

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

IN RE: CECIL C. JOHNSON, JR.

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**DAVIDSON COUNTY
ORIGINAL APPEAL
No. 81-16-I**

AFFIDAVIT OF JAMES G. THOMAS

James G. Thomas, being first duly sworn, deposes and states as follows:

1. I am the attorney of record for Cecil C. Johnson, Jr., in this matter, and have been a member of the Bar of this Court since 1980.
2. My law firm, Neal & Harwell, PLC, committed to representing Cecil Johnson on a pro bono basis in November 1982, following the completion of proceedings on his direct appeal. By way of further background, a group of Nashville criminal defense lawyers who were concerned about the way that Cecil Johnson's case had been handled approached my partner, James F. Sanders, in the fall of 1982 to ask him to participate in Cecil Johnson's representation on a going-forward basis. My firm has continuously represented Cecil Johnson since that time, both in state post-conviction and, subsequently, federal habeas corpus proceedings, entirely on a pro bono basis.
3. At the very outset of the case, Mr. Sanders and I made a judgment, somewhat contrary to "conventional wisdom" in the defense of death penalty cases, that we would attempt to expedite proceedings in the case as much as possible. This judgment was based, in part, on our recognition of the possibility that the dispositive decision in Cecil Johnson's case could ultimately rest with the United States Court of Appeals for the Sixth Circuit. Although, as I recall, there was literally no post-*Furman* death penalty case law in the

Sixth Circuit at the time, the pattern in other circuits with federal habeas corpus death penalty caseloads strongly suggested that it would be better to reach the Court of Appeals sooner rather than later (if we were unsuccessful in state post-conviction proceedings). To be more precise, our research indicated that the federal appellate courts had a higher rate of granting relief in the earliest death penalty cases they encountered.

4. While there was obviously an element of risk in this approach (to which the client gave his informed consent), our judgment was further informed by our belief that Cecil Johnson had an extremely strong case on the merits and that there was a substantial likelihood of success in obtaining guilt phase relief, ideally in state post-conviction proceedings but, if necessary, on federal habeas corpus review.

5. In keeping with a deadline that this Court had imposed, we filed Cecil Johnson's 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, and conducted an evidentiary hearing over the course of five days beginning on April 12 and concluding on May 31, 1983. On September 14, 1983, he entered an order denying our petition in all respects.

6. We timely appealed to the Court of Criminal Appeals ("CCA"). The case was argued in the CCA 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 CCA did, however, order a new sentencing hearing, but denied any relief as to the guilt phase of Cecil Johnson's trial. *Johnson v. State*, No. 83-241-III, 1988 Tenn. Crim. App. LEXIS 29.

7. By way of two orders dated August 29 and 30, 1988, respectively, this Court granted each party's application for permission to appeal. On September 4, 1990, this Court rendered its decision reversing the CCA 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).

8. Having now (we believed) fully exhausted Cecil Johnson's available state remedies (as required by federal habeas law), we bypassed the opportunity to file a cert petition in the U.S. Supreme Court, but 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 the Honorable Thomas A. Wiseman, Jr.

9. There then ensued a development that would have a profound impact on the course of future proceedings. Specifically, in the spring of 1992, having been denied access on multiple occasions, we finally obtained access to the District Attorney General's file in this case based a new judicial interpretation of the Tennessee Open Records Act. Without getting into the merits of Cecil Johnson's *Brady* claim, suffice it to state that 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.

10. Based on the evidence discovered in the District Attorney General's file, we filed a motion in the U.S. District Court to add a *Brady* claim to Cecil Johnson's pending habeas petition, which Judge Wiseman granted on January 25, 1993.

11. On September 8, 1993, Glenn R. Pruden, the Assistant Attorney General then assigned to this case, sent a letter to me on which he copied Judge Wiseman. The letter speaks for itself, but in substance it conveyed that there had been an 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. A copy of the letter is attached as Exhibit A to my Affidavit. In what can only be interpreted as a response to the letter, Judge Wiseman entered a one-sentence Order recusing himself from the case on September 16, 1993 (although, as is standard in my experience, the Order did not articulate any basis for the recusal).

12. 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.

