No. _____

In the Supreme Court of the United States
October Term, 2007

EDWARD JEROME HARBISON,
Petitioner,

v.

RICKY BELL,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

Every jurisdiction that authorizes the death penalty provides for clemency, which is of vital importance in assuring that the death penalty is carried out justly. But, in this case the District Court held Mr. Harbison's federally-funded lawyers could not present, on his behalf, a clemency request to Tennessee's governor. The denial of clemency counsel contravenes basic principles of justice.[1] As Chief Justice Rehnquist noted in *Herrera v. Collins*:[2]

> Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.

Indeed, the clemency power exists because "the administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt."[3] Thus, executive clemency is the "'fail safe' in our criminal justice system."[4] A system which includes capital punishment but does not provide a meaningful opportunity for executive clemency is "totally alien to our notions of criminal justice."[5]

Yet, the lower courts arbitrarily denied Mr. Harbison's federally-funded habeas counsel permission to represent him in state clemency proceedings after the State had denied him counsel for that purpose. The District Court and the Court of Appeals for the Sixth Circuit not only defied Congress' explicit directions to provide clemency counsel for the condemned, but denied Mr. Harbison a meaningful opportunity to present compelling facts mitigating his guilt and the punishment of death to the only person presently able to consider them, the Governor of the State of Tennessee.

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[1] *See* Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and its Structure*, 89 Va. L. Rev. 239, 240-43, 252-54 (April 2003) (discussing how clemency is integral to the administration of justice and how the criminal justice system relies on clemency).

[2] 506 U.S. 390, 411-12 (1993).

[3] *Ex parte Grossman*, 267 U.S. 87, 120-21 (1925).

[4] *Herrera*, 506 U.S. at 415; Heise, *Mercy by the Numbers*, *supra*, 89 Va. L. Rev. at 252 ("the need for clemency's error correction function is at its highest in the death penalty setting.").

[5] *Gregg v. Georgia*, 428 U.S. 153, 200 n.50 (1976)(opinion of Justices Stewart, Powell, and Stevens).

Equally troubling, the Sixth Circuit barred Harbison from appealing the denial of clemency counsel by refusing to grant a certificate of appealability on the issue.

In order to harmonize the law of the circuits and to decide an important issue regarding the appeals court's jurisdiction, this Court should resolve the following questions:

1. Does 18 U.S.C. §3599(a)(2) and (e) (recodifying *verbatim* former 21 U.S.C. §848(q)(4)(B)and (q)(8)), permit federally-funded habeas counsel to represent a condemned inmate in state clemency proceedings when the state has denied state-funded counsel for that purpose?

2. Is a certificate of appealability required to appeal an order denying a request for federally-funded counsel under 18 U.S.C. §3599(a)(2) and (e)?

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The Sixth Circuit Court of Appeals opinion in *Harbison v. Bell*, No. 07-5059, which issued without the benefit of briefing or oral argument, is reported at 503 F.3d 566 (6th Cir. 2007) and is Appendix A to the petition. The unpublished order of the United States District Court for the Eastern District of Tennessee can be found at 2007 WL 128954 (E.D.Tenn. Jan. 16, 2007) and is Appendix B to the petition.

JURISDICTION

On January 16, 2007, the United States District Court for the Eastern District of Tennessee ruled that an appointment of counsel under 18 U.S.C. §3599 (formerly 21 U.S.C. §848(q)) does not authorize state clemency representation. (App.B). On September 27, 2007, the United States Court of Appeals for the Sixth Circuit denied a certificate of appealability and held that 18 U.S.C. §3599(e)(formerly 21 U.S.C. §848(q)(4)(B)) does not authorize federal compensation for legal representation in state matters as it held in *House v. Bell*, 332 F.3d 997, 998-99 (6th Cir. 2003). (App.A).

The District Court had jurisdiction over the appointment and compensation of counsel pursuant to 21 U.S.C. §848(q) *recodified* at 18 U.S.C. § 3599. The court of appeals had jurisdiction pursuant to 28 U.S.C. §1291. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

18 U.S.C. §3599(a)(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).

18 U.S.C. §3599(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.

STATEMENT OF THE CASE

Mr. Harbison has faced three real execution dates without counsel to trigger the "fail safe" of the capital punishment system; he has been denied the assistance of clemency counsel. The state court denied Mr. Harbison a lawyer to present to the Governor of Tennessee his compelling case for clemency. The lower federal courts have prohibited Mr. Harbison's federally-funded habeas counsel from representing him in state clemency proceedings. This denial of clemency counsel conflicts with the law set forth by Congress, 18 U.S.C. §3599(a)(2) and (e), and the law of the Eighth and Tenth Circuits.

