NO. 16-5229, 16A58

IN THE SUPREME COURT OF THE UNITED STATES

JOHN WAYNE CONNER,

Petitioner,

v.

ERIC SELLERS, WARDEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

CONSOLIDATED BRIEF IN OPPOSITION AND RESPONSE IN OPPOSITION TO APPLICATION FOR A STAY OF EXECUTION

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QUESTION PRESENTED

Should this Court grant certiorari to consider whether allowing the State to carry out Petitioner's death sentence would violate the Eighth Amendment?

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RESPONDENT'S BRIEF IN OPPOSITION

I. STATEMENT OF THE CASE

Petitioner John Wayne Conner ("Petitioner") was indicted in Telfair County, Georgia, in February 1982 for malice murder, armed robbery and motor vehicle theft in connection with the death of J.T. White. At a three-day jury trial in July 1982, at which the state sought the death penalty based on two statutory aggravating circumstances, Petitioner was found guilty of all counts. At the sentencing phase, the jury found the existence of the O.C.G.A. § 17-10-30(b)(7) statutory aggravating circumstance, i.e., the murder was outrageously vile, horrible or inhuman in that it involved depravity of mind or an aggravated battery to the victim, and sentenced him to death for malice murder. The jury did not find the existence of the O.C.G.A. § 17-10-30(b)(2) statutory aggravating circumstance based on armed robbery. In accord with the sentencing verdict, the trial court sentenced Petitioner to death for malice murder, as well as seven years for motor vehicle theft and 20 years for armed robbery, to run consecutively to each other but concurrently with any other sentence he was serving.

On direct appeal, the convictions and sentences for malice murder and motor vehicle theft were affirmed, but the armed robbery conviction and sentence were

set aside. Conner v. State, 251 Ga. 113, 303 S.E.2d 266, cert. denied, 464 U.S. 865, reh'g denied, 464 U.S. 1005 (1983).

Petitioner filed his first state collateral attack on his convictions in March 1984, Conner v. Zant, No. 6335 (Butts Super. Ct. Jan. 6, 1997) ("Conner I"). He amended the petition twice before evidentiary hearings were held in September 1984 and February 1985, and he filed a third amendment at the 1985 hearing where his former trial/appellate counsel testified and he presented affidavits of five family members in support his ineffective assistance of counsel claims: his mother, his father, his sister Linda Jones, her husband Phillip Jones, and his sister Sally Conner. The case was subsequently reassigned to several visiting judges, and the last judge reviewed the entire record and denied relief in January 1997. The Georgia Supreme Court denied his application for a certificate of probable cause to appeal ("CPC application") in 2000. This Court denied certiorari. Conner v. Head, 533 U.S. 932 (2001).

Petitioner then filed a second state collateral attack in 2001, raising one claim: he is "intellectually disabled" as defined in O.C.G.A. § 17-7-131(a)(3)[1] and ineligible for a death sentence under Fleming v. Zant, 259 Ga. 686, 386 S.E.2d 339

[1] This statute, which was enacted in 1988 and was the first statute in the nation to bar the execution of intellectually disabled offenders as noted in Atkins v. Virginia, 536 U.S. 304, 313-14 (2002), uses the term "mentally retarded." Respondent hereinafter uses the term "intellectually disabled" in lieu of the statutory term.

(1989), and provisions of the Georgia and United States Constitutions. Conner v. Head, No. 2001-V-692 (Butts Super. Ct., dismissed as successive, Oct. 26, 2001) ("Conner II"). The state habeas court dismissed this petition as successive under O.C.G.A. § 9-14-51, upon finding that the intellectual disability issue could reasonably have been raised in his first state collateral attack since Conner I was pending decision when Fleming was announced, and the Georgia Supreme Court denied his CPC application. This Court denied certiorari. Conner v. Head, 537 U.S. 908, reh'g denied, 537 U.S. 1069 (2002)[2].

Meanwhile, Petitioner submitted a federal habeas corpus petition in the Southern District of Georgia in 2001, which was stayed until after certiorari was denied in his second state collateral attack, Conner II. Relief was denied in November 2009, with the district court deferring to the state court's finding of default on the intellectual disability claim and to the merits adjudication of the ineffectiveness at sentencing claim.

