No. 07-8521

In the Supreme Court of the United States

EDWARD JEROME HARBISON, PETITIONER

v.

RICKY BELL, WARDEN

(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The Terrorist Death Penalty Enhancement Act of 2005, Pub. L. No. 109-177, Tit. II, § 222(a), 120 Stat. 231 (2006) (to be codified at 18 U.S.C. 3599 (2006)) (Section 3599), provides federal funding for counsel for indigent defendants and postconviction litigants in federal capital cases. The questions presented are:

1. Whether Section 3599 provides prisoners sentenced under state law the right to federally appointed and funded counsel to pursue clemency under state law.

2. Whether a district court's order denying a request for federally funded counsel under Section 3599 may be appealed without a certificate of appealability issued pursuant to 28 U.S.C. 2253(c).

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This brief is submitted in response to the order of the Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. Congress provides indigents with federally funded counsel and other services in certain federal death-penalty proceedings. See Terrorist Death Penalty Enhancement Act of 2005 (TDPEA), Pub. L. No. 109-177, Tit. II, § 222(a), 120 Stat. 231 (2006) (to be codified at 18 U.S.C. 3599 (2006)) (Section 3599).[1] Indigent federal defendants are eligible if they face one or more charges for which the maximum penalty is death. Indi-

[1] Section 3599 is reprinted in the appendix to this brief.

gent prisoners, federal or state, are also eligible if they seek federal postconviction relief from a death sentence under either 28 U.S.C. 2254 or 2255. Eligible indigents are entitled to federally funded counsel who meet specified qualifications, see Section 3599(b) and (c), and to "investigative, expert, or other services" when they are "reasonably necessary," Section 3599(f).

Appointed counsel continue to represent the defendant or prisoner "throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process." Section 3599(e). Counsel's representation also extends to "applications for stays of execution and other appropriate motions and procedures." *Ibid.* Relevant here, counsel "shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant." *Ibid.*

Section 3599 was originally enacted as part of the statute creating a new federal capital offense of drug-related homicide and accompanying sentencing procedures, and was originally codified at 21 U.S.C. 848(q)(4)-(10). Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001(b), 102 Stat. 4393-4394. In 2006, Congress repealed the death penalty procedures in Title 21 and moved the statute providing for appointment of counsel, without substantive change, to its current location at 18 U.S.C. 3599. See TDPEA §§ 221(4), 222, 120 Stat. 231-232; see also H.R. Conf. Rep. No. 333, 109th Cong., 1st Sess. 102 (2005) (H.R. Conf. Rep.) (noting that the conference committee had added a provision to "transfer[] existing statutes from the death penalty procedures con-

tained in title 21 * * * to the death penalty procedures in title 18").

2. In 1983, in Chattanooga, Tennessee, petitioner bludgeoned Edith Russell to death when she surprised him burglarizing her house. Following a jury trial in a Tennessee state court, petitioner was convicted of first-degree murder, second-degree burglary, and grand larceny. He was sentenced to death as a result of his murder conviction. The Tennessee Supreme Court affirmed petitioner's convictions and death sentence. *State* v. *Harbison*, 704 S.W.2d 314, 315-316, cert. denied, 476 U.S. 1153 (1986).

Petitioner thereafter filed a petition for state post-conviction relief. After an evidentiary hearing, the state trial court denied the petition. The Tennessee Court of Criminal Appeals affirmed, *Harbison* v. *State*, No. 03C01-9204-CR-00125, 1996 WL 266114 (May 20, 1996), and the Tennessee Supreme Court denied discretionary review.

3. In February 1997, petitioner moved the United States District Court for the Eastern District of Tennessee to stay his execution and appoint counsel to represent him in filing a federal habeas petition, pursuant to the statute now codified as Section 3599. The motions were granted, and the district court appointed Federal Defender Services of East Tennessee, Inc. (Federal Defender Services) to represent petitioner. *Harbison* v. *Bell*, 408 F.3d 823, 827 (6th Cir. 2005), cert. denied, 547 U.S. 1101 (2006); see Pet. App. 15-16.

Through his appointed counsel, petitioner filed a federal habeas petition challenging his conviction and death sentence. The district court denied habeas relief. Petitioner obtained a certificate of appealability (COA) on three of his claims, but on review the Sixth Circuit af-

firmed the denial of his habeas petition. *Harbison*, 408 F.3d at 837. Petitioner unsuccessfully sought post-judgment relief from the denial of his first habeas petition or, in the alternative, permission to file a second or successive federal habeas petition. See Pet. App. 1-3. This Court denied his petitions for a writ of certiorari. 128 S. Ct. 1479, 1493 (2008).

