

HARBISON v. BELL

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I. INTRODUCTION

On September 27, 2007, the Sixth Circuit Court of Appeals denied Edward Jerome Harbison's motion for a certificate of appealability.¹ Earlier, the United States District Court for the Eastern District of Tennessee had denied Harbison's motion to expand the appointment of the Federal Defender Services of Eastern Tennessee, Inc., to allow it to represent him in state clemency proceedings.²

Harbison petitioned the United States Supreme Court and was granted certiorari on two issues.³ This Commentary will address the first issue: whether federally-funded counsel may represent a habeas petitioner in a state clemency proceeding under 18 U.S.C. § 3599(a)(2) and (e) when the state has denied the petitioner state-funded counsel.⁴

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1. Harbison v. Bell, 503 F.3d 566, 567 (6th Cir. 2007). A certificate of appealability must be issued by a circuit justice or judge before an appeal may be taken to the circuit court of appeals from the final order in a habeas corpus proceeding for relief from state detention. 28 U.S.C.A. § 2253(c) (West 2008). As discussed below, this Commentary will not address the issue of whether Harbison was required to obtain a certificate of appealability. *See infra*. note 4.

2. *Id.* at 570.

3. Brief for Writ of Certiorari at ii, *Harbison*, 503 F.3d 566 (No. 07-8521).

4. The second issue for which certiorari was granted is whether a petitioner must obtain a certificate of appealability to appeal an order denying a request for counsel under 18 U.S.C. § 3599(a)(2) and (e). *Id.* Petitioner, Respondent, and the Solicitor General all agree that the text of 28 U.S.C. § 2253 does not require a certificate of appealability to appeal the denial of clemency counsel under § 3599. *See* Brief for Petitioner at 16, *Harbison*, 503 F.3d 566 (No. 07-8521); Brief of Respondent at 8, *Harbison*, 503 F.3d 566 (No. 07-8521); Brief for the United States as Amicus Curiae at 19, *Harbison*, 503 F.3d 566 (No. 07-8521). It is unlikely that the certificate of appealability issue will be dispositive; instead, the availability of federally-funded counsel during state clemency proceedings will likely be the dispositive issue.

II. FACTS

In January of 1983, Edith Russell returned home where she found Harbison and an accomplice burglarizing her home.⁵ Harbison killed her by hitting her repeatedly in the head with a heavy vase.⁶ After questioning the accomplice, police searched Harbison's girlfriend's house and found several of the Russells' possessions, including a heavy marble vase, which tested positive for blood.⁷ Following this discovery, the police vacuumed the carpet of Harbison's car and found crystalline calcite fragments "consistent with the marble vase."⁸

On February 21, 1983, police arrested Harbison on suspicion of burglary and murder.⁹ Harbison gave a taped confession in which he described the burglary, Mrs. Russell's return, and the struggle during which he hit her with the marble vase.¹⁰ At trial, however, Harbison recanted his confession and testified that he had confessed because the police had threatened to arrest his girlfriend and take away her children.¹¹ Ultimately, the jury that tried Harbison discounted his testimony, convicted him of first degree murder, and sentenced him to death.¹²

Harbison appealed his conviction to the Tennessee Supreme Court, which upheld both the conviction and the sentence.¹³ In 1997, he filed his first petition for a federal writ of habeas corpus.¹⁴ This petition was dismissed by the district court in 2001, and the dismissal was affirmed by the Sixth Circuit in 2005.¹⁵

Harbison next filed a motion for relief from judgment, which the district court also denied.¹⁶ Subsequently, Harbison requested leave to expand the appointment of his federally-funded counsel¹⁷ to allow

5. State v. Harbison, 704 S.W.2d 314, 315–16 (Tenn. 1986).

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 315.

13. *Id.* at 320.

