IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-50026

JOSE ANGEL MORENO,

Petitioner,

v.

JAMES A. COLLINS,
Director, Texas Department of Criminal Justice,
Institutional Division,

Respondent.

Appeal from the United States District Court
for the Western District of Texas

On Application for Certificate of
Probable Cause and Stay of Execution,
And Petition for Writ of Mandamus
(94-CV-31)

(January 17, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

Jose Angel Moreno is currently confined on death row in the Texas Department of Criminal Justice, Institutional Division, and he is scheduled to be executed by the State of Texas shortly after 12:00 a.m. on January 19, 1994. The United States District

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Court for the Western District of Texas denied Moreno's pro se motion for stay of execution and request for appointment of counsel on January 13, 1994, and Moreno seeks a stay of execution, certificate of probable cause (CPC), or in the alternative a writ of mandamus from this court.

I. PROCEDURAL POSTURE

This case comes to us in an unusual, but not unprecedented, posture. Moreno was convicted of capital murder and sentenced to death in Texas state court. His conviction and sentence were affirmed on direct appeal to the Texas Court of Criminal Appeals, and his petition for certiorari to the United States Supreme Court was denied. Moreno v. State, 858 S.W.2d 453 (Tex. Crim. App.), cert. denied, 114 S. Ct. 445 (1993). Moreno has never filed a petition for habeas corpus relief in the courts of Texas or in federal court.

In early January 1994, Moreno filed in federal district court his pro se motion for stay of execution and request for appointment of counsel. The district court denied Moreno's motion for stay of execution and request for appointment of counsel by order entered January 13, 1994. The order reflected that the court had reviewed all the pleadings filed by Moreno, and the court concluded that Moreno had not satisfied this circuit's standard for granting a stay of execution, as set forth in cases such as Buxton v. Collins, 925 F.2d 816, 819 (5th Cir.), cert. denied, 498 U.S. 1128 (1991). The court further observed

that Moreno had failed to file any document that could be construed, even liberally, as a federal habeas corpus petition. The court took note of this court's opinion in McFarland v. Collins, 7 F.3d 47 (5th Cir.), cert. granted, 114 S. Ct. 544 (1993), that a motion for stay and for appointment of counsel is not the equivalent of an application for habeas relief. Id. at 49. Moreno filed a notice of appeal from the district court's order denying his stay of execution and refusing to appoint counsel. A subsequent request to the district court for a CPC to appeal to this court was denied.

Moreno has renewed his application for a CPC, or, in the alternative, a writ of mandamus, and his motion for a stay of execution in this court.[1]

II. ANALYSIS

A. *McFarland v. Collins*

The rule in this circuit is that the law of this circuit governs whether a stay of execution should be granted; the grant of certiorari by the United States Supreme Court to review an issue settled in this circuit does not itself require a stay of execution. Hawkins v. Lynaugh, 862 F.2d 487, 490 (5th Cir.) (Higginbotham, J., concurring), stay granted, 488 U.S. 989 (1988), vacated and remanded, 494 U.S. 1013 (1990); see also id. (Rubin and King, JJ., concurring). Thus, we must thoroughly

[1] We note that the requirement of obtaining a CPC in order to appeal applies only to an appeal from "the final order in a habeas corpus proceedings" initiated by a state prisoner. 28 U.S.C. § 2253. Because no habeas proceedings have ever been filed in the instant case, no CPC need be obtained.

review this court's opinion in McFarland, in which we considered claims by a state death row inmate presented in the same procedural posture as in the instant case, in order to determine its precedential effect on Moreno's case.

McFarland also involved an inmate on death row in Texas. The inmate, Frank B. McFarland, did not file any petitions for habeas corpus relief in federal or state court, but instead filed a number of motions for stays of execution in both court systems. McFarland, 7 F.3d at 48. McFarland also filed a request for the appointment of counsel in federal district court. Id. The federal district court denied McFarland's request for a stay of execution, his request for the appointment of counsel, and his application for a CPC. Id. McFarland then sought review of these rulings in this court. Id.

