IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DEREK BRANDON CONWAY — APPELLANT

VS. — NO. 2009-CA-0886

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DEREK BRANDON CONWAY **APPELLANT**

VERSUS **NO. 2009-CA-0886-COA**

STATE OF MISSISSIPPI **RESPONDENT**

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Derek Brandon Conway was convicted in the Circuit Court of Forrest County on a charge of murder and was sentenced to life imprisonment. (C.P.35-36) Aggrieved by the judgment rendered against him, Conway perfected an appeal. On November 20, 2005, his judgment of conviction and sentence was affirmed by the Court of Appeals. *Conway v. State*, 915 So.2d 521 (Miss.App.2005). Thereafter, Conway filed in the Mississippi Supreme Court an Application for Leave to Proceed in the Trial Court for post-conviction collateral relief. On August 9, 2007, the Supreme Court granted Conway's motion. On September 12, 2008, the state filed in the circuit court a response in opposition to Conway's motion for post-conviction relief. (C.P.42) Conway's motion was denied summarily. (C.P.54) Aggrieved by the judgment rendered against him, Conway has perfected an appeal to this Court.

SUMMARY OF THE ARGUMENT

Conway's brief is essentially a reiteration of the arguments raised below. Those arguments were fully rebutted by the state and rejected by the circuit court. It follows that Conway clearly has failed to sustain his burden of showing that the circuit court erred in denying his motion for post-conviction relief. Accordingly, the judgment entered below should be affirmed.

PROPOSITION:

CONWAY HAS FAILED TO SHOW ERROR IN THE CIRCUIT COURT'S DENIAL OF HIS MOTION FOR POST-CONVICTION RELIEF

At the outset, the state submits that the judgment entered by the circuit court is presumed to be correct, and that the burden rests on Conway to demonstrate error in the court's ruling. *Sago v. State*, 978 So.2d 1285, 1287 (Miss.App.2008). A review of the record reveals that Conway's brief is essentially a reiteration of the argument presented below, fully rebutted by the state,[1] and ultimately rejected by the circuit court. Under these circumstances, the state contends Conway has not begun to sustain his burden of showing that the circuit court erred in denying his motion for post-conviction relief. Accordingly, the state respectfully submits the judgment entered below should be affirmed.

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[1]The response filed in the circuit court by the assistant district attorney is attached hereto as an exhibit. This response fully answers the points raised in Conway's motion.

CONCLUSION

The state respectfully submits that Conway has failed to show error in the court's denial of his motion for post-conviction relief. Accordingly, the judgment entered below should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI

BY: DEIRDRE McCRORY
SPECIAL ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I, Deirdre McCrory, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Robert B. Helfrich
Circuit Court Judge
P. O. Box 309
Hattiesburg, MS 39403

Honorable Jon Mark Weathers
District Attorney
Post Office Box 166
Hattiesburg, MS 39403-0166

Edwin L. Pittman, Esquire
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This the 4th day of January, 2010.

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IN THE CIRCUIT COURT OF FORREST COUNTY, MISSISSIPPI

DEREK BRANDON CONWAY — MOVANT

VERSUS — CAUSE NO. ~~03-235CR~~ CI 07-0211

STATE OF MISSISSIPPI — RESPONDENT

FILED
SEP 12 2008
Lyn Ellen Adams
FORREST COUNTY CIRCUIT CLERK

RESPONSE IN OPPOSITION TO MOTION FOR POST-CONVICTION RELIEF

STATEMENT OF THE CASE

Derek Brandon Conway was convicted in the Circuit Court of Forrest County on a charge of murder and was sentenced to life imprisonment. Aggrieved by the judgment rendered against him, Conway perfected an appeal. On November 20, 2005, his judgment of conviction and sentenced was affirmed by the Court of Appeals. Conway v. State, 915 So.2d 521(Miss. App.2005). Thereafter, Conway filed in this Court an Application for Leave to Proceed in the Trial Court for post-conviction collateral relief. The Supreme Court granted leave to Proceed by Order dated August 9, 2007.