The Tennessee Supreme Court set an execution date and appointed the state Office of the Post-Conviction Defender to represent petitioner in any final state-court proceedings. Pet. 3-4. The court clarified in a subsequent order, however, that the Post-Conviction Defender's representation does not extend to executive clemency. Pet. 4.

4. In December 2006, petitioner moved the federal district court to expand the appointment of counsel and permit Federal Defender Services to represent him in state clemency proceedings in the event that his efforts to obtain judicial relief should fail. Petitioner's appointed counsel submitted an affidavit averring that if petitioner were unsuccessful in obtaining judicial relief from his conviction or death sentence, he intended to seek clemency from the Governor and wished the assistance of counsel. Pet. App. 15-16. Petitioner asserted that the expanded appointment was authorized by Section 3599 and by 18 U.S.C. 3006A(a)(2)(B), which permits a district court to appoint "representation * * * for any [indigent] person who * * * is seeking relief under [28 U.S.C. 2254]." See Pet. App. 16 & n.6.

The district court denied the motion. Pet. App. 15-19. The court recognized that "there is a circuit split on whether [Section 3599], which authorizes the appointment of *federal* habeas corpus counsel, extends that appointment to *state* clemency proceedings." *Id.* at 16.

The court held, however, that the Sixth Circuit had effectively resolved the question "in a closely analogous situation." *Id.* at 17. The court of appeals had rejected an inmate's request for his federally funded counsel to assist him in seeking *state* postconviction relief, holding: "The two representations shall not mix. The state will be responsible for state proceedings, and the federal government will be responsible for federal proceedings." *Ibid.* (quoting *House* v. *Bell*, 332 F.3d 997, 999 (6th Cir. 2003) (en banc)). In the district court's view, the "'simple'" rule laid down in *House* plainly showed that the Sixth Circuit "would follow the same reasoning if asked to determine whether the statute provides for federally-appointed counsel during state clemency proceedings." *Ibid.*

5. Petitioner appealed. The court of appeals directed him to file an application for a COA, which he did. The appeal proceeded on those papers, *i.e.*, without separate merits briefing.

The court of appeals affirmed in a published opinion. Pet. App. 1-4. The court first observed that it was "not clear" that petitioner's appeal required a COA, and stated that if it reached the issue it "would follow the implied rule from [the Fifth Circuit] * * * that no COA was required." *Id.* at 4 (citing *Smith* v. *Dretke*, 422 F.3d 269, 288 (5th Cir. 2005)).

The court of appeals then held that its en banc decision in *House* foreclosed petitioner's interpretation of Section 3599, which "does not authorize federal compensation for legal representation in state matters." Pet. App. 4. The court therefore held that if petitioner were required to obtain a COA, it would deny one because circuit precedent was clear. The court concluded that it would both "[d]eny the motion for a COA for [Federal

Defender Services] to represent [petitioner] in state clemency proceedings" *and* "[a]ffirm the district court." *Ibid.*

6. Petitioner's execution by lethal injection was subsequently stayed when petitioner, represented by Federal Defender Services, challenged Tennessee's lethal-injection protocol in a Section 1983 action in another federal district court. *Harbison* v. *Little*, 511 F. Supp. 2d 872 (M.D. Tenn. 2007), appeal pending, No. 07-6225 (6th Cir. filed Oct. 11, 2007). Following this Court's decision in *Baze* v. *Rees*, 128 S. Ct. 1521 (2008), the Sixth Circuit set a briefing schedule but has left the stay in place.

DISCUSSION

Petitioner seeks review of two questions: (1) whether Section 3599 authorizes federal funding for counsel to pursue state clemency on behalf of a state capital defendant; and (2) whether a COA is required to appeal from the denial of federal funding under Section 3599. The court of appeals correctly held that federal funding is not available, and in our view, no COA was required to proceed with the appeal. Nevertheless, the decision of the court of appeals on the funding issue implicates a circuit split on a question that is worthy of this Court's review. The threshold question whether petitioner was required to obtain a COA does not implicate any direct conflict among the circuits, but resolving it would be a jurisdictional prerequisite to reaching the question of statutory interpretation on which there is a conflict. Because the funding issue warrants resolution by this Court, we believe that certiorari should be granted on both of the questions presented.