On February 7, 1997, the United States District Court for the Eastern District of Tennessee, pursuant to 21 U.S.C. §848(q)(4)(B), appointed Federal Defender Services of Eastern Tennessee, Inc. to represent Edward Jerome Harbison "in the preparing and filing of a petition for a writ of habeas corpus pursuant to 28 United States Code Section 2254 and all proceedings in connection therewith." On June 13, 2006, the State moved the Tennessee Supreme Court to schedule Mr. Harbison's execution. Habeas counsel responded on Mr. Harbison's behalf and asked that, in the event the state court set an execution date, the court appoint counsel to represent Mr. Harbison in his request for clemency before the Tennessee Board of Probation and Parole and the Governor and any other available proceedings.

On July 17, 2006, the state court ordered Mr. Harbison to be executed on October 11, 2006, and appointed the state-funded Post-Conviction Defender office to

represent Mr. Harbison. The Post-Conviction Defender filed a motion to withdraw, noting it did not have time or resources to adequately prepare a case for clemency in the short time provided. On August 15, 2006, the state court denied the withdrawal motion but reset the execution date to February 22, 2007, to "afford sufficient time for adequate representation."

Mr. Harbison was under the impression the matter of clemency counsel had been resolved. However, about two months later, the state supreme court took away what it had previously granted. Donnie Johnson, another death row inmate facing imminent execution, requested that the Tennessee Supreme Court appoint counsel to represent him in clemency proceedings. The State argued against the appointment of counsel asserting there is no "right to court-appointed counsel in executive clemency proceedings." The state supreme court agreed. On October 6, 2006, the state court, in denying Johnson's request for clemency counsel, held that its appointment order in *Harbison* "specifically limited the appointment of counsel to 'the instant case No. M1986-00093-SC-OT-DD' and did not extend the appointment of counsel to clemency proceedings." Although state law allows representation in clemency proceedings, and appointed counsel in some cases,[6] the state court agreed with the State that "no statute, rule of court, or constitutional provision" authorized the state court to appoint clemency counsel.[7] Mr. Harbison

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[6]TENN. CODE ANN. §§40-28-104, -106; TENN. CODE ANN. §40-28-106(b)(1).

[7]*State v. Johnson*, 2006 Tenn.LEXIS 1236, at *2-3 (Oct. 6, 2006).

was not provided any notice or opportunity to be heard on the court's decision to rescind clemency counsel.

Mr. Harbison filed a motion in federal District Court seeking leave to expand the original appointment of habeas counsel to include state clemency proceedings. As Mr. Harbison explained to the courts below, the record contains a strong case for clemency which warrants meaningful consideration by Tennessee's Governor because procedural roadblocks have prevented the courts from considering the facts favoring relief.

Mr. Harbison is the only condemned inmate on Tennessee's death row convicted of felony murder with the single aggravating circumstance that the murder was committed during the course of a burglary. Mr. Harbison did not take a weapon into the victim's home and did not intend to kill the victim. Mr. Harbison, an African American man with borderline intelligence, had no criminal history prior to this incident. Here, there was no plan to kill the victim, an older white woman. Instead, she was hit over the head with a vase when, upon returning to her house, she interrupted the perpetrators during the burglary. The victim died within minutes.

In addition, the jury that sentenced Mr. Harbison to death heard a mere 45 lines of "mitigation" testimony. The jury did not hear, and no judge voting to maintain Mr. Harbison's sentence of death has considered, the overwhelming evidence proving he is less morally culpable and a life sentence is sufficient punishment. A glimpse of available information trial counsel failed to uncover and

present to assure that Mr. Harbison received an individualized and just sentence, and which should be presented to and considered by the Governor of Tennessee before any execution takes place, follows:

Mr. Harbison entered the world impoverished, starved of food, neglected and abused by his violent, alcoholic parents. Immediately handicapped by intellectual limitations, malnutrition and emotional and physical trauma, school records identify Mr. Harbison as borderline mentally retarded, slow in all subject areas and recommend that he be placed in "educably mentally retarded" classes. School records further describe Mr. Harbison as a quiet, well-behaved and withdrawn child. He was excessively timid, insecure and described as "emotionally out of it." This is, perhaps, due to what court records describe as his home life being "horrible in all areas imaginable."

The Harbison family lived in run down, dirty shacks without running water or electricity. The five children wore ragged and dirty donated clothes. As a child, Mr. Harbison's mother taught him and his siblings to scavenge for scrap metal and shoplift necessities, such as socks. Although his father was employed, he drank away his paycheck leaving the family without adequate food. The Harbison siblings picked "poke" salad and mixed flour and water to make "milk." The Harbison children were constantly picked on by others because of their living conditions. The children grew up not understanding how times were so tough that they had to go without eating but there was always alcohol in the house for their parents to drink. All the siblings started drinking at an early age, in part to overcome hunger pangs.

They replaced the alcohol they drank from their parents' plentiful supply with water. When their parents noticed the watered-down alcohol they would become enraged, not because the children were drinking, but because there was less alcohol for them to drink.

Mr. Harbison's parents engaged in drunken, vicious fights, injuring each other with irons, broken bottles, knives and even shooting each other. Court records describe the parents' pattern of "stealing, aggressiveness, murder and attempting to do bodily harm." Mr. Harbison and his siblings did not escape the wrath of drunken violence. Neighbors knew that yelling and screaming would be heard if they walked past the Harbison house, and they knew the Harbison children were beaten. Neighborhood children made up a song about the Harbisons, "Cathie shot Hobb in the bathroom window – bang, bang, bang!" Some of the worst injuries inflicted upon Mr. Harbison came from a power drill, gun fire and being set on fire. Mr. Harbison's sisters were sexually abused. Neighbors heard about incest at the Harbison house. Their father watched the girls bathe and was said to have impregnated one sister.

When he was ten years old, Mr. Harbison witnessed his 14-year-old sister shoot her 26-day-old son and her 14-month-old daughter. His sister was placed in a mental institution where she hanged herself. Mr. Harbison watched his other sister's mental health decompensate to the point where she received, and continues to receive, frequent treatments at a local mental health facility. He was often left responsible for caring for this sister who was unable to care for herself. Mr.

Harbison also watched as his brother committed crimes and spent increasing amounts of time in jail.

The psychological and emotional impairment as a result of his traumatic history and developmental history is profound. Mr. Harbison's mental impairments cause problems with interpersonal relations, making decisions and understanding the consequences of his actions. He appears his chronological age but experiences the world at the emotional intellectual equivalent of an adolescent. Mr. Harbison's impaired mental state reduces his moral culpability.

Despite his traumatic upbringing and resulting limitations, as a young adult, Mr. Harbison remained loyal to his family. He worked with his father doing handyman jobs. He cared for his mentally ill sister. He assumed a parental role with his girlfriend's children and cared for them. He committed no crimes before he was accused of the instant murder. It was the brother of Mr. Harbison's girlfriend, a career criminal, who pinned this crime on him.

The jury did not hear these facts weighing in favor of a life sentence. Mr. Harbison's counsel did not present this evidence. Further, the state court reviewing Mr. Harbison's case upon post-conviction did not hear this evidence because counsel's request for funding and expert services was denied.[8] Counsel presented the facts he could muster without the necessary resources and support. The federal court, invoking the AEDPA, did not consider this evidence because it was not

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[8]*Harbison v. State*, 1996 WL 266114, at *9-10 (Tenn. Crim. App. May 20, 1996).

presented to the state court. Clemency provides the only avenue for this compelling evidence to be considered.

An additional consideration for clemency is that Mr. Harbison did not receive a fair trial to determine his guilt. The jury did not hear compelling evidence exculpating Mr. Harbison. Though Mr. Harbison requested a copy of law enforcement records on this case no less than six times throughout the years, the police file was not released for fourteen years. The 206 documents disclosed to federal habeas counsel by the Chattanooga Police Department in 1997 contain evidence showing that someone else committed the murder and explaining why Mr. Harbison was, instead, singled out as the suspect. They provide ample support for Mr. Harbison's alibi defense and assertions of innocence at his 1983 trial.

Because of the State's late disclosure of the police records, they have never been fully considered by the courts. The police file shows that, contrary to the State's theory at trial, Ray Harrison, not Mr. Harbison, was involved in the crime. Harrison had a motive and admitted to his wife that he was in the victim's house at the time of the crime. Witnesses placed him across the street from the victim's house immediately before the time of the crime. The jacket Harrison wore was missing and witnesses observed he was scared to death after the killing. Nevertheless, Harrison was extradited to Florida on burglary and assault charges and was never tried for the murder in this case.

Police records also show that the only person who implicated Mr. Harbison in the crime, David Clarence Schreane, said he was going to "pin the crime" on Mr.

Harbison. Co-defendant Schreane initially told police another person, not Mr. Harbison, accompanied him at the crime scene. But Schreane later implicated Mr. Harbison out of jealousy and revenge and to deflect primary responsibility for the murder from himself. Schreane's strategy worked. Schreane admitted he killed the victim, received a sentence of 20 years and was released after 8 years. Schreane has since been convicted for another murder and is currently in federal prison serving a 327 month sentence. Schreane was also convicted in state court of especially aggravated robbery and felony murder in the first degree; he was sentenced to 60 years and life without possibility of parole to be served consecutive to his federal sentence.

