SUPREME COURT OF THE UNITED STATES

No. 93–6497

FRANK B. McFARLAND, PETITIONER *v.* WAYNE SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 30, 1994]

JUSTICE THOMAS, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

Today the Court holds that a state prisoner under sentence of death may invoke a federal district court's jurisdiction to obtain appointed counsel under 21 U. S. C. §848(q)(4)(B) and to obtain a stay of execution under 28 U. S. C. §2251 simply by filing a motion for appointment of counsel. In my view, the Court's conclusion is at odds with the terms of both statutory provisions. Each statute allows a federal district court to take action (appointing counsel under §848(q)(4)(B) or granting a stay under §2251) only after a habeas proceeding has been commenced. As JUSTICE O'CONNOR points out, such a proceeding is initiated under the habeas corpus statute, 28 U. S. C. §2241 *et seq.*, only with the filing of an application for a writ of habeas corpus. I therefore agree with JUSTICE O'CONNOR that a district court lacks jurisdiction to grant a stay under §2251 until such an application has been filed. See *ante*, at 2–5 (concurring in judgment in part and dissenting in part). But because §848(q)(4)(B), like §2251, conditions a court's power to act upon the existence of a habeas proceeding, I would also hold that

a district court cannot appoint counsel until an application for habeas relief has been filed. I therefore respectfully dissent.

In its attempt to discern Congress' intent regarding the point at which §848(q)(4)(B) makes counsel available, the Court spends a good deal of time considering how, as a "practical matter," the provision of counsel can be made meaningful. See *ante*, at 6–7. See also *ante*, at 1–2 (O'CONNOR, J., concurring in judgment in part and dissenting in part). But here, as in any case of statutory interpretation, our primary guide to Congress' intent should be the text of the statute. The relevant terms of §848(q)(4)(B) state that an indigent prisoner shall be entitled to an attorney and "investigative, expert, or other reasonably necessary services" only "[i]n any post conviction proceeding under section 2254 . . . seeking to vacate or set aside a death sentence." The clear import of the provision is that an indigent prisoner is not entitled to an attorney or to other services under the section *until* a "post conviction proceeding under section 2254" exists—that is, not until after such a proceeding has been commenced in district court.

The Court appears to acknowledge that a §2254 proceeding must be initiated before counsel can be appointed under §848(q)(4)(B), but asserts that "[n]either the federal habeas corpus statute . . . nor the rules governing habeas corpus proceedings define a `post conviction proceeding' under §2254 . . . or expressly state how such a proceeding shall be commenced." *Ante*, at 5. It is difficult to imagine, however, how the federal habeas statute could be more "express" on the matter. As JUSTICE O'CONNOR explains in detail, the statute makes clear that a "proceeding" is commenced only with the filing of an application for a writ of habeas corpus. See *ante*, at

4–5 (concurring in judgment in part and dissenting in part).[1] Section 2254(d), for example, provides that the well-known presumption of correctness of state court findings of fact attaches "[i]n any proceeding *instituted* in a Federal court *by an application for a writ of habeas corpus* by a person in custody pursuant to the judgment of a State court." 28 U. S. C. §2254(d) (emphasis added). See also 28 U. S. C. §2241(d) (power to grant the writ is not triggered except by "application for a writ of habeas corpus"). Cf. 28 U. S. C. §1914 (equating the filing of an "application for a writ of habeas corpus" with the "instituting" of a "proceeding" for purposes of setting filing fees).[2]

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[1]JUSTICE O'CONNOR, of course, discusses the question of how a habeas "proceeding" is commenced in the context of determining whether a district court has jurisdiction under §2251 to enter a stay of execution prior to the filing of an application for habeas relief. See 28 U. S. C. §2251 ("A justice or judge of the United States before whom a *habeas corpus proceeding is pending*, may . . . stay any proceeding against the person detained" under state authority) (emphasis added).

[2]The procedural rules governing §2254 cases confirm that it is the filing of a habeas petition that commences a habeas proceeding. Rule 3 of the Federal Rules of Civil Procedure clearly states that "[a] civil action is commenced by filing a complaint." The Federal Rules of Civil Procedure apply in the context of habeas suits to the extent that they are not inconsistent with the Habeas Corpus Rules. See 28 U. S. C. §2254 Rule 11; Fed. Rule Civ. Proc. 81(a)(2). The analogue to a complaint in the habeas context is an "application . . . in the form of a petition for a writ of habeas corpus." 28 U. S. C. §2254 Rule 2(a). Thus, a habeas action is commenced with the filing of such an application.