13. In the meantime, a convergence of then-recent Sixth Circuit and Tennessee appellate decisions left Cecil 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. Without going into all the details, the combination of the cases made it clear that the otherwise applicable three-year statute of limitations in the Tennessee Post-Conviction Procedure Act at the time would not be a bar to the *Brady* claim under the circumstances, such that we had to initiate a second state post-conviction proceeding to satisfy the exhaustion requirement of federal law. See *O'Guinn v. Dutton*, 88 F.3d 1409 (6th Cir. 1996) (en banc), and *Caldwell v. State*, No. 02C01-9405-CC-00099, 1994 Tenn. Crim. App. LEXIS 851 (Tenn. Crim. App. Dec. 28, 1994), *rev'd on other grounds*, 917 S.W.2d

662 (Tenn. 1996). (The en banc *O'Guinn* decision affirmed the earlier panel's holding that a Tennessee habeas petitioner in Cecil Johnson's materially indistinguishable position had to return to state court to exhaust a newly-discovered *Brady* claim, despite his blamelessness for not raising it in his first state post-conviction proceeding and despite the additional delay that was likely to ensue. It was the convergence of the *O'Guinn* panel decision and the CCA's *Caldwell* decision in December 1994 that prompted our decision to file a second state post-conviction proceeding on February 28, 1995, a few weeks later.)

14. We 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 now serving on the Tennessee Supreme Court.)

15. On April 24, 1996, the United States Congress enacted the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which established new and extremely deferential standards of review in federal habeas corpus cases, at least when the state courts had ruled on the merits of a given issue. At the time, it was unclear whether the statute would be applied retroactively, or prospectively only. (Under prior law, the standard of review was de novo, except as to state court findings of historical fact.)

16. On May 6, 1996, the post-conviction court entered its order denying relief on Cecil Johnson's *Brady* claim, which we timely appealed to the CCA. (As, once again, the federal exhaustion requirement demanded.)

17. On June 23, 1997, the United States Supreme Court rendered its decision in *Lindh v. Murphy*, 521 U.S. 320 (1997), which held that the 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).

18. On November 3, 1997, and despite the fact that Cecil Johnson's federal habeas case had remained on the District Court's docket since February 28, 1995 (the filing date of our second state post-conviction petition), Assistant Attorney General Pruden filed a motion seeking the dismissal of Cecil Johnson's federal case without prejudice. In subsequent filings opposing the motion and presenting the viable alternative of simply holding the federal petition in abeyance pending the exhaustion of state remedies, we 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. The District Court, however, ultimately put us to the choice of 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, we "elected" the Hobson's choice of dismissal without prejudice.

19. On November 25, 1997, the CCA rendered its decision affirming the post-conviction court. Still compelled to do so by the federal exhaustion requirement, we filed an application for permission to appeal to this Court, which was denied on October 5, 1998.

20. Once again bypassing the opportunity to petition the U.S. Supreme Court for a writ of certiorari, we promptly filed our second habeas corpus petition in the United States District Court on January 18, 1999. In August of that year, both sides filed motions for summary judgment, which Judge Echols held under advisement until September 30, 2002 (over three years

later). At that time, he granted the State's motion, denied Cecil Johnson's, and dismissed the petition with prejudice. As we had anticipated, the District Court applied the deferential AEDPA standard of review to almost all of Cecil Johnson's claims (including the *Brady* claim), rejecting our 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.

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

22. Under AEDPA, Cecil Johnson could not appeal the District Court's ruling as a matter of right, but had to obtain a "Certificate of Appealability" ("COA") from either the District Court or the Court of Appeals itself. On March 25, 2004, the District Court sua sponte entered an Order denying a COA as to any issue, which would have precluded Cecil Johnson from appealing anything absent relief from the Court of Appeals.

23. Accordingly, on May 10, 2004, we promptly filed an application for a COA in the Sixth Circuit.

24. On February 16, 2006 (almost two years later), 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 the District Court (having kept the case under advisement for over a year). Like the District Court, the Court of Appeals applied the deferential AEDPA standard of review to almost

all of Cecil Johnson's claims (except for a few that the state courts had failed to reach on the merits).

