No. 07-8521 (Capital Case)

In the Supreme Court of the United States

EDWARD JEROME HARBISON,

Petitioner,

v.

RICKY BELL, WARDEN

Respondent.

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

BRIEF FOR PETITIONER

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether a certificate of appealability issued pursuant to 28 U.S.C. § 2253(c) is required to enable a court of appeals to consider the appeal of an order denying a request for federally appointed clemency counsel under 18 U.S.C. § 3599.

2. Whether counsel appointed pursuant to Section 3599 to represent a defendant sentenced to death under state law in post-conviction proceedings under 28 U.S.C. § 2254 also may represent the defendant in subsequent state clemency proceedings when the defendant is otherwise unrepresented.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Add. 5a-14a;[1] Pet. App. A) is reported at 503 F.3d 566. The opinion of the district court (Add. 15a-31a; Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 2007 (Add. 5a; Pet. App. A). The petition for a writ of certiorari was filed on December 21, 2007, and was granted on June 23, 2008. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Subsections (a)(2) and (e) of 18 U.S.C. § 3599 provide:

> (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).
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> * * * *

[1] Because the certiorari petition was filed *in forma pauperis*—and not in printed form—we have reproduced the opinions below in the addendum to this brief for the Court's convenience.

> (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.

The full text of Section 3599 and the text of 28 U.S.C. § 2253 are reproduced on pages 1a-4a of the addendum to this brief.

STATEMENT

The governing text in this statutory interpretation case is 18 U.S.C. § 3599(e). That section explicitly directs that counsel appointed under Section 3599(a)(2) to represent a state defendant in proceedings challenging a death sentence under 28 U.S.C. § 2254 "shall also represent the defendant in such * * * proceedings for executive or other clemency as may be available to the defendant." It is indisputable that state clemency proceedings fall within the plain language of this text; they are "executive or other clemency" proceedings that are "available to" defendants sentenced to death whose counsel are appointed in Section 2254 proceedings.

The Court must "start, as always, with the language of the statute." *Williams* v. *Taylor*, 529 U.S. 420, 431 (2000). This case ends with the language as well, because when, as here, "the statute's language is plain, 'the sole function of the courts' "—at least absent an absurd result—"'is to enforce [the statute] according to its terms.'" *Hartford Underwriters Insurance Co.* v. *Union Planters Bank*, 530 U.S. 1, 6 (2000) (internal quotation marks omitted).

A. Section 3599

Congress in 1988 provided for "quality legal representation" in capital cases because of "'the seriousness of the possible penalty and * * * the unique and complex nature of the litigation.'" *McFarland* v. *Scott*, 512 U.S. 849, 855 (1994) (quoting 21 U.S.C. § 848(q)(7) (now codified at 18 U.S.C. § 3599(d)). The Anti-Drug Abuse Act of 1988 authorized federal courts to appoint counsel for unrepresented indigent defendants in death-penalty-related proceedings. See Pub. L. No. 100-690, § 7001(b), 102 Stat. 4393-94 (codified at 21 U.S.C. § 848(q)). In 2006, this provision was repealed, reenacted without change, and codified as 18 U.S.C. § 3599. See Terrorist Death Penalty Enhancement Act of 2005, Pub. L. No. 109-177, Tit. II, § 222, 120 Stat. 230, 231.

Section 3599 is titled "Counsel for financially unable defendants." Subsection 3599(a)(2) governs the situation presented here—the appointment of counsel for an indigent, otherwise unrepresented defendant who is seeking through federal habeas corpus proceedings to vacate or set aside a death sentence imposed by a state court.[2] It states that, "[i]n any

[2] 18 U.S.C. § 3599(a)(1) provides for the appointment of counsel to represent persons charged with a federal capital crime. Sub-

post conviction proceeding under section 2254 * * * of title 28"—a provision which applies only to state-court convictions—"any defendant who is challenging a death sentence and who is or becomes financially unable to obtain adequate representation 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)." Thus, when four conditions are satisfied—the defendant is proceeding under Section 2254, the defendant is seeking to invalidate a sentence of death imposed by a state court, the defendant is indigent, and the defendant is otherwise unrepresented—the defendant "shall be entitled to" federally appointed counsel.

Subsections (b) through (d) concern the quality and number of appointed counsel. Subsections (b) and (c) establish qualifications for appointment before and after judgment, respectively; subsection (d) authorizes appointment of a second attorney in complex or otherwise difficult cases.

Subsection (e) addresses the scope of appointed counsel's representation and is the provision that answers the question presented in this case. Section 3599(e) first provides that, "[u]nless replaced by similarly qualified counsel," appointed counsel "shall represent the defendant throughout every subsequent stage of available judicial proceedings." Second, it specifies—with particular pertinency to attorneys who are appointed under Section 3599(a)(2) to represent a state or federal defendant in a post-

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section (a)(2) expressly and separately provides for the appointment of counsel in capital post conviction proceedings brought *either* by federal convicts (under 28 U.S.C. § 2255) *or* by state convicts (under 28 U.S.C. § 2254).

conviction proceeding "seeking to vacate or set aside a death sentence"—that these proceedings include "all available post-conviction process." Third, subsection (e) adds that, "together with" such post-conviction process, the responsibilities of appointed counsel include representing the defendant on "applications for stays of execution and other appropriate motions and procedures."

Fourth, subsection (e) directs that appointed counsel "shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant."

B. Mr. Harbison's Proceedings And Background

1. In March 1983, the Hamilton County, Tennessee grand jury indicted Mr. Harbison on two counts of first-degree murder—one count charging premeditated murder and the other count charging felony-murder—as well as counts of second degree burglary and larceny, in connection with the homicide of 62-year-old Edith Russell on January 15, 1983. The guilt and the penalty phases of the case were tried to a jury in the Hamilton County Criminal Court from November 30 through December 2, 1983.

The evidence presented at trial was that Mr. Harbison and David Schreane were in the process of burglarizing the Russell house when they were surprised by Ms. Russell's return home. Mr. Harbison stated that Ms. Russell reached for what he incorrectly believed to be a gun. He grabbed a marble vase weighing approximately twenty-five pounds and struck her in the head. The medical examiner testified that Ms. Russell suffered massive skull fractures

which were consistent with being struck with the vase at least three times. *State* v. *Harbison,* 704 S.W.2d 314, 316 (Tenn. 1986). Mr. Harbison recanted his confession during trial, stating that it had been coerced by police threats to arrest his girlfriend and take her children away, and professed his innocence. *Id.* at 317. The jury returned a verdict of guilty. *Ibid.*

The evidence presented at the penalty phase consisted of 47 lines of testimony from Mr. Harbison's mother. Trial counsel argued that Mr. Harbison lacked a significant history of prior criminal activity, that he brought no weapon to the Russell house, that he believed Ms. Russell was going for a gun, and that Ms. Russell's death was instantaneous. The jury found one aggravating circumstance—that the murder was committed during a burglary—and found that this aggravating factor outweighed the mitigation. 704 S.W.2d at 320. Mr. Harbison was sentenced to death.

The Tennessee Supreme Court upheld Mr. Harbison's conviction and sentence. *Harbison*, 704 S.W.2d at 320.

Mr. Harbison next unsuccessfully pursued relief in post-conviction proceedings in the Tennessee courts. *Harbison* v. *State,* No. 03C01-9204-CR-00125, 1996 Tenn. Crim. App. LEXIS 307 (May 20, 1996).

2. In February 1997, the United States District Court for the Eastern District of Tennessee, acting pursuant to the predecessor of Section 3599, appointed Federal Defender Services of Eastern Ten-

nessee, Inc.[3] to represent Mr. 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." R.5.[4]

Mr. Harbison's habeas corpus petition included claims previously raised and rejected by the state courts, as well as two new claims—that the State had violated the due process rule of *Brady v. Maryland*, 373 U.S. 83 (1963), and that direct appeal counsel had a conflict of interest—drawn from police records obtained by Mr. Harbison after his federal proceedings had begun. The district court denied relief, finding, *inter alia*, that Mr. Harbison's ineffective-assistance-of-counsel claims were barred for the reasons expressed by the state courts (R.118, at 30-38), and that the *Brady* and conflict-of-interest claims were barred because their factual bases could have been, but were not, discovered while the state post-conviction proceedings were pending. R.118, at 15-21 & 39-40.

A panel of the United States Court of Appeals for the Sixth Circuit affirmed the district court's grant of summary judgment for the State and dismissal of Mr. Harbison's habeas petition, with one judge dissenting on the ground that Mr. Harbison was entitled to relief on his *Brady* claim. *Harbison* v. *Bell*, 408 F.3d 823 (6th Cir. 2005). This Court denied *certiorari*. *Harbison* v. *Bell*, 547 U.S. 1101 (2006).

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[3] Federal Defender Services of Eastern Tennesse, Inc. ("FDSET") is a non-profit organization established pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A(g)(2)(B).

[4] Record cites (R.__) reference U.S. District Court Eastern District of Tennessee Docket No.1:97-cv-52.

3. On June 13, 2006, the State of Tennessee moved its Supreme Court to schedule Mr. Harbison's execution. Mr. Harbison responded and asked that, if his execution was scheduled, the court appoint counsel to represent him in seeking clemency before the Tennessee Board of Probation and Parole and the Governor as well as in any other available proceedings.

On July 17, 2006, the Tennessee Supreme Court ordered Mr. Harbison to be executed October 11, 2006. The State's Post-Conviction Defender Office was appointed to represent Mr. Harbison. R.156-3.

The Post-Conviction Defender filed a motion to withdraw, citing a lack of time and resources to prepare adequately an application for clemency. R.156-4. The state court denied the withdrawal motion but reset the execution date to February 22, 2007, to "afford sufficient time for adequate representation." R.156-5.

Subsequently, the Tennessee Supreme Court issued its decision in *State* v. *Johnson*, No. M1987-00072-SC-DPE-DD, 2006 Tenn. LEXIS 1236 (Oct. 6, 2006), holding that "no statute, rule of court, or constitutional provision" authorized the court to appoint clemency counsel. *Id.* at *2-*3. The court stated that its appointment order in *Harbison* was limited to state court proceedings related to the conviction or sentence and "did not extend the appointment of counsel to clemency proceedings." *Id.* at *3.