14. Harbison v. Bell, No. 1:97-CV-52, 2007 WL 128954, at *1 (E.D. Tenn. Jan. 16, 2007).

15. *Id.*

16. *Id.*

17. *Id.* at *6. The Federal Defender Services of Eastern Tennessee, Inc., had represented Harbison in his habeas petition since 1997.

that counsel to represent him in state clemency proceedings.¹⁸ The district court composed an extensive memorandum that analyzed the circuit split over whether to grant federally-funded counsel for state clemency proceedings under 18 U.S.C. § 3599, but ultimately found that its decision was controlled by the Sixth Circuit's holding that "the statute does not entitle a death-row inmate to federally-funded counsel in state post-conviction cases."¹⁹

III. LEGAL BACKGROUND

A. 18 U.S.C. § 3599

In the Anti-Drug Abuse Act of 1988, Congress authorized federal courts to appoint counsel for defendants in capital cases who are financially unable to obtain representation.²⁰ In 1994, the Supreme Court interpreted the statute's language to facially grant "indigent capital defendants a mandatory right to qualified legal counsel," which vests prior to the defendant's application for habeas relief.²¹ Subsection (a)(2) specifically entitles indigent defendants in state or federal habeas proceedings to the appointment of counsel.²² The

18. Harbison v. Bell, No. 1:97-CV-52, 2007 WL 128954, at *1, *6. Clemency is the power to pardon a criminal or commute a criminal sentence. BLACK'S LAW DICTIONARY 269 (8th ed. 2004). The Tennessee clemency process is non-judicial. See BOARD OF PROBATION AND PAROLE, EXECUTIVE CLEMENCY available at <http://www.tn.gov/bopp/Docs/ClemencyApplicationProcess=02-13-03.pdf> (detailing all parties and steps involved in Tennessee clemency process); DEATH PENALTY INFORMATION CENTER, DEATH PENALTY POLICY BY STATE available at <http://www.deathpenaltyinfo.org/death-penalty-policy-state> (noting only judicial clemency involvement in California proceedings to pardon or commute sentence of twice convicted felon). In Tennessee, a Board of Probation and Parole processes applications grants hearings when warranted and makes non-binding recommendations to the Governor. *Id.* Among states that impose the death penalty, over half, including Tennessee, give the Governor the final authority to grant or deny clemency. Brief of Current and Former Governors as Amici Curiae in Support of Petitioner at 4 (citing MARGARET COLGATE LOVE, RELIEF FROM COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE 99–101 (2006); DEATH PENALTY INFORMATION CENTER, *supra*); *Id.* at 4 n.2 (citing LOVE, *supra*, at 32–36).

19. Harbison v. Bell, No. 1:97-CV-52, 2007 WL 128954, at *6–*7 (citing House v. Bell, 332 F.3d 997 (6th Cir. 2003) (en banc)).

20. 21 U.S.C.A § 848(q) (West 2006) (repealed 2006). In 2006, Congress reenacted the entire section verbatim in the Terrorist Death Penalty Enhancement Act, Pub. L. No. 109-177, Title II, § 222, 2006 U.S.C.C.A.N. (120 Stat.) 230. The original language, codified at 18 U.S.C. § 3599, continues to regulate the appointment of counsel for financially unable defendants. Compare 18 U.S.C.A § 3599 (West 2008) with 21 U.S.C.A. § 848(q) (West 2006) (repealed 2006).

21. McFarland v. Scott, 512 U.S. 849, 854–55 (1994).

22. 18 U.S.C.A. § 3599(a)(2) (West 2008) ("In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death

statute also requires that the appointment accord with subsections (b) through (f).²³

Subsection (e) details the scope of the appointed attorney's representation²⁴: "[E]ach 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 for executive or other clemency as may be available to the defendant."²⁵

The circuit courts have split over the proper interpretation of subsection (e)'s final phrase, hereinafter referred to as the "clemency phrase." Some circuits have read the phrase broadly so as to grant defendants the right to appointed counsel in both federal or state clemency proceedings;²⁶ others have interpreted the appointment narrowly so as to apply it only in federal clemency proceedings.²⁷

