

**ENTERED**

August 22, 2018

David J. Bradley, Clerk

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
BROWNSVILLE DIVISION**

RUBEN GUTIERREZ,	§	
	§	
Petitioner,	§	
VS.	§	CIVIL NO. 1:09-CV-00022
	§	
LORIE DAVIS,	§	
	§	
Respondent.	§	

**ORDER**

Petitioner Ruben Gutierrez (“Gutierrez”) is scheduled for execution by the State of Texas on September 12, 2018. Before the Court are Gutierrez’s August 15, 2018, opposed Motion for Stay of Execution, Dkt. No. 73; Respondent Lorie Davis’ (“Davis”) August 16, 2018, Opposition to Petitioner’s Motion for a Stay of Execution, Dkt. No. 76; and Gutierrez’s August 21, 2018, reply to the opposition, Dkt. No. 77. After considering the pleadings, the record, and the law, the Court **GRANTS** Gutierrez’s motion and **STAYS** Gutierrez’s execution.

**I. Background**

A Texas jury convicted Gutierrez in 1999 for the capital murder of 85-year-old Escolastica Harrison. He was sentenced to death. After unsuccessfully seeking state appellate and habeas remedies, Gutierrez sought federal habeas corpus review. On September 15, 2008, the Court appointed Margaret Schmucker (“Schmucker”) to represent Gutierrez in his federal habeas corpus proceedings pursuant to 18 U.S.C. § 3599. *Gutierrez v. Quarterman*, 1:08-mc-008, Dkt. No. 5. The Court denied Gutierrez’s federal petition on October 3, 2013. Dkt. No. 44. The Fifth Circuit affirmed on November 13, 2014, *Gutierrez v. Stephens*, 590 F. App’x 371 (5th Cir. 2014), and the United States Supreme Court subsequently denied certiorari review, *Gutierrez v. Stephens*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 35 (2015). The State of Texas has set Gutierrez’s execution for September 12, 2018.

On July 24, 2018, Schmucker filed a motion for the substitution of counsel. *See* Dkt. No. 56. Schmucker provided two reasons why her withdrawal from representation was necessary. First, Schmucker argued that she lacked the experience necessary to litigate effectively challenges Gutierrez anticipated raising before his execution date. *Id.* at 1-2. Second, Schmucker stated she could not handle any appeal to the Fifth Circuit because she had been “disqualif[ie]d . . . from performing work pursuant to the Criminal Justice Act . . . in cases before [that] court as a result of a pattern of rude and unprofessional communications with court staff.” *In re Schmucker*, No. 17-98007 (5th Cir. Dec. 15, 2017). Further, the Court notes that the pleadings did not show that Schmucker had consulted with her client, his position on that motion, or that he had received a copy of the motion.

The Court entered an expedited scheduling order on July 24, 2018. Dkt. No. 57. Davis filed an opposition to the substitution on July 27, 2018. Dkt. No. 58. Schmucker filed a reply on August 3, 2018. Dkt. No. 62. On August 6, 2018, with only thirty-eight days remaining before his execution, the Court granted Schmucker’s motion to withdraw from representing Gutierrez and appointed Attorney Richard W. Rogers, III, (“Rogers”) as substitute counsel. Dkt. No. 63. The Court also ordered expedited briefing on whether the substitution of counsel would require a stay of Gutierrez’s execution. *Id.* at 6. The Court has since conditionally appointed the Federal Community Defender Office for the Eastern District of Pennsylvania as co-counsel in this case. Dkt. No. 71.

On August 15, 2018, Gutierrez filed a motion to stay his execution. Dkt. No. 73. Gutierrez argues that the appointment of new counsel has created circumstances requiring a stay. Gutierrez contends that the statutory right to counsel guarantees a right to “quality legal representation.” *Id.* at 5. He further argues that Schmucker was unable to provide that level of representation because she was unprepared or unable to pursue available avenues of relief. *Id.* at 6-7. Gutierrez also argues that the substitution of legal counsel a mere thirty-eight days before execution impedes counsel’s ability to research and present meaningful grounds for relief. *Id.* at 7.

Davis opposes any stay. Dkt. No. 76. Davis provides two reasons why the execution should go forward. First, Davis argues that this Court lacks authority to stay his execution. *Id.* at 3-11. Recognizing that the Fifth Circuit has recently found that district courts possess jurisdiction in similar circumstances, Davis argues that those cases misapplied Supreme Court precedent. *Id.* at 3-5. Second, Davis argues that the circumstances of this case are not such that a stay is necessary. *Id.* at 11-18.

In his reply to Davis' Opposition, however, Gutierrez argues that the Court has jurisdiction to stay his execution. Dkt. No. 77 at 1. In doing so, Gutierrez cites recent cases in which the Fifth Circuit has found that a district court has jurisdiction in similar circumstances. *Id.* at 2-3. Gutierrez responds to Davis' substantive arguments and urges that the circumstances warrant a stay of execution. *Id.* at 5-6. Specifically, Gutierrez argues that the short time since the substitution of counsel has not provided a sufficient opportunity to engage in meaningful research and preparation of viable claims. *Id.* at 5. Simply, "[i]f his execution date is not stayed, he will not receive the meaningful assistance of counsel to research and present all available postconviction claims, or a petition for clemency. Under any applicable standard, a stay is necessary and just in these limited circumstances." *Id.* at 6.