A. Certiorari Is Warranted To Resolve A Circuit Split Concerning Whether Federal Funding Is Authorized For State Clemency Counsel

In *In re Taylor*, 537 U.S. 1079 (2002), this Court denied review on the first question presented. Since then, the Tenth Circuit, sitting en banc, has rejected the holdings of several other courts of appeals that funding for state clemency counsel is not authorized. The Tenth Circuit's en banc decision has created an entrenched circuit split on that question, which therefore is ripe for resolution by this Court.

1. Three circuits have held that Section 3599 provides funding only for counsel in federal proceedings. The Sixth Circuit so held in *House* v. *Bell*, 332 F.3d 997 (2003) (en banc), as to collateral litigation in state court, noting that Section 3599 embodies the "simple" rule that "[t]he state will be responsible for state proceedings, and the federal government will be responsible for federal proceedings." *Id.* at 999. It applied that rule here to state clemency proceedings. The Fifth and Eleventh Circuits have likewise rejected requests for federal funding for representation in state clemency proceedings and in state postconviction proceedings. *King* v. *Moore*, 312 F.3d 1365, 1366-1368 (11th Cir.) (clemency), cert. denied, 537 U.S. 1069 (2002); *Clark* v. *Johnson*, 278 F.3d 459, 461-463 (5th Cir.) (same), cert. denied, 537 U.S. 1079 (2002); *Sterling* v. *Scott*, 57 F.3d 451, 458 (5th Cir. 1995) (state-court litigation), cert. denied, 516 U.S. 1050 (1996); *In re Lindsey*, 875 F.2d 1502, 1506 (11th Cir. 1989) (same).

The law in the Eighth Circuit is less clear. Under a prior version of the statute, which permitted courts to "fix the compensation to be paid to attorneys appointed

under this subsection * * * at such rates or amounts as the court determines to be reasonably necessary to carry out the [statute's] requirements," 21 U.S.C. 848(q)(10) (1988), the Eighth Circuit thought that Congress intended "to [e]nsure that indigent state petitioners receive 'reasonably necessary' competency and clemency services." *Hill* v. *Lockhart*, 992 F.2d 801, 803 (1993). But the court held that such services would not be "reasonably necessary," and thus would not be federally funded, unless "state law provide[d] no avenue to obtain compensation for these services"; the underlying federal habeas petition was "non-frivolous"; and "in most if not all cases," the request for funding was "made prior to performing the services." *Ibid.*[2]

In 1996, however, Congress amended the statute to eliminate the "reasonably necessary" phrase, on which the Eighth Circuit relied, from the provisions authorizing federal funding of counsel. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 903(b), 110 Stat. 1318. "[I]nvestigative, expert, and other services" are still covered only if "reasonably necessary," but attorneys' appointment and compensation now do not turn on a finding of reasonable necessity. Section 3599(f) and (g)(1). In light of that change, it is unclear whether the Eighth Circuit would adhere to its analysis in *Hill*.[3]

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[2] The court also adopted the Eleventh Circuit's conclusion that federal funding is categorically unavailable for state postconviction proceedings. See *Hill*, 992 F.2d at 803 (citing *Lindsey*, 875 F.3d at 1506-1507).

[3] Given the uncertainty about *Hill*'s viability, the government had filed a brief in *In re Taylor* at the Court's invitation, suggesting that the petition be denied because of the absence of a square conflict at that time. U.S. Amicus Br. at 7-18, *In re Taylor*, *supra* (No. 01-1605).

2. In *Hain* v. *Mullin*, 436 F.3d 1168 (2006), the en banc Tenth Circuit broke ranks and held that any counsel appointed under Section 3599 to represent a state death row inmate in federal habeas corpus proceedings is "authorized by the statute to represent the[] client[] in state clemency proceedings and [is] entitled to compensation for clemency representation." *Id*. at 1170. The court declined to decide whether federal funding was available for state *judicial* proceedings. *Id.* at 1173 n.6. But it acknowledged that its interpretation created "a circuit split on the issue" of funding for state clemency proceedings. *Id*. at 1172.

