UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CECIL C. JOHNSON, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. ____________**
	)	
PHIL BREDESEN, Governor of the State of Tennessee; GEORGE M. LITTLE, Commissioner of the Tennessee Department of Correction; and RICKY J. BELL, Warden, Riverbend Maximum Security Institution, in their official capacities only,	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTIONS FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Plaintiff, Cecil C. Johnson, Jr., respectfully submits this Memorandum in support of his Motion for Temporary Restraining Order and Motion for Preliminary Injunction to prohibit his judicial execution, which is currently scheduled for 1:00 a.m. CST on Wednesday, December 2. This Court should issue a temporary restraining order and a preliminary injunction barring Mr. Johnson's execution pending resolution of the meritorious claims raised in this action. The underlying facts are detailed in Plaintiff's Verified Complaint.

Despite a deliberate defense strategy to expedite proceedings in this case as much as possible, nearly thirty years have passed since Cecil Johnson was sentenced to death in January 1981. Through no fault on the part of Mr. Johnson, his case has been unnecessarily delayed for many years because of the State's manipulations and misconduct, including the withholding of exculpatory evidence for over ten years in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

Because of the unavoidable "second layer" of litigation that ensued from it, this ultimately gave rise to a delay of eighteen years just by itself. The State even engineered the dismissal of Mr. Johnson's federal habeas petition (after it had been pending for six years) on the ground that he had not exhausted the *Brady* claim whose predicate was the very exculpatory evidence the State concealed until more than one year after federal habeas proceedings had commenced.

Mr. Johnson has spent this time in mortal suspense, constantly waiting for that uncertain day on which he will be strapped to a chair or a gurney and killed – a day that could arrive next week, next month, next year, but also maybe never. Being forced to persist in a state of constant apprehension of imminent death for nearly three decades amounts to torture. After already imposing such punishment on Mr. Johnson, it would be "unacceptably cruel" to also take his life. *See Thompson v. McNeil*, 129 S. Ct. 1299, 1300 (2009) (Stevens, J., respecting denial of certiorari).

Statement of Facts

Cecil Johnson was convicted and sentenced to death in January 1981. After Mr. Johnson came to the end of his proceedings on direct appeal in October 1982 (when the United States Supreme Court denied certiorari), undersigned counsel committed to represent Mr. Johnson in his state post-conviction and, subsequently, federal habeas corpus proceedings. In keeping with a deadline imposed by the Tennessee Supreme Court, Mr. Johnson filed his first petition for post-conviction relief in the Davidson County Criminal Court on February 9, 1983. Then-Judge A.A. Birch (who had presided over the trial in January 1981) handled the matter expeditiously, conducting an evidentiary hearing over the course of five days beginning on April 12 and concluding on May 31, 1983. On September 14, 1983, Judge Birch entered an order denying the petition in all respects.

Mr. Johnson timely appealed to the Tennessee Court of Criminal Appeals. The case was argued in the Court of Criminal Appeals on December 18, 1984, but then, setting what became something of a recurring pattern, the case remained under advisement for over three years, until January 20, 1988. The Court of Criminal Appeals ordered a new sentencing hearing, but denied any relief as to the guilt phase of Mr. Johnson's trial. *Johnson v. State,* No. 83-241-III, 1988 Tenn. Crim. App. LEXIS 29. On September 4, 1990, the Tennessee Supreme Court rendered its decision reversing the Court of Criminal Appeals on the sentencing phase relief it had ordered, but summarily affirming the lower court's decision in all other respects. *Johnson v. State*, 797 S.W.2d 578 (Tenn. 1990).

Mr. Johnson then bypassed the opportunity to file a certiorari petition in the U.S. Supreme Court, and proceeded directly to the filing of a habeas corpus petition in the United States District Court for the Middle District of Tennessee. The case was assigned to United States District Judge Thomas A. Wiseman, Jr. Then, in the spring of 1992, having been denied access on multiple occasions, Mr. Johnson and his counsel finally obtained access to the District Attorney General's file in this case based on a new judicial interpretation of the Tennessee Open Records Act. Although the merits of Cecil Johnson's *Brady* claim are not at issue in this action, the file contained multiple police reports containing exculpatory material that the State should have produced before trial, as the State itself even stipulated in subsequent proceedings. Moreover, the materials were responsive to multiple specific requests that had been made at both the trial and post-conviction levels. Based on the evidence discovered in the District Attorney General's file, on January 25, 1993, Judge Wiseman granted a motion to add a *Brady* claim to Mr. Johnson's pending habeas petition.

