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In The Supreme Court
Of The State of Mississippi

Carl Lee Johnson

Appellant

Versus

Cause No. 2008-CP-00204-COA

FILED

State Of Mississippi

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Appellee

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Brief Of Appellant

Respectfully,

Carl Lee Johnson

Carl Lee Johnson

#39897 Unit 32-B

Parchman, Ms. 38738

In The Supreme Court
Of The State of Mississippi

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Appellant

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Cause No. 2008-CP-00204-COA

State Of Mississippi

Appellee

Certificate Of Interested Person(s)

The undersigned Pro'Se Appellant certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justice of this Court may evaluate possible disqualifications or recusals.

Carl Lee Johnson [and] Family
Defendant / Appellant

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Honorable Kenneth L. Thomas
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Clarksdale, Ms. 38614

Carl Lee Johnson

Carl Lee Johnson

Pro'Se Litigant

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Statement Of The Case

On the 14th., day of June, 1994, an indictment was returned by the Grand Jury of Coahoma County, Mississippi, charging the Appellant, Carl Lee Johnson (hereinafter known as Johnson), in a multi-count indictment charging, Count I, Aggravated Assault pursuant to M.C.A. section 97-3-7(2)(b), also charging Johnson as a habitual offender pursuant to M.C.A. Section 99-19-83, and M.C.A. Section 99-19-81, being Cause No. 8423.

Johnson was indicted for allegedly committing an aggravated assault upon Clarksdale Police Department's Officer William Read (hereinafter known as Officer Read) on May 25, 1994, by shooting at Officer Read with a pistol.

Following a plea of not guilty in this cause, the first trial of this case commenced in the Circuit Court of Coahoma County, Mississippi, on October 17, 1994, however, Johnson sought and was granted a continuance, owing to the absence of a material witness who was subpoenaed by Johnson to testify on his behalf. A second trial commenced on February 7, 1995, this trial was terminated in a mistrial, due to the failure of a State witness to disclose to Johnson's trial counsel, prior to trial, material evidence relating to the allegations made by the State against Johnson.

The question of Johnson's guilt or innocence was submitted to a Jury in a third trial which commenced on February 23, 1995. At the conclusion of the trial, the Jury rendered a verdict of "guilty as charged."

Following the verdict by the Jury, Johnson was sentenced to serve a term of life imprisonment in a facility under the supervision and control of the Mississippi Department of Corrections. Johnson was sentenced as an habitual offender pursuant to Miss. Code Ann. Section 99-19-83 (1972 as amended) hence, Johnson is ineligible for parole or the suspension of any part of his sentence. Johnson is presently incarcerated at the Mississippi State Penitentiary, North Sunflower County, Parchman, Mississippi.

On the 31st. day of July, 2006, Carl Lee Johnson filed his Petition For Writ Of Habeas Corpus For Post-Conviction Relief pursuant to Rule 8.01, Uniform Criminal Rules of Circuit Court Practice. The Circuit Court of Coahoma County, Mississippi, entered an order denying relief on the Petition on the 9th. day of January, 2008, being Cause No. 14-CI-06-0142. (see Exhibit-~~D~~"order of denial")

This appeal stems from the denial of Johnson's Petition For Writ Of Habeas Corpus For Post-Conviction Relief.

Summary Of Argument

1. Appellant Johnson's Petition For Writ Of Habeas Corpus For Post-Conviction Relief is not subject to any procedural bars that would otherwise preclude it from review. The constitutional violation presented are of such basic fundamental rights, that they meet the exceptional Clause of M.C.A. Section 99-39-5(2) and Section 99-39-23(6), in that Johnson has been illegally sentenced in violation of due process and laws of the United States and laws of the State of Mississippi.

2. Appellant Johnson is actually innocent of the crime of aggravated assault upon Clarksdale Police Department's Officer William Read, in that new and material evidence obtained post-trial indicate that Johnson never had a gun, neither did he fire a shot at Officer Read or fire a shot during the night in question. Johnson's support this claim with sworn affidavits other than his own. It would amount to a fundamental miscarriage of justice for this Court to affirm the judgement of the Court below summarily dismissing Johnson's Petition as Procedural barred.

Argument

1. Even though Johnson's Petition For Writ Of Habeas Corpus For Post-Conviction Relief is time barred. Johnson's case

discloses a denial of due process in sentencing, and should be excepted from any procedural bars, see Smith v. State, 477 So.2d 191, 195-96 (Miss. 1985). As the Mississippi Supreme Court has held, "Errors affecting fundamental constitutional rights, such as the right to a legal sentence, may be excepted from procedural bars which would otherwise prevent their consideration." see on, Ivy v. State, 731 So.2d 601 (Miss. 1999), (quoting) Lockett v. State, 582 So.2d 428, 430 (Miss. 1991).

It is well established law in this Court that, "certain exceptions are carved out of procedural bars where there is questions that party's fundamental rights have been violated." see on, Ethridge v. State, 800 So.2d 1221 (Miss. 2001); "given the right to be free from an illegal sentence has been found to be fundamental."

As were found in Smith, Supra, Ivy, Supra, Lockett, Supra and Ethridge, Supra, so as the case sub judice, "Petitions based upon alleged illegal sentence were not subject to applicable statute of limitations," and this Court should be required to hear evidence on Johnson's claims, see on, Weaver v. State, 785 So.2d 1085 (Miss. 2001).

Even though Johnson's Petition For writ of Habeas Corpus For Post-Conviction Relief is successive writ barred. It is well settled in this Court that, "Errors affecting fundamental constitutional rights may be excepted

from procedural bars which would otherwise prohibit their consideration on successive petitions for post-conviction relief," see *on, Gray v. State*, 819 So.2d 542 (Miss. 2001); see also, *Stevenson v. State*, 674 So.2d 501 (Miss. 1996), as were found in *Gray, supra*, and *Stevenson, supra*, so as the case at bar, Johnson's sentence is an illegal and unenforceable sentence, plain error capable of being addressed, notwithstanding any procedural bars which might otherwise prohibit its consideration. see also, *Gray v. State*, 584 So.2d 786 (Miss. 1991).

2. In Johnson's Petition, Johnson made a substantial showing of the violation of his constitutional rights, both state and Federal. His claim that he is actually innocent both factually and legal was in-artfully drafted and pleaded in his prose Petition. The claim was pleaded under the heading of Issue Three: "Petitioner was Deprived of A Fair Trial Whereas Inconsistent Testimony of Prosecution Witnesses were Beyond Belief" (see pages 22-32 of Johnson's prose Petition. see also Exhibit "C", pages 1-11 where the State's key witness recanted his trial testimony). In *Gonzales v. Abbott*, 967 F.2d 1499, 1504 (11th Cir. 1992) "the petitioner argued that he was convicted for conduct that was not a crime and that he

was therefore actually innocent" *Id* (citations omitted). The Eleventh Circuit concluded that because of the actually innocence argument, the petitioner's claim was not procedurally

barred from review. *Id.* (citing Wainwright vs. Sykes, 433 U.S. 72, 90-91, 97 S.Ct. 2497, 2508-09, 53 L.Ed.2d 594 (1977)).

There was no evidence that Appellant Johnson had a gun or that he fired a gun at Officer Read. Johnson is actually innocent of aggravated assault.

The court below did not apply the correct standard of review announced by this court to a pro'se prisoners filings. This Court has held: "that where a prisoner is proceeding pro'se on petition for post-conviction relief the Supreme Court takes that fact into account and in its discretion credits not so well-pleaded allegations to the end that a prisoners meritorious complaint may not be lost because it was in-artfully drafted. see on, Myers vs. State, 583 So.2d 174 (Miss. 1991); see also, the United States Supreme Court precedent Haines vs. Kerner, 404 U.S. 519 (1972) ("Liberal review and construction of pro'se prisoner pleadings required").

