

IN THE SUPREME COURT OF FLORIDA

DANIEL OWEN CONAHAN, JR.,

Appellant,

CASE NO. SC18-303

L.T. Number 97-CF-00166

v.

STATE OF FLORIDA,

DEATH PENALTY CASE

Appellee.

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

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

Daniel Conahan, Jr. was charged by indictment with premeditated murder of Richard Montgomery, felony-murder, kidnapping and sexual battery. He waived jury proceedings in the guilt phase and the court found Conahan guilty of first degree premeditated murder and kidnapping and adjudicated him guilty of both crimes. The jury selected for the penalty phase unanimously recommended death. Conahan was sentenced to death on December 10, 1999.

This Court summarized the relevant facts in its opinion affirming Defendant's judgment and sentence of death:

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

The next day, April 17, Thomas Reese and Michael Tish, who were storm utility engineers for Charlotte County, discovered a human skull in a remote, heavily wooded area off of Highway 41 and immediately notified the police department. While searching the scene, deputies found the nude body of a young, white male that was later identified as Richard Montgomery. He had visible signs of trauma to the neck, waist, and wrists, and the genitalia had been removed. The forensic lab personnel arrived and collected various

items from the scene, including a rope found on the top of a nearby trash pile, carpet padding that covered the victim's body, a skull and a torso (neither of which belonged to the victim), a gray coat, and various combings from the victim's arms, hands, chest, pubic area, and thighs. On the following day, Deputy Todd Terrell arrived on the scene with a K-9 dog which showed significant interest in a sabal palm tree, specifically the side of the tree which was somewhat flattened and damaged.

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

Due to the unique nature of the homicide (being tied to a tree naked and then strangled), police reviewed a similar assault reported on August 15, 1994. The victim, Stanley Burden, was a high school drop-out who, like Montgomery, had difficulty keeping a steady job and had physical features similar to those of Montgomery. The report indicated that Burden met Conahan, who offered to pay him \$100 to \$150 to pose for nude photographs. Burden agreed and Conahan drove him to a rocky dirt road in a secluded area where Conahan pulled out a duffle bag with a tarp and a Polaroid camera. The two men headed into the woods where Conahan laid the tarp out and asked Burden to take off his shirt and show a little hip. After taking numerous pictures of Burden, Conahan then took out a new package of clothesline so he could get some bondage pictures. He asked Burden to step close to a nearby tree and then clipped the clothesline in several pieces, draping them over Burden to make it look like bondage. Conahan moved behind Burden, snapped the rope tightly around him, pulled his hands behind the tree, placed ropes around his legs and chest, and wrapped the rope twice around Burden's neck. Conahan then performed oral sex on Burden and attempted to sodomize him. Burden fought to position himself in the middle of the tree while Conahan tried

to pull him to the side to have anal sex. After many unsuccessful attempts, Conahan snapped the rope around Burden's neck, placed his foot against the tree, and pulled on the rope in an attempt to strangle Burden, who tried to slide around the tree to keep his windpipe open. Conahan hit Burden in the head and unsuccessfully attempted to strangle him for thirty minutes. Conahan asked Burden why he would not die and finally gave up, gathered his possessions, and left. Burden freed himself, went to a local hospital, and received treatment for his injuries. The police located the crime scene and found that one of the melaleuca trees had ligature indentions that corresponded with Burden's injuries.

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

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

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

photos showed that minutes later, at 6:12 p.m., Conahan withdrew funds from an ATM which was located close to the Wal-Mart.

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

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

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

Conahan's aunt, Betty Wilson, testified on behalf of the defense that Conahan was a jovial, personable individual who participated in family activities and cared for his ailing mother before she died. Robert Lindy and his daughter Nancy Thomson, the father and sister of Hal Lindy, who was Conahan's roommate and lover when he lived in Chicago, testified that Conahan was like another son and brother to them. Conahan was instrumental in helping Hal and Nancy overcome alcoholism, was considered one of the family, and was

included in many family functions. Thereafter, the defense rested its case.

Before the jury deliberated, the trial court gave instructions relative to the following aggravators: (1) the murder was heinous, atrocious, or cruel (HAC); (2) the murder was cold, calculated, and premeditated (CCP); and (3) the murder was committed during the course of a kidnapping. By a vote of twelve to zero, the jury recommended the death penalty. A Spencer hearing was held on November 5, 1999, and on December 10, 1999, Conahan was sentenced to death for the first-degree murder of Richard Montgomery and to fifteen years' imprisonment for kidnapping.

