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 BLACKMUN delivered the opinion of the Court.

In establishing a federal death penalty for certain drug offenses under the Anti-Drug Abuse Act of 1988, 21 U. S. C. §848(e), Congress created a statutory right to qualified legal representation for capital defendants in federal habeas corpus proceedings. §848(q)(4)(B). This case presents the question whether a capital defendant must file a formal habeas corpus petition in order to invoke this statutory right and to establish a federal court's jurisdiction to enter a stay of execution.

Petitioner Frank Basil McFarland was convicted of capital murder on November 13, 1989, in the State of Texas and sentenced to death. The Texas Court of Criminal Appeals affirmed the conviction and sentence, *McFarland* v. *State*, 845 S. W. 2d 824 (1992), and on June 7, 1993, this Court denied certiorari. 508 U. S. ___. Two months later, on August 16, 1993, the Texas trial court scheduled McFarland's execution for September 23, 1993. On September 19, McFarland filed a *pro se* motion requesting that the trial court stay or withdraw his execution date to

allow the Texas Resource Center an opportunity to recruit volunteer counsel for his state habeas corpus proceeding. Texas opposed a stay of execution, arguing that McFarland had not filed an application for writ of habeas corpus and that the court thus lacked jurisdiction to enter a stay. The trial court declined to appoint counsel, but modified McFarland's execution date to October 27, 1993.

On October 16, 1993, the Resource Center informed the trial court that it had been unable to recruit volunteer counsel and asked the court to appoint counsel for McFarland. Concluding that Texas law did not authorize the appointment of counsel for state habeas corpus proceedings, the trial court refused either to appoint counsel or to modify petitioner's execution date. McFarland then filed a *pro se* motion in the Texas Court of Criminal Appeals requesting a stay and a remand for appointment of counsel. The court denied the motion without comment.

Having failed to obtain either the appointment of counsel or a modification of his execution date in state court, McFarland, on October 22, 1993, commenced the present action in the United States District Court for the Northern District of Texas by filing a *pro se* motion stating that he "wish[ed] to challenge [his] conviction and sentence under [the federal habeas corpus statute,] 28 U. S. C. §2254." App. 41. McFarland requested the appointment of counsel under 21 U. S. C. §848(q)(4)(B) and a stay of execution to give that counsel time to prepare and file a habeas corpus petition.[1]

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[1]Traditionally in Texas, capital defendants had invoked their federal right to appointed counsel by filing a perfunctory habeas corpus petition, often reciting a single claim. Texas customarily did not oppose a stay following the filing of such a *pro forma* petition, and federal district courts regularly granted a stay of execution under these circumstances and appointed counsel to file a legally sufficient habeas application. Tr. of Oral Arg. 32–33.

In the month prior to McFarland's scheduled execution, however, a capital defendant facing imminent execution filed such a *pro forma* habeas petition in District Court. Texas did not oppose the filing, but the District Court denied the stay and dismissed the skeletal petition on the merits. *Gosch* v. *Collins*, No. SA-93–CA-731 (WD Tex., Sept. 15, 1993). The Court of Appeals for the Fifth

The District Court denied McFarland's motion on October 25, 1993, concluding that because no "post conviction proceeding" had been initiated pursuant to 28 U. S. C. §2254 or §2255, petitioner was not entitled to appointment of counsel and the court lacked jurisdiction to enter a stay of execution. App. 77. The court later denied a certificate of probable cause to appeal.

On October 26, the eve of McFarland's scheduled execution, the Court of Appeals for the Fifth Circuit denied his application for stay. 7 F. 3d 47. The court noted that federal law expressly authorizes federal courts to stay state proceedings while a federal habeas corpus proceeding is pending, 28 U. S. C. §2251, but held that no such proceeding was pending, because a "motion for stay and for appointment of counsel [is not] the equivalent of an application for habeas relief." *Id.*, at 49. The court concluded that any other federal judicial interference in state court proceedings was barred by the Anti-Injunction Act, 28 U. S. C. §2283.

Shortly before the Court of Appeals ruled, a federal magistrate judge located an attorney willing to accept appointment in McFarland's case and suggested that if the attorney would file a skeletal document entitled

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Circuit affirmed, *Gosch* v. *Collins*, 8 F. 3d 20, cert. pending, No. 93–6025. Gosch then filed a subsequent, substantive habeas petition, which the District Court dismissed as successive and abusive. *Gosch* v. *Collins*, No. SA-93–CA-736 (WD Tex. Oct. 12, 1993).

In a letter supporting McFarland's motion in the District Court, the Resource Center indicated that the *Gosch* case had left capital defendants reluctant to invoke their federal right to counsel by filing *pro forma* habeas petitions, given the substantial possibility that the petition might be dismissed on the merits, and that any habeas petition later filed would be dismissed summarily as an abuse of the writ. See App. 73–74.

