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UNITED STATES DISTRICT COURT

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EASTERN DISTRICT OF CALIFORNIA

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RICHARD JOHN VIEIRA,) Case No. CIV. F-05-01492 OWW
)
Petitioner,) DEATH PENALTY CASE
)
vs.) ORDER GRANTING LEAVE TO PROCEED
Steven W. Ornoski, as Acting) IN FORMA PAUPERIS AND REQUEST FOR
Warden of San Quentin State) APPOINTMENT OF COUNSEL BUT
Prison,) DENYING WITHOUT PREJUDICE REQUEST
Respondent.) FOR TEMPORARY STAY OF EXECUTION

Petitioner Richard John Vieira ("Vieira") commenced this action on November 22, 2005 pursuant to 28 U.S.C. § 2254 by electronically filing a combined request for appointment of counsel and a temporary stay of execution. Vieira filed an application to proceed in forma pauperis under separate cover simultaneous with his request for appointment of counsel and temporary stay of execution. Counsel employed by the Capital Habeas Unit of the Eastern District of California Federal Defender's Office assisted Vieira in the preparation and electronic filing of his moving papers. Assistant Federal Defender Joseph Schlesinger has advised the Court that the papers referred to above were served by mail on the Deputy Attorney General Catherine Chatman, counsel for Respondent Steven W. Ornoski,

1 as Acting Warden of San Quentin State Prison (the "Warden") on
2 November 23, 2005.

3 **I. Application for Leave to Proceed in Forma Pauperis.**

4 Rule 3(a)(2) of the Rules governing § 2254 Cases provides that
5 a motion for leave to proceed in forma pauperis shall be accompanied
6 by "the affidavit required by 28 U.S.C. § 1915, and a certificate from
7 the warden or other appropriate officer of the place of confinement
8 showing the amount of money or securities that the petitioner has in
9 any account in the institution." The affidavit described in 28 U.S.C.
10 § 1915 shall "include a statement of all assets such prisoner
11 possesses [and] that the person is unable to pay such fees or give
12 security therefor."

13 In his combined application for appointment of counsel and
14 temporary stay of execution, Vieira appends a declaration under
15 penalty of perjury, which in addition to describing the basis for his
16 request for appointment of counsel, avers that he is indigent and has
17 assets of only \$.70 in his prison trust account. Accompanying
18 documents from San Quentin State Prison, including an inmate trust
19 account statement, corroborate Vieira's indigent status. Vieira's
20 declaration and accompanying documents together satisfy the
21 requirements of 28 U.S.C. § 1915 and Rule 3(a)(2) of the Rules
22 governing § 2254 Cases. Vieira is authorized to proceed with the
23 present habeas action in forma pauperis, without restriction.

24 **II. Request for Appointment of Counsel.**

25 Section 848(q)(4)(B) of Title 21 of the United State Code
26 provides:

27 In any post conviction proceeding under section 2254 or
28 2255 of Title 28, seeking to vacate or set aside a death
sentence, any defendant who is or becomes financially

1 unable to obtain adequate representation or investigative,
2 expert, or other reasonably necessary services shall be
3 entitled to the appointment of one or more attorneys and
4 the furnishing of such other services in accordance with
5 paragraphs (5), (6), (7), (8), and (9).

6 Local Rule 81-191(d) of the Local Rules of the United States
7 District Court for the Eastern District of California also provides
8 for the appointment of counsel for indigent capital habeas
9 petitioners. Under this rule, selection of an attorney is made from
10 "[a] panel of attorneys qualified for appointment in death penalty
11 cases" and "certified by a selection board appointed by the Chief
12 Judge."

13 Vieira requests that the Court authorize the Selection Board for
14 the Eastern District of California to recommend federal counsel for
15 appointment in this case. He avers in his supporting declaration that
16 private attorney Wesley A. Van Winkle is considering federal
17 appointment if recommended by the Selection Board.

18 Vieira candidly discloses that procedurally his case is not ready
19 for federal adjudication because his state attorneys have not yet
20 filed a post-conviction petition before the California Supreme Court.
21 He explains that his filing of the instant application and intention
22 to file a federal petition is motivated by the recent United States
23 Supreme Court opinion in *Pace v. DiGuglielmo*, 544 U.S. ___, 125 S.Ct.
24 1807 (2005), which significantly has altered the jurisprudence
25 concerning statutory tolling under 28 U.S.C. § 2244(d)(2). He states
26 the need to retain federal counsel in order to prepare and file a
27 federal petition. He further notes that another recent Supreme Court
28 case, *Rhines v. Weber*, 544 U.S. ___, 125 S.Ct. 1528 (2005), makes it
 possible for him to file a comprehensive petition in federal court
 even though the California Supreme Court has not ruled on post-

1 conviction claims. Vieira does not state when his state post-
2 conviction petition will be filed or what progress is being made
3 toward that end. Understandably, he also does not project when a
4 federal habeas petition may be filed.

5 In light of recent United State Supreme Court jurisprudence,
6 Vieira is entitled to appointment of federal counsel to prepare and
7 file a petition seeking a writ of habeas corpus in this Court. The
8 matter is therefore referred to the Selection Board for the Eastern
9 District of California for recommendation of a qualified attorney to
10 represent him. The Court requests that the Selection Board provide
11 the Court monthly updates on progress in locating qualified, available
12 counsel. The updates may be transmitted informally.

13 **III. Request for Temporary Stay of Execution.**

14 Local Rule 81-191(h) governs the issuance of stays of execution
15 in capital cases. Subsection (h) (2) of Rule 81-191 provides that when
16 an indigent, condemned habeas petitioner submits an application for
17 appointment of counsel and a temporary state of execution, the Court
18 shall issue a temporary stay of execution for a period of 45 days,
19 while counsel is located. Subsection (h) (3) of Rule 81-191 further
20 provides that upon appointment of counsel in a capital habeas
21 proceeding, a separate stay of execution for a period of 120 days
22 shall be issued while newly appointed counsel prepares the federal
23 petition. Both temporary stays of execution may be extended at the
24 discretion of the Court upon a showing of good cause.

25 Vieira requests a stay of execution of his sentence while the
26 Selection Board locates counsel over the next 45 days under Local Rule
27 81-191(h) (2), and upon appointment of counsel for another temporary
28 stay of 120 days under Local Rule 81-191(h) (3). Deputy Attorney

1 General Catherine Chatman has confirmed to the Court, however, that
2 no efforts have been undertaken by the Warden to schedule a hearing
3 with the Stanislaus County Superior Court for purposes of setting an
4 execution date. Because there is neither an execution date set nor
5 plans to set an execution date, a stay of execution is not necessary
6 in this action. Accordingly, Vieira's request for a stay of execution
7 of his sentence is denied without prejudice. If need be, he may seek
8 a temporary stay of execution as appropriate in a later application.

9 Good cause appearing therefor,

10 1. Vieira's application for leave to proceed in forma
11 pauperis is granted.

12 2. The matter is referred to the Selection Board for the
13 Eastern District of California to locate qualified and
14 available counsel to represent Vieira in these federal
15 habeas proceedings, with monthly updates on the
16 progress of such efforts remitted informally.

17 3. Vieira's request for a temporary stay of execution is
18 denied without prejudice.

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20 IT IS SO ORDERED.

21 Dated: November 30, 2005

22 /s/ Oliver W. Wanger
23 Oliver W. Wanger
24 United States District Judge
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