

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

STATE OF TENNESSEE

)

)

v.

)

No. M1987-00072-SC-DPE-DD

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DONNIE E. JOHNSON

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RESPONSE IN OPPOSITION TO MOTION  
TO APPOINT CLEMENCY COUNSEL  
AND 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 October 3, 2006, the Tennessee Post-Conviction Defender filed a motion on Johnson's behalf seeking an order of appointment to represent Johnson in clemency proceedings and requesting that the Court reset the execution date to afford the post-conviction defender's office "the time necessary to represent Mr. Johnson properly." Johnson asserts that attorney Mark Pickrell, who had previously been appointed to represent him in federal habeas corpus proceedings and currently appears as counsel of record for Johnson in an appeal before the United States Court of Appeals for the Sixth Circuit, *Johnson v. Bell*, 6th Cir. No. 05-6925, will not be representing Johnson in any future executive clemency proceedings due to a perceived conflict of interest.<sup>1</sup>

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<sup>1</sup>Johnson's characterization of attorney Pickrell and the law firm of Waller Lansden Dortch & Davis LLP as "clemency counsel" is inaccurate. With less than three weeks before his scheduled execution, no application for clemency has been filed requesting relief in any form

Johnson's motion should be denied because it provides no legitimate justification to alter the Court's previous order setting an execution date. There is no constitutional or statutory right to court-appointed counsel in executive clemency proceedings. *See Coleman v. Thompson*, 501 U.S. 722, 756-57 (1991) (no right to counsel beyond the first appeal as of right). The statute governing proceedings before the Tennessee Board of Probation and Parole does not provide for the appearance of counsel, let alone the appointment of counsel, at hearings on requests for pardons, reprieves or commutations, Tenn. Code Ann. §§ 40-28-104, -106, although the Board may permit such appearance if it wishes. *Compare with* Tenn. Code Ann. § 40-28-106(b)(1) (authorizing the Board to appoint counsel in parole revocation proceedings). And nothing in the statutes or the rules of this Court governing appointments creates any statutory right to the appointment of counsel when a clemency petition is lodged with the Governor. *See, e.g.*, Tenn. Sup. Ct. R. 13 (addressing, *inter alia*, appointment of counsel in criminal, juvenile delinquency, state habeas corpus, post-conviction, and parole revocation proceedings).

While the Post-Conviction Defender's enabling statute permits him in his discretion to represent death-sentenced inmates before the Board of Probation and Parole and the Governor, that statute creates no *right* to such representation, nor is there

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from the Governor of Tennessee. While the Waller firm may deem it appropriate to decline further representation of Johnson, there is certainly no necessity for a "withdrawal" of counsel from non-existent proceedings. The State further notes that, to date, Mr. Pickrell has taken no steps to withdraw from representation of Johnson in the proceedings *actually pending* before the Sixth Circuit on the basis of any perceived conflict of interest.

any other statutory authority for judicial appointment of counsel for purposes of an executive proceeding.

Where the post-conviction defender determines that it is in the interest of justice, *the post-conviction defender may represent, without additional compensation, a death sentenced inmate*, who, at the completion of both state post-conviction proceedings and federal collateral review, remains under a sentence of death, if such individual is presently represented by the post-conviction defender or if such individual is not currently represented by the post-conviction defender but is unable to secure counsel due to indigency, *during clemency proceedings before the Tennessee board of probation and parole and the governor . . . .*

Tenn. Code Ann. § 40-30-206(e). *Cf.* Tenn. Code Ann. § 40-30-206(a) (Defender’s participation in post-conviction proceedings requires court determination that inmate “requires the appointment of counsel”); § 40-30-206(b) (Defender’s participation in capital direct appeal requires judicial determination of indigency *and* “court determination that competent counsel is unavailable”); § 40-30-206(c) (Defender’s participation in federal court proceedings requires federal court appointment and reimbursement under 18 U.S.C. § 3006A).

Johnson’s reliance on this Court’s order resetting the execution date in *State v. Harbison*, No. M1986-00093-SC-OT-DD (Tenn. Aug. 15, 2006), is misplaced. The July 17 appointment of the Post-Conviction Defender in that case was expressly for purposes of proceedings before this Court.<sup>2</sup> The August 15 order denying the Defender’s motion

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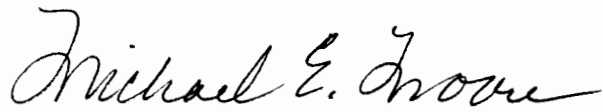
<sup>2</sup>At the time of appointment, a request to issue a certificate of commutation under Tenn. Code Ann. § 40-27-106 was pending before this Court. The Court specifically appointed the Post-Conviction Defender to “represent Harbison in the instant case No. M1986-00093-SC-OT-DD.”

to withdraw and resetting the execution date did not address the question of the right to counsel in executive clemency proceedings, nor did the Court's order appoint the Defender or any other counsel to represent Harbison for clemency purposes.

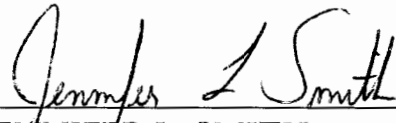
Clemency proceedings are not part of the judicial process. They are conducted entirely by the executive branch, independent of the direct appeal and collateral review processes. *Ohio Adult Parole Authority v. Woodward*, 523 U.S. 272, 284 (1998). While traditionally available to capital inmates as an alternative avenue of relief from a death sentence, clemency has not generally "been the business of courts." *Connecticut Bd. of Pardons v. Dumschat*, 453 U.S. 458, 464 (1981). As stated previously, no petition for clemency on Johnson's behalf has yet been submitted to the Governor. If and when that occurs, should Johnson and/or counsel appearing on his behalf think that additional time for preparation is necessary, such request should be made directly to the executive, who has both the discretion and authority to grant a reprieve from this Court's scheduled execution date. Tenn. Code Ann. § 40-27-101. But this Court plainly lacks the statutory authority to appoint "clemency counsel." Moreover, it should not inject itself into the operation of a coordinate political branch. *Cf. State v. Tyson*, 603 S.W.2d 748, 752 (Tenn. Crim. App. 1980) (no statutory authority for appointment of counsel to represent defendant in a sister state).

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

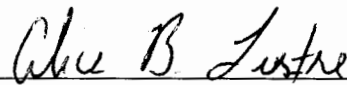
Respectfully submitted,



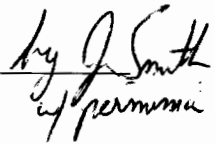
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by J. Smith  
w/ permission

## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served via U.S. Mail, first class postage prepaid, on Donald E. Dawson, Tennessee Post-Conviction Defender, 530 Church Street, Suite 600, Nashville, TN 37243, on this 5<sup>th</sup> day of October, 2006.

Alice B. Lustre by J. Smith  
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