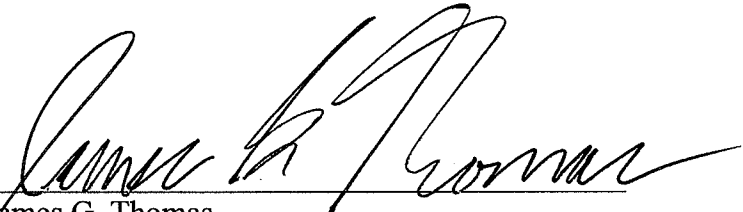
25. We filed a petition for rehearing and a suggestion for rehearing en banc, which the Court denied on July 17, 2008. Thereafter, a group of U.S. Supreme Court practitioners in the firm of Sidley Austin LLP volunteered to take on Cecil Johnson's case in the Supreme Court as a pro bono matter.

26. The Sidley Austin lawyers timely filed a cert petition in the U.S. Supreme Court on November 5, 2008, which the Court denied on March 30 this year. A subsequent petition for rehearing was denied on May 18.

27. In keeping with Rule 12.4 of this Court, the State then filed its Motion to Set Execution Date on Wednesday, May 27.

28. A "Chronology of Proceedings in Cecil Johnson Case" is attached as Exhibit B hereto. Among other things, it also reflects (in color-coding) the motions for extensions filed by both sides over the course of the proceedings (excluding requested extensions of a week or less).

FURTHER AFFIANT SAITH NOT.


James G. Thomas

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

Sworn to and subscribed before me this 8TH day of June, 2009.


Notary Public

My Commission Expires:



My Commission Expires MAR. 20, 2010

STATE OF TENNESSEE

Office of the Attorney General



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9/9/93
[Handwritten signature]

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September 8, 1993

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2000 Dominion Tower
150 Fourth Avenue, North
Nashville, TN 37219-2498

SUBJECT: Cecil C. Johnson, Jr. v. Michael Dutton
(M.D. Tenn.), No. 3:91-0119

Dear Jim:

Yesterday, while preparing responses to your discovery requests, I learned some facts regarding Robert Bell, Sr., and Judge Wiseman. While I do not believe they present a conflict of interest, I feel obligated to bring them to your attention.

Mr. Bell informed me that he worked as a field representative, from 1970 to 1972, for the Retirements Division of the Tennessee Treasury Department. Judge Wiseman was the individual who interviewed and hired him for that position. As explained to me, Judge Wiseman was the supervisor of Mr. Bell's supervisor. Aside from the interview and hiring, there was no regular contact between the two of them resulting from Mr. Bell's employment with the State.

EXHIBIT A

James G. Thomas, Esq.
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Mr. Bell also informed me that, being a member of the Young Democrats, he has had de minimis social contact with Judge Wiseman at various political/social functions.

Finally, approximately five (5) years ago, Judge Wiseman permitted Mr. Bell to use him as a reference while applying for jobs with both the state and federal governments.

Please, note that I have provided an information copy to Judge Wiseman. Should he determine that a conflict, or potential conflict, of interest exists, the State of Tennessee will waive any objection to his deciding the above-captioned case.

Sincerely,



GLENN R. PRUDEN
Assistant Attorney General
(615) 741-7070

GRP:kja

pc: The Honorable Thomas A. Wiseman, Jr.
United States District Judge for the
Middle District of Tennessee
824 U.S. Courthouse
801 Broadway
Nashville, TN 37203

AS OF JUNE 8, 2009

CHRONOLOGY OF PROCEEDINGS IN CECIL JOHNSON CASE

State's requests for extensions in red; Cecil Johnson's in blue. Does not include extensions of a week or less.