## II. Legal Standards

A prisoner condemned to death, however imminent that death may be, has no automatic entitlement to a stay of execution. *See McFarland v. Scott*, 512 U.S. 849, 858 (1994). "A stay of execution is an equitable remedy that is not available as a matter of right." *Wood v. Collier*, 836 F.3d 534, 538 (5th Cir. 2016). In deciding whether to issue a stay of execution, federal courts consider two different standards. First, the Supreme Court in *McFarland* "has instructed federal courts to grant a stay" when an inmate has "insufficient time to meaningfully exercise [his right to counsel] because of an impending execution . . . ." *Charles v. Stephens*, 612 F. App'x 214, 222 (5th Cir. 2015). Second, the Supreme Court in *Nken v. Holder*, 556 U.S. 418, 433-34 (2009) outlined four factors that courts use in deciding whether to stay

an execution: “(1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest.” *In re Campbell*, 750 F.3d 523, 534 (5th Cir. 2014) (quotation omitted). The Fifth Circuit has not decided which standard governs whether to stay an execution. *See Battaglia v. Stephens*, 824 F.3d 470, 475 (5th Cir. 2016); *Charles*, 612 F. App’x at 222. The Court will consider the motion to stay under both the *McFarland* and *Nken* standards.

### III. Analysis

#### A. Jurisdiction

Before turning to the question of whether a stay of execution is appropriate, the Court dispenses with Davis’ argument that no jurisdiction exists to take such action. In earlier cases, the Fifth Circuit held that “[t]he power to issue a stay of execution comes from [28 U.S.C.] § 2251,” and thus when considering a stay “the question is whether there is a pending or potential habeas corpus proceeding before the court.” *Rosales v. Quarterman*, 565 F.3d 308, 311 (5th Cir. 2009) (citing *Teague v. Johnson*, 151 F.3d 291 (5th Cir. 1998) (“[O]nce the appellate mandate issues, a habeas petition is no longer pending before the court of appeals, and we have no jurisdiction to stay proceedings under § 2251.”); *see also Howard v. Dretke*, 157 F. App’x 667, 670-72 (5th Cir. 2005); *Williams v. Cain*, 143 F.3d 949, 950 (5th Cir. 1998). Davis argues that the Court has no authority to stay Gutierrez’s execution because no habeas action is currently pending.

In recent cases, however, the Fifth Circuit found that a district court has power to grant a stay after counsel is appointed and that jurisdiction continues even when an active habeas petition is not pending. *See Ramirez v. Davis*, 675 F. App’x 478, 479 (5th Cir. 2017); *Battaglia*, 824 F.3d at 475; *Charles*, 612 F. App’x at 218; *see also Ryan v. Gonzales*, 568 U.S. 57, 70-71 (2013) (“[A] district court may stay a capital prisoner’s execution once the prisoner has invoked his statutory right to counsel.”). For example, in *Ramirez* the district court entered a stay after

substituting counsel only days before a scheduled execution. *Ramirez v. Davis*, No. 2:12-cv-00410 (S.D. Tex. Jan. 31, 2017). Davis appealed that order and raised jurisdictional arguments nearly identical to those in the instant case. The Fifth Circuit affirmed the lower court in a brief order and stated that “the district court did not lack jurisdiction under these circumstances to grant the stay.” *Ramirez*, 675 F. App’x at 479.

Davis argues that the more recent Fifth Circuit cases misapplied Supreme Court precedent. Dkt. No. 76 at 6. The Court is not at liberty nor inclined to ignore current Fifth Circuit law. Following recent Fifth Circuit precedent in *Battaglia*, *Ramirez*, and *Charles*, the Court finds that it has authority to consider Gutierrez’s motion to stay.

B. *McFarland* Standard

Once a court appoints an attorney under § 3599, that attorney “shall represent the defendant *throughout every subsequent stage of available judicial proceedings*” unless that attorney is “replaced by similarly qualified counsel.” 18 U.S.C. § 3599(e) (emphasis added). Under the *McFarland* standard, a federal court may stay an execution to make the right to counsel “effective.” *Battaglia*, 824 F.3d at 475. To be entitled to a stay of execution under the *McFarland* standard, a petitioner must show that the right cannot be meaningfully realized unless his execution is stayed. *McFarland*, 512 U.S. at 858-59.