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On September 8, 1993, Glenn R. Pruden, the Assistant Attorney General then assigned to this case, sent a letter to undersigned counsel on which he copied Judge Wiseman. In substance, the letter conveyed that there had been an extremely attenuated employment relationship between Judge Wiseman and Bob Bell (a critical witness in this case and the father of one of the homicide victims) when Judge Wiseman had been State Treasurer over twenty years before. Shortly thereafter, in what can only be interpreted as a response to the letter, Judge Wiseman entered a one-sentence Order recusing himself from the case.

The case was reassigned to United States District Judge Robert Echols, which necessarily generated some additional delay. The case did, however, move forward, as evidenced by the fact that Judge Echols conducted a lengthy hearing on motions and cross-motions for partial summary judgment on November 4, 1994, which he took under advisement. In the meantime, a convergence of then-recent Sixth Circuit and Tennessee appellate decisions left Mr. Johnson with no choice but to go back to state court on a second post-conviction proceeding to exhaust his *Brady* claim, at the risk of being precluded from pursuing it in federal court if he failed to do so.

Mr. Johnson and his counsel prosecuted the second post-conviction proceeding vigorously, as evidenced by the fact that the trial court (Randall Wyatt, J.) conducted an evidentiary hearing on stipulated facts on October 23, 1995. (By this time, Justice Birch was serving on the Tennessee Supreme Court.) On May 6, 1996, the post-conviction court entered its order denying relief on Mr. Johnson's *Brady* claim, which he timely appealed to the Court of Criminal Appeals as required by the federal exhaustion doctrine.

On November 3, 1997, and despite the fact that Mr. Johnson's federal habeas case had remained on the District Court's docket since February 28, 1995 (the filing date of the second

state post-conviction petition), Assistant Attorney General Pruden filed a motion seeking the dismissal of Mr. Johnson's federal case without prejudice. A few months earlier, the United States Supreme Court had rendered its decision in *Lindh v. Murphy*, 521 U.S. 320 (1997), which held that the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") standards of review were inapplicable to habeas cases pending in federal court on the date of the statute's enactment (as was Cecil Johnson's first petition). In subsequent filings opposing the State's motion and presenting the viable alternative of simply holding the federal petition in abeyance pending the exhaustion of state remedies, Mr. Johnson repeatedly pointed out that the sole purpose of the State's motion under the circumstances was to make the stricter AEDPA standards applicable to a subsequent federal habeas petition. The State never denied the point, which was not susceptible to any other explanation in any event.

This Court, however, ultimately required Mr. Johnson to make the choice between dropping the *Brady* claim or allowing the dismissal of the petition without prejudice. Because dropping the *Brady* claim would have almost certainly meant being precluded from further pursuing it in federal court, as it would have been considered an improper "successive" petition, Mr. Johnson "elected" the Hobson's choice of dismissal without prejudice.

On November 25, 1997, the Tennessee Court of Criminal Appeals rendered its decision affirming the post-conviction court. Still compelled to do so by the federal exhaustion requirement, Mr. Johnson filed an application for permission to appeal to the Tennessee Supreme Court, which was denied on October 5, 1998. Once again bypassing the opportunity to petition the U.S. Supreme Court for a writ of certiorari, Mr. Johnson promptly filed his second habeas corpus petition in this Court on January 18, 1999.

In August of 1999, both sides filed motions for summary judgment, which Judge Echols held under advisement for more than three years, until September 30, 2002. At that time, he granted the State's motion, denied Mr. Johnson's, and dismissed the petition with prejudice. The Court applied the deferential AEDPA standard of review to almost all of Mr. Johnson's claims (including the *Brady* claim), rejecting Mr. Johnson's argument to the effect that the State's gamesmanship made this fundamentally unfair, particularly in view of the fact that it actually allowed the State to benefit from its own chicanery in not disclosing the exculpatory material (despite numerous requests for it) until 1992.

On October 15, 2002, for the purpose of clarifying the record and ensuring the proper preservation of certain issues for appeal, Mr. Johnson filed a motion to alter or amend the September 30 decision. On February 25, 2004 (over sixteen months later), the Court granted the motion in part and denied it in part.

