IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

IN RE: CECIL C. JOHNSON, JR.	)	**DAVIDSON COUNTY**
	)	**ORIGINAL APPEAL**
	)	**No. 81-16-I**

RESPONSE TO MOTION TO SET EXECUTION DATE

A Davidson County jury convicted Cecil C. Johnson, Jr., of robbery and murder in January 1981. No physical evidence has ever linked the crimes to Mr. Johnson, who since his arrest has consistently maintained his innocence. Three eyewitnesses identified Mr. Johnson as the assailant at trial, but evidence that the prosecution suppressed – and that Mr. Johnson's lawyers did not discover until over a decade later – contradicts their testimony and would have fatally undermined their credibility. That evidence included police reports showing that one eyewitness, shortly after the murders, said he did not even see the assailant's face, and then picked two *other* individuals from a photo array containing Mr. Johnson's photo. The suppressed reports further showed that a second eyewitness (i) described the assailant has having no facial hair, even though Mr. Johnson had facial hair, and (ii) reported that only males were at the scene, even though the third eyewitness was female. With respect to the third eyewitness, one of the reports suggested that no women had been at the scene of the crime. Moreover, the third eyewitness testified that a male at the scene – the first eyewitness, who was white – was black; in addition, she stated that she had been able to purchase a soft drink during the robbery, and admitted that she had not called the police for weeks after the incident.

The only principal witness not directly affected by the suppressed evidence was Victor Davis, who until days before trial was set to be an alibi witness for Mr. Johnson. But Mr. Davis

shifted gears entirely when, days before trial, he was arrested on an unrelated charge and interrogated by the prosecutors (including Assistant District Attorney General Sterling Gray), who threatened him with a capital prosecution if he persisted in testifying for Mr. Johnson. Davis would ultimately testify for the State as its last witness in its case-in-chief under a grant of immunity. On direct appeal, this Court discounted Mr. Davis's testimony in affirming Mr. Johnson's convictions, noting that Mr. Johnson's "insurmountable problem . . . was not Davis's testimony, but the testimony of the three eyewitnesses . . . ." *State v. Johnson*, 632 S.W.2d 542, 547 (Tenn. 1982) (Cooper, J.). The trial testimony of those three witnesses, as noted above, would have been fatally undermined by the suppressed police reports. Moreover, although the suppressed evidence did not relate directly to Mr. Davis, Mr. Johnson could have used it to bolster his contention that Davis had been improperly coached and coerced by the prosecution.

Thus, it is beyond any reasonable dispute that the prosecution manipulated Mr. Johnson's capital murder trial by suppressing crucial exculpatory evidence that would have undermined the testimony of its key eyewitnesses, and by improperly coercing Johnson's alibi witness on the eve of trial. Sixteen years later, the prosecution manipulated these proceedings yet again by engineering the dismissal of Mr. Johnson's 1991 federal habeas petition – on the ground that he had not exhausted the *Brady* claim whose predicate was the very exculpatory evidence the State concealed until after federal habeas proceedings had commenced – for the sole purpose of invoking the more stringent standard of habeas review that a 1996 federal statute imposed. Mr. Johnson's request for federal habeas relief was denied by a Sixth Circuit panel, over a vigorous dissent.

Now that the U.S. Supreme Court has denied certiorari, the State has filed a motion to set an execution date. The motion should be denied for the following reasons.

Argument

I. THE MOTION TO SET AN EXECUTION DATE SHOULD BE DENIED BECAUSE THE EXCESSIVE DELAY IN CARRYING OUT THE CAPITAL SENTENCE (FOR WHICH MR. JOHNSON IS BLAMELESS) AMOUNTS TO CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, § 16 OF THE TENNESSEE CONSTITUTION.

For nearly thirty years, Cecil Johnson has anxiously awaited the resolution of appellate and post-conviction review of his capital sentence. As a condemned man housed on Death Row, continuously confined, the prospect of execution has been Mr. Johnson's ever-present companion. Such extreme psychological "punishment" – which was not, and could not be, ordered by any court – is fairly described only as "cruel and unusual." Taking Mr. Johnson's life after he has suffered so much for so long would violate the Eighth Amendment of the United States Constitution and Article 1, § 16 of the Tennessee Constitution. The motion to set execution date therefore should be denied, and Mr. Johnson's sentence should be commuted to life imprisonment (which this Court has the authority to do, given its broad powers under Article VI, § 1 of the Tennessee Constitution. *Cf. Ray v. State*, 67 S.W. 553, 556 (Tenn. 1901)).