Davis’ pleadings allege that Schmucker made some efforts to prepare a civil rights complaint for filing in federal court before Gutierrez’s execution. Nothing in the record shows what efforts, if any, she made to prepare for his execution date. Various avenues of relief remain open to Gutierrez, but each will soon close. The Court appointed Rogers sixteen days before a clemency petition was due.<sup>1</sup> There is nothing in the record to show that Schmucker made any efforts to investigate or prepare any matters to advance in a clemency petition. Similarly, the pleadings and record do not show whether Schmucker made efforts to investigate any potential

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<sup>1</sup> A clemency application must be filed with the Texas Board of Pardons and Paroles at least twenty-one calendar days before a scheduled execution. See 37 TEX. ADMIN. CODE § 143.43.

basis for a successive state or federal habeas petition, both of which contain strict timelines.<sup>2</sup> Only weeks remained in which Rogers could seek relief on his client's behalf in the Texas Court of Criminal Appeals or the Fifth Circuit.

Davis argues that “[n]othing (e.g., Ms. Schmucker’s removal from the CJA roster) prevented Ms. Schmucker from preparing a clemency petition on Gutierrez’s behalf, and nothing prevents current counsel from doing the same.” Dkt. No. 76 at 13. While Gutierrez’s current attorneys can assuredly file various papers before the execution date, the law promises more than what, without adequate time or resources, could best be characterized as superficial representation by counsel. The *McFarland* standard comes down to modifiers. The right to counsel cannot be satisfied unless that right is “effective.” *Battaglia*, 824 F.3d at 475. The right to counsel “necessarily includes a right for that counsel *meaningfully* to research and present a defendant’s habeas claims.” *McFarland*, 512 U.S. at 858 (emphasis added).

Davis argues that “Gutierrez does not even suggest any *potential* basis for relief.” Dkt. No. 76 at 14. But this Court appointed counsel only a short time ago. Given the complexity of capital proceedings, the intricacies of the factual issues at play, and the sheer volume of records counsel must plow through, it is unsurprising that Rogers has not identified what issues he may raise in the future. Even with a looming filing date for a clemency petition, Gutierrez’s attorneys argue that “they have only just begun to familiarize themselves with the case and are hardly in a position to produce a constitutionally adequate clemency petition (though they will endeavor to do so). Simply because a filing can be made does not render it ‘meaningful.’” Dkt. No. 77 at 5, n.3. Allowing the execution to proceed, however, would deny Gutierrez any meaningful opportunity to conduct an investigation into the factual and legal basis of potential claims.

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<sup>2</sup> Texas Court of Criminal Appeals Miscellaneous Rule 11-003 requires that counsel file any pleadings requesting a stay of execution seven days before an execution. Rule 8.10 of the Fifth Circuit Rules threatens counsel with sanctions if filing any pleadings fewer than seven days before an execution without a showing of good cause.

This is not a case where “a dilatory capital defendant inexcusably ignores [the] opportunity [to secure counsel] and flouts available processes . . . .” *McFarland*, 512 U.S. at 858. There is nothing in the record to show that Gutierrez was aware of the Fifth Circuit’s action until after the substitution of counsel occurred on August 6, 2018. Dkt. No. 63.<sup>3</sup> The Court finds that Gutierrez’s right to counsel can only be given meaningful effect if Rogers and his co-counsel have more time to investigate, research, and prepare potential grounds for relief. Under the *McFarland* standard, and given the discrete facts of this case, the Court finds that Gutierrez has met his burden of showing that a stay of execution is necessary.

C. *Nken* Factors

Alternatively, the Court relies on the same arguments supporting the *McFarland* analysis to find that Gutierrez has met the four *Nken* factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other party interested in the proceeding; and (4) where the public interest lies.

Because counsel has had little time to investigate potential issues, it would be premature to decide whether Gutierrez may succeed in any future grounds for relief. *See Battaglia*, 824 F.3d at 475. While not a dispositive factor “[i]n a capital case, the possibility of irreparable injury weighs heavily in the movant’s favor.” *O’Bryan v. Estelle*, 691 F.2d 706, 708 (5th Cir. 1982). Without a stay, no remedy would exist for the breaches in meaningful representation that have resulted from Schmucker’s suspension. The State of Texas has a definite right to enforce its judgment, but the public interest also lies in legal proceedings that honor and preserve an individual’s inherent rights. Weighing the relevant factors, and giving heavy consideration to the promise of meaningful legal representation, the Court finds under the *Nken* factors that Gutierrez is entitled to a stay of execution.

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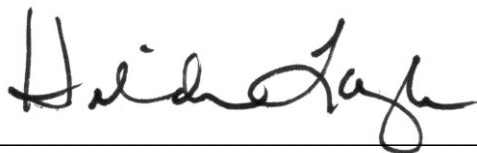
<sup>3</sup> Court staff was informed by the Warden of the Polunsky Unit of TDCJ that Gutierrez received the order substituting counsel (Dkt. No. 63) on August 9, 2018.

**IV. Conclusion**

The Court finds that a stay of execution is necessary to preserve Gutierrez's right to meaningful and effective legal representation. The Court, therefore, **GRANTS** Gutierrez's motion and **STAYS** Gutierrez's execution. Dkt. No. 73.

The Court **DIRECTS** the Clerk of the Court to send a copy of this Order to Gutierrez by overnight delivery.

SIGNED this 22nd day of August, 2018.

A handwritten signature in black ink, appearing to read "Hilda Tagle", written over a horizontal line.

Hilda Tagle  
Senior United States District Judge