ARGUMENT

CONWAY'S MOTION SHOULD BE DENIED

1. Conway has not presented adequate grounds on his claims of ineffective assistance of counsel.

Conway first claims that he was denied his Sixth Amendment right to effective assistance of counsel at trial. At the outset, the state answers that Conway has not made a showing sufficient to rebut the presumption that his counsel's decisions were strategic, and therefore did not constitute unprofessional lapses. Nor has he made sufficient claims of prejudice.

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EXHIBIT

To proceed further in the circuit court, Conway "must present a substantial showing" that his counsel's "conduct was deficient, and a reasonable probability that, but for the deficient conduct of his trial, the outcome of his trial would have been different." Holly v. State, 716 So.2d 979, 991 (Miss. 1998). "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Foster, 687 So.2d at 1129 (Miss. 1996). There is a strong presumption that the challenged action is the result of sound trial strategy. Hughes v. State, 807 So.2d 426, 431 (Miss. 2001). As this Court observed in Holly v. State, 716 So.2d 979, 990 (Miss. 1998),

> "Judicial scrutiny of counsel's performance [is] highly deferential." Strickland [v. Washington], 466 U.S. at 689, 104 S.Ct.2052. There is a strong but rebuttable presumption that counsel's conduct falls within the wide range of reasonable professional assistance. [citations omitted] Only where it is reasonably probable that but for the attorney's errors, the outcome of the trial would have been different, will we find that counsel's performance was deficient.

Having articulated these standards, the state proceeds to address Conway's specific issues.

A. Conway's claims that his counsel was unable to prepare for trial.

Pointing to the motion for continuance file one week before trial, Conway asserts that his counsel "was admittedly and demonstrably deficient in his preparations for trial."(Application 6) Attempting to show how he will establish the prejudice prong of the Strickland test, Conway argues in a conclusory manner that this arguable lack of preparation led to "a breakdown in the adversary process that renders the result unreliable."

The state counters that Conway has not, and cannot, articulate a basis for finding a reasonable likelihood of a different outcome had counsel been afforded another week, or month, or six months to prepare for trial. Incorporating by reference the statement of facts and

arguments in its brief, as well as the holding of the Court of Appeals, the state submits that the overwhelming evidence of guilt makes it impossible for Conway to establish prejudice with respect to this claim.[1]

This issue is encompassed in the prosecution's argument and the trial court's finding on the motion for j.n.o.v/new trial, wherein Conway raised the question of the propriety of the denial of the motion for continuance on this ground. (See Brief for Appellee 7-8) (T.426-28) Of course, in order to show error in the court's denial of a motion for continuance, the defense is required to show that substantial prejudice, or manifest injustice, resulted. Rhinehart v. State, 883 So.2d 575, 575(Miss. 1004). By denying the motion for j.n.o.v./new trial, the trial court effectively found that no such prejudice had been shown. The Court of Appeals held that his ruling was not error."Conway offers no proof that his attorney at trial was unprepared or that he was prejudiced from his attorney's lack of preparation." Conway, 915 So.2d at 525. Likewise, Conway has failed to show any prejudice. Accordingly, it should be denied.

B. Whether Conway's counsel rendered ineffective assistance in failing to renew his motion to exclude the "doctored" videotape

Contending that this Court should deny Conway's motion, the state adopts by reference its argument under 1.A.above. The state argued during the hearing on the post-trial motions and in its brief filed in the Court of Appeals that this evidence was cumulative and that its admission did not constitute reversible error in light of the overwhelming evidence of guilt. The Court of Appeals held, "Based on this Court's review of the record and evidence against Conway, we find

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[1]Addressing Conway's claim that his counsel was unable to estimate the impact of the enhanced videotape, the state adopts by reference the assistant district attorney's argument that this evidence was merely cumulative. Even if Conway's attorney had been successful in excluding it, Conway cannot show a reasonable likelihood of a different outcome.

the evidence against Conway is overwhelming." Accordingly, the admission of the videotape did not constitute reversible error. 915 So.2d at 526. Conway has wholly failed to show how he could establish Strickland prejudice with respect to his counsel's failure to renew his motion to exclude the videotape. It follows that this claim should be denied.