It has long been 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). 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 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).

For this reason, long delays in execution constitute "cruel and unusual punishment." *Lackey* v. *Texas*, 514 U.S. 1045, 1045-47 (1995) (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). 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. (The U.S. Supreme Court has yet to grant certiorari to resolve this issue.)

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*, *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 27-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. (A detailed recitation of the procedural history of this case is included in the Affidavit of undersigned counsel, Appendix A hereto, which also attaches a timeline for ease of reference.) 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 – and a petition for federal habeas relief. Those proceedings were not concluded until May 18, 2009, more than *28 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.

This decades-long delay is not attributable to Mr. Johnson, and none have suggested otherwise. The Affidavit of undersigned counsel attached as Appendix A attests to the fact that from the very outset of the post-conviction proceedings in this case, the defense strategy was to *expedite* the proceedings as much as possible (contrary to what some might view as "conventional wisdom" in the defense of death penalty cases). All of the appeals and petitions

filed by Mr. Johnson 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 28 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. Throughout the course of these proceedings, the State has requested and received at least 11 extensions in various filing deadlines, delaying consideration of these matters by nearly a full year (329 days) just by themselves.[1] *See* timeline attached as Exhibit B to Appendix A. More significantly, had the prosecution provided the suppressed materials to Mr. Johnson prior to his trial, neither his federal habeas claims under *Brady* v. *Maryland*, 373 U.S. 83 (1963), nor his second petition for state post-conviction relief, would have been necessary. This is so because the jury, presented with such strong impeachment evidence, would most likely have acquitted; and if the jury had convicted, Mr. Johnson's direct appeal and first petition for post-conviction relief would have been adjudicated on full information, quickly (and likely successfully). Instead, the prosecution's suppression of the evidence until 1992 resulted in years of added delay entirely and exclusively attributable to prosecutorial misconduct.

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[1] By way of comparison, putting aside a June 1989 postponement of oral argument before this Court due to a conflicting federal criminal trial (resulting in a delay of fewer than four months), Mr. Johnson has only twice sought extensions in the direct appeals and other post-conviction proceedings since the conclusion of his trial in January 1981. These extensions delayed adjudication of the matters under review by a combined 90 days.

Furthermore, the State has deliberately interposed procedural objections with no apparent purpose other than to unfairly prejudice Mr. Johnson and delay proceedings. Most notable among these is a 1997 motion to dismiss Mr. Johnson's then-pending habeas petition. As detailed in the attached Affidavit of undersigned counsel (Appendix A, ¶ 8), Mr. Johnson first filed his federal habeas petition in February 1991. Slightly over a year later, he finally gained access to the exculpatory evidence that the State suppressed before and during trial and promptly moved to amend his petition to add a *Brady* claim. Subsequently, in accordance with (and, indeed, compelled by) then-governing law, he filed a second state post-conviction petition raising the same claim. The federal case, however, remained on the District Court's docket for almost three years, without objection by the State. This changed, however, after the Supreme Court held in *Lindh* v. *Murphy*, 521 U.S. 320 (1997), that the more stringent standards for habeas relief prescribed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") did not apply to petitions, like Mr. Johnson's, filed before AEDPA's enactment. Soon thereafter the State, for the first time, moved the District Court to dismiss Mr. Johnson's habeas petition because the *Brady* claims had not been exhausted.

Despite Mr. Johnson's plea that the federal petition should be held in abeyance, rather than dismissed outright, the district court dismissed the petition on June 17, 1998. Less than four months later, on October 5, 1998, this Court declined to review the denial of Mr. Johnson's second post-conviction petition, including the *Brady* claim. Mr. Johnson then re-filed his federal habeas petition, which the court held was governed by the strict AEDPA standards for relief. The State was thus able to reap the benefits of its own wrongdoing, withholding exculpatory evidence from Mr. Johnson, and then relying on the delay in discovering that evidence as grounds for dismissal of the habeas petition and application of AEDPA to the second petition.