B. Three Circuits Have Found No Right to Federally-Funded Counsel in State Proceedings

The argument against appointing federally-funded counsel in state clemency proceedings originated in petitions for counsel appointment in non-clemency state post-conviction proceedings. First, in *In re Lindsey*, the Eleventh Circuit addressed a petitioner's right to have a federally-appointed attorney represent him in state collateral review proceedings.²⁸ The court read the relevant sections of the statute to be inapplicable to state proceedings.²⁹ The court expressed concern that a broad reading would "have the practical effect of supplanting state-court systems for the appointment of counsel in collateral review cases" and would encourage future petitioners to "ignore the

sentence, any defendant who is or becomes financially unable to obtain adequate representation . . . shall be entitled to the appointment of one or more attorneys . . ." (emphasis omitted)).

23. *Id.* Subsections (b), (c), and (d) discuss the number and qualifications of attorneys to be appointed. Subsection (f) concerns the appointment of non-attorney services. *Id.*

24. *Id.* § 3599(e).

25. *Id.*

26. *E.g.*, *Hain v. Mullin*, 436 F.3d 1168, 1170 (10th Cir. 2006) (en banc) (finding appointment extends to state court clemency proceedings); *Hill v. Lockhart*, 992 F.2d 801, 803 (8th Cir. 1993) (finding counsel could be appointed for state clemency proceedings when the court deems it reasonably necessary).

27. *E.g.*, *House v. Bell*, 332 F.3d 997, 998–99 (6th Cir. 2003) (en banc) (finding no right to federally appointed counsel in state proceedings); *Clark v. Johnson*, 278 F.3d 459, 462–63 (5th Cir. 2002) (same); *King v. Moore*, 312 F.3d 1365, 1365–66 (11th Cir. 2002) (per curiam) (same).

28. *In re Lindsey*, 875 F.2d 1502, 1505 (11th Cir. 1989).

29. *Id.* at 1506.

exhaustion requirement” and file for federal habeas relief before filing for state habeas relief.³⁰

Next, in *Sterling v. Scott*, the Fifth Circuit Appellate Court refused to appoint federally-funded counsel for the petitioner while he exhausted state post-conviction remedies.³¹ The court expressed three grounds for a narrow reading of the clemency phrase, which have been echoed in subsequent circuit decisions.³² First, the court read the right to appointed counsel in the context of surrounding statutory provisions, so that it applied “only in connection with federal proceedings.”³³ Second, the court considered the cost of providing counsel in state post-conviction proceedings, and stated that “Congress is usually more express in its intent when it decides to fund a project;” therefore, the court found no such express intent.³⁴ Third, the court emphasized, in the interest of federalism, that state court proceedings need to remain free from interference by the federal court.³⁵

In *Clark v. Johnson*, the Fifth Circuit applied the *Sterling* reasoning to state clemency proceedings.³⁶ After Clark’s execution, his federally-appointed counsel sought “compensation and reimbursement of expenses incurred in connection with [Clark’s] state clemency proceeding.”³⁷ The court acknowledged that *Sterling* had not addressed clemency proceedings, but cited the opinion as instructive and held that the statute did not apply to state clemency proceedings.³⁸

30. *Id.*

31. *Sterling v. Scott*, 57 F.3d 451, 458 (5th Cir. 1995).

32. *E.g.* *Clark v. Johnson*, 278 F.3d 459, 462–63 (5th Cir. 2002) (discussing the *Sterling* analysis in detail); *King v. Moore*, 312 F.3d 1365, 1367 (11th Cir. 2002) (per curiam) (citing *Sterling* to support contextual and legislative history arguments).

33. *Sterling*, 57 F.3d at 457.

34. *Id.*

35. *Id.* (“It would seem indelicate on our part, absent an express intent on the part of Congress, to permit intrusion into the state judicial process by having lawyers who are practicing before state courts, representing state court defendants and petitioners pursuant to state court rules, to have their qualifications set by federal statute (21 U.S.C. § 848(q)(5), (6)) and to be answerable, at least in part, to federal judges for their conduct.”)