Three judges dissented in an opinion by Judge Briscoe. The dissent focused on Section 3599 as a whole, noting that it was enacted as part of a statute creating a new federal capital offense and providing federally funded representation to federal defendants in capital cases. *Hain*, 463 F.3d at 1177. In the dissent's view, the statutory structure demonstrated that although Subsection (e) does not use the word "federal" to describe "pretrial proceedings," "sentencing," "motions for new trial," "post-conviction proceedings," or "clemency," for which federal funding is available, "all of the proceedings listed in [Subsection (e)] are federal proceedings." *Id.* at 1178. "[T]he majority of the proceedings expressly listed in [Subsection (e)] have no applicability at all to state capital prisoners," the dissent concluded, and Congress could not have intended for state prisoners to receive federally funded counsel in (for example) resentencings or even new trials in state court. *Ibid.*

As for the statute's provision in Subsection (e) that appointed counsel "shall also represent the defendant in * * * such proceedings for executive or other clemency as may be available"—which the majority thought must

refer to state clemency since federal clemency is "executive," see 436 F.3d at 1174—Judge Briscoe suggested that Congress "could reasonably have anticipated the availability of 'other' avenues for federal prisoners to obtain clemency." *Id.* at 1179; see *id.* at 1179-1180 (discussing the clemency boards used by Presidents Ford and Truman, as well as other possible avenues for seeking clemency besides directly from the President). By contrast, "had Congress intended to provide federal funding to state capital defendants in state clemency proceedings," it likely would not have done so "through a vague reference to 'other clemency.'" *Id.* at 1180.

The en banc decision in *Hain* creates a square conflict. Death row inmates in the six States of the Tenth Circuit (all of which have the death penalty) are currently entitled to federally funded lawyers to prepare and press their clemency applications. Inmates sentenced to death in the Fifth, Sixth, and Eleventh Circuits (where nine States have the death penalty) cannot receive federal funding for those lawyers. The issue is a recurring one that warrants this Court's review.[4]

3. On the merits, petitioner is incorrect in his contention (Pet. 13-14) that the statute "plainly authorizes" federal funding for representation in state clemency proceedings, or any other state proceedings. Indeed, the principle on which petitioner himself relies (Pet. 15-18)—that Congress's re-enactment of statutory lan-

[4] The state wardens within the Tenth Circuit are unlikely to seek this Court's review—indeed, they may not have a live stake in whether an inmate receives *federal* funding for clemency counsel. See, *e.g.*, *Hill*, 992 F.3d at 803 n.3 (Arkansas Attorney General sided with the inmate's request for federally funded counsel); Br. in Opp. 5-6. The real party in interest would appear to be the United States, which must provide the funding.

guage presumptively ratifies the consensus judicial interpretation of the unchanged—offers him no support.

a. Petitioner's premise—that Congress intended to provide counsel for both state and federal proceedings—is refuted by Section 3599's text and structure. First, Section 3599 has no application until a defendant or habeas petitioner comes into federal court. State prisoners do not receive federal funding for state post-conviction proceedings before they file for federal habeas relief, and it would be incongruous to provide such federal funding for state litigation after federal proceedings have begun, or even ended.

Second, reading Section 3599 to authorize funding for state proceedings would provide incentives to circumvent the longstanding requirement that *all* claims presented in a federal habeas petition be properly exhausted. See *Rhines* v. *Weber*, 544 U.S. 269, 273-274 (2005). On petitioner's reading, an inmate who invokes federal habeas jurisdiction immediately becomes entitled to federally funded counsel who can promptly return to state court on the inmate's behalf, to exhaust any claims that had not previously been presented. Inmates would have a significant incentive to file mixed or unexhausted federal habeas petitions as soon as possible so that counsel will be appointed and begin working on exhausting. The federal habeas statutes—including the exhaustion requirement and the statute of limitations' tolling provision—encourage precisely the opposite practice: petitioning for relief in federal court should come only after thorough litigation in state court. See *id.* at 276-277; *Duncan* v. *Walker*, 533 U.S. 167, 180 (2001).

Third, Sections 3599(b) and (c) establish minimum qualifications for appointed counsel by reference to

practice in *federal* court. See Section 3599(b) (when counsel are appointed before judgment, "at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is tried for not less than five years"); Section 3599(c) (when counsel are appointed after judgment, "at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years"). There is no requirement that counsel appointed after judgment be admitted to practice in the State of conviction, which presumably would be necessary if Section 3599 anticipated that counsel would handle "all available post-conviction process" and "applications for stays of execution" in state court.