4. On December 13, 2006, Mr. Harbison's appointed federal habeas counsel moved the district court to expand her authorized scope of representation to include state clemency proceedings. R.156-1. The district court denied the motion on January 16,

2007, holding that *House* v. *Bell*, 332 F.3d 997 (6th Cir. 2003)—which had held that Section 3599 did not authorize federally appointed counsel to represent death-row inmates in state-court post-conviction proceedings—also precluded the appointment of counsel for state clemency proceedings. Add. 29a-31a.[5]

On September 27, 2007, the Court of Appeals for the Sixth Circuit summarily affirmed the district court's order refusing to authorize Mr. Harbison's habeas counsel to represent him in clemency proceedings and also denied Mr. Harbison's motion for a certificate of appealability ("COA") on the issue. Add. 12a.[6] The court of appeals stated that "[i]t is not clear that Harbison requires a COA to appeal the district court's denial of this counsel motion," observing that it would follow a Fifth Circuit precedent "which found that no COA was required to appeal

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[5] Federal habeas counsel had not sought a stay of execution in connection with her motion to expand the scope of her representation to include clemency. While the appeal from the district court's denial of that motion was pending in the Sixth Circuit, Mr. Harbison received a reprieve of his February 22 execution date. Subsequently, the Tennessee Supreme Court set a new execution date of September 26, 2007. Then, on September 19, 2007, Mr. Harbison's execution was enjoined as a result of unrelated litigation. *Harbison* v. *Little*, 511 F. Supp. 2d 872, 903 (M.D. Tenn. 2007).

[6] Mr. Harbison had not initially sought a COA with respect to the clemency counsel issue, but on June 27, 2007, the Sixth Circuit directed him to file a motion for a COA. Mr. Harbison's motion asserted that the case was automatically appealable but requested a COA as ordered. Application for Certificate of Appealability at 2; see also Reply to Response to Application for Certificate of Appealability at 1 & 3 (noting the State of Tennessee's agreement that a COA was unnecessary and requesting the court of appeals to so hold).

from the denial of expert assistance under" Section 3599. Add. 11a. "However," the court stated, "even if a COA is required for this issue," because of the Sixth Circuit's prior ruling in *House* "that § 3599(e) * * * does not authorize federal compensation for legal representation in state matters, a COA should not be granted for this issue." *Ibid.*

Federal habeas counsel's request for expansion of the scope of her appointment was supported, inter alia, by an attachment summarizing information relevant to the clemency determination she proposed to seek for Mr. Harbison. The information concerning Mr. Harbison's personal and family background included the following:

School and juvenile court records identify Mr. Harbison as borderline mentally retarded, slow in all subject areas; his recommended placement was in "educably mentally retarded" classes.[7] Mr. Harbison was excessively timid, insecure and characterized by one of his teachers as "emotionally" out of it.[8]

Court records state that Mr. Harbison's home life was "horrible in all areas imaginable."[9] For example:

- The Harbison family lived in run-down, dirty shacks without running water or electricity. Mr. Harbison and his four siblings wore ragged and dirty, donated clothes.[10]

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[7] R.103, Att.B, Juvenile Court Records-Hearing Transcript 10/8/64 p.1.

[8] R.103, Att.B, Affidavit of Brian Hackett ¶ 3.

[9] R.103, Att.B., Juvenile Court Records-Social History 10/21/69.

[10] R.103, Att.B, Affidavit of James Tyrone Harbison ¶ 3; *id.*, Affidavit of Kenneth Jerome Johnson ¶ 3; *id.*, Affidavit of Brian

- As a child, Mr. Harbison's mother taught him and his siblings to scavenge for scrap metal and shoplift necessities, such as socks.[11]
- Mr. Harbison and his siblings started drinking at an early age, in part to overcome hunger pangs. They used water to replace the alcohol they drank from their parents' liquor supply. 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 the parents to drink.[12]
- Mr. Harbison's parents engaged in drunken fights witnessed by the Harbison children. They injured each other with irons, broken bottles, and knives. They shot each other. Court records describe the parents' pattern of "stealing, aggressiveness, murder and attempting to do bodily harm."[13]
- Some of the worst injuries inflicted upon Mr. Harbison by his parents came from a power drill, gunshots, and being set on fire.[14] Neighbors heard about incest at the Harbison house. Harbison's father watched his

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Hackett ¶¶ 6-7; *id.*, Juvenile Court Records-Social History 10/21/69 p.1.; R.103, Att.B, Affidavit of Joyce Lynn Duke ¶ 2.

[11] R.103, Att.B, Affidavit of James Tyrone Harbison ¶ 3; R.103, Att.B, Affidavit of Kenneth Jerome Johnson ¶ 2.

[12] R.103, Att.B, Affidavit of Joyce Lynn Duke p.1.

[13] R.103, Att.B, Juvenile Court Records-Social History 10/21/69 p.1.

[14] R.103, Att. B, Affidavit of Catherine Elizabeth Harbison ¶ 3; *id.*, Affidavit of Brian Hackett ¶ 9.

daughters when they bathed and it was said that he impregnated the eldest.[15]

- When he was ten years old, Mr. Harbison witnessed his fourteen-year-old sister shoot her twenty-six-day-old son and her fourteen-month-old daughter. His sister was placed in a mental institution where she hanged herself.[16]
- 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.[17] Mr. Harbison was often left in charge of this sister because she was unable to care for herself.
- Mr. Harbison's brother committed crimes and Mr. Harbison watched his brother spend increasing amounts of time in jail.[18]

The psychological and emotional impairment resulting from this history causes Mr. Harbison difficulty with interpersonal relations, making decisions,

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[15] R.103, Att.B, Affidavit of Brian Hackett ¶¶ 7, 11; R.103, Att.B, Affidavit of Catherine Elizabeth Harbison ¶¶ 8-9 .

[16] R.103, Att.B, Erlanger Hospital Report 10/12/65; *id.*, Order of Commitment 10/19/65; *id.*, Death Certificate of Deborah Ann Harbison; *id.*, Affidavit of James Tyrone Harbison ¶ 9; *id.*, Affidavit of Kenneth Jerome Johnson ¶ 5; *id.*, Affidavit of Catherine Elizabeth Harbison ¶ 8; *id.*, Juvenile Court Records-Social History 10/21/69 p.1.

[17] R.103, Att.B, Affidavit of Catherine Elizabeth Harbison ¶ 7.

[18] R.103, Att. B, Affidavit of Catherine Elizabeth Harbison ¶ 5; *id.*, Juvenile Court Records-Hearing Transcript 9/11/69 p.4; *id.*, Social History 10/21/69 p.2.

and understanding the consequences of his actions. Mr. Harbison appears his chronological age but experiences the world at the emotional and intellectual equivalent of an adolescent.[19]

Mr. Harbison's background also reflects that he had not been charged with a crime before he was accused of Ms. Russell's murder. David Schreane, the brother of Mr. Harbison's girlfriend and a career criminal who was convicted of a second murder after he was released on his conviction for the murder here, told police Mr. Harbison committed this crime. However, police records that had not been disclosed to trial counsel showed that Schreane said he was going to "pin the crime" on Mr. Harbison. R.135, Att.B, Police Records p.186. Schreane initially told police another person, not Mr. Harbison, accompanied him at the crime scene. R.135, Att.B, Police Records p.79. Schreane later implicated Mr. Harbison out of jealousy and revenge and to diminish his own responsibility for the murder. R.135, Att.B Police Records pp. 115-18.[20]

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[19] R.103, Att.B, Affidavit of Dr. Toomer ¶¶ 12, 15.

[20] Two hundred and six police records were released to federal habeas counsel by the Chattanooga Police Department in 1997. (R.135, Att.B, Police Records). They also contain evidence showing that a third person, Ray Harrison, participated in Ms. Russell's murder. 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 Harrison, as well as Schreane and another male who was not Mr. Harbison, across the street from the victim's house immediately before the time of the crime. On the advice of the same attorney who later represented Mr. Harbison on his motion for new trial and direct appeal, Harrison refused to cooperate with law enforcement by taking a polygraph examination. Harrison was extradited to Florida on burglary and

SUMMARY OF ARGUMENT

A certificate of appealability ("COA") was not needed to allow Mr. Harbison to obtain appellate review of the district court's order denying his request that appointed counsel represent him in the state clemency proceeding. The COA requirement applies only to an appeal of "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). That language means the order finally disposing of a habeas petitioner's challenges to his or her detention under state-court process. An order regulating the responsibilities of appointed counsel with respect to clemency proceedings—the order rendered in this case—is not such an order. It therefore may be reviewed by a court of appeals without a COA.

The text of Section 3599(e) states explicitly that the lawyer appointed to represent a state prisoner in federal habeas corpus proceedings under 28 U.S.C. § 2254 seeking to vacate a death sentence "shall also represent the defendant in such * * * proceedings for executive or other clemency as may be available to the defendant." Because the words of Section 3599 allow of only one meaning, they are where the proper analysis of *this* case ends. *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-54 (1992) ("in interpreting a statute a court should always turn first to one, cardinal cannon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. * * * When the words

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assault charges. He was never arrested or prosecuted in this case. R.135, Att.B, Police Records pp. 61 & 72.

of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete'").

"As in all statutory interpretation cases," analysis must "'begin with the language of the statute.'" *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 U.S. 241, 255 (2004) (internal quotation marks omitted). Section 3599(e) states that appointed counsel "shall" represent the defendant in "such" clemency proceedings "as may be available to the defendant"—and the only clemency proceeding "available" to a state defendant is the one provided by state law—the statute's only possible meaning is that the responsibilities of appointed counsel include state clemency proceedings. Indeed, because persons convicted under federal law may obtain clemency only from the President, Section 3599(e)'s reference to "executive *or other* clemency" (emphasis added) confirms the inclusion of state clemency proceedings: "or other" is needed to encompass clemency processes in those States in which the governor is not the decisionmaker. The phrase would be surplusage if the statute were limited to federal clemency proceedings.

Given the clear meaning of the provision's words, that should be the end of the inquiry. "'When the statute's language is plain,'" the function of the courts is "'to enforce it according to its terms.'" *Lamie* v. *U.S. Trustee*, 540 U.S. 526, 534 (2004) (internal quotation marks omitted). The plain meaning of the clear terms of the governing statute here dictate that Mr. Harbison's federal habeas counsel shall represent him in available state clemency proceedings.