The McFarland court denied McFarland all relief, except to grant him leave to proceed in forma pauperis, id. at 49, 48, and the court provided three rationales for its decision. First, the court noted that the Anti-Injunction Act, 28 U.S.C. § 2283, forbids federal courts from staying proceedings in state courts, with three exceptions. McFarland, 7 F.3d at 48. The court viewed 28 U.S.C. § 2251 as satisfying the first exception to the Anti-Injunction Act, which permits federal courts to stay state court proceedings when expressly authorized by act of Congress. Id. at 48-49. However, 28 U.S.C. § 2251 authorizes a stay only by a federal court "before which a habeas corpus proceeding is pending." Id. at 49. We held that McFarland's motions for stays

of execution and for the appointment of counsel were not sufficient to meet the requirement of § 2251 that a habeas proceeding be "pending" before a federal court may stay state court proceedings. Id. (disagreeing with Brown v. Vasquez, 952 F.2d 1164 (9th Cir. 1991), cert. denied, 112 S. Ct. 1778 (1992)).

Second, the McFarland court addressed McFarland's argument that he should be granted a stay to vindicate his entitlement to appointed counsel and allow time to prepare a habeas petition. Id. The court held that this argument did not present sufficient grounds to entitle McFarland to a stay, observing that there is no constitutional right to court-appointed counsel in state post-conviction proceedings. Id. (citing Coleman v. Thompson, 111 S. Ct. 2546 (1991), and Murray v. Giarratano, 492 U.S. 1 (1989)).

Finally, the court noted that McFarland had not met this circuit's standard for determining whether an applicant is entitled to a stay; in particular, McFarland did not show "a substantial case on the merits" involving a "serious legal question." Id. (citing Byrne v. Roemer, 847 F.2d 1130, 1133 (5th Cir. 1988)). Further, McFarland did not "even indicate[] the issues that might be raised in a habeas application, much less show[] a substantial case on the merits." Id.

B. *Applicability of McFarland to Moreno*

Our next task is to scrutinize Moreno's claims now before us to determine whether McFarland controls our disposition of any or all of them.

1. *21 U.S.C. § 848(q)(4)(B)*

Moreno first presents an intricate argument that 28 U.S.C. § 2251 and 21 U.S.C. § 848(q)(4)(B) empower the district court to enter a stay of execution.[2] The first link in Moreno's argument is his claim that his federal statutory right to appointed counsel attaches before he files his first habeas corpus petition. See 21 U.S.C. § 848(q)(4)(B) (guaranteeing that counsel will be appointed to represent indigent inmates "[i]n any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence"). Moreno next proposes that his motions for stay of execution and appointment of counsel in the district court were sufficient to trigger his § 848(q)(4)(B) right to counsel. Finally, Moreno claims that an event triggering an inmate's § 848(q)(4)(B) right to counsel must inevitably also entitle the inmate to a stay of execution to make use of his appointed counsel. Because § 848 says nothing about the power to issue a stay, Moreno is ultimately forced to insist that 28 U.S.C. § 2251 is somehow informed by § 848SQin effect, that whatever triggers the § 848(q)(4)(B) right to counsel must therefore be a "habeas corpus proceeding" under § 2251.

[2] This argument was not presented, at least in any recognizable form, to the district court. Instead, in a passage that flies in the teeth of McFarland, Moreno argued in his motion for stay and appointment of counsel that the district court was authorized to issue the stay under § 2251 because the filing of the motion started a habeas corpus proceeding. For this proposition he cited Brown v. Vasquez, 952 F.2d 1164 (9th Cir. 1991), cert. denied, 112 S. Ct. 1778 (1992), which the McFarland court declined to follow.