Petitioner, and the Tenth Circuit in *Hain*, suggest that the mere fact that Section 3599(e) does not use the word "federal" is dispositive as a matter of "plain language." Pet. 15; *Hain*, 436 F.3d at 1172. But "the meaning of statutory language, plain or not, depends on context." *Holloway* v. *United States*, 526 U.S. 1, 7 (1999) (quoting *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994), and *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)). And the context here makes plain that the proceedings listed in Subsection (e) are federal ones. Indeed, the word "federal" does not appear in Subsection (a)(1), which affords "a defendant" the right to federally funded counsel in capital cases, but the statute's structure makes clear that this provision benefits only *federal* defendants—not every capital-murder defendant in the country.

b. The structure of Section 3599 also refutes the notion, advanced by the Tenth Circuit in *Hain*, that every defendant or petitioner who is appointed counsel Section 3599 *must* be entitled to counsel for each and

every proceeding listed in Subsection (e). Section 3599 provides for appointment of counsel for two entirely distinct categories of clients: defendants charged with a federal capital crime and prisoners pursuing federal postconviction relief from a capital conviction. The statute then provides, in Subsection (e), a list of the proceedings for which appointed counsel may receive federal funding. But because some clients are accused defendants not yet convicted, and others are seeking postconviction relief after trial and direct review are complete, some of the proceedings listed in Subsection (e) apply only to a subset of cases.

For example, in context, "pretrial proceedings," "trial," "sentencing," and "motions for new trial" can only refer to *federal* pre- and post-trial proceedings. Because in federal criminal cases defendants become eligible for counsel under Section 3599(a)(1) as soon as they are charged with a death-eligible crime, counsel appointed under that section frequently are called upon to represent clients at those pre- and post-trial stages. Proceedings such as "motions for new trial," moreover, simply have no application to habeas petitioners.

c. The reference in Subsection (e) to "executive or other clemency" does not undo this sensible reading of the statute. First, as Judge Briscoe explained in her *Hain* dissent, giving meaning to the phrase "or other" does not require the strained conclusion that Congress meant to sweep in *state* clemency proceedings. 436 F.3d at 1179. For example, the President has periodically enlisted the assistance of other officials in reviewing applications for clemency. *Ibid.* Congress could reasonably have used the distinction between "executive" and "other" clemency proceedings to distinguish between

relief granted by the President himself and proceedings before another entity.

Furthermore, Congress would not have placed such weight on the ambiguous two-word phrase "or other." The manifold expansion of the scope of the statute that would be occasioned by reading it to provide federal funding for state proceedings as well as federal would be the kind of "radical departure[] from past practice" that Congress would not attempt to accomplish with the two words "or other." *Jones* v. *United States*, 526 U.S. 227, 234 (1999); see *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 543 (1994); *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 693-694 (1983). That is so especially because of the potential friction with values of federalism that would result from federal courts' appointing lawyers to litigate in state court *or* before state executive officials, and supervising their representation according to federal standards. *King*, 312 F.3d at 1367-1368; *Clark*, 278 F.3d at 462; *Sterling*, 57 F.3d at 457-458; *Lindsey*, 875 F.2d at 1506-1507. See generally *United States* v. *Bass*, 404 U.S. 336, 349 (1971) (courts should not lightly infer an intent to alter the federal-state balance).

d. Petitioner contends (Pet. 15-16) that Congress's recent "re-codification, *verbatim*, of § 848(q)(8) at 18 U.S.C. § 3599(e)" supports his position. In fact the opposite is true. When Congress re-enacts a statute, it is presumed to be aware of the settled interpretation of the statute's language, and when it re-enacts the statute without change, it is presumed to have acquiesced in that settled interpretation. See, *e.g.*, *Keene Corp.* v. *United States*, 508 U.S. 200, 212-213 (1993); *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978). While petitioner relies on that principle, at the time the recodifying stat-

ute was written, *no* court of appeals had clearly adopted petitioner's position.

The legislation that recodified Section 848(q)(4)-(10) as Section 3599 was adopted by a House-Senate conference committee in December 2005. See H.R. Conf. Rep. at 1. At that time, the Tenth Circuit had not yet filed its en banc opinion in *Hain*. The only circuits to have taken a position on the existing language—the Fifth, Sixth, and Eleventh—had all held that it applies only to federal proceedings. The single appellate decision leaning in the other direction, the Eighth Circuit's decision in *Hill*, had turned on the "reasonably necessary" language that Congress later deleted from the statute in 1996. See p. 8, *supra*.[5] The Tenth Circuit's decision in *Hain* came only after the recodifying legislation had gone through conference committee, had its text finalized, and been adopted by the House. See 151 Cong. Rec. H11543-H11544 (daily ed. Dec. 14, 2005). The Senate adopted the conference report five weeks after *Hain*, 152 Cong. Rec. S1631-S1632 (daily ed. March 2, 2006), and the President signed the bill. Thus, at the time the legislation was being drafted, Congress would have understood that the courts of appeals had unanimously interpreted the statute to provide federal funding only for federal proceedings, but for the Eighth Circuit's *Hill* decision, which relied on language Congress had already removed. If the acquiescence principle is employed as a