C. Whether Conway's counsel rendered ineffective assistance in failing to object or move for a mistrial when he became aware that a juror was a former co-worker of his (Conway's) mother

Conway argues additionally that his counsel committed an unprofessional lapse by failing to object or move for a mistrial when he became aware that juror Cleta Zeller was a former co-worker of Conway's mother, Deborah Sumrall (now Bishop). Attached to Conway's Application is an affidavit from Ms. Bishop stating that she had known Ms. Zeller for years; that they had worked together; and that she "felt Cleta Zeller should have been excused from the jury" for this reason. Ms. Bishop did not elaborate; she did not aver any basis for a finding that Ms. Zeller would have been biased against her son. It follows that Conway has failed to rebut the presumption that his counsel's decisions with regard to Ms. Zeller were strategic, see Simon v. State, 857 So.2d 668, 692 (Miss. 2003). It is curios that no mention is made of when Attorney Ray Price became aware of the juror because it is clear that his strategy was to not make further inquiry because he felt good about that co-worker being on the jury.

Nor can he show a reasonable probability of a different outcome had Ms. Zeller not sat on the jury. For these reasons, this claim should be denied.

D. Whether Conway's counsel rendered ineffective assistance in failing to object to the qualifications and testimony of Dr. Hayne

Finally, Conway contends his trial counsel was ineffective in failing to failing to object to

the qualifications of Dr. Steven Hayne, who was accepted without objection as an expert in the field of forensic pathology. Dr. Hayne, who had performed the autopsy on the body of the victim, testified that Mr. Mooney had suffered injuries about the head which were consistent with having been inflicted by a blunt object as well as having been caused by the victim's having fallen onto asphalt pavement. "[T]here was an entrance gunshot wound located over the chest near the midline at a point 14 inches below the top of the head... "The bullet had entered the sternum, going from right to left and "downward at approximately 20 to 25 degrees." The trajectory of the bullet, considered with the fact that the truck was not damaged, was consistent with its having been fired when the decedent was in an upright seated position. (T.199-208)

Citing Edmonds v. State, 955 So.2d 787,793 (Miss. 2007), Conway argues that his trial counsel committed an unprofessional lapse in failing to question Dr. Hayne's qualifications and to object to his acceptance by the court as an expert in the field of forensic pathology. In response, the state submits first that nothing in the majority opinion issued in Edmonds impugns Dr. Hayne's qualifications in the general field of forensic pathology. To the contrary, the majority held specifically that Dr. Hayne is so qualified. Edmonds, 955 So2d at 792. The Court did go on to hold that Dr. Hayne's testimony regarding the "two shooter" theory was speculative, and that its admission was harmful, in large part because it "was the only evidence-other than Tyler's contested confession-to support the State's theory of the case."id.

The state submits Conway's reliance on Edmonds is unavailing. First, nothing in the majority opinion indicates that an objection to Hayne's expert opinions in this particular case would have been well taken; thus, counsel cannot be faulted for failing to interpose such objection. Additionally, Conway cannot show a reasonable likelihood of a different result had

such objection been interposed successfully. The state's theory of the case was amply supported by the testimony two eyewitnesses; the case did not hinge on Dr. Hayne's testimony about the trajectory of the bullet. It follows that Conway can show satisfy neither prong of the Strickland test with respect to this claim and should be denied.

