

IN THE TENNESSEE SUPREME COURT
AT NASHVILLE

STATE OF TENNESSEE)
)
v) No. M1987-00072-SC-DPE-DD
)
DONNIE E. JOHNSON)

REPLY TO RESPONSE TO
MOTION TO APPOINT CLEMENCY COUNSEL
AND RESET EXECUTION DATE

Contrary to the state’s assertions, Donnie Johnson’s motion for appointment of counsel and for a stay are well-taken. The requested relief is appropriate in the interest of justice. The state’s arguments are not well taken:

1. First, the state misrepresents the situation at hand, when it claims that Waller, Lansden has only represented Donnie Johnson in federal court. As a matter of fact, before October 2, 2006, Mr. Pickrell and Waller, Lansden attorneys were, acting *pro bono*, intimately involved in representing Donnie Johnson by developing a case for clemency. As Johnson’s clemency counsel, Waller, Lansden attorneys had even discussed the clemency process with the Governor’s counsel. Waller, Lansden attorneys had researched and investigated Johnson’s case for clemency, and Mr. Pickrell had personally obtained the formal clemency application from the Board of Probation and Parole. See Exhibit 1 (Affidavit of C. Mark Pickrell). It was in the middle of that process – before Waller, Lansden was able to file a formal petition – that the conflict of interest arose which requires Waller, Lansden to withdraw from any further representation.

2. To say that somehow Waller, Lansden had to file a clemency petition before it could be considered Johnson’s clemency counsel is simply not true, factually or legally. Waller,

Lansden has been providing Donnie Johnson legal counsel and acting as his legal representative. Waller, Lansden has been acting on Johnson's behalf with the ultimate goal of securing clemency. Waller, Lansden has been investigating and preparing to file a formal clemency petition. See Exhibit 1, ¶¶4, 5. Waller, Lansden was not required to file a formal petition to be acting as counsel. Were that true, no one would have legal counsel until counsel actually filed a document in court. Of course, much legal representation occurs before a party ever files a formal written document, such as a complaint. That is the exact situation here.¹

3. Further, the state's assertion that *Harbison* does not entitle Johnson to clemency counsel is wrong. Harbison specifically asked this Court for "appointment of counsel to represent him in his request for clemency before the Board of Probation and Parole and the Governor." *In Re Harbison*, No. M1986-0083-SC-OT-DD, Response In Opposition To Motion To Set Execution Date, p. 10. This Court granted that motion. The state's claim that this Court appointed the PCDO to represent Harbison to pursue a certificate of commutation (State's Response, p. 3 n.2) makes no sense: By the time this Court appointed the PCDO to represent Harbison, this Court had already denied Harbison his requested certificate.

4. In fact, when the PCDO moved to withdraw as counsel, the PCDO specifically stated that: "The PCD was appointed by the Court to represent Mr. Harbison in the last stages of his litigation, including any clemency proceeding. . . ." State v. Harbison, No. M1986-00093-SC-OT-DD, Motion To Withdraw As Counsel, p. 3. The PCDO then proceeded to explain, in great

¹ Equally important, had Donnie Johnson filed a clemency petition challenging the actions of Paul Summers, Waller, Lansden would still have to withdraw for all the reasons expressed by Mr. Pickrell in his affidavit. This likewise establishes that it is the existence of the attorney-client relationship, not the formal filing of a clemency petition, which determines whether Waller, Lansden has been counsel for Donnie Johnson with respect to clemency. Waller, Lansden has.

detail, “The Demands of Clemency Litigation” including those imposed by the American Bar Association (Id., pp. 3-6). The PCDO further explained the extensive matters which “would have to be reviewed, analyzed, and evaluated” by the PCDO and “presented in any clemency proceeding for Mr. Harbison.” Id. at 9. It was on the basis of the PCDO’s extensive discussion of its clemency responsibilities that this Court granted Harbison’s motion for stay. The state’s attempt to claim that Harbison is not a clemency case does not withstand scrutiny.

5. While Johnson’s entitlement to clemency counsel is fully supported by *Harbison*, it is also supported by the PCDO statute. That statute establishes that the PCDO shall be counsel in “clemency proceedings” before the Board of Probation and Parole and the Governor. The statute does not use the word “hearing.” It uses the broader term “proceedings.” As noted *supra*, “proceedings” encompass preparation, investigation, filing of a petition, and any hearings (if granted). The only requirement of Tennessee law necessary for the PCDO to undertake that representation is explicitly contained in the statute: The Post-Conviction Defender must “determine[] that it is in the interest of justice” that Mr. Johnson be represented in “clemency proceedings.” Tenn. Code Ann. §40-30-206. With the Post-Conviction Defender having made that certification as required by Tennessee law, Donnie Johnson is entitled to be represented by the PCDO.

6. Because Johnson is entitled to have the PCDO represent him under these circumstances, his motion falls squarely within the scope of *Harbison*, which recognized that, upon appointment, the PCDO is entitled to adequate time to provide the representation to which a petitioner is entitled: The investigation and preparation of a clemency petition, and representation in further proceedings. As the Supreme Court has noted elsewhere, in a capital case, the need for counsel exists even before a formal pleading is filed. See *McFarland v. Scott*,


114 S.Ct. 2568, 2573 (1994). As in *Harbison*, Donnie Johnson is entitled to counsel under the PCDO statute, and counsel is entitled to a reasonable amount of time to properly represent him.

7. With his life at stake, Donnie Johnson has lost his clemency counsel due to circumstances beyond his control. Those circumstances have left him without clemency counsel to prepare and present his case for clemency. The state's assertion that Donnie Johnson should be executed without counsel for clemency is legally and morally untenable, especially when this state of affairs has been brought about by Waller, Lansden's adherence to its ethical duties.

Waller, Lansden ought not see its former client executed under these circumstances.

8. Rather, the PCDO should be appointed, and if not, this Court should give the PCDO and/or Mr. Johnson sufficient time to "recruit qualified members of the bar who are willing to provide" Mr. Johnson representation under these circumstances. See Tenn. Code Ann. §40-30-206(d)(4).

Respectfully submitted,


Donald E. Dawson
Post-Conviction Defender
530 Church Street
Suite 600
Nashville, Tennessee 37243
(615) 741-9331

*By permission
Paul Morant
Deputy P-C D*

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing motion has been hand-delivered to Alice Lustre, Office of the Attorney General, John Sevier Building - Second Floor, 500 Charlotte Avenue, Nashville, Tennessee 37243.

Date: 10-05-06

Donald Dawson by permission
Paul J. Morrow
Deputy P-C D

EXHIBIT 1

AFFIDAVIT

STATE OF TENNESSEE)
)
COUNTY OF DAVIDSON)

Affiant C. Mark Pickrell swears as follows:

1. I am an adult resident citizen of Nashville, Davidson County, Tennessee.
2. I am a member in good standing of the Tennessee Supreme Court Bar.
3. I am currently a Partner at Waller Lansden Dortch & Davis, LLP.
4. Mr. Johnson requested that Waller Lansden and I represent him in clemency proceedings. We agreed to do so on a *pro bono* basis. At that time Waller Lansden and I became clemency counsel.
5. To be sure, Waller Lansden and I have not filed formal papers requesting clemency. We have, however, engaged in substantial efforts aimed at that goal, including, *inter alia*,
 - (a) researching issues for presentation at a clemency proceeding;
 - (b) investigating facts for such presentation;
 - (c) meeting with State personnel knowledgeable about and involved in the clemency process;
 - (d) meeting, corresponding, and communicating with Mr. Johnson's other counsel regarding final-stage filings;
 - (e) corresponding and communicating with the Board of Probation and Parole regarding the Board's clemency process, rules, proceedings, and forms;
 - (f) preparing drafts of Mr. Johnson's initial clemency filings; and
 - (g) meeting on multiple occasions with Mr. Johnson for the purpose of determining an appropriate clemency strategy, filings, and presentation.
6. Over the course of the past month, I, along with other partners and associates of the firm, have expended over seventy hours preparing for Mr. Johnson's clemency proceedings.
7. I intend, and have intended since Mr. Summers joined the firm, to move to withdraw from representing Mr. Johnson in the Sixth Circuit as soon as possible. Any implication,

as suggested by the State, that I have sought to represent Mr. Johnson in the Sixth Circuit while withdrawing from Mr. Johnson's clemency representation is false.



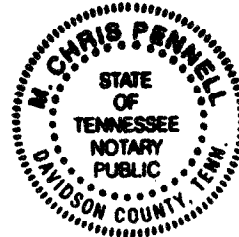
C. Mark Pickrell

Sworn and subscribed before me this 5th day of October, 2006.



Notary Public

My commission expires:



My Commission Expires MAY 22, 2010