[5] A single federal district court had held that Section 848(q) required the appointment of counsel to investigate claims for presentation to (and exhaustion in) state courts. *Gordon* v. *Vasquez*, 859 F. Supp. 413, 417-418 (E.D. Cal. 1994). The Ninth Circuit held that the respondent state warden had no standing to challenge the order, and that the court's ruling therefore was insulated from review. *Calderon* v. *United States Dist. Court*, 107 F.3d 756, 761, cert. denied, 522 U.S. 907 (1997).

means of divining congressional intent, rather than mere formalism, then clearly post-drafting developments are entitled to little or no weight. Far from silently rejecting the pre-*Hain* consensus, Congress's actions are best understood as ratifying it.

B. Review Is Warranted On The Threshold Question Whether A Certificate Of Appealability Is Required

On the question whether petitioner required a certificate of appealability in order to appeal the district court's interpretation of Section 3599, no direct circuit conflict independently warrants this Court's review. The Court would be obliged to resolve that issue, however, before turning to the merits of the Section 3599 question, because satisfying the COA requirement is a condition of appellate jurisdiction in habeas cases. In the government's view, a COA is not required, but the Court should grant review on the COA issue because the underlying funding question warrants review.

1. The COA requirement is jurisdictional

The court of appeals did not definitively determine whether petitioner required a certificate of appealability (COA) to appeal the denial of his motion to expand the scope of his habeas counsel's appointment, because it concluded that petitioner's argument was not even persuasive enough to warrant a COA, let alone reversal. See Pet. App. 4. The court should have confronted the COA question, however, because the COA requirement, when it applies, is a "jurisdictional prerequisite" to taking an appeal in a habeas case. *Miller-El* v. *Cockrell*, 537 U.S. 322, 336 (2003) (explaining that a COA "is a jurisdictional prerequisite because the COA statute mandates that '[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken

to the court of appeals'") (quoting 28 U.S.C. 2253(c)(1)) (brackets in original). When a habeas petitioner's appeal must satisfy the standards for a COA, but does not, the correct disposition is dismissal for lack of appellate jurisdiction, not affirmance (which the court seemingly entered here). See *id.* at 336-337. Indeed, this Court has disapproved the practice of denying a COA by looking ahead to the merits of the petitioner's claim. See *ibid.* ("When a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction."); accord *id.* at 349 (Scalia, J., concurring).

Thus, because no judge or court has yet granted petitioner a COA,[6] for this Court to reach the merits of petitioner's first question presented, it would first have to decide whether a COA is required.

2. *The COA issue does not present a square conflict*

Petitioner asserts that the courts of appeals are split on the question whether a habeas petitioner must obtain a COA to appeal a district court's denial of funding under Section 3599. There is no developed conflict on that question, however.

As both petitioner and the court of appeals stated, the Fifth Circuit follows the rule that habeas petitioners need not obtain a COA in these circumstances. That holding traces back to the nonprecedential disposition in *Moreno* v. *Collins*, No. 94-50026, 1994 WL 24929 (5th Cir. Jan. 17, 1994), vacated mem. on other grounds, 512 U.S. 1252 (1994), which applied the similar but distinct

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[6] When a lower court has already granted a COA, this Court has reached the merits of a case without looking back at whether a COA was required. *E.g.*, *Gonzalez* v. *Crosby*, 545 U.S. 524, 535 n.7 (2005).

pre-AEDPA requirement to obtain a certificate of probable cause, see 28 U.S.C. 2253 (1994). Moreno had not filed a federal habeas petition, but sought appointment of counsel and a stay of execution in advance of such a filing. The district court denied that relief, and the court of appeals affirmed, noting in passing that Moreno was not required to obtain a certificate of probable cause because "no habeas proceedings have ever been filed in the instant case." 1994 WL 24929, at *1 & n.1. The Fifth Circuit has proceeded, without substantial analysis, to apply *Moreno*'s holding even in cases in which a habeas petition *has* been filed and the petitioner seeks permission for counsel to broaden their representation under Section 3599. *Barnard* v. *Collins*, 13 F.3d 871, 878 n.6 (5th Cir. 1994) (citing *Moreno*); *Sterling*, 57 F.3d at 454 (citing *Barnard*); *Hill* v. *Johnson*, 210 F.3d 481, 487 n.2 (5th Cir. 2000) (citing *Sterling*); *Smith* v. *Dretke*, 422 F.3d 269, 288 (5th Cir. 2005) (citing *Hill*).

