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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS—continued

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTION, STATUTES AND RULE

TABLE OF AUTHORITIES—continued

Page(s)

OTHER AUTHORITIES

REPLY BRIEF FOR PETITIONER

The United States, appearing as *amicus curiae*, argues that Section 3599 prevents the federally-paid counsel who represented Mr. Harbison throughout proceedings under Section 2254—and as a result became fully familiar with all of the facts relevant to his case—from utilizing that knowledge to assist Mr. Harbison in seeking relief from the death penalty in the state clemency process that follows rejection of his Section 2254 application. That supposedly is true notwithstanding Section 3599(e)'s express statement that counsel appointed pursuant to Section 3599(a)(2) to represent a state defendant in a Section 2254 action "shall also represent the defendant in such * * * proceedings for executive or other clemency as may be available to the defendant."

The Solicitor General's position cannot be squared with this plain statutory language; indeed, his brief does not get around to analyzing this text until half-way through the argument. He instead relies on inferences from legislative history and on policy arguments regarding state *court* representation, an issue not implicated by the clemency clause of Section 3599(e) that is the subject of this case. This Court should reject the Solicitor General's invitation to rewrite Congress's language and instead interpret the statute in accordance with its plain meaning.

A. Subsection (e)'s Unambiguous Reference To "Proceedings For * * * Clemency As May Be Available To The Defendant" Is Dispositive Of The Issue In This Case.

Recognizing that Section 3599(e)'s express statement requiring representation of defendants in clemency proceedings presents a high barrier to his ar-

gument, the Solicitor General asserts that other subsections of Section 3599—as well as other language in subsection (e)—provide important "context" that somehow overrides the explicit statutory obligation to represent death row defendants in clemency proceedings. These arguments are unavailing: subsection (e) means what it says and requires federally-paid counsel appointed under Section 3599(a)(2) to represent a state defendant in a Section 2254 action also to represent that defendant in subsequent state clemency proceedings.

*1. **Section 3599(a)(2) makes clear that subsection (e) delineates the legal services that federally-paid counsel "shall" provide to state defendants.***

Despite his repeated references to "context," the Solicitor General ignores the most important statutory context for construing subsection (e): subsections (a)(1) and (a)(2), which determine who is entitled to counsel. Subsection (a)(1) states in pertinent part:

> 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 * * * shall be entitled to the appointment of one or more attorneys * * *.

Subsection (a)(2) provides:

> In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, * * * any defendant who is or becomes financially unable to obtain adequate representation * * * shall be entitled to the appointment of one or more attorneys * * *.

Subsections (a)(1) and (a)(2) thus create two classes of defendants who are entitled to counsel, with (a)(2) granting counsel in postconviction proceedings to indigent, otherwise unrepresented state and federal capital defendants (Section 2254 and Section 2255 defendants, respectively). Accord U.S. Am. Br. 14 ("Section 3599(a) makes two different groups of indigents eligible for federal funding").

Subsection (a)(2) further states that defendants eligible for counsel under that provision are "entitled to the appointment of one or more attorneys and the furnishing of such other services *in accordance with subsections (b) through (f)*" (emphasis added). It accordingly makes clear that subsection (e) is the statutory provision defining the range of "services" to which a state-sentenced defendant is entitled from the counsel appointed to represent him in his capital Section 2254 proceeding.

2. There is no basis for modifying the text of subsection (e) to limit the representation obligation to "federal" fora.

The Solicitor General does not seriously contend that federally-appointed counsel's representation of Mr. Harbison in Tennessee's clemency proceedings falls outside the plain language of the clemency clause of subsection (e). Nor could he.

The provision states that an attorney appointed to represent a defendant in a Section 2254 proceeding "shall also represent the defendant in such * * * proceedings for executive or other clemency as may be available to the defendant." 18 U.S.C. § 3599(e). The Tennessee clemency proceeding plainly involves

"clemency" and is "available to" Mr. Harbison. That is all the statutory language requires.[1]

Even though Section 3599(e) contains no language restricting the representation obligation to "federal" fora, the Solicitor General asserts that such a limitation should be read into the statute. That plea for a judicial revision of Congress's language should be rejected by this Court.