36. *Clark*, 278 F.3d. at 462–63. The petitioner in *Clark* was denied certiorari on the issue of reimbursement under the statute for legal work performed in a state clemency proceeding. *In re Taylor*, 537 U.S. 1079 (2002) (mem.).

37. *Clark*, 278 F.3d at 460.

38. *Id.* at 462–63.

The Eleventh Circuit in *King v. Moore* agreed with the Fifth Circuit that the statute does not apply to state clemency proceedings.³⁹ Citing the above cases, the court supported its construction with the three-part reasoning used by the Fifth Circuit in *Sterling*⁴⁰ and expressed a practical concern that a broad interpretation would “entitle habeas petitioners—if successful in having their state convictions vacated in federal court—to federally funded counsel for their resulting new state trial, state appeal, and state habeas proceedings.”⁴¹ Finally, the court cited the legislative history of the statute, which was “added to the bill very late in the session and seemingly without floor debate,” arguing that the hasty manner in which it was added indicated that Congress did not intend the “big and innovative” consequences that a broad reading of the statute would permit.⁴²

Most recently, the Sixth Circuit denied a petitioner federally-funded counsel for state post-conviction claims in *House v. Bell*.⁴³ The court agreed with the Fifth and Eleventh Circuits “that Section 848(q)(4)(B) must be construed narrowly.”⁴⁴ The court cited *King*’s reasoning and concluded with its own solution to the federalism concerns: “The rule is simple. The two representations shall not mix. The state will be responsible for state proceedings, and the federal government will be responsible for federal proceedings.”⁴⁵

C. *Two Circuits Have Found a Right to Federally-Funded Counsel in State Clemency Proceedings When Reasonably Necessary*

Though the Eighth Circuit in *Hill v. Lockhart* denied an attorney’s request for compensation for the work he performed in a state

39. *King v. Moore*, 312 F.3d 1365, 1368 (11th Cir. 2002) (per curiam).

40. *See id.* at 1367 (“Before we would decide to obligate the United States to pay for counsel in a state proceeding, Congress’s intent to pay would need to be so clear as to leave room for no other reasonable interpretation. . . . [T]he entanglement of federal courts in state proceedings would raise substantial problems impacting on our federalism. . . . Section 848(q) is entitled ‘Appeal in capital cases; counsel for financially unable defendants’ and seems directed to the appeals of death-penalty sentences in federal cases.”).

41. *Id.*

42. *Id.* at 1367–68 (“The whole-business of federal compensation (controlled by the federal courts) for lawyers acting in state proceedings on behalf of state prisoners seems too big and innovative to have been dealt with at the tail end of a session as the legislation was being approved at the last moment.”).

43. *House v. Bell*, 332 F.3d 997, 998 (6th Cir. 2003) (en banc).

44. *Id.* at 998–99.

45. *Id.*

clemency proceeding, the holding did not preclude appointments of federally-funded counsel for such assistance.⁴⁶ The Eighth Circuit read the statute to “evidence[] a congressional intent to insure that indigent state petitioners receive ‘reasonably necessary’ competency and clemency services from appointed, compensated counsel.”⁴⁷ The court determined that appointing counsel to assist with a state clemency proceeding is only reasonably necessary when “the request is made as part of a non-frivolous federal habeas corpus proceeding” and “state law provides no avenue to obtain compensation for these services.”⁴⁸ Additionally, federally-funded attorneys must request compensation for services in state proceedings prior to rendering those services.⁴⁹