The court below abused its discretion by not applying this standard of review to Appellant Johnson's pro'se pleading thus depriving him of due process and adequate post-conviction review. Myers and Haines, Supra.

Statement Of Facts

At trial seven (7) witnesses testified for the prosecution. Of these seven (7) witnesses, four (4) of them allegedly witnessed the supposedly shot fired at Officer William Read.

Officer Dale Jones testified that the Appellant alone was standing in the area in which the alleged shot at Officer Read came from. He testified that Officer Read pulled up to the vehicle with his blue lights and siren on. He noticed the Appellant turn around and shoot at the vehicle, (Police Car), shoot in the area, and jumped in the vehicle (Trial Transcript, page 26). He further testified that he apprehended Michael Stewart on Madison Street (Trial Transcript, page 27) --- that after Officer Read took off chasing the vehicle, that Michael Stewart had ran to the front of the residence, where he (Officer Jones) apprehended him (Trial Transcript, page 29).

Officer Fernando Harris testified that

both Appellant and Michael Stewart was standing in the area in which the alleged shot at Officer Read came from. He testified that Officer Read came with his blue lights behind the vehicle. At the time, he saw the car where Appellant and Michael Stewart was --- he noticed a muzzle blast come --- and he "heard" a shot toward Officer Read. The vehicle took off and Officer Read gave chase (Trial Transcript, page 41). He further testified that he ran to the front of the residence and that he himself, was the one that apprehended Michael Stewart (Trial Transcript, page 43).

Co-defendant Michael Cox testified that he was intoxicated and was only testifying to what was told to him by others. He was asked these questions and replied as follows:

Defense - Isn't it true that the only knowledge that you have of this alleged shooting is knowledge that you learned after the shooting?

Cox - Yes, Sir.

Defense - Isn't it true that you didn't see any shooting that night? You were in the vehicle, but it's true you didn't see a shot?

Cox - Yes, Sir.

(Trial Transcript, page 197).

Michael Cox went on to testify as to why he initially lied about seeing the Appellant fire the shot, as follows:

Prosecutor—But you had a lot of chances to tell me that you told Fortenberry (Officer) a lie, knowing that you were going to come in here and testify under oath; didn't you, and you never said that to me, not once, did you?

Cox—No, Sir. But I was offered a lighter sentence. I was offered five years on paper (probation) to testify that Mr. Johnson (Appellant) was shooting at the police. I'm not lying under oath telling nobody that.

(Trial Transcript, page 231).

Jason Russell also initially testified, expressing some doubt, that he saw the Appellant fire the shot, as follows:

Prosecutor—where did the gunshot come from?

Russell—It sounded like it come from Carl Johnson.

Prosecutor—where did the shot come from?

Russell—It sounded— all I know is it sounded like it come from Carl Johnson.

(Trial Transcript, page 75).

On cross-examination, Russell testified as follows:

Defense - The first shot that you heard that you say came from near Carl Johnson, you didn't actually see that shot, did you?

Russell - No, Sir.

Defense - Okay. So you're just basing this based upon your own sense perception of where that shot might have come from?

Russell - Yes, Sir.

Defense - But that shot could have come from somewhere else, it was a pretty loud shot, wasn't it?

Russell - Yes, Sir.

(Trial Transcript, page 83).

On February 28, 1995, after the completion of the trial, Jason Russell made contact with defense Counsel and stated that he wanted to speak to him about the case. Russell visited the office of defense counsel Stephen A. Brandon and made the following taped interview (in parts):

SAB - All right. At the time... well, let me just go ahead and ask you, you know the million-dollar question; at any time after you heard the gunshot, was there ever a time that night that you saw Carl Lee Johnson with a gun?

Russell - No, Sir.

SAB - Okay. Was there ever a time that night that you saw Carl Lee Johnson fire a gun?

Russell - No, Sir.

SAB - Okay, and when did you hear the gunshot?

Russell - About the time Carl Johnson opened up the car door.

SAB - At that time did you see Carl Lee Johnson with a weapon?

Russell - No, Sir.

SAB - Okay, why did you tell Whit Read that you saw those shots being fired?

Russell - Because I thought they was going to take me to jail, so I told them that because I thought that's what they wanted to hear.

SAB - Okay, why did you think that's what they wanted to hear?

Russell - Well, because I gave them one statement, and when I got through with my statement they came back wanting more and more.

Finally, I just told them what I thought they wanted to hear.

There was many other inconsistencies from these alleged eyewitnesses, and no other evidence. Yet, the Appellant stands convicted of this crime and imprisoned for his natural life therefrom.

The Appellant, Carl Lee Johnson, now directs the Court's attention to the issues.

Issues

1. Whether the court below committed error when it procedurally barred Johnson's claim of illegal sentence as an habitual offender as a matter of law.
2. Whether the court below committed error by depriving Johnson of a fair trial as a result of prosecutorial misconduct.
3. Whether Johnson was actually innocent of Aggravated Assault as to the evidence and was deprived of a fair trial whereas inconsistent testimony of prosecution witnesses were beyond belief.
4. Whether the trial court was in error when it refused to grant Johnson a new trial as to the insufficiency of evidence to support the charge in the interest of justice.

Issue - I

Whether the Court below committed error when it procedurally barred Johnson's claim of illegal sentence as an habitual offender as a matter of law.

The Appellant, Carl Lee Johnson, contends that his sentence of life without the possibility of parole is illegal; in violation of his rights under the provision of the due process of law clause, and equal protection of law clause of the Fourteenth (14th) Amendment to the United States Constitution.

In the case subjudice, the Appellant was convicted after jury trial, of Aggravated Assault on a law enforcement officer. Thereafter, on May 15, 1995, the Appellant was sentenced to life imprisonment without the possibility of parole or early release, as an habitual offender under Miss. Code Ann. Section 99-19-83. At a bifurcated hearing required under the recidivist statutes, the state must prove, beyond a reasonable doubt, that the Appellant meets the requirements for sentencing as an habitual offender. The State, in this case failed to meet this burden of proof; Bandy vs. State, 495 So.2d 486 (Miss. 1986).

Miss. Code Ann. Section 99-19-83, entitled Sentencing of habitual criminals to life.

imprisonment, states as follows:

"Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime [upon charges separately brought] and arising out of separate incidents at different times and who shall have been sentenced to and [served separate terms of one (1) year or more] in any state and/or Federal penal institution, whether in this state or elsewhere, and where any one (1) of such felonies shall have been a crime of violence shall be sentenced to life imprisonment, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation."

In the case at bar, as part of the indictment enhancement of sentence provision, two (2) prior convictions rendered in the Coahoma County Circuit Court was listed as follows: Cause No. 6380 Burglary, committed August 1, 1981, date of conviction February 18, 1982, sentenced to four (4) years; and Cause No. 6409 Armed Robbery, committed August 10, 1981, date of conviction February 18, 1982, sentenced to twenty (20) years with ten (10) years suspended. Sentences

to be served consecutively; see Exhibit-"A".

In reference to the first highlight of section 99-19-83 herein [charges separately brought], this was not the case in the prior convictions emphasized, as these two (2) convictions were jointly tried and disposition rendered on February 18, 1982. The mere listing of these two (2) prior charges that was tried jointly, does not prove the requirement of charges separately brought, as set forth in habitual offender statute; Davis vs. State, 680 So.2d 848 (Miss. 1996).

The two (2) prior convictions in question was tried (guilty pleas) jointly, and sentences imposed on February 18, 1982, in the Circuit Court of Coahoma County, Mississippi, before Honorable Elzy J. Smith Cause Numbers (6380 and 6409). In this regard, the Appellant was improperly sentenced as an habitual offender, whereas the charges for these two (2) crimes was not separately brought; Iron vs. State, 785 So.2d 1112 (Miss. Ct. Apps. 2001).

