No. 07-8521

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 OF RESPONDENT

ROBERT E. COOPER, JR.
Attorney General & Reporter
STATE OF TENNESSEE

MICHAEL E. MOORE
Solicitor General

GORDON W. SMITH
Associate Solicitor General
Counsel of Record

425 Fifth Avenue North
Nashville, Tennessee 37243
(615) 741-4150
Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

CAPITAL CASE
QUESTIONS PRESENTED

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

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

STATUTES AND RULES:

OPINIONS BELOW

The opinion of the court of appeals (Pet. Br. Add. 5a) is reported at 503 F.3d 566. The relevant opinion of the district court (Pet. Br. Add. 15a) is unreported but may be found at 2007 WL 128954.

JURISDICTION

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

STATUTORY PROVISION INVOLVED

This case involves an interpretation of 28 U.S.C. § 2253, which 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).

STATEMENT OF THE CASE

On January 15, 1983, petitioner burglarized the Chattanooga, Tennessee, home of Edith Russell, beat her to death with a heavy, marble vase when she came home unexpectedly, and stole various items of value belonging to her. A jury convicted him of first-degree murder, second-degree burglary, and grand larceny, and sentenced him to death for the murder.

The Tennessee Supreme Court affirmed the judgment. *State v. Harbison*, 704 S.W.2d 314, 315-16 (Tenn.), *cert. denied*, 476 U.S. 1153 (1986).

After unsuccessfully seeking state post-conviction relief, *see Harbison v. State,* 03C01-9204-CR-00125, 1996 WL 266114 (Tenn. Crim. App. May 20, 1996), *app. denied* (Tenn. Nov. 12, 1996), petitioner filed a motion for appointment of counsel and a motion for a stay of execution in the district court in February 1997. (No. 1:97-cv-00052, Docket Entry Nos. 1, 3 (E.D. Tenn. Feb. 5, 1997)). The motions were granted, and under the authority of the statute now codified at 18 U.S.C. § 3599, Federal Defender Services of Eastern Tennessee, Inc. (Federal Defender Services) was appointed to represent petitioner "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." (*Id*., Docket Entry No. 5 (Feb. 7, 1997)). Through his appointed counsel, petitioner filed a federal habeas petition challenging his conviction and death sentence in November 1997. (*Id*., Docket Entry No. 45 (Nov. 24, 1997)). The district court denied habeas corpus relief in 2001 (*id*., Docket Entry No. 102 (Mar. 6, 2001)), and the court of appeals affirmed the judgment. *Harbison v. Bell*, 408 F.3d 823 (6th Cir. 2005), *cert. denied*, 547 U.S. 1101 (2006).

While his federal habeas corpus petition was proceeding in the federal courts, petitioner filed in state court both a motion to reopen his post-conviction petition and a petition for a writ of error

coram nobis. In 2004, the state trial court denied relief on procedural grounds, and the judgment was affirmed on appeal. *Harbison v. State*, No. E2004-00885-CCAR28PD, 2005 WL 1521910 (Tenn. Crim. App. June 27, 2005), *app. denied* (Tenn. Dec. 19, 2005).

In April 2006, petitioner, through Federal Defender Services, filed a second "petition for writ of habeas corpus" in the district court, alternatively requesting that the district court entertain the petition as a motion for relief from the 2001 judgment under Fed.R.Civ.P. 60(b)(6). (No. 1:97-cv-00052, Docket Entry No. 135 (E.D. Tenn. Apr. 19, 2006)). Treating the pleading as both a "second or successive habeas corpus application" under 28 U.S.C. § 2244 and a Rule 60(b)(6) motion, in November 2006 the district court denied the Rule 60(b)(6) motion and transferred the successive application to the court of appeals pursuant to 28 U.S.C. § 1631 for treatment as a motion for authorization to file a second or successive habeas corpus application. (*Id.*, Docket Entry No. 152 (Nov. 28, 2006)).

With a scheduled execution date of February 22, 2007, pending and state executive clemency proceedings apparently contemplated but not yet filed, Federal Defender Services filed on December 13, 2006, a motion requesting the district court to extend the appointment to include representation in Harbison's anticipated state clemency proceedings under 18 U.S.C. § 3599. (*Id.*, Docket Entry No. 156). Respondent did not oppose the motion. On January 16, 2007,

the district court denied the motion. (*Id*., Docket Entry No. 158).

