

No. 16-5230 and 16A59

IN THE SUPREME COURT OF THE UNITED STATES

In re* JOHN WAYNE CONNER, *Petitioner

PETITION FOR A WRIT OF HABEAS CORPUS

CAPITAL CASE

**BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT
TO PETITION FOR CERTIORARI REVIEW AND REQUEST FOR STAY**

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QUESTIONS PRESENTED

1. Whether this Court should grant certiorari to review a claim that is moot?
2. Whether this Court should grant certiorari to review a decision of the lower courts that does not conflict with its precedent?
3. Whether this Court should grant certiorari to review a claim that was not raised below?

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

SUMMARY OF ARGUMENT1

PROCEDURAL HISTORY.....1

REASONS FOR SUMMARILY DENYING THE WRIT.....5

CONCLUSION7

BRIEF IN OPPOSITION
ON BEHALF OF RESPONDENT

Respondent, Warden, respectfully prays that the petition writ of habeas corpus be denied.

I. SUMMARY OF ARGUMENT

Petitioner is seeking certiorari review on issues that are moot, seeking advisory opinions, not raised below or not in conflict with this Court's precedent. Certiorari review should be denied.

III. PROCEDURAL HISTORY

Petitioner John Wayne Conner ("Petitioner") was sentenced to death, following a jury trial, in 1982. On direct appeal, the convictions and sentences for malice murder and motor vehicle theft were affirmed. 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. 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).

Although having been incarcerated for 19 years, Petitioner filed a second state collateral attack in 2001, raising only a claim of “intellectually disability,” not an Eighth Amendment claim on the length of his incarceration. The state habeas court dismissed this petition as successive under O.C.G.A. § 9-14-51. This Court denied certiorari. Conner v. Head, 537 U.S. 908, reh’g denied, 537 U.S. 1069 (2002).

Meanwhile, Petitioner submitted a federal habeas corpus petition in the Southern District of Georgia in 2001 raising his intellectual disability claim and a claim of ineffective assistance of counsel. Relief was denied in November 2009.

In the first appearance of the case in the Eleventh Circuit, where Petitioner had been granted a certificate of appealability (“COA”) 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.

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). A two-day federal hearing was held in May 2013.¹

At the conclusion of the hearing, after oral argument from the parties, the district court made extensive oral findings of fact and conclusions of law on the record, and denied relief.

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. This Court denied certiorari review. Conner, 136 S. Ct. at 1246, 1538.

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.

On June 23, 2016, Petitioner returned to Butts County, where he had filed a third state habeas in the intervening time period while his federal habeas petition was pending and filed an amendment. On June 27, 2016, Petitioner filed a second amendment to his third petition alleging for the first time that it would double jeopardy and cruel and unusual punishment under the Eighth Amendment of the federal

¹ Evidence presented about Petitioner's criminal 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.

Constitution to execute him due to the length of time he has been on “death row.”

On 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 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.

Also on Thursday, July 14, 2016, Petitioner filed a successive federal habeas petition, raising the same claims he now raises before this Court - his death sentence was unconstitutional based on his 34 years in prison. The district court found the claim was successive, and in the alternative found the claim to be without merit.

Late on July 14, 2016, Petitioner filed a successive federal habeas petition raising his Eighth and Fifth Amendment claims. The district court found it was successive, not properly filed; and alternatively, without merit.

On request to appeal, the Eleventh Circuit found that a certificate of appealability (COA) may only issue from the denial of a § 2254 petition “if the application has made a substantial showing of a denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). On this basis, the Eleventh Circuit found Petitioner was not entitled to a COA.

III. REASONS FOR SUMMARILY DENYING THE WRIT

Petitioner is seeking certiorari review on issues that: are moot (are Lackey claims only ripe when an execution is set); seeking advisory opinions (whether the Lackey claim could be raised as a § 1983 claim); not raised below (Question Three (p. ii)); and not in conflict with this Court's precedent (the denial of COA).

Certiorari review should be denied.

A. WHETHER PETITIONER'S CLAIM WAS RIPE PRIOR TO THE SETTING OF HIS EXECUTION IS.

Petitioner first requests certiorari review, asking this Court to issue an advisory opinion on when his Eighth and Fifth Amendment claims concerning the length of time he has been on death row became ripe and whether should as be raised as habeas claims or a § 1983 claim. As the Eleventh Circuit found that his claim was ripe, but not meritorious, as did the district court, this issue is moot.

Certiorari review is not warranted.

B. THE ELEVENTH CIRCUIT PROPERLY DENIED COA.

Petitioner also seeks certiorari review of the circuit court's disposition of his Eighth and Fifth Amendment excessive delay claims. These provide no basis for the grant of certiorari as there is no clearly established precedent from this Court supporting Petitioner's position and this Court has never suggested that time on death row prior to execution violates the Double Jeopardy Clause. The court's decision is in accord with this Court's precedent. There is no clearly established

precedent supporting Petitioner’s position and it was a proper denial of a certificate of appealability.

C. THE THIRD QUESTION IS NEW.

This Court should decline to grant certiorari on his third question as it was not raised below. In the third question, he claims for the first time that his execution would offend the Fifth, Eighth and Fourteenth Amendment because he has been a “model inmate under the harsh conditions” of death row and there is allegedly no legitimate goal in implementing his death sentence. As this Court has held:

We do not generally entertain arguments that were not raised below and are not advanced in this Court by any party, see United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 60, n. 2 (1981); Bell v. Wolfish, 441 U.S. 520, 532, n. 13 (1979); Knetsch v. United States, 364 U.S. 361, 370 (1960).

Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2776 (2014).

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing Pleading, prior to filing the same, by emailing, properly addressed upon:

Brian Kammer
Georgia Resource Center
303 Elizabeth Street, NE
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This 14th day of July, 2016.

s/Paula K. Smith
PAULA K. SMITH
Senior Assistant Attorney General