2. Conway has failed to present a colorable claim of ineffective assistance of appellate counsel.

Conway claims next that he was denied effective assistance of counsel on appeal by counsel's failure to file a motion for rehearing of the decision of the Court of Appeals. Claims of ineffective assistance of counsel are analyzed under the Strickland standard. See Evitts v. Lucy, 469 U.S. 387 (1985). Thus, decisions regarding issues raised on appeal are presumed to be tactical, and are left to the sound judgment of counsel. United States v. Perry, 908 F.2d 56, 59 (6th Cir. 1990). The state submits that with respect to this issue, Conway can demonstrate neither an unprofessional lapse nor a reasonable likelihood of a different outcome had counsel filed post-affirmance motions.

By an unanimous decision, the Court of Appeals affirmed the judgment of conviction and sentence. Appended to Conway's application is a copy of a letter from the office of the Forrest County Public Defender, informing Conway that his counsel had "reviewed the court's decision and found no basis to file for a rehearing in accordance with the rules." The letter went on to state,

> To date our office has exhausted all appellate remedies available to you that had merit. We have found no legal or factual basis that would allow us to proceed with any further remedies such as a petition for rehearing of [sic] writ of certiorari. However, you may do so on your own or with other counsel.

Under the facts presented here, Conway can satisfy neither prong of the Strickland

standard. Conway focuses on the holding by the Court of Appeals that the admission of the videotape was error, but harmless. He contends the Court "did not follow the law when examining the harmlessness of the error" and that, therefore, he had a colorable claim to present in a motion for rehearing. (Application 12)

The state counters that the Court of Appeals utilized this reasoning in deeming the error harmelss:

> No trial is free of error; however, to require reversal the error must be of such magnitude as to leave no doubt that the appellant was unduly prejudiced [citations omitted] When the weight of the evidence against the defendant is overwhelming, such error is harmless. [citations omitted] Based on this Court's review of the record and the evidence against Conway, we find that the evidence against Conway is overwhelming. Conway, 915 So.2d at 526

See also McKee v. State, 791 So.2d 804, 810 (Miss. 2001) ("[a]n error is harmless when it is apparent on the face of the record that a fair-minded jury could have arrived at no verdict other than that of guilty"), and Carter v. State, 722 So.2d 1258, 1262 (Miss. 1998) ("[w]here the prejudice from an erroneous admission of evidence dims in comparison to other overwhelming evidence, this Court has refused to reverse").

Conway cannot be heard to claim that the Court of Appeals did not follow the law. It follows that he cannot show that his lawyer rendered ineffective assistance in declining to challenge a valid holding. He can show neither an unprofessional lapse, nor a substantial likelihood of success had counsel filed a motion for rehearing. His second claim for relief should be denied.

3. Conway has failed to show that his right to fair trial was violated by the conduct of certain witnesses

Conway contends additionally that he was denied his right to fair trial by "several

prejudicial actions taken by witnesses and jurors which warrant a new trial." To support this claim he presents four affidavits, the first two from his mother, Deborah Bishop. The substance of that affidavit is set out below:

> On the first day of the trial, we were taken into a long room like a conference room in the courthouse. Then they moved us to two small rooms down the hall outside the courtroom. They put Paul Ingram, Michael Smith, Joseph Jensen, and Anthony Thames in one room and me, Christina Conway, and Heather Essary in the other room. Christina returned to the witness room after she testified. She said she was caught by Tommy Fredrick discussing the case in the men's witness room and was carried back before the Judge about what she was talking about. Then they brought her back to the witness room saying her conversation was harmless to the case.
>
> Also while in the witness room, Tracy Wallace was allowed to come in the witness room to talk to her son, Joseph Jensen. Sgt. Taylor from the Forrest County Sheriff's Department came in and told Tracy she was not supposed to be in the witness room. Tracy told him Rusty Keyes gave her permission to come back, so she stayed for a little while and talked to everyone in both rooms. Tracy made the statement that it sure was good to know someone around the courthouse (meaning so she could come back to the witness room to see her son and others in both rooms). Me and Heather Essary were kept in the witness room during the whole trial until the last day of the sentencing and were never called to the witness stand.