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

This Court affirmed Conahan's convictions and sentence on January 16, 2003. Conahan v. State, 844 So. 2d 629 (Fla. 2003). Appellant's motion for rehearing was denied April 24, 2003, and the mandate issued the same date.

The United States Supreme Court denied certiorari review on October 6, 2003. Conahan v. Florida, 540 U.S. 895 (2003).

This Court denied Conahan's initial postconviction motion in Conahan v. State, 118 So. 3d 718 (Fla. 2013). Conahan's first successive motion for postconviction relief was affirmed by this Court in Conahan v. State, 2017 WL 656306 (Fla. Feb. 17, 2017), which, by agreement of the parties, held that the Hurst¹ claim Conahan attempted to raise therein was premature. Conahan's

¹ Hurst v. State, 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017).

second motion for postconviction relief was filed on October 13, 2017. In that motion, Conahan sought Hurst relief as well as retroactive application of Chapter 2017-1. The lower court summarily rejected both claims and the instant appeal followed.

PRELIMINARY STATEMENT

In this Court's briefing schedule the parties were directed to "file briefs addressing why the lower court's order should not be affirmed based on this Court's precedent in Hurst v. State, 202 So. 3d 40 (Fla. 2016), *cert. denied*, No. 16-998 (U.S. May 22, 2017), Davis v. State, 207 So. 3d 142 (Fla. 2016), and Mosley v. State, 209 So. 3d 1248 (Fla. 2016)." Additionally, this Court directed that the parties could "include a brief statement to preserve arguments as to the merits of the previously decided cases, as deemed necessary, without additional argument."

Appellee objects to Appellant's brief as it exceeds the scope of the issues to be addressed as ordered by the briefing schedule. Appellant has included several issues beyond the scope of this Order. The 15-page limit for Appellee's response precludes an in-depth response to the out-of-scope issues raised by Appellant's brief. Without waiving any defenses to these arguments, Appellee will limit its response as directed by this Court's briefing Order. If this Court would like Appellee to respond to any of the other issues raised by Appellant, Appellee requests the opportunity to file a supplemental brief.

SUMMARY OF THE ARGUMENT

The lower court properly summarily denied Conahan's successive motion for postconviction relief. The record conclusively establishes that any Hurst error was harmless beyond a reasonable doubt as the jury in this case unanimously recommended the death penalty. As this Court has made clear, the jury's unanimous recommendation is "precisely what [this Court] determined in Hurst to be constitutionally necessary to impose a sentence of death." Davis v. State, 207 So. 3d 142, 175 (Fla. 2016).

STANDARD OF REVIEW

The trial court's summary denial of Conahan's successive motion for postconviction relief is reviewed by this Court *de novo*, accepting the defendant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling if the record conclusively establishes that the defendant is entitled to no relief. Walton v. State, 3 So. 3d 1000, 1005 (Fla. 2009).

ARGUMENT

THE LOWER COURT PROPERLY DENIED CONAHAN'S CLAIM THAT HIS DEATH SENTENCE WAS UNCONSTITUTIONAL.

In Hurst v. Florida, 136 S. Ct. 616 (2016), the United States Supreme Court declared the portion of Florida's capital sentencing scheme requiring the judge, rather than a jury, to find each fact necessary to impose a sentence of death unconstitutional in light of Ring v. Arizona, 536 U.S. 584 (2002). On remand, this Court interpreted this holding as requiring that jury to make numerous factual findings prior to the court imposing a death sentence: the jury "must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." Hurst v. State, 202 So. 3d 40, 57 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017).

Retroactivity

Conahan's sentence became final after the Supreme Court issued its decision in Ring v. Arizona, 536 U.S. 584 (2002). Pursuant to Mosley v. State, 209 So. 3d 1248, 1275 (Fla. 2016), the Supreme Court's decision in Hurst v. Florida and this

Court's decisions following Hurst, apply to Conahan.²

Harmless Error

In Davis v. State, 207 So. 3d 142, 174 (Fla. 2016), this Court found that when the jury unanimously recommends a death sentence, their unanimous recommendation "allow[s] 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." In the instant case, not only did the jury unanimously recommend the death penalty, the jury also unanimously found the prior violent felony aggravating circumstances based on their verdicts for each of the contemporaneous murders.

