

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SCOTT ALLEN HAIN,

Petitioner - Appellant,

v.

MIKE MULLIN, Warden, Oklahoma
State Penitentiary,

Respondent - Appellee.

No. 03-5038

No. 03-5049

(D.C. No. 98-CV-331-K)

(N.D. Oklahoma)

ORDER
Entered April 2, 2003

Before **BRISCOE**, **LUCERO**, and **MURPHY**, Circuit Judges.

This matter is before the above panel on petitioner Scott Allen Hain's emergency petition for panel rehearing. Hain asks us to reconsider our March 26, 2003, decision affirming the district court's denial of funding under 21 U.S.C. § 848(q)(8) for federally-appointed counsel to represent him in a state clemency proceeding. Hain also asks us to reconsider our March 21, 2003, decision denying his emergency motion for stay of execution and affirming the district court's denial of a stay of execution.

Before addressing the specific arguments asserted by Hain, we first address the United States' assertion that the case is now moot. According to the parties' pleadings,

the Oklahoma Pardon and Parole Board conducted a clemency hearing for Hain on March 31, 2003, and, at the conclusion of the hearing, voted unanimously against granting clemency. The parties' pleadings further indicate that Hain's federal habeas counsel appeared at the hearing and argued on Hain's behalf. The United States asserts that the § 848(q)(8) issue is moot since Hain received his state clemency hearing and was represented by counsel at the hearing. Hain disagrees. Hain argues that, as a result of the lack of federal funding, his counsel was unprepared and gave a poor presentation. Hain asserts that if his pending petition for rehearing en banc is granted and the panel decision is reversed, his counsel could engage in more thorough preparation, with the availability of funding, and could request a second clemency hearing from the Oklahoma Pardon and Parole Board. Hain further asserts that, if his counsel is better prepared, there is a chance the outcome of a second clemency proceeding would be different from the first.

We agree with Hain that a valid case or controversy remains pending before this court. The crux of Hain's appeal is that § 848(q)(8) affords him a right to federally-appointed and funded counsel to represent him in his state clemency proceedings. Although Hain has now received a clemency hearing and was represented by counsel at that hearing, it is undisputed that he did not receive what he claims in his appeal that he is entitled to, i.e., representation by federally-appointed and funded counsel. If Hain would ultimately prevail in this appeal, it remains possible that he could persuade the Oklahoma Pardon and Parole Board to reconsider its decision and/or grant him a new clemency

hearing. Thus, we conclude that Hain “continue[s] to have a personal stake in the outcome” of this case. Spencer v. Kemna, 523 U.S. 1, 7 (1998) (internal quotations omitted).

We now turn to the merits of Hain’s petition for panel rehearing. After carefully considering Hain’s arguments, we deny his petition with respect to the issue of funding under § 848(q)(8). The majority of the panel continues to believe § 848(q)(8) encompasses only federal proceedings, and therefore does not authorize funding for representation in a state clemency proceeding. Judge Lucero continues to hold the views expressed in his dissent on the issue.

The stay issue presents a closer question. In our prior order denying Hain’s request for a stay of execution, we noted that Hain’s federal habeas proceedings had been finally resolved and that, accordingly, 28 U.S.C. § 2251 afforded no basis for staying the scheduled execution. We also rejected the All Writs Act, 28 U.S.C. § 1651, as a basis for staying the execution. In his petition for rehearing, Hain effectively concedes that § 2251 is not applicable here. He asserts, however, that the All Writs Act remains a viable basis for staying the scheduled execution. We therefore focus on that question.

The All Writs Act provides that “[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” 28 U.S.C. § 1651(a). Generally speaking, the All Writs Act appears to afford a federal appellate court authority

to issue a stay in order to prevent an appeal from becoming moot. See Renaissance Arcade & Bookstore v. County of Cook, 473 U.S. 1322, 1323 (1985). The Supreme Court has indicated, however, that the All Writs Act is not available “[w]here a[nother] statute specifically addresses the particular issue at hand.” Pennsylvania Bureau of Corr. v. United States Marshals Serv., 474 U.S. 34, 43 (1985).

It could be argued that § 2251, which specifically addresses stays of state court proceedings (including executions), is controlling whenever a stay of a state execution is sought and thereby trumps the All Writs Act. We ultimately reject this view, however, in light of Lenhard v. Wolff, 443 U.S. 1306 (1979). In Lenhard, Justice Rehnquist, acting alone, granted a stay of execution pursuant to the All Writs Act for a state habeas petitioner pending consideration of the petitioner’s certiorari request by the full Court. Because only a petition for writ of certiorari was pending before the Court, rather than an actual “habeas corpus proceeding” (i.e., a habeas case in which certiorari had been granted), it is reasonable to infer from Justice Rehnquist’s reliance on the All Writs Act that § 2251 was inapplicable under the circumstances presented. See 28 U.S.C. § 2251 (allowing “[a] justice or judge . . . before whom a habeas corpus proceeding is pending” to grant a stay of pending state proceedings) (emphasis added). More importantly, we conclude from Lenhard that the All Writs Act remains a viable source of authority in the event that unique circumstances render § 2251 inapplicable.

