

Montgomery-West spoke to police in the days after her son's death, providing officers with great detail about his life, friends, acquaintances, and coworkers. (PCR-900-27). She never mentioned Conahan or any facts about Conahan's life to suggest she knew of his existence or that her son knew him. At trial, on direct, she repeated much of what she told police two years prior, and again, did not mention Conahan. (T-1099-1101). However, on cross examination, Montgomery-West suddenly claimed her son knew Conahan. (T-1103-06). Caught off-guard by this surprise revelation, counsel asked her why she did not provide this information to police. She first told the court she *thought* she told the officers the night she gave her recorded statement; however, as her testimony continued, she changed her story and claimed that *she did* tell the lead detective after Conahan had been arrested and his name was in the newspaper. (T-1107). On redirect, the State elicited testimony from Montgomery-West about Conahan through leading questions, molding her testimony to the State's theory of the case.

Relying on the Florida Supreme Court's findings, the district court determined that Conahan failed to meet the requirements of *Giglio*. However, this finding ignores the state court's failure to apply the proper *Giglio* materiality analysis and made factual findings unsupported by the state court record.

The state court wholly failed to acknowledge that Montgomery-West's

testimony was false, instead determining that "her self-qualified thought" that she had told police about her conversation with her son during her recorded interview indicated she "was mistaken" and did not necessarily show that her testimony was false. *Conahan v. State*, 118 So. 3d 719, 729 (Fla. 2013). The court found that Montgomery-West "perhaps" told police prior to the start of the recording of her April 18th interview, and that the postconviction testimony "indicates [she] had interactions with other law enforcement officers and made an oral statement to the prosecutor concerning this matter." *Id*.

Finding the state court's application of *Giglio* reasonable, the district court ruled that Conahan didn't offer evidence challenging the "truth of Montgomery-West's testimony describing a conversation she had with Montgomery about Conahan," and instead focused on when she reported the conversation. (Doc. 92 at 25). The court noted that Montgomery-West's testimony about when she told police about the conversation was "equivocal," and that the state court "identified other times [she] might have relayed the information to police, and those findings are consistent with the record." *Id.*

The district court rejected Conahan's claim that the State knew the testimony was false, finding that the prosecutor testified that she "told him about the conversation before trial. . ." and that "he denied having any belief or indication Montgomery-West testified falsely." *Id.*

The reasoning adopted by both the state court and the district court is an erroneous determination of fact unsupported by the state court record. During postconviction proceedings, Conahan presented forensic audio analysis that ruled out any possibility Montgomery-West mentioned Conahan during her interview with police. Further, testimony from law enforcement established that she did not mention anything about Conahan or say his name to police at any time prior to trial. Hundreds of pages of discovery from the State provided to defense counsel in postconviction, establish Montgomery-West never reported to police that she had ever heard of Conahan or suspected he knew her son. The State was aware her testimony was fabricated. Jurists of reason could debate the State and the district court's findings.

The state court determined that the State "established that the testimony was immaterial" because "Newman and Whittaker established that the victim and defendant knew each other," and the *Williams* rule evidence was "not contingent upon Mrs. Montgomery's testimony." *Conahan,* 118 So. 3d at 729. The district court further found fair-minded jurists could find that the conversation is "duplicative of other evidence linking Conahan and Montgomery-namely, the testimony of Neuman and Whit[t]aker." (Doc. 92 at 26). However, fair-minded jurists could also disagree.

For example, the state court's materiality analysis included a finding that

Conahan "himself admitted in his trial testimony that he had told police he had been to see the victim about three times." (PCR-1716). This is an unreasonable determination of the facts. Conahan *did not testify* that he ever went to see Montgomery. Conahan testified that he had become acquainted with Jeff Dingman who lived in Robert Whittaker's trailer, and that he had visited the trailer to see Dingman, but that *he never met* Montgomery. (T-1940). The state court relied on Whittaker's testimony claiming Conahan had come to his home looking for Montgomery. Whittaker testified that Conahan hadn't been to the trailer since December of 1995, (T-992), months before Montgomery-West claimed Conahan became Montgomery's new friend.

Whittaker's testimony was not credible. He claimed Conahan told him that Montgomery's sister Carla told him her brother was in the trailer with Whittaker, (T-987); however, Carla testified and denied Whittaker's claims. (T-1581). She clarified that hadn't ever seen Conahan and that he never came to her looking for Montgomery. (T-1581).

The state court unreasonably applied a heightened materiality analysis—"there is no reasonable possibility of a different verdict as it was harmless beyond a reasonable doubt" *Conahan*, 118 So. 3d at 729. However, evidence is material under *Giglio* if there is "any reasonable likelihood that the false testimony could … have affected the judgment." *Ford v. Hall,* 546 F.3d 1326,

1332 (11th Cir. 2008); *see also Kyles*, 514 U.S. at 436. Because the state court misapplied the legal standard, or identified an incorrect standard, AEDPA deference does not apply. *Price v. Vincent*, 538 U.S. 634, 640 (2003).

Moreover, in order to assess the confidence in the outcome of a trial, the court must evaluate the totality of the evidence for its cumulative effect. *See Kyles*, 514 U.S. 419. Here, the state court assessed each claim individually, failing to recognize its cumulative effect. The State allowed the presentation of false information of the victim's mother who not only testified falsely that the name Conahan was in the inaudible portions of her recorded statement, but more significantly falsely testified to new and fabricated facts establishing the State's entire theory.

Even after applying *Brecht* for purposes of Conahan's federal habeas review, reasonable jurists could agree, or disagree for that matter, that the facts demonstrate that Montgomery-West's false testimony was fatal to Conahan's defense. The presentation of Montgomery-West's false testimony—both substantially and going to her credibility—had a substantial and injurious effect or influence on the outcome of his trial. *Brecht,* 507 U.S. at 637. Indeed, the application of *Brecht* itself is debatable among jurists of reason. *Dickey v. Davis*, 69 F.4th 624, 645 n.11 (9th Cir. 2023) (collecting cases). The case against Conahan was purely circumstantial.

Reasonable jurists could agree or disagree with the district court's resolution of Ground II.

2. The District Court's Resolution of Mr. Conahan's *Giglio* and *Brady* Claims in which he Asserts the State Allowed Stanley Burden, the State's *Williams* Rule Witness, to Testify Falsely, is Debatable Among Reasonable Jurists.

In Ground VIII, Conahan argued that the State's failure to disclose its offer of assistance to Stanley Burden, the State's *Williams* rule witness, was cumulative to other instances of prosecutorial misconduct and also a violation of *Brady* and *Giglio*, which rendered the proceedings fundamentally in fair in violation of his due process rights. In rejecting Conahan's claim, the district court agreed with the Florida Supreme Court's determination that Conahan failed to meet all three *Giglio* prongs, (Doc. 92 at 25), however, the district court failed to recognize that the Florida Supreme Court misapplied the *Giglio* materiality standard and made findings premised on unreasonable determinations of the facts in light of the state court record.

The State built a purely circumstantial case against Conahan, relying heavily on Burden's testimony. Burden testified that Conahan lured him into the woods under similar pretenses to Montgomery, tried to strangle him, and then simply gave up. The trial court found that Burden's testimony was indicative of modus operandi that identified Conahan as the perpetrator in Montgomery's

death. (T-2499). Burden disclosed the “modus operandi” facts to police only after they visited him in an Ohio prison where he was serving a sentence for child rape.

During the *Williams* rule proffer, the prosecution asked Burden whether he had "been promised anything in exchange for [his] testimony." Burden answered "No." (PCR2-671-72). On cross he was asked again, "anybody from local law enforcement told you that they're going to send a letter to the parole board about your participation in this case?" Burden again answered "No." (PCR2-692).

