

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

STATE OF TENNESSEE

)

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v.

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No. M1987-00072-SC-DPE-DD

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DONNIE E. JOHNSON

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RESPONSE IN OPPOSITION TO  
MOTION TO RESET EXECUTION

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On June 20, 2006, this Court entered an Order setting Donnie Johnson's execution date for October 25, 2006. On July 14, 2006, Johnson filed the instant motion requesting that this Court reset the execution date to some date beyond the November 7, 2006, gubernatorial election. The motion should be denied because it fails to provide any legitimate justification to alter the Court's previous order.

"[P]ardon and commutations decisions have not traditionally been the business of the courts; as such, they are rarely, if ever, appropriate subject for judicial review." *Connecticut Bd. of Pardons v. Dumschat*, 453 U.S. 458, 464 (1981). Clemency decisions are left to the sole discretion of the Governor under the Tennessee Constitution. *See* Tenn. Const., Art. III, § 6; Tenn. Code Ann. §§ 40-27-101 to 40-27-109 (2003). Johnson does not here allege that the Governor has, or will, render a decision based upon whim or a flip of a coin or that he has been, or will be, arbitrarily denied access to the clemency process. *Ohio Adult Parole Auth. v. Woodward*, 523 U.S. 272, 289 (1998)

(O'Connor, J., concurring). Rather, he complains that the executive may be unable or unwilling to render a objective decision out of fear of political reprisal. In essence, Johnson argues that Tennessee's executive cannot be trusted to exercise his constitutional clemency powers properly because of some inherent bias created by the very political process that has entrusted him to make the clemency decision in the first place.

But executive clemency is fundamentally different from adjudicatory decisions within the judicial branch, and Johnson's attempt to inject judicial recusal principles into the executive clemency process should be rejected. For example, the clemency process permits the executive to take into consideration matters beyond the scope of judicial review unfettered by rules of evidence, procedure or other indicia of judicial procedure. *See, e.g.*, Tenn. Code Ann. § 40-27-109(a) ("After consideration of the facts, circumstances and any newly discovered evidence in a particular case, the governor may grant exoneration to any person whom the governor finds did not commit the crime for which such person was convicted."). Moreover, unlike the judicial process, in which a "judge sees only with judicial eyes," *Herrera v. Collins*, 506 U.S. 390, 413 (1993), the clemency decision is necessarily influenced by the unique background, life experience, and presumably political philosophy of the executive decision-maker. And, while executive clemency is inherently an act of "grace" or "mercy," the decision to grant or deny a clemency request goes beyond the individual who happens to hold office. Indeed,

one commentator has observed that, when the people's elected executive considers clemency, "he or she acts as the 'distilled conscience' of the citizenry." *Bacon v. Lee*, 549 S.E.2d 840, 852 (N.C. 2001) (quoting Brown, *The Quality of Mercy*, 40 U.C.L.A. L. Rev. 327, 328-30 (1992)).


The framers of the Tennessee Constitution granted broad authority to the executive in the discharge of his clemency power. To accept Johnson's argument would improperly inject this Court into the operation of a coordinate political branch. Our courts presume that all public officials will perform their duties in good faith and in the manner prescribed by law. *See Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *Williams v. American Plan Corp.*, 216 Tenn. 435, 441, 392 S.W.2d 920 (1965); *Reeder v. Holt*, 220 Tenn. 428, 435-36, 418 S.W.2d 249 (1967). Johnson's unsupported conjecture that the Governor cannot be trusted to do so provides no legal basis for altering this Court's prior order.


WHEREFORE, this Court should deny the motion to reset Johnson's execution date.

Respectfully submitted,

PAUL G. SUMMERS  
Attorney General & Reporter

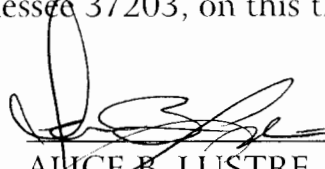
  
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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served via U.S. Mail, first class postage prepaid, on Christopher M. Minton, Office of the Federal Public Defender, 810 Broadway, Suite 200, Nashville, Tennessee 37203, on this the 18<sup>th</sup> day of July, 2006.



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