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 O'CONNOR, concurring in the judgment in part and dissenting in part.

I agree with the Court's conclusion that 21 U. S. C. §848, entitles capital defendants pursuing federal habeas corpus relief to a properly trained attorney. I also agree that this right includes legal assistance in preparing a habeas petition. Thus, the Court correctly holds that a defendant need not file a habeas petition to invoke the right to counsel. *Ante*, at 7. I write separately, however, because I disagree with the Court's conclusion that 28 U. S. C. §2251 allows a district court to stay an execution pending counsel's preparation of an application for a writ of habeas corpus. *Ante*, at 7–9.

As the Court explains, §848(q) must be read to apply prior to the filing of a habeas petition. It is almost meaningless to provide a lawyer to pursue claims on federal habeas if the lawyer is not available to help prepare the petition. First, the habeas petition, unlike a complaint, must allege the factual underpinning of the petitioner's claims. See Habeas Corpus Rule 2(c) ("The petition . . . shall specify all the grounds for relief which are available to the petitioner . . . and shall set forth in summary form the facts supporting each of the grounds thus specified"). Furthermore, district courts are authorized to summarily dismiss petitions which appear on their face to be meritless. See Habeas Corpus Rule 4. And

our carefully crafted doctrines of waiver and abuse of the writ make it especially important that the first petition adequately set forth all of a state prisoner's colorable grounds for relief. Indeed, Congress expressly recognized "the seriousness of the possible penalty and . . . the unique and complex nature of the litigation." 21 U. S. C. §848(q)(4)(B)(7). Moreover, the statute entitles capital defendants not only to qualified counsel, but also to "investigative, expert or other services . . . reasonably necessary for the representation of the defendant." 21 U. S. C. §848(q)(4)(B)(9). For such services to be meaningful in the habeas context, they also must be available prior to the filing of a first habeas petition. See *ante*, at 5–6.

In my view, however, petitioner is not entitled under present law to a stay of execution while counsel prepares a habeas petition. The habeas statute provides in relevant part that "[a] justice or judge of the United States before whom a habeas corpus proceeding is pending, may . . . stay any proceeding against the person detained in any State court." 28 U. S. C. §2251. While this provision authorizes a stay in the habeas context, it does not explicitly allow a stay prior to the filing of a petition, and our cases have made it clear that capital defendants must raise at least some colorable federal claim before a stay of execution may be entered.

> "[F]ederal habeas is [not] a means by which a defendant is entitled to delay an execution indefinitely. The procedures adopted to facilitate the orderly consideration and disposition of habeas petitions are not legal entitlements that a defendant has a right to pursue irrespective of the contribution these procedures make toward uncovering constitutional error." *Barefoot* v. *Estelle*, 463 U. S. 880, 887–888 (1983).

See also *Autry* v. *Estelle*, 464 U. S. 1 (1983) *(per curiam)* (no automatic stay in this Court for review of a first federal habeas petition where petition lacks merit).

Petitioner has not filed anything describing the nature of his claims, if any. As a consequence, the Court's approach, which permits a stay of execution in the absence of any showing of a constitutional claim, conflicts with the sound principle underlying our precedents that federal habeas review exists only to review errors of constitutional dimension, and that the habeas procedures may be invoked only when necessary to resolve a constitutional claim. *Barefoot*, *supra*, at 892–896; see *Townsend* v. *Sain*, 372 U. S. 293, 312 (1963).

Congress knows how to give courts the broad authority to stay proceedings of the sort urged by the

petitioner. For example, Congress expressly provided this Court with authority to grant stays pending the filing of a petition for a writ of certiorari:

> "In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court." 28 U. S. C. §2101(f).

The absence of such explicit authority in the habeas statute is evidence that Congress did not intend federal courts to enter stays of execution in the absence of some showing on the merits.

Moreover, just as the counsel provisions of §848(q) are intended to apply before the submission of a petition, the text and structure of the federal habeas statute suggest that the stay provision contained in §2251 is intended to apply only after a petition has been filed. Although the statute does not specifically identify when "a habeas corpus proceeding is pending," *ibid*., other provisions of the statute show that there is no "pending" habeas corpus proceeding until an application for habeas corpus has been filed, which is the mechanism for "institut[ing]" a proceeding under the statute. For example §2254(d) refers to "any proceeding *instituted* in a Federal court *by an application* for a writ of habeas corpus" (emphasis added). Another statute setting filing fees provides that "the parties *instituting* any . . . proceeding in [district court must] pay a filing fee of $120, except that on application for a writ of habeas corpus the filing fee shall be $5." 28 U. S. C. §1914(a) (emphasis added). This indicates that the institution of a proceeding requires the filing of an "application," which petitioner has not done. See 28 U. S. C. §2242 (an "[a]pplication for a writ of habeas corpus . . . shall allege the facts concerning the applicant's commitment or detention"); Habeas Corpus Rule 2(a)

("[T]he application shall be in the form of a petition").

The rules governing §2254 cases confirm this conclusion. Although originally enacted by this Court, the rules were amended by Congress and approved as amended. See Pub. L. 94–426, §1, 90 Stat. 1334 (1976). By their terms, the habeas rules only apply to "procedure[s] in the United States district courts on *applications* under 28 U. S. C. §2254." Rule 1(a) (emphasis added). See also Habeas Corpus Rule 2 (referring to "[a]pplicants in present custody" and "[a]pplicants subject to future custody"). These same rules also make an express exception for the appointment of counsel "at any stage of the case," Rule 8(c), a further indication that the rules otherwise apply *after* an application for a writ of habeas corpus has been filed in the district court. This consistent textual focus on the existence of an "application" leads me to conclude that the district court's authority to issue a stay pursuant to §2251 also requires the filing of an "application."[1]

Congress is apparently aware of the clumsiness of its handiwork in authorizing appointment of an attorney under 21 U. S. C. §848(q)(4)(B) "[i]n any post conviction proceeding," while leaving intact 28 U. S. C. §2251, which authorizes a stay only when a "habeas corpus proceeding is pending." See S. 1441, §3(b), 103rd Cong., 1st Sess. (1993). The remedy for this problem, however, lies with Congress, and not, as the Court would have it, by reading the Anti-Drug Abuse Act of 1988, Pub. L. 100–690, 102 Stat. 4393,

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[1]Because the habeas statute itself addresses when district courts may order a stay of state proceedings, the All Writs Act, 28 U. S. C. §1651, does not provide a residual source of authority for a stay. "Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." *Pennsylvania Bureau of Corrections* v. *United States Marshals Service*, 474 U. S. 34, 43 (1985).

to impliedly amend the habeas statute. See *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 134 (1974). Such a reading is inconsistent with our prior cases and with the important federalism principles underlying the limited habeas jurisdiction of the federal courts. I would leave the matter to Congress to resolve. Finally, prisoners can avoid the need for a stay by filing a prompt request for appointment of counsel well in advance of the scheduled execution.

In the judgment currently under review, the Court of Appeals for the Fifth Circuit held that petitioner's "motion for stay of execution and appointment of counsel is . . . denied." 7 F. 3d 47, 49 (1993) *(per curiam)*. Because I agree with the Court that petitioner is entitled to an attorney, I concur in the judgment reversing the Court of Appeals on this point. But because in my view petitioner cannot obtain a stay of execution before filing a petition for a writ of habeas corpus in the District Court, I would affirm the judgment in part. I therefore respectfully dissent from the Court's contrary determination.