First, the Solicitor General points (Br. 15-16) to the absence of the word "federal" from Section 3599(a)(1), the provision requiring appointment of counsel in federal criminal proceedings in which the defendant is subject to the death penalty. Because that provision should be construed to apply only to federal cases notwithstanding the absence of an express limitation, the argument goes, subsection (e) should be construed in the same manner even though it is not expressly limited to "federal" proceedings. The flaw in this reasoning is that the two provisions are not analogous.

Section 3599 is contained in title 18, which principally addresses federal criminal proceedings. Unless the context indicates otherwise, therefore, it is logical to read a provision to relate only to defendants in federal proceedings. Section 3599(a)(1)—

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[1] As discussed below (at pages 11-13), we agree with the Solicitor General (Br. 13) that "some of the services listed in Subsection (e) apply only to federal defendants." But that is not true of representation in clemency proceedings because—as discussed in the text—the clemency clause contains no language limiting its applicability to federal defendants; indeed, the statutory reference to "executive or other" clemency proceedings makes clear that state clemency proceedings are encompassed within the provision. Pet. Br. 23-24; see pages 6-7, *infra*.

which falls at the beginning of the provision and applies to "every criminal action in which a defendant is charged with a crime which may be punishable by death"—contains no language providing grounds for an exception to this general approach.

That is not true of Section 3599(e), which applies to appointments of counsel under *both* subsection (a)(1) *and* under subsection (a)(2). The latter provision requires appointment of counsel for "any defendant" in "any post conviction proceeding under section 2254"—a category made up almost exclusively of defendants sentenced under state law—and expressly references "subsections (b) through (f)" to define the services to be provided to the defendant. Because the statutory text thus makes clear that subsection (e), unlike subsection (a)(1), applies to defendants convicted under state law as well as those subject to proceedings under federal law, the phrase "proceedings for executive or other clemency as may be available to the defendant" in subsection (e) necessarily must be read to encompass clemency proceedings available to both categories of defendants for whom counsel is appointed under subsection (a), whether sentenced under state or federal law.

Indeed, if Congress intended the services listed in subsection (e) to apply only to federal capital defendants in federal "forums," as urged by the government, then Congress would have said so by indicating in subsection (a)(2) that counsel is appointed to defend Section 2254 defendants "in accordance with" only subsections (c), (d), (f) and (g); or by including in subsection (a)(2) a restriction on the services available to defendants in Section 2254 proceedings. It did not. Rather, Congress specifically

provided Section 2254 defendants the services described in subsection (e).

That being the case, the reference to subsection (e) in Section 3599(a)(2) and the inclusion of Section 2254 defendants in subsection (a)(2) cannot be ignored and the government's "contextual" argument is actually a significant—and wholly unjustified—revision of the plain language.

Second, as we explained in our opening brief (Pet. Br. 23-24), the text of the clemency clause confirms its applicability to state defendants by the reference to "proceedings for executive *or other* clemency" (emphasis added), making clear that the clause extends beyond the federal system, which provides only for grants of clemency by the President.

The Solicitor General strains to argue (Br. 25) that "or other" was included to encompass "proceedings before other persons whom [the Executive] may enlist to help review clemency applications." But any such ancillary advice plainly would be part of the "proceeding[] for executive * * * clemency" because the ultimate decision still rests with the President.

The Solicitor General also contends (Br. 27) that "clemency in capital cases is in fact an executive function throughout the Nation" and the "or other" phrase therefore is not indicative of congressional intent to encompass state clemency proceedings. In fact, a number of States employ processes quite different from the federal government. Thus, in Georgia clemency decisions are made by a board whose members—while appointed by the governor—cannot be removed by him except for cause. Ga. Const. Art. IV, § 2; Ga. Code § 42-9-14. Other States utilize a similar

approach. See Governor/Former Governor Am. Br. 4-5.

In New Hampshire, the governor's decisions must be ratified by an elected council. Governor/Former Governor Am. Br. 4-5 n.3. In other States, the courts are part of the process and in still others the legislatures have reserved certain pardon authority to themselves. See *id.* at 4-5; U.S. Am. Br. 26-27.

