IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN J. KOEHLER,	:	
	:	
Petitioner,	:	
	:	NO: 3:CV-00-1932
v.	:	
	:	
MARTIN HORN, et al.,	:	(Judge Caputo)
	:	
Respondents.	:	

MEMORANDUM

Petitioner Koehler was convicted and sentenced to death in a Pennsylvania court on two counts of first degree murder and related charges. (Motion for a Stay of Execution, Doc. 1 at 6.) On October 18, 2000, Governor Ridge signed a death warrant setting a December 7, 2000 execution date. (Doc.1 at 2.) Presently before this court are Petitioner's motions to admit his counsel *pro hac vice*, (Docs. 2, 3), motion for *in forma pauperis* status (Doc 1), and motion for a stay of execution so that his counsel can prepare his first federal habeas corpus petition, (Doc. 1). The state has not filed a responsive brief objecting to Petitioner's motions.

I. Stay of Execution: Legal Background. 21 U.S.C. § 848(q)(4)(B) authorizes a federal court to appoint counsel for an indigent prisoner seeking to set aside a death sentence "[i]n any post conviction proceeding under section 2254 or 2255 of title 28." Since habeas proceedings traditionally were thought to commence with the filing of a habeas corpus petition, it initially was unclear whether or not § 848(q)(4)(B) provided for the appointment of counsel to prepare

the habeas corpus petition. That question was resolved in McFarland v. Scott, 512 U.S. 849, 114 S.Ct. 2568, 129 L.Ed. 666 (1994), in which the Supreme Court held that a motion for counsel under § 848(q)(4)(B) commences a "post conviction proceeding," and thus allows for the appointment of counsel even before a formal petition is filed. See Id. at 855-56, 114 S.Ct. at 2572. The high court founded its analysis on the clear intent of Congress to ensure that death row inmates have effective legal representation during their federal habeas proceedings, and concluded that because the drafting of a habeas corpus petition is rife with pitfalls that could prevent the claims of a *pro se* petitioner from ever being heard on the merits, § 848(q)(4)(B) should be construed to allow *pro se* prisoners to secure representation prior to the filing of a petition. See Id. Under McFarland, then, a district court may appoint counsel during the investigatory and drafting stage of a capital defendant's federal habeas corpus petition.

In the second part of its opinion, the McFarland court observed that the right to appointed counsel would be meaningless without a stay of execution to afford the newly appointed counsel a meaningful opportunity to research and present the petitioner's habeas claims. Id. at 858, 114 S.Ct. at 2573. Under 28 U.S.C. § 2251, a federal judge "before whom a habeas corpus proceeding is pending" may stay a state court proceeding, such as a scheduled execution, during the pendency of the habeas proceedings. Therefore, reading § 2251 and § 848(q)(4)(B) *in pari materia*, the McFarland court held that the "pending"

habeas corpus proceeding of § 2251 is none other than the "post conviction proceeding" referred to in § 848(q)(4)(B), so that the filing of a § 848(q)(4)(B) motion for the appointment for counsel not only allows counsel to be appointed prior to the filing of a petition, but also triggers jurisdiction in the district court to enter a stay of execution. 512 U.S. at 857-58, 114 S.Ct. at 2573.

II. Jurisdiction to Enter a Stay. In the present matter, Petitioner has not moved for the appointment of counsel under § 848(q)(4)(B) because he has already secured *pro bono* counsel to represent him in his habeas appeal. At first glance, this seems to take Petitioner outside of McFarland, since in that case jurisdiction to issue a stay of execution was predicated upon a capital defendant's motion for the appointment of counsel. However, as the reasoning underlying McFarland extends with equal force to the present situation, this court has jurisdiction to stay Petitioner's execution.

In the first place, it must be emphasized that Petitioner's *pro bono* counsel did not represent him in his state proceedings since, as is often the case, Petitioner procured new counsel to represent him in his federal habeas corpus action. Consequently, Petitioner's new counsel have no great familiarity with his case and are just as much in need of a stay of execution, in order to have a meaningful opportunity to prepare and present Petitioner's petition, as would be counsel appointed pursuant to § 848(q)(4)(B).