To further compound this issue, even though in Exhibit-"A", it was listed that the Appellant received four (4) years for the Burglary charge, and twenty (20) years with ten (10) years suspended for the Armed Robbery charge; there is

nothing to indicate that the Appellant served at least one (1) year in confinement of each of these consecutive sentences as dictated by the second highlight of Section 99-19-83 herein [served separate terms of one (1) year or more]. Thus, the Appellant is entitled to have his sentence as an habitual offender under this section vacated, where the state at the trial proved that he had two (2) felony conviction (received in one court setting), and failed to prove that he actually served one (1) year or more on such convictions. The State's proof would only have sustained a conviction under Miss. Code Ann. Section 99-19-81; Ellis vs. State, 485 So.2d 1062 (Miss. 1986).

In regards to the Appellant's actual time served, as well as the joint convictions representing only one (1) sentence, see Exhibit - "B" annexed hereto. Furthermore, the record reveals that the Appellant's mandatory sentence (10 years) concluded on February 18, 1992. In respect to the consecutive four (4) years sentence, the Appellant was paroled on December 17, 1992. Thus, the Appellant did not serve one (1) year or

time. Amongst other factors, an illegal sentence evolves when a sentence, as herein, is in excess of the relevant statutory provision; United States v. Bishop, 774 F.2d 771 (7th Cir. 1985). This factor, along with the flimsy and circumstantial evidence of the case subjudice, makes the Appellant's life sentence unduly harsh under an Eighth (8th) Amendment Cruel and Unusual punishment analysis; Ashley vs. State, 538 So.2d 1181 (Miss. 1989). At this stage, the State is barred from perfecting further evidence in an attempt to prove the Appellant is a habitual offender; Cox vs. State, 586 So.2d 761 (Miss. 1991).

Issue - 2

Whether the court below committed error by depriving Johnson of a fair trial as a result of prosecutorial misconduct.

The Appellant contends that he was deprived of his right to a fair trial, as a result of prosecutorial misconduct; in violation of his constitutional rights under the provisions of the due process of law clause, and the equal protection of law clause, of the Fourteenth (14th) Amendment to the United States Constitution.

In the case sub judice, the prosecution committed several acts of misconduct; which served to deprive the Appellant of his right to a fair trial...i.e., Eliciting and/or allowing false testimony to go uncorrected; testifying in itself; undermining the court; impeaching his own witness; and calling the Appellant and defense witnesses liars. This misconduct deprived the Appellant of rights guaranteed by the Federal Constitution, and such a conviction obtained therefrom, should not be allowed to stand; U.S. v. Gartmon, 146 F.3d 1015 (D.C. Cir. 1998). see also, U.S. v. Gonzalez, 122 F.3d 1383 (11th Cir. 1997) and Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340 (1935).

During the cross-examination of Tyrone Davis, the prosecution related false information, known to be false. Davis testified that he could not see certain incident, as his view was partially blocked by a house. The prosecution then followed with:

Prosecutor - well, I understand that. You've identified this drawing as being accurate for that neighborhood, and the house wouldn't be between you and this back here, according to this drawing.

(Trial Transcript, page 257, lines 24-28).

The prosecution knew that the drawing was not accurate, and falsely presented this statement in an attempt to further its cause. It is of no consequence whether the falsehood bore upon the witness' credibility or directly upon the Appellate's guilt. A lie is a lie, no matter what the subject, when it is relevant to the case; *Alapue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173 (1959). See also, *U.S. v. Berger*, 295 U.S. 78, 55 S.Ct. 629.

During the rebuttal testimony of Officer Dale Jones, the prosecution elicited testimony known to be false, as follows:

Prosecutor - I just have one or two questions. Let me ask them as succinctly as possible. On May 25th, when you arrested Stewart, tell the jury whether or not you obtain any drugs as part of that arrest?

Jones - Yes, sir, I did.

Prosecutor - And from what place did you obtain these drugs?

Jones - In the hand of Michael Stewart. (Trial Transcript, page 302, lines 11-17)

The Prosecutor knowing that the drugs was not actually found on Stewart's person, elicited this false information and failed to correct same; U.S. v. Young, 17 F.3d 1201 (9th Cir. 1994), see also, U.S. v. Wallach, 935 F.2d 445 (2d Cir. 1991) and U.S. v. Rivera Pedin, 861 F.2d 1522 (11th Cir. 1988).

The Prosecution further asserted statements that was not in evidence, thereby testifying and improperly becoming its own witness. No gun was in evidence, yet the prosecution painted false pictures for the jury: Prosecutor - And if the defendant had the gun when it was last seen, and took off in the woods running with it, would you expect to recover the gun?

(Trial Transcript, page 121, Lines 28-29/122, Line 1). There was no testimony nor evidence, that a gun was seen in the Appellant's hand, immediately before he ran into the woods; Jarden v. Weinberg, 477 U.S. 168 (1986). The Prosecution went on to make this improper statement in the form of a question:

Prosecutor - I say even though you didn't see him with a gun, you're not going to tell this jury that it was impossible for him to get a gun down the street somewhere later that day, are you?

(Trial Transcript, page 180, Lines 17-19).

Again, there was no evidence nor testimony that the Appellant got a gun down the street, or from any where else. This possibility was implanted in the jury's mind by the prosecution improper remarks; U.S. v. Young, 470 U.S. 1 (1985).

In the case at bar, the Prosecution's misconduct continued, when it went on to undermine the court. In questioning Jason Russell about the presence of a gun, the Prosecution went forward as follows:

Prosecutor - where did the gunshot come from?

Russell - It sounded like it come from Carl Johnson.

Defense - Objection as to speculation.

Court - Sustained.

Prosecutor - Your Honor, he testified to what it sounded like.

Court - Sustained unless there's a better foundation given.

Prosecutor - where did the shot come from?

Russell - All I know is it sounded like it
come from Carl Johnson.

(Trial Transcript, page 75, Lines 4-17).

Even though the court had just sustained Defense objection, and admonished the Prosecution to lay a better foundation; the Prosecution undermined the court by asking the exact same question, only changing one word -- gunshot to shot -- which did not lay any foundation requested by the court; Robb v. Connolly, 111 U.S. 624, 4 S.Ct. 544.

In cross examining Michael Cox, after he was called back to the stand as a defense witness; the Prosecution undermined the court by improperly grand standing Cox's guilty plea. As an Attorney first, then Prosecutor, the Prosecution knew that in a guilty plea proceeding, a defendant must answer the court's questions in a specific manner in order to have the plea accepted. Every one involved knows that false statements are necessary by the defendant, i.e., did anyone promise you anything (Tailored Response No, even though a certain sentence was promised) --- did you commit the crime (for plea purpose, "yes" even if not guilty)

At any rate, knowing these factors, the Prosecution went on to undermine the court (Jury) painting the witness as a liar under oath, using his plea bargain proceeding;

(Trial Transcript, pages 231-234).

U.S. v. Forlorma, 94 F.3d 91 (2d Cir. 1996).

During a prior testimony, Michael Cox testified that Captain Tim Fortenberry made specific remarks, and presented him with the tape/written statement of Jason Russell, to get him to make a similar statement. Captain Fortenberry had no way of knowing the substance of Cox testimony. Evidently, Captain Fortenberry was told exactly what Cox stated and how to respond. During his testimony (Rebuttal Witness) for the Prosecution, he stated:

Fortenberry - No. I sat down and read him his rights. Officer ~~Read~~ was present, and I explained his rights to him, and then he gave a statement which is on this tape. [H]e didn't read anything; [h]e wasn't told anything.

Trial Transcript, page 299, Lines 3-7).

Either Captain Fortenberry is blessed with powerful ESP, or the Cat was let out of the bag by the prosecution; ignoring the reasons why it is important that those providing evidence not be allowed to

hear the other's testimony. The Prosecution undermined the court in breaching key aspects of Cox testimony to Captain Fortenberry; and then calling him as a Rebuttal witness to get his point across; U.S. v. Udechukwu, 11 F.3d 1101 (1st. Cir. 1993).

In the instant case, Michael Cox was initially called as a witness for the state. However, during cross-examination, Cox's testimony was more favorable to the defense, rather than the prosecution. Being aware of this factor, during redirect examination, the Prosecution tended to impeach its own witness:
Prosecution - Well, are you telling this jury that
you lied to them about these things
that you've testified to?

(Trial Transcript, page 68, Lines 4-5).

As long as Cox's responses was favorable to the State, the prosecution was fine, but once his testimony (The Truth) began to support the Petitioner's case, the Prosecution improperly went after Cox for purpose of impeachment; U.S. v. Alemany Rivera, 781 F.2d 229 (1st. Cir. 1986).

The Prosecution improperly continued to attack its own witness's testimony, only because it was exculpatory in nature for the Petitioner;

Prosecutor - If Your Honor, please, could the Court instruct this witness to tell us the truth, once, in this trial.

(Trial Transcript, page 70, Lines 15-17).

And further:

Prosecutor - Have you told this jury anything that's the truth today?

(Trial Transcript, page 72, Lines 3-4).

Rather than accept the good with the bad, the Prosecution chose to impeach its witness, and to discredit Cox's entire testimony ---- solely because it was partly favorable to Petitioner; U.S. v. Garcia, 785 F.2d 214 (8th Cir. 1986.)

Finally the Prosecution misconduct concluded with improperly calling Petitioner and his witnesses all liar, in the presence of the jury. During cross of Michael Stewart as to the color of the Petitioner's shirt:

Prosecutor - Darker than that chair?

Stewart - Yes, Sir.

Prosecutor - Is that as true as the rest of your testimony?

This comment was improper and amounted to misconduct on the part of the prosecution;

U.S. v. Agurs, 427 U.S. 97, 96 S.Ct. 2392 (1976).

Cross of Jerome Stewart:

Prosecutor - And you saw that?

Stewart - Yes, Sir.

Prosecutor - With your own eyes?

Stewart - Yes, Sir.

Prosecutor - An that's as true as the rest of
your testimony, right?

Suggesting that Jerome Stewart's testimony was
not to be believed was improper comment and
misconduct; U.S. v. Mitchell, 1 F.3d 235 (4th Cir. 1993).

In several instances, upon facing its own
witness (Michael Cox) the Prosecutor made
improper comments calling Cox a liar---
solely because Cox decided to tell the truth,
and that showed the Petitioner was not
guilty of this charged offense:

Prosecutor - which time were you lying? Were
you lying this morning or are you
lying this afternoon about hearing
that shot or not hearing it?

(Trial Transcript, page 221, Lines 15-17).

Prosecutor - Do you know the truth if you see it or say it? Do you even know the truth? Would you recognize the truth?

(Trial Transcript, page 223, Lines 11-12) and,

Prosecutor - And so if Jason tells a lie, you're going to tell a lie; is that right?

Cox - Yes, Sir, I guess.

Prosecutor - If Jason goes out and jumps off the Fourth Street bridge in the river, are you going to do that, too?

These comments were improper misconduct, and served to deprive Petitioner of his right to a fair trial; U.S. v. Crutchfield, 26 F.3d 1098 (11th Cir. 1994).

Lastly, the Prosecution made an improper attack upon the testimony of the Petitioner:

Prosecutor - So what was your reason for making up that lie at that point?

Petitioner - I don't know. That's something that come to my mind because I was scared at the time.

Prosecutor - So you would lie to get somebody out of trouble? (including yourself?)

(Trial Transcript, page 293-4, Lines 19-28; Line 1).

These comments was improper, prejudicial to Petitioner, and such misconduct by the Prosecution deprived Petitioner of his right to a fair trial. The resulting conviction must be reversed; U.S. v. Francis, 170 F.3d 546 (6th Cir. 1999).

Issue - 3

Whether Appellant Johnson was actually innocence of Aggravated Assault as to the evidence and was deprived of a fair trial whereas inconsistent testimony of prosecution witnessess were beyond belief.

Appellant Johnson asserts that he is actually innocence of aggravated assault upon Clarksdale Police Officer William Reed and that he never had a gun nor fired a shot at anyone and that he was deprived of his right to a fair trial, whereas the inconsistent testimony of the prosecution key witnesses was beyond belief; in violation of his rights under the provision of the Fourteenth (14th) Amendment to the United States Constitution.

In the case sub judice, there were four (4) state witnessess, that allegedly saw the Petitioner fire the shot on that night, that is in question herein. From the onset, there were supposingly only two (2) witnessess making this claim, Michael Cox (co-indictee) and Jason Russell; according to investigative reports filed by the Clarksdale Police Department. However, and real suspect, by the time of the trial, Officer Dale Jones and Fernando Harris also made this claim. Yet, as season officers, they never once step forward prior to Petitioner's trial, and stated to anyone at all, that they had witnessed the Petitioner take a shot at their fellow officer. Is this the sort of information that seasoned officers keep from their supervisors, and not file relevant reports thereto? As previously stated, suspect, suspect, suspect!

In addition, this instant case, is filled with testimony, so inconsistent, that no fair minded person could possibly believe. First, those officers whose testimony is suspect from the onset. The following excerpts concerns whom was in the precise area, where the alleged shot was fired from. Officer Dale Jones stated as follows:

Jones - Officer Read then pulled up to the vehicle with his blue lights and siren on, and we noticed Michael Stewart start to running back toward -- out of the area, back toward Madison Street. We noticed Mr. Johnson turn around and shot at the vehicle, shoot in the area, and jumped in the vehicle.

(Trial Transcript, page 26, Lines 16-21).

Officer Jones says that Petitioner was standing there alone when the shot was fired. What does Officer Fernando Harris have to say;

Harris - At the time, I observed Officer Read come with his blue lights behind the vehicle. At the time I saw the car where Mr. Johnson [and Mr. Stewart was, I noticed a muzzle blast come, and I heard a shot toward officer Read.

(Trial Transcript, page 41, Lines 15-18).

During cross-examination, Officer Harris had a third version; At page 47, Lines 2-5.

Harris being questioned by Defense Counsel;

Defense - When did you see -- where was Carl Lee Johnson in relation to the vehicle?

Harris - At the time he was sitting on the outside of the passenger's seat.

In these excerpts, Officer Jones puts the Petitioner standing alone, and turning around to take a shot at the vehicle. Yet, Officer Harris puts the Petitioner and Mr. Stewart there at the same time, when he saw the muzzle blast. He also puts Petitioner sitting inside the door of the car when the shot was allegedly fired. It is impossible to distinguish which officer, if either, are being truthful; Crawford v. United States, 212 U.S. 183, 29 S.Ct. 260, see also, Nichols v. State, 174 Miss. 271, 164 So. 20.

The next inconsistency concerns which of the two (2) officers actually arrested Michael Stewart. This is essential to the case, due to the controversy surrounding this arrest; i.e., whether or not a shot was fired during this arrest when Stewart was struck with a gun by the arresting officer; or, whether or not he was arrested with drugs on his person. Officer Jones testified as follows:

Prosecutor — Did you say it was you that apprehended Mr. Stewart?

Jones — Yes, Sir.

Prosecutor — Where did you apprehend him?

Jones — I apprehended him right in front of the residence.

(Trial Transcript, page 29, Lines 14-17).

In contrast, what was officer Harris's testimony concerning Michael Stewart's arrest:

Prosecutor— And the subjects that you apprehended at that point, who were they?

Harris— Uh, one of them was Mr. Michael Stewart and the other two were juveniles.

Prosecutor— Now, when you apprehended this Mr. Stewart, were any shots fired at that time?

Harris— No, it wasn't.

(Trial Transcript, page 43, Lines 1-7).