On February 1, 2007, the Governor of Tennessee granted an executive reprieve to petitioner until May 2, 2007, to allow the Department of Correction to review Tennessee's lethal-injection protocol. (No. 07-5059, Docket Entry of Feb. 2, 2007 (6th Cir.)). Following the expiration of the reprieve, the Tennessee Supreme Court set a new execution date of September 26, 2007. (*Id*., Docket Entry of May 31, 2007). In the meantime, petitioner appealed from the district court's order denying the expansion of counsel's appointment. The court of appeals directed him to file an application for a certificate of appealability (COA) (*id*., Docket Entry of June 27, 2007), which he did.[1] (*Id*., Docket Entry of July 27, 2007).

On September 27, 2007, the court of appeals affirmed the judgment. In a published opinion, the court stated:

> It is not clear that Harbison requires a COA to appeal the district court's denial of this

[1] While the appeal was pending, petitioner's execution by lethal injection was enjoined on September 19, 2007, by the United States District Court for the Middle District of Tennessee pending resolution of a Section 1983 action challenging Tennessee's lethal-injection protocol. *Harbison v. Little*, 511 F.Supp.2d 872 (M.D. Tenn. 2007), appeal pending, No. 07-6225 (6th Cir. filed Oct. 11, 2007). Following this Court's decision in *Baze v. Rees*, 128 S.Ct. 1521 (2008), the Sixth Circuit set a briefing schedule but left the injunction intact.

> 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 the 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.

(Pet. Br. Add. 11a). The court concluded that it would both "[d]eny the motion for a COA for [Federal Defender Services] to represent [petitioner] in state clemency proceedings" and "[a]ffirm the district court." (Pet. Br. Add. 11a-12a).

SUMMARY OF THE ARGUMENT

Because respondent has no real stake in whether a state prisoner receives federal funding for state clemency counsel, respondent expresses no view on Question 1. With respect to Question 2, the district court's order denying petitioner's motion for federally funded clemency counsel was not an order "in a habeas corpus proceeding" within the meaning of 28

U.S.C. § 2253(c)(1)(A). Therefore, a COA was not required.

ARGUMENT

I. RESPONDENT EXPRESSES NO VIEW ON THE QUESTION WHETHER 18 U.S.C. § 3599 PROVIDES STATE PRISONERS THE RIGHT TO FEDERALLY APPOINTED AND FUNDED COUNSEL TO PURSUE STATE CLEMENCY.

Question 1 presents the issue whether 18 U.S.C. § 3599 provides state prisoners the right to federally appointed and funded counsel to pursue clemency under state law. Respondent took no position on petitioner's motion in the district court and did not file any response to the motion. In the court of appeals, respondent took the position that, in denying petitioner's motion, the district court did not abuse its discretion by following circuit precedent holding that there was no statutory authorization for the appointment, but otherwise respondent did not express a view concerning whether that precedent was correctly decided. Because respondent has no real stake in whether an inmate receives federal funding for clemency counsel, respondent expresses no view on Question 1.

II. PETITIONER WAS NOT REQUIRED TO OBTAIN A COA IN ORDER TO APPEAL FROM THE DISTRICT COURT'S ORDER DENYING THE MOTION FOR FEDERALLY FUNDED CLEMENCY COUNSEL.

A COA is required before a habeas applicant may take an appeal to the court of appeals from "the final order in a habeas corpus proceeding in which the detention arises out of process issued by a State court." 28 U.S.C. § 2253(c)(1)(A). The order denying petitioner's motion for federally funded clemency counsel was not an order "in a habeas corpus proceeding."[2] Therefore, a COA was not required.

---

[2] It is undisputed that the order denying the motion was a "final" one for purposes of the COA requirement. *Catlin v. United States*, 324 U.S. 229, 233 (1945) (a final judgment "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment"). And petitioner's custody under the 1983 state-court judgment "arises out of process issued by a state court."