Another reason the courts have never considered this evidence from the police file and that it should be presented to the Governor, is actually contained in that file as well. The police records reveal that Rodney Strong, Mr. Harbison's attorney at the motion for new trial, imposition of sentence, and direct appeal, had a significant conflict of interest because he previously represented prime suspect, Ray Harrison, on the exact same crime. Strong did not use proof of Harrison's involvement to support the claim that trial counsel failed to adequately investigate Mr. Harbison's case. Nor did Strong use the proof of Harrison's involvement to support Mr. Harbison's innocence.

Harbison's case for executive clemency is overwhelming, but without counsel, his story will never be told. A little more than a month before Mr. Harbison's February 22, 2007 execution date, and despite the wealth of compelling evidence

which clemency counsel could have presented to the Governor on his behalf, the District Court denied the motion to expand the appointment of Mr. Harbison's federally-funded counsel to include state clemency proceedings. The District Court found that the Sixth Circuit Court of Appeals' opinion in *House v. Bell*, 332 F.3d 997 (6th Cir. 2003), barred such representation. Sixteen days later, the Governor of the State of Tennessee issued a temporary reprieve so that the State could examine its legal injection protocol. Mr. Harbison appealed the District Court's order denying clemency counsel.

While Mr. Harbison's appeal was pending, the State of Tennessee set a new execution date of September 26, 2007. Still without state clemency counsel and with his execution less than three months away, Mr. Harbison asked the Sixth Circuit Court of Appeals to stay his execution so that his appeal might be resolved and any federally-funded clemency counsel would have time to make a meaningful plea for mercy to the Governor of Tennessee. The court of appeals did not rule on Mr. Harbison's motion for a stay until the day after his scheduled execution. The lower court denied a certificate of appealability and summarily affirmed the decision of the District Court without the benefit of either briefing or oral argument.[9]

[9]Fortuitously, the State of Tennessee had been enjoined eight days earlier from carrying out Mr. Harbison's execution after Mr. Harbison proved in his civil rights suit that Tennessee officials demonstrated deliberate indifference to a substantial risk that Mr. Harbison would suffer unnecessary pain if the State carried out his execution in the manner planned.

REASONS FOR GRANTING THE WRIT

1. THE SIXTH CIRCUIT COURT OF APPEALS REQUIRES CORRECTION TO BRING UNIFORMITY AMONG THE CIRCUITS, TO CARRY OUT THE INTENT OF CONGRESS, AND TO DO JUSTICE IN THIS CASE.

The Sixth Circuit Court of Appeals has second-guessed the clear and unambiguous Congressional directive that federal habeas counsel be permitted to represent state death-sentenced inmates in executive clemency proceedings. The court of appeals' departure from settled rules of statutory construction in this case brings further instability to the clemency area which is increasingly important in capital cases as the scope of federal review of state court judgments is further limited by legislative action. The Sixth Circuit's adherence to its earlier decision in *House v. Bell,* 332 F.3d 997 (6th Cir. 2003), and the decisions of the Fifth and Eleventh Circuits in *Clark v. Johnson*, 278 F.3d 459, 462 (5th Cir. 2002), and *King v. Moore*, 312 F.3d 1365, 1367-1368 (11th Cir. 2002), respectively, disregard decades of precedent guiding the interpretation of statutory language.[10] The Sixth Circuit's decision in this case also ignores Congress' recent evisceration of the bedrock hypothesis upon which those earlier circuit court decisions rest: that the express language of then- 21 U.S.C. §848(q)(4)(B), now- 18 U.S.C. §3599(a)(2), was the inadvertent product of undue haste as opposed to a reflection of Congressional

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[10]Furthermore, these decisions are analytically flawed because they fail to differentiate between appointment of federally-funded counsel in state "judicial proceedings" from "proceedings for executive clemency." Gavin S. Martinson, *Clarifying the Confusion of 21 U.S.C. §848(q): When Indigent State Clemency Petitioners are Entitled to Federally-Funded Counsel*, 2 Seton Hall Cir. Rev. 365, 376-77 (Spring 2006).

intent. It is the legislative branch of government by enacting laws, not the federal judiciary, that is charged with carrying out public policy. While the legislature has narrowed federal habeas corpus review it has maintained the statutory right to clemency counsel for those facing the ultimate punishment of death.

