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IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE

AT CHATTANOOGA

DIVISION III

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HAROLD WAYNE NICHOLS, )

Petitioner, )

v. )

STATE OF TENNESSEE, )

Respondent. )

) Case No. 205863  
) Capital Post-Conviction

**ORIGINAL**

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Chattanooga, Tennessee  
January 31, 2018

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE DON R. ASH

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APPEARANCES:

FOR THE PETITIONER:

DEBORAH DREW, ESQ.  
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FOR THE RESPONDENT:

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1 the Court to see if they meet with the Court's approval  
2 to resolve not only his -- the matter before the Court,  
3 but his overall sentence.

4 THE COURT: Okay. So help me with this.  
5 How do you propose we do this?

6 MR. PINKSTON: That we modify the sentence,  
7 and then at the end of that he withdraws his petition.

8 THE COURT: And what's the basis for  
9 modifying the sentence?

10 MR. PINKSTON: Your Honor, there's a series  
11 of -- as has been filed in the briefs -- cases, Supreme  
12 Court cases that essentially make the aggravating factor  
13 that -- one of the aggravating factors that the State  
14 sought when he got the death penalty, essentially, at  
15 this point null and void and not applicable to him. The  
16 previous aggravator was withdrawn several years ago.

17 THE COURT: Right. And I think the case  
18 you're talking about -- is that Johnson?

19 MR. PINKSTON: That's correct, Your Honor.

20 THE COURT: And hadn't the Tennessee  
21 appellate court ruled on that and said it's not enough?

22 MR. PINKSTON: I --

23 THE COURT: Not aware of that?

24 MR. PINKSTON: I'm not aware of that, no,  
25 Your Honor.

1 THE COURT: Let me see if I can give you the  
2 case.

3 MR. PINKSTON: There are other issues within  
4 the petition that we've talked about.

5 THE COURT: All right. And all those are  
6 procedural and they've all run, I mean, based on me  
7 looking at it, and that's without y'all making argument,  
8 so I'm not going to keep you from making argument,  
9 but -- let's see.

10 The case is Donnie E. Johnson v. State,  
11 September 11th, 2017.

12 MR. HARRIS: Your Honor, our position is  
13 that the district attorney can concede relief on any  
14 claim that they wish. That's in their power. It's also  
15 in their power to agree to modification of the sentence  
16 and --

17 THE COURT: How is that possible?

18 MR. HARRIS: As district attorney they have  
19 the power to do that, and we have done that in other  
20 Tennessee cases.

21 THE COURT: So let me see if I understand  
22 this. You're telling me -- and I appreciate the  
23 authority of the district attorney. You're telling me  
24 that after the jury finds someone guilty, sentences them  
25 to death, and it goes through all the appellate

1 the district attorney general met.

2 MR. PINKSTON: Okay.

3 THE COURT: Found a problem where there was  
4 not a -- a mitigating factor was left out that should  
5 have been included. They got up and told me -- in fact,  
6 it's in my -- I brought my order that I did. They told  
7 me, Judge, here's what we found, this is the basis for  
8 the modification of the sentence.

9 MR. PINKSTON: Okay.

10 THE COURT: And I did it, but I'm asking you  
11 if y'all have anything like that.

12 MR. PINKSTON: Can you give me just one  
13 moment, please?

14 THE COURT: Absolutely.

15 MR. HARRIS: Your Honor, can we step out  
16 just a moment, please?

17 THE COURT: Absolutely.

18 (Brief recess.)

19 MR. PINKSTON: Your Honor, if I may?

20 THE COURT: Sure.

21 MR. PINKSTON: I think as far as concession  
22 goes, the -- in this particular case the Court notified  
23 the jury what the prior felony was, rape, in this case,  
24 instead of allowing the jury to find that.

25 And I think under the Hurst decision and

1 others that it's very clear that the jury must find  
2 those particular facts as opposed to the Court telling  
3 them. And I think under that situation the State is  
4 willing to concede on that part, and then offer the  
5 modified sentence to the Court.

6 THE COURT: No Tennessee case has agreed  
7 with what you've just said, have they, that Hurst says  
8 that or applies to Tennessee that way?

9 MR. PINKSTON: Not in particular, no, sir.

10 THE COURT: I looked. I couldn't --

11 MR. PINKSTON: Right.

12 THE COURT: And Hurst, if I remember  
13 correctly -- and I may be wrong, so educate me if I get  
14 this wrong. Hurst, I believe, was a Florida case, and  
15 in Florida, the way their system was set up, they too  
16 had a bifurcated hearing. The jury does its work, but  
17 then the judge makes the ultimate decision about that.  
18 And in Hurst, they said that was wrong, that a jury  
19 needs to make that decision.

20 And then the way it's been argued in  
21 Tennessee, I think, says that in Tennessee it's wrong  
22 for the judge -- or they argue this -- it's wrong for  
23 the judge to even say these are violent offenses, that  
24 that's the determination to be made by the jury. Is  
25 that kind of it?

1 MR. PINKSTON: I would agree with that, yes,  
2 sir.

3 THE COURT: Okay.

4 MR. PINKSTON: The other part, looking at it  
5 another way, the one aggravator that existed at the time  
6 of the offense --

7 THE COURT: Well, there were two.

8 MR. PINKSTON: And one was removed.

9 THE COURT: One was thrown out.

10 MR. PINKSTON: Right. And then the jury  
11 seemed to have been charged with additional language  
12 that wasn't in the aggravator that he was charged with.  
13 And so there's also the argument that there's a lack of  
14 notice to him at that time because there was other  
15 language that did not exist at the time he was charged.  
16 So I think under either scenario there is -- the State's  
17 willing to concede on that part.

18 THE COURT: Okay. Anything else from the  
19 defense on that?

20 MS. DREW: No, Your Honor.

21 THE COURT: Okay. I think I do need to go  
22 over this -- or tell me if you think I need to go over  
23 this Rule 11 withdrawal of his post-conviction petition,  
24 if I accept this. Do I need to do that now, or is that  
25 something later, or --