In the years following Conahan’s conviction, Burden declined to meet with postconviction counsel; however, in 2015, counsel received a package from a third party with letters written by Burden indicating that the State failed to follow through on the State’s promise to write a letter to the parole board in exchange for his testimony against Conahan. Burden then agreed to two interviews with the postconviction investigator, during which Burden admitted, "Prosecutor Lee told me if asked [to say] that I wasn't promised anything on the stand." (PCR2-60). The investigator obtained an affidavit and declaration, both which establish that Burden lied at Conahan' s trial about promises made to him in exchange for his testimony and that the prosecutor was aware of the false

testimony. Conahan included this information in a successive state postconviction motion, asserting the statements constituted newly discovered evidence that directly contradicted Burden's testimony in deposition and at trial. This information was material and went directly to Burden's credibility. The court denied Conahan's claim without an evidentiary hearing.

The State's failure to disclose its offer of assistance and failure to correct his false testimony denying the State's promises in exchange for his testimony violate *Brady* and *Giglio* and go to the heart of the State's case. The State's case rested on this *Williams* ruled evidence. There was no DNA evidence linking Conahan to Montgomery's murder or to the Burden case.

The district court's rejection of these claims is debatable among jurists as a reasonable juror could find that the state court unreasonably applied clearly established federal law and made an unreasonable determinations of the facts in light of the state court record thus setting aside AEDPA deference and requiring *de novo* review. The state court denied Conahan's claim, finding that he could not establish the newly discovered evidence was "of such nature that it would probably produce an acquittal on retrial," because Burden's affidavit "explained" he wouldn't have testified but for the prosecutors promise to write a letter to the parole board, but was not a recantation of his testimony at trial. *Conahan*, 2017

WL 656306, at *l (quoting *Johnston v. State*, 27 So. 3d 11 (Fla. 2010)).

The court further determined Conahan did not meet the materiality requirement for *Giglio* and *Brady* claims, finding that the "scars around Burden's neck and indentations around the tree from the rope that Conahan used to restrain and to attempt to strangle Burden," corroborated his testimony at trial. *Id.* The court, however, failed to acknowledge Burden's admission that he lied under oath at trial *at the direction of the State*, unreasonably diminishing this misconduct and determining that the factfinder was aware "that Burden hoped that by testifying he would get documentation illustrating his cooperation that he could contribute to his court file and prison record and that he planned to inform the parole board about his cooperation in the Montgomery case." *Id.*

The district court determined the state court's decision was reasonable because Burden "did not claim Lee's promise influenced the substance of the testimony," and that the promises to testify occurred after Burden had spoken with police and implicated Conahan. (Doc. 92 at 47). "Burden identified Conahan as his attacker and described the attack multiple times years earlier-the record contains a detailed account of the attack Burden gave in a deposition about two years before trial." *Id.*

The district court further determined that the evidence was relevant to

Burden's credibility, but would not have made an impact on the factfinder who, the court noted, "already questioned Burden's credibility." *Id.* at 48.

Because the postconviction court summarily denied this claim, the district court relied on and adopted the State's argument, not evidence, that "[t]he agreement to write a letter to the Ohio parole board occurred after Burden made his statements to detectives and after Burden testified in his deposition" and that "[b]efore any alleged conversation with Mr. Lee, a statement to law enforcement and a sworn deposition had been taken."

The postconviction court did not hold a hearing or admit testimony establishing that any promise was made after Burden's sworn testimony; the record establishes the opposite is true. Burden gave a deposition in November 1997 at which trial counsel and Lee were present at the Ohio correctional facility where Burden was incarcerated. (PCR2-713). Burden told trial counsel that he met with Lee in Ohio prior to the deposition. (PCR2-715; 174).

Moreover, the state court's determination that the trial court was already aware Burden hoped to gain some benefit for testifying is an unreasonable determination of the facts. While Burden testified that he put the subpoena for Montgomery's trial in his master file-along with everything he receives-he explicitly told the court that he would not tell the parole board about his participation in the Montgomery case. (T-1204).

The state court's determination that Burden's lies about the promises he received did not affect the veracity of his trial testimony is a misapplication of *Brady* and *Giglio* and an unreasonable determination of fact in light of the state court record. Reasonable jurists could agree or disagree as to the district court's resolution of this issue. Burden lied to the police from the very beginning of his involvement in the Montgomery case, which he admitted at trial. (T-1206). The record also demonstrates that he not only lied about promises made in exchange for his testimony, but he also lied about the substance of his story throughout the case. Yet, the court failed to assess the impact on the fact finder if the fact finder had known that Burden was *willing to lie under oath at the direction of the State* in order to procure a chance at parole on his own 25-year prison sentence for child rape. Reasonable jurists could agree or disagree as to the district court's resolution of this issue.

In order to assess the confidence in the outcome of a trial, the court must evaluate the totality of the evidence for its cumulative effect. *See Kyles*, 514 U.S. 419. Here, the state court assessed each claim individually, failing to recognize its cumulative effect.

There is no question that Burden's testimony was the crux of the State's case against Conahan, and the police used his claims to craft their entire case. Conahan waived a jury at the guilt phase of his trial, and Judge Blackwell made the

decisions about Conahan's guilt after hearing proffered *Williams* rule evidence. However, because the state had nolle prossed the charges against Conahan for the Burden case, the allegations were never scrutinized under the reasonable doubt standard. Instead, the trial court admitted Burdens *Williams* rule testimony supporting a similar signature crime committed under the clear and convincing evidence standard.

The state's suppression of Burden's false testimony and failure to correct his fabrications amounted to clear violations of due process and the dictates of *Brady* and *Giglio*. Reasonable jurists could agree or disagree with the district court's resolution of Ground VIII.

3. The District Court's Resolution of Mr. Conahan's Due Process Claim is Debatable Among Reasonable Jurists.

In Ground IV, Mr. Conahan raised due process violations which he maintains render his conviction and sentence of death unconstitutional. The state court considered Conahan's claims of prosecutorial misconduct arising from improper statements to the jury, and determined the trial court abused its discretion when it allowed the State to comment on the Burden's *William's* rule evidence in opening and closing arguments before the jury because the evidence was inadmissible. *Conahan*, 844 So. 2d 629 (Fla. 2003).

However, because other misconduct, including the State's intentional delay of the Burden case to obtain a tactical advantage, was never preserved or argued on

direct appeal, the state court denied Conahan's claim as procedurally barred. The court, however, rejected Conahan's claim that appellate counsel was ineffective for failing to raise the claim at the appropriate stage. The court also ruled Conahan's claim that appellate counsel's failures rose to the level of fundamental error was without merit, "because the state never refiled charges in the Burden case." *Conahan*, 118 So. 3d at 735.

The district court denied relief finding that "the fundamental error in question is a matter of state law. . ." (Doc. 92 at 34) (quoting *Pinkney v. Sec'y, DOC*, 876 F.3d 1290, 1299 (11th Cir. 2017)). Reasonable jurists can come to a different conclusion on this claim as it is not premised only on independent state grounds, but concerns violations of constitutional protections enumerated by the due process clause, including notions of fundamental fairness.

The State filed a nolle prosequi in the Burden case without providing a valid reason for doing so. The record reveals that the State's action was done intentionally to gain tactical advantages in both the Burden and Montgomery cases. This action also allowed Lee to use Burden under a lesser burden of proof as a *Williams* rule witness in the Montgomery case.

Pre-indictment delay can rise to the level of a due process violation when the delay is "the product of a deliberate act by the government designed to gain tactical advantage." *United States v. Foxman v. U.S.*, 87 F.3d 1220, 1223 (11th Circ.

1996). The State delayed, indefinitely, any trial on the Burden charges by its nolle prosequi of that case in order to secure the Burden evidence as *Williams* rule evidence in the Montgomery trial.