Date	Event
7/5/80	Bob Bell's Market robbery and murders.
7/6/80	Cecil Johnson arrested.
7/8/80	Initial interview of Victor Davis by investigators for Public Defender's Office (then representing Cecil Johnson). Davis exculpates Johnson.
7/17/80	Victor Davis gives tape-recorded statement (27 pages) to State investigators, which likewise exculpates Cecil Johnson.
8/6/80	Cecil Johnson indicted by Davidson County grand jury.
1/10/81	Victor Davis changes story under questioning by Assistant Attorney General Sterling Gray, who threatens Davis with his own capital prosecution for the Bob Bell's Market crimes if he testifies for Cecil Johnson. By Gray's own admission (never disputed), his intent was to eliminate Davis as a defense witness.
1/13/81	Trial begins. (N.B. First capital murder trial in Davidson County following 1977 reinstatement of the death penalty in Tennessee.)
1/20/81	Trial concludes. Cecil Johnson becomes twentieth inmate on Tennessee's death row.
5/3/82	Tennessee Supreme Court affirms on direct appeal. <i>State v. Johnson</i> , 632 S.W.2d 542 (Tenn. 1982) (Cooper, J.).
10/4/82	U.S. Supreme Court denies certiorari.
11/82	Neal & Harwell ("N&H") commits to represent Cecil Johnson going forward in post-conviction proceedings on pro bono basis.
2/9/83	N&H files petition for post-conviction relief in state trial court.
4/12/83, 4/27/83, 5/6/83, 5/12/83, 5/31/83	Trial court conducts evidentiary hearing over the course of these five days.
9/14/83	Trial court enters order denying post-conviction petition.

EXHIBIT B

10/11/83	Notice of Appeal filed.
10/15/84	State files motion for 45-day extension of time to file brief (granted).
12/18/84	Case argued in Court of Criminal Appeals.
1/20/88	Court of Criminal Appeals renders decision granting relief on sentencing phase, but denying any relief as to guilt phase. <i>Johnson v. State</i> , No. 83-241-III, 1988 Tenn. Crim. App. LEXIS 29. (N.B. Case was under advisement for over three years.)
2/8/88	Johnson moves for a 30-day extension to file application for permission to appeal to Tennessee Supreme Court (granted).
3/1/88	State moves for 30-day extension of time to file application for permission to appeal (granted).
3/21/88	N&H files application for permission to appeal to Tennessee Supreme Court; State files application on sentencing phase issue.
4/11/88	State moves for 14-day extension to respond to Johnson's application for permission to appeal (granted).
8/29-30/88	Tennessee Supreme Court grants both sides' applications for permission to appeal.
9/7/88	Johnson moves for 60-day extension of time to file initial brief in Tennessee Supreme Court (granted).
9/24/88	State moves for 45-day extension of briefing deadline (granted).
1/5/89	State moves for 30-day extension of briefing deadline (granted).
2/3/89	State moves for additional 31-day extension of briefing deadline (granted).
6/1/89	Johnson moves for postponement of oral argument in light of conflicting federal criminal trial; argument postponed from June 6 to October 2, 1989. (Parties jointly offered to submit case on briefs if postponement unacceptable.)
10/2/89	Case argued in Tennessee Supreme Court.
9/4/90	Tennessee Supreme Court renders decision reversing Court of Criminal Appeals on sentencing relief but summarily affirming in all other respects. <i>Johnson v. State</i> , 797 S.W.2d 578 (Tenn. 1990).

1/14/91	Tennessee Supreme Court denies second petition to rehear.
2/14/91	First habeas corpus petition filed in United States District Court. Case assigned to Judge Thomas Wiseman. (N.B. Bypassed filing cert petition in U.S. Supreme Court, and there was no statute of limitations in effect at the time for filing of federal habeas petition.)
3/11/91	State moves for 30-day extension to respond to petition (granted).
4/9/91	State moves for an additional 30-day extension to respond to petition (granted).
Spring 1992	N&H finally obtains access to the materials underlying what became Johnson's <i>Brady</i> claim in the District Attorney General's file after new court decisions on the Tennessee Open Records Act. (N.B. Trial counsel and, subsequently, post-conviction counsel had made numerous requests to which the evidence was responsive.)
11/12/92	Johnson files motion to add <i>Brady</i> claim to pending habeas petition.
1/25/93	Motion to Amend granted; <i>Brady</i> claim added.
9/16/93	In response to a letter from the Attorney General's Office, Judge Wiseman recuses himself.
11/4/94	District Court (Judge Robert Echols) conducts lengthy hearing on motions and cross-motions for partial summary judgment and takes them under advisement.
2/28/95	In light of then-recent Sixth Circuit and Tennessee decisions making it clear that Johnson had to return to state court to exhaust <i>Brady</i> claim or risk procedurally defaulting it in federal court, Johnson files second petition for post-conviction relief in state court.
10/23/95	Post-conviction court conducts evidentiary hearing on stipulated facts.
4/24/96	Congress enacts Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), establishing extremely deferential standards of review in federal habeas corpus cases.
5/6/96	Post-conviction court enters order denying relief on <i>Brady</i> claim.
6/3/96	Johnson files notice of appeal to Court of Criminal Appeals.
12/18/96	State's motion for 30-day extension to file brief (granted).