All told, the State's dilatory conduct blocked timely resolution of this case by roughly two decades. Had the State not withheld exculpatory evidence during the trial, the matter would have been resolved more quickly. And had the State not continued to suppress evidence of its misconduct throughout the 1980s (despite numerous requests by defense counsel), the basis for the suppressed evidence claim could have been discovered long before 1992. That claim could then have been presented and adjudicated in the first state post-conviction proceeding, and (if the state proceeding had been unsuccessful) at the outset of the federal habeas proceeding. Instead, Mr. Johnson was forced to file second state and federal petitions on this claim, which was not to be finally adjudicated until *2009*.

Delays of less time have been said to violate the Eighth Amendment, warranting invalidation of a death sentence. *Foster, supra*, 537 U.S. at 992 (observing that courts of other nations have held that delays of 15 years or less were "degrading, shocking, or cruel"). Consistent with these principles, Mr. Johnson's continued confinement on Death Row for 28 years constitutes "cruel and unusual punishment" under the Eighth Amendment, thus precluding his execution. *See id.*

Moreover, even if the Eighth Amendment did not provide relief, Article I, § 16 of the Tennessee Constitution would. Federal constitutional standards establish the floor, not the ceiling, on the protections that States must provide their citizens. And, while the language in § 16 is nearly identical to that in the Eighth Amendment, our State's cruel-and-unusual-punishments clause is read more broadly. *See Van Tran v. State*, 66 S.W.3d 790, 799-810 (Tenn. 2001) (holding that the Tennessee Constitution's prohibition on cruel and unusual punishments bars the execution of mentally retarded individuals even though the federal constitution had not yet been so interpreted); *id.* at 801 ("it is axiomatic that this Court may extend greater protection

under the Tennessee Constitution than is provided by the United States Supreme Court's interpretations of the federal constitution") (citing *State v. Black*, 815 S.W.2d 166, 189 (Tenn. 1991)). Three inquires are required to determine whether execution following excessive delay is cruel and unusual under the Tennessee Constitution: (1) whether such a punishment conforms to contemporary standards of decency; (2) whether it is grossly disproportionate to the offense; and (3) whether it is necessary to achieve any legitimate penological objective. *See Black*, 815 S.W.2d at 189.

It is hardly contestable that a punishment involving the extreme and maximum penalty of death imposed under conditions of decades-long delay, ever-present uncertainty, and unremitting psychological distress fails this test. Our contemporary standards of decency – be they nationally defined or localized to the citizens of Tennessee – cannot and do not sanction such conditions as morally or legally legitimate. Only in George Orwell's dystopian nightmares is psychological destruction an accepted prelude to execution – not here. While we do not contend that Mr. Johnson has been rendered insane or is incompetent to be executed, that does not mitigate the situation; in fact, his retention of his faculties just means he has remained fully cognizant of the sword hanging over him. Insanity or incompetence would, at least, provide a form of mental escape.

Mr. Johnson has spent 28 years 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 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. And torture, as our Nation has now collectively resolved, can never, as a matter of moral principle and American values, satisfy proportionality.

Finally, and most critically, no legitimate penological purpose can possibly be served by Johnson's execution now, at this late hour. It strains credulity to suggest that one in Johnson's position (even assuming his contested guilt for purposes of argument) would fail to be deterred by a legal rule that transmutes a sentence of death to life imprisonment following 30 years in constant mortal jeopardy. In fact, the opposite is true; a rule that discourages prosecutorial misconduct and minimizes unnecessary delay will inevitably lead to speedier executions, which, in turn, will enhance, not diminish, general deterrence (assuming the continued viability of the death penalty and "general deterrence" as one of its justifications). Nor can the principle of retributive justice any longer be served. Mr. Johnson has suffered for nearly three decades. Executing Mr. Johnson today would reflect a desire for vengeance, not an instinct for justice.

Thus, Mr. Johnson been forced to languish on death row for 18 unnecessary years solely because of the State's misconduct and subsequent evasive maneuvers. This is added to nearly 10 years he had already served under sentence of death while the State continued to withhold exculpatory evidence. Under these extraordinary circumstances, for which Mr. Johnson is blameless, the State's motion to set an execution date should therefore be denied, and Mr. Johnson's sentence commuted to life imprisonment.

II. AS APPLIED TO THIS CASE, THE INFLICTION OF CAPITAL PUNISHMENT WOULD BE SO ARBITRARY AND CAPRICIOUS THAT EXECUTING MR. JOHNSON WOULD VIOLATE THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, § 16 OF THE TENNESSEE CONSTITUTION.