By entering a nolle prosequi of the charges, the State was able to present Burden's statements in the Montgomery case without any risk. Had the State moved forward on the Burden case, the evidence would have been a battle of credibility between the testimony of Conahan and Burden. Given Burden's criminal history and the fact that law enforcement did not believe his story at the time he initially reported it, an acquittal of Conahan was a reasonable possibility, thereby barring the use of Burden's testimony as *Williams* rule evidence in Montgomery's case.

This permitted the State to present Burden's *Williams* rule testimony supporting a similar signature crime committed by Conahan into his consideration of guilt in the Montgomery case under the clear and convincing evidence standard as opposed to having his testimony scrutinized under the strict beyond a reasonable doubt standard in his own case.

This tactic amounted to a clear violation of Conahan's 8th and 14th Amendment rights. The *Williams* rule evidence became a feature of the trial as twenty-five of the State's thirty-eight witnesses were essentially *Williams* rule witnesses.

The trial court's improper admission of the *William*'s rule evidence, and the state's flagrant misconduct, constitute fundamental error and further highlights the cumulative effect of the misconduct throughout the trial and undermines the confidence in Conahan's convictions and sentences.

Conclusion

Conahan has met the limited threshold that entitles him to a COA. This Court should grant a COA and allow Conahan to proceed further.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Petitioner-Appellant certifies that pursuant to Federal Rule of Appellate Procedure 27(d)(2)(A), this brief contains 5,143 words, excluding items noted in Rule 32(a)(7) and 11th Circuit Rule 22-2. Pursuant to 11th Circuit Rule 27-1, no copies have been provided.

CERTIFICATE OF TYPE SIZE AND STYLE

Petitioner-Appellant certifies that the size and style of type used in this brief is Time New Roman 14-point, in compliance with the requirements of Rule 32(a)(5) and 32(a)(6).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on July 5, 2024, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which sent a notice of electronic filing to: Timothy A Freeland, Assistant Attorney General, *timothy.freeland@myflorida.legal.com.*

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ATTACHMENT A

In the

United States Court of Appeals

For the Eleventh Circuit

No. 24-10844

DANIEL O. CONAHAN, JR.,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 2:13-cv-00428-JES-KCD

ORDER:

Appellant's motion for certificate of appealability is DENIED.

/s/ Britt C. Grant
UNITED STATES CIRCUIT JUDGE

DOCKET NO. _____

OCTOBER TERM 2024

IN THE

SUPREME COURT OF THE UNITED STATES

DANIEL OWEN CONAHAN, JR.
Petitioner,

vs.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS
AND FLORIDA ATTORNEY GENERAL.
Respondent.

On Petition For A Writ of Certiorari To
The United States Court of Appeals For The Eleventh Circuit

APPENDIX G

Conahan v. State, 118 So. 3d 718 (Fla. 2013)

118 So.3d 718
Supreme Court of Florida.

Daniel O. CONAHAN, Jr., Appellant,
v.
STATE of Florida, Appellee.
Daniel O. Conahan, Jr., Petitioner,
v.
Michael D. Crews, etc., Respondent.

Nos. SC11–615, SC11–2504.
|
March 21, 2013.
|
Rehearing Denied July 18, 2013.

Synopsis

Background: Following affirmance on direct appeal of defendant's convictions for first-degree murder and kidnapping, and his death sentence, 844 So.2d 629, defendant filed motion for postconviction relief. The Circuit Court, Charlotte County, Donald E. Pellecchia, J., denied motion. Defendant appealed and filed petition for writ of habeas corpus.

Holdings: The Supreme Court of Florida held that:

defense counsel did not render ineffective assistance during guilt phase;

defendant failed to establish *Giglio* claim that state knowingly presented false testimony of victim's mother;

defendant failed to establish *Brady* claim concerning audio recording of an undercover operation investigating him;

defense counsel did not render ineffective assistance during penalty phase;

other crimes evidence in form of defendant's prior, similar assault of another victim was admissible at trial; and

appellate counsel did not render ineffective assistance on direct appeal.

Affirmed.

Attorneys and Law Firms

***723** Neal Andre Dupree, Capital Collateral Regional Counsel, William McKinley Hennis, III, Litigation Director, and Craig Joseph Trocino, Assistant CCR Counsel, Southern Region, Fort Lauderdale, FL, for Appellant/Petitioner.

Pamela Jo Bondi, Attorney General and Charmaine Millsaps, Assistant Attorney General, Tallahassee, Florida, and Stephen D. Ake, Assistant Attorney General, Tampa, FL, for Appellee/Respondent.

Opinion

PER CURIAM.

Daniel O. Conahan, Jr., appeals an order of the circuit court denying his motion filed under Florida Rule of Criminal Procedure 3.851 and petitions this Court for a writ of habeas corpus.[1] For the reasons that follow, we affirm the denial of his postconviction motion and deny his habeas petition.

I. BACKGROUND

Conahan was convicted of the 1996 first-degree murder and kidnapping of Richard Montgomery. The facts of this case were fully set out by this Court on direct appeal:

> On April 16, 1996, Richard Montgomery, who lived with his sister, was with Bobby Whitaker, Gary Mason, and other friends when he mentioned that he was going out to make a few hundred dollars and would be back shortly. When asked whether it was legal, he smiled. Montgomery also told his mother that someone had offered to pay him $200 to pose for nude pictures, but he did not tell her who made the offer. In the same conversation, Montgomery mentioned that he had recently met the defendant Daniel O. Conahan, Jr., who lived in Punta Gorda Isles and was a nurse at a medical center. The last time friends saw Montgomery alive was on April 16 between 4 p.m. and 7 p.m.
>
> The next day, April 17, Thomas Reese and Michael Tish, who were storm utility engineers for Charlotte County, discovered a human skull in a remote, heavily wooded area

off of Highway 41 and immediately notified the police department. ***724** While searching the scene, deputies found the nude body of a young, white male that was later identified as Richard Montgomery. He had visible signs of trauma to the neck, waist, and wrists, and the genitalia had been removed. The forensic lab personnel arrived and collected various items from the scene, including a rope found on the top of a nearby trash pile, carpet padding that covered the victim's body, a skull and a torso (neither of which belonged to the victim), a gray coat, and various combings from the victim's arms, hands, chest, pubic area, and thighs. On the following day, Deputy Todd Terrell arrived on the scene with a K–9 dog which showed significant interest in a sabal palm tree, specifically the side of the tree which was somewhat flattened and damaged.

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

Due to the unique nature of the homicide (being tied to a tree naked and then strangled), police reviewed a similar assault reported on August 15, 1994. The victim, Stanley Burden, was a high school drop-out who, like Montgomery, had difficulty keeping a steady job and had physical features similar to those of Montgomery. The report indicated that Burden met Conahan, who offered to pay him $100 to $150 to pose for nude photographs. Burden agreed and Conahan drove him to a rocky dirt road in a secluded area where Conahan pulled out a duffle bag with a tarp and a Polaroid camera. The two men headed into the woods where Conahan laid the tarp out and asked Burden to take off his shirt and show a little hip. After taking numerous pictures of Burden, Conahan then took out a new package of clothesline so he could get some bondage pictures. He asked Burden to step close to a nearby tree and then clipped the clothesline in several pieces, draping them over Burden to make it look like bondage. Conahan moved behind Burden, snapped the rope tightly around him, pulled his hands behind the tree, placed ropes around his legs and chest, and wrapped the rope twice around Burden's neck. Conahan then performed oral sex on Burden and attempted to sodomize him. Burden fought to position himself in the middle of the tree while Conahan tried to pull him to the side to have anal sex. After many unsuccessful attempts, Conahan snapped the rope around Burden's neck, placed his foot against the tree, and pulled on the rope in an attempt to strangle Burden, who tried to slide around the tree to keep his windpipe open. Conahan hit Burden in the head and unsuccessfully attempted to strangle him for thirty minutes. Conahan asked Burden why he would not die and finally gave up, gathered his possessions, and left. Burden freed himself, went to a local hospital, and received treatment for his injuries. The police located the crime scene and found that one of the melaleuca trees had ligature indentions that corresponded with Burden's injuries.