Under AEDPA, Mr. Johnson could not appeal the Court's ruling as a matter of right, but had to obtain a "Certificate of Appealability" ("COA") from either this Court or the Court of Appeals itself. On March 25, 2004, Judge Echols *sua sponte* entered an Order denying a COA as to *any* issue, which would have precluded Mr. Johnson from appealing anything absent relief from the Court of Appeals. Accordingly, on May 10, 2004, Mr. Johnson promptly filed an application for a COA in the Sixth Circuit (although there was no specific deadline for doing so). Almost two years later, on February 16, 2006, a Sixth Circuit panel entered an Order granting a COA on six issues.

The case was then argued on March 15, 2007, and on April 29, 2008, the Sixth Circuit panel issued a bitterly-divided two-to-one decision affirming this Court (having kept the case under advisement for over a year). Like this Court, the Court of Appeals applied the deferential

AEDPA standard of review to almost all of Mr. Johnson's claims (except for a few that the state courts had indisputably failed to reach on the merits). Mr. Johnson filed a petition for rehearing and a suggestion for rehearing en banc, which the Court denied on July 17, 2008. Mr. Johnson timely filed a certiorari petition in the U.S. Supreme Court on November 5, 2008, which the Court denied on March 30, 2009. A subsequent petition for rehearing was denied on May 18, 2009.

Mr. Johnson then submitted a Petition for Executive Clemency to Governor Bredesen on August 27. The Governor denied it on November 25, 2009.

As reflected in Exhibit A to the Verified Complaint, over the course of these post-conviction and federal habeas proceedings, the State requested and received at least eleven extensions of various filing deadlines (not counting extensions of a week or less), delaying the case by nearly a full year (329 days) just by these extensions alone. With the exception of a four-month postponement of oral argument in the Tennessee Supreme Court due to his counsel's having a conflicting federal criminal trial, Mr. Johnson, on the other hand, only twice sought extensions (of more than a week) in the direct appeals and other post-conviction proceedings after the conclusion of his trial in January 1981, resulting in a combined delay of only ninety days.

All told, the State's dilatory conduct, including the *Brady* violation and subsequent dismissal of Mr. Johnson's federal habeas petition, blocked timely resolution of this case by roughly two decades. While the State continued its delays and misconduct, Mr. Johnson was confined on Death Row, suffering from the psychological torture that results from living for nearly thirty years in constant mortal jeopardy.

Argument

The facts and the law demand an injunction prohibiting Plaintiff's execution. In deciding whether to grant a motion for preliminary injunctive relief under the circumstances presented, the Court must balance the following factors: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction." *Tumblebus, Inc. v. Cranmer*, 399 F.3d 754, 760 (6th Cir. 2005); *see also Workman v. Bell*, 484 F.3d 837, 839 (6th Cir. 2007) (applying nearly identical factors in determining whether to stay condemned inmate's execution pending appeal). To obtain a stay, Mr. Johnson must show a "significant possibility of success on the merits." *Workman*, 484 F.3d at 839.

A. Cecil Johnson Has a Significant Possibility of Succeeding on the Merits of his Section 1983 Claim.

The imposition of Mr. Johnson's death sentence under the circumstances of his case would constitute a violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, § 16, of the Tennessee Constitution. For nearly thirty years, Mr. Johnson has remained confined on Death Row awaiting the resolution of appellate and post-conviction review of his capital sentence. During this extraordinarily lengthy incarceration, he has been subjected to extreme psychological punishment through the ever-present prospect of his execution. Taking Mr. Johnson's life after he has suffered so much for so long – when he has actually endeavored in good faith to *expedite* the proceedings in his case, the factor that evidently makes this case unique – would violate both the United States Constitution and the Tennessee Constitution.

Although the U.S. Supreme Court has yet to grant certiorari to address this issue, a number of its Justices have recognized the psychological impact caused by an extraordinarily lengthy incarceration on Death Row. *See, e.g.*, *Lackey v. Texas*, 514 U.S. 1045, 1045-47 (1995) (Stevens, J., respecting denial of certiorari). Long before Justice Stevens issued his opinion in *Lackey* acknowledging the merit of a claim such as Mr. Johnson's, Supreme Court Justices and scholars alike recognized that inordinate and unreasonable delays between sentencing and execution exact a profound and "frightful" psychological toll upon death row inmates. *Furman v. Georgia*, 408 U.S. 238, 287-88 (1972) (Brennan, J., concurring); *see* Robert Johnson, *Under Sentence of Death: The Psychology of Death Row Confinement*, 5 Law & Psychol. Rev. 141, 142 (1979). In fact, more than a century ago, the Supreme Court observed that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." *In re Medley*, 134 U.S. 160, 172 (1890).