Both the Eighth Amendment to the U.S. Constitution and Article I, § 16 of the Tennessee Constitution prohibit the infliction of "cruel and unusual punishments." In *Furman* v. *Georgia*, 408 U.S. 238, 239-40 (1972) (per curiam), invoking the Eighth Amendment, the United States Supreme Court effectively abolished the death penalty in this country as it was being administered at the time. *See also Hunter* v. *State*, 496 S.W.2d 900, 904 (Tenn. 1972)

(recognizing that *Furman* had voided the death penalty as it then existed under the statutes of Tennessee).

In a separate concurring opinion, Justice Stewart famously observed that death sentences imposed under the Georgia and Texas schemes specifically at issue were "cruel and unusual in the same way that being struck by lightning is cruel and unusual." 408 U.S. at 308. He further observed that the petitioners were among "a capriciously selected random handful [of rapists and murderers] upon whom the sentence of death has in fact been imposed," and he concluded that the Eighth Amendment could not tolerate the infliction of a death sentence under a legal system that permitted this unique penalty to be "so wantonly and so freakishly imposed." *Id.* at 309-10; *see also Walker* v. *Georgia*, 172 L. Ed. 2d 344 (2008) (Stevens, J., respecting denial of certiorari) (summarizing Justice Stewart's opinion and characterizing Justice Stewart as the "architect" of the Court's death penalty jurisprudence during his tenure).

In 1976, the Court upheld the revamped death penalty statutes of Georgia, Texas, and Florida. *Gregg* v. *Georgia*, 428 U.S. 153 (1976); *Jurek* v. *Texas*, 428 U.S. 262 (1976); *Proffitt* v. *Florida*, 428 U.S. 242 (1976). Like many other states, Tennessee responded by enacting its own new death penalty statute in 1977. *See* William P. Redick, Jr., Bradley A. MacLean & M. Shane Truitt, *Pretend Justice – Defense Representation in Tennessee Death Penalty Cases*, 38 U. Mem. L. Rev. 303, 309 n.12, 316 (2008).

This recent law review article provides the impetus for the instant argument and what could be viewed as the "long form" of a brief in support. To summarize, the authors conclude that "[t]he administration of the death penalty nationwide remains broken and arbitrary, and that seems particularly true in Tennessee." *Id.* at 361 (quoting Gilbert S. Merritt, *The Death Penalty in Tennessee: Reforming a Broken System*, Tenn. B.J. Sept. 2005, at 22, 22-23, 26-27) (internal

quotation marks omitted). The authors go on to conclude that "[t]hough it may wish, intend, or pretend otherwise, Tennessee has not and is not meeting its constitutional obligations to provide equal justice to defendants charged, convicted, and sentenced to death." *Id.* at 361-62.

Undersigned counsel acknowledge that the Court has upheld the constitutionality of the death penalty in Tennessee on innumerable occasions. But the detailed statistical information appended to the article puts this case in a different perspective and, in our judgment, warrants the conclusion that on the facts of this case, the actual infliction of a death sentence upon Cecil Johnson would be wanton and freakish, i.e., cruel and unusual, in a manner substantively indistinguishable from what the *Furman* Court forbade.

Specifically, the article documents that as of May 9, 2007, Tennessee courts had sentenced a total of 184 inmates to death since the reinstatement of the death penalty in 1977, of whom sixty-seven had been granted "permanent relief" from their death sentences by the courts. Of the remaining 117 death-sentenced inmates, 101 were still on Death Row, thirteen had died from causes other than execution, and three had been executed. *Id.* at 313 & n.24.[2]

A compilation entitled "Tennessee Death Penalty Demographic Chart" (current as of December 31, 2006) is attached as Appendix C to the article. An updated version of the same chart (current as of June 15, 2008) is attached as Appendix B hereto. It reflects that Cecil Johnson was the twentieth inmate to go on Tennessee's Death Row following the 1977 reinstatement of the death penalty. Of those twenty, only two (Donald Wayne Strouth and Michael Coleman) remain on Death Row with Cecil Johnson. Fourteen others (or 70%) have