These systems plainly differ fundamentally from one in which the final decision is made by the chief executive alone, with or without input from an advisory board. It therefore is logical to conclude that Congress added the phrase "or other" to ensure that the right to counsel encompassed all of the various clemency processes employed by the States. There is no other reasonable explanation for inclusion of the phrase.[2]

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[2] The Solicitor General engages in close analysis of the various approaches employed by the States (see U.S. Am. Br. 26-27) in an effort to establish that all are "executive" because they are in some way linked to executive authority. Given Congress's perspective, however, it is likely that it employed the word "executive" to capture systems, like the federal government's, in which the ultimate decision is made by the chief executive; and used the phrase "or other" to include all other approaches. It seems unlikely that Congress would have engaged in a detailed analysis of each State's system—and the particular offenses subject to the death penalty in that State—to determine whether the clemency system was "executive" in the separation-of-powers sense that it ultimately rested on executive authority alone. And even if it did, because in some States, such as Georgia, the clemency authority is exercised by what is the equivalent of an independent agency in the federal system, it would have concluded that the term "executive" alone would not have been sufficient to encompass all of the various state mechanisms.

3. Subsection (e)'s reference to "available" clemency proceedings is unambiguous and does not mean "only federal" proceedings.

The Solicitor General next contends (Br. 15) that the word "available" in subsection (e)'s clemency clause actually means "federal." That contention is inconsistent with both common sense and basic linguistic principles.

The government first appears to suggest (Br. 13 n.2) that because a very small subset of Section 2254 petitioners may be eligible for clemency from the President (prisoners in U.S. territories), "available" should be read to mean only "federal" clemency proceedings.

As a threshold matter, even if Presidential clemency were available for this very discrete set of defendants, it still is not the clemency process "available to" the overwhelming majority of defendants who invoke Section 2254—defendants convicted under state law. And the government's argument therefore provides no basis for interpreting subsection (e) to deny representation in the clemency proceedings that *are* available to such defendants, clemency proceedings under state law.

But the government's argument also is flawed even on its own terms. As the Solicitor General concedes (Br. 13-14 n.2), Section 2254 defendants challenging territorial convictions cannot be included within those persons entitled to counsel under subsection (a)(2), which requires a death sentence, because there are no capital offenses under the law of any of the territories. Moreover, the federal regulation indicating that persons convicted of territorial

crimes should submit clemency petitions to the appropriate territorial official—not to the President—existed for five years before Congress enacted the predecessor to Section 3599. See 28 C.F.R. 1.4 (1983).

In the hypothetical event that a territory sentenced one of its prisoners to death, and that prisoner sought federal habeas relief under Section 2254 and sought federally appointed counsel under Section 3599(a)(2), Congress would have known that the territorial prisoner would *not* seek "federal" clemency from the President. Accordingly, the class of Section 2254 defendants that the government claims can invoke Presidential clemency in fact does not exist.

Moreover, substituting the word "federal" for the word "available" in the clemency clause of subsection (e), would result in a nonsensical reading of the provision: "and shall also represent the defendant in such * * * proceedings for executive or other clemency as may be [federal] to the defendant." A reorganization of that clause's structure to limit section (e) clemency proceedings to "federal" clemency is incompatible with subsection (a)(2) because federal clemency is not available to Section 2254 capital defendants.

The position urged by the Solicitor General excludes virtually all Section 2254 defendants from those defendants referred to in subsection (e) to whom clemency may be available. This strained and illogical revision of the statute is not supported by its plain language, especially when Congress could have explicitly limited representation for clemency proceedings "as may be available to the [subsection (a)(1) and/or Section 2255] defendant." Congress did not do so. This Court should decline the suggestion

that the word "federal" be forced into the clemency clause where it neither logically fits nor is even implied by the statute's plain language.

4. Giving effect to the plain language of subsection (e)'s clemency clause will not trigger the Solicitor General's parade of horribles relating to state court litigation.

Most of the Solicitor General's argument (*e.g.*, Br. 14-20) focuses on the portion of subsection (e) providing that an appointed attorney "shall represent the defendant throughout every subsequent stage of available judicial proceedings" and then specifying the various types of proceedings in which representation must be provided. See Pet. Br. 20-21. He contends that if the clemency clause is interpreted to encompass state clemency proceedings, then counsel appointed in Section 2254 proceedings necessarily will be permitted to represent state defendants in state postconviction proceedings and other proceedings in state court.