Based on this information, the police began an undercover investigation of Conahan. On May 24, 1996, Deputy Scott Clemens was approached by Conahan at Kiwanis Park, and Conahan offered Clemens $7 to show his penis or $20 if Clemens would allow Conahan to ***725** perform fellatio. Clemens refused the offer and the next day returned to the park where he again encountered Conahan, who offered him $150 to pose for nude photos.

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

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

The trial court permitted the State to introduce *Williams*[2] rule evidence of Burden's attempted murder and sexual battery, ruling that the evidence was sufficiently similar to the evidence leading up to Montgomery's death so as to constitute a unique modus operandi sufficient to establish the identity of Montgomery's murderer.

Conahan v. State, 844 So.2d 629, 632–34 (Fla.2003).

After a bench trial, Conahan was found guilty of the first-degree premeditated murder and kidnapping of Richard Montgomery. The penalty phase was conducted on November 1, 1999, before a jury. *Id.* at 634. The medical examiner testified that Montgomery died by ligature strangulation. *Id.* The defense also presented testimony from Conahan's aunt, Betty Wilson, "that Conahan was a jovial, personable individual who participated in family activities and cared for his ailing mother before she died." *Id.* Additionally, the father and sister of Conahan's former lover, Hal Linde, testified to the good things that Conahan had done for the family and that he was like a member of their family. *Id.*

The jury unanimously recommended the death penalty, and Conahan was sentenced to death for the first-degree murder of Richard Montgomery and to fifteen years' imprisonment for kidnapping.[3] *Id.* On direct appeal, this Court affirmed both convictions and sentences,[4] *id.* at 643, and the ***726** United States Supreme Court denied certiorari, *Conahan v. Florida,* 540 U.S. 895, 124 S.Ct. 240, 157 L.Ed.2d 172 (2003).

In October 2009, Conahan filed a motion for postconviction relief asserting twenty claims. The circuit court granted an evidentiary hearing on several of the claims, while summarily denying others. Following the evidentiary hearing in June 2010, the circuit court entered an order denying postconviction relief on all claims, concluding they were either procedurally barred, conclusively refuted by the record, facially or legally insufficient as alleged, or without merit as a matter of law.

Conahan appeals the circuit court's denial of postconviction relief and also petitions this Court for a writ of habeas corpus.

II. POSTCONVICTION MOTION

A. Ineffective During the Guilt Phase

Conahan argues that his trial counsel provided ineffective assistance during the guilt phase for: (1) failing to demand a *Richardson*[5] hearing; (2) failing to secure a forensic audio expert; and (3) failing to object to and challenge the *Williams* rule evidence. Because Conahan has failed to establish the requirements necessary for relief, we affirm the circuit court's denial.

Following the United States Supreme Court's decision in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), this Court explained that for ineffective assistance of counsel claims to be successful, two prongs must be established:

> First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied.

Bolin v. State, 41 So.3d 151, 155 (Fla.2010) (quoting *Maxwell v. Wainwright,* 490 So.2d 927, 932 (Fla.1986)).

Regarding the first prong of the *Strickland* standard, there is a strong presumption that counsel's performance was not deficient, and it is the defendant's burden to overcome this presumption. *Strickland,* 466 U.S. at 689–90, 104 S.Ct. 2052. Additionally, every effort must be made to eliminate the effects of hindsight and "to evaluate the conduct from counsel's perspective at the time." *Id.* at 689, 104 S.Ct. 2052.

The second prong of *Strickland* requires that the defendant prove prejudice resulted from the deficient performance. In order to prove prejudice, a defendant must show that, but for counsel's deficiency, there is a reasonable probability that there would have been a different outcome. ***727** *Henry v. State,* 948 So.2d 609, 617 (Fla.2006). "A reasonable probability is a 'probability sufficient to undermine confidence in the outcome.' " *Id.* (quoting *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052).

Because both prongs of the *Strickland* test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing the legal conclusions de novo. *See Sochor v. State,* 883 So.2d 766, 771–72 (Fla.2004).

1. Failure to Demand a Richardson Hearing

First, Conahan claims that trial counsel was ineffective for failing to demand a *Richardson* hearing when Mrs.

Montgomery, the victim's mother, testified to a matter that was not in the transcript of the recorded statement she gave to law enforcement. Specifically, during cross-examination, Mrs. Montgomery testified that her son had told her he had met a man named Conahan and on re-direct stated that her son had told her that Conahan lived in Punta Gorda Isles, was a nurse, and had been in the Navy. When asked why she had never told this information to police she stated that she "thought" she had when she gave her recorded statement, proposing that the information was described as "inaudible" in the transcript. Because Conahan has failed to establish deficiency or prejudice, we affirm the circuit court's denial of this claim.

Specifically, Conahan has failed to demonstrate how counsel's actions were not reasonable given the facts of the case and counsel's perspective at the time. Trial counsel testified at the evidentiary hearing that he did not object to the testimony because it was elicited as a result of a direct question on cross-examination and he could not figure out a way to "unring the bell." Instead, trial counsel attempted to impeach Mrs. Montgomery's testimony. This Court has held that counsel will not be held ineffective if "alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Occhicone v. State,* 768 So.2d 1037, 1048 (Fla.2000).

Additionally, Conahan failed to establish prejudice. Even if Mrs. Montgomery's testimony was stricken after a *Richardson* hearing, the outcome would have been the same and confidence is not undermined because there was other evidence linking the victim and Conahan, such as the testimony of Whitaker and Newman. Newman had been Conahan's cellmate at one time and testified at trial that Conahan had told him he knew the victim, Mr. Montgomery. Specifically, Newman testified that Conahan had said he had been on beer runs with Montgomery, had been to Montgomery's house, and that "Montgomery was a mistake." And Whitaker and the victim were roommates at one time, and Whitaker testified that Conahan had come to his home looking for Montgomery.

Accordingly, because Conahan has failed to establish both prongs of *Strickland,* he is not entitled to relief on this claim.

2. Failure to Secure a Forensic Audio Expert

Next, Conahan claims that trial counsel was ineffective for failing to secure an audio expert to analyze the inaudible portions of Mrs. Montgomery's recorded statement. However, because Conahan has failed to establish prejudice, we uphold the circuit court's denial of relief.

***728** In this case, even if counsel had obtained an audio expert to analyze the statement, it would not have changed the nature of Mrs. Montgomery's testimony that she "thought" she had told officers this information during the interview in which the recorded statement was made. Moreover, having a more accurate transcript would not have broken the evidentiary link between Conahan and the victim because there were two other witnesses, Whitaker and Newman, who established that Conahan and the victim knew each other. Therefore, there is not a reasonable probability of a different outcome. Our confidence in the outcome is not undermined.

Accordingly, we affirm the circuit court's denial of this claim.

3. Failure to Object to and Challenge the Williams Rule Evidence

Next, Conahan argues that trial counsel was ineffective for failing to object to and challenge the *Williams* rule evidence that was admitted during the guilt phase of his trial. We affirm the circuit court's denial of this claim.

This claim is conclusively refuted by the record, which indicates that trial counsel repeatedly objected to the *Williams* rule evidence and that the trial court treated this as a standing objection. As for Conahan's challenge to the sufficiency and detail of the objections, the record demonstrates that trial counsel went to great lengths to point out differences between the assault on Stanley Burden and the murder of Richard Montgomery and presented detailed arguments as to why the other *Williams* rule evidence should not be admitted. This Court has repeatedly held that "[c]ounsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions." *Occhicone,* 768 So.2d at 1048; *see also Chandler v. State,* 848 So.2d 1031, 1045–46 (Fla.2003) (holding that disagreeing with trial counsel's strategy of not vigorously challenging the *Williams* rule evidence did not mean that trial counsel was ineffective).