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[2] The Court may take judicial notice of the fact that the latter number has subsequently increased to five, with the executions of Daryl Holton in 2007 (who actively opposed relief from his death sentences) and, most recently, Steve Henley. It also bears noting that as of the date of this writing (June 8, 2009), the official Web site of the Tennessee Department of Correction states that the Death Row population is down to eighty-seven condemned inmates. *See* www.state.tn.us/correction/deathfacts.html.

received relief from their death sentences, while three died of unstated causes other than execution. None of the twenty have been executed. In fact, and from a broader perspective, of the 112 defendants sentenced to death from 1977 through 1990, only thirty-nine (or just slightly over a third) remained on Death Row as of June 15, 2008, while only four had been executed.[3]

Finally, it bears mention that as to one inmate who remained on Death Row as of June 15, 2008 (Paul House), the State subsequently dismissed all charges against him. *See* Appendix C (certified copy of Petition to Enter Nolle Prosequi and Judgment filed on May 12, 2009, in the Criminal Court of Union County). Mr. House, however, had the extreme good fortune to be the direct beneficiary of a United States Supreme Court ruling in his favor. See *House* v. *Bell*, 547 U.S. 518, 522 (2006) (holding that House had met the "stringent showing" required to proceed on a "compelling claim of actual innocence" in a federal habeas proceeding, despite having procedurally defaulted it in state court). Absent the statistically rare occurrence of that Court's intervention (by way of granting certiorari at all), there is a very high likelihood that Mr. House would have been executed by now.[4]

The *House* case can itself be viewed as an example of the breakdown in Tennessee's administration of the death penalty that the authors of the University of Memphis Law Review article, *supra*, chronicled at some length. House's conviction and death sentence repeatedly

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[3] Daryl Holton did not receive his sentences (which he never challenged in any event) until June 15, 1999, per Appendix B, at 26.

[4] According to the most recent figures available from the Administrative Office of the U.S. Courts, the Court granted 259 cert petitions out of a total of 10,015 that it disposed of in the period from October 1, 2007, to September 30, 2008, or just under 2.6%. *See* Administrative Office of the United States Courts, *2008 Annual Report of the Director: Judicial Business of the United States Courts.* Washington, D.C.: U.S. Government Printing Office, 2009, *available at* www.uscourts.gov/judbus2008/appendices/B02Sep08.pdf. Under Supreme Court practice, it is well-established that the Court's denial of a writ of certiorari in this case (or any case) bespeaks nothing about its merits. *E.g., Teague v. Lane*, 489 U.S. 288, 295 (1989) ("denial of a writ of certiorari imports no expression of opinion upon the merits of the case") (internal quotation marks and citations omitted).

survived multiple challenges in the state and federal courts from the date of his conviction and sentencing in 1986 until the Supreme Court's decision in 2006. *See House*, 547 U.S. at 533-36 (recounting post-trial procedural history in detail). He most likely remains alive today only because his case presented a procedural issue of federal habeas law that the Court deemed of sufficient importance to review.[5]

But in any event (setting *House* aside), the point is that for Cecil Johnson both to fail to obtain relief from his death sentences and to actually be executed, given the history of the death penalty's administration in Tennessee to date, the statistical information set forth above, and the

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[5] In this connection, Rule 10 of the Rules of the United States Supreme Court, entitled "Considerations Governing Review on Certiorari," merits quotation in full:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
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> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
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> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided on an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
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> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

record in this case, would be "cruel and unusual in the same way that being struck by lightning is cruel and unusual." A sentence of death should not be "so wantonly and so freakishly" carried out. *Cf. Furman*, 408 U.S. at 308-10 (Stewart, J., concurring). Both the Eighth Amendment to the United States Constitution and Article I, § 16 of the Tennessee Constitution forbid it.

III. IN VIEW OF THE CONCERNS ABOUT THE UNRELIABILITY OF EYEWITNESS TESTIMONY THAT THIS COURT EXPRESSED IN *STATE v. COPELAND* TWO YEARS AGO, THE COURT SHOULD REACH BACK AND GRANT CECIL JOHNSON'S RULE 11 APPLICATION THAT IT DENIED IN 1998 TO REVIEW THE *BRADY* ISSUE IN THIS CASE.

The undersigned recognize that none of the members of this Court has ever been exposed to this case at any level.[6] The Sixth Circuit's split decision in *Johnson v. Bell*, 525 F.3d 466 (6th Cir. 2008), sets the stage and provides the historical foundation for the argument that follows, but Mr. Johnson will attempt to provide a succinct synopsis for the Court's benefit.

