

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE v. DONNIE JOHNSON

No. M1987-00072-SC-DPE-DD

DISSENTING ORDER

I respectfully dissent from the order setting a date for the execution of Donnie Johnson. In my view, Johnson has raised a valid legal issue concerning whether trial counsel had a conflict of interest arising from the firm's former representation of the State's "star" witness, Ronnie McCoy. Specifically, Johnson presents evidence indicating that McCoy may have had an immunity agreement to testify for the State, a fact that may have been known by trial counsel, but concealed from Johnson and not presented to the jury to impeach McCoy. As presented, it appears that this information has only recently come to light and was unknown at the original hearing on the petition for post-conviction relief.

Due to the heightened scrutiny in the review of capital cases, I believe that this information is serious enough to impact the validity of the conviction in this case, and warrants refraining from setting an execution date until the basis for such accusation can be either confirmed or disproved.

I agree with the Court that the request for the appointment of a special master should be denied. The appropriate avenue for relief on this claim is a motion to reopen the post-conviction petition. Although I recognize the case has completed the standard "three tier" review and is thus technically "ripe" for setting of an execution date, see *Coe v. State*, 17 S.W.3d 251 (Tenn. 2000), the question affecting the reliability of the conviction and the finality of the death sentence convinces me that there should be no rush to execution. I would grant Johnson a grace period of sixty days to file a petition to reopen and reconsider the State's motion to set execution.

For these reasons, I dissent from the order setting a date for Johnson's execution.

ADOLPHO A. BIRCH, JR.