Accordingly, we affirm the denial of this claim.[6]

B. Giglio Violation

Conahan also contends that the State violated *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972),

by knowingly using the false testimony of Mrs. Montgomery. We disagree.

To establish a *Giglio* violation, three prongs must be shown: (1) the testimony was false; (2) the prosecutor knew it was false; and (3) the testimony was material. *Guzman v. State,* 868 So.2d 498, 505 (Fla.2003) (citing *Ventura v. State,* 794 So.2d 553, 562 (Fla.2001)). If the defendant successfully establishes the first two prongs, then the State bears the burden of proving that the testimony was not material by showing that there is no reasonable possibility that it could have affected the verdict because it was harmless beyond a reasonable doubt. *See* ***729** *Johnson v. State,* 44 So.3d 51, 64–65 (Fla.2010); *Guzman,* 868 So.2d at 506–07. In evaluating *Giglio* claims, this Court applies a mixed standard of review, deferring to the trial court's factual findings that are supported by competent, substantial evidence and reviewing the application of the law to those facts de novo. *Suggs v. State,* 923 So.2d 419, 426 (Fla.2005) (citing *Sochor,* 883 So.2d at 785).

In this case, Conahan has failed to establish that Mrs. Montgomery's testimony was false. Mrs. Montgomery qualified her testimony, stating that she "thought" she told law enforcement this information when she gave her recorded statement. However, the State stipulated at the evidentiary hearing that the name Conahan does not appear in the recorded statement, which tends to show that her self-qualified "thought" was mistaken, not necessarily that her testimony was false. Additionally, the transcript of the recorded statement indicates that Mrs. Montgomery provided the officers taking her statement with some information prior to the tape being turned on. Perhaps Mrs. Montgomery relayed the information at that point. Furthermore, there was additional testimony presented at the evidentiary hearing that indicates Mrs. Montgomery had interactions with other law enforcement officers and made an oral statement to the prosecutor concerning this matter, the circumstances and contents of which collateral counsel did not pursue at the evidentiary hearing. Therefore, Conahan has failed to establish that Mrs. Montgomery's testimony was false.

Additionally, the State has established that the testimony was immaterial because there was no reasonable possibility of a different verdict as it was harmless beyond a reasonable doubt. *See Johnson,* 44 So.3d at 64–65; *Guzman,* 868 So.2d at 506–07 (defendant is not entitled to relief if State can prove that presentation of false testimony was harmless beyond a reasonable doubt). As the State demonstrates, the testimony from Newman and Whitaker established that the victim and the defendant knew one another. Moreover, the admission of the *Williams* rule evidence was not contingent upon Mrs. Montgomery's testimony. As we noted on direct appeal,

> Conahan killed Montgomery in the same manner in which he attempted to kill Stanley Burden. Montgomery and Burden were similar physically; neither one completed high school; both had difficulty in maintaining employment and were in need of money when Conahan solicited them to pose nude for money in a secluded wooded area. Both were tied to a tree and suffered similar abrasions and ligature wounds.

Conahan, 844 So.2d at 635.

Accordingly, Conahan has failed to establish that a *Giglio* violation occurred, and we affirm the circuit court's denial of relief.

C. Brady Claim

Next, Conahan alleges that the State in this case failed to turn over an audio recording of an undercover operation on May 29, 1996, in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). We affirm the denial of this claim.

In order to establish a *Brady* violation, three elements must be shown: (1) the evidence at issue was favorable to the defendant, either because it is exculpatory or is impeaching; (2) the evidence was suppressed, willfully or inadvertently, by the State; and (3) because the evidence was material, its suppression resulted in prejudice. *Strickler v. Greene,* 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); *see also* ***730** *Johnson v. State,* 921 So.2d 490, 507 (Fla.2005); *Rogers v. State,* 782 So.2d 373, 378 (Fla.2001). To establish the materiality element of *Brady,* the defendant must demonstrate " 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *Guzman,* 868 So.2d at 506 (quoting *United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Bagley,* 473 U.S. at 682, 105 S.Ct. 3375).

When addressing *Brady* claims, this Court utilizes a mixed standard of review, " 'defer[ring] to the factual findings

made by the trial court to the extent they are supported by competent, substantial evidence, but review [ing] de novo the application of those facts to the law.' " *Sochor,* 883 So.2d at 785 (quoting *Lightbourne v. State,* 841 So.2d 431, 437–38 (Fla.2003)).

First, Conahan has failed to establish that the recording at issue actually exists and that the State suppressed this evidence. None of the witnesses at the evidentiary hearing could conclusively say whether or not a tape had been made of the May 29, 1996, undercover operation, and no one had ever seen or heard a recording from that day. Testimony or evidence that recordings were made on other days or in other operations has no bearing on whether a recording was made on May 29. Furthermore, Conahan has not presented any evidence that the State suppressed the alleged recording. Therefore, his *Brady* claim was properly denied on this basis alone. *See Wyatt v. State,* 71 So.3d 86, 106 (Fla.2011) (denying defendant's *Brady* claim because he failed to establish "the existence of evidence [for the State] to withhold").

Second, Conahan has failed to establish that the evidence is either exculpatory or impeaching. Conahan claims that the contents of the tape would have shown that he was interested in seeking sex for money and was not interested in soliciting men for nude photographs. However, this very contention is refuted by the record. The testimony from the undercover officers demonstrates that on separate occasions Conahan solicited the officers for sex acts and to pose in nude bondage photographs. Additionally, Conahan admitted during his testimony at trial that he solicited Mr. Burden to pose in nude bondage photographs, who was the victim of the similar assault that was admitted as *Williams* rule evidence. Finally, Mr. Burden's independent testimony of his encounter with Conahan also refutes the argument that Conahan did not solicit men for nude photographs. Therefore, if this recording exists, it would not have the exculpatory effect claimed by the defendant because other evidence demonstrated the defendant's solicitation of men for photographs.

Accordingly, this Court affirms the circuit court's denial of Conahan's *Brady* claim.

D. Ineffective During the Penalty Phase

1. Failure to investigate and present mitigation evidence

Next, Conahan claims that trial counsel was ineffective for failing to adequately investigate and present mitigation evidence in the penalty phase. Specifically, he claims trial counsel was ineffective for failing to present the mental health and competency evaluations of Doctor Gunder and Doctor Keown, failing to have a neuropsychologist evaluate him, and failing to present the testimony of the mitigation specialists, the investigator, and his sister. We affirm the circuit court's denial of relief.

***731** As explained earlier, this Court has described the two prongs of *Strickland* as follows:

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

Bolin, 41 So.3d at 155 (quoting *Maxwell,* 490 So.2d at 932).

Regarding the second prong,

> [the defendant] must show that but for his counsel's deficiency, there is a reasonable probability he would have received a different sentence. To assess that probability, we consider "the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the [postconviction] proceeding"—and "reweig[h] it against the evidence in aggravation."

Porter v. McCollum, 558 U.S. 30, 130 S.Ct. 447, 453–54, 175 L.Ed.2d 398 (2009) (quoting *Williams v. Taylor,* 529 U.S. 362, 397–98, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). "A reasonable probability is a 'probability sufficient to undermine confidence in the outcome.' " *Henry,* 948 So.2d at 617 (quoting *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052).

Here, Conahan has failed to demonstrate that trial counsel's performance resulted in prejudice. At the evidentiary hearing, Conahan did not present any additional statutory or non-statutory mitigation evidence, experts, or witnesses that would have been available at trial and that trial counsel failed to present. Additionally, Conahan did not present his sister's testimony at the evidentiary hearing, so it is unknown how it could possibly have aided him.