Some lower courts, and the Solicitor General in his amicus brief at the certiorari stage, justify a contrary result not by interpreting the statute, but by rewriting it to reach what they believe is a preferable

policy result. Even if their policy judgment were correct, none of their arguments provides any basis whatever for disregarding the unequivocal statutory text. "'Whatever temptations the statesmanship of policymaking might wisely suggest,' the judge's job is to construe the statute—not to make it better. The judge 'must not read in by way of creation,' but instead abide by the 'duty of restraint, th[e] humility of function as merely the translator of another's command.'" *Jones* v. *Bock*, 127 S. Ct. 910, 921 (2007) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Columbia L. Rev. 527, 533-34 (1947)).

ARGUMENT

I. A DISTRICT COURT'S DENIAL OF A REQUEST FOR APPOINTED COUNSEL UNDER SECTION 3599 IS APPEALABLE AS OF RIGHT.

The text of 28 U.S.C. § 2253 makes clear that a certificate of appealability ("COA") is not required to obtain appellate review of the district court's denial of petitioner's request for appointment of clemency counsel under Section 3599. Petitioner, Respondent (Br. 8-12), and the Solicitor General (U.S. Cert. Am. Br. 19-22) all agree that a COA was not required here.[21]

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[21] All parties also agree that the district court's order was a "final" determination properly before the court of appeals under 28 U.S.C. § 1291. As the Solicitor General points out, "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." U.S. Cert. Am. Br. 19 n.8.

Section 2253(c)(1)(A) provides that a COA is only required for an appeal of "the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court." A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." *Id*. § 2253(c)(2).

The plain meaning of the phrase "the final order in a habeas corpus proceeding" is the order finally disposing of the habeas petition challenging the petitioner's detention. *Miller-El* v. *Cockrell*, 537 U.S. 322, 327 (2003) ("Congress mandates that a prisoner seeking postconviction relief under 28 U.S.C. § 2254 has no automatic right to appeal a district court's denial or dismissal of the petition. Instead, petitioner must first seek and obtain a COA").

The district court's order refusing to expand the authority of habeas counsel to include representation of Mr. Harbison in clemency proceedings does not fall within that category. Rather, it addresses an entirely collateral matter having nothing to do with the claim of unlawful detention that is at the core of a habeas application. Accord, U.S. Cert. Am. Br. 20 ("[r]equests for clemency counsel * * * do not involve the pursuit of any federal legal challenge to the petitioner's conviction or death sentence").[22]

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[22] *Smith* v. *Dretke*, 422 F.3d 269, 288 (5th Cir. 2005) (COA not necessary to appeal the denial of funds for expert assistance); *Hain* v. *Mullin*, 324 F.3d 1146, 1147 n.1 (10th Cir. 2003), vacated on other grounds, 436 F.3d 1168 (10th Cir. 2006); *Weeks* v. *Jones*, 100 F.3d 124, 127 n.6 (11th Cir. 1996) (per curiam) (although a CPC is required to appeal the denial of habeas corpus relief, there is no such requirement in order to appeal the denial of the appointment of counsel); *Sterling* v. *Scott*, 57 F.3d 451, 454 n.3 (5th Cir. 1995) (there is no CPC require-

This Court accordingly should hold that a certificate of appealability is not required to appeal an order denying a request for appointed clemency counsel under Section 3599.

II. SECTION 3599 AUTHORIZES FEDERALLY APPOINTED COUNSEL TO REPRESENT CAPITAL DEFENDANTS IN STATE CLEMENCY PROCEEDINGS.

18 U.S.C. § 3599(a)(2) expressly requires a federal habeas court to appoint counsel for an indigent, condemned, otherwise-unrepresented, state defendant who is seeking to vacate or set aside his or her death sentence. The appointment of counsel is triggered by the defendant's pursuit of a "post conviction proceeding under section 2254." But once counsel is appointed, the scope of his or her responsibilities is governed by 18 U.S.C. § 3599(e).

Subsection (e) describes in detail the duties that must be performed by appointed counsel in a capital case, "[u]nless replaced by similarly qualified counsel." A specific proceeding enumerated in Subsection (e) in which appointed counsel "shall" represent the defendant is "such * * * proceedings for executive or other clemency as may be available to the defendant." For the defendant sentenced to death under

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ment to appeal the denial of the appointment or retention of counsel). See also *Gosier* v. *Welborn*, 175 F.3d 504, 506 (7th Cir. 1999) (a request for counsel under predecessor of Section 3599 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). But see *Michael* v. *Horn*, 459 F.3d 411, 416, 418 (3d Cir. 2006) (implying a COA is required by considering whether it should issue before resolving the question of whether the district court violated predecessor of Section 3599 in dismissing appointed counsel).

state law, counsel's representation clearly extends to any available state clemency proceedings.

"[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. * * * When the words of a statute are unambiguous, * * * 'judicial inquiry is complete.'" *Connecticut National Bank* v. *Germain*, 503 U.S. 249, 253-54 (1992). The plain, unambiguous language of Section 3599(e)—specifying that appointed counsel's responsibilities include "proceedings for executive or other clemency as may be available to the defendant"—makes clear that the duties of counsel appointed to represent a state capital defendant in a Section 2254 proceeding include representing that defendant in subsequent state clemency proceedings.

Some lower courts have reached the contrary conclusion, frankly acknowledging that their construction inserts into the statute words Congress did not write. But this Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Germain*, 503 U.S. at 253-54. It should reaffirm that principle in this case and hold that Congress meant what it said when it enacted Section 3599.

A. The Plain Language Of Section 3599 Provides That Appointed Attorneys "Shall" Represent Clients In Any Available Proceedings For Executive Or Other Clemency.

Section 3599(a)(2) sets forth the circumstances under which a federal court must appoint counsel for a defendant who seeks to vacate or set aside a sentence under 28 U.S.C. § 2254 or § 2255. The defen-

dant must be under a sentence of death, must be indigent, and must be unable otherwise to obtain adequate counsel. When these conditions are satisfied, the defendant "shall be entitled to" federally appointed counsel.

Section 3599(e)'s description of appointed counsel's responsibilities parallels the progression of legal processes faced by and available to capital defendants:

> 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*.

18 U.S.C. § 3599(e) (emphasis added).

Subsection (e) thus imposes two distinct duties on attorneys appointed to represent petitioners in Section 2254 proceedings. First, the statute directs that the appointed attorney "shall represent the defendant throughout every subsequent stage of available judicial proceedings." When the attorney is appointed pursuant to Section 3599(a)(2), in a Section 2254 proceeding following the entry of a judgment of

conviction, that roster of stages includes "all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures."

Second, the appointed attorney "shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant."

1. *Appointed counsel's representation expressly encompasses "proceedings for * * * clemency as may be available to the defendant."*

Section 3599(a)(2) expressly provides for appointment of counsel in capital postconviction proceedings "under section 2254" in accordance with subsections (b)-(f). When counsel is appointed under Section 3599(a)(2) to represent a state capital defendant in federal habeas, the clemency proceedings provided by state authority are plainly "proceedings for * * * clemency * * * available to [that] defendant," as described in Section 3599(e).

The only proceedings that may be brought under Section 2254 are those instituted by *state* prisoners. The only source of clemency available to state prisoners is *state* clemency proceedings. And Section 3599(e) says that federal habeas counsel appointed for these death-sentenced state inmates "*shall*" represent them in whatever "proceedings for * * * clemency as may be available" to them (emphasis added). Subsection (e) therefore requires the appointed attorney to represent the state defendant in state clemency proceedings.

The contrary result can be reached only by rewriting the statutory text. But doing so renders the

statute incoherent and self-contradictory. As noted, Section 3599(e) expressly requires counsel appointed in Section 2254 proceedings to represent capital defendants in available clemency proceedings. But the only defendants who can maintain Section 2254 proceedings are those convicted in a state court; and federal clemency proceedings are never available to such defendants. See *Young* v. *United States*, 97 U.S. 39, 66 (1877) ("if there is no offence against the laws of the United States, there can be no pardon by the President"). Interpreting subsection (e) to permit representation only in federal clemency proceedings thus would direct counsel appointed in Section 2254 proceedings to represent their clients in "available" clemency proceedings that cannot possibly ever be available.

This "effort to trump [the] regular English" of Section 3599(e) (*Watson* v. *United States,* 128 S.Ct. 579, 585 (2007)) is indefensible. As the en banc Tenth Circuit correctly concluded, the statute "employs clear and precise language, admitting of no ambiguity and leaving no room for interpretation." *Hain* v. *Mullin*, 436 F.3d 1168, 1171 (10th Cir. 2006). "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 in state clemency proceedings; "we * * * see no other logical way to read the statute." *Id*. at 1172; accord, *Hill* v. *Lockhart*, 992 F.2d 801, 803 (8th Cir. 1993).

2. *The phrase "proceedings for executive or other clemency" confirms the inclusion of state clemency proceedings.*

The same conclusion follows from yet another aspect of the statute's plain language. Section 3599(e) says that court-appointed federal habeas counsel must represent their clients in "proceedings for executive *or other* clemency" (emphasis added) The only clemency proceedings available to individuals sentenced to death under federal law are "executive." That is so—as Congress would have known—because no one but the President has the power to grant pardons or clemency for offenses under federal law. U.S. Const., Art. II, § 2, Cl. 1 (conferring upon the President "Power to grant Reprieves and Pardons for Offenses against the United States").

The word "other" preceding the word "clemency" in Section 3599(e) therefore cannot refer to federal clemency. It must have been included in the statute to assure that all of the several forms of clemency procedures utilized by different State jurisdictions would be encompassed within the statute.

The States use a variety of decision making procedures for administering clemency. Some follow the federal model and confer all authority on their chief executive officer, the governor. In those States, the governor may be the sole decisionmaker or may share the decision with a board that makes either binding or non-binding recommendations. See Margaret Colgate Love, *Relief from Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide* 23 & 29 (2006).