In *Hain v. Mullin*, the Tenth Circuit read the statute broadly so as to authorize federally-appointed attorneys to represent state capital defendants in state clemency proceedings.⁵⁰ The court emphasized that the statute explicitly grants representation to defendants who are proceeding under § 2254⁵¹ and that defendants proceed under § 2254 to seek vacature of a state sentence.⁵² Because only state clemency can alter a state sentence, the statute’s grant of representation to § 2254 defendants can only be given effect in state clemency proceedings.⁵³ The court found that reading the statute narrowly to apply only to federal clemency proceedings “ignores the plain meaning of the statute, violates the canon of statutory interpretation requiring us to give effect to every word of a statute, and reads the statute out of context.”⁵⁴

IV. HOLDING

In *Harbison v. Bell*, in the portion of the opinion relevant to this Commentary, the Sixth Circuit Court considered whether Harbison could be represented in his state clemency proceeding by federally-funded counsel.⁵⁵ The court disposed of the issue in fewer than five

46. Hill v. Lockhart, 992 F.2d 801, 803 (8th Cir. 1993).

47. *Id.*

48. *Id.*

49. *Id.*

50. Hain v. Mullin, 436 F.3d 1168, 1170 (10th Cir. 2006) (en banc).

51. *Id.* at 1171–72.

52. 28 U.S.C.A. § 2254 (West 2008).

53. *Hain*, 436 F.3d at 1171–72.

54. *Id.* at 1173.

55. Harbison v. Bell, 503 F.3d 567, 570 (6th Cir. 2007).

sentences.⁵⁶ Citing its ruling in *House v. Bell* “that § 3599(e) . . . does not authorize federal compensation for legal representation in state matters,” the court found no right to federal compensation for legal representation in state clemency proceedings.⁵⁷ In conclusion, the court denied Harbison’s motion for a certificate of appealability to expand the appointment of his federally-funded counsel to state clemency proceedings.⁵⁸

V. ANALYSIS

A. *Extension of Federally Appointed Legal Representation into State Matters*

The Sixth Circuit’s ruling in *Harbison v. Bell* is problematic because it denied counsel for clemency proceedings based on the reasoning of a prior opinion that applied only to judicial proceedings and because it failed to address subsequent developments in its sister circuits and in the state of Tennessee.

First, the court relied on precedent, established in *House v. Bell*, that is inapplicable to non-judicial state proceedings.⁵⁹ In *House*, the court cited the “weight of the authority” from its sister circuits as the primary reason to deny the request for appointment of counsel.⁶⁰ Though the Tenth Circuit in *Hain v. Mullin* had interpreted the statute to apply to state clemency proceedings a mere six months before *House*, the Sixth Circuit failed to mention the case.⁶¹ The court repeated the Fifth and Eleventh Circuits’ concern that federal courts would interfere with the independent control of states over their own judicial proceedings.⁶² As the Fifth Circuit explained in *Sterling v. Scott*, “[c]ounsel who are appointed and qualified and whose pay is

56. *Id.* at 570.

57. *Id.*

58. *Id.* In the remainder of the opinion, the court denied a request for permission to file a successive habeas corpus petition and denied a motion for a certificate of appealability to appeal the denial of a Rule 60(b) motion. *Id.* at 568. Harbison did not petition for certiorari regarding either of these issues.

59. See *infra*, note 18.

60. *House v. Bell*, 332 F.3d 997, 999 (6th Cir. 2003).

61. *Id.*

62. *Id.* at 999 (citing *King v. Moore*, 312 F.3d 1365, 1368 (11th Cir. 2002) (per curiam); *Clark v. Johnson*, 278 F.3d 459 (5th Cir. 2002); *Sterling v. Scott*, 57 F.3d 451 (5th Cir. 1995); *Hill v. Lockhart*, 992 F.2d 801, 803 (8th Cir. 1993); *In re Lindsey*, 875 F.2d 1502 (11th Cir. 1989)).

approved by federal judges are ultimately controlled by and responsible to federal courts.”⁶³

The *House* court was gravely concerned with the federalism implications of federal financial support for key players in state judicial proceedings. It declared that entitling a petitioner to federal counsel in subsequent state proceedings is “unacceptable.”⁶⁴ The decision quoted heavily from the Eleventh Circuit’s *King v. Moore* decision, specifically that it was likely that “federal compensation (controlled by federal courts) for lawyers acting in state proceeding on behalf of state prisoners” was not Congress’s intent when it drafted § 848(q)(4)(B).⁶⁵ This precedent, however, is not a sufficient basis to deny Harbison’s petition for the appointment of counsel for state clemency proceedings under § 3599(e). The Sixth Circuit’s use of *House*—a case about representation in state post-conviction judicial proceedings—as precedent for the right to representation in non-judicial state clemency proceedings, is certainly an overly-broad application of precedent and could be considered misplaced reliance on dicta.⁶⁶

Additionally, the Sixth Circuit failed to acknowledge two developments regarding clemency counsel that could have affected its decision to apply the *House* precedent to *Harbison* without further analysis. Though the Sixth Circuit declared in *House* that “the weight of the authority does not support”⁶⁷ expansion of the federally-appointed counsel’s representation, it failed to consider in *Harbison* the two circuit decisions that did support expansion of federally-appointed counsel.

First, the Sixth Circuit cited *Hill v. Lockhart*, without qualification, as a case that construed the statute narrowly to “not authorize federal compensation for representation in state proceedings.”⁶⁸ The Eighth Circuit, however, held in *Lockhart* that the plain language of the statute could grant a right to federally-funded counsel under the

63. *Sterling v. Scott*, 57 F.3d 451, 457 (5th Cir. 1995).

64. *House*, 332 F.3d at 999.

65. *Id.* at 999 (quoting *King*, 312 F.3d at 1367–68).

66. *See King v. Moore*, 312 F.3d 1365, 1366–67 n.3 (11th Cir. 2002) (per curiam) (stating that its prior opinion in *In re Lindsey* was dicta and not controlling “because *Lindsey* did not involve state clemency proceedings”). Ironically the Sixth Circuit relied primarily on the *King* decision to justify its holding in *House*, 332 F.3d at 999.

67. *House*, 332 F.3d at 999.

68. *Id.* at 998–99.

statute in state clemency proceedings.⁶⁹ Focusing on the phrase “reasonably necessary” in the statutory section now codified at 18 U.S.C. § 3599(a)(2), the court determined that services provided for state clemency proceedings “can be” reasonably necessary under the statute unless the request is frivolous or the state already provides compensation for such services.⁷⁰ The attorney’s petition failed in *Lockhart* because he had not shown “that state law provides no avenue to obtain compensation” for legal services performed in a state clemency proceeding.⁷¹

The Eighth Circuit’s analysis of “reasonably necessary” would have been particularly relevant in *Harbison*. The previous year, the Tennessee Supreme Court had granted an order stating that “no statute, rule of court, or constitutional provision authorizes this Court to appoint the Office of the Post-Conviction Defender to represent [petitioner] at clemency proceedings.”⁷² By the Eighth Circuit’s standard, Harbison’s indigence and the lack of any state procedure by which an indigent petitioner could seek counsel would have rendered appointed counsel reasonably necessary under the statute. The Sixth Circuit, however, addressed neither the plain language of the statute nor the lack of any state avenue for compensation.

Second, subsequent to *House* but prior to *Harbison*, the Tenth Circuit held that the plain language of § 848(q)(4)(B) “[u]nambiguously” entitled state petitioners to federally funded counsel and services by specifically including those seeking relief under § 2254 which is available only to state prisoners.⁷³ Because there is no federal executive power to pardon state prisoners, the court read the phrase “executive or other clemency” to indicate congressional intent to fund representation in state clemency proceedings.⁷⁴ Unlike the Sixth Circuit, which listed the Eighth Circuit in accord with the Eleventh and Fifth Circuits, the Tenth Circuit acknowledged a split among the circuits and aligned itself with the Eighth Circuit’s broad interpretation of the plain language of the statute.⁷⁵

69. *Hill v. Lockhart*, 992 F.2d 801, 803–04 (8th Cir. 1993).