Having concluded that the All Writs Act is an available source of authority under

the unique circumstances presented here, we further conclude that a stay of Hain's scheduled execution is now necessary to protect our jurisdiction.¹ As previously noted, Hain asserts that if the pending petition for rehearing en banc is granted and the panel decision is reversed, his federal counsel would have the necessary funding to fully prepare a case for clemency and could ask the Oklahoma Pardon and Parole Board to conduct a second hearing and reconsider its vote. Obviously, these tasks would take time. Given the imminency of the scheduled execution and the time necessarily involved in considering and deciding the petition for rehearing en banc, it is apparent that the petition for rehearing en banc will be rendered moot if Hain's execution is allowed to proceed as scheduled. Accordingly, we grant Hain's petition for panel rehearing with respect to our denial of his request for an emergency stay of execution.

Finally, we note that Hain has filed a pro se Motion for a Stay of Execution. In the motion, Hain asks the court to stay his scheduled execution and grant him leave to file a second or successive application for federal habeas relief. As a general rule, we do not entertain pro se pleadings from litigants who are represented by counsel. See United

¹ In our March 26, 2003 decision, we concluded we had jurisdiction over Hain's appeal of the § 848(q)(8) issue. To briefly expand on that conclusion, we believe that the collateral order doctrine affords us jurisdiction under 28 U.S.C. § 1291 to review the district court's ruling on the § 848(q)(8) issue. See Swint v. Chambers County Comm'n, 514 U.S. 35, 42 (1995) (noting that the collateral order doctrine affords appellate jurisdiction over "decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action")

States v. Guadalupe, 979 F.2d 790, 795 (10th Cir. 1992); 28 U.S.C. § 1654 (noting that “parties may . . . conduct their own cases personally or by counsel”) (emphasis added). In any event, his request for a stay is now moot. As for his request for leave to file a second or successive habeas petition, we note that most, if not all, of the claims Hain seeks to assert were asserted previously in his original habeas petition. To the extent he is attempting to assert new claims, he has failed to satisfy the requirements for doing so in 28 U.S.C. § 2244(b)(2) (i.e., demonstrating that the claims rely on a new rule of constitutional law or on a factual predicate that could not have been discovered previously through the exercise of due diligence).

The emergency petition for panel rehearing is DENIED in part and GRANTED in part. Hain’s execution, currently scheduled by the State of Oklahoma for April 3, 2003, is STAYED pending resolution of this appeal. Hain’s pro se Motion for a Stay of Execution is DENIED. The petition for en banc review remains pending.

Entered for the Court

Mary Beck Briscoe
Circuit Judge

Nos. 03-5038, -5049, *Hain v. Mullin*.

MURPHY, Circuit Judge, dissenting.

The majority has indeed produced a Solomonic order on rehearing: it reaffirms the view that Hain is not entitled to a federally funded counsel for his state clemency proceedings while, at the same time, granting him a stay of execution so that he can seek *en banc* review. While I have serious reservations whether 28 U.S.C. § 1651 provides for such a course of action, the panel is without power to even reach this question because this case is now moot. The majority has acted beyond the strictures of Article III of the United States Constitution, and I therefore respectfully dissent.

As noted in the majority opinion, the Oklahoma Pardon and Parole Board (“Parole Board”) conducted a clemency hearing for Hain on March 31, 2003. Hain’s federal habeas counsel appeared at the hearing and argued on Hain’s behalf. At the conclusion of the hearing, the Parole Board unanimously voted to deny clemency. Nevertheless, the majority concludes that this case is not moot because “[i]f Hain would ultimately prevail in this appeal, it remains **possible** that he could persuade the [Parole Board] to reconsider its decision and/or grant him a new clemency hearing.” Majority Op. at 2-3. This is a particularly thin reed upon which to base a conclusion that this case is not moot. There is no indication in the record that the Parole Board has ever before granted *seriatim* clemency proceedings. Not only was its denial of clemency unanimous, the Parole Board also unanimously denied counsel’s request that Hain be granted a thirty-day reprieve so that the instant appeal could conclude and counsel could prepare with federal funding.

There is simply nothing in the record before this court demonstrating any realistic possibility that Hain could ever obtain a second clemency hearing. *See Valley Forge Christian College v. Ams. United for Separation of Church & State*, 454 U.S. 464, 472 (1982) (holding that the proponent of federal court jurisdiction has the burden of demonstrating that the case is justiciable). The majority necessarily relies on the following representations of Hain's counsel:

Upon leaving the hearing, after the state called five witnesses, plus presented the Board with a three-inch thick anti-clemency petition, and the statement of counsel, and after which the Board had voted 5-0 against clemency, counsel was approached by two of the Board members and an observer from the audience.

One Board member said she would have voted for clemency, but was not convinced that this was the right case. She volunteered to go to the Legislature next session in support of a bill to prohibit juvenile executions. Counsel believes better preparation and a better presentation could have convinced her this was the right case. The other Board member told counsel that he had done well with what little he had, and expressed his condolences that counsel was not better prepared. He, too, might have been persuaded to vote differently. So too might the other three members of the Board.

The observer, Dr. William Martin of Oklahoma City, has observed approximately twenty clemency hearings. He told counsel that he felt counsel was "handcuffed," and that the reading to the Board of forty minutes was not very effectual. Dr. Martin commented that there was a wide contrast between Mr. Hain's hearing and the other hearings he had attended, with Mr. Hain's being a poor presentation.

See Appellant Scott Allen Hain's Notice to the Court Concerning Yesterday's Court Order and the State Clemency Hearing. This wild speculation relied upon by the majority is clearly insufficient to demonstrate that the case presents a continuing, live controversy.

See Whitmore v. Arkansas, 495 U.S. 149, 156-57 (1990).