This case arose from an armed robbery of what was then Bob Bell's Market on Twelfth Avenue South in Nashville on the evening of July 5, 1980 (now the site of the "12 South Taproom and Grill"). The gunman shot and killed three victims and wounded two others, those being Bob Bell, Jr., and Louis Smith. One of the three homicide victims was Mr. Bell's own twelve year-old son, who was shot to death before Mr. Bell's very eyes. The gunman then turned his gun on Mr. Bell and Mr. Smith, wounding them both.

Based upon Mr. Bell's photographic identification (out of a six-photo array), Cecil Johnson was arrested the next day, but he has consistently maintained his innocence ever since. He even testified in his own defense at trial, a relative rarity.

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[6] With the marginal exception that Chief Justice Holder was a member of the Court that denied Cecil Johnson's Rule 11 Application on October 5, 1998, to which the discussion above will shortly turn.

The record reflects a complete absence of any form of physical evidence against Mr. Johnson (fingerprints, robbery proceeds, murder weapon, etc.). As the Sixth Circuit panel's opinions all reflect (Judge Gibbons's majority opinion, Judge Batchelder's separate concurrence, and Judge Cole's dissent), the case against Cecil Johnson came down to the eyewitness identifications of Bob Bell and Louis Smith.[7]

Both Mr. Bell and Mr. Smith made seemingly strong, positive eyewitness identifications of Cecil Johnson at trial, and the prosecution emphasized their identifications in closing argument. It is undisputed that Cecil Johnson and Mr. Bell (both of whom are African-American) were loosely acquainted because Mr. Johnson was an occasional customer at the store; in fact, he had been in the market only two nights before the events in question. Cecil Johnson and Louis Smith (who is white) were total strangers to one another, but Mr. Smith testified that he had gotten a "good look" and even a "real good look" at Mr. Johnson during the course of the robbery.

Defense counsel made numerous, specific *Brady* requests before trial that went directly to the reliability of the eyewitness identifications, but Assistant District Attorney Sterling Gray repeatedly asserted that there was nothing responsive.

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[7] There were two other witnesses whose testimony directly incriminated Petitioner, i.e., Debra Smith (no relation to Louis) and Victor Davis, but the Sixth Circuit majority, concurrence, and dissent all discounted the value of their testimonies. In fact, this Court's opinion on direct appeal similarly emphasized the apparent weight of the Bob Bell and Louis Smith testimonies. Specifically, in addressing Petitioner's challenge to the State's "conversion" of Victor Davis from a defense alibi witness into a prosecution witness, Justice Cooper wrote that Mr. Johnson's "insurmountable problem in this case was not Davis's testimony, but the testimony of the three eyewitnesses, two of whom looked into the barrel of the pistol held by [Mr. Johnson] and were shot by him." *State v. Johnson*, *supra*, 632 S.W.2d at 547. (Ms. Smith was the third eyewitness, but Justice Cooper obviously underscored the weight of the two victims' testimonies, and the opinion is otherwise virtually silent about the substance of Ms. Smith's testimony.)

Undersigned counsel took on Cecil Johnson's post-conviction representation in the fall of 1982. In the spring of 1992, we finally (after repeated efforts) obtained access to the District Attorney's file in this case. The file contained certain police reports documenting that in his initial, contemporaneous statements, Mr. Smith stated unambiguously that he had not even seen the gunman's face. Moreover, when shown the same photo array that Mr. Bell viewed on July 6, 1980, Mr. Smith picked out two other photos, *neither of which was Cecil Johnson's.*

As for Mr. Bell, in a contemporaneous statement to Detective Jerry Moore, he unambiguously described his assailant as having "no facial hair." Cecil Johnson, by contrast, had a mustache and goatee at the time (as documented by his July 6, 1980, mug shot and a videotape of WTVF television news footage the same day). This is important precisely because Mr. Bell and Cecil Johnson *were* somewhat acquainted with one another; in other words, the fact that Bob Bell would describe the gunman as having "no facial hair" when he was passingly familiar with Cecil Johnson (who did) calls the identification into question (especially given the trauma that Mr. Bell had undergone).