6/23/97	U.S. Supreme Court decides <i>Lindh v. Murphy</i> , 521 U.S. 320 (1997), holding AEDPA standards of review inapplicable to habeas cases pending in federal court on date of statute's enactment (as was Johnson's first petition).
7/15/97	Case argued in Court of Criminal Appeals.
11/3/97	Despite fact that Johnson's federal habeas case had remained on the District Court's docket since 2/28/95 (filing date of second state post-conviction petition), State now files motion seeking dismissal of Johnson's federal case without prejudice. In subsequent filings opposing motion, Johnson repeatedly points out that sole purpose of State's motion was to make stricter AEDPA standards applicable to a second federal petition, which State never denies.
11/25/97	Court of Criminal Appeals renders decision denying relief.
2/12/98	Johnson files application for permission to appeal to the Tennessee Supreme Court (as required by exhaustion rule in federal court).
3/9/98	In response to State's motion to dismiss, District Court enters Order directing Johnson to either amend petition to remove <i>Brady</i> claim within 30 days, or else petition would be dismissed without prejudice.
4/7/98	In response to District Court's Order, Johnson serves notice that as between choice of amending his petition and losing <i>Brady</i> claim in federal court and dismissal without prejudice, he will acquiesce in the latter (while renewing his objection to the State's strategic ploy).
6/17/98	Receipt of Notice from Appellate Court Clerk advising that there might be a delay in the Tennessee Supreme Court's ruling on the application for permission to appeal. U.S. District Court enters Order dismissing Johnson's federal habeas petition without prejudice.
7/31/98	District Court's Order dismissing federal petition becomes final.
10/5/98	Tennessee Supreme Court denies application for permission to appeal.
1/18/99	Second habeas corpus petition filed in federal court. (N.B. Once again bypassed opportunity to petition U.S. Supreme Court for writ of certiorari.)
8/99	Both sides file motions for summary judgment.
9/30/02	District Court grants State's Motion, denies Johnson's, and dismisses petition with prejudice. (N.B. Under advisement for over three years.)

10/15/02	Johnson files motion to alter or amend for purposes of preserving certain issues for appeal.
10/24/02	Johnson files initial notice of appeal to Sixth Circuit.
2/25/04	District Court grants in part and denies in part the motion to alter or amend. (N.B. Under advisement for over 16 months.)
3/8/04	Johnson files amended notice of appeal to Sixth Circuit.
3/25/04	District Court sua sponte enters Order denying a Certificate of Appealability ("COA") (jurisdictional requirement under AEDPA for appealing adverse decision on habeas petition).
5/10/04	Johnson files application for a COA in the Sixth Circuit. (N.B. There was no particular time limitation in effect, so this was quite expeditious.)
5/12/04	State files motion for 30-day extension of deadline for filing response to application for COA (granted).
2/16/06	Sixth Circuit enters Order granting a COA on six issues. (N.B. Application was under advisement for almost two years.)
6/21/06	State files motion for 14-day extension of briefing deadline (granted).
3/15/07	Case argued in Sixth Circuit.
4/29/08	Sixth Circuit issues 2-1 decision affirming District Court. (N.B. Under advisement for over a year.)
7/17/08	Sixth Circuit denies rehearing and rehearing en banc.
11/5/08	Cert petition filed in U.S. Supreme Court.
3/30/09	Cert denied.
4/24/09	Petition for rehearing filed in U.S. Supreme Court.
5/18/09	Rehearing petition denied.
5/27/09	State files Motion to Set Execution Date.