Accordingly, there is no question that the error was harmless beyond a reasonable doubt. This Court has consistently followed Davis and found harmless error in cases involving

² Although Appellee recognizes that this Court has determined that Hurst is retroactive, Appellee maintains, however, that Hurst v. Florida should not be retroactively applied as it is merely an extension of Ring, which has been held to not be retroactive. See Schriro v. Summerlin, 542 U.S. 348, 358 (2004) ("[t]he right to jury trial is fundamental to our system of criminal procedure, and States are bound to enforce the Sixth Amendment's guarantees as we interpret them. But it does not follow that, when a criminal defendant has had a full trial and one round of appeals in which the State faithfully applied the Constitution as we understood it at the time, he may nevertheless continue to litigate his claims indefinitely in hopes that we will one day have a change of heart. Ring announced a new procedural rule that does not apply retroactively to cases already final on direct review.")

unanimous recommendations. See Kaczmar v. State, 228 So. 3d 1 (Fla. 2017); Guardado v. Jones, 226 So. 3d 213 (Fla. 2017); Cozzie v. State, 225 So. 3d 717 (Fla. 2017); Knight v. State, 225 So. 3d 661 (Fla. 2017); Tundidor v. State, 221 So. 3d 587 (Fla. 2017); Middleton v. State, 220 So. 3d 1152 (Fla. 2017); Morris v. State, 219 So. 3d 33 (Fla. 2017); Oliver v. State, 214 So. 3d 606 (Fla. 2017); Hall v. State, 212 So. 3d 1001 (Fla. 2017); Jones v. State, 212 So. 3d 321 (Fla. 2017); Truehill v. State, 211 So. 3d 930 (Fla. 2017); King v. State, 211 So. 3d 866 (Fla. 2017). As Appellant has failed to demonstrate any basis for this Court to recede from this precedent, the State urges this Court to affirm the trial court's denial of his Hurst claim.

In the instant case, any Hurst error is clearly harmless given the jury's unanimous findings on each of the three aggravating factors and the jury's unanimous death recommendation. The jury in this case unanimously agreed that three aggravating factors were present: (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. Significantly, the jury also unanimously recommended that death was the appropriate sentence. The jury's unanimous recommendation is "precisely what

[the Florida Supreme Court] determined in Hurst to be constitutionally necessary to impose a sentence of death." Davis v. State, 207 So. 3d at 175. Thus, the jury's recommendation satisfies the unanimity requirement of Hurst.

This Court should also reject Appellant's argument that the Hurst error cannot be harmless because the penalty phase jury's role was allegedly minimized in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). In Hall v. State, 212 So. 3d 1001 (Fla. 2017), this Court recently affirmed a defendant's death sentence based on a unanimous recommendation and rejected his challenge to Florida's jury instructions based on Caldwell. Id. at 1032-36 (noting that this Court has repeatedly rejected challenges to Florida's standard jury instructions based on Caldwell). It is well established that the harmless error test applies to constitutional error, and this Court has consistently found that a jury's unanimous death recommendation satisfies the harmless error standard as it establishes, beyond a reasonable doubt, that the jury unanimously made the requisite factual findings. See Jones, 212 So. 3d at 343 (noting that the jury's factual findings that the aggravating circumstances were sufficient to impose death and outweighed the mitigation was inherent in the jury's unanimous recommendation); King, 211 So. 3d at 889-93; Truehill, 211 So. 3d at 955-57.

Furthermore, Appellant's claim is based on pure speculation. There is nothing in the record to support the proposition that the jury's responsibility in rendering the advisory verdict was diminished. As this Court has noted, it is "inherent" in this recommendation that the jury determined that the aggravating circumstances were sufficient to impose death and that the aggravators outweighed the mitigation. Jones v. State, 212 So. 3d 321, 343 (Fla. 2017). Thus, even if there was any Eighth Amendment error in this case, the error was harmless beyond a reasonable doubt. Accordingly, this Court should affirm the court's ruling denying Conahan any relief based on Hurst.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 3rd day of May, 2018, I electronically filed the foregoing with the Clerk of the Court by using the e-portal system which will send a notice of electronic filing to the following: William M. Hennis, III, Litigation Director, and Jason Kruszka, Staff Attorney, Capital Collateral Regional Counsel-Southern Region, 1 East Broward Boulevard, Suite 444, Ft. Lauderdale, Florida 33301, **hennisw@ccsr.state.fl.us** [and] **kruskaj@ccsr.state.fl.us**.

CERTIFICATE OF FONT COMPLIANCE

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

/s/ Timothy A. Freeland

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