Inmates on death row endure constant and unremitting fear for their lives. They lack any meaningful control over their fate. Whether he or she will live for another week, another month, another year, another decade, or eventually be granted mercy is unknown and unknowable. *See* Johnson, *supra*, at 142. People in such circumstances invariably suffer extreme mental anguish, and, after years of delay, often experience "the onset of insanity." *Solesbee v. Balkcom*, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting). This amounts to a form of "psychological torture." Michael P. Connolly, *Better Never Than Late: Prolonged Stays on Death Row Violate the Eighth Amendment*, 23 New Eng. J. on Crim. & Civ. Confinement 101, 119 (1997).[1]

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[1] *See also People v. Anderson*, 493 P.2d 880, 894 (Cal. 1972) ("The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often

For this reason, long delays in execution constitute "cruel and unusual punishment," and executing defendants after such delays is "unacceptably cruel." *Lackey v. Texas*, 514 U.S. 1045, 1045-47 (1995) (Stevens, J., respecting denial of certiorari); *Thompson v. McNeil*, 129 S. Ct. 1299, 1300 (2009) (Stevens, J., respecting denial of certiorari). English courts have unequivocally held that forcing inmates to remain on death row for extended periods contravenes section 10 of the Bill of Rights of 1689, the progenitor of our own Eighth Amendment. *See, e.g.*, *Pratt v. Attorney General for Jamaica*, [1994] 2 A.C. 1, 29, 33, 4 All E.R. 769, 783, 786 (P.C. 1993) (en banc) (U.K. Privy Council), *cited in Foster v. Florida*, 537 U.S. 990, 991-93 (2002) (Breyer, J., respecting denial of certiorari); *see also Gregg v. Georgia*, 428 U.S. 153, 169-70 (1976); *Furman, supra,* 408 U.S. at 314-20 (Marshall, J., concurring).

In fact, courts of other nations have found that delays of fifteen years *or less* – half the time endured by Mr. Johnson – can render capital punishment "degrading, shocking, or cruel." *See Foster*, 537 U.S. at 992-93, *citing Pratt v. Attorney General for Jamaica, supra*; *Soering v. United Kingdom*, 11 Eur. Ct. H. R. (ser. A), pp. 439, 478, P111 (1989) (European Court of Human Rights). Two members of the current U.S. Supreme Court have agreed, noting that long confinement under such conditions is precisely the type of "gratuitous infliction of suffering" the Eighth Amendment was intended to prevent. *See Thompson v. McNeil*, 129 S. Ct. 1299, 1299-1300, 1303-04 (2009) (opinions of Stevens, J., and Breyer, J., respecting denial of certiorari); *Lackey, supra,* 514 U.S. at 1047.

Moreover, the execution of an individual who already has endured such agony does not, and cannot, serve any legitimate societal or penological purpose. Neither the goals of deterrence nor retribution continue to demand the ultimate sanction under such circumstances. *Lackey*,

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so degrading and brutalizing to the human spirit as to constitute psychological torture."), *cited in Lackey v. Texas*, *supra,* 514 U.S. at 1046 n.* (Stevens, J., respecting denial of certiorari).

supra, 514 U.S. at 1045-46. "[T]he pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes . . . would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment." *Furman*, *supra,* 408 U.S. at 312 (White, J., concurring); *see also Foster*, *supra,* 537 U.S. at 993 (Breyer, J., respecting denial of certiorari) ("If executed [after a twenty-seven year delay, the defendant] will have been punished both by death and also by more than a generation spent in death row's twilight."); *Gomez v. Fierro*, 519 U.S. 918, 918 (1996) (Stevens and Breyer, JJ., respecting denial of certiorari) ("Delay in the execution of judgments imposing the death penalty frustrates the public interest in deterrence and eviscerates the only rational justification for that type of punishment . . . [and] can become so excessive as to constitute cruel and unusual punishment prohibited by the Eighth Amendment.").