The Tenth and Eighth Circuit Courts of Appeals' decisions in *Hain v. Mullin*, 436 F.3d 1168, 1171 (10th Cir. 2006)(*en banc*), and *Hill v. Lockhart*, 992 F.2d 801, 803 (8th Cir. 1993), respectively, give proper respect to Congress' decision to permit federally-funded habeas counsel to continue to represent state death-sentenced inmates in the pursuit of clemency. This Court should grant *certiorari* review to reconcile this conflict among the circuits and to provide guidance to correct those lower federal courts that have departed from the role of the judiciary to interpret the law and infringed upon the role of Congress to enact the law.[11]

a. 18 U.S.C. §3599(e) plainly authorizes federally-funded habeas counsel to continue to represent state death-sentenced inmates in proceedings for executive clemency.

Federal law governs the appointment of undersigned habeas counsel and delineates counsel's responsibilities to Mr. Harbison:

> 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 ... ***shall be*** entitled to the appointment of one

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[11]"Courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so." *Brogan v. United States*, 522 U.S. 398, 408 (1989); Martinson, *Clarifying the Confusion*, *supra*, 2 Seton Hall Cir. Rev. at 383-84 (when statutory language is clear, policy concerns are not within the jurisdiction of the courts and should be left to Congress.).

or more attorneys ... in accordance with subsections (b) through (f)."[12]

This law has historically provided that legal representation shall extend to clemency proceedings as delineated in subsection (e):[13]

> 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 ... and ***shall also represent the defendant in*** such competency proceedings and ***proceedings for executive or other clemency*** as may be available to the defendant.

Consistent with this Court's decision in *McFarland v. Scott*,[14] the overriding policy concern of former §848(q) and current §3599 is that capital proceedings are grave and complex and indigent capital defendants must have competent representation. The court of appeals nonetheless held that its 2003 decision in *House v. Bell*,[15] addressing former §848, foreclosed habeas counsel's representation of Mr. Harbison in state clemency proceedings.[16] Given this Court's concern to protect the right to counsel, initially granted by Congress in §848, it is safe to assume that Congress "did not intend for the express requirement of counsel to be defeated in this manner."[17]

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[12]18 U.S.C. §3599(a)(2) (emphasis added). In 2006, Congress re-codified, *verbatim*, former 21 U.S.C. §848(q)(4)(B) at 18 U.S.C. §3599(a)(2).

[13]18 U.S.C. §3599(e)(formerly 21 U.S.C. §848(q)(8))(emphasis added).

[14]512 U.S. 849, 855 (1994)

[15]332 F.3d 997, 998 (6th Cir. 2003).

[16]*Harbison v. Bell*, 2007 WL 128954 (E.D. Tenn. Jan. 16, 2007) (App.B, p.App-017-App-019); *Harbison v. Bell*, 503 F.3d 566, 570 (6th Cir. 2007) (App.A, p.App-004).

[17]*Woodford v. Garceau*, 538 U.S. 202, 209 (2003)(quoting *McFarland* 512 U.S. at 856).

The court of appeals' reliance on *House* to deny Mr. Harbison's request for clemency counsel was misplaced. The *House* case did not involve a request for clemency counsel. Instead, counsel requested permission to appear in a state court post-conviction proceeding. In denying this request, the *House* Court discounted the plain meaning of some of the words in the controlling statute (former §848(q)(4)(B)), by noting the provisions about federally appointed counsel appearing in state proceedings were "'dealt with at the tail end of a session as the legislation was being approved at the last moment.'"[18]

The lower court's extension of *House* to the clemency counsel request in this case contradicts not only the plain language of the statute but also subsequent Congressional activity. The *House* Court's skepticism about Congressional intent when enacting 21 U.S.C. §848, which was at the heart of its ruling, has now been alleviated by the fact that Congress re-enacted, as 18 U.S.C. §3599, the exact same language whose plain meaning the *House* court had questioned.

That Congress meant what it said, that is, that counsel must continue in clemency, is confirmed by the recent re-codification, *verbatim*, of §848(q)(8) at 18 U.S.C. §3599(e). Prior judicial decisions regarding statutory provisions at issue have "special force" in statutory interpretation because Congress remains free to alter statutory language when the courts incorrectly interpret Congressional

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[18] *House*, 332 F.3d at 999 (quoting *King v. Moore*, 312 F.3d 1365, 1367-68 (11th Cir. 2002)).