"petition for writ of habeas corpus," the District Court might be willing to appoint him and grant McFarland a stay of execution. The attorney accordingly drafted and filed a *pro forma* habeas petition, together with a motion for stay of execution and appointment of counsel. As in the *Gosch* case, see n. 1, *supra*, despite the fact that Texas did not oppose a stay, the District Court found the petition to be insufficient and denied the motion for stay on the merits. *McFarland* v. *Collins*, No. 4:93–CV-723–A (WD Tex., Oct. 26, 1993).

On October 27, 1993, this Court granted a stay of execution in McFarland's original suit pending consideration of his petition for certiorari. 510 U. S. ___. The Court later granted certiorari, 510 U. S. ___ (1993), to resolve an apparent conflict with *Brown* v. *Vasquez*, 952 F. 2d 1164 (CA9 1991).

Section 848(q)(4)(B) of Title 21 provides:

> "In any *post conviction proceeding* under section 2254 or 2255 of title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services *shall be entitled* to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9)" (emphasis added).

On its face, this statute grants indigent capital defendants a mandatory right to qualified legal counsel[2]

[2]Counsel appointed to represent capital defendants in post conviction proceedings must meet more stringent experience criteria than attorneys appointed to represent

and related services "[i]n any [federal] post conviction proceeding." The express language does not specify, however, how a capital defendant's right to counsel in such a proceeding shall be invoked.

Neither the federal habeas corpus statute, 28 U. S. C. §2241 *et seq.*, nor the rules governing habeas corpus proceedings define a "post conviction proceeding" under §2254 or §2255 or expressly state how such a proceeding shall be commenced. Construing §848(q)(4)(B) in light of its related provisions, however, indicates that the right to appointed counsel adheres prior to the filing of a formal, legally sufficient habeas corpus petition. Section §848(q)(4)(B) expressly incorporates 21 U. S. C. §848(q)(9), which entitles capital defendants to a variety of expert and investigative services upon a showing of necessity:

> "Upon a finding in ex parte proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant, . . . 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" (emphasis added).

The services of investigators and other experts may be critical in the preapplication phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified. Section 848(q)(9) clearly anticipates that capital defense counsel will have been appointed under §848(q)(4)(B)

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noncapital defendants under the Criminal Justice Act of 1964, 18 U. S. C. §3006A. At least one attorney appointed to represent a capital defendant must have been authorized to practice before the relevant court for at least five years, and must have at least three years of experience in handling felony cases in that court. 21 U. S. C. §848(q)(6).

before the need for such technical assistance arises, since the statute requires "the defendant's attorneys to obtain such services" from the court. §848(q)(9). In adopting §848(q)(4)(B), Congress thus established a right to preapplication legal assistance for capital defendants in federal habeas corpus proceedings.

This interpretation is the only one that gives meaning to the statute as a practical matter. Congress' provision of a right to counsel under §848(q)(4)(B) reflects a determination that quality legal representation is necessary in capital habeas corpus proceedings in light of "the seriousness of the possible penalty and . . . the unique and complex nature of the litigation." §848(q)(7). An attorney's assistance prior to the filing of a capital defendant's habeas corpus petition is crucial, because "[t]he complexity of our jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law." *Murray* v. *Giarratano*, 492 U. S. 1, 14 (1989) (KENNEDY, J., joined by O'CONNOR, J., concurring in judgment); see also *id.*, at 28 (STEVENS, J., joined by Brennan, Marshall, and BLACKMUN, JJ., dissenting) ("[T]his Court's death penalty jurisprudence unquestionably is difficult even for a trained lawyer to master").

Habeas corpus petitions must meet heightened pleading requirements, see 28 U. S. C. §2254 Rule 2(c), and comply with this Court's doctrines of procedural default and waiver, see *Coleman* v. *Thompson*, 504 U. S. ___ (1992). Federal courts are authorized to dismiss summarily any habeas petition that appears legally insufficient on its face, see 28 U. S. C. §2254 Rule 4, and to deny a stay of execution where a habeas petition fails to raise a substantial federal claim, see *Barefoot* v. *Estelle*, 463 U. S. 880, 894 (1983). Moreover, should a defendant's *pro se* petition be summarily dismissed, any petition subsequently filed by counsel could be subject to dismissal

as an abuse of the writ. See *McCleskey* v. *Zant*, 499 U. S. 457, 494 (1991). Requiring an indigent capital petitioner to proceed without counsel in order to obtain counsel thus would expose him to the substantial risk that his habeas claims never would be heard on the merits. Congress legislated against this legal backdrop in adopting §848(q)(4)(B), and we safely assume that it did not intend for the express requirement of counsel to be defeated in this manner.