We think it clear that this argument is foreclosed by McFarland. Ultimately, Moreno's argument is a claim that § 2251 authorizes federal courts to stay state proceedings without the filing of a formal federal habeas petition. McFarland is squarely to the contrary. McFarland, 7 F.3d at 48-49; cf. In re Lindsey, 875 F.2d 1518, 1519 (11th Cir. 1989) (holding that § 848(q) does not authorize a district court to appoint new counsel for a state prisoner unless a federal habeas petition has been filed).

2. *The All Writs Act*

Moreno next seeks to avoid the controlling effect of McFarland by arguing that the district court had jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a), to grant a stay of execution and appoint counsel. The McFarland court did not specifically address the argument that the All Writs Act provides a basis for a federal court to grant a stay of execution even in the absence of the filing of a federal habeas petition. However, we believe that the All Writs Act was raised in McFarland and implicitly rejected. Our view is confirmed by the fact that certiorari was granted by the Supreme Court in McFarland to review the following question:

> Does a federal district court possess jurisdiction to grant a stay of execution under either 28 U.S.C. § 2251 or 28 U.S.C. § 1651(a), in order to appoint counsel for an indigent pro se death row inmate who has not yet filed a habeas corpus petition but who has expressed an intention to file a petition once counsel is obtained?

(emphasis added). We therefore adhere, as we must, to McFarland's implicit rejection of Moreno's argument under the All Writs Act.

3. *Constitutional Claims*

Moreno next argues that the district court's refusal to stay his imminent execution for the appointment of counsel violated several different constitutional provisions.

First Moreno relies on the federal constitutional right of "access to the courts," which he claims was recognized by six Justices of the Supreme Court in Murray v. Giarratano, 492 U.S. 1 (1989). See id. at 14 (Kennedy, J., joined by O'Connor, J., concurring in the judgment); id. at 15 (Stevens, J., joined by Brennan, Marshall, and Blackmun, JJ., dissenting). The plurality held that there is no federal constitutional right to counsel for indigent prisoners seeking state post-conviction relief, even for prisoner who face execution. Id. at 12 (plurality opinion). Justice Kennedy effectively limited the holding of Murray to the precise facts of the case:

> no prisoner on death row in Virginia has been unable to obtain counsel to represent him in postconviction proceedings, and Virginia's prison system is staffed with institutional lawyers to assist him in preparing petitions for postconviction relief. I am not prepared to say that this scheme violates the Constitution.

Id. at 14-15 (Kennedy, J., joined by O'Connor, J., concurring in the judgment). However, the plurality view in Murray captured a majority of the Court in Coleman v. Thompson, 111 S. Ct. 2546, 2566 (1991). We followed Coleman in McFarland, holding that there is "no constitutional right to court appointed counsel in

state post-conviction proceedings." McFarland, 7 F.3d at 49. Moreno's argument is without merit.

Moreno next asserts a federal constitutional right to counsel in habeas proceedings. This assertion is unsupported by argumentation, except for brief references to the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Eighth Amendment. In any event, the holdings in Coleman and McFarland require us to rule against Moreno for the same reason that his right of "access to the courts" claim is without merit: "There is no constitutional right to an attorney in state post-conviction proceedings." Coleman, 111 S. Ct. at 2566.

Moreno's next argument, which is based on the Habeas Corpus Suspension Clause, is also without merit. In Hardwick v. Doolittle, 558 F.2d 292, 296 (5th Cir. 1977), cert. denied, 434 U.S. 1049 (1978), we concluded that "a federal court injunction barring future habeas petitions cannot be sustained without risking a violation of the Suspension Clause." No injunction or other similar bar has prevented Moreno from filing a habeas petition. His lack of counsel may be a hindrance to his preparation of a petition, but, as we have seen, the Constitution does not require prisoners to be provided with counsel as they pursue post-conviction remedies.

III.

This case is controlled by McFarland, now pending before the Supreme Court. Any escape from its reach now lies with that

Court. The stay is therefore DENIED. The application for a writ of mandamus is DENIED. The application for CPC is DISMISSED.