There can be no doubt that Cecil Johnson's years of confinement under such circumstances constitute the sort of psychological torture that prohibits the further imposition of death. Mr. Johnson was sentenced on January 20, 1981. He thereafter timely filed a direct appeal, two petitions for state post-conviction relief – the second filed only because the prosecution suppressed exculpatory evidence for over ten years, which Mr. Johnson did not discover until 1992, after federal habeas proceedings had commenced – two petitions for federal habeas relief (the second filed for the same reason), and a petition for executive clemency. Those proceedings were not concluded until November 25, 2009, almost *twenty-nine years* after Mr. Johnson was sentenced to death. For the entirety of that period, Mr. Johnson has been confined on death row, the sword of Damocles hanging over his head. As Justice Stevens observed in *Lackey* (regarding a confinement of a mere seventeen years), "after such an extended

time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted." *Lackey, supra,* 514 U.S. at 1045.

It bears particular emphasis that this decades-long delay is not attributable to Mr. Johnson, and none have suggested otherwise. To the contrary, he and his counsel have tried to press his case at all turns. All of the appeals and petitions that Mr. Johnson has filed have been timely. None have been found to be anything other than legitimate challenges to his convictions and sentences. Indeed, over the course of the last twenty-eight years, several jurists have recognized that Mr. Johnson's claims of constitutional error were meritorious, warranting relief from the sentences or the convictions themselves. *See, e.g.*, *Johnson v. State*, No. 83-241-III, 1988 Tenn. Crim. App. LEXIS 29 (Jan. 20, 1988), *rev'd in relevant part*, 797 S.W.2d 578 (Tenn. 1990); *Johnson v. Bell*, 525 F.3d 466, 490-97 (6th Cir. 2008) (Cole, J., dissenting on *Brady* issue). The State's conduct has, in contrast, been marked by unjustified intransigence and delay, including extensions resulting in a combined delay of nearly a full year. More significantly, the prosecution's suppression of evidence until 1992 in violation of *Brady v. Maryland* added years of delay entirely and exclusively attributable to prosecutorial misconduct.

Mr. Johnson and his counsel acted appropriately and efficiently to move his case forward as expeditiously as possible, only to have delays presented at every turn. Mr. Johnson has been forced to languish on death row for eighteen unnecessary years solely because of the State's misconduct and subsequent evasive maneuvers. This is added to nearly ten years he had already served under sentence of death while the State continued to withhold exculpatory evidence. After nearly thirty years spent in death row's twilight, taking Mr. Johnson's life would be simply inhumane.

There is no question that Mr. Johnson can show not merely a significant *possibility* of success on the merits, but a significant *probability* of success on his claim that the proposed execution would violate the Eighth Amendment to the United States Constitution and Article 1, § 16 of the Tennessee Constitution. His case is unique in that respect, and plainly merits the opportunity to have the Supreme Court review it, at the least.

B. The Remaining Factors Overwhelmingly Weigh in Favor of Granting the Requested Stay of Execution.

Not only has Mr. Johnson demonstrated above that this Court should grant a stay because there is a significant possibility that he will succeed on the merits, the other factors that the Court must consider also weigh in favor of granting a stay of execution. First, there is no question that Mr. Johnson would suffer irreparable injury without the injunction if he is executed in violation of the Eighth Amendment and the Tennessee Constitution (i.e., death, the most irreparable injury of all). It is just as clear that issuing a temporary stay of execution pending resolution of the important questions raised in this action would not cause substantial harm to others.

The final factor to be considered is whether the public interest would be served by issuance of the injunction. In *Hartman v. Bobby*, 319 Fed. Appx. 370, 371 (6th Cir. 2009), the Sixth Circuit addressed this factor in the context of a claim of innocence by the inmate. The Court explained that "while the state has an important interest in enforcing its criminal judgments, executing an innocent man would not be in the state's interest, and could undermine the public's confidence in Ohio's criminal justice system." *Id.* at 371. These considerations are equally applicable in the instant case, where Mr. Johnson's execution would be cruel and unusual in violation of the Eighth Amendment and the Tennessee Constitution. It is certainly not in the State's interest to conduct an execution that would be in violation of both the federal and state constitutions, and allowing such an unconstitutional execution to proceed would undermine the

public's confidence in Tennessee's criminal justice system. This Court should grant a stay of execution to Mr. Johnson.

Conclusion

For all of these reasons, Mr. Johnson respectfully requests that this Court issue a temporary restraining order and a preliminary injunction staying his execution pending a final resolution of this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by email and hand-delivery upon Jennifer L. Smith, Esq., Associate Deputy Attorney General, 425 Fifth Avenue North, Second Floor, Nashville, TN 37202, this the 25th day of November, 2009.

s/James G. Thomas