

IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE

IN RE: DONNIE JOHNSON                    )  Shelby County  
  )  Originally S.Ct. No. 4  
  )  M1087-00072-SC-DPE-DD  
  )  Filed - July 12, 2004

RESPONSE TO MOTION TO SET EXECUTION DATE

I.     INTRODUCTION

Donnie Johnson's trial was a finger pointing contest between Mr. Johnson and Ronnie McCoy. While the two acknowledged that they disposed of Connie Johnson's body after she was dead, each claimed that the other killed her.

Unknown to Mr. Johnson, the attorneys who represented him had also represented McCoy - who had a deal for his testimony. McCoy falsely testified that no such deal existed, and the prosecution told the jury in closing argument that there was no reason for McCoy to lie. The jury convicted Mr. Johnson of first-degree murder and sentenced him to death.

No court has held a hearing on the above facts. This Court cannot relegate review of such conduct - which strikes at the very heart of the judicial system - to a clemency proceeding governed by politics instead of rules. Given the Court's role in applying the death penalty and regulating attorney conduct, it should appoint a Special Master to take evidence on the extent of trial counsel's misconduct - including the shocking possibility that counsel worked out a deal for

one client by sending another client to death row - find facts, and report back to this Court. Until that process is completed, an execution date should not be set.

## II. FACTS

On August 14, 1984, the State indicted Ronnie McCoy, a man with a lengthy criminal record,<sup>1</sup> on charges of false reporting.<sup>2</sup> Either Jeff Crow or Clark Washington instructed Leslie Fatowe, a junior member of SCHLEDWITZ, CROW, BELILES, BEARMAN, BUTLER & WASHINGTON, to represent McCoy.<sup>3</sup> On November 13, 1984, Ms. Fatowe obtained for McCoy resolution of the charges against him - in return for his guilty plea the State sentenced McCoy to four months at the Shelby County Penal Farm.<sup>4</sup> Less than one month later, McCoy became involved in Connie Johnson's murder.

On December 8, 1984, Mr. Johnson signed McCoy out of the Penal Farm and took him to their place of employment, Force Camping Sales. At the close of the work day Ms. Johnson met them there. What happened next was the central issue at Mr. Johnson's trial.

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<sup>1</sup> See 7/11/88 Presentence Report, Apx. 2.

<sup>2</sup> Jacket for State v. McCoy, Apx. 6.

<sup>3</sup> 4/7/99 Declaration of Leslie Fatowe at ¶¶ 3-4, Apx. 7.

<sup>4</sup> Jacket for State v. McCoy, Apx. 6; R. 355 (McCoy Trial Testimony). Mr. Johnson shall cite the trial transcript as R. (page); he shall cite the post-conviction hearing transcript as P.C.R. (Volume), (page).

At the guilt stage of Mr. Johnson's trial, McCoy testified that he left Mr. and Ms. Johnson alone in a sales office, and when he returned Mr. Johnson showed him Ms. Johnson's dead body. McCoy testified that he thereafter helped Mr. Johnson clean up the office and dispose of the body because he was scared of Johnson. In a jury out hearing, McCoy assured, under oath, that there was no deal for his testimony<sup>5</sup> - testimony which implicated McCoy as an accessory after the fact to first-degree murder. At closing the prosecution seized on this testimony, telling the jury "There's been nothing here shown ... why Ronnie McCoy would lie."<sup>6</sup> The jury convicted Mr. Johnson of first-degree murder.

At the sentencing stage, Mr. Johnson testified that he left Ms. Johnson and McCoy alone in the sales office and when he returned McCoy was standing at a desk. Johnson related that as McCoy motioned to a back room, he told Johnson that he had gotten into an argument with Ms. Johnson. Mr. Johnson testified that he went to the back room where he found Ms. Johnson's body. Johnson explained that he helped clean up the crime scene and dispose of the body because he was scared of what McCoy would do if Johnson did not cooperate. The jury sentenced Mr. Johnson to death.

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<sup>5</sup> R. 354 (McCoy Trial Testimony).

<sup>6</sup> R. Closing Arguments 21.

Two and a half years after Mr. Johnson's trial, the State charged McCoy with kidnaping and robbing a woman and beating and robbing a man. The presentence report memorializes that McCoy "was on work release in 1984 when he became involved in a murder case. He stated that he was granted immunity for turning state's evidence."<sup>7</sup>

### III. THIS COURT SHOULD INITIATE AN INVESTIGATION INTO THE CONDUCT OF MR. JOHNSON'S TRIAL ATTORNEYS

#### A. Because This Case Raises Issues Pertaining To The Practice Of Law, This Court Has Original Jurisdiction Over This Matter

This Court is the repository of the inherent power of the judiciary in this State. Included within this inherent power is the authority to regulate the conduct of Tennessee attorneys. To exercise this authority, this Court has original jurisdiction over issues pertaining to the practice of law. In re Petition of Burson, 909 S.W.2d 768, 772-73 (Tenn. 1995); see also Memphis & Shelby County Bar Association, Inc. v Vick, 290 S.W.2d 871, 875 (Tenn. App. 1955)(Court has original jurisdiction in matters involving the investigation of attorney conduct). For the following reasons it should exercise that jurisdiction in this case, appoint a Special Master to further investigate the conduct of Mr. Johnson's trial attorneys, and refrain from setting an execution date until the matter has been resolved.

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<sup>7</sup> 7/11/88 Presentence Report, Apx. 2.

B. The Apparent Misconduct Of Mr. Johnson's Trial Attorneys Strikes At The Heart Of The Judicial Process

Mr. Johnson's trial counsel quickly became aware that the central issue in Mr. Johnson's trial would be who killed Ms. Johnson - Ronnie McCoy or Mr. Johnson - and McCoy was going to be the principal witness against Mr. Johnson.<sup>8</sup> Thus, counsel rested on a strategy that "centered around hoping to destroy McCoy."<sup>9</sup> Trial counsel's ethical obligations to McCoy, however, prevented counsel from executing their chosen strategy.

At the time Mr. Johnson's trial counsel represented him, they had a duty to Mr. McCoy (1) to refrain from any conduct that would jeopardize the work release status Ms. Fatowe had garnered for Mr. McCoy approximately one month prior; and (2) to keep confidential information they knew about McCoy that would embarrass him or would be detrimental to him. Tennessee Formal Ethics Opinion 84-F-65; see DR 4-101. Any action aimed at establishing that McCoy killed Connie Johnson would directly threaten the work release status McCoy enjoyed. See T.C.A. §§ 40-28-123, 41-2-136. And while trial counsel sought to "destroy" McCoy, it could not use a type of information uniquely appropriate for that effort:

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<sup>8</sup> 4/7/99 Declaration of Leslie Fatowe at ¶6, Apx. 8; P.C.R. 2, 191, 212.

<sup>9</sup> P.C.R. 2, 212.

information that was embarrassing or detrimental to McCoy. And that's just the effect of the conflict about which we currently know.

In November 1984, Leslie Fatowe represented Mr. McCoy on charges of false reporting. Less than one month later McCoy became involved in a situation far more serious. Potential charges against McCoy for Ms. Johnson's murder ranged from first-degree murder to, at the least, accessory after the fact to first-degree murder. See T.C.A. § 39-11-411. Any of these would cost McCoy his work release status. Given the consequences Mr. McCoy faced, it is reasonable to suspect that he went back to the attorney who was able to obtain a favorable disposition of the prior charges - Leslie Fatowe. The July 1988 Presentence Report demonstrates that McCoy had a deal for his testimony against Johnson. That deal not only spared McCoy from charges relating to the Connie Johnson homicide, but also got McCoy out of the penal farm two months early.<sup>10</sup> These circumstances raise the shocking specter that trial counsel may have worked out a deal for Mr. McCoy by sending Mr. Johnson to death row.

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<sup>10</sup> 1/2/85 Summons, Apx. 11 (as of January 2, 1985, McCoy's address was 4170 Slumber Lane)..