In a separate affidavit, Ms. Bishop averred in pertinent part that "[t]he witnesses were able to converse with one another both State and defense witnesses. We had been directed by the Court not to discuss the case. However, there was some discussion while in the witness room." The affidavits of Julia Essary and Rose Ingram state essentially the same facts. The affidavit of Ms. Ingram adds, "I was in the courtroom, and during breaks could see witnesses talking to each other, and others in the hallway."

Missing from these affidavits is any allegation that these witnesses said anything which would have had an effect on the outcome of the trial. At most, these affidavits show a technical violation of M.R.E. 615. Such violation is harmless where, as here, "it is 'clear beyond a

reasonable doubt that the error complained of did not contribute to the verdict obtained'" Conley v. State, 790 So.2d 773, 789 (Miss. 2001), quoting Stokes v. State, 548 So.2d 118, 124 (Miss.1989). Conway clearly is not entitled to relief on this claim.

4. Conway has not made of colorable claim of denial of his right to due process with respect to his counsel's decision not to file a motion for rehearing

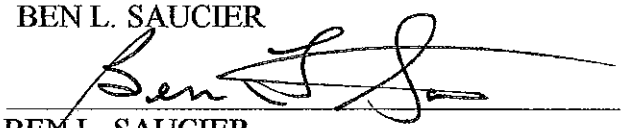
Conway finally contends that he was not provided with procedural due process on appeal. He has cited no authority for the proposition that a criminal defendant has a due process right to file a motion for rehearing, and if necessary, a petition for writ of certiorari, where no arguable basis exists for such filing.[2] Conway has not articulated a valid basis for a determination that his due process rights were violated by his counsel's considered decision not to file a motion for rehearing in this case. His final claim has no merit.

CONCLUSION

For the reasons set out above, the state respectfully submits the motion should be denied.

Respectfully submitted,

BEN L. SAUCIER

BY: 

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[2]The right to appeal is a statutory right, not a constitutional right. Abney v. United States, 431 U.S. 651, 656 (1977).

CERTIFICATE OF SERVICE

I, Ben L. Saucier, Assistant District Attorney for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **RESPONSE TO MOTION FOR POST CONVICTION RELIEF** to the following:

1. Honorable Edwin Lloyd Pittman, Esquire
   Attorney At Law
   800 Avery Blvd. North, Suite 101
   Ridgeland, MS 39157

2. Honorable Deidre McCroy
   Office of the Attorney General
   P. O. Box 220
   Jackson, MS 39205-0220

This is the 12th day of September, 2008.

BEN L. SAUCIER
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IN THE CIRCUIT COURT OF FORREST COUNTY, MISSISSIPPI

DEREK CONWAY — **APPELLANT**

vs. — **CASE NO. CI07-0211**

STATE OF MISSISSIPPI — **APPELLEE**

NOTICE OF APPEAL

Comes now Derek Brandon Conway, by and through his attorney, and files this his Notice of Appeal under the Uniform Rules of Appellate Procedure and in support thereof would show unto the Court the following:

1.

That Derek Conway is the petitioner having been aggrieved by the decision of the Court, but before the entry of the Judgment.

2.

Service of the Notice of Appeal can be served on John Mark Weathers at 316 Forrest St., Hattiesburg, MS 39401 and Jim Hood Mississippi Attorney General at the Carroll Gartin Justice Building, 450 High Street, fifth Floor, Jackson, MS 39201.

3.

That on October 10, 2008 the Appellant's motion for post-conviction relief in the Circuit Court of Forrest County, Mississippi on the charge of Murder was heard. The Court denied the motion. The Appellant is aggrieved by the Judgment of the Court.

4.

The appellant files this appeal without supersedeas.