Section 2253(c)'s reference to "the" final order in a habeas corpus proceeding at first blush suggests that a COA is required only from the one, ultimate order disposing of the habeas petition. But, in the Dictionary Act, 1 U.S.C. § 1, Congress made it clear that in the statutes it enacts, "unless the context indicates otherwise[,] words importing the singular include and apply to several persons, parties, or things. . . ." Thus, when necessary to carry out the evident intent behind § 2253(c)(1)(A), more than "the" final order in a habeas corpus proceeding is subject to the COA requirement. For example, an order denying a Fed.R.Civ.P. 60(b) motion seeking to reopen an earlier order denying habeas relief would require a COA because "the evident legislative intent behind requiring such certificates in habeas cases was to filter out undeserving appeals with a minimum of

(Continued on following page)

In § 2253(c)(1)(A), the phrase, "habeas corpus proceeding," is immediately followed and modified by the phrase, "in which the *detention* complained of arises out of process issued by a State court." (emphasis added). Both 28 U.S.C. § 2241(c)(3) and § 2254(a) make the writ of habeas corpus available to persons "in *custody* in violation of the Constitution or laws or treaties of the United States." (emphasis added). Thus, although not expressly defined by these statutes, a "habeas corpus proceeding" is a judicial proceeding for challenging a prisoner's detention or custody in violation of the Constitution, laws, or treaties of the United States.

In several cases establishing the dividing line between § 2254 relief and relief under 42 U.S.C. § 1983, this Court has defined the essence of the habeas corpus remedy. In *Preiser v. Rodriguez*, 411 U.S. 475 (1973), holding that a state prisoner cannot use a § 1983 action to challenge the fact or duration of his confinement, the Court declared that "[i]t is clear, not only from the language of §§ 2241(c)(3) and 2254(a), but also from the common-law history of the writ, that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody,

---

judicial effort, and that intent would be frustrated unless 'the final order' is interpreted to include final orders denying Rule 60(b) relief in habeas cases." *Gonzalez v. Secretary for the Dep't of Corr.*, 366 F.3d 1253, 1264 n.2 (11th Cir. 2004) (en banc), *aff'd on other grounds sub nom. Gonzalez v. Crosby*, 545 U.S. 524 (2005).

and that the traditional function of the writ is to secure release from illegal custody." 411 U.S. at 484. The Court described "the core of habeas corpus" as an attack upon "the very duration of . . . physical confinement itself." *Id*. at 487. In *Heck v. Humphrey*, 512 U.S. 477 (1994), the Court, on its way to holding that a state prisoner may not challenge the constitutionality of his conviction in a suit for damages under § 1983, echoed *Preiser*'s pronouncement that "habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release." 512 U.S. at 481; *see also Wilkinson v. Dotson*, 544 U.S. 74, 81 (2005) (characterizing "'core'" habeas corpus claims for relief as including requests for "present or future release").

State executive clemency, on the other hand, is not a federal judicial remedy. Indeed, this Court has characterized clemency as "the historic remedy for preventing miscarriages of justice *where judicial process has been exhausted*." *Herrera v. Collins*, 506 U.S. 390, 412 (1993) (emphasis added). Nor does a request for clemency seek to invalidate the fact or duration of a prisoner's confinement or detention on legal grounds. Instead, the remedy sought is extrajudicial, purely discretionary, and "simply a unilateral hope," *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981). And clearly clemency is not a remedy available in a habeas corpus proceeding. It is beyond the power of any federal court to grant clemency in a habeas corpus (or any other) proceeding.

While petitioner's motion for federally funded clemency counsel technically was filed under the style and docket number of petitioner's second application for habeas relief, it did not itself request habeas relief or request any action by the district court related to the habeas case itself. Instead, it requested authorization for representation in a future state executive clemency proceeding, a proceeding wholly distinct in both function and venue.

Furthermore, when petitioner's motion was filed on December 13, 2006, all habeas corpus proceedings challenging his state conviction and sentence had been concluded. Petitioner's initial federal habeas corpus proceeding was long over: the district court denied relief in 2001, the court of appeals affirmed the judgment in 2005, and this Court denied certiorari in April 2006. Even petitioner's second action had been concluded by November 28, 2006, when the district court denied the Rule 60(b)(6) motion and transferred the successive habeas application to the court of appeals for treatment as a motion for authorization to file a second or successive habeas corpus application. Therefore, petitioner's motion for clemency counsel can hardly be said to have been filed, or the order on that motion entered, "in" a habeas corpus proceeding.

The district court's January 16, 2007, order denying petitioner's motion for federally funded clemency counsel was not an order "in a habeas

corpus proceeding." Thus, petitioner was not required to obtain a COA before appealing from that order.

CONCLUSION

To the extent the judgment below requires a COA for an appeal from the order denying petitioner's motion for federally funded clemency counsel, it should be reversed.

Respectfully submitted,

ROBERT E. COOPER, JR.
Attorney General & Reporter
STATE OF TENNESSEE

MICHAEL E. