

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

FILED
2013 OCT 14 AM 10:48

IN RE:)
)
DAVID EARL MILLER)

No. E1982-00075-SC-MWR-DW
APPELLATE COURT CLERK
NASHVILLE

**REQUEST FOR TEMPORARY RELIEF
AND EXTENSION OF TIME TO RESPOND**

Comes now David Earl Miller, through undersigned counsel, and requests temporary relief in the form of an abeyance of the instant proceeding and an extension of time to respond to the State's motion to set an execution date until such time as Mr. Miller will not be disadvantaged by his lack of legal representation.

Request for Temporary Relief

As this Court is aware, on October 1, 2013, the federal government shutdown as a result of Congress's failure to pass a budget bill and/or a resolution to continue funding the federal government in the absence of such a bill.

On October 3, 2013, the State moved this Court to schedule execution dates for four death row inmates, including David Miller, who are represented by the four attorneys employed in the capital habeas unit of Federal Defender Services of Eastern Tennessee, Inc., ("FDSET").

Counsel received notice of the State's four motions on October 4, 2013. The State's simultaneous requests to schedule execution dates for four of FDSET's

clients are unprecedented and has overwhelmed the four habeas attorneys, who were already under increased pressure due to the office's current fiscal crisis. Pursuant to Tenn. S. Ct. Rule 12.4(A), responses to the State's four motions, including the motion for Miller's execution date, must be filed with this Court within ten days. Temporary relief from the ten-day filing deadline is requested for the reasons explained below.

Counsel's time and resources were already stressed due to the government shutdown when the State filed its four motions for execution dates. FDSET is a community defender organization ("CDO") established under 18 U.S.C. §3006A(a) & (e)(2)(B). FDSET is a not-for-profit organization. It is not a federal office and its employees, including undersigned counsel, are not federal employees. FDSET, however, is funded by the federal government through periodic sustaining grants. 18 U.S.C. §3006A(g)(2)(B)(ii).

Due to Congress's failure, FDSET is not receiving its periodic grants. As of October 18, 2013, FDSET will have spent the funds from its previous grants. FDSET will have only a skeleton staff beginning October 21, and in effect, will be closed. Because FDSET employees, and undersigned counsel, are not federal employees the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §201, *et. seq.*, applies.¹ Under the FLSA, employees cannot work without being paid. Nor can employees volunteer for work for which they are usually paid.

¹ In contrast, essential federal employees can be required to work without pay.

Although the office shutdown date has been a moving target, counsel have spent considerable time organizing, and then revising, contingency plans for the office shutdown. A substantial amount of time has been spent identifying those deadlines in the near-future which are, and are not, eligible for continuances; counsel have been preparing continuance motions where appropriate; and, counsel have been working extra hours to prepare for immovable court dates and complete ahead of time those pleadings for which continuances are unavailable.²

Mr. Miller is entitled to adequate and continuous representation as set forth in 18 U.S.C. §3599(a)(1)(B) & (a)(2) & (e). This statutory right to continuous legal representation includes the assistance of counsel for “all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and ... competency proceedings and proceedings for executive clemency[.]” 18 U.S.C. §3599(e). This right also includes reasonably necessary funding for “investigative, expert, or other services” for Mr. Miller’s representation. 18 U.S.C. §3599(a)(1)(B) & (a)(2) & (f) & (g)(2).

Due to the government shutdown on October 1st and the ensuing instability surrounding FDSET’s federal funding, Mr. Miller’s legal representation has already been interrupted.

Due to a lack of federal funding, on October 21, 2013, he will be without the “adequate representation or investigative, expert, or other reasonably necessary

² FDSET’s habeas attorneys are also responsible for a small handful of federal trial cases.


services” as guaranteed under §3599(a)(1) & (a)(2).

The State of Tennessee is requesting that this Court schedule Mr. Miller’s execution date. There is no more critical time period in the course of his legal representation than now. Every day counts towards counsel’s efforts to adequately protect Mr. Miller’s constitutional rights. Through no fault of Mr. Miller or undersigned counsel, counsel is unable to fulfill their statutory and ethical obligations. Under these circumstances, principles of Due Process and Equal Protection dictate that the State should not be able to proceed towards Mr. Miller’s execution. Accordingly, the case should be held in abeyance until Mr. Miller’s legal representation is fully restored. Under the present circumstances, preserving the status quo in this matter of life or death is the only just and equitable action.

WHEREFORE, Mr. Miller respectfully requests that this Court enter an order:

- (1) holding the case in abeyance pending restoration of FDSET's federal funding;
- (2) directing undersigned counsel to notify this Court within 24 hours from when FDSET's funding is fully restored; and,
- (3) directing a response to the State's motion to set an execution date to be filed in this Court within thirty (30) days from the date the notice of restoration of funding is filed.

Respectfully Submitted,



Dana C. Hansen Chavis
Asst. Federal Community Defender
BPR # 019098

Stephen M. Kissinger
Asst. Federal Community Defender
(Motion for Admission *Pro Hac Vice* pending)

Designation of Attorney of Record

Dana C. Hansen Chavis is Mr. Miller's attorney of record upon whom services shall be made. Counsel's contact information is:

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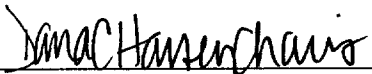
Counsel prefers to be notified of orders or opinions of the Court by Email at: dana_hansen@fd.org

Certificate of Service

I hereby certify that a copy of the foregoing document is being hand-delivered to:

Jennifer L. Smith
Deputy Attorney General
500 Charlotte Avenue
Nashville, Tennessee 37202-0207

on October 14, 2013.



Dana C. Hansen Chavis