By providing that death-sentenced prisoners may obtain counsel "[i]n any post conviction proceeding under section 2254," Congress referred to a well-known form of action with established contours. We should therefore assume that Congress intended to incorporate into §848(q)(4)(B) the settled understanding of what constitutes a "proceeding under section 2254" in the habeas statute. Cf. *Miles* v. *Apex Marine Corp.*, 498 U. S. 19, 32 (1990). Indeed, the similarity between the language in §§848(q)(4)(B) and 2254(d) suggests that Congress used the phrase "[i]n any post conviction proceeding under section 2254" in the former provision as a shorthand form of the language "[i]n any proceeding instituted in a Federal court by an application for a writ of habeas corpus" contained in the latter. In short, the terms of §848(q)(4)(B) indicate that Congress intended that legal assistance be made available under the provision only after a habeas proceeding has been commenced by the filing of an application for habeas relief.

The Court rejects this interpretation. Rather than turning to the habeas statute for guidance in determining when a "proceeding under section 2254" commences, the Court bases its examination of the question primarily on what it perceives to be the time at which legal assistance would be most useful to a death-sentenced prisoner. See *ante*, at 6. From this analysis, the Court concludes that a "`post conviction proceeding' within the meaning of §848(q)(4)(B) is commenced by the filing of a death row defendant's [preapplication] motion requesting the appointment of counsel." *Ante*, at 7. The only textual provision the Court cites in support of that conclusion is 21 U. S. C. §848(q)(9), which states that

> "Upon a finding in ex parte proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant, whether in connection with issues

> relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore . . . .”

At bottom, the Court's textual argument amounts to the following: because investigative, expert, and other services described in §848(q)(9) “may be critical in the preapplication phase of a habeas corpus proceeding,” *ante*, at 5–6, and because §848(q)(9) provides that those services are to be obtained by the defendant's attorneys, an attorney must be appointed “before the need for such technical assistance arises”—that is, prior to the filing of an application for habeas relief. *Ante*, at 6. Thus, the sole textual source upon which the Court relies is the statement that “the defendant's attorneys” are “authorize[d]” to obtain services on the defendant's behalf.

In my view, such an oblique reference to “the defendant's attorneys” is a remarkably thin reed upon which to rest Congress' supposed intention to “establis[h] a right to preapplication legal assistance for capital defendants in federal habeas corpus proceedings.” *Ante*, at 6. Indeed, had Congress intended to establish such a “right,” it surely would have done so in §848(q)(4)(B), which provides for appointment of counsel, rather than in §848(q)(9), which sets forth the mechanics of how “investigative, expert or other services” are to be obtained.

Moreover, §848(q)(9) simply does not address the issue of *when* “investigative, expert or other services” are to be made available to a death-sentenced prisoner. The Court asserts that such services “may be critical” in the preapplication period. *Ante*, at 5. Yet the issue of when these services are to be available, like the question of when a prisoner is entitled to counsel, is expressly addressed not in §848(q)(9), but in §848(q)(4). See §848(q)(4)(A) (indigent defendant “charged with a

[federal] crime which may be punishable by death" may obtain "representation [and] investigative, expert, or other reasonably necessary services" both "before judgment" and "after the entry of a judgment imposing a sentence of death but before the execution of that judgment"); see also §848(q)(4)(B) (indigent prisoner "seeking to vacate or set aside [his] death sentence" may obtain "representation [and] investigative, expert, or other reasonably necessary services" "[i]n any post conviction proceeding under section 2254 or 2255"). And for purposes of this case, §848(q)(4)(B) resolves the issue: such services are to be made available only after a "post conviction proceeding under 2254" has been commenced.

As for the policy concerns rehearsed by the Court, I agree that legal assistance prior to the filing of a federal habeas petition can be very valuable to a prisoner. See *ante*, at 6. That such assistance is valuable, however, does not compel the conclusion that Congress intended the Federal Government to *pay* for it under §848(q). As the Ninth Circuit has aptly observed: "Section 848(q) is *a funding statute*. It provides for the appointment of attorneys and the furnishing of investigative services for [federal] defendants or habeas corpus petitioners seeking to vacate or set aside a death sentence." *Jackson* v. *Vasquez*, 1 F. 3d 885, 888 (1993) (emphasis added). It might well be a wise and generous policy for the government to provide prisoners appointed counsel prior to the filing of a habeas petition, but that is not a policy declared by Congress in the terms of §848(q)(4)(B).