intent.[19] Congress was aware of the competing decisions of the Eighth and Tenth Circuits versus the Fifth, Sixth and Eleventh Circuits concerning the scope of counsel's representation under §848.[20] And Congress passed 18 U.S.C. §3599(a)(2) and §3599(e), which contain the identical, unambiguous language from §848 mandating clemency representation. *See* P.L. 109-177, §222. Had Congress wanted a rule different from the one expressed by the language of §848, or the rule from the Tenth Circuit in *Hain*, Congress would have changed the wording of §3599 to eliminate any reference to clemency in §2254 cases. Congress did not do so. Unlike the circumstances surrounding the enactment of §848 as alleged by the Circuits on the opposite side of the *Hain* ruling, and upon which was inferred carelessness in legislative drafting, one cannot conclude that Congress acted hastily or unknowingly in passing §3599. Congress expressly re-legislated the exact same language from §848 regarding clemency counsel. There is no doubt that federally appointed counsel "*shall* also represent the defendant in ... proceedings for executive or other clemency."[21]

The court of appeals departed from the standard rule of statutory construction that, because the statute is not ambiguous, it must be interpreted according to its plain meaning. As the Tenth Circuit explained when addressing

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[19] *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989).

[20] *Hain*, 436 F.3d at 1172; *see also Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988)(courts must presume Congress is knowledgeable about existing law pertinent to the legislation it enacts.).

[21] 18 U.S.C. §3599(e)(emphasis added).

former §848:[22]

> One need look no further than the statute's plain language to see that Congress has directed that counsel appointed to represent state death row inmates during § 2254 proceedings must 'represent the defendant throughout every subsequent stage of available judicial proceeding' including 'proceedings for executive or other clemency as may be available to the defendant.' When Congress required attorneys appointed to represent § 2254 petitioners to pursue 'proceedings for executive or other clemency' it must have meant state clemency proceedings given that federal officials have no authority to commute a state court sentence . . .

The *Hain* court acknowledged a circuit split on the issue but concluded, "we nonetheless see no other logical way to read the statute."[23] The court also found it entirely plausible that "Congress did not want condemned men . . . to be abandoned by their counsel at the last moment and left to navigate the sometimes labyrinthine clemency process from their jail cells, relying on limited resources and little education in a final attempt at convincing the government to spare their lives."[24]

Congress has shown the Tenth Circuit is correct. Congress plainly authorized federally-funded clemency counsel when it re-codified former §848 as 18

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[22]*Hain*, 436 F.3d at 1172.

[23]*Id.* The court in *Hain* noted the Sixth Circuit's decision in *House v. Bell*, 332 F.3d 997, 999 (6th Cir. 2003), which expressed concerns about affording the statute its plain meaning. The *Hain* court disagreed with such concerns, stating, "[w]e doubt, however, that the parade of horribles presented by the Sixth Circuit has a factual basis." *Hain*, 436 F.3d at 1173 n.6. The Tenth Circuit's interpretation of the statute has been validated by Congress' subsequent re-codification of the exact same language regarding representation in clemency proceedings.

[24]*Id.* at 1175. *See also United States v. Knight*, 53 M.J. 340, 343 (C.A.A.F. 2000) (Requiring clemency counsel, stating, "[t]he U.S. Military Justice System is perhaps the best in the world. Representation by adequate counsel is an integral part of that system. Here appellant had adequate counsel during almost every aspect of his case; however, he was without counsel at the very end. Having counsel even 99% of the time and no counsel 1% of the time during significant criminal proceedings would doom this case.").

U.S.C. §3599(a)(2) and (e).

b. Certiorari review is necessary to resolve the conflict between the circuits.

The circuits are of opposing views regarding federally-funded habeas counsel's representation of state death-sentenced inmates in proceedings for executive clemency when state-funded clemency counsel has been denied. The Eighth and Tenth Circuits hold that the clear and unambiguous language of former 21 U.S.C. §848(q)(4)(B)(recodified *verbatim* as 18 U.S.C. §3599(a)(2)) provides that federally-funded habeas counsel may continue to represent death-sentenced inmates through state clemency proceedings when counsel is not otherwise provided. *See Hain v. Mullin*, 436 F.3d at 1171; *Hill v. Lockhart*, 992 F.2d at 803. Espousing the opposite view, the Sixth Circuit's decision in this case joins the Fifth and Eleventh Circuits' decision that the plain language of former §848 does not authorize federally-funded representation in clemency proceedings. This contrary conclusion rests on the notion that the language permitting the appointment of federally-funded counsel to represent state death-sentenced prisoners in federal habeas corpus proceeding (§ 848(q)(4)(B)) had been added at the last minute, after the language extending representation through clemency (§848(q)(8)). *See Clark v. Johnson*, 278 F.3d at 462, *citing, Sterling v. Scott,* 57 F.3d 451, 457-58 (5th Cir. 1995); *King v. Moore*, 312 F.3d at 1367-68; *In re: Lindsey*, 875 F.2d 1502 (11th Cir.

