

1 **WO**

2

3

4

5

6

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

7

8

9

Juan Velazquez,

)

No. CIV 07-1044-PHX-CKJ

10

Petitioner,

)

DEATH PENALTY CASE

11

vs.

)

12

Dora B. Schriro, et al.,

)

ORDER DISMISSING PETITION

13

Respondents.

)

14

15

16

On May 24, 2007, Petitioner Juan Velazquez, an Arizona prisoner under sentence of death, filed *pro se* a Petition for Writ of Habeas Corpus by a Person in State Custody Pursuant to 28 U.S.C. § 2254. The petition asserts that the Arizona Supreme Court has refused to provide him with either a complete record for appeal or conflict-free appellate counsel. (Dkt. 1 at 1.) Therefore, he requests that this Court order a stay of state court appellate proceedings and provide appointment of federal habeas counsel to pursue his claims in this Court. (*Id.* at 2; Dkt. 4.)

17

18

19

20

21

22

23

BACKGROUND

24

According to the petition, Petitioner was sentenced to death in Maricopa County Superior Court on October 8, 2004. (Dkt. 1 at 6.) Pursuant to Rule 31.2(b) of the Arizona Rules of Criminal Procedure, an automatic notice of appeal was filed on that same date. Sentencing on Petitioner’s non-capital convictions occurred on November 5, 2004, and notice of appeal from this judgment was filed three days later. (*Id.*)

25

26

27

28

1 and the federal legal theory so that the state courts have a “fair opportunity” to apply
2 controlling legal principles to the facts bearing upon his constitutional claim.” *Kelly v. Small*,
3 315 F.3d 1063, 1066 (9th Cir. 2003). In cases carrying a death sentence, such as Petitioner’s,
4 claims are exhausted once the Arizona Supreme Court has ruled on them. *See Swoopes v.*
5 *Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999).

6 The exhaustion requirement is not satisfied if there is a post-conviction proceeding,
7 such as an appeal, still pending in state court, even if the issue to be challenged in the federal
8 habeas petition has been finally settled in the state courts. *Sherwood v. Tomkins*, 716 F.2d
9 632, 634 (9th Cir. 1983). This is because, even if the federal constitutional question raised
10 by the petitioner cannot be resolved in a pending state appeal, that appeal may result in the
11 reversal of the petitioner’s conviction on some other ground, thereby mooting the federal
12 question. *Id.*

13 Petitioner argues that he is excused from the exhaustion requirement because “there
14 is either an absence of available State corrective process or the existence of circumstances
15 rendering such process ineffective to protect the rights of the prisoner.” *Coe v. Thurman*, 922
16 F.2d 528, 530 (9th Cir. 1990) (citing 28 U.S.C. § 2254(b)(1)(B)). In *Coe*, the Ninth Circuit
17 refused to apply the *Sherwood* rule to a petitioner who had brought a due process claim
18 arising from extreme delay in state appellate proceedings. *Id.* The petitioner demonstrated
19 that the delay would impair his defense in the event of a retrial. *Id.* at 531-32. The court
20 excused exhaustion, reasoning that it would be meaningless to send a petitioner back to state
21 court on an exhaustion rationale when the essence of his due process claim arose out of his
22 ability to exhaust state remedies.¹ *Id.* at 530.

23 Petitioner relies heavily on *Coe*, but he does not allege that the Arizona Supreme
24 Court has unduly delayed disposition of his appeal. Indeed, Petitioner seeks an order from
25

26 ¹ In *Coe*, the court considered the following four factors in determining whether
27 delay was so inordinate that it violated the petitioner’s due process rights: (1) length of the
28 delay; (2) reason for the delay; (3) defendant’s assertion of his rights; and (4) prejudice. 922
F.2d at 531-32.

1 this Court staying his state appellate proceedings. Even were the Court to consider the
2 timing issue, Petitioner has failed to establish unusual or excessive delay in the processing
3 of his appeal. Unlike the petitioner in *Coe*, Petitioner was convicted of first degree murder
4 and sentenced to death. Capital trials are by nature lengthy and complex. There are also
5 numerous administrative issues attendant upon direct appeals of Arizona death penalty cases,
6 including the length of records and the fact that appellate counsel must meet the
7 qualifications of Rule 6.8 of the Arizona Rules of Criminal Procedure. Information provided
8 by a recent study of appellate case processing in states with capital punishment, including
9 Arizona, reveals that the median time from date of death sentence to appellate decision is 2.7
10 years. Barry Latzer & James N.G. Cauthen, *Justice Delayed? Time Consumption in Capital*
11 *Appeals: A Multistate Study* 28 (2007), <http://www.ncjrs.gov/pdffiles1/nij/grants/217555.pdf>.
12 Petitioner's case, at this point in his state appellate proceeding, is within the average period
13 for a direct capital appeal. Thus, he has failed to establish that his case has been inordinately
14 delayed.

15 As noted, the crux of Petitioner's complaint is not undue delay. Rather, he complains
16 about the completeness of the state court record on appeal and alleges that his appellate
17 counsel suffers from a conflict of interest. These allegations fall far short of establishing that
18 there is "an absence of available State corrective process" or the existence of circumstances
19 that "render such process ineffective to protect the rights of the applicant." 28 U.S.C. §
20 2254(b)(1)(B)(i) & (ii); *see Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) ("An exception [to
21 the exhaustion requirement] is made only if there is no opportunity to obtain redress in state
22 court or if the corrective process is so clearly deficient as to render futile any effort to obtain
23 relief."). Petitioner's allegations concerning the competency of appellate counsel must
24 necessarily be presented in a state post-conviction-relief (PCR) petition, which will not be
25 initiated until after his direct appeal proceedings are concluded. *See State v. Spreitz*, 202
26 Ariz. 1, 2, 39 P.3d 525, 526 (2002) (directing that all IAC claims be presented in a PCR
27 petition rather than appeal); Ariz. R. Crim. P. 32.4 (providing in capital cases for automatic
28 notice of PCR upon issuance of direct appeal mandate). In addition, Petitioner has filed in

1 state court *pro se* motions regarding his record concerns, and if, as Petitioner speculates, the
2 Arizona Supreme Court renders a decision based on an erroneous determination of the facts,
3 he is entitled to seek reconsideration of that ruling or pursue the issue in PCR proceedings.
4 *See* Ariz. R. Crim. P. 31.18(c), 32.1. The Court concludes that there is neither absent nor
5 inadequate state corrective process in Arizona to adjudicate Petitioner’s claims. Therefore,
6 he is subject to the exhaustion requirement. 28 U.S.C. § 2254(b).