Implicit in the Court's analysis is the assumption that it would be unthinkable for Congress to grant an entitlement to appointed counsel, but to have that entitlement attach only upon the filing of a habeas petition. The Court suggests that its interpretation is required because it is "the *only* one that gives

meaning to the statute as a practical matter." *Ante,* at 6 (emphasis added). Any other interpretation, according to the Court, would "requir[e] an indigent capital petitioner to proceed without counsel in order to obtain counsel." *Ante*, at 7. Yet under the interpretation of §848(q)(4)(B) I have outlined above, Congress has not required death-sentenced prisoners to proceed *without counsel* during the preapplication period; rather, it has merely concluded that such prisoners would proceed without counsel *funded under* §848(q)(4)(B).

Moreover, leaving prisoners without counsel appointed under §848(q)(4)(B) during the preapplication period would be fully reasonable. Congress was no doubt aware that alternative sources of funding for preapplication legal assistance exist for death-sentenced prisoners. Petitioner, for example, is represented by the Texas Resource Center, which has been "designated . . . a Community Defender Organization in accordance with 18 U. S. C. §3006A for the purpose of providing representation, assistance, information, and other related services to eligible persons and appointed attorneys in connection with" federal habeas corpus cases arising from capital convictions. Brief for Petitioner 4, n. 3 (internal quotation marks and citation omitted). The Center, which is "funded primarily by a grant from the Administrative Office of the United States Courts," *id*., at 5, n. 4, became involved in petitioner's case soon after his conviction was affirmed by the Texas Court of Criminal Appeals. Thus, although petitioner did not have preapplication assistance of counsel made available to him under §848(q)(4)(B), he still could benefit from federally funded legal assistance.

In addition, it seems likely that Congress expected that the States would also shoulder some of the burden of providing preapplication legal assistance to indigent death-sentenced prisoners. Cf. *Hill* v. *Lockhart*, 992 F. 2d 801, 803 (CA8 1993) ("A state

that has elected to impose the death penalty should provide adequate funding for the procedures it has adopted to properly implement that penalty"). Defendants under a state-imposed sentence of death must exhaust state remedies by presenting their claims in state court prior to coming to federal court. See 28 U. S. C. §2254(b). See also *Coleman* v. *Thompson*, 501 U. S. 722 (1991). Given this exhaustion requirement, it would have been logical for Congress, in drafting §848(q)(4)(B), to assume that by the time a death-sentenced prisoner reaches federal court, "possible claims and their factual bases" will already have been "researched and identified." *Ante*, at 6. Indeed, if the claims have not been identified and presented to state courts, a prisoner cannot proceed on federal habeas. See *Coleman*, *supra*, at 731 ("This Court has long held that a state prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims"). Thus, it would not have been unreasonable for Congress to require prisoners to meet the ordinary requirement for invoking a federal court's habeas jurisdiction—namely, the filing of an adequate application for habeas corpus relief—prior to obtaining an attorney under §848(q)(4)(B).

Had the Court ended its analysis with the ruling that an indigent death-sentenced prisoner is entitled to counsel under §848(q)(4)(B) prior to filing an application for habeas relief, today's decision would have an impact on federal coffers, but would not expand the power of the federal courts to interfere with States' legitimate interests in enforcing the judgments of their criminal justice systems. The Court, however, does not stop with its decision on availability of counsel; rather, it goes on to hold that upon a motion for appointment of counsel, a death-

sentenced prisoner is also able to obtain a stay of his execution in order to permit counsel "to research and present [his] habeas claims." *Ante*, at 9.