C. Because Of Yet Another Apparent Ethical Violation, No Court Has Held A Hearing On The Apparent And Profound Conflict Which Disabled Trial Counsel

At the State post-conviction hearing, when post-conviction counsel for Mr. Johnson cross-examined attorney Jeff Crow, she demonstrated an interest in knowing about any representation of Mr. McCoy in a criminal matter by Crow's law firm. Crow responded

The only thing I can testify to is my own knowledge, and Ron McCoy was involved in an automobile accident at or about the time of Connie Johnson's murder. He retained me to represent him. I withdrew as soon as I learned that he was going to be a witness against Johnson.<sup>11</sup>

In subsequently cross-examining another of Mr. Johnson's trial attorneys, Leslie Fatowe - the woman who actually represented McCoy in the criminal matter - the same post-conviction counsel refrained from asking Ms. Fatowe about any such representation.<sup>12</sup> As a result, no record of the criminal representation of McCoy, and hence the resulting conflict, was made during State post-conviction proceedings. The troubling reality is that at the time of the post-conviction hearing, both Ms. Fatowe and Mr. Johnson's post-conviction counsel worked in the Shelby County Public Defender's Office.<sup>13</sup> Hence, one member of the Public

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<sup>11</sup> P.C.R. 2, 216.

<sup>12</sup> P.C.R. 4, 451-71.

<sup>13</sup> P.C.R. 4, 460.

Defender's Office refrained from asking a question which would have made another member of the same office admit to an ethical violation. See DR 5-105 (repealed). That, too, is an ethical violation. See DR 5-101(A); DR 5-102(B). Knowing that this conflict existed, Mr. Johnson asked the court to allow him to examine Fatowe. The court denied his request.<sup>14</sup>

Based on post-conviction counsel's failure to present evidence of the conflict of interest claim, the United States District Court for the Western District of Tennessee held that the conflict of interest claim was procedurally defaulted, held Mr. Johnson was not entitled to an evidentiary hearing on it, and granted the State summary judgment. Thus, no court has held a hearing on that claim.

**D. This Court Should Appoint A Special Master To Take Evidence And Report Back To This Court**

This Court is, quite literally, the court of last resort for Mr. Johnson's conflict of interest claim. Absent ordering a hearing on that claim, Mr. Johnson will have only the lawless clemency process. The conduct involved here deserves a more searching inspection - one guided by rules, not politics. In a similar situation, this Court appointed a Special Master to take evidence and report back to it.

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<sup>14</sup> P.C.R. 4, 460.



In In re Petition of Burson, 909 S.W.2d 768 (Tenn. 1995), this Court was petitioned to resolve whether non-attorneys could represent citizens before the Board of Equalization (Board) who were challenging property assessments. Because the matter involved issues pertaining to the practice of law, this Court assumed original jurisdiction over the matter. In re Burson, 909 S.W.2d at 772-73. This Court noted that resolution of the questions before it required factual findings about proceedings before the Board. This Court therefore appointed a Special Master who took evidence, made findings, and reported back to this Court. See id., 909 S.W.2d at 769. That procedure placed this Court in the position to resolve the questions presented. This Court should do likewise here.

As in In re Burson, the issues here involve this Court's inherent power to regulate the practice of law. As in In re Burson, there is an incomplete record which this Court needs to complete so it can resolve the questions presented - particularly the question of whether Mr. Johnson's trial counsel worked out the deal that gave Mr. McCoy immunity from prosecution. As in In re Burson, this Court should appoint a Special Master to take evidence, make fact findings and report back to this Court.

#### IV. CONCLUSION

For the foregoing reasons, this Court should appoint a Special Master to take evidence about trial counsel's conduct, find facts, and report back to this Court. Until that process is complete, an execution date should not be set.

Respectfully submitted,

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#### CERTIFICATE OF SERVICE

I certify that on July 12, 2004, I placed a copy of the foregoing in the United States mail, first-class postage prepaid, addressed to Alice B. Lustre, Assistant Attorney General, P.O. Box 20207, Nashville, Tennessee 37202-0207.

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C. Mark Pickrell