Thus, Conahan has not demonstrated prejudice because "the mitigating evidence adduced at the evidentiary hearing combined with the mitigation evidence presented at

the penalty phase would not outweigh the evidence in aggravation." *Tanzi v. State,* 94 So.3d 482, 491 (Fla.2012); *see also Porter,* 130 S.Ct. at 453–54. In other words, Conahan did not demonstrate that calling any of these individuals as witnesses would have resulted in mitigation that would "undermine[ ] this Court's confidence in the sentence of death when viewed in the context of the penalty phase evidence and the mitigators and aggravators found by the trial court." *Hurst v. State,* 18 So.3d 975, 1013 (Fla.2009).

Accordingly, we affirm the circuit court's denial of relief.

2. Failure to question jurors about homosexuality

Next, Conahan argues that trial counsel was ineffective during voir dire for failing to question the panel regarding their views on homosexuality. However, we affirm the circuit court's denial of this claim.

Specifically, Conahan has failed to establish prejudice under Strickland. This Court has previously held that a defendant must demonstrate that an unqualified or biased juror actually served on his jury in order to demonstrate prejudice in a postconviction ineffective assistance of counsel claim. *See Davis v. State,* 928 So.2d 1089, 1117 (Fla.2005). Conahan has not presented any evidence that a juror who was biased because of his or her personal views regarding homosexuality actually served on his jury. Therefore, there is not a reasonable probability of a different sentence, and our confidence in the outcome is not undermined.

732 *E. Prosecutorial Misconduct

Next, Conahan alleges that there were several instances of prosecutorial misconduct that occurred during his trial that his trial counsel failed to object to and, when considered cumulatively, amount to fundamental error. Specifically, the alleged instances of misconduct are that: (1) the State improperly delayed the prosecution of the Burden case in bad faith so that it could use the Burden assault as *Williams* rule evidence in this case; (2) the testimony of Hal Linde, Conahan's former lover, regarding Conahan's sexual bondage fantasy was admitted by the State for the purpose of showing the bad character of Conahan and his propensity for violence; (3) the State committed a *Brady* violation by failing to disclose the recording of the May 29, 1996, surveillance operation and committed a *Giglio* violation by allowing Mrs. Montgomery's false testimony to go uncorrected; and (4) the State, when opposing Conahan's motion for judgment of acquittal, misrepresented the testimony of Newman and improperly argued aspects of Mrs. Montgomery's false testimony to bolster the testimony of Newman and Whitaker. The circuit court denied this claim as procedurally barred, and we affirm.

This Court already considered claims of prosecutorial misconduct on direct appeal and found that, although the prosecutor's comments during opening statements were improper, the error was harmless. *Conahan,* 844 So.2d at 639–41. Conahan's additional prosecutorial misconduct claims should have or could have been raised on direct appeal. *See Franqui v. State,* 965 So.2d at 35 (holding the defendant's claim that improper prosecutorial comments constituted fundamental error was procedurally barred because it could have been raised as fundamental error on direct appeal); *Spencer,* 842 So.2d at 68 (holding that "[i]ssues which either were or could have been litigated ... upon direct appeal are not cognizable through collateral attack") (quoting *Smith v. State,* 445 So.2d 323, 325 (Fla.1983)). Therefore, Conahan's claims are procedurally barred, and we affirm the circuit court's denial.

III. HABEAS PETITION

A. Ineffective Appellate Counsel

1. Failure to raise the issue of fundamental error with regards to the Williams rule evidence

In his habeas petition, Conahan claims that his appellate counsel on direct appeal was ineffective for failing to argue that the admission of the *Williams* rule evidence was fundamental error because it was not established by clear and convincing evidence, was not sufficiently similar, and became a feature of the trial. However, Conahan is not entitled to relief.

Claims of ineffective assistance of appellate counsel are appropriately presented in a petition for a writ of habeas corpus. *Valle v. Moore,* 837 So.2d 905, 907 (Fla.2002); *Freeman v. State,* 761 So.2d 1055, 1069 (Fla.2000). The standard of review for claims of ineffective assistance of appellate counsel mirrors the *Strickland* standard for ineffective assistance of trial counsel. *Valle,* 837 So.2d at 907. In order to grant habeas relief on an ineffectiveness of appellate counsel claim, this Court must determine:

first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.

***733** *Pope v. Wainwright,* 496 So.2d 798, 800 (Fla.1986) (citing *Johnson v. Wainwright,* 463 So.2d 207, 209 (Fla.1985)). The reviewing court must presume that counsel's conduct was within the broad range of reasonable professional conduct, and the defendant bears the burden of overcoming this presumption. *See Freeman,* 761 So.2d at 1069 (noting that the defendant bears "the burden of alleging a specific, serious omission or overt act upon which the ineffective assistance of [appellate] counsel can be based"). Additionally, habeas petitions are not vehicles for second appeals and cannot raise issues that should have or could have been raised on direct appeal. *See Everett v. State,* 54 So.3d 464, 488 (Fla.2010); *Breedlove v. Singletary,* 595 So.2d 8, 10 (Fla.1992).

Furthermore, appellate counsel cannot be deemed deficient for failing to raise meritless issues or issues that were not properly raised in the trial court and are not fundamental error. *Valle,* 837 So.2d at 907–08. In order to be a fundamental error, " 'the error must reach 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.' " *Jaimes v. State,* 51 So.3d 445, 448 (Fla.2010) (quoting *State v. Delva,* 575 So.2d 643, 644–45 (Fla.1991)).

In this case, the admission of the *Williams* rule evidence was not error, let alone fundamental error. First, the *Williams* rule evidence was established by clear and convincing evidence. Mr. Burden gave unrebutted testimony at trial detailing his encounter with Conahan and the assault. Furthermore, the undercover detectives testified at trial regarding their interactions with Conahan and how Conahan had solicited them to pose in nude bondage photographs. Additionally, there were recordings of some of these operations that confirmed the detectives' testimony.

Second, the evidence was sufficiently similar and properly admitted because, as the trial court found, there were various points of similarity that were relevant to prove a common scheme or plan and an unusual modus operandi. We have previously held that the collateral crime does not have to be identical to the crime charged in order to be admitted as *Williams* rule evidence. *See Gore v. State,* 599 So.2d 978, 984 (Fla.1992) (noting that the collateral crime does not have to be identical to the crime charged and finding that the collateral crime in *Gore* was properly admitted and the dissimilarities seemed to be the result of differences in opportunity rather than differences in modus operandi); *see also Durousseau v. State,* 55 So.3d 543, 551–52 (Fla.2010) (holding that evidence that the defendant committed substantially similar crimes on other occasions was properly admitted as *Williams* rule evidence because it was relevant to material issues such as identity and premeditation), *cert. denied,* —— U.S. ——, 132 S.Ct. 149, 181 L.Ed.2d 66 (2011).

Specifically, the trial court found multiple similarities between the victims, Burden and Montgomery, namely age, race, height, weight, and complexion. There were similarities between the crime scenes, including that they were both remote, secluded, wooded areas, accessible only by foot, and the victims were tied to a tree. In addition, the crimes were conducted in a similar manner. Clothesline-like rope was used, placement of rope and the strangulation caused grooved abrasions on the neck in the same area, both victims were naked, ropes were placed tightly on the wrists of the victims, the victims were offered money to pose in nude photos, and Conahan had purchased cutting pliers near the time of each crime.

