

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

PHILIP RAY WORKMAN,)	
)	
Petitioner,)	
)	
V.)	No. 94-2577-D
)	
RICKY BELL, Warden,)	
RIVERBEND MAXIMUM SECURITY)	
INSTITUTION,)	
)	
Respondent.)	

ORDER GRANTING PETITIONER'S AMENDED MOTION TO CONFIRM APPOINTED
COUNSEL'S AUTHORITY TO PROVIDE REPRESENTATION IN CLEMENCY
PROCEEDINGS

Before the Court is Petitioner's Amended Motion To Confirm Appointed Counsel's Authority To Provide Representation In Clemency Proceedings (doc. no. 192). Petitioner is a death-sentenced inmate currently incarcerated at Riverbend Maximum Security Institution, in Nashville, Tennessee. The Court has denied his petition for writ of habeas corpus, as well as a post-judgment motion for relief pursuant to Fed. R. Civ. P. 60(b). Petitioner now seeks an order "confirming" his federally appointed counsel's authority to continue representing him in state clemency proceedings. The execution of Petitioner's sentence of death is presently scheduled for May 9, 2007.

The Court has previously been confronted with the issue of whether the statutory authority for appointment of counsel in capital habeas proceedings extends to proceedings for clemency before the state executive. The Sixth Circuit has held, in House v. Bell, 332 F.3d 997, 999 (6th Cir. 2003), that 21 U.S.C. § 848(q)(8), re-codified at 18 U.S.C. § 3599 after House, does not provide for the continuation of federally appointed habeas counsel in state post-conviction proceedings. Though House was not concerned expressly with whether § 848(q) provided for federal habeas counsel's continued representation in state clemency proceedings, the Sixth Circuit appeared to adopt a clear interpretation of 848(q) which would bar continued representation in state clemency: "The rule is simple. The two representations shall not mix. The state will be responsible for state proceedings, and the federal government will be responsible for federal proceedings." Id. In Alley v. Bell, no. 97-3159, doc. no. 181, this Court noted that § 848(q) plainly appears to provide for the continued representation of federal habeas counsel in state clemency proceedings if the petitioner is otherwise unable to obtain counsel. Relying on the Tenth Circuit's analysis in Hain v. Mullen 436 F.3d 1168, 1172 (10th Cir. 2006), this Court reasoned that the concerns underlying House's restriction on continued representation in state post-conviction proceedings do not apply with equal force in the context of state clemency proceedings and

that, therefore, the plain language of the statute should prevail in the clemency context. Thus, the Court entered an order, at doc. no. 183, "confirming" federal counsel's authority to continue in clemency upon the petitioner's showing that he was unable to obtain the services of the Tennessee Post-Conviction Defender for purposes of his pending clemency proceedings. Subsequent to this Court's order in Alley, a panel of the Sixth Circuit entered an order "confirming" federally appointed counsel's continued representation of a Tennessee death-sentenced inmate in state clemency proceedings in Abdus-Samad v. Bell, no. 03-6404 (Nov. 15, 2006). Though the panel's order is in summary form and cannot overrule the en banc holding of House, it appears to mark a departure from or exception to the rule announced in House and, in any event, is directly on-point with the issue raised in Alley and the instant motion.

This Court will continue to adhere to its analysis in Alley. Counsel was appointed under § 848(q), which plainly appears to provide for federally appointed habeas counsel's continued representation in state clemency proceedings, provided that the petitioner is unable to obtain counsel elsewhere. Notwithstanding House, a panel of the Sixth Circuit has recently "confirmed" this authority of federally appointed counsel under identical circumstances. Petitioner has provided the Court with the declaration of the Tennessee Post-Conviction Defender that it is not "in the interests of justice" for his Office to represent

Petitioner in state clemency proceedings. It would appear, therefore, that Petitioner is unable to obtain representation for the clemency proceedings he contemplates initiating in the near future. Thus, for good cause shown, Petitioner's Motion To Confirm Appointed Counsel's Authority To Provide Representation In Clemency Proceedings is GRANTED.

IT IS SO ORDERED this 23rd day of March, 2007.

s/Bernice Bouie Donald
BERNICE BOUIE DONALD
UNITED STATES DISTRICT COURT JUDGE