Such has been the basis for the *Brady* claim that Cecil Johnson has been pursuing ever since 1992, so far without success.[8]

Despite Petitioner's blamelessness for not obtaining the *Brady* material until 1992 (in fact, he had zealously pursued it), federal habeas law required him to return to state court to "exhaust" the claim, which he did.

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[8] It bears noting that the Sixth Circuit panel was constrained to apply the extremely deferential standard of review that the Anti-Terrorism and Effective Death Penalty Act of 1996 (codified in pertinent part at 28 U.S.C. § 2254(d)(1)) implemented. Previously, the standard would have been de novo. *See, e.g., Wiggins v. Smith,* 539 U.S. 510, 519 (2003); *Brown v. Smith,* 551 F.3d 424, 430 (6th Cir. 2008). In other words, the State actually benefited by suppressing the *Brady* material as long as possible. *Cf. Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997) (referring to "§ 2254(d)'s new, *highly, deferential standard* for evaluating state court rulings) (emphasis added).

The trial court (Randall Wyatt, J.)[9] denied the petition in 1996, which a two-member panel of the Court of Criminal Appeals affirmed in November 1997 (Judges Barker and Peay). This Court then denied Petitioner's Rule 11 application on October 5, 1998. A copy of that Application is attached as Appendix D.

The undersigned obviously recognize that it would be extraordinary for this Court to grant a previously-rejected Rule 11 application at this juncture, although given the Court's broad powers under Article VI, § 1 of the Tennessee Constitution, there would apparently be no impediment to it (not to mention the broad language in this Court's Rule 12.4(A)). What specifically prompts Petitioner's request for reconsideration, however, is this Court's opinion in *State v. Copeland*, 226 S.W.3d 287 (Tenn. 2007), which overruled the Court's earlier decision in *State v. Coley*, 32 S.W.3d 831 (Tenn. 2000), which had categorically rejected the admissibility of expert testimony concerning the reliability of eyewitness testimony. *Id.* at 833-34, 838.

In holding that trial courts may now admit such testimony under appropriate circumstances, this Court took some pains to note the extensive body of developing scientific research that calls into question the reliability of eyewitness identifications, even while jurors, by and large, continue to accept such testimony at face value, and the more seemingly certain, the better. *See Copeland, supra*, 226 S.W.3d at 299-300. Moreover, writing for a unanimous Court, Justice Wade referred to a particular study indicating that "half or more of all wrongful felony convictions are due to eyewitness misidentification." *Id.* at 300.

In Mr. Johnson's view, this Court's discussion in *Copeland* and its palpable sensitivity to the potential unreliability of eyewitness identification as a matter of scientific fact brings a whole new urgency to Cecil Johnson's *Brady* claim that cries out for this Court's attention. The fact of

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[9] By this time, the original trial judge, the Honorable A.A. Birch, had been elevated to this Court.

the matter is that, in substance, Mr. Johnson was convicted on the basis of a single eyewitness's testimony, and the suppressed *Brady* material plainly calls that identification into question. (As for Mr. Smith, the *Brady* material revealed that he, in fact, was no eyewitness *identification* witness at all.) This Court's view of eyewitness testimony has indisputably evolved and matured since 1998, and it calls for this Court's review of Cecil Johnson's *Brady* claim in light of that enhanced understanding about the perils of eyewitness testimony. Given the circumstances, Mr. Johnson should not be executed without this Court's review of his *Brady* claim, in light of *Copeland.* It is literally a matter of life and death.

Conclusion

For all of these reasons, the Court should either resentence Cecil Johnson to life imprisonment or grant the Rule 11 application that it denied in October 1998 for plenary review of the *Brady* issue in this case. The Court should not set an execution date in any event.

Alternatively, should the Court reject Cecil Johnson's arguments and set an execution date, we respectfully request a setting that will allow enough time for the orderly pursuit and consideration of executive clemency, especially in view of the U.S. Supreme Court's recent reiteration of executive clemency's important role as the "fail safe" in the criminal justice system. *Harbison v. Bell*, 173 L. Ed. 2d 347, 359, 129 S. Ct. 1481 (2009).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by hand-delivery upon Jennifer L. Smith, Esq., Associate Deputy Attorney General, 425 Fifth Avenue North, Second Floor, Nashville, TN 37202, this the 8th day of June, 2009.

The undersigned attorney of record prefers to be notified of any orders or opinions of the Court by email at jthomas@nealharwell.com.

_____
James G. Thomas