Other States confer upon a clemency board sole authority to decide clemency requests. Margaret Colgate Love, *supra*, at 23-24 & 26. Still other states vest clemency authority exclusively in the legislature, while others vest that power in both the legislature and the executive, and still others in both the executive and the judiciary. See *Hain*, 436 F.3d at 1174 (citing examples); see also *id*. at n.8 (same). Congress manifestly added "other" clemency to "executive" clemency in subsection (e) in order to take account of the different clemency decisionmakers recognized by state law, some of which cannot be characterized as "executive."

This Court has long recognized the "cardinal principle of statutory construction that we must 'give effect, if possible, to every clause and word of a statute.'" *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000) (quoting *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955)). In light of the absence of any non-executive clemency proceedings available to federal capital defendants, the Solicitor General's proposed construction of Section 3599(e) as limited to federal clemency proceedings would make "or other" meaningless surplusage and therefore violate this cardinal principle. The only way to give effect to the words "or other" is to recognize that Section 3599(e) includes state clemency proceedings, including those that involve decision makers other than the chief executive. See *Hain,* 436 F.3d at 1174 ("[t]he statute's reference to 'other clemency' is meaningless unless it refers to state clemency proceedings, as executive clemency is the only form of clemency in the federal system").[23]

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[23] The Solicitor General suggested in his brief at the *certiorari* stage (at 13-14) that the President could decide to seek the as-

In sum, the plain language of Section 3599 provides that counsel appointed to represent an indigent death-sentenced state prisoner in federal habeas corpus litigation is obligated by subsection (e) to continue to represent him or her in available state clemency proceedings—unless, of course, he or she is otherwise able to obtain adequate clemency counsel.[24]

B. There Is No Justification For Ignoring The Plain Language Enacted By Congress.

Notwithstanding the unambiguous terms and plain meaning of § 3599(e), some lower courts as well as the Solicitor General have ventured far beyond the statutory text in search of justifications for disregarding Congress's language and interpolating "the word 'federal' [as] an implied modifier for 'proceedings' when 'proceedings' are mentioned" in subsection (e). *King* v. *Moore*, 312 F.3d 1365, 1367 (11th Cir. 2002) (per curiam).

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sistance of other officials in reviewing clemency applications and that "or other" was included by Congress to cover such a hypothetical process. But even if the President employed an advisory board, any activity by that board would be part of a "proceeding[] for executive * * * clemency" because the ultimate clemency decision would have to be made by the President as the sole federal constitutional repository of the clemency power. See *Hain*, 436 F.3d at 1174 n.7 ("should the President appoint a board to assist in the exercise of clemency, any grant of clemency would remain a form of executive clemency").

[24] Some States provide appointed counsel to represent indigent capital defendants in clemency proceedings. In those States, the defendant would not be "unable to obtain adequate representation" for the clemency proceedings within the meaning of Section 3599(a)(2), and federal habeas counsel would not be required to represent the defendant in those proceedings.

It is, however, quite wrong to look outside the text where, as here, the text is unambiguous and no one has (or could) contend that enforcing the text as written leads to an absurd result. See, *e.g.*, *Lamie* v. *U.S. Trustee*, 540 U.S. at 534 ("[i]t is well established that when the statute's language is plain, the sole function of the courts — at least where the disposition required by the text is not absurd — is to enforce it according to its terms") (citations and internal quotation marks omitted); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) ("we have considered ourselves bound to assume that the legislative purpose is expressed by the ordinary meaning of the words used") (citation and internal quotation marks omitted); *id*. at 452-53 (Scalia, J., concurring in the judgment) (recognizing the "venerable principle" that "[j]udges interpret laws rather than reconstruct legislators' intentions [and] [w]here the language of those laws is clear, we are not free to replace it with unenacted legislative intent").

The arguments that have been advanced for disrespecting the plain meaning of the text of Section 3559(e) are wholly unpersuasive.

1. *The absence of legislative history confirming that Congress meant what it said provides no basis for disregarding the statutory text.*

The courts of appeals that have refused to give effect to Section 3599's explicit language have rested their decisions in substantial part on a peculiar argument: that the *absence* of legislative history implies a lack of attention by Congress to the scope of the provision. Thus, the Eleventh Circuit pointed to "[t]he last minute nature of the amendment [regarding appointment of counsel] and the lack of recorded

debate about the issue." *King*, 312 F.3d at 1368; see also *House* v. *Bell*, 332 F.3d 997, 999 (6th Cir. 2003) (same); *Sterling* v. *Scott*, 57 F.3d 451, 456-457 (5th Cir. 1995) (characterizing the addition to Section 3599 of the reference to Section 2254 proceedings as a "statutory afterthought").

No principle of statutory construction makes legislative history a prerequisite to giving effect to unambiguous language that Congress enacts. Rather, by demanding that Congress do something more than state plainly the result which its words dictate, the lower courts that make this demand have turned statutory interpretation on its head. "The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself." *Conroy* v. *Aniskoff,* 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment) (citation, emphasis, and internal quotation marks omitted); see also *I.N.S.* v. *Cardoza-Fonseca,* 480 U.S. at 453 (Scalia, J., concurring in the judgment) (the enacted text always trumps unenacted legislative intent, even if one can be divined).

These courts' disparagement of the timing of Congress's action—"last minute" and "late in the session"—similarly provides no basis for disregarding Section 3599(e)'s plain language. Courts have no warrant to second-guess whether Congress has sufficiently pondered the language of proposed legislation before enacting it into law. Once a law has been adopted, the statutory language has legal force, and courts must interpret that language in accordance with its plain meaning.

A contrary approach would open the door to impressionistic assessments by courts of the extent to which Congress has considered the potential effects

of a statute. Not only do courts lack the capability and any objective standard for such an exercise, but the exercise is also forbidden by the respect due to a coordinate branch of government. It is presumptuous for a court to grade Congress for not doing its work, let alone to fault it for doing its work too quickly.

Moreover, Congress reenacted the relevant provisions in 2006. Even if the courts had any license to override the provision's plain language, on the theory that the language was introduced late in the legislative process and may not have received sufficient consideration at the time of its initial enactment, Congress's subsequent reaffirmation of precisely the same language eliminates any basis for such speculation.

The statutory provisions for counsel now contained in Section 3599 were originally enacted in 1988 as part of a statute creating a new federal capital offense, drug-related homicide. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001(b), 102 Stat. 4393-94. They were included in one of the subsections of the statutory provisions creating the new offense and codified at 21 U.S.C. § 848q(4)-(10).

In 2006, Congress repealed the parts of Title 21 containing the provisions for appointment of counsel and reenacted them as Section 3599 of Title 18. See Terrorist Death Penalty Enhancement Act of 2005, Pub. L. No. 109-177, Tit. II, § 222, 120 Stat. 230, 231. This deliberate reenactment of the identical provisions destroys whatever basis the lower courts believed they had for denying clemency counsel to state capital defendants on the ground that the language explicitly providing for such counsel had been "hastily included" in 1988. See *House* v. *Bell*, 332 F.3d at

999; *King*, 312 F.3d at 1367-68; *Sterling* v. *Scott*, 57 F.3d at 457.[25]

2. *There was no settled consensus of judicial decisions for Congress to "ratify" when it reenacted the statute.*

The Solicitor General contends (U.S. Cert. Am. Br. 14-16) that Congress in 2006 ratified the pre-2006 decisions holding that the statute did not encompass representation in state clemency proceedings. But that argument requires this Court to ignore the several pre-2006 decisions holding that the statute did provide for representation in state clemency proceedings. There simply was no settled judicial interpretation of the provision that Congress could ratify when it acted in 2006.

In *Hill* v. *Lockhart*, 992 F.2d 801 (8th Cir. 1993), the court recognized that the predecessor of subsection (e) obligated appointed attorneys to represent defendants in state clemency proceedings and that the statute also required compensation for legal services "reasonably necessary to carry out" that obligation. It held that the statute's "plain language * * * evidences a congressional intent to insure that indigent state petitioners receive 'reasonably necessary' competency and clemency services from appointed, compensated counsel," explaining that such services were not reasonably necessary if the State provided a

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[25] These courts are also wrong as a matter of fact. The provision for appointment of habeas counsel was actually added to the bill before the language requiring appointed counsel to represent the defendant in available clemency proceedings. Compare Cong. Rec. H7281 with Cong. Rec. H7286 (Sept. 8, 1988).

mechanism for compensating counsel. 992 F.2d at 803.[26]

Several federal district courts also had concluded prior to 2006 that the statute allows federally appointed counsel to represent capital defendants in state clemency proceedings. See *Hickey* v. *Schomig*, 240 F. Supp. 2d 793, 795 (N.D. Ill. 2002) ("The plain language of [Section] 848(q)(8) requires counsel appointed for a habeas corpus petitioner who is under a state-imposed death sentence to represent the petitioner in connection with a later-filed petition seeking clemency from the state's authorities."); *United States* ex. rel. *Cloutier* v. *Schomig*, No. 00-5476, 2002 U.S. Dist. LEXIS 14229, at *5 (N.D. Ill. June 12, 2002) ("As the unequivocal language of [Section] 848(q)(8) indicates, once an attorney is appointed to represent an indigent defendant in a capital case, that attorney must represent the defendant through all available proceedings, including state clemency actions."); *Lowery* v. *Anderson*, 138 F. Supp. 2d 1123, 1125 (S.D. Ind. 2001) ("This court finds the plain language of [Section] 848(q)(8) to be controlling here,

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[26] The Solicitor General asserts (U.S. Cert. Am. Br. 8 & 15) that Congress's subsequent amendment of the statute to eliminate the "reasonably necessary" showing as a prerequisite for compensation of attorneys undermined the Eighth Circuit's rationale, but that is an untenable view of *Hill* in light of the *Hill* Court's reasoning. The Eighth Circuit relied on the language contained in what is now subsection (e) to hold that state clemency proceedings were encompassed within the statute; the "reasonably necessary" language limited that representation obligation. Congress's elimination of the limiting language leaves in place the court of appeals' conclusion that state clemency proceedings are included within the federal statute. And that is how other courts of appeals have understood *Hill*. See, *e.g.*, *Hain*, 436 F.3d at 1172.

consistent with the straightforward and persuasive reasoning of the Eighth Circuit in *Hill*"); *Strickler* v. *Greene*, 57 F. Supp. 2d 313, 315 (E.D. Va. 1999) (holding that the statutory text creates "an entitlement to paid counsel" for clemency). These decisions preclude the conclusion that there was any consensus in 2006 regarding the proper interpretation of the language that Congress reenacted that year.