Several Defense witnesses testified that during the arrest of Michael Stewart, the officer struck him about the head with his gun, causing the gun to discharge. That being the only shot fired in that area. The officers testified inconsistently in an attempt to shield the other, and their testimony is beyond belief by any fair minded person; Holmgren v. United States, 217 U.S. 509, 30 S.Ct. 588. See also, Cole v. State, 217 Miss. 779, 65 So.2d 262.

There was also discrepancy in the testimony concerning lights in the area; since this incident took place around 10:30 or so at night.

Officer Jones had this to say:

Defense - Is that area just ablaze with street lights at that time of night?

Jones - The car wash is.

Defense - The car wash is. Well, how about all up and down Monroe street?

Jones - It is. It's a light in that area that the car wash at, and the view that we had we could probably see even if it was dark?

(Trial Transcript, page 37, Lines 13-20).

Officer Jones was evasive about the amount of light on Monroe, he constantly places many lights around the car wash, but shot is alleged to have occurred down Monroe. Officer Harris had this to say:

Prosecutor - Officer Harris, was that area well lit that night?

Harris - No, not on the back of Monroe Street, it wasn't.

(Trial Transcript, page 54, Lines 6-7).

Yet, this is the area where the officers allegedly observed the shot fired, while they were standing in the rear of a building off of Madison street. At any rate, the testimony is inconsistent and not worthy of belief; Pyle v. Kansas, 317 U.S. 213,

63 S.Ct. 177. see also, Curran v. Delaware, 259 F.2d 707 (3rd Cir.).

A final and major discrepancy in the Officer's account of things, is whether or not Michael Stewart was arrested with drugs on his person. Officer Jones during rebuttal:

Prosecutor - On May 25th., when you arrested Michael Stewart, tell the jury whether or not you obtained any drugs as a part of that arrest?

Jones - Yes, Sir, I did.

Prosecutor - And from what place did you obtain those drugs?

Jones - In the hand of Michael Stewart.

(Trial Transcript, page 302, Lines 11-17).

Officer Harris, also as a rebuttal witness had this to say:

Prosecutor - As to the incident on May 25th., 1994, did you see Dale Jones at some point in his encounter with Michael Stewart?

Harris - Yes, I did.

Prosecutor - Would you tell the jury whether or not you saw him recover some drugs?

Harris — Yes, I did.

Prosecutor — From what place did he recover those drugs?

Harris — They was in front of Michael Stewart on the ground.

Prosecutor — How far from his hand?

Harris — Maybe a yard.

(Trial Transcript, page 304, Lines 16-26).

Depending on whom you believe, you can place the drugs in Stewart's hand, or on the ground a yard or so away from him. The fact is the inconsistency, and unbelievability of the testimony as a whole; Thompson v. Dye, 221 F.2d 763 (3rd. Cir.). see also, Almeida v. Baldi, 195 F.2d 815 (3rd. Cir.).

In addition to the inconsistency of Officers Jones and Harris, there were also inconsistent testimony from Michael Cox and Jason Russell, the only two (2) alleged eyewitnesses interviewed by investigator Danny Hill, as follows:

Prosecutor — Who were the eyewitnesses that you talked to?

Hill — Jason Russell and Michael Cox. And, of course Officer Reed just said he was shot at. He didn't know exactly who shot at him.

(Trial Transcript, page 120, Lines 20-23).

This Court is encouraged to read the complete testimony of these witnesses to get a full impact of their inconsistency. However, for the purpose of this case sub judice, the words of Michael Cox and Jason Russell speak for themselves.

Michael Cox, admittedly lied about the Petitioner having a gun, and taking a shot at Officer Reed. He testified in fact that the Petitioner never had a gun, so he never shot at anyone. That the single shot heard, was fired by the Officer who arrested Michael Stewart. He further testified why he lied in the first instance, as follows:

Prosecutor— But you had a lot of chances to tell me that you told Fortenberry a lie, knowing that you were going to come in here and testify under oath; didn't you, and you never said that to me, not once, did you?

Cox— No, Sir, But I was offered a lighter sentence. I was offered five years on paper to testify that Mr. Johnson was shooting at the police. I'm not lying under oath telling nobody that.

(Trial Transcript, page 231, Lines 15-22).

As a co-defendant, under indictment along with Petitioner, Cox's testimony was to be viewed with caution from the onset;

Caminetti v. United States, 242 U.S. 470, 37 S.Ct. 192. see also, Stoneking v. United States, 232 F.2d 385 (8th Cir.).

Post-trial, on February 28, 1995, Jason Russell contacted Defense Counsel, Stephen A. Brandon on his own accord, and provided a taped interview as to why he had lied about Petitioner having a gun, and shooting at Officer Reed (Exhibit-"C"- Eleven pages). Defense Counsel immediately filed a motion for a new trial, based on this newly discovered evidence. The criteria for a new trial on this new evidence was fully met; U.S. v. Swarek, 677 F.2d 41 (8th Cir. 1982). The Court abused its discretion at that time, in denying the Petitioner's request for a new trial; Hill v. State, 388 So. 2d 903 (Miss. 1981). see also, Pickett v. State, 751 So. 2d 1031 (Miss. 1999), and Brown v. State, 731 So. 2d 595 (Miss. 1999).

In view of the successive writ doctrine, Petitioner is precluded from submitted the information imparted in the taped interview of Jason

Russell, as newly discovered evidence. However, since Petitioner has never been afforded the opportunity to argue the merits of this claim, it is presented herein in the interest of justice; Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981 (1998). see also, Smith v. State, 477 So.2d 191 (Miss. 1985).

In this case, Petitioner, Carl Lee Johnson, is actually innocent of aggravated assault on a police officer. Failure to hear the merits of his claims would endorse a fundamental miscarriage of justice. see Calderon v. Thompson, 523 U.S. 538, 559, 118 S.Ct. 1489, 1502-03, 140 L.ed.2d 728 (1998); Murray, 477 U.S. at 495-96, 106 S.Ct. at 2649 (Explaining that a "fundamental miscarriage of justice" occurs in an extraordinary case, where a constitutional violation has resulted in the conviction of someone who is actually innocent," to meet this standard, a Petitioner must "show in light of the evidence, 'that it is more likely than not that no reasonable juror would have convicted him of the underlying offense.'" Schlup v. DeLo, 513 U.S. 298, 327, 115 S.Ct. 851, 867, 130 L.Ed.2d 808 (1995).

Johnson has sufficiently met this standard.

Issue - 4

Whether the trial court was in error when it refuse to grant Johnson a new trial as to the insufficiency of the evidence to support the charge in the interest of justice.

The Petitioner asserts that courts are authorized to grant a new trial when it would be in the interest of justice. This term includes all the grounds/issues, that cannot be presented under the heading "Newly discovered evidence." In evaluating the "interest of justice" claim, This Court will act "as a thirteenth juror." It will determine whether a "fair trial requires that the [evidence] be made available to [a new] jury," for its consideration of the guilt or innocence of the defendant; Benton v. U.S., 188 F.2d 625 (D.C. Cir. 1951).

Conclusion

It follows inexorably that Petitioner has been denied due process and equal protection of law; guaranteed under the provisions of the Fourteenth (14th) Amendment to the United

States Constitution; Thompson v. Louisville, 362 U.S. 199, 80 S.Ct. 624 (1960). And because these constitutional errors clearly and concededly, resulted in an invalid conviction, and the imposition of an unauthorized sentence, it also follows that Petitioner is a victim of a miscarriage of justice; Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977).