The other cases petitioner cites, however, are inapposite, and none squarely requires a COA. First, the court of appeals in this case directed petitioner to file a motion for a COA and "[d]en[ied]" that motion, but never actually held that a COA is required. Pet. App. 4. And its judgment was to "[a]ffirm" the district court rather than to dismiss the appeal. *Ibid.*

Second, although the Eleventh Circuit once stated that a certificate of probable cause was not required, in that case, the habeas petitioner had been executed and his *attorneys* were appealing the court's rejection of their reimbursement vouchers. *Weeks* v. *Jones*, 100 F.3d 124, 127 n.6 (11th Cir. 1996) (citing *Sterling*, 57 F.3d at 454 n.3, and *Barnard*, 13 F.3d at 878 n.6). Holding that no certificate is required for an attorney to appeal in a collateral fee proceeding does *not* establish that

the same is true for an appeal by the petitioner "in a habeas corpus proceeding," 28 U.S.C. 2253(c)(1)(A).[7]

Third, the single decision that petitioner identifies as requiring a COA does not truly confront the question. In *Michael* v. *Horn*, 459 F.3d 411 (3d Cir. 2006), the habeas petitioner sought to dismiss his lawyers, and the district court agreed. The court granted a COA on the question whether dismissing the lawyers had violated current Section 3599; it did not address whether a COA is required at all, or why. *Id.* at 416-418.

3. Petitioner was not required to obtain a COA here

In the government's view, the COA requirement does not apply to petitioner's appeal. As relevant here, the COA requirement applies to "the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court." 28 U.S.C. 2253(c)(1)(A). Petitioner's motion for federally funded clemency counsel is not substantively part of a "habeas corpus proceeding."[8]

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[7] Several cases have arisen in that posture. See, *e.g.*, *Hain*, 436 F.3d at 1171; *Hill*, 992 F.2d at 802.

[8] The COA requirement otherwise would be applicable: the district court's order denying petitioner federally funded clemency counsel is a "final" one, because it leaves no matters pending and is appealable immediately. And petitioner is in custody pursuant to the judgment of a state court.

Habeas petitioners have occasionally suggested that the phrase "*the* final order" means that only appeals from the one ultimate, dispositive order resolving a habeas proceeding are subject to the COA requirement. See, *e.g.*, *Gonzalez* v. *Secretary for the Dep't of Corr.*, 366 F.3d 1253, 1298-1301 (11th Cir. 2004) (en banc) (Tjoflat, J., specially concurring in part and dissenting in part), aff'd on other grounds *sub nom. Gonzalez* v. *Crosby*, 545 U.S. 524 (2005). The courts of appeals, virtually unanimously, have rejected that argument in other contexts. Nearly every circuit requires habeas petitioners and Section 2255

A habeas corpus proceeding, for purposes of the COA statute, is primarily one in which the petitioner seeks to challenge his confinement based on an alleged violation of the Constitution, laws, or treaties of the United States. 28 U.S.C. 2241(c)(3); cf. *Wilkinson* v. *Dotson*, 544 U.S. 74, 81 (2005) (stating that "'core' habeas corpus relief" includes "requests [for] present or future release"). Orders of the district court dealing with the merits of the federal claim or with procedural obstacles to granting relief are "final order[s] in a habeas corpus proceeding," for which a COA is required. Cf., *e.g.*, *Slack* v. *McDaniel*, 529 U.S. 473, 484-485 (2000) (applying the COA requirement to procedural orders).

Requests for clemency counsel, by contrast, do not involve the pursuit of any federal legal challenge to the petitioner's conviction or death sentence. Indeed, there is no constitutional right either to clemency itself or to counsel to pursue it. Although the goal of clemency is relief from the conviction or sentence, that relief comes on discretionary rather than legal grounds. It would be incongruous, therefore, to characterize a ruling on such a request as an "order in a habeas corpus proceeding."