1989); *Harbison v. Bell*, 503 F.3d 566 (6th Cir.2007) (attached as App. A).[25]

Regardless of whether the Fifth, Sixth, and Eleventh Circuit Courts' speculation regarding the prior statute's plain language is proper as a matter of statutory construction,[26] the fact that Congress, aware of the conflict between the circuits, re-adopted the same language shows that they are wrong. Had the court below simply acknowledged that its prior reasoning in *House v. Bell* was no longer correct and allowed Mr. Harbison's federally-funded habeas counsel to also pursue executive clemency on his behalf, and done so in a timely manner, this Court's intervention would not be necessary. Congress obviously intended to prevent the tragedy of a condemned inmate facing execution alone and without legal assistance to invoke the clemency review that provides a necessary final level of scrutiny in this country's capital punishment system.[27] Instead, this tragedy almost occurred in Mr. Harbison's case.

Despite a case which calls out for mercy, Mr. Harbison came within eight days of being executed without a lawyer to represent him in clemency proceedings and without a clemency petition submitted to the Governor on his behalf. The Sixth Circuit refused to even act on Mr. Harbison's request until his execution date had

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[25] *See also* Martinson, *Clarifying the Confusion, supra*, 2 Seton Hall Cir. Rev. 365 (discussing the circuit-split over the provision for federally-funded clemency counsel).

[26] *See Duncan v. Walker*, 533 U.S. 167, 174 (2001); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

[27] Martinson, *Clarifying the Confusion, supra*, 2 Seton Hall Cir. Rev. at 366 (explaining that a petitioner may need representation to ensure meaningful clemency review and Congress addressed this concern when it passed §848).

passed, and then denied him what Congress clearly required without so much as briefing or oral argument. The departure of the court below from the procedure normally followed in addressing statutory questions and the increasing circuit split on the issue of federally-funded clemency counsel demonstrate the clear need for this Court's intervention.[28]

2. THIS COURT SHOULD RESOLVE THE CIRCUIT-SPLIT ON THE IMPORTANT QUESTION OF FEDERAL APPELLATE COURT JURISDICTION OVER A DISTRICT COURT'S DENIAL OF THE APPOINTMENT OF FEDERALLY-FUNDED COUNSEL UNDER 18 U.S.C. §3599(a)(2) and (e).

The Circuit Courts of Appeals are divided over whether the provisions for a certificate of appealability ("COA"), found in 28 U.S.C. §2253 of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), must be satisfied before an appeal may be heard on a District Court's order denying services provided by former 21 U.S.C. §848, current 18 U.S.C. §3599, to a state death row inmate.

This is an important question because 18 U.S.C. §3599 makes the appointment of counsel mandatory in capital cases. Making the denial of counsel unappealable would render the statutory right to counsel "a right the legal and practical value of which could be destroyed if not vindicated" on appeal.[29]

In this case, the Sixth Circuit said it "would follow the implied rule from *Smith v. Dretke*, 422 F.3d 269, 288 (5th Cir. 2005), which found that no COA was

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[28]Martinson, *supra*, 2 Seton Hall Cir. Rev. at 366 (noting that while this Court "has yet to resolve the split, the issue continues to gain steam in the circuit courts.").

[29]Hertz and Liebman, *Federal Habeas Corpus Practice and Procedure*, 5th Ed. §12.5 and n.31 (LexisNexis 2005) *quoting Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981).

required to appeal from the denial of expert assistance under 21 U.S.C. §848(q)." App.A, p.App-004 Nevertheless, the court of appeals denied "the motion for a COA for the Federal Public Defender Services [sic] to represent Harbison in state clemency proceedings." App,A, p.App-004. Accordingly, the outcome of the case below conflicts with the Fifth Circuit's decision in *Smith v. Dretke*, *supra*, and the Eleventh Circuit's decision in *Weeks v. Jones*, 100 F.3d 124, 127 n.6 (11th Cir. 1996). The case below aligns the Sixth Circuit with the Third Circuit's decision in *Michael v. Horn*, 459 F.3d 411, 416, 418 (3d Cir. 2006), which implied a COA was required by granting one on the question of whether the district court violated §848(q)(4)(B) in dismissing appointed counsel.

Denial of a motion for the appointment of counsel pursuant to 18 U.S.C. §3599(a)(2) and (e) constitutes a case which is appealable as of right. Those Circuits holding otherwise conflict with this Court's decisions in *Hohn v. United States*, 524 U.S. 236 (1998) and *Ex parte Quirin*, 317 U.S. 1 (1942), which stand for the proposition that the rejection by a district court of a COA, a motion to file a petition for a writ of habeas corpus, or, as here, a motion for appointment of counsel constitutes an appealable case of its own right. In *Woodford v. Garceau*, 538 U.S. 202 (2003), this Court cautioned that a request for the appointment of counsel is not the equivalent of a habeas application under AEDPA. This Court distinguished a request for appointment of counsel as being "a 'case' that could be reviewed on appeal" as opposed to "creat[ing] a 'case'" under the habeas statute. *Garceau*, 538

U.S. at 209-10 *citing Gosier v. Welborn*, 175 F.3d 504, 506 (7th Cir. 1999) (a request for counsel under §848(q)(4) is a "case" in the sense that it is subject to appellate review but it is not a case under Chapter 153 of Title 28, AEDPA).

The nature of this case indicates appellate jurisdiction is based on 28 U.S.C. §1291, alone, and not on the issuance of a COA. Importantly, AEDPA mandates a COA only for an appeal of habeas cases. *See* 28 U.S.C. §2253. In determining the nature of a §3599 request (former §848) in another context, the lower federal courts, including the Sixth Circuit, have found that "[t]he sort of case opened by a motion under §848(q)(4) is not the kind of pending litigation mentioned in Chapter 154 [of AEDPA]." *Williams v. Coyle*, 167 F.3d 1036, 1040-41 (6th Cir. 1999) *quoting Holman v. Gilmore*, 126 F.3d 876, 880 (7th Cir. 1997). In *Garceau*, this Court cited with approval this rule from *Coyle, Holman*, and *Isaacs v. Head*, 300 F.3d 1232, 1244-45 (11th Cir. 2002). *Garceau*, 538 U.S. at 207. This Court further explained that "whether AEDPA applies to a state prisoner turns on what was before a federal court... ." *Id.* The clear weight of authority indicates that an appeal from an order denying a request for the appointment of counsel under the federal statute, 18 U.S.C. §3599, is not governed by the COA provisions of AEDPA, 28 U.S.C. §2253, because such a request is not "an application for habeas relief seeking an adjudication on the merits of the petitioner's claims." *Id.* This Court's intervention is needed because of the Sixth Circuit's departure from this authority.

The Third and Sixth Circuit Courts of Appeals stand alone in requiring a

COA from the denial of a §3599 motion for appointed counsel. *Harbison v. Bell*, App.A, p.App-004; *Michael v. Horn*, 459 F.3d 411 (3d Cir. 2006). The Court of Appeals for the Fifth, Tenth and Eleventh Circuits have found appealable as of right orders denying motions regarding federally funded counsel under §3599 (or former §848). *Smith v. Dretke*, 422 F.3d at 288; *Hain v. Mullin*, 324 F.3d at 1147 n.1 *vacated on other grounds*, 324 F.3d 1146; *Weeks v. Jones*, 100 F.3d at 127 n.6. The Court of Appeals for the Sixth, Seventh and Eleventh Circuits have found that orders denying requests regarding federally-funded counsel constitute cases independent of AEDPA. *Isaacs v. Head*, 300 F.3d at 1244-45; *Williams v. Coyle*, 167 F.3d at 1040-41; *Holman v. Gilmore*, 126 F.3d at 880. Other authority finds appellate jurisdiction of such orders as of right under 28 U.S.C. §1291 or, in non-final cases, based on the writ of mandamus or the collateral order exception.[30] A COA is not required for appellate jurisdiction.

The statutory language of AEDPA does not require a COA to appeal cases such as this one. Finding an appeal as of right in cases presenting requests for federally-funded counsel comports with this Court's application of AEDPA. This Court has consistently refused to graft restrictions into AEDPA that are not supported by the plain language of the statute.[31] Nothing in AEDPA specifically

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[30] *See Hertz* and *Liebman, supra*, at §12.5.

[31] *House v. Bell*, 126 S.Ct. 2064 (2006) (rejecting State's argument that AEDPA abrogated *Schlup's* gateway innocence standards because nothing in AEDPA "addresses" that standard); *Gonzalez v. Crosby*, 545 U.S. 524 (2005)(AEDPA did not eliminate the right of habeas petitioner to file a Rule 60(b) motion); *Hohn*, 524 U.S. at 249-50 (declining to expand limitations of appellate jurisdiction under AEDPA without clear statutory language to that effect); *Felker v. Turpin*, 518 U.S.

addresses whether a COA is required to appeal an order denying the appointment of federally-funded counsel. Given the nature of such an appeal, appellate jurisdiction is based upon 28 U.S.C. §1291. A COA is not required.

This Court should intervene in this case to settle the circuit split.

CONCLUSION

For the foregoing reasons Petitioner respectfully requests that this Court grant the petition for a writ of certiorari.

651, 660-61 (1996) ("declining to find a repeal ... by implication" of the Supreme Court's power to entertain original habeas petitions).

Respectfully submitted,

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LIST OF APPENDICES