70. *Id.* at 803–04.

71. *Id.* at 803.

72. *State v. Johnson*, No. M1987-00072-SC-DPE-DD (Tenn. Oct. 6, 2006) (per curiam) (order denying motion to appoint clemency counsel).

73. *Hain v. Mullin*, 436 F.3d 1168, 1171 (10th Cir. 2006) (en banc).

74. *Id.* at 1172.

75. *Id.* (“Acknowledging a circuit split on the issue, we nonetheless see no other logical way to read the statute. As expressed by the Eighth Circuit ‘The plain language of § 848(q)

In *House*, the Sixth Circuit based its holding on the premise that all federal jurisdictions that had addressed the issue had prohibited the appointment of federally-paid attorneys in state proceedings,⁷⁶ and cited no authority beyond its survey of jurisdictions.⁷⁷ As the court had no basis for its holding in *House* independent of the holdings of its fellow circuit courts, the Sixth Circuit should have corrected its interpretation of the Eighth Circuit's holding and factored the subsequent Tenth Circuit decision into the balance of authorities before applying the *House* precedent to *Harbison*.

VI. ARGUMENTS AND DISPOSITION

Because the Sixth Circuit's opinion in *Harbison v. Bell* contains almost no legal analysis, the Supreme Court is likely to focus its opinion on the arguments that make up the two sides of the circuit split and their application to state clemency proceedings.

A. *The Case Against Appointing Counsel for State Clemency Is Not Persuasive*

The various circuits' holdings against the appointment of federally-funded counsel in state clemency proceedings have centered on four key arguments. The first two arguments—that allowing federal courts to appoint federally-funded counsel would introduce federal court control into state court proceedings and would encourage petitioners to ignore exhaustion requirements—are not persuasive in the context of clemency proceedings. Clemency proceedings are non-judicial and are subsequent to state judicial proceedings. Because clemency is sought subsequent to judicial proceedings, it is unlikely that state prisoners would forego state exhaustion requirements to obtain federal clemency. Additionally, states are free to provide legal representation to indigent petitioners in state clemency proceedings and thereby avoid any federal intrusion.

The two textual arguments—that the context of the statute indicates that Congress intended to grant representation only in

evidences a congressional intent to insure that indigent state petitioners receive reasonably necessary clemency services from appointed, compensated counsel.”).

76. *House v. Bell*, 332 F.3d 997, 999 (6th Cir. 2003) (“As the weight of authority does not support House’s request . . . House’s motion . . . is DENIED.”).

77. *Id.* at 998–99.

federal clemency proceedings and that the lack of specific language signifies that Congress did not intend to fund counsel for state proceedings—are more relevant within clemency proceedings. Given, however, the lack of any overtly conflicting legislative history and the Supreme Court’s hesitancy to engage in creative statutory interpretation, these arguments are likely to be only minimally persuasive to the Court.

B. The Case for Appointment of Counsel for State Clemency Is Persuasive

The plain language of 18 U.S.C. § 3599(a)(2) and (e) favors the argument that appointment of counsel should extend to state clemency proceedings. In *Herrera v. Collins*, the Court described clemency as “the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.”⁷⁸ Given the linguistic interpretation that would be necessary to read the statute to apply only in federal clemency proceedings combined with the Tennessee Supreme Court’s recent determination that it has no jurisdiction to appoint counsel for state prisoners in state clemency proceedings, it seems unlikely that the Court would decide *Harbison* such that state prisoners would be left without legal assistance when they pursue that “historic remedy.”

C. Likely Disposition

It is likely that the Supreme Court will overturn the holding of the Sixth Circuit Court and find that the plain language of 28 U.S.C. § 3599 grants criminal defendants seeking to vacate or set aside a death sentence the right to have federally-funded representation appointed in state clemency proceedings when the state provides no avenue for the compensation of clemency counsel.

78. *Herrera v. Collins*, 506 U.S. 390, 412 (1993).