C. Interpreting Section 3599 In Accordance With Its Plain Language Is Fully Consistent With The Statute's Objective.

Giving effect to the plain meaning of Section 3599's language is also consistent with Congress's aim in enacting Section 3599—to ensure "quality legal representation" in capital cases, because of "'the seriousness of the possible penalty and * * * the unique and complex nature of the litigation.'" *McFarland*, 512 U.S. at 855 (quoting 21 U.S.C. § 848(q)(7) (now codified at 18 U.S.C. § 3599(d))).

Clemency plays a critical role as "the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Herrera* v. *Collins*, 506 U.S. 390, 411-122 (1993) (footnote omitted); see also *Dretke* v. *Haley*, 541 U.S. 386, 399 (2004) (Kennedy, J., dissenting) ("the clemency power can correct injustices that the ordinary criminal process seems unable or unwilling to consider. These mechanisms hold out the promise that mercy is not foreign to our system. The law must serve the cause of justice").

The clemency process begins with a written submission that includes both factual and normative aspects. To invoke the process effectively, it is neces-

sary to ascertain the substantive norms that apply to the clemency determination and the kinds of arguments that have been successful in obtaining positive determinations in the past. It is also necessary to identify, gather, organize, evaluate, and present a wide range of factual information that is potentially pertinent to the question whether death is the appropriate punishment for the unique individual and for his or her crime. Often, this factual information is inadequately developed and documented in the judicial records of a case, and the reasons for the inadequacy must also be explored.

Here, for example, there is a very substantial body of facts to be marshaled in support of clemency for Mr. Harbison. Extensive information about his life history and mental state were not presented to his sentencing jury or to the courts reviewing his sentence. Police reports that have come to light only after the conclusion of all state-court proceedings indicate that an individual other than Mr. Harbison and David Schreane was present at the scene of the crime and that Mr. Harbison's trial counsel had previously represented the initial suspect in the murder investigation and may therefore have had an incentive to not reveal evidence relating to this other client's involvement—evidence that the federal habeas court concluded had emerged too late for the courts to consider. Mustering these fact-intensive arguments for proper consideration in the clemency process will be a complex task.

Preparing a well-developed case for clemency would be daunting work for any inmate. But the characteristics of capital defendants and the complexity of the materials that bear upon the clemency determination in their cases exacerbate the diffi-

culty. Studies of death row inmates have revealed a mean level of achievement or reading comprehension in the fifth to sixth grade range, even though mean formal schooling was above the ninth grade level. Mark D. Cunningham & Mark P. Vigen, *Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature*, 20 Behav. Sci. & Law 191, 200 (2002). A quarter or more of death row inmates have IQ scores in the borderline or mentally retarded range, *id.* at 199, and the high incidence of mental illness among death row inmates can contribute to diminished intellectual functioning, *id.* at 200.

Mr. Harbison suffers from these precise disabilities. He is utterly unable to organize the voluminous relevant facts of his case into an effective argument for clemency. If he is denied the assistance of counsel promised by the text of Section 3599, his clemency proceedings cannot possibly fulfill their vital role as "the 'fail-safe' in our criminal justice system." *Herrera*, 506 U.S. at 415.

Finally, enforcing Section 3599 according to its terms achieves a sound practical outcome. The lawyer who is appointed to represent a defendant in a Section 2254 proceeding will have invested substantial time and effort and, as a result, will be intimately familiar with most of the facts and considerations relevant to clemency. Clemency proceedings typically are initiated immediately following the denial of relief under Section 2254. It is efficient and sensible for that well-informed lawyer to utilize the information gathered in the Section 2254 process to prepare the defendant's clemency application. As the Tenth Circuit stated: "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." *Hain*, 436 F.3d at 1175.

Accordingly, this Court should hold that counsel appointed pursuant to Section 3599(a)(2) to represent a defendant sentenced to death under state law may represent the defendant in subsequent state clemency proceedings when the defendant is otherwise unrepresented.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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SEPTEMBER 2008

ADDENDA

ADDENDUM A

1. 18 U.S.C. § 3599 provides:

(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 admitted 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 relating 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 circuit. 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.

2. 28 U.S.C.A. § 2253 provides:

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

ADDENDUM B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

EDWARD JEROME HARBISON,

Petitioner-Appellant,

v.

RICKY BELL, Warden,
Respondent-Appellee.

Nos. 06-6474, 06-6539, 07-5059

Appeal from the United States District Court for the Eastern District of Tennessee.
No. 97-00052—Curtis L. Collier, Chief District Judge.

Before: SILER, CLAY, and COOK, Circuit Judges.

SILER, J., delivered the opinion of the court, in which COOK, J., joined. CLAY, J., delivered a separate dissenting opinion.

OPINION

SILER, Circuit Judge. Petitioner Edward Jerome Harbison was convicted of first-degree murder, second-degree burglary, and grand larceny, and was sentenced to death. After unsuccessfully appealing through the Tennessee state courts, he petitioned in federal court for a writ of habeas corpus under 28 U.S.C. § 2254. After the district court denied relief in 2001, we affirmed the district court in *Harbison v. Bell*, 408 F.3d 823 (6th Cir. 2005). We will not repeat the facts as related in that opinion, except where they may be relevant to the current cases. While his habeas corpus claim was proceeding in the federal courts, in 2001, Harbison filed a motion in

state court to reopen his post-conviction petition, which he subsequently moved to treat as a petition for a writ of error coram nobis. In 2004, the trial court denied his motion as untimely, and the Tennessee Court of Criminal Appeals affirmed that decision. *Harbison* v. *State*, No. E2004-00885-CCA-R28-PD, 2005 Tenn. Crim. App. LEXIS 636, 2005 WL 1521910 (Tenn. Crim. App. June 27, 2005) (unpublished). Harbison thereafter filed these three matters in federal district court, and they came before us, either as appeals or on transfer from the district court. He also asks for a stay of execution. For the reasons stated thereafter, we affirm the district court's rulings and deny all other relief requested.

No. 06-6474

This case is an original action involving the district court's transfer of Harbison's request for permission to file a successive habeas corpus petition before this court for initial consideration under 28 U.S.C. § 2244(b)(3). Harbison's current pleading involves two claims previously raised in his initial *§ 2254* petition. First, he argues that pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), newly-available evidence previously withheld by the Chattanooga Police Department raises the possibility of other suspects in the homicide. Second, he argues that newly-discovered evidence reveals that the attorney who handled his motion for a new trial and his direct appeal had an impermissible conflict of interest.

The district court concluded that, while part of Harbison's argument was properly raised in a Rule 60(b) motion, a portion of his argument could only be raised in a successive § 2254 petition. If Harbison is attempting to raise new claims or present claims

previously adjudicated, those claims can only be raised in a successive § 2254 petition, *Gonzalez v. Crosby,* 545 U.S. 524, 531-32 (2005), and the district court properly transferred the case to this court so that Harbison could request permission to file a successive § 2254 petition. To the extent that Harbison is attempting to raise new issues or re-raise issues presented in his prior § 2254 petition, his current motion should be construed as an attempt to file a successive petition under § 2244(b)(3). Thus, he requires this court's authorization to file such a petition with the district court.

To obtain this permission, Harbison must make a prima facie showing either that: (1) a new rule of constitutional law applies to his case that the Supreme Court made retroactive to cases on collateral review; or (2) a newly-discovered factual predicate exists which, if proven, sufficiently establishes that no reasonable factfinder would have found Harbison guilty of the underlying offense but for constitutional error. 28 U.S.C. §§ 2244(b)(2) & 2244(b)(3)(C).

The requirements under the Antiterrorism and Effective Death Penalty Act (AEDPA) apply here. Harbison has not met the standard under either provision of § 2244(b)(2) that would allow him to file a successive petition. First, he does not rely on a new rule of constitutional law to justify filing a § 2254 petition. Second, while he does rely on newly-discovered evidence, the evidence is not sufficient to establish that no reasonable factfinder would have found him guilty of first-degree murder. We previously reviewed this evidence and concluded that it "is not sufficient to create a reasonable probability that the result of the trial would have been different [,]" *Harbison,* 408 F.3d at 834, and "was unlikely to

change the result of Harbison's trial." *Id.* at 836. Therefore, Harbison's request for authorization to file a successive § 2254 petition will be denied.

No. 06-6539

In this case, Harbison appeals from the district court's denial of his Rule 60(b) motion. Initially, Harbison is required to obtain a Certificate of Appealability (COA) in order to receive a full review of his claims in this appeal. *See United States v. Hardin,* 481 F.3d 924, 925-26 (6th Cir. 2007).

Harbison has not demonstrated that he is entitled to a COA. Under 28 U.S.C. § 2253(c)(2), the court should grant a COA for an issue raised in a § 2254 petition only if the petitioner has made a substantial showing of the denial of a federal constitutional right. A petitioner satisfies this standard by demonstrating that reasonable jurists could disagree with the district court's resolution of his constitutional claims or that jurists could conclude that the issues raised are adequate to deserve further review. *Banks v. Dretke,* 540 U.S. 668, 705 (2004).

Harbison has not shown that reasonable jurists would disagree with the district court's dismissal of his Rule 60(b) motion or that the issue is adequate to deserve further review. He argued in his Rule 60(b) motion that the two claims from his § 2254 petition should not have been dismissed as procedurally defaulted. Because Harbison had not raised these claims in state court before presenting them in his initial § 2254 petition, we concluded that the claims were procedurally defaulted because he had no remaining state court remedies through which he could raise the claims. *Harbison,* 408 F.3d at 830-33 & 836.