As a threshold matter, the clemency issue before the Court in this case turns on the meaning of the clemency clause of Section 3599(e), not on the separate portion of that subsection relating to "judicial proceedings." There simply is no occasion for the Court to address the meaning of the latter clause in this case.[3]

Moreover, the government is simply wrong in asserting that a holding by the Court that the clemency

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[3] That is especially true because the clemency clause contains the "or other" language, which clearly encompasses non-federal clemency processes. See pages 6-7, *supra*.

clause encompasses state clemency proceedings will somehow open the door to broad representation by federally-paid counsel in state courts. The portion of subsection (e) relating to judicial proceedings states:

> 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.

Subsection (e) thus sets out the "ordinary sequence of events" for capital defendants who come before the federal courts. See U.S. Am. Br. 15 ("the way the term [motions for new trial] appears in context – between 'sentencing' and 'appeal' – shows that it refers to motions for new trial filed in the ordinary sequence of events, *i.e.*, before direct appellate review"); Pet. Br. 20-21.

The first group of events occurs in the course of trial and direct review: "pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States." 18 U.S.C. § 3599(e). The second group of events occurs on collateral review: "post-conviction process, together with stays of execution and other appropriate motions and procedures." *Ibid.*

This text—divided according to the "ordinary sequence of events" in a capital case—thus makes clear that the availability of representation by appointed counsel in a particular proceeding listed in

subsection (e) depends upon whether the attorney is appointed under subsection (a)(1) (to represent a federal defendant at trial) or under subsection (a)(2) (to represent a state or federal defendant in postconviction proceedings).

The list of services to be performed by counsel appointed pursuant to Section 3599(a)(2) is shorter than counsel's duties when appointed under subsection (a)(1) because (a)(2) defendants are litigating in the final tier of the post-trial review process. Given the two different groups of defendants created by subsections (a)(1) and (a)(2), it is natural that, as the Solicitor General observes (Br. 14), "not every listed service applies to both categories of indigent clients." See also Pet. Br. 20-21 (the roster of stages for which representation is provided begins for a Section 2254 defendant with "all available postconviction process" and ends with "executive or other clemency as may be available to the defendant").

Holding that the separate clemency clause encompasses state clemency proceedings thus will have no impact whatever on the extent to which federally-paid counsel will litigate in state court, because that separate question does *not* turn upon the presence or absence of the word "federal" as the Solicitor General contends. The division of services with respect to the category of defendant—(a)(1) or (a)(2)—is accomplished by a plain and logically sequential reading of the statute.[4]

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[4] The government's other contextual argument, relying upon subsections (b) and (c) of the statute, also does little to advance its cause. The fact that Congress chose to set minimum qualifications for those attorneys who are appointed under Section 3599 (U.S. Am. Br. 16), in no way usurps a State's right to set

The fact that subsection (e) does not expressly delineate this division of services (U.S. Am. Br. 14) is irrelevant, because the necessary delineation is accomplished by the provision's logical recitation of litigation steps. The Solicitor General is therefore wrong in asserting (U.S. Am. Br. 18) that following Congress's express language regarding representation in clemency would open the gates to a flood of federally-funded state court litigation.[5]

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its own qualifications for attorneys assisting clients as they seek clemency from its governor. Counsel appointed under Section 3599 and the Criminal Justice Act, 18 U.S.C. § 3006A, must meet the qualifications contained in Section 3599(b) or (c) and the minimum qualification of being "learned in the law applicable to capital cases." 18 U.S.C. § 3005. However, these requirements are not always exclusive and do not always apply only to federal court. "[F]ederal courts may add requirements" to a Federal District's assigned counsel plan. *Russell* v. *Hug*, 275 F.3d 812, 817-818 (9th Cir. 2002). Indeed, some CJA plans require bar membership in the State in which the District is located. *Id.* at 815, 818.