The language and purposes of §848(q)(4)(B) and its related provisions establish that the right to appointed counsel includes a right to legal assistance in the preparation of a habeas corpus application. We therefore conclude that a "post conviction proceeding" within the meaning of §848(q)(4)(B) is commenced by the filing of a death row defendant's motion requesting the appointment of counsel for his federal habeas corpus proceeding.[3] McFarland filed such a motion and was entitled to the appointment of a lawyer.

Even if the District Court had granted McFarland's motion for appointment of counsel and had found an attorney to represent him, this appointment would have been meaningless unless McFarland's execution also was stayed. We therefore turn to the question whether the District Court had jurisdiction to grant petitioner's motion for stay.

Federal courts cannot enjoin state court proceedings unless the intervention is authorized expressly by federal statute or falls under one of two other exceptions to the Anti-Injunction Act. See

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[3]JUSTICE THOMAS argues in dissent that reading §848(q)(4)(B) to allow the initiation of a habeas corpus proceeding through the filing of a motion for appointment of counsel ignores the fact that such proceedings traditionally have been commenced by the filing of a habeas corpus petition and creates a divergent practice for capital defendants. *Post*, at 9, n. 3. As JUSTICE O'CONNOR agrees, *post,* at 2, however, §848(q)(4)(B) bestows upon capital defendants a mandatory right to counsel, including a right to preapplication legal assistance, that is unknown to other criminal defendants. Because noncapital defendants have no equivalent right to the appointment of counsel in federal habeas corpus proceedings, it is not surprising that their habeas corpus proceedings typically will be initiated by the filing of a habeas corpus petition.

Mitchum v. *Foster*, 407 U. S. 225, 226 (1972). The federal habeas corpus statute grants any federal judge "before whom a *habeas corpus proceeding is pending*" power to stay a state court action "for any matter involved in the habeas corpus proceeding." 28 U. S. C. §2251 (emphasis added). McFarland argues that his request for counsel in a "post conviction proceeding" under §848(q)(4)(B) initiated a "habeas corpus proceeding" within the meaning of §2251, and that the District Court thus had jurisdiction to enter a stay. Texas contends, in turn, that even if a "post conviction proceeding" under §848(q)(4)(B) can be triggered by a death row defendant's request for appointment of counsel, no "habeas corpus proceeding" is "pending" under §2251, and thus no stay can be entered, until a legally sufficient habeas petition is filed.

The language of these two statutes indicates that the sections refer to the same proceeding. Section 848(q)(4)(B) expressly applies to "any post conviction proceeding under section 2254 or 2255"—the precise "habeas corpus proceeding[s]" that §2251 involves. The terms "post conviction" and "habeas corpus" also are used interchangeably in legal parlance to refer to proceedings under §2254 and §2255. We thus conclude that the two statutes must be read *in pari materia* to provide 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. Because §2251 expressly authorizes federal courts to stay state court proceedings "for any matter involved in the habeas corpus proceeding," the exercise of this authority is not barred by the Anti-Injunction Act.

This conclusion by no means grants capital defendants a right to an automatic stay of execution. Section 2251 does not mandate the entry of a stay, but dedicates the exercise of stay jurisdiction to the sound discretion of a federal court. Under ordinary

circumstances, a capital defendant presumably will have sufficient time to request the appointment of counsel and file a formal habeas petition prior to his scheduled execution. But the right to counsel necessarily includes a right for that counsel meaningfully to research and present a defendant's habeas claims. Where this opportunity is not afforded, "[a]pproving the execution of a defendant before his [petition] is decided on the merits would clearly be improper." *Barefoot*, 463 U. S., at 889. On the other hand, if a dilatory capital defendant inexcusably ignores this opportunity and flouts the available processes, a federal court presumably would not abuse its discretion in denying a stay of execution.

A criminal trial is the "main event" at which a defendant's rights are to be determined, and the Great Writ is an extraordinary remedy that should not be employed to "relitigate state trials." *Id.*, at 887. At the same time, criminal defendants are entitled by federal law to challenge their conviction and sentence in habeas corpus proceedings. By providing indigent capital defendants with a mandatory right to qualified legal counsel in these proceedings, Congress has recognized that federal habeas corpus has a particularly important role to play in promoting fundamental fairness in the imposition of the death penalty.

We conclude that a capital defendant may invoke this right to a counseled federal habeas corpus proceeding by filing a motion requesting the appointment of habeas counsel, and that a district court has jurisdiction to enter a stay of execution where necessary to give effect to that statutory right. McFarland filed a motion for appointment of counsel and for stay of execution in this case, and the District Court had authority to grant the relief he sought.

The judgment of the Court of Appeals is reversed.

It is so ordered.