The district court determined that Harbison's motion was brought under Fed. R. Civ. P. 60(b)(6), which is the residual clause. A movant's claims can be brought under Rule 60(b)(6) only if they cannot be brought under another clause of Rule 60(b). *Abdur'Rahman v. Bell,* 493 F.3d 738, 741 (6th Cir. 2007). However, Harbison's argument is more properly brought under Rule 60(b)(1), which provides for relief on the basis of mistake, inadvertence, or excusable neglect. In his Rule 60(b) motion, Harbison maintained that the district court and this court committed legal error or mistake because state court remedies remained for his claims and, therefore, they were not procedurally defaulted. Since Harbison is alleging legal error, he had to bring his motion within the normal time for taking an appeal from the district court's judgment. *Townsend v. Soc. Sec. Admin.,* 486 F.3d 127, 133 (6th Cir. 2007). Even if Harbison's motion is construed as brought under the more general provisions of Rule 60(b)(1), he was still required to file his motion within one year after the judgment was entered. *See Abdur'Rahman,* 493 F.3d at 741. The district court dismissed Harbison's initial § 2254 petition in March 2001, and Harbison did not file his Rule 60(b) motion until April 2006. Therefore, his motion, if filed under Rule 60(b)(1), was untimely.

Even if Harbison's motion is construed as filed under Rule 60(b)(6), he still has not demonstrated that the issue is adequate to merit further review. Motions under Rule 60(b)(6) do not have a time limit, but a movant is required to demonstrate extraordinary circumstances which would justify reopening a final judgment. *Gonzalez,* 545 U.S. at 535. Relief under Rule 60(b)(6) should be granted only in unusual and extreme situations where principles of eq-

uity mandate relief. *GenCorp., Inc. v. Olin Corp.,* 477 F.3d 368, 373 (6th Cir. 2007).

While Harbison's argument concerning the procedural default of his claims is somewhat correct, it is not sufficient to meet the high standard required for 60(b)(6) relief. Although this court and the district court may have incorrectly determined that Harbison had procedurally defaulted his two claims on the basis that he had no state court remedies remaining, he still procedurally defaulted in state court. The Tennessee Court of Criminal Appeals found that Harbison could not raise in a coram nobis petition his claim that one of his attorneys suffered from a conflict of interest, but implied that he could raise a *Brady* claim in a coram nobis petition. Nevertheless, it found that his petition for the *Brady* claim was untimely and the merits of the claim were not sufficient to outweigh the untimeliness of his petition. *See Harbison,* 2005 Tenn. Crim. App. LEXIS 636, 2005 WL 1521910, at *5-6.

Therefore, Harbison still procedurally defaulted his *Brady* claim in state court, but on the basis of his failure to timely pursue his relief rather than on the unavailability of state court remedies. Harbison must establish cause and prejudice to excuse this procedural default in order to obtain review of his *Brady* claim. *Bousley v. United States*, 523 U.S. 614, 622 (1998). We previously rejected his claims for cause and prejudice. *See Harbison,* 408 F.3d at 833-36. We also previously concluded that Harbison procedurally defaulted his claim on the conflict of interest by his attorney and had not demonstrated cause and preju-dice to excuse the procedural default. *Id.* at 836.

Therefore, Harbison has not demonstrated that an adequate issue exists concerning whether extraordinary circumstances are present to justify Rule 60(b) relief, so we will deny his motion for a COA.

No. 07-5059

In this case, Harbison appeals from the district court's denial of his motion to alter or amend the judgment and the denial of his request to authorize the Federal Public Defender Services to represent him in state clemency proceedings. However, in his COA application, he only challenges the district court's decision denying his request to appoint counsel to represent him in the clemency proceedings under 18 U.S.C. § 3599(e).

It is not clear that Harbison requires a COA to appeal the district court's denial of this counsel motion. Although we have never held that a COA is required to appeal from a final order denying counsel in a clemency proceeding, we would follow the implied rule from *Smith v. Dretke*, 422 F.3d 269, 288 (5th Cir. 2005), which found that no COA was required to appeal from the denial of expert assistance under 21 U.S.C. § 848(q). However, even if a COA is required for this issue, because we have previously ruled in *House v. Bell,* 332 F.3d 997, 998-99 (6th Cir. 2003) (en banc) (order), that § 3599(e) (as previously codified at 21 U.S.C. § 848(q)(4)(B)) does not authorize federal compensation for legal representation in state matters, a COA should not be granted for this issue.

Conclusion

Therefore, we hereby:

1. Deny the request for authorization to file the successive § 2254 petition. (No. 06-6474).

2. Deny the motion for a COA on the Rule 60(b) motion. (No. 06-6539).

3. Deny the motion for a COA for the Federal Public Defender Services to represent Harbison in state clemency proceedings. (No. 07-5059).

4. Deny the accompanying motions to stay execution.

5. Affirm the district court in its rulings in these cases.

CLAY, Circuit Judge, dissenting. I dissented with respect to the prior panel opinion in this matter, *Harbison v. Bell,* 408 F.3d 823 (6th Cir. 2005), because the district court improperly failed to grant Harbison's petition for a writ of habeas corpus on the ground that the prosecution violated *Brady v. Maryland,* 373 U.S. 83 (1963); and Harbison had demonstrated cause and actual prejudice for his failure to raise his *Brady* claim in state court prior to seeking habeas relief in federal court. Despite several court orders compelling disclosure of exculpatory materials from the Chattanooga Police Department records which indicate that another individual, Ray Harrison, had the motive and opportunity to murder Edith Russell and burglarize her home, the majority in the prior panel decision dismissed the materiality of the exculpatory evidence by engaging in the crassest form of speculation in an attempt to minimize the importance of the evidence. Nor did the panel majority adequately explain or justify the withholding of

the jail house statements of potential witness, David Schreane, regarding Detective Foster's notes concerning Schreane's motive to falsely implicate Harbison in the murder. Because of the panel majority's denial of the habeas petition in 2005, Harbison was never accorded sufficient opportunity to demonstrate that Ray Harrison's wife placed Harrison at the scene of the crime, thereby buttressing Harbison's alibi defense to the murder charge. As a result, Harbison was effectively prevented from demonstrating his innocence inasmuch as he might have used the suppressed evidence to aid his acquittal by shifting the blame for the murder to Harrison. In other words, the prosecution's *Brady* violation denied Harbison the right to present his best possible defense to the jury. Furthermore, as explained by my prior dissent in this matter, at 408 F.3d at 841, Harbison did not procedurally default his *Brady* claim or, if he did, such procedural default should have been excused by the showing of cause for the default, and prejudice resulting from the default, as explained in excruciating detail by the aforesaid dissent. The dissent goes to great lengths to explain why there was cause for the procedural default, notwithstanding the purported lack of evidence of deliberate prosecutorial concealment. Consequently, the panel majority's failure to provide habeas relief based on the *Brady* claim means that it is entirely possible that Edward Harbison, who was scheduled for execution on September 26, 2007, may be actually innocent of the offense for which he is to be executed.

In order for the majority in the instant appeal, in Case Nos. 06-6474 and 06-6539, to conclude, as it does, that Harbison cannot obtain any relief because he cannot demonstrate that "a newly-discovered factual predicate exists which, if proven, sufficiently es-

tablishes that no reasonable fact finder would have found Harbison guilty of the underlying offense but for constitutional error," the majority has to implicitly rely upon its prior unsupportable and unpersuasive holdings in the prior panel opinion, reported at 408 F.3d 823, to the effect that there was no *Brady* violation in connection with the state court trial; that there was no improper withholding of evidence that should have been divulged to petitioner; and that petitioner had no justification for failing to come forward with exonerating evidence that he did not know about because it had been concealed or withheld from him. The circular rationale and the illogic of the majority's application of death penalty jurisprudence in this case operate to defeat the principle of the Brady case that convictions are not to be obtained based upon evidence which is concealed, or not disclosed. In the instant appeal, the majority justifies its inability or unwillingness to grant relief based upon its prior improper determination that Harbison is not entitled to the protection of the Brady case and therefore concludes that Harbison should not be afforded the opportunity to file a successive habeas petition or be granted a certificate of appealability with respect to Harbison's Rule 60(b) motion. I therefore respectfully dissent.

ADDENDUM C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

EDWARD JEROME HARBISON,

Petitioner,

v.

RICKY BELL, Warden,

Respondent.

NO. 1:97-CV-52

Judge Curtis L. Collier

MEMORANDUM and ORDER

Edward Jerome Harbison ("Harbison"), a Tennessee prison inmate awaiting execution, filed this case as a petition for a writ of habeas corpus pursuant to 28 U.S.C.§ 2241, et seq. (Court File No. 135) or, alternatively, as a motion for relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure. Harbison has now filed two motions–a motion to alter or amend (Court File No. 154) and a motion to expand the appointment of counsel (Court File No. 156) Respondent Rickey Bell, Warden ("Respondent") filed a response to the motion to alter or amend (Court File No. 157).

Because the Court finds Harbison's motions are not well taken and are not supported by governing law, the Court **DENIES** both motions.

III. DISCUSSION

A. Procedural History

This case began in 1997 when Habison first filed his habeas petition. In 2001 the Court granted summary judgment to Respondent and dismissed the petition (Court File No. 102). Harbison appealed this Court's decision to the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit")(Court File No. 122). In 2005 the Sixth Circuit affirmed the Court's decision (Court File No. 128). Harbison filed a writ of certiorari with the United States Supreme Court and also file a second petition for the writ of habeas corpus (Court File No. 135). Included in this petition was also a request for relief from the judgment.

Based upon the clear statutory law and case law precedents, this Court issued an order and memorandum, denying the motion for relief from judgment and transferring the petition part of the filing to the Sixth Circuit (Court File No. 152, Order of Court; Court File No. 151, Memorandum of Law).

In reaction to this order, Habison now brings these two new motions, his Motion to Alter or Amend Order and Memorandum and his Request for Leave to Expand Appointment Order.

The Court will discuss them in turn.

B. Motion to Alter or Amend

Harbison argues the Court should amend its order and memorandum to include "findings as to whether the state procedural bar as applied to this case and discussed in the memorandum rests upon independent state grounds." (Court File No.154, Motion to Alter or Amend). In the body of the motion

Harbison mentions Fed. R .Civ.P. 52 (b) and 59 as authority for his request. Later on he mentions Fed. R. Civ. 60(b). It is not at all clear from his arguments which rule he relies upon because he had made no effort to demonstrate he has complied with the requirements of any of the three rules.

The Court's order was entered on November 28, 2006. This motion was filed on December 7, 2006. Rule 52 by its very terms applies to instances where the court has tried a case without a jury. Obviously, no such trial took place in this case. How Rule 52 is applicable is not stated.

Rule 59(e) authorizes motions to alter or amend a judgment if filed within ten days. However, under Rule 59(e), the district court has considerable discretion whether to alter or amend or reconsider an earlier ruling. *Edward H. Bohlin Co., Inc. v. Banning Co., Inc.,* 6 F.3d 350, 355 (5th Cir. 1993); *Columbia Gas Transmission Corp. v. Limited Corp.,* 951 F.2d 110, 112 (6th Cir. 1991). The court must balance the need for finality with the need to render just decisions. *Edward H. Bohlin Co., Inc.*, 6 F.3d at 355. However, '[i]n practice, because of the narrow purposes for which they are intended, Rule 59(e) motions typically are denied.' Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2810.1 at 128; *see also Ruscavage v. Zuratt,* 831 F. Supp. 417, 418 (E.D. Pa. 1993) (noting Rule 59(e) motions "should be granted sparingly because of the interests in finality and conservation of judicial resources").

A Rule 59(e) motion is "aimed at reconsideration, not initial consideration." *F.D.I.C. v. World University Inc.,* 978 F.2d 10, 16 (1st Cir. 1992) (citations omitted). A party should not use the motion to "raise arguments which could, and should, have been

made before judgment issued." *Id.* Thus, the motion should "either clearly establish a manifest error of law or must present newly discovered evidence." *Id.* Evidence brought to a court's attention under Rule 59(e) must have been previously "unavailable." *Lostumbo v. Bethlehem Steel, Inc.,* 8 F.3d 569, 570 (7th Cir. 1993); *Atlantic States Legal Foundation v. Karg Bros.,* 841 F. Supp. 51, 53 (N.D.N.Y. 1993) (noting a court is justified in reconsidering its earlier ruling if "new evidence not previously available comes to light"). "Newly discovered evidence" is that which is "truly newly discovered or ... could not have been found by due diligence." *Atlantic States,* 841 F. Supp. at 56 (citation omitted).

Rule 60(b) permits motions for relief from judgment in very limited circumstances. Rule 60(b) provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:
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> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment

> upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> (6) any other reason justifying relief from the operation of the judgment.

To prevail under Rule 60(b) a petitioner must demonstrate the presence of "a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent manifest injustice." See *GenCorp, Inc. v. Am. Int'l Underwriters,* 178 F.3d 804, 834 (6th Cir. 1999).

Harbison has made no effort to show a manifest error of law or the existence of any newly discovered evidence as required by Rule 59(e). Nor has he made an effort to show any of the first five categories of Rule 60(b) applies. For that reason he may be relying upon the catchall category of Rule 60(b)(6). However, under this provision he is still required to 'show 'extraordinary circumstances' justifying the reopening of a final judgment.' *Gonzalez v. Crosby*, 545 U.S. 524 (2005) (quoting *Ackermann v. United States*, 340 U.S. 193, 199 (1950)).

Since Harbison has made no effort to demonstrate he falls within any rule permitting the Court to alter, amend or reconsider the Court's earlier order, the Court **DENIES** the motion to alter or amend (Court File No. 154).

Had the Court determined Harbison had demonstrated he had complied with Rule 59(e) or Rule 60(b), and the Court had considered the merits of the motion, the Court would nevertheless have denied his motion for the following reasons. In this motion, Harbison asks the Court to alter or amend its prior

order and memorandum, but only with respect to the first ruling (i.e., with regard to the Rule 60(b) motion) (Court File No.154). Harbison suggests, in his present motion, that the part of the order and memorandum involving the Rule 60(b) motion be modified to include an inquiry into whether the procedural bar found by the state court is independent of federal law (the third factor in the four-factor test in *Maupin v. Smith,* 785 F.2d 135 (6th Cir. 1986)).[1] The Respondent objects to the motion to alter (Court. File No. 157).

To place the present motion in context, Harbison's Rule 60(b) motion must be revisited. In the earlier motion, Harbison maintained the Court incorrectly ruled that certain claims raised in his original petition had never been presented to the state courts; could not then be presented; and, therefore, were procedurally barred. Harbison also maintained that, after these rulings were issued, he went back to the state courts and exhausted various claims, including a claim of an alleged violation of the rule in *Brady v. Maryland,* 373 U.S. 83 (1963). The decision resulting from the latest state court proceedings, according to Harbison, showed this

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[1] Under *Maupin*, a court must make specific inquiries when a state asserts a petitioner's procedural default bars review of his federal claim. *See Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). A court must determine: 1) whether there is a procedural rule which applied to a petitioner's claim and whether a petitioner complied with the rule; 2) whether the procedural rule was actually enforced against a petitioner; 3) whether it is an adequate and independent state ground sufficient to block habeas review; and 4) whether a petitioner can demonstrate cause for his failure to comply with the rule and prejudice resulting from the alleged constitutional violation. *Id.,* at 138.

Court's rulings with respect to those claims to be defective. Finally, in a marked exaggeration he asserted the defective rulings subverted the integrity of the Court's judgment.

The Court determined there was no merit to Harbison's assertions and denied the Rule 60(b) motion. First of all, this Court's prior conclusion that his claim had never been presented to the state courts and could not then be presented was indisputably correct at the time the conclusion was reached. Though the state courts permitted Harbison to file a motion to reopen his post-conviction petition (subsequently converted, upon his request, to a petition for a writ of error coram nobis), which was amended to include the *Brady* claim, the state courts did not review the claim on its merits but, instead, held the coram nobis petition was filed outside the statute of limitations. The Court's earlier determination of procedural default rested on one type of procedural default (i.e., a claim which is technically exhausted, yet procedurally defaulted),[2] but it now appears, since the state courts have actually employed Tennessee's coram nobis statute of limitations as a procedural bar to Harbison's *Brady* claim, it is the second type of procedural default which applies.

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[2] A petitioner who has never presented a claim in the state courts and who is barred from returning to those courts to present his claim meets the technical requirements of exhaustion because there are no state remedies left to exhaust. *Coleman v. Thompson,* 501 U.S. 722 (1991). A petitioner in this position has committed a procedural default which can only be overcome by a showing of cause to excuse the default and actual prejudice as a result of the alleged constitutional violation. *Sawyer v. Whitley,* 505 U.S. 333, 338 (1992); *Coleman,* 501 U.S. at 750.

This is important because, in the Sixth Circuit, the pertinent analysis for making a procedural default determination depends upon the type of procedural default asserted. A default in the latter category requires the application of *Maupin's* four-factor test, whereas a procedural default which falls within the former classification dispenses with the first three factors in the *Maupin* test and proceeds directly to the cause-and-prejudice factor. Harbison suggests, in his present motion, that the order and memorandum involving the Rule 60(b) motion be modified to include an inquiry into whether the procedural bar found by the state court rests upon grounds independent of federal law (the third factor in the four-factor *Maupin* test).

In one sense, it is doubtful[3] that a Rule 60(b) motion requires the Court to make new rulings concerning matters not addressed in the 2001 memorandum and order (which are, after all, the subjects of the Rule 60(b) motion) and, certainly, the Court did not address in its earlier entries whether the procedural scheme applied as a bar to the coram nobis petition was independent of federal law. Because the Court did address cause-and-prejudice in its original decision on the § 2254 petition, the Court re-examined its prior cause-and-prejudice findings, in light of the coram nobis proceedings, to determine whether those earlier findings were defective. Though the Court views the analysis under *Maupin* to be required when making a procedural default determination ab

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[3] Harbison provided the Court with no authority for the proposition it is proper to go back in time and make alternative or additional determinations long after judgment has been rendered.

initio, no such analysis is required when a prior determination of procedural default is merely being revisited under the aegis of Rule 60(b). Of course, this does not mean it would be inappropriate to apply the *Maupin* test *if* the Sixth Circuit authorizes Harbison to file a second or successive petition, see *Gonzalez v. Crosby,* 545 U.S. 524 (2005) (holding that a Rule 60(b) motion is not to be treated as a habeas corpus petition), and *if* the Respondent then asserts a procedural default with respect to the *Brady* claim, based on the recent state coram nobis proceedings.

There is a one-year statute of limitations governing the filing of coram nobis petitions, *see* Tenn. Code Ann. § 27-7-103 ("The writ of error coram nobis may be had within one (1) year after the judgment becomes final. . ."), with which Harbison did not comply. The state courts enforced the procedural bar. This satisfies *Maupin*'s first two factors.

The third factor requires the Court to determine whether the procedural bar constitutes an adequate and independent state ground sufficient to preclude habeas review. Where 'resolution of [a] state procedural law questions depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law.' *Ake v. Oklahoma,* 470 U.S. 68, 75 (1985). It is Harbison's contention, in his motion to alter, that the coram nobis limitations statute is not an independent state ground sufficient to bar federal review because the tolling procedure in *Burford v. State*, 845 S.W.2d 204 (Tenn.1992),[4] as applied in his case, required the

[4] Under the rule in *Burford v. State*, 845 S.W.2d 204 (Tenn.1992), the one-year period is tolled when a strict application of the statute would deny a petitioner a reasonable oppor-

state courts to assess the strength of his claim under the *Brady* principles and because such an assessment depends on the state court's view of federal law. Hence, according to Harbison's theory, there can be no independent state procedural default.

Harbison's position is deficient for several reasons. First, the Court sees no discussion of the merits of a *Brady* claim in the state court opinion, much less a merits ruling on the claim. It is also telling that the analysis section of the opinion contains no reference to the *Brady* decision; no recitation of the elements of a *Brady* claim; and, not surprisingly, no application of those elements to the facts in Harbison's case. The more natural reading of the opinion is that the discussion of the allegedly suppressed evidence comprising the *Brady* claim was an integral part of the state court's determination as to whether the different-outcome prerequisite for coram nobis relief existed. It would have been impossible to reach a conclusion as to whether presentation of the suppressed evidence at trial would have resulted in a different outcome without discussing the missing evidence, as well as the proof adduced at trial.

