

Former prosecutors, judges join push for new trial in Alabama death row case

By **Mark Berman**

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A group of former prosecutors and judges in Alabama this week joined a district attorney in seeking a new trial for Toforest Johnson, a Black man who has spent two decades on death row.

They join voices from across the legal system — including scholars and defense attorneys — who have taken aim at a death sentence in Alabama, one of the country’s most active death-penalty states.

Johnson was convicted of killing William Hardy, a deputy sheriff, in a Birmingham, Ala., parking lot in 1995. Hardy was working as a private security guard at a hotel when someone fatally shot him, according to court filings.

Johnson has argued in court filings that multiple witnesses saw him “across town at the time of the murder,” but said none of those people were called to testify during his second trial.

His legal saga has drawn nationwide scrutiny in recent years, including a 2019 Washington Post story describing a “multitude of problems with how [Johnson’s] case was investigated.”

Last year, the push to reconsider his conviction gained a significant ally when Danny Carr, elected Jefferson County district attorney in 2018, called for a new trial in the case.

Court documents said Carr’s review of the case lasted nine months. In his brief, Carr wrote that he was not taking a position on Johnson’s guilt or innocence, but instead ticked off a litany of problems with the proceedings that put the 48-year-old man on death row.

Carr wrote that a key witness in the case later admitted to lying to officials under oath. A main witness, who testified to overhearing Johnson admit to killing Hardy, was later paid \$5,000 by the state, which went unmentioned at the trial. Across multiple trials, Carr said, prosecutors “presented as many as five different theories” about who shot Hardy.

The lead prosecutor involved in trying Johnson “expressed concerns about this case” and now backs a new trial, as well, Carr said.

“A prosecutor’s duty is not merely to secure convictions, but to seek justice,” Carr wrote. He declined to comment on Wednesday.

Carr’s filing in June 2020 came as the country was gripped with a racial reckoning spurred by George Floyd’s death in Minneapolis the previous month. The death penalty has been one of the arenas drawing renewed scrutiny, with the Death Penalty Information Center releasing a report last fall that found people of color are overrepresented on death rows.

Executive director Robert Dunham said the renewed focus on the case “may be an indicator that after George Floyd and the public recognition that race has overwhelmingly infected death penalty cases, that people who might not have spoken in the past are now coming forward.”

Johnson’s attorneys with the University of California at Berkeley School of Law’s Death Penalty Clinic and the Southern Center for Human Rights declined to comment on this week’s filings, citing his ongoing legal cases.

One challenge in Johnson’s case is pending at an appeals court. Carr’s brief and others calling for a new trial were filed in a circuit court, where the case is on hold pending the appeals court’s outcome. The Alabama attorney general’s office declined to comment on the new briefs and the case’s status on Wednesday.

In one of the filings, a group of ex-judges — including two former chief justices of the state’s Supreme Court — said a new trial was needed “to prevent a reprehensible miscarriage of justice that may otherwise lead to the execution of a likely innocent man.”

The Innocence Project also filed a brief supporting Johnson, writing: “If ever a case bore the hallmarks of a wrongful conviction, Toforest Johnson’s is it.”

Lindsey C Boney IV, a conservative lawyer who wrote the group’s brief, said he was struck by the range of people who weighed in on Johnson’s case, pointing to their varied backgrounds and roles in the legal system.

“The support for Toforest Johnson has been extraordinary to me,” said Boney, a Birmingham-based attorney with the firm Bradley Arant Boult Cummings, who has worked with the Innocence Project before.

The filings showed “a heightened sense . . . that sometimes, the system can and will get it wrong,” Boney said in an interview. “In those instances, all parties within the system ought to take a close look . . . and be willing to admit that mistakes can sometimes happen.”

Another filing, signed by former prosecutors, does not take a stance on Johnson’s guilt or innocence but says “confronting potential errors in the justice system builds public trust.”

Among the people who signed it was William J. Baxley, a former Alabama attorney general, who wrote in a Post op-ed published Tuesday that he continues to support the death penalty but describes Johnson as an innocent man.

“Given where the case now is, if I worked for the state of Alabama and there was anything I could do to correct this injustice, I would do it immediately,” he wrote.

Legal analysts cautioned against reading any sweeping shift on Alabama’s death penalty or criminal justice issues from the parade of former officials who backed Johnson’s push for a new trial.

His is a “particularly egregious case,” said Amy F. Kimpel, an assistant professor of clinical legal instruction at the University of Alabama’s law school.

“It’s not as though there’s been a wholesale shift,” said Kimpel, who directs the school’s Criminal Defense clinic. “But certain people who’ve been looking at the system for a while are starting to see that some of the outcomes are not consistent with outcome of guilt, or the penalties are disproportionately harsh.”