7 Petitioner also requests appointment of federal habeas counsel under 18 U.S.C. § 3599
8 (former 21 U.S.C. § 848(q)(4)(B)) and *McFarland v. Scott*, 512 U.S. 849 (1994). In relevant
9 part, § 3599 provides:

10 In any post conviction proceeding under section 2254 or 2255
11 of title 28, United States Code, seeking to vacate or set aside a
12 death sentence, any defendant who is or becomes financially
unable to obtain adequate representation . . . shall be entitled to
the appointment of one or more attorneys

13 18 U.S.C. § 3599(a)(2). In *McFarland*, the Court construed this statutory right to counsel
14 to include the right to legal assistance prior to the filing of a formal habeas corpus petition
15 and concluded that “a ‘post conviction proceeding’ is commenced by the filing of a death
16 row defendant’s motion requesting the appointment of counsel for his federal habeas corpus
17 proceeding.” 512 U.S. at 856-57.

18 However, as already noted, an application for habeas corpus relief may not be granted
19 unless it appears that all remedies in state court have been exhausted. 28 U.S.C. § 2254.
20 This requirement is premised on the doctrine of comity, which provides that state courts
21 should have the first opportunity to decide a petitioner’s claims. *Rhines v. Weber*, 544 U.S.
22 269, 276 (2005) (reaffirming the Supreme Court’s “simple and clear instruction to potential
23 litigants: before you bring any claims to federal court, be sure that you first have taken each
24 one to state court”) (citing *Rose v. Lundy*, 455 U.S. 509, 520 (1982)).

25 Justice Blackmun, who authored the majority opinion in *McFarland v. Scott*,
26 recognized that the right to counsel under former § 848(q) generally attaches only after state
27 remedies have been exhausted. In a dissent from the Court’s order denying certiorari in a
28 separate petition filed by *McFarland*, the justice wrote: “The right to qualified legal counsel

1 in federal habeas corpus proceedings bestowed by § 848(q)(4)(B) is triggered only after a
2 capital defendant has completed his direct review and, generally, some form of state
3 postconviction proceeding.” *McFarland v. Scott*, 512 U.S. 1256, 1263 (1994) (Blackmun,
4 J., dissenting); *see also Death Row Prisoners of Penn. v. Ridge*, 948 F. Supp. 1278, 1281
5 (E.D. Pa. 1996) (denying appointment of counsel after determining that statutory right to
6 counsel triggered only upon exhaustion of state court remedies); *Moseley v. Freeman*, 977
7 F. Supp. 733, 734 (M.D. N.C. 1997) (“The statutory procedure of Section 848(q)(4)(B)
8 presupposed that the petitioner has a present right to file a Section 2254 post-conviction
9 proceeding. This normally occurs when state post-conviction proceedings have been
10 exhausted.”).

11 Because Petitioner has failed to establish that there is “an absence of available State
12 corrective process” or “the existence of circumstances rendering such process ineffective,”
13 28 U.S.C. § 2254(b)(1)(B), he is not excused from the exhaustion requirement. In light of
14 the pending proceedings in state court, which could affect Petitioner’s conviction and/or
15 sentence and which could also ultimately affect these proceedings, it would be inappropriate
16 for this Court to appoint federal habeas counsel or to rule on Petitioner’s claims at this time.
17 *Sherwood*, 716 F.2d at 634; *Schnepp v. State of Oregon*, 333 F.2d 288 (9th Cir. 1964) (*per*
18 *curiam*) (pending post-conviction proceedings precluded grant of writ of habeas corpus).
19 Because this habeas action is premature, the Court will dismiss the case without prejudice
20 to refiling after Petitioner has exhausted all remedies in state court.

21 Based on the foregoing,

22 **IT IS ORDERED** that Petitioner’s motions for stay of state court proceedings and
23 appointment of federal habeas counsel (Dkts. 2 & 4) are **DENIED**.

24 **IT IS FURTHER ORDERED** that Petitioner’s *Pro Se* Petition for Writ of Habeas
25 Corpus (Dkt. 1) is **DISMISSED WITHOUT PREJUDICE**. The Clerk of Court shall enter
26 judgment accordingly.

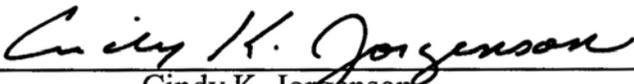
27 **IT IS FURTHER ORDERED** that, pursuant to Rule 4 of the Rules Governing
28 Section 2254 Cases, the Clerk of Court shall serve a copy of the petition and this Order on

1 Kent Cattani, Assistant Arizona Attorney General.

2 **IT IS FURTHER ORDERED** that the Clerk of Court forward a copy of this Order
3 to Rachelle M. Resnick, Clerk of the Arizona Supreme Court, 1501 W. Washington, Phoenix,
4 AZ 85007-3329.

5 DATED this 27th day of July, 2007.

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28


Cindy K. Jorgenson
United States District Judge