Moreover, it is possible that an attorney appointed to represent a defendant during the trial phase of a case may not be a member of the bar of the relevant court of appeals or of this Court. In those circumstances, another attorney may be appointed to represent the defendant in such proceedings. The same is true in the unlikely circumstance that an attorney appointed to represent a defendant in a Section 2254 proceeding was not a member of the bar of the State under whose law the defendant was convicted.

[5] Certainly the Solicitor General has not shown that those jurisdictions currently abiding by the twenty-year-old statute's plain language and allowing counsel to continue to represent their clients in state clemency proceedings have experienced such a phenomenon. They haven't. The specter of abusive litigation tactics, raised in other return-to-state-court contexts, has not carried the day nor have such dire predictions materialized. See, *e.g. Rhines* v. *Weber*, 544 U.S. 269, 277-278 (2005); *Slack* v. *McDaniel*, 529 U.S. 473, 489 (2000).

To the contrary, interpreting Section 3599 in accordance with its plain language results in an efficient continuity of resources when, at the end of the federal habeas process, the unsuccessful and otherwise unrepresented capital defendant seeks clemency. The plain language of Section 3599 requires appointed counsel only when a defendant is "unable to obtain adequate representation" and Mr. Harbison does not argue otherwise.

In fact, Mr. Harbison asked the Tennessee Supreme Court to appoint clemency counsel to represent him, but the request was denied. Pet. Br. Add. 27a. Mr. Harbison's simple assertion that the statute be enforced according to its plain terms does not encroach on a State's prerogative to provide counsel to perform any relevant services listed under Section 3599(e). If a State does so, the statute's own provisions disallow the appointment of counsel.

In sum, there simply is no need to depart from the statute's plain language and re-write it to insert the word "federal" throughout subsection (e).

5. ***Congress did not ratify the Solicitor General's interpretation of the statute.***

We explained in our opening brief (at 29-31) that the government's ratification argument must be rejected because there was no settled judicial view regarding the issue in this case when Congress reenacted Section 3599 in 2006.

The Solicitor General reprises (Br. 28-30) his contention that the conclusion in *Hill* v. *Lockhart*, 992 F.2d 801 (8th Cir. 1993), that appointed attorneys were obliged to represent defendants in state clemency proceedings "was dictum" and therefore did

not undercut the supposed judicial consensus. But the explanation supporting that conclusion takes nearly two full pages in the government's brief (see U.S. Am. Br. 28-30), and the government is forced to acknowledge that "some district courts in the Eighth Circuit have continued to approve funding for state clemency counsel based on *Hill*." U.S. Am. Br. 30; see also *Hain* v. *Mullin*, 436 F.3d 1168, 1172 (10th Cir. 2006) (construing *Hill* to determine that state clemency proceedings are encompassed within the federal statute); Pet. Br. 30 n.26. In these circumstances, it simply is not credible to assert that Congress would have ignored *Hill* and found a judicial consensus regarding the proper interpretation of the statute with respect to this issue.

That is especially true because of the significant number of district court decisions in other circuits rejecting the interpretation advanced by the government. Pet. Br. 30-31. Citing *Herman & MacLean* v. *Huddleston*, 459 U.S. 375 (1983), the Solicitor General asserts (Br. 28-29 n.11) that district court decisions should be ignored in determining the existence of a judicial consensus. Of the two contrary district court decisions in *Huddleston*, however, one had been rendered a nullity by a subsequent decision of the court of appeals encompassing the district and the second "stood alone at the time of the [congressional action] * * *, and even that decision had not been followed in the district in which it was decided, or elsewhere within the same Circuit." 459 U.S. at 385 n.21 (citations omitted). It was the fact that the two district court decisions had been undermined that permitted the Court to disregard them.

That is not the case here—the district court decisions cited in our opening brief have not been un-

dermined. Indeed, because the district courts are the primary appointing authority, applying Section 3599 in every capital case involving an indigent defendant, their prevailing interpretation carries significant weight.