The Court reaches its decision through the sheerest form of bootstrapping. After reasoning that "a proceeding under section 2254" for purposes of §848(q)(4)(B) commences with the filing of a motion for appointment of counsel, the Court imports that meaning of "proceeding" into 28 U. S. C. §2251, which provides that a federal judge "before whom *a habeas corpus proceeding is pending*" may "stay any proceeding against the person detained in any State court." (emphasis added). The Court thus concludes that "once a capital defendant invokes his right to appointed counsel, a federal court also has jurisdiction under §2251 to enter a stay of execution." *Ante*, at 8. I agree with the Court that the "language of [§848(q)(4)(B) and §2251] indicates that the sections refer to the same proceeding." *Ante*, at 8. But the method the Court employs to impart meaning to the term "proceeding" in the two provisions is simply backwards. Section 848(q)(4)(B) was enacted as part of the Anti-Drug Abuse Act of 1988, 102 Stat. 4393, long after the enactment of the habeas statute. As noted above, in using the terms "post conviction proceeding under section 2254" in §848(q)(4)(B), Congress was referring to a form of action whose contours were well established under the habeas statute. As a matter of basic statutory construction, then, we should look to the habeas statute to inform our construction of §848(q)(4)(B), not *vice versa*.

The reason the Court pursues a different approach is clear: There is no basis in the habeas statute for reading "habeas corpus proceeding" in §2251 to mean an action commenced by the filing of a motion for appointment of counsel. Thus, to avoid the conclusion that a "proceeding" in §2251 is commenced by the filing of an application for habeas relief, the Court is forced to hold that by enacting

§848(q), Congress amended the habeas statute *sub silentio*. Cf. *ante*, at 5 (O'CONNOR, J., concurring in judgment in part and dissenting in part).[3] In effect, the Court determines that Congress, in providing death-sentenced prisoners with federally funded counsel in §848(q)(4)(B), intended to expand the jurisdiction of the federal courts to stay state proceedings under the habeas statute. Yet §848(q)(4)(B) in no way suggests a connection between the availability of counsel and the stay power; indeed, the provision does not even mention the term "stay." A proper interpretation of the provisions at issue here, however, avoids the dubious assumption that Congress intended to effect such an amendment of the habeas statute by implication. Correctly interpreted, both §§848(q)(4)(B) and 2251 refer to a "proceeding" that begins with the filing of an application for habeas relief, after which a federal court has jurisdiction to enter a stay and to appoint counsel.

In reaching its expansive interpretation of §2251, the Court ignores the fact that the habeas statute provides federal courts with exceptional powers. Federal habeas review "disturbs the State's significant interest in repose for concluded litigation,

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[3]Presumably, the Court's holding regarding a federal court's jurisdiction to stay a state proceeding only applies when a state prisoner is "seeking to vacate or set aside a death sentence." 21 U. S. C. §848(q)(4)(B). Thus, after today, the "proceeding" to which §2251 refers will have two different meanings depending upon whether the stay is sought by a capital or non-capital prisoner. In the former situation, a "habeas corpus proceeding" under §2251 will be "pending" once a motion for appointment of counsel is filed. In the latter, no matter how many preliminary motions a prisoner might file, a proceeding will not be "pending" until an application for habeas relief is filed.

denies society the right to punish some admitted offenders, and intrudes on State sovereignty to a degree matched by few exercises of federal judicial authority." *Duckworth* v. *Eagan*, 492 U. S. 195, 210 (1989) (O'CONNOR, J., concurring) (internal quotation marks and citation omitted). See also *ante*, at 5 (O'CONNOR, J., concurring in judgment in part and dissenting in part). We should not lightly assume that Congress intended to expand federal courts' habeas power; this is particularly true regarding their power directly to interfere with state proceedings through granting stays.

Moreover, as JUSTICE O'CONNOR observes, in expanding the federal courts' power to grant stays, the Court's decision "conflicts with the sound principle underlying our precedents that federal habeas review exists only to review errors of constitutional dimension." *Ante,* at 3 (concurring in judgment in part and dissenting in part). Under the Court's interpretation of §2251, a prisoner may obtain a stay of execution without presenting a single claim to a federal court. Indeed, under the Court's reading of the statute, a federal district court determining whether to enter a stay will no longer have to evaluate whether a prisoner has presented a potentially meritorious constitutional claim. Rather, the court's task will be to determine whether a "capital defendant" who comes to federal court shortly before his scheduled execution has been "dilatory" in pursuing his "right to counsel." *Ante*, at 9. If he has not been "dilatory," the district court presumably must enter a stay to preserve his "right to counsel" and his "right for that counsel meaningfully to research and present [his] habeas claims." *Ibid.* In my view, simply by providing for the appointment of counsel in habeas cases, Congress did not intend to achieve such an extraordinary result.

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Because petitioner had not filed an application for

habeas relief prior to filing his motion for stay of execution and for appointment of counsel, the courts below correctly determined that they lacked jurisdiction to consider his motion. I respectfully dissent.