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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

PATRICK CHARLES McKENNA,)
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 Petitioner,)
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 vs.)
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 E.K. McDANIEL, *et al.*,)
)
 Respondents.)
)
 _____)

2:11-cv-00191-JCM-PAL

ORDER

This action is a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 by Patrick Charles McKenna, a Nevada prisoner under sentence of death. McKenna’s *pro se* habeas corpus petition was filed on February 3, 2011. Docket #1.

McKenna paid the \$5 filing fee for this action. He also filed an application for leave to proceed *in forma pauperis*. Docket #3. In view of the financial information McKenna has provided with his application, the court will grant his motion in part and deny it in part. The court will not waive payment of the \$5 filing fee, but will grant McKenna leave to proceed *in forma pauperis* with respect to subsequent fees and costs.

McKenna also filed a motion for appointment of counsel. Docket #4. His application to proceed *in forma pauperis* shows that he lacks the resources necessary to employ counsel to prosecute this capital habeas corpus proceeding. Therefore, pursuant to 18 U.S.C. § 3599(a), in the interest of justice, the Federal Public Defender for the District of Nevada (“FPD”) shall be appointed

1 to represent McKenna. If the FPD is unable to undertake representation, due to a conflict of interest
2 or any other reason, then alternate counsel for McKenna will be located, and appointed by the court.
3 McKenna's appointed counsel will represent him in all future federal proceedings in this court
4 relating to this matter, including subsequent actions, and appeals therefrom, pursuant to 18 U.S.C. §
5 3599(e), until allowed to withdraw.

6 Lastly, McKenna also filed a motion for stay of execution. Docket #5. Initial stays of
7 execution are appropriately granted in death penalty cases when no previous habeas petitions have
8 resulted in a final order deciding the merits of federal habeas claims or resulted in a finding that
9 relief is precluded on procedural grounds. *McFarland v. Scott*, 512 U.S. 849 (1994); 28 U.S.C. §
10 2251. Though this court entered, on October 22, 1996, an order dismissing McKenna's prior federal
11 habeas petition as moot (see docket #71 in CV-S-90-785-PMP(LRL)), this current action challenges
12 the judgment of conviction filed in the state district court for Clark County on September 20, 1996,
13 which imposed a sentence of death after McKenna's prior death sentence had been set aside.
14 Accordingly, the court will grant McKenna a stay of execution. Unless the respondents can show
15 cause why such relief should not be granted, the stay shall remain in effect until this habeas corpus
16 action is finally resolved and a final judgment entered.

17 **IT IS THEREFORE ORDERED** that petitioner's application to proceed *in forma pauperis*
18 (docket #3) is **GRANTED IN PART AND DENIED IN PART**. The application to proceed *in*
19 *forma pauperis* is **DENIED** with respect to waiver of payment of the filing fee, but **GRANTED**
20 with respect to subsequent fees and costs.

21 **IT IS FURTHER ORDERED** that petitioner's motion for appointment of counsel (docket
22 #4) is **GRANTED**. The Federal Public Defender for the District of Nevada is appointed to represent
23 petitioner, and shall have **thirty (30) days** from the date of entry of this order to undertake
24 representation of petitioner or to indicate to the court its inability to represent petitioner in these
25 proceedings.

26 **IT IS FURTHER ORDERED** that the Clerk of Court shall **SERVE** a copy of this order on

1 Michael Pescetta, Capital Habeas Division, Office of the Federal Public Defender, 411 East
2 Bonneville Ave., Ste. 250, Las Vegas, NV 89101.

3 **IT IS FURTHER ORDERED** that the Clerk shall **SERVE** the respondents, by certified
4 mail, with a copy of this order and a copy of the habeas corpus petition (docket #1, only).
5 Respondents' counsel shall file a notice of appearance of counsel within **thirty (30) days** from the
6 date of entry of this order, but shall not answer the habeas corpus petition until the court orders
7 otherwise.

8 **IT IS FURTHER ORDERED** that petitioner's motion for stay of execution (docket #5) is
9 **GRANTED**. The execution of Patrick Charles McKenna is hereby **STAYED**, and shall remained
10 stayed until this habeas corpus action is finally resolved. Respondents shall have twenty (20) days
11 from the date this order is entered to show cause why such relief should not be granted.

12 DATED: February 9, 2011.

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15 UNITED STATES DISTRICT JUDGE
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