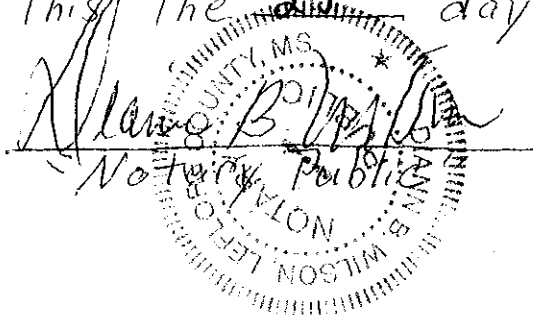
Wherefore Premises Considered, Petitioner, moves this Honorable Court to reverse and render the judgement and conviction of the circuit court freeing the Petitioner from his unconstitutional confinement.

Respectfully,

Carl Lee Johnson

Carl Lee Johnson

Sworn to and subscribed before me,
This The 25 day of FEBRUARY, 2008



NOTARY
MY COMMISSION EXPIRES JULY 2, 2008
BONDED THRU STEGALL NOTARY SERVICE

My Commission Expires:

Certificate of Service

This is to certify that I, Carl Lee Johnson, MDOC #39897, have this day caused to be mailed, via United States Mails, Postage Pre-Paid, a true and correct copy of the foregoing Brief of Appellant to the following listed person(s):

Jim Hood

Attorney General

State of Mississippi

Post Office Box 220

Jackson, Ms. 39205-0220

Betty W. Septon, Clerk

Mississippi Supreme Court

Post Office Box 249

Jackson, Ms. 39205-0249

This the 25, day of February, 2008.

/s/ Carl Lee Johnson

Carl Lee Johnson

#39897 Unit 32-B

Parchman, Ms. 38738

Exhibit "A" thru "D"

CONTINUATION OF INDICTMENT AGAINST DEFENDANT

Carl Lee Johnson

and upon conviction the said defendant is hereby charged under MCA 99-19-83 to be sentenced to life imprisonment, and under MCA 99-19-81 to be sentenced to the maximum term of imprisonment prescribed for such felony, named thirty (30) years, and such sentences shall not be reduced or suspended nor shall such person be eligible for parole or probation; in that the said defendant shall, then and there, have been convicted at least twice previously of a felony or federal crime upon charges separately brought and arising out of separate incidents at different times, and shall have been sentenced to and served separate terms of one (1) year or more in a state and/or federal penal institution, whether in this state or elsewhere; and in that Armed Robbery shall have been and was a crime of violence; and to the extent that the specifics of said conviction and sentences and time served are known to the Grand Jury at this time, they are more particularly described as follows:

CAUSE NO.	COURT OF CONVICTION	DATE OF CONVICTION	OFFENSE	DATE OF INCIDENT	SEN. YRS.	TIME SERVED
6380	Circuit Court Coahoma County Mississippi	February 18, 1982	Burglary of dwelling	August 1, 1981	Four(4) years	More than 1 year
6409	Circuit Court Coahoma County. Mississippi	February 18, 1982	Armed Robbery	August 10, 1981	Twenty (20) years (10 sup.)	More than 1 year

Exhibit - "A"

LINES

1- RECEIVED March 1, 1982
2- MDOC# 51564 FBI NO. 243 119 X10
3- NAME Johnson, Carl Lee
4- ALIAS _____

DETAINEES

1.
2.
3.
4.
5.
6.

5- COUNTY Coahoma CAUSE NO. 6409 DATE OF SENTENCE 2-18-1982 TERM 20 yrs. W/10 yr
6- OFFENSE Armed Robbery MANDATORY AFFIRMED Susp.
7- COUNTY Coahoma CAUSE NO. 6380 DATE OF SENTENCE 2-18-1982 TERM 4 yrs. CS
8- OFFENSE Burglary Of A Dwelling AFFIRMED /
9- COUNTY _____ CAUSE NO. _____ DATE OF SENTENCE _____ TERM _____
10- OFFENSE _____ AFFIRMED _____

11- NO. FELONY CONVICTIONS Two convictions
12- CONFINEMENTS One confinement

1st _____ 2nd _____
3rd _____ 4th _____
5th _____ 6th _____

ESCAPED CAPTURED RETURNED

UNIT ASSIGNMENT

Unit	Date	Unit	Date
26	7-16-1986 dw		
30	7-30-1986 dw		
29	6-22-1987 kj		
24	9-15-1987 dw		
29	9-30-1987 dw		

SUSPENSIONS

TERM	RELEASE DATE	TERMINATION DATE
	PAROLED DEC 19 1988	
	DISCHARGED APR 22 1993	

PRIOR ESCAPE RECORD

1. _____
2. _____
3. _____
4. _____

CUSTODY STATUS

C-CUSTODY B-CUSTODY A-CUSTODY
2-18-1982 9-8-1982 BL 3-25-1982 DW
1-13-1983 DW 3-24-1983 DW 12-2-1982
3-3-1983 DW 3-5-1983 DW _____
2-20-1987 DW 6-12-1987 DW _____
8-20-1987 DW 8-11-1988 DW _____
6-5-1987 DW 10-21-1987 DW _____
7-20-1988 DW 5-2-1989 DW _____
11-20-1989 DW 11-10-82 _____

PRIOR CRIMINAL RECORD (MDOC)

DISPOSITION

PAROLED WARRANT ISSUED RETURNED REVOKED

WORK RELEASE WARRANT ISSUED RETURNED REVOKED

DIED _____ DISCHARGED _____

RACE Black SEX Male DATE OF BIRTH 3-10-1963 AGE 19 HT 5 FT 1 IN.

WEIGHT 125 HAIR Black EYES Brown COMPLEXION _____ BUILD _____

REMARKS _____

Exhibit - "B"

EXHIBIT
"B"

EXHIBIT
"B"

~~EXHIBIT~~ ~~EXHIBIT~~
TRANSCRIPT OF STATEMENT OF JASON RUSSELL

STEPHEN A. BRANDON: Today is February 28th. It's 4:51 p.m. I'm in the offices of Twiford Webster & Gresham, and I'm in my office, and with me is Jason Russell. Jason, before we begin talking, I want to ask you if I have your permission to tape record our conversation.

JASON RUSSELL: Yes, sir.

SAB: Okay. Jason, I -- you understand that I want to ask you some questions about the crime that Carl Lee Johnson was arrested for?

JR: Yes, sir.

SAB: And do you know that he was arrested for aggravated assault upon a police officer?

JR: Yes, sir.

SAB: Okay. And, in fact, you testified at that trial, right?

JR: Yes, sir.

SAB: Okay. Information has come back to me that you want to talk to me now and give me -- share with me some knowledge about that case that is different from some of the testimony that came out at trial. Is that correct?

JR: Yes, sir.

SAB: You personally did not contact me to let me know this, did you?

JR: No, sir.

SAB: Okay. Are you appearing in my office to talk with me about this case of your own free will?

JR: Yes, sir.

SAB: Has anybody pressured you or used any kind of influence to try to get you to come and talk with me about this case?

JR: No, sir.

SAB: Have I in any way tried to coerce you or use any influence or pressure you to come and talk with me about this case?

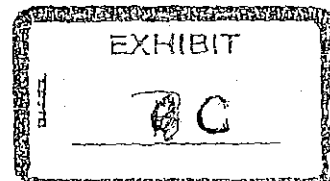
JR: No, sir.

SAB: Is there anybody who has threatened you or made you any promises in order to get you to come and talk with me about this case?

JR: No, sir.

SAB: I ask you once again: Are you doing this of your own free will?

JR: Yes, sir.



SAB: You are doing this because you want to tell me what you know about what happened on that night -- is that right?

JR: Yes, sir.

SAB: Okay. All right. Well, why don't we start at the beginning. You know what Carl Lee Johnson was indicted for was having taken a shot at Whit Reed, a police officer, back on -- I think it was -- was it May 25, 1994? Have I got that date correct?

JR: Right.

SAB: Okay. Why don't we start off by -- instead of me asking you a whole bunch of questions, why don't you just tell me what happened that night, beginning with: When did you meet up with Michael Cox?

