

MAR - 7 2005

12:10 p.m.
Betty A. Griess, Clerk
Cheyenne

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

JAMES MARTIN HARLOW,)
)
Plaintiff,)
)
vs.) Case No. 05-CV-039-B
)
SCOTT ABBOTT, Warden, Wyoming)
State Penitentiary Complex,)
)
Defendant.)

ORDER GRANTING MOTION FOR APPOINTMENT OF COUNSEL AND STAYING
EXECUTION

This matter comes before the Court upon motion by Mr. Harlow requesting that the Court appoint counsel to assist him in drafting a petition for habeas corpus pursuant to 28 U.S.C. § 2254. He also requests, pursuant to *McFarland v. Scott*, 512 U.S. 849 (1994), that the Court stay his pending execution until such time as his habeas corpus petition has been ruled on by this Court. The Court, having reviewed the motion, and being fully advised, finds that both requests should be **GRANTED**.

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).

The Supreme Court held that this provision established a right to "preapplication legal assistance for capital defendants in federal habeas corpus proceedings." *McFarland* at 855. This right to appointed counsel adheres prior to the filing of a formal, legally sufficient habeas corpus petition. *Id.* In order to avail himself of this right, a death row defendant need only file a motion stating that he is indigent and requesting the appointment of counsel for his federal habeas corpus proceeding.

On February 9, 2005, the Court received such a motion from Mr. Harlow. The motion recites that he is currently a prisoner in the custody of the State of Wyoming. He has been sentenced to death. Mr. Harlow claims that he is being held in custody in violation of the Constitution of the United States. He also argues that he is unable to pay for counsel to assist him in a habeas corpus proceeding. Attached to the motion is a completed affidavit of indigency. The Court has reviewed the affidavit and finds that it is appropriate to appoint counsel for Mr. Harlow in this case.

The Court contacted several qualified attorneys who expressed an interest in assisting in Mr. Harlow's representation. After

reflection, the Court has selected Mr. Sean O'Brien, Esq. of Kansas City, Missouri to represent Mr. Harlow. The Court will appoint local counsel to assist in Mr. Harlow's defense as well. This appointment will be made upon motion from the Petitioner and his counsel. The Court notes, however, that as of this date no filing fee has been paid and the Court has not received a motion to proceed *in forma pauperis* from Mr. Harlow.

Mr. Harlow also seeks a stay of his execution, currently set for March 31, 2005. Mr. Harlow seeks this stay so that counsel has sufficient time to review the record and conduct necessary investigations to ensure that all federal constitutional issues are raised.

Once a capital defendant invokes his right to appointed counsel, a federal court also has jurisdiction under 28 U.S.C. § 2251 to enter a stay of execution. *McFarland* at 858. Section 2251 does not, however, mandate the entry of a stay, but places the decision regarding a entry of a stay within the sound discretion of a federal court. *Id.* A stay is warranted where counsel requires time to meaningfully research and present a defendant's habeas claims.

In Mr. Harlow's case, the Court was forced to look outside

Wyoming to find counsel qualified under 21 U.S.C. § 848 in matters of capital habeas. As a result, Mr. Harlow's newly appointed counsel has no previous knowledge regarding the underlying facts or potential legal issues relevant to potential habeas claims. It is reasonable to expect that Mr. Harlow's attorney will want to familiarize himself with all of the state court proceedings, including the lengthy trial transcripts. The Court does not believe that this can be achieved before Mr. Harlow's scheduled execution date of March 31, 2005. Mr. Harlow's execution will therefore be stayed pending further order of this Court. In granting this stay, it is not the Court's intent to delay the legal process any longer than necessary. The Court simply wishes to ensure that the case is handled in a manner that will ensure both an expeditious and just result.

NOW, THEREFORE, IT IS HEREBY **ORDERED** that Mr. Harlow's motion for appointment of counsel is hereby granted and Mr. Sean O'Brien, Esq. shall be appointed to represent Mr. Harlow in his capital habeas proceeding. The Court will consider the appointment of local counsel upon motion from Mr. Harlow and his attorney.

IT IS FURTHER **ORDERED** that Mr. Harlow's motion for stay of execution is hereby granted, and the execution of Petitioner

ordered by the Order and Warrant of Execution issued by the Second Judicial District Court, in and for Carbon County, Wyoming, on February 18, 2005, is stayed pending further order of this Court.

IT IS FURTHER **ORDERED** that Mr. Harlow shall remain in the custody of the Warden of the Wyoming State Penitentiary pending further order of this Court.

IT IS FURTHER **ORDERED** that the Clerk of this Court shall provide copies of this order forthwith to the Warden of the Wyoming State Penitentiary, the Attorney General of the State of Wyoming, the Governor of the State of Wyoming, the Second Judicial District Court, in and for Carbon County, Wyoming and to Mr. Harlow through his attorney, Mr. Sean O'Brien.

Dated this 7th day of March, 2005.

/s/ Clarence A. Brimmer
UNITED STATES DISTRICT JUDGE