

FILED
OCT 04 2019
Clerk of the Appellate Courts
Rec'd By LM

IN THE TENNESSEE SUPREME COURT
AT NASHVILLE

STATE OF TENNESSEE,)
)
 Movant,)
)
 v.) Case No. M2001-01865-SC-R11-PD
)
 DONALD RAY MIDDLEBROOKS,) CAPITAL CASE
)
 Respondent.)

REPLY TO RESPONSE IN OPPOSITION TO MOTION FOR EXTENSION OF
TIME TO FILE RESPONSE TO MOTION TO SET EXECUTION DATE

The State Attorney General overlooks several key facts and the applicable law. Middlebrooks appreciates the concession that each individual be permitted a "reasonable time" in which to file his response. Resp. 5. A reasonable time is at least ninety days.

First, the State Attorney General chose the timing; he chose to file nine motions at once. Undersigned counsel represents seven of the nine men. Contrary to the AG's response, counsel has not "represent[ed] each of these defendants for a number of years." Resp. 4. As the AG knows, the assigned lawyers for five of these clients resigned their positions with the office in the summer of 2018.

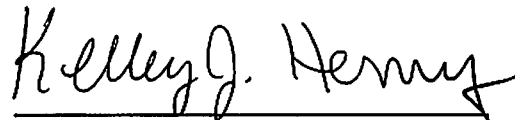
Second, although it is true that each of the seven men for whom the AG seeks execution dates is mentally ill, competency to be executed cannot be determined until an execution is "imminent." *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45 (1998). Before undersigned counsel can represent to this Court that it is

appropriate to initiate a proceeding under *Van Tran*, she must review the records in the file, consult with mental health experts, conduct related investigation, and analyze the data in terms of the current state of the law. *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999). Most essentially, counsel must meet with each individual for a sufficient amount of time to form a good-faith opinion about whether he meets the threshold showing for a competency-to-be-executed claim under current law. *Compare Irick*, 320 S.W.3d at 284 *with Madison v. Alabama*, 139 S. Ct. 718 (2019) (broadening the standard from that articulated in *Irick*).

The AG ignores that Supreme Court Rule 12.4(A) requires that each response set forth any reason in support of a request for a certificate of commutation as permitted by statute and case law. Tenn. Code Ann. § 40-27-106; *Workman v. State*, 22 S.W.3d 807 (Tenn. 2000). Counsel cannot fulfill her ethical duty to present reasons for a certificate of commutation without performing a considered and thoughtful review of the history of each case and the current state of the law as it pertains to each individual. Tennessee is unique in granting this Court the statutory duty to consider each individual's case for a certificate of commutation. This Court can only discharge this solemn duty if it is provided with a detailed and well-researched request. In a matter of this magnitude, each individual client deserves a full and fair opportunity to present his case. Anything less than ninety days is a denial of due process under the state and federal constitutions. U.S. CONST. amend. VI, VIII, XIV; Tenn. Const. art. I, § 8.

The AG's request for mass executions has already disrupted ongoing litigation in other capital cases in federal court. Counsel is devoting all the resources of her unit to preparation of the responses in these seven cases. Even so, ninety days is not nearly enough time to complete the task at hand. Anything less is simply untenable.

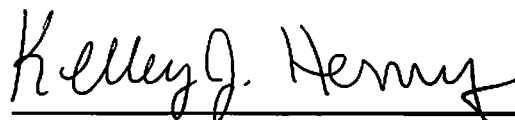
WHEREFORE, Middlebrooks' motion for an extension of time to respond to the AG's motion to set his execution date should be granted.



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CERTIFICATE OF SERVICE

I, Kelley J. Henry, certify that a true and correct copy of the foregoing Unopposed Motion for Extension of Time to File Response in Opposition to Request to Set Execution Date was served via email and United States Mail to opposing counsel, Amy Tarkington, Associate Solicitor General, P.O. Box 20207, Nashville, Tennessee, 37202.



Kelley J. Henry