JR: I was sitting at home watching TV. Michael Cox come [sic] by and picked me up. We went riding. We drunk [sic] a couple of beers. We decided to go to the car wash and pick up some "rock." We got to the car wash, and as soon as we pulled up in the car wash, two guys walked up to the back of the car. Mike got out. He walked -- come [sic] back over there, got back in the car and pulled out and pulled behind the car wash. And then Carl Johnson walked up toward the car, and as he was walking up toward the car there was a gunshot fired. And then Carl Johnson got in the car, and then we started driving off and the police started chasing us.

SAB: Okay. All right, let me ask you some questions about what you have already told me. About what time of day did you and Michael Cox get together?

JR: About 9:00 or 10:00. It was night.

SAB: Okay. Now there was some testimony during the course of the trial (which you may or may not have heard) that suggested that you may have been drinking more than two beers. To the best of your recollection, how many beers did you have before you and Mike went to the car wash?

JR: Maybe a six-pack.

SAB: Now, tell me if this is true or false: Do you think that you drank a six-pack and Mike drank a six-pack?

JR: True.

SAB: Okay. All right. And I ask you that -- and now, having answered that, asked you that question, I will tell you the reason I ask it. Heather Cox, during the course of talking with me, told me that she thought that between the two of you, that each of you had probably had at least a six-pack of the Budweiser "tall boys." Does that sound right?

JR: Yes, sir.

EXHIBIT
C-1

EXHIBIT
C-1

SAB: Okay. When you went to the car wash, do you know what time it was?

JR: Around 10:30.

SAB: Okay. When you were in the car wash -- where were you when you heard the gunshot go off?

JR: I was sitting in the car.

SAB: Okay. You were still seated; you were not outside of the car?

JR: Yes, sir.

SAB: Who else was in the car with you at the time the gunshot went off?

JR: Michael Cox.

*SAB: All right. Where was Carl Lee Johnson at the time that you heard the gunshot?

*JR: He was just starting to open up my car door.

SAB: Okay. When you said that y'all went to the car wash to purchase some "rock" -- what do you mean by "rock"?

JR: Cocaine.

*SAB: Was there anything about the gunshot that allowed you to make any kind of determination as to what area it was fired from? -- from the sound of the gunshot where it sounded like it came from?

*JR: It sounded like it was a little ways off.

*SAB: Okay. Did it sound like it was coming from near the car wash, in the neighborhood somewhere, beyond the neighborhood, or could you even tell where it came from?

*JR: It sounded like it was somewhere in that area.

*SAB: Somewhere just in the area of the car wash, or of the neighborhood, or --

*JR: The car wash.

*SAB: Okay. Somewhere in the area of the car wash. At the time that you heard the gunshot, what is your own best recollection of whether you were sober or intoxicated or ... Is there anything that you think would interfere with your ability to clearly remember the gunshot?

*JR: No, sir.

*SAB: Okay. So you do distinctly remember hearing the gunshot?

*JR: Yes, sir.

* SAB: All right. At the time ... Well, let me just go ahead and ask you, you know, the million-dollar question: At any time after you heard that gunshot, was there ever a time that night that you saw Carl Lee Johnson with a gun?

* JR: No, sir.

* SAB: Okay. Was there ever a time that night that you saw Carl Lee Johnson fire a gun?

* JR: No, sir.

SAB: After Carl Lee Johnson got in the car with you at the car wash, where did y'all go?

JR: We pulled on down to the next turn, took a right, and turned onto Madison and took a left, and headed out toward across 61 and down New Africa Road.

SAB: Okay. Was there ever a time that y'all pulled in front of projects -- I think it is called Project One. Do you recall if y'all did that?

JR: I can't remember.

SAB: There is [sic] some little stores down the street from the car wash --

JR: Right there across the street from the chain saw place?

SAB: Exactly. Did y'all pull into that parking lot?

JR: Yeah, we pulled in there.

SAB: Did you pull into the parking lot after you left the car wash?

JR: Yeah, right.

SAB: Okay, how long did y'all stay in that parking lot?

JR: Maybe two or three minutes --

SAB: Okay.

JR: -- if that long.

SAB: Who all was with you at the time that y'all pulled into the car wash?

JR: Just me and Mike.

SAB: Okay. Where had Carl Lee gone?

JR: He was gone to get the "rock."

SAB: Did he go with anybody?

JR: I don't know.

SAB: Did you see if he went with anybody?

JR: I didn't see him go with nobody [sic].

Exhibit - 6

SAB: All right. Did you see anybody else in that neighborhood that night that you knew?

JR: Not that I can remember.

SAB: Did you know Carl Lee Johnson before that night?

JR: I had met him once or twice.

SAB: Okay. Was his face familiar to you?

JR: Yes.

SAB: Is there any -- as you think back upon it, is there any doubt in your mind that Carl Lee Johnson was the man who got in the pickup with you at the car wash?

JR: Right.

SAB: It was Carl Lee Johnson?

JR: It was Carl Johnson.

SAB: Okay. All right now, you say that y'all stayed in the parking lot at Project One for a couple of minutes and then -- if I understand what happened next -- and you tell me if this is right or wrong -- y'all pulled around behind the Terry's chainsaw place and parked to meet up with Carl Lee Johnson. Is that true or false?

JR: That's true.

SAB: Okay. How long did y'all stay parked there before y'all met up with Carl Lee?

JR: Maybe three or four minutes.

SAB: Okay. And where did Carl Lee come from?

JR: He come around toward the alley way.

SAB: Was anybody with him?

JR: I didn't see anybody else.

SAB: Okay. As best you can recall, had Michael Cox, or you, or the both of you, smoked any marijuana that day?

JR: Yes, sir we had.

SAB: Okay, when did y'all do that?

JR: It was about -- maybe an hour before we got over there.

SAB: Okay. The fact that y'all -- How much marijuana did y'all smoke?

JR: I am not sure --

SAB: Okay.

JR: -- one or two joints.

EXHIBIT

EXHIBIT

SAB: Okay. The fact that y'all had smoked some marijuana before y'all went over and met with Carl Lee -- to the best of your ability, do you think that has in anyway interfered with your ability to recall the events of that night?

JR: No, sir.

SAB: Okay. The fact that you were intoxicated -- did that sort of make it seem like it was just a blur as it was happening?

JR: Kind of, but not really.

*SAB: Okay. So what you are telling me today is the truth as best as you can remember, is that right?

*JR: That's right.

SAB: Okay. So after Carl Lee came up to the car, y'all -- let me bring us back to where we were: Y'all parked behind Terry's chain saw --

JR: Right.

SAB: -- the Terry's sales place, right?

JR: Right.

SAB: All right. And y'all were parked there three or four minutes before Carl Lee Johnson came up, is that right? And then he came up from the alley -- is that right?

JR: That's right.

*SAB: Okay, and then what happened?

*JR: Then he started walking up toward the car. He opened the car door, and about the time he opened the car door a gunshot went off, and then Carl got in the car and we drove off.

*SAB: All right, now -- is that another gunshot?

*JR: No, I didn't hear but one gunshot.

*SAB: All right, now -- as I understand what you said earlier, you heard a gunshot when y'all were over at the car wash --

*JR: No, I was talking about behind the chain saw place.

*SAB: -- Oh, okay. All right, so -- let's make sure that this is clear. How many gunshots did you hear that night?

*JR: At the scene?

*SAB: Yes.

*JR: I just heard one.

SAB: Okay, and where were you when you heard that gunshot?

JR: Sitting right there by the passenger door.

SAB: Okay, and where was the vehicle?

JR: Sitting behind Terry's chain saw place.

*SAB: Okay, and when did you hear the gunshot?

*JR: About the time Carl Johnson opened up the car door.

*SAB: Okay. At that time did you see Carl Lee Johnson with a weapon?

*JR: No, sir.

SAB: Okay. To the best of your knowledge was there a weapon in that Ranchero that Michael Cox was driving?