Secondly, Harbison's contention regarding the state court's application of *Burford* to his coram nobis case, as least as it relates to the decision of the Court of Criminal Appeals, is not borne out by the state appellate court's opinion. Though the state appellate court cited *Burford's* holding that the statute of limitations must be tolled if the private interests

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tunity to pursue relief and thereby violate his due process rights. To determine whether a reasonable opportunity has been afforded, Tennessee courts balance a petitioner's liberty interest in having his claim heard against the state's interest in preventing litigation of stale or fraudulent claims.

of a petitioner outweigh the governmental interest in preventing stale and groundless claims, *Harbison v. State,* No. E2004-00885-CCA-R28-PD, 2005 Tenn. Crim. App. LEXIS 636, 2005 WL 1521910, *4 (Tenn. Crim. App. June 27, 2005), *permission to app. denied* 2005 Tenn. LEXIS 1176 (Tenn. Dec. 19, 2005), it did not discuss any private interests on the part of Harbison nor any interests on the part of the State, much less attempt to balance such interests. It is questionable as to whether *Burford* was actually applied since a mere citation to *Burford* does not do service as the balancing test required by Burford.

Third, even if the rule in *Burford* was applied in the coram nobis proceedings, the Court is mindful of the holding in a death-row inmate's habeas corpus case which involved a later-arising *Brady* claim. In *Hutchison v. Bell,* 303 F.3d 720 (2002), the Sixth Circuit considered whether a Tennessee post-conviction court's application of *Burford* and its subsequent finding of a procedural bar (the waiver rule) was intertwined with federal law and, thus, did not constitute an independent state law ground. Observing 'the decision to apply the *Burford* exception does not depend upon the state court's determination of the merits of the petitioner's constitutional challenges to his conviction or sentence,' the Sixth Circuit implicitly held the post-conviction statute of limitations with its *Burford* tolling mechanism to be an independent state law ground. *Id.* at 740-41 and n. 6.

The Court recognizes that Hutchison involved the one-year post-conviction statute of limitations while this case involves the one-year coram nobis limitations statute, but sees no compelling reason not to apply the same rationale to this case and now finds, to the extent such a finding is necessary, the

state court's decision not to apply the *Burford* exception in Harbison's case does not depend upon a merits review of the *Brady* claim and, therefore, the procedural bar to Harbision's coram nobis petition as found by the state court is independent of federal law.

The cause-and-prejudice factor in *Maupin* was addressed in the memorandum disposing of the Rule 60(b) motion, and no further discussion of this factor is sought or warranted.

Harbison also offers some arguments in his motion to alter which appear to have been recycled from his "§ 2241 et seq." petition/Rule 60(b) motion. To the extent these arguments relate to Harbison's § 2241 petition--and not to his assertion the Court should have determined whether the asserted state procedural bar was independent of federal law–those arguments are no more persuasive in the current motion than they were in his earlier filing. They are rejected.

C. Motion to Expand Appointment of Counsel.

In his last motion, Harbison seeks leave under 18 U.S.C. § 3006A[5] and § 3599 (formerly 21 U.S.C. § 848(q)(4)(B)8(e)), to extend the appointment of the Federal Defender Services of Eastern Tennessee, Inc., to permit it to represent him in his state clemency proceedings (Court File No. 157). Respondent has not responded to the motion. As bases for his motion, Harbison points to his execution date of Feb-

[5] In relevant part, 18 U.S.C. § 3006 permits a court to appoint counsel to represent a state prisoner seeking habeas corpus relief under 28 U.S.C. § 2254. *See* 18 U.S.C. § 3006A(a)(2)(B).

ruary 22, 2007, and to a recent Tennessee Supreme Court opinion, which holds state law does not provide for the appointment of counsel in a clemency request to the Governor (*Id.*, Attach. D and Attach. E, *State v. Johnson,* No. M1987-00072-SC-DPE-DD 2006 Tenn. LEXIS 1236 (Tenn. Oct. 6, 2006) (per curiam order) (explaining, in reference to an order in Harbison's case, that the order did not extend the appointment of the Post-Conviction Defender to clemency proceedings)).

He has also submitted a supporting affidavit from Donald E. Dawson, the Post-Conviction Defender, who avers his office has a heavy caseload; does not have the funding or the staff to represent Harbison in the clemency matter; does not have the time to conduct an investigation or to review extensive state and federal court records involved prior to initiating the clemency proceedings; and simply cannot provide adequate assistance to Harbison in state clemency proceedings [*Id.*, Attach. F, Affidavit of Donald E. Dawson].

Dana Hanson Chavez, an attorney with the Federal Defender Services of Eastern Tennessee, Inc. ('FDSET'), who represents Harbison in these instant proceedings, indicates her client, though facing imminent execution, has been without state clemency counsel for three months; that FDSET has represented Harbison in his habeas corpus petition since 1997; and that, if Harbison is not granted relief in the courts, he intends to seek clemency from the Governor and, absent the granting of this motion, will be forced to "navigate the labyrinthine clemency process' *pro se*."

An indigent death-sentenced inmate is entitled to the appointment of counsel to represent him in a

section 2254 case, and '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." 18 U.S.C. § 3599(a)(2) and (e).[6]

As Harbison notes, there is a circuit split on whether the statute (i.e., 18 U.S.C. § 848, now 18 U.S.C. § 3599), which authorizes the appointment of federal habeas corpus counsel, extends that appointment to state clemency proceedings. *Compare Hain v. Mullin,* 436 F.3d 1168 (10th Cir. 2006) (holding 'that counsel appointed under § 848(q)(4)(B) to represent state death row inmates in 28 U.S.C. § 2254 proceedings are authorized by the statute to represent these clients in state clemency proceedings') and *Hill v. Lockhart*, 992 F.2d 801 (8th Cir. 1993) (finding, under some circumstances, the statute extends to state clemency proceedings) with *Clark v. Johnson,* 278 F.3d 459 (5th Cir. 2002) (holding the statute does not extend representation in federal habeas corpus cases to state clemency proceedings) and *In re Lindsey,* 875 F.2d 1502 (11th Cir. 1989) (ruling the statute does not authorize federal compensation for representation in state proceedings).

This circuit, though not directly addressing the issue at hand, has determined in a closely analogous situation the statute does not entitle a death-row

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[6] Harbison also cites *to* 18 U.S.C. § 3006 as authority for his motion. In relevant part, 18 U.S.C. § 3006 provides for the appointment of counsel for a state prisoner seeking habeas corpus relief under 28 U.S.C. § 2254. *See* 18 U.S.C. § 3006A(a)(2)(B).

inmate to federally-funded counsel in state post-conviction cases. *See House v. Bell,* 332 F.3d 997 (6th Cir. 2003) (en banc). Narrowly construing the statute, the Sixth Circuit succinctly stated: "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." *Id.* at 999.

Though the above language in *House* clearly indicates the Sixth Circuit would follow the same reasoning if asked to determine whether the statute provides for federally-appointed counsel during state clemency proceedings, the Western District has concluded that, under certain circumstances, the statute applies in state clemency proceedings. *See Alley v. Bell,* No. 97-cv-3159, 2006 U.S. Dist. LEXIS 94891 (W.D. Tenn.) (order of Mar. 10, 2005, entered as Court File No. 181). Citing to 18 U.S.C. § 3599(a)(2), the district court noted the government's duty to fund federally-appointed counsel in state clemency proceedings arises only if a petitioner "is or becomes financially unable to obtain adequate representation." 2006 U.S. Dist. LEXIS 94891, [order] at 4. Thus, if a state must furnish clemency counsel, the statute is not implicated since adequate representation is available. *Ibid. (citing Hain,* 436 F.3d at 1173 n.6).

While acknowledging the concerns expressed in *House* (i.e., that reading the statute as providing for federal counsel in state post-conviction proceedings would entitle a petitioner who succeeds in having his sentence vacated to federally appointed counsel in any resulting new state trial, state appeal, and state habeas corpus), the district court found that, where a petitioner has already failed in his endeavor to ob-

tain habeas corpus relief, *House's* directive that the "representations shall not mix" could be reconciled with the statutory instruction that counsel appointed during § 2254 proceedings "shall continue their representation." This reconciliation is made possible, according to the district court, by reading the statutory requirement for federally-funded counsel as being triggered only where a state is not obliged to furnish such representation since, under this circumstance, adequate representation is not available. Soon after, the petitioner submitted proof he had failed in his attempt to secure the services of the Post-Conviction Defender's office in the clemency proceedings, and the district court granted his motion, confirming federal funding for his federally-appointed counsel would extend to his state clemency proceedings. *Alley*, No. 97-cv-3159 (order of May 16, 2006, entered on the docket sheet as Court File No. 183).

Additionally, on November 15, 2006, after the district court's above decision in *Alley*, a three-judge panel of the Sixth Circuit considered a motion filed by counsel appointed to represent a death-sentenced Tennessee inmate in his § 2254 case. *See Abdus-Samad v. Bell,* No. 03-6404 (6th Cir. Nov. 15, 2006) (unpublished order). The motion sought court confirmation that the representation was to continue in state clemency proceedings. See *Abdus-Samad v. Bell, No.* 03-6404 (6th Cir. Nov. 15, 2006) (unpublished order). The Sixth Circuit panel, without any discussion, granted the motion. Like Harbison, Abdus-Samad had sought and failed to obtain relief in his previous § 2254 petition. *See Abdus-Samad v. Bell,* 420 F.3d. 614 (6th Cir. 2005), *cert. denied,* 127 S. Ct. 380 (2006).

While the Court respects the sentiments and reasoning stated in the district court's decision in *Alley* the Court is bound to follow and apply clear Sixth Circuit precedent. The Circuit spoke clearly and plainly in *House*. *House* is a published *en banc* decision. An unpublished panel decision that did not even discuss the issue is of no weight in the face of *House*. Harbison provides the Court with no basis to disregard *House* other than to argue *House* was wrongly decided. That is an argument that must be made to a higher court, not this Court.

Accordingly, Harbison's motion for the FDSET to represent him in state clemency matters (Court File No 156), is **DENIED**.

IV. CONCLUSION

For the reasons stated above, the Court **DENIES** Harbison's Motion to Alter and Amend (Court File No. 154) and Harbison's Motion for Leave to Expand Appointment Order (Court File No. 156).

SO ORDERED.

ENTER:

/s/_____

CURTIS L. COLLIER
CHIEF UNITED STATES DISTRICT JUDGE