***734** Furthermore, although the *Williams* rule evidence was helpful in establishing a common scheme or plan and a unique modus operandi, it did not become a feature of the trial. The State produced other evidence that established Conahan's guilt, including testimony from other witnesses that the victim and Conahan knew each other, testimony from the victim's friends that Montgomery stated he was going to do something to make $200 on the night he was killed, evidence that Conahan withdrew a similar amount of cash from an ATM that evening, and a Walmart receipt showing that on that evening Conahan bought a rope identical to the one that the victim was tied up with, as well as a pair of pliers, polaroid film, and a knife. There was also testimony from the victim's mother that her son had told her he had met a man named Conahan and that someone had offered him money to pose in nude photographs. Conahan's former lover testified that Conahan had a bondage fantasy, and Conahan himself admitted that he had a bondage fantasy. Moreover, there was other forensic evidence.

Accordingly, the *Williams* rule evidence was properly admitted and did not become an improper feature of the trial.

Because it was properly admitted, there was no fundamental error. And appellate counsel cannot be deemed deficient for failing to raise this meritless issue.

2. Failure to argue that the trial court erred in finding Conahan guilty of kidnapping with the intent to commit a sexual battery

Next, Conahan claims that appellate counsel was ineffective for failing to argue on direct appeal that he should not have been convicted of kidnapping with the intent to commit a sexual battery because the State failed to prove beyond a reasonable doubt that he possessed this intent at the time of the kidnapping. This claim is without merit.

On direct appeal, Conahan challenged the kidnapping conviction, arguing that the State had not established that the victim had not consented to being tied to a tree. *Conahan,* 844 So.2d at 636. This Court rejected his claim and affirmed the denial of the motion for judgment of acquittal, finding that the State had proven a prima facie case for kidnapping and had established Conahan's "common scheme of luring young men into a secluded, wooded area for sexual pleasure and murdering them under the guise of posing for nude bondage pictures." *Id.* at 637. Thus, this Court effectively addressed this issue on direct appeal by finding that the evidence was sufficient to support the conviction, and appellate counsel cannot be held ineffective for failing to raise a claim this Court actually addressed on direct appeal. *Valle,* 837 So.2d at 908.

Accordingly, Conahan is not entitled to habeas relief.

3. Failure to raise that there was a flawed search

Conahan also claims that appellate counsel was ineffective for failing to argue on direct appeal that there was a flawed search. However, Conahan is not entitled to habeas relief because this claim is facially insufficient.

A habeas petition must plead specific facts that entitle the defendant to relief. Conclusory allegations have repeatedly been held insufficient by this Court because they do not permit the court to examine the specific allegations against the record. *Bradley v. State,* 33 So.3d 664, 685 (Fla.2010) (citing *Doorbal v. State,* 983 So.2d 464, 482 (Fla.2008)); *Patton v. State,* 878 So.2d 368, 380 (Fla.2004) (citing ***735** *Ragsdale v. State,* 720 So.2d 203, 207 (Fla.1998) (finding that conclusory allegations are also not sufficient for appellate purposes in habeas proceedings)). Because Conahan fails to plead specific facts as to how the search warrants and supporting affidavits were deficient, his claim is merely conclusory and speculative. Therefore, he is not entitled to relief.

4. Failure to raise claim that prosecutorial misconduct amounted to fundamental error

Lastly, Conahan asserts that there were several instances of prosecutorial misconduct that took place during his trial, which he claims appellate counsel should have raised on direct appeal. He alleges that the following instances of misconduct, when considered cumulatively, amount to fundamental error and entitle him to habeas relief: (1) the State improperly delayed the prosecution of the Burden case in bad faith so that it could use the Burden assault as *Williams* rule evidence; (2) the State presented false testimony from Mrs. Montgomery; (3) the State committed a *Brady* violation by failing to disclose the recording of the May 29 surveillance operation; (4) the State, when opposing Conahan's motion for judgment of acquittal, misrepresented testimony of Newman and used Mrs. Montgomery's false testimony to bolster the testimony of Newman and Whitaker and improperly implied that the reason the victim's genitals were removed was because there was DNA evidence and that the genitals had been removed by the same kind of knife that Conahan purchased that day; and (5) that the State made improper comments during closing in the guilt phase.

We need only address claims one, four, and five, because the other claims were raised as part of Conahan's postconviction motion, and he may not now relitigate these issues as part of his habeas petition. *See Johnston v. State,* 63 So.3d 730, 747 (Fla.2011) (holding that the defendant's habeas claims were procedurally barred because they could have been or were raised in his postconviction motion); *Knight v. State,* 923 So.2d 387, 395 (Fla.2005) (holding that claims raised in a postconviction motion cannot be relitigated in a habeas petition).

Because the remaining claims were not properly preserved at trial by objection, appellate counsel cannot be deficient for failing to raise these claims on appeal unless the claims constitute fundamental error. *See Valle,* 837 So.2d at 909. As previously explained, in order to be a fundamental error, " 'the error must reach 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.' " *Jaimes,* 51 So.3d at 448 (quoting *Delva,* 575 So.2d at 644–45).

Conahan first claims that the State committed prosecutorial misconduct by filing a nolle prosequi in the Burden case in order to gain a tactical advantage. However, Conahan provides no support for this assertion. Furthermore, there was no improper delay because as the circuit court found the State never re-filed charges in the Burden case. Thus, this claim is without merit.

Next, Conahan claims that the State misrepresented the testimony of Newman in the arguments opposing Conahan's motion for judgment of acquittal. However, this claim is refuted by the record. Specifically, the prosecutor argued that Newman had testified that Conahan initially denied knowing Montgomery, but then admitted he did know Montgomery and characterized Montgomery as a mistake. This is indeed the testimony that Newman provided at trial. Thus, the prosecution presented an accurate summary ***736** of Newman's testimony, and there was no misconduct.

Additionally, Conahan claims that the State misrepresented the testimony of Mrs. Montgomery in arguments opposing Conahan's motion for judgment of acquittal. However, this claim is also refuted by the record. Specifically, the prosecutor argued that Mrs. Montgomery had testified that her son told her that he had met a man named Conahan who was a nurse and had been in the Navy and that someone had offered her son $200 to pose in nude photographs. This is an accurate summary of Mrs. Montgomery's trial testimony. Therefore, this argument was not improper.

Next, Conahan claims that the State made improper arguments while opposing his motion for judgment of acquittal by implying that the reason the victim's genitals had been removed was to eliminate DNA evidence and that the genitals had been removed by a sharp knife, the same kind that Conahan had purchased that day. However, Conahan is not entitled to relief. The alleged improper statements were made as part of the prosecutor's specific argument opposing the judgment of acquittal on the sexual battery charge, but the trial court granted Conahan's motion for judgment of acquittal on the sexual battery charge. Therefore, even if these arguments were misleading or improper, the error was not fundamental, and appellate counsel cannot be held deficient for failing to raise a meritless issue. *Schoenwetter v. State,* 46 So.3d 535, 563 (Fla.2010) (citing *Rutherford v. Moore,* 774 So.2d 637, 643 (Fla.2000)).

Finally, Conahan claims that the State made improper comments during the closing arguments of the guilt phase by (1) implying that Hal Linde held back in his testimony as to the full extent of Conahan's fantasy; (2) by arguing that Conahan admitted to having a dark, sexual fantasy; and (3) by arguing in conflict with the medical examiner's testimony that Conahan used a razor sharp knife to remove the genitals of Montgomery and stating there was some foreign material left behind in the genital area. Again, Conahan is not entitled to relief.

During closing arguments in the guilt phase, the prosecutor argued that Hal Linde, Conahan's former lover, had testified to Conahan's bondage fantasy that involved "picking up hitchhikers, taking them out in the woods, tying them up and having sex with them." He then stated that it was obvious that Mr. Linde still cared for Conahan and that Mr. Linde held back the ultimate culmination of the fantasy, which was to murder the men after tying them up and having sex with them. These comments were not improper misrepresentations as the record shows that Mr. Linde did in fact testify about Conahan's sexual bondage fantasy and did admit on the record that he was still in love with Conahan. Implying that the culmination of the fantasy was murder was reasonable given other evidence in the case. Conahan had seemingly acted out this same fantasy with Burden, and, as Burden testified at trial, Conahan attempted to kill Burden by trying to strangle him. Additionally, the record supports the prosecutor's statement that Conahan admitted during his testimony to having a sexual bondage fantasy that included tying individuals up in the woods.

Furthermore, the medical examiner testified at trial that the genitals had been removed "very precisely with a sharp knife, ... or a scalpel blade, very sharp" and that upon examination of the area "some foreign material was there." Therefore, the prosecutor's comments that Conahan removed the victim's genitals ***737** with a razor sharp knife and that there was foreign material left behind was an accurate summary of all of the testimony and evidence that had been presented.

Accordingly, because appellate counsel cannot be deemed deficient for failing to raise meritless or procedurally barred issues, we deny relief.

IV. CONCLUSION

For the foregoing reasons, we affirm the denial of Conahan's postconviction motion and deny his habeas petition.

It is so ordered.

All Citations

118 So.3d 718, 38 Fla. L. Weekly S179

POLSTON, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, LABARGA, and PERRY, JJ., concur.

Footnotes

1 We have jurisdiction. *See* art. V, § 3(b)(1), (9), Fla. Const.

2 *Williams v. State,* 110 So.2d 654 (Fla.1959).

3 The trial court found three aggravating factors: "(1) that the murder was committed during the course of a kidnapping; (2) that the murder was cold, calculated, and premeditated (CCP); and (3) that the murder was heinous, atrocious, or cruel (HAC)." *Conahan,* 844 So.2d at 642. The trial court considered the following nonstatutory mitigators: "(1) loyalty, affection, and service to his parents [some weight]; (2) self-improvement by enrolling in nursing school [some weight]; (3) ability to maintain good familial relationships [some weight]; (4) open, unselfish, polite personality [no weight]; and (5) hardworking character [little weight]." *Id.* at 642 & n. 10.

4 On direct appeal, Conahan claimed that: (1) the trial court erred in denying his motion for judgment of acquittal because the evidence was legally insufficient to support a finding of premeditation; (2) the trial court erred in denying his motion for judgment of acquittal on the kidnapping charge; (3) the trial court erred by instructing the jury on two of the aggravating factors; (4) that the prosecutor made improper comments during his opening and closing statements in the penalty phase; and (5) the trial court violated his right to a fair trial by admitting the autopsy and certain crime scene photos into evidence. *Id.* at 634–42. This Court found that the prosecutor made improper comments during his opening statements to the jury during the penalty phase but that the error was harmless. *Id.* at 639–40. All of Conahan's other claims were denied.

5 *Richardson v. State,* 246 So.2d 771, 774–75 (Fla.1971).

6 We do not discuss in detail Conahan's claim that the trial court erred in summarily denying his ineffectiveness of trial counsel claim that the *Williams* rule evidence was not established by clear and convincing evidence, was not sufficiently similar to the charged offense, and became a "feature of the trial" because we find the circuit court properly determined that this claim was procedurally barred. Conahan should have and could have raised this issue on direct appeal. *See Connor v. State,* 979 So.2d 852, 868 (Fla.2007); *Franqui v. State,* 965 So.2d 22, 35 (Fla.2007); *Spencer v. State,* 842 So.2d 52, 60–61 (Fla.2003). Moreover, as explained when addressing his habeas petition, Conahan failed to establish that the admission of the *Williams* rule evidence amounted to fundamental error.

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DOCKET NO. _____

OCTOBER TERM 2024

IN THE

SUPREME COURT OF THE UNITED STATES

DANIEL OWEN CONAHAN, JR.
Petitioner,

vs.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS
AND FLORIDA ATTORNEY GENERAL.
Respondent.

On Petition For A Writ of Certiorari To
The United States Court of Appeals For The Eleventh Circuit

APPENDIX H

Conahan v. State, No. SC16-1153, 2017 WL 656306 (Fla. Feb. 17, 2017)

2017 WL 656306
Only the Westlaw citation is currently available.
Supreme Court of Florida.

Daniel O. CONAHAN, Jr., Appellant(s)

v.

STATE of Florida, Appellee(s)

CASE NO.: SC16–1153

|

FEBRUARY 17, 2017

Lower Tribunal No(s).: 081997CF0001660001XX

Opinion

***1** Petitioner Daniel O. Conahan, Jr., a prisoner under sentence of death for the 1996 murder of Richard Montgomery, appeals the denial of his successive postconviction motion filed pursuant to Florida Rule of Criminal Procedure 3.851. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const. In his current postconviction appeal, Conahan raises the following two issues: (1) whether the lower court erred by summarily denying his claim raised based on newly discovered evidence and related Giglio[1] and Brady[2] violations; and (2) whether action by this Court is required regarding Hurst[3] at this time.

Conahan cannot prevail on his first claim because he cannot satisfy the second prong of the two part test to obtain a new trial based on newly discovered evidence, and the evidence is not material under the Giglio or Brady standards. To obtain a new trial based on newly discovered evidence, the second prong requires that "the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial." Johnston v. State, 27 So. 3d 11, 18 (Fla. 2010) (quoting Jones v. State, 709 So. 2d 512, 521 (Fla. 1998)). "If the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence." Id. at 18–19 (quoting Marek v. State, 14 So. 3d 985, 990 (Fla. 2009)).

Evidence is material under Giglio "if there is any reasonable possibility that it could have affected the verdict, and the State bears the burden of proving the false testimony was not material by demonstrating it was harmless beyond a reasonable doubt." Rivera v. State, 187 So. 3d 822, 835 (Fla. 2015). Under Brady, "[t]o establish the materiality prong, a defendant must demonstrate a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. In other words, evidence is material under Brady only if it undermines confidence in the verdict." Id. at 838 (citation omitted).

Here, in Burden's November 2015 affidavit, Burden explained that he would not have testified voluntarily but for a promise from the prosecutor to write a letter to the parole board on Burden's behalf. Burden did not recant his testimony that Conahan tied him to a tree and attempted to sodomize and strangle him. Moreover, there was physical evidence corroborating Burden's testimony, including scars around Burden's neck and indentations around the tree from the rope that Conahan used to restrain and to attempt to strangle Burden. Additionally, the trier-of-fact was already aware from Burden's testimony that Burden hoped that by testifying he would get documentation illustrating his cooperation that he could contribute to his court file and prison record and that he planned to inform the parole board about his cooperation in the Montgomery case.

Accordingly, we affirm the denial of Conahan's first claim because the alleged newly discovered evidence would not probably produce an acquittal or a less severe sentence, there is not a reasonable possibility that it could have affected the result, and our confidence in the outcome is not undermined. See Kormondy v. State, 154 So. 3d 341, 352–53 (Fla. 2015); State v. Woodel, 145 So. 3d 782, 806–07 (Fla. 2014); Ponticelli v. State, 941 So. 2d 1073, 1085–86, 1088–89 (Fla. 2006).

***2** As to Conahan's second claim under Hurst, the lower court denied it without prejudice as premature because this Court had not yet ruled on the retroactivity of Hurst. Here, both Conahan and the State request the Court not to address Hurst on appeal. Because Hurst is not raised, by agreement of the parties to address at a later time if appropriate, we do not address Hurst in this case without prejudice to the parties to raise a claim under Hurst in a different proceeding.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and LAWSON, JJ., concur.

All Citations

Not Reported in So. Rptr., 2017 WL 656306

Footnotes

1 Giglio v. United States, 405 U.S. 150 (1972).
2 Brady v. Maryland, 373 U.S. 83 (1963).
3 Hurst v. State, 202 So. 3d 40 (Fla. 2016).