JR: No, sir.

SAB: Did you ever see Michael Cox with a weapon?

JR: No, sir.

SAB: All right. Did you have a weapon?

JR: No, sir.

SAB: Okay. All right, at the time that y'all heard the gunshot, did Officer Reed pull up at about the time that you heard the gunshot?

JR: Yes, sir.

SAB: Okay, and then what happened?

JR: Then we continued to drive. We drove off and continued to drive, and turned onto Madison and went on down Madison, and went across 61 and went down New Africa Road. We went down about, maybe, four miles and took a left, and then we went down maybe another quarter of a mile, half-a-mile, or something like that, and then I heard another gunshot. And then the car flipped.

SAB: Okay. What happened after the car flipped?

JR: After the car flipped, I stayed there, and Mike and Carl took off. Officer Whit Reed was on the scene. He handcuffed me, arrested me, and took me to jail -- took me to the police department and I give him my statement -- give him the statement, and then I left and went home.

SAB: Okay. All right. Do you say that you heard a gunshot after the car chase?

JR: Right.

SAB: Okay. Where was that that you heard the gunshot after the car chase?

JR: On the gravel road that we had the wreck on.

SAB: Okay. All right. And you were taken into custody at the scene of the wreck, right?

JR: Right.

SAB: Okay, and I think that Carl Lee Johnson left the scene of the accident and -- did Michael Cox also leave the scene of the accident?

JR: Right.

SAB: Okay. Now, you know that what you are telling me today is in many ways very different from what you testified to under oath in the course of this trial?

JR: Right.

SAB: You know that, right?

JR: Right.

*SAB: So you'll understand that I've got to ask you ... Why have you decided to come forward and tell me -- give me this information today? -- this information which is very different from what you gave in the course of the trial?

*JR: I just didn't like the thought of nobody going to jail for something I know he didn't do.

*SAB: Does the fact that Carl Lee Johnson may be going to prison -- I mean, you're not -- are you saying what you have just told me simply to save him, or are you telling me this stuff because it is the truth?

*JR: Because it is the truth.

*SAB: You know that you gave a statement to Captain Fortenberry -- I think it was the day after all of this happened -- is that right?

*JR: No, sir.

*SAB: Okay. Did you ever give a statement to the police?

JR: I gave one to Officer Whit Reed.

*SAB: Okay, you gave one to Officer Reed. In that statement -- I don't have it in front of me, but it seems like that I recall that you told Officer Reed that Carl Lee Johnson fired a shot, is that correct? -- or that you saw may be two or three shots being fired ... but, anyway, that you saw some shots being fired that night?

*JR: Right.

*SAB: Okay, why did you tell Whit Reed that you saw those shots being fired?

*JR: Because I thought they was going to take me to jail, so I didn't tell them that because I thought that's what they wanted to hear.

*SAB: Okay. Why did you think that's what they wanted to hear?

*JR: Well, because I gave them one statement, and when I got through with my statement they come back wanting more and more. Finally, I just told them what I thought they wanted to hear.

*SAB: Okay. Who is "they"? -- when you say "they" came back and "they" kept wanting more?

*JR: Officer Whit Reed.

*SAB: Whit Reed? Okay. So -- so, tell me a little bit -- describe for me how this statement was taken. Was it taken in one sitting, or would they ask you some questions and then he would leave and come back? How did he take your statement?

*JR: Well, I give him my whole statement. Then he went -- he left the room, he come [sic] back maybe five, ten minutes later. He asked me a few more questions and I answered them questions. He got up and left the room again, and he come [sic] back about five or ten minutes later and asked me a couple more questions, and I answered them. Then he left the room, and about ten minutes later he come [sic] back in there, and then they said I could go.

*SAB: Okay. All right. I am trying to think if there is anything else that I want to ask you. Well, I do want to ask you this: What you have just now told me -- I asked you this at the beginning of the statement: Has anybody threatened you or made any promises to you in order to get you to tell me what you have just told me?

*JR: No, sir.

*SAB: Have I threatened you in order to get you to tell me what you have just told me?

*JR: No, sir.

*SAB: Has anybody tried to influence you or -- for example, tried to give you any money to change your statement? I mean, has anybody done anything to get you to change what you said in court?

*JR: No, sir.

*SAB: You do understand that what you are telling me is very different from what you said in court?

*JR: Yes, sir.

*SAB: Okay. You know what -- the big question that I have to ask you -- and there is no other way for me to ask it -- are you telling me that when you testified in court, that you were lying when you said that you saw Carl Lee Johnson with a gun?

*JR: Yes, sir.

*SAB: Well, you know ... You know that a lot of time passed between the time that you gave your statement to Whit Reed and the time that you appeared in court. Why did you say what you said in court about, you know, Carl Lee having a gun?

*JR: Well, I guess I just still thought they were going to arrest me if I didn't tell them what I thought they wanted to hear.

*SAB: Okay. But just to make sure -- you knew that you weren't under arrest, right?

*JR: Right.

*SAB: Are you then saying that you did say what you said in court because you thought that is what the police wanted you to say?

*JR: Right.

SAB: Okay. All right. Well, Jason are you aware that this conversation has been tape recorded?

JR: Yes, sir.

SAB: Have I had your permission to do that?

JR: Yes, sir.

SAB: Okay. Do you have any objection whatsoever to me using the information that you have given me in the course of this statement to -- any objection to me using it as I see fit for the purposes of representing Carl Lee Johnson -- for the purposes of either appealing his case or filing a motion for a new trial or anything like that? Do you object to me using the information that you have just given me to me?

JR: No, sir.

SAB: May I use it as I see fit for the purposes of representing Carl Lee Johnson?

JR: Yes, sir.

SAB: If I need to ask you further questions about this case, will you cooperate with both me and the authorities to the extent that it is needed so that Carl Lee Johnson can be given the fair chance of telling his story that he deserves?

JR: Yes, sir.

SAB: Okay. And if I need to ask you any questions in the future, will you let me do that?

JR: Yes, sir.

SAB: All right. And I once again ask you: Is what you have told me today is this all the truth?

JR: Yes, sir.

SAB: All right. It is now ten minutes after 5:00 p.m. This is February 20th. I am in my office at Twiford Webster &

EXHIBIT

EXHIBIT

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Graham. This is Steve Brandon and this concludes a tape recorded conversation with Jason Russell.

EXHIBIT - C

IN THE CIRCUIT COURT OF COAHOMA COUNTY, MISSISSIPPI

CARL LEE JOHNSON

PETITIONER

v.

CAUSE NO. 14-CI-06-0142

STATE OF MISSISSIPPI

RESPONDENT

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS FOR POST
CONVICTION RELIEF

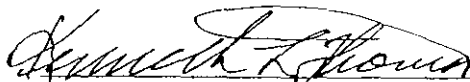
This matter comes before the Court pursuant to the Petitioner's request for a writ of habeas corpus. After carefully reviewing the matter, the Court finds as follows:

The Petitioner was tried by a jury and convicted in this matter in May of 1995. He subsequently filed a direct appeal to the Mississippi Supreme Court and his conviction was affirmed. Since then, he was filed numerous requests for various forms of post-conviction relief, all of which were denied.

The Court finds that the Petitioner is procedurally barred from filing this current Petition in that his time for filing such an action has elapsed under the Mississippi Uniform Post-Conviction Collateral Relief Act and he fails to raise any new issues that were not previously addressed by the Court or any issues that could not have been previously raised.

For the foregoing reasons, the Petitioner's petition for writ of habeas corpus for post conviction relief is hereby DENIED.

SO ORDERED AND ADJUDGED this the 9th day of January, 2008.


KENNETH L. THOMAS
CIRCUIT COURT JUDGE

Exh. b. + "D"

2008 JAN 10 PM 3:05
CLERK OF COURT
CHARLES A. DAKES