A related incongruity comes from the COA requirement itself. To obtain a COA, a petitioner must make a "substantial showing of the denial of a constitutional

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movants to obtain a COA when they seek to appeal denial of a postjudgment motion. *Gonzalez*, 545 U.S. at 535 n.7 (collecting cases); *West* v. *Schneiter*, 485 F.3d 393, 394 (7th Cir. 2007) (COA required to appeal denial of motion for relief from judgment under Fed. R. Civ. P. 60(b)); *United States* v. *Rinaldi*, 447 F.3d 192, 195 (3d Cir.) (COA required to appeal denial of motion to reopen the time to appeal under Fed. R. App. P. 4(a)(6)), cert. denied, 127 S. Ct. 300 (2006). But cf. *Ochoa Canales* v. *Quarterman*, 507 F.3d 884, 887-888 (5th Cir. 2007) (explaining that in some circumstances Rule 60(b) movants may appeal without a COA), cert. denied, 128 S. Ct. 1697 (2008).

right." 28 U.S.C. 2253(c)(2). This is so even if the district court rules on procedural grounds. *Slack*, 529 U.S. at 484-485. Applying that standard to claims for clemency counsel would be difficult. Even assuming a capital petitioner could claim procedural constitutional violations in clemency proceedings, cf. *Ohio Adult Parole Auth.* v. *Woodard*, 523 U.S. 272 (1998), requests for appointment of federally funded counsel will in some cases (as here) occur before the clemency process has even occurred. And if federal law provided such a right of paid clemency counsel, seeking appointment in advance of representation would be a logical time to make the application. At that point, however, before any clemency proceedings have taken place, it would be implausible to suggest that a defendant (or his counsel) could make a "substantial showing of the denial of a constitutional right." That incompatibility of the COA standard with the claimed right suggests that the COA requirement does not apply to appeals from denial of the alleged entitlement to federally funded counsel to pursue state clemency.

Furthermore, the regulation of federally funded capital defense counsel may occur entirely outside the habeas corpus proceeding. Reimbursement of counsel formerly was handled ex parte, see 21 U.S.C. 848(q)(9) and (10) (1994), and even now counsel may pursue fees in their own name, potentially even under their own docket numbers, in some cases after their clients have been executed. See, *e.g.*, *Hain*, 436 F.3d at 1171; *Clark*, 278 F.3d at 460.

Accordingly, although in the government's view the COA issue must be decided before resolving the merits, the presence of the COA issue in this case is not a vehicle problem that will likely preclude reaching the merits.

Furthermore, even if the Court holds that petitioner was required to obtain a COA, it might still choose to opine on the substantive question of Section 3599's proper interpretation while applying the COA standard. See, *e.g.*, *Tennard* v. *Dretke*, 542 U.S. 274, 287-289 (2004) (resolving merits question in deciding whether a COA should have issued). Therefore, because the underlying issue warrants resolution, the Court should grant review on the COA question as well.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2008

APPENDIX

Section 222(a) of the Terrorist Death Penalty Enhancement Act of 2005, Pub. L. No. 109-177, Tit. II, 120 Stat. 231 (2006) (to be codified at 18 U.S.C. 3599 (2006)), provides in relevant part:

Counsel for financially unable defendants

(a)(1) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either—

(A) before judgment; or

(B) after the entry of a judgment imposing a sentence of death but before the execution of that judgment;

shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

(2) In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, 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 subsections (b) through (f).

(b) If the appointment is made before judgment, at least one attorney so appointed must have been admit-

ted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court.

(c) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

(d) With respect to subsections (b) and (c), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

(e) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

(f) Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues re-

lating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under subsection (g). No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

(g)(1) Compensation shall be paid to attorneys appointed under this subsection at a rate of not more than $125 per hour for in-court and out-of-court time. The Judicial Conference is authorized to raise the maximum for hourly payment specified in the paragraph up to the aggregate of the overall average percentages of the adjustments in the rates of pay for the General Schedule made pursuant to section 5305 of title 5 on or after such date. After the rates are raised under the preceding sentence, such hourly range may be raised at intervals of not less than one year, up to the aggregate of the overall average percentages of such adjustments made since the last raise under this paragraph.

(2) Fees and expenses paid for investigative, expert, and other reasonably necessary services authorized under subsection (f) shall not exceed $7,500 in any case, unless payment in excess of that limit is certified by the court, or by the United States magistrate judge, if the services were rendered in connection with the case disposed of entirely before such magistrate judge, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the cir-

cuit. The chief judge of the circuit may delegate such approval authority to an active circuit judge.

(3) The amounts paid under this paragraph for services in any case shall be disclosed to the public, after the disposition of the petition.