

IN THE TENNESSEE SUPREME COURT
AT NASHVILLE

STATE OF TENNESSEE)
)
v) No. M1987-00072-SC-DPE-DD
) Filed: July 14, 2006
DONNIE E. JOHNSON)

MOTION TO RESET EXECUTION DATE

Donnie E. Johnson respectfully requests that this Court reset his execution date, currently set for October 25, 2006, to a date that will allow a clemency process to occur after the November 7, 2006, Gubernatorial Election.

As each Justice on this Court is aware, a majority of Tennesseans support the death penalty, decisions made in death penalty cases are intensely political, and any decision getting in the way of an execution can cost a person his job. The fate of former Tennessee Supreme Court Justice Penny White demonstrates this reality.

On June 3, 1996, less than two months before retention elections for this Court's membership, this Court issued its opinion in State v. Odom, 928 S.W.2d 18 (Tenn. 1996). In it, Justice White and two other members of this Court agreed that Richard Odom's death sentence should be vacated and his case sent back to the trial court for re-sentencing. The repercussions were swift and fatal. Through efforts of the Tennessee Conservative Union and others purporting to represent the vast majority of Tennesseans who support the death penalty, Judge White was ousted. There is little doubt of the reason why. See 8/2/96 Commercial Appeal ("WHITE FIRST CASUALTY OF YES-NO OPTION ON JUDGES/SOFT-ON-CRIME CHARGE COSTS SEAT: Tennessee voters threw Justice Penny White off the state Supreme Court Thursday after an unprecedented campaign by conservative activists and victims advocates who labeled her soft

on crime.”)(attached as Exhibit 1); 8/4/96 Commercial Appeal (“ORGANIZATION TAKING CREDIT FOR OUSTING PENNY WHITE: Tennessee Conservative Union President John Davies gives his organization credit for the ouster of state Supreme Court Justice Penny White ... The TCU’s effort against White began in June after the Supreme Court reversed the death sentence of Richard Odom”) (attached as Exhibit 2).

The White experience taught Tennessee elected officials a lesson: if you make a decision in a death penalty case that runs contrary to the broad State-wide support for the death penalty, you risk losing your job. See 9/22/96 Commercial Appeal (“JUDGES MAY FEAR LOSING THEIR JOBS: Job security will (be) on the minds of state Supreme Court candidates when they stand before the Tennessee Judicial Selection Commission. That’s because voters removed Penny White from her seat on the state Supreme Court”)(attached as Exhibit 3); 10/9/96 Commercial Appeal (“DEATH PENALTY GAINING MORE FRIENDS AMONG TENN. LEGISLATIVE CANDIDATES: They don’t want to end up like Penny White.”)(attached as Exhibit 4).

Donnie Johnson’s current execution date is October 25, 2006. Experience teaches that Governor Bredesen will not make any decision on whether to commute Mr. Johnson’s death sentence until shortly before that date. The voters will decide whether to elect Governor Bredesen to a second term as Tennessee’s Governor on November 7, 2006, less than two weeks after Mr. Johnson’s scheduled execution. We can all agree that Governor Bredesen doesn’t “want to end up like Penny White.” Thus, any late October decision Governor Bredesen would make on whether to commute Mr. Johnson’s death sentence would be, or at the very least appear to be, one of political expediency. That’s not the way it’s supposed to be.

Chief Justice Rehnquist, writing for the United States Supreme Court, recognizes that

(T)he heart of executive clemency (is) a matter of grace, thus allowing the executive to consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations.

Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 280-81 (1998). It's unreasonable to believe that Governor Bredesen can make an honest decision on whether to bestow grace on Mr. Johnson when reality tells him that if he does so he may lose his job. See Palacios, V., *Faith In Fantasy: The Supreme Court's Reliance On Commutation To Ensure Justice In Death Penalty Cases*, 49 Vand. L. Rev. 311, 349-51 (1996)("[T]he political consequences of granting commutations are simply too great [S]erious political consequences can follow when a governor grants clemency against the popular will For governors, the choice is a pragmatic one. When a 'tough on crime' policy prevails in a state, commutations are reduced."). And even if Governor Bredesen was able to remove political considerations from his commutation decision, any decision he would make to deny Mr. Johnson's commutation request could reasonably be viewed with a jaundiced eye because of the close proximity to the election.

Donnie Johnson acknowledges that it may well be impossible to remove all political concerns from what is supposed to be an act of grace. This Court, however, has the power to remove some of those concerns from this case, along with the appearance that Governor Bredesen's decision as to whether Mr. Johnson should live or die is a matter of political expediency rather than what it should be: a reasoned reflection of grace.

WHEREFORE, Donnie Johnson respectfully requests that this Court reset his execution date for a date after the November 7, 2006, Tennessee Gubernatorial election.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 14, 2006, a copy of the foregoing was placed in the United States mail, first-class postage prepaid, addressed to Alice Lustre, 425 Fifth Avenue North, Nashville, Tennessee 37243.