Allowing a stay of execution whenever a capital defendant retains new counsel to litigate his federal habeas claims, regardless of whether the new

counsel is compensated under § 848(q)(4), is consistent with Congress' purpose of ensuring that all capital defendants seeking federal habeas review are meaningfully represented by counsel. "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." McFarland, 512 U.S. at 855, 114 S.Ct. at 2572. Therefore, just as a motion for appointment of counsel under § 848(q)(4) commences a habeas corpus proceeding for purposes of § 2251, a good faith entry of appearance by counsel who did not previously represent the capital defendant should likewise create a "pending" habeas corpus proceeding under 28 U.S.C. § 2251, thereby allowing the district court to enter a stay of execution.[1]

Indeed, it would be anomalous, not to mention inequitable, if one capital defendant's newly acquired *pro bono* lawyers were not given a meaningful opportunity to prepare a federal habeas petition, while another's government funded lawyers *were* afforded such a meaningful opportunity. As counsel in both situations must begin their representation at the federal habeas stage, counsel in both cases should be accorded a stay of execution in order to properly and thoroughly draft a petition. When a sentence of death hangs in the balance, a

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1 Of course, the situation would be different if it appeared that Petitioner had changed his counsel simply to delay his execution. However, a capital defendant often loses his state appointed counsel at the conclusion of his direct appeals, or has one of a number of valid reasons for wishing to change counsel. In particular, such defendants often have good reason not to employ counsel at the federal level who have already failed at the state level.

distinction as trivial as whether counsel will be compensated under § 848(q)(4) or by a legal services institution cannot be allowed to determine whether or not a petitioner will receive a meaningful opportunity to prepare his petition. Accordingly, this court holds that an entry of appearance by counsel who did not previously represent the petitioner confers on a federal court jurisdiction under § 2251 to issue a stay of execution.[2]

III. Propriety of a Stay of Execution. Whether a stay of execution should be granted is a question distinct from whether the court has jurisdiction to issue one. Moreover, it is clear that a capital defendant has no right to an automatic stay of execution. See id.

> 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, approving the execution of a defendant before his petition is decided on the merits would clearly be improper. 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.

Id. (citations and internal quotations omitted).

Koehler's petition for Writ of Certiorari to the United States Supreme

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2 This court requires that petitioner's counsel be new to his case in order to avoid the sort of over-expansive reading of McFarland condemned by the Sixth Circuit: "Neither the statute nor McFarland stand for the proposition that an already well-represented prisoner may invoke the 'stay' jurisdiction of a federal court by seeking pre-petition appointment of counsel who already represent him. [Petitioner's] position would allow a prisoner with counsel who has represented him for years, as is the case here, to stop all state proceedings against him indefinitely...." In re Parker, 49 F.3d 204, 211 (6th Cir. 1995). In the present case, Petitioner's new counsel have only recently begun to represent him, and consequently need a stay in order to have a meaningful opportunity to prepare his petition.

Court was denied on October 2, 2000. See Koehler v. Pennsylvania, __ U.S. __, 121 S.Ct. 79, __ L.Ed.2d __ (2000). Petitioner's present motion was filed with this court one month later on November 2, 2000. Consequently, as is there no evidence of delay on the part of Petitioner, it cannot be said that he acted in a dilatory fashion or flouted the collateral remedies available to him. Therefore, since Petitioner has not acted in a dilatory fashion in bringing his first federal habeas corpus petition, and since Petitioner's counsel cannot meaningfully research and present his claims before his scheduled December 7, 2000 execution, it would be improper for this court to deny him a stay of execution. See McFarland, 512 U.S. at 858, 114 S.Ct. at 2573. Further, as it is not unreasonable to devote 90 days to the preparation of a capital defendant's first habeas corpus petition, see, e.g., Crawley v. Horn, 7 F.Supp.2d 587 (E.D. Pa. 1998) (initially granting petitioner a 90-day stay), Petitioner will be granted a 90-day stay of execution in which to prepare his habeas corpus petition.

IV. *In Forma Pauperis* Status. With regard to Petitioner's motion for *in forma pauperis* status, Petitioner has failed to comply with Local Rule 83.32.3. This rule requires, *inter alia*, that the movant attach to his motion an affidavit which states that he is unable to pay the costs of his action and which details his assets, especially his prison account balance. Because Petitioner has not complied with LR 83.32.3, his motion for *in forma pauperis* status will be denied without prejudice to subsequent renewal.

An appropriate order will follow.

November 22, 2000
Date

A. Richard Caputo
United States District Judge

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MARTIN HORN, et al.,	:	(Judge Caputo)
	:	
Respondents.	:	

ORDER

NOW, this 22nd day of November, 2000 IT IS HEREBY ORDERED that:

1. Petitioner's motion for the admission *pro hac vice* of Billy H. Nolas, Esquire (Doc. 2) is **GRANTED**;

2. Petitioner's motion for the admission *pro hac vice* of Anne L. Saunders, Esquire (Doc. 2) is **GRANTED**;

3. Petitioner's motion for a stay of execution pursuant to 28 U.S.C. § 2251 (Doc.1) is **GRANTED**;

4. The execution of John J. Koehler, currently scheduled for December 7, 2000, is **STAYED**;

5. Should Petitioner fail to file a petition for writ of habeas corpus by February 26, 2001, the stay issued herein shall be lifted upon application of Respondents;

6. Petitioner's motion to proceed *in forma pauperis* (Doc.1) is **DENIED** without prejudice.

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A. Richard Caputo
United States District Judge

Filed 11/22/2000