For these reasons, there is no basis for finding a judicial consensus when Congress reenacted the statute in 2006. See also *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 171-173 (2004) (concluding that three district court decisions all agreed with respect to the particular legal proposition before determining Congress's understanding of the state of the law at the time it enacted the statute before the Court).[6]

B. Section 3599's Legislative History Provides No Basis For Ignoring The Plain Meaning Of The Statutory Language.

Resorting to legislative history in interpreting statutory language is always perilous, and when the statute is clear and unambiguous—as here—improper. See Pet. Br. 27. The risks of this enterprise are particularly great here, where the Solicitor General attempts (Br. 20-23) to draw speculative conclusions from the legislative process while ignoring significant features of the legislative history of Section 3599.

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[6] The government's citation (Br. 29 n.11) of *Pierce* v. *Underwood*, 487 U.S. 552, 567 (1988), is mystifying. That case did not involve a claim of congressional ratification; to the contrary, the Court stated that "[t]his is *not* * * * a situation in which Congress reenacted a statute that had in fact been given a consistent judicial interpretation along the lines that the quoted Committee Report suggested." *Ibid.* (emphasis added).

The Solicitor General asserts that the legislative history "demonstrates that the list of services set out in Subsection (e) was written to apply to federal defendants at trial and on direct review." U.S. Am. Br. 23; see also *id.* at 21 ("Subsection (e) was not written to apply to state habeas petitioners; they were added to the eligible class just a few hours before the bill passed * * *").

The text of subsection (e) disproves this assertion because it clearly requires representation *after* trial and direct review. See pages 11-12, *supra*. And the legislative history also reveals that subsection (e), at its inception, was written by Representative Conyers to provide representation for individuals in addition to federal defendants at trial and on direct review.

By the time subsection (e) was proposed, the House of Representatives had previously debated and adopted an amendment by Representative Gekas providing appointed counsel for defendants in Section 2254 and Section 2255 proceedings.[7] Although the Gekas amendment was replaced by the subsequent Conyers amendment that included subsection (e), its purpose and effect were preserved: the Conyers amendment also contemplated counsel for Section 2254 defendants. Representative Conyers explained "the importance of this provision to provide adequate representation to persons on death row. While State courts appoint lawyers for indigent defendants, there is no legal representative automatically provided once the case is appealed to the

[7] 134 Cong. Rec. H7281 (Sept. 8, 1988). The Gekas amendment did not specifically provide for counsel before judgment or on direct appeal.

Federal level." 134 Cong. Rec. H7259-02, 1988 WL 175612, at 96-97 (Sept. 8, 1988).

Representative Conyers further stated: "[w]hat has been happening is that it is becoming increasingly difficult to identify counsel throughout the country willing and able to accept the appointment in a growing number of capital cases for which representation is required." 134 Cong. Rec. H7259-02, 1988 WL 175612, at 96-97. In 1988, when this bill was debated and enacted, there were no prisoners on federal death row. Representative Conyers therefore could only be referring to Section 2254 cases.[8] Of course, the need for Section 2255 counsel was anticipated, and addressed in the provision that became Section 3599, because Congress was creating a new death-eligible federal crime within the same bill.

During the legislative bargaining process that resulted in the predecessor to Section 3599, the language contained in the Gekas amendment was restored (with the additional text granting services in accordance with subsections (b) through (f)), and

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[8] Elizabeth B. Bazan, *Capital Punishment: An Overview of Federal Death Penalty Statutes*, RL30962, CRS-3 & n.2 (Library of Congress updated Jan. 5, 2005), at http://www.fas.org/sgp/crs/RL30962.pdf (discussing the constitutional status of federal death penalty laws prior to the enactment of the Anti-Drug Abuse Act of 1988); *The Federal Death Penalty System: A Statistical Survey (1988-2000)*, pp.1 & 37 n.30 (U.S. Dep't of Justice Sept. 12, 2002), at http://www.usdoj.gov/dag/pubdoc/_dp_survey_final.pdf (after *Furman* v. *Georgia*, 408 U.S. 238 (1972) (per curiam), declared death penalty statutes unconstitutional, the federal death penalty was re-introduced in 1988); Death Penalty Information Center, at http://www.deathpenaltyinfo.org/federal-death-penalty (indicating that after reinstatement of the federal death penalty the first federal death sentence was in 1991).

eventually became subsection (a)(2).[9] Far from a last-minute change never carefully considered before passage, the addition of subsection (a)(2) contained the entirety of the Gekas amendment that had been previously debated and adopted. Its inclusion in the final bill clarified that the Conyers Amendment provided a statutory right to counsel to state and federal death row inmates once they sought federal habeas review.

The inclusion of subsection (a)(2) in Section 3599 thus can be described as the result of a decision by Congress that once a death sentence is imposed and a defendant enters federal habeas review, then state and federal defendants should receive the same legal services. Alternatively, it may be possible to speculate about other reasons that might underlie the deletion and subsequent resurrection of the Gekas amendment. That is the nature of the legislative process. See *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 461-462 (2002) (courts risk disturbing congressional compromise when, in the name of abstract purpose, they deviate from clear statutory text that emerges from the legislative process). That is also the reason why resorting to Section 3599's legislative history cannot aid the government's effort to rewrite the plain language of the statute.

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[9] Acknowledging the Gekas amendment as the source of the final changes adopted by the House of Representatives prior to passage removes the need to "presume" (U.S. Am. Br. 23) why the word "defendant[s]" was used to describe petitioners under Sections 2254 and 2255. That was the term used by Representative Gekas. See 134 Cong. Rec. H7281.

C. The Solicitor General's Policy Arguments Should Be Addressed To Congress; They Cannot Override Section 3599's Plain Language.

The Solicitor General finally contends (Br. 30-33) that providing representation by federally-paid counsel in state clemency proceedings is bad policy. The amicus briefs filed in support of petitioner point out the important policy concerns that *support* providing such representation for defendants facing the death penalty. The balancing of these concerns is a matter for Congress, not for this Court. Certainly the government's arguments provide no grounds for disregarding the clear language that Congress used when it wrote the statute.

First, although the Solicitor General invokes (Br. 31) "federalism concerns," the State of Tennessee expressly disavows any "real stake in whether an inmate receives federal funding for clemency counsel." Resp. Br. 7. In addition, one sitting Governor and ten former Governors from States authorizing the death penalty have expressed to this Court their view that "when funding for counsel is not otherwise available, federal funding of clemency counsel * * * serves as an essential backstop, ensuring that Governors can obtain the information they need to make fully informed clemency decisions." Governor/Former Governor Am. Br. 2-3. No States have filed briefs supporting the Solicitor General's position.

The Solicitor General's unsupported speculation—which in any event rests principally on his erroneous view that the decision in this case will result in representation by federally-paid counsel in large numbers of state judicial proceedings (see pages 10-

14, *supra*)—provides no justification for ignoring the statute's plain language.

Second, the Solicitor General expresses (Br. 31) concern about cost, although he makes no attempt to quantify the amount. Federally-paid counsel would be available only in States that do not provide indigent death row defendants with counsel for clemency proceedings. See Pet. Br. 25 n.24. And even in those situations, much if not all of the background work regarding the defendant's case will have been performed in connection with the representation in the Section 2254 proceeding. Finally, the lower federal courts "have a long experience under the Criminal Justice Act with individualized attorneys' fees decisions" (*Simmons* v. *Lockhart*, 931 F.2d 1226, 1233 (8th Cir. 1991)), and can continue to ensure the wise expenditure of such monies.[10]

Moreover, Congress has in related contexts indicated its willingness to expend federal funds to increase the accuracy of the States' administration of the death penalty. See U.S. Am. Br. 20 & 8a-11a (discussing federal grant program to assist States in establishing a state defense system that appoints, trains and monitors attorneys who represent indigent capital defendants and ensures "funding for the cost of competent legal representation by the defense team and outside experts selected by counsel." Innocence Protection Act of 2004, Pub. L. No. 108-405, § 421(e)(2)(F), 118 Stat. 2286-2288 (codified at 42 U.S.C. §§ 14163-14163a)).

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[10] Here, of course, the issue does not involve incremental funding, but, instead, permission for Federal Defender Services to represent Mr. Harbison in clemency proceedings.

The real question is not whether federal funding somehow raises federalism concerns but whether the plain text of Section 3599(e), providing representation by appointed counsel in clemency proceedings "as may be available to the defendant," applies to Section 2254 defendants entitled to counsel under Section 3599(a)(2). The answer to that question is "yes."

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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