In the first appearance of the case in the Eleventh Circuit, where Petitioner had been granted a certificate of appealability ("COA") on the intellectual

[2] On June 20, 2002, while Petitioner's certiorari petition was pending from the Conner II decisions, this Court announced Atkins, in which it held that the Eighth Amendment bars the execution of a "mentally retarded" offender." Atkins, 536 U.S. at 321. In 1989, the same year that Fleming was announced, this Court found no such Eighth Amendment consensus against the execution of intellectually disabled offenders in Penry v. Lynaugh, 492 U.S. 302 (1989).

disability issue , the ineffective assistance of counsel at the sentencing phase claim and a third issue relating to the prosecutor's closing argument, the circuit court found that the intellectual disability claim had not been heard on the merits in the state courts and declined to find there was an adequate state bar to preclude federal review of the claim. Conner v. Hall, 645 F.3d 1277, 1292-94 (11th Cir. 2011). The Court vacated the judgment and remanded the entire case for further proceedings consistent with its opinion, including whether Petitioner was entitled to discovery and a federal hearing on the intellectual disability claim since this claim had not been heard on the merits by the state court. Id. The Court did not decide the ineffectiveness and closing argument issues. Id.

On remand, the district court granted limited discovery and ordered a federal evidentiary on the intellectual disability claim. See Conner v. GDCP Warden, 784 F.3d 752 (11th Cir. 2015), cert. denied, ___ U.S. ___, 136 S.Ct. 1246, reh'g denied, ___ U.S. ___, 136 S.Ct. 1538 (2016). The federal hearing was scheduled for May 2013.

However, roughly two months before the scheduled federal hearing, Petitioner filed his third state habeas corpus petition on March 8, 2013, raising an intellectual disability claim based on Fleming and Atkins, Conner v. Humphrey, No. 13-V0162 (Butts Super. Ct., filed March 3, 2013) ("Conner III"). With the

petition he filed appendices containing records, reports and affidavits.[3]

Respondent filed an answer and moved to dismiss the petition as successive under O.C.G.A. § 9-14-51. Respondent also moved to hold the state case in abeyance pending a final resolution of the intellectual disability claim in Conner's federal habeas case.

Pleadings in the Conner III record show that on March 12, 2013, five days after he filed the third state petition, Petitioner filed a motion in the district court to hold his federal habeas corpus case in abeyance pending resolution of his third state habeas case. Respondent opposed the motion. On March 28, 2013, the federal district court denied Petitioner's motion to hold the federal habeas case in abeyance and ordered that the federal hearing would proceed on May 7-8, 2013. On April 14, 2013, the Butts Superior Court entered an order holding Conner III in abeyance pending a final resolution of the intellectual disability claim in the federal habeas case.

At the two-day federal hearing in May 2013, seven expert witnesses testified, i.e., a neurologist, two psychiatrists, a neuropsychologist, two psychologists, and a social worker, and documentary evidence was presented,

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[3] The documents in the appendices filed with the third petition were subsequently presented to and considered by the federal district court at the May 2013 federal evidentiary hearing.

including Petitioner's criminal history.[4] On the third day, after hearing oral argument from the parties, the district court made extensive oral findings of fact and conclusions of law on the record, finding that Petitioner's intellectual disability claim lacked merit, and incorporated those findings into its written order of June 11, 2013. Conner, 784 F.3d at 764. The court denied relief on the two remaining claims, i.e., ineffective assistance of counsel at sentencing (which is the same claim reasserted in Conner III) and the prosecutor's closing argument at sentencing, for the reasons set forth in its November 2009 order.

After briefing and oral argument, the Eleventh Circuit affirmed the denial of relief on all three grounds in April 2015. Conner, 784 F.3d at 761, 766, 769.

Petitioner sought certiorari review in this Court on the ineffective assistance claim, but this Court denied certiorari on February 29, 2016, and denied rehearing on April 4, 2016. Conner, 136 S.Ct. at 1246, 1538.

Petitioner returned to Butts County and amended the Conner III petition on June 23, 2016, to reasserted two issues: Claim I, his intellectual disability claim based on Fleming and Atkins; and Claim II, alleging trial counsel provided

[4] This history included a 1971 Dodge County involuntary manslaughter conviction, arising from a guilty plea entered under a malice murder indictment, convictions for burglary and criminal damage to property, and a second murder conviction from Dodge County, arising from a guilty plea entered in August 1984 after the Telfair County trial, as the district court noted a pages 11-13 of its oral ruling.

ineffective assistance at the sentencing phase. He presented two new affidavits, one from the attorney who represented him in Conner I as to why that attorney did not attempt to raise a Fleming claim in Conner I, and the other from Petitioner's sister Linda Jones, who gave an affidavit in Conner I.

On June 24, 2016, the trial court entered an order, scheduling the seven-day window for Petitioner's execution to open at noon on July 14, 2016, and close at noon on July 21, 2016. The Commissioner of Corrections has set Petitioner's execution for 7 p.m. on July 14, 2016.

On Monday, June 27, 2016, Petitioner filed a second amendment to his third petition, adding Claims III and IV. Claim III asserts that it would be cruel and unusual punishment under the Eighth Amendment of the federal Constitution to execute him due to the length of time he has been on "death row." Claim IV asserts that it would violate the federal Fifth Amendment protection against double jeopardy to carry out his death sentence as he allegedly has been serving "a de facto life sentence."

On Tuesday, June 28, 2016, Respondent filed a supplemental answer, a supplemental motion to dismiss the petition as successive and a brief in support, addressing Claims I and II of the first amendment. That same day Respondent

filed a second supplemental answer and a brief in support, addressing Claims III and IV, and submitted a proposed final order to the presiding judge.

On Wednesday, June 29, 2016, the habeas court entered a final order, dismissing and denying the third petition. However, the following day, the court vacated its order of June 29th, stating that the court had inadvertently filed its order prior to seeing Petitioner's email (sent Wednesday afternoon) stating that Petitioner would respond to Respondent's recent submissions on Thursday, June 30, 2016. In the June 30th order, the court stated it would "reconsider Petitioner's petition for writ of habeas corpus after receiving Petitioner's response. (June 30, 2016, Order).

In the interim, Petitioner filed a motion for stay of execution on June 29th, and Respondent filed a response in opposition to the motion for stay.

On Friday, July 1, 2016, Petitioner filed his "response to Respondent's motion to dismiss and brief in support" with two attachments. On July 1st Respondent filed a reply to Petitioner's response.

On Tuesday, July 5, 2016, both parties submitted proposed final orders to the court.

On Wednesday, July 6, 2016, the habeas court entered an order in which it dismissed the third petition, denied relief and denied the motion for stay of execution. Petitioner filed a notice of appeal that same day.

On Tuesday, July 12, 2016, Petitioner filed a consolidated CPC application and motion for stay of execution, which he supplemented, in the Georgia Supreme Court, seeking a certificate to appeal the decision in Conner III. That same day Respondent filed a consolidated response in opposition to the CPC application and motion for stay as supplemented.

On Wednesday evening, July 13, 2016, the Georgia State Board of Pardons and Paroles denied Petitioner's request for clemency.

On Thursday, July 14, 2016, the Georgia Supreme Court denied his CPC application and motion for stay.

This petition seeks review of his defaulted Eighth Amendment claim that carrying out his sentence after the time he has spent awaiting execution while he challenged his sentence would be cruel and unusual punishment. The state courts found this issue is defaulted, as it could reasonably have been raised in Petitioner's two prior state collateral attacks, and alternatively found it lacked merit.

Due to the nature of the issues presented and Petitioner's attempts to portray himself as a "intellectually impaired" individual who was sentenced to death

without constitutional protections, Respondent adopts and incorporates by reference herein the facts found by the Georgia Supreme Court as to Petitioner's crimes. Conner v. State, 251 Ga. at 113-14. Those facts are as follows:

> At the time of the murder, Conner lived with his girl friend, Beverly Bates, in Milan. On the evening of January 9, 2981, they rode with friends, including the victim, J.T. White, to a party in Eastman. After spending the evening drinking and smoking marijuana, the group returned to Milan around midnight. J.T., described by one witness as "humble and satisfied," and by another as "mellow," exited the vehicle with Conner and Ms. Bates at their house. Soon afterwards, Conner and J.T. left the house on foot, taking with them a nearly empty bottle of bourbon that Conner had purchased the night before. They walked to the home of Pete Dupree, woke him up, and asked him to take them to get more whiskey. He refused.
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> Then, according to Conner, "[M]e and J.T. left and went down the road. J.T. made the statement that he would like to go to bed with my girl friend and so I got made and we got into a fight and fought all the way over to the oak tree and I hit him with a quart bottle. He run over there to the fence trying to get through or across, I reckon, so I run over there and grabbed him and pulled him back and hit him again and he fell in the water and he grabbed my leg. I was down there at him right there in the ditch where he was at and he was swinging trying to get up or swinging at me to try to hit me one, and there was a stick right there at me, and I grabbed it and went to beating him with it."
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> The next day, J.T.'s body was found in a drainage ditch near the Milan Elementary School. Injuries on his forehead bore the pattern of the sole of a tennis shoe. His nose was broken, both his cheekbones were fractured, his eyes were swollen, and his left ear was severely damaged. He had been hit so hard in the face with a blunt object that teeth, as well as portions of the bone to which they were attached, were broken away from his upper and lower jaws. Dr. Larry Howard, who conducted the autopsy, testified that the trauma to J.T.'s head and face caused brain damage and bleeding in and around the brain which extended into his lungs, causing him to drown in his own blood.

> Beverly Bates had gone to bed when Conner and J.T. left. When Conner returned, he woke her up and told her they had to leave; he had had a fight with J.T. and thought he was dead. Conner ripped off his shirt and threw it into the fire. He told Ms. Bates that he knew where a car was with its keys in it.
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> The car was parked in front of the school. Before they left town, Conner told Ms. Bates that "he had to be sure," and walked toward the ditch. She heard a thud, Conner returned, and said how he was sure, let's go. They stopped to get gas in Eastman. Ms. Bates gave Conner $20 to buy gas with; in return, he gave her a bloody $5 bill. They were caught in Butts County.
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> The $5 bill, as well as a whiskey bill and a tree limb found near the body, were subsequently analyzed and found to have blood on them that was consistent with that of the victim and inconsistent with that of Conner (understandable, since Conner suffered no injuries during the "fight").
>
> Conner presented no evidence, either at the guilt-innocence phase, or (against the advice of his attorney) at the sentencing phase of his trial. He was found guilty on all three counts and sentenced to death for the murder.

Conner, 251 Ga. at 113-14.

II. REASONS FOR NOT GRANTING THE WRIT

THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO CONSIDER THE DEFAULTED LACKEY CLAIM

Petitioner asks this Court to grant certiorari to consider whether carrying out his death sentence at this juncture would violate the Eighth Amendment ban

against cruel and unusual punishment. Respondent submits this defaulted issue provides no basis for the grant of certiorari.

As noted in the procedural history, the Conner III court found this claim, based on the dissent in Lackey v. Texas, 514 U.S. 1045 (1995), was defaulted under Georgia's successive petition rule of O.C.G.A. § 9-14-15, as the issue had not been raised in Petitioner's two prior state petitions, but reasonably could have been. The court alternatively found it lacked merit. Since the merits decision is clearly an alternative holding, this Court should decline to grant certiorari to consider the Eighth Amendment claim as the state court decision rests primarily on the procedural bar. Harris v. Reed, 489 U.S. 255 (19889).

Without waiving the procedural bar, Respondent notes that Petitioner relies on dissents from the denials of petitions for writs of certiorari, beginning with Lackey v. Texas, and including Johnson v. Bresdesen, 558 U.S. 1067 (2009), and Glossip v. Gross, 135 S.Ct. 2726 (2015), in asserting that his carrying out his execution after the time he has spent challenging his sentence should invalidate his sentence. Twice this term the Court has declined to grant certiorari on a Lackey claim: Boyer v. Davis, No. 15-8119 (U.S. May 2, 2016), and Moore v. Texas. Respondent submits the Court should similarly deny certiorari to review Petitioner's Lackey claim.

The Conner III court initially found the delay issue was successive, as it was not but could reasonably have been raised in Conner's prior habeas cases. That the court rested its decision on the procedural bar that the claim could have been raised before reflects the current state of the law on this issue, as there is no precedent delineating when a Lackey claim would become "ripe" for review.

As Justice Thomas pointed out in his concurrence in Johnson, this Court has never established what is an "acceptable" length of time for review of a death sentence. Johnson, 558 U.S. at 2071 (Thomas, J., concurring). He also pointed out that, despite one's views on and disagreements with capital punishment, "as long as our system affords capital defendants the procedural safeguards this Court has long endorsed, defendants who avail themselves of these procedures will face the delays" that even Petitioner now laments. Id. at 1972-73.

Without waiving any procedural bar, Respondent notes that Petitioner's arguments about his purported conditions of confinement are just that: arguments. His arguments also belie his clemency petition presented to the state parole board (and which is now public record) which asserts that he has "flourished" during his time in prison.

The procedural history shows that Petitioner has at all times sought to overturn his death sentence. The state and federal courts have thoroughly reviewed

his case and reliably found no constitutional violations in the proceedings giving rise to his conviction and sentence. Now that he has completed this careful process, Petitioner should not be heard to complain that this extensive process of review has violated his rights.

CONCLUSION

Wherefore, for all the above reasons, Respondent prays that this Court decline to grant certiorari and deny the motion for stay of execution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Paula K. Smith, a member of the Bar of this Court, hereby certify that I have this day served within the time for filing a copy of this BRIEF, prior to filing same, by electronic mail and by depositing a copy of the same in the United States Mail, first class postage prepaid and properly addressed, to:

Brian S. Kammer, Esq.
Georgia Resource Center
303 Elizabeth Street, NE
Atlanta, Georgia 30307

This 14th day of July, 2016.

Paula K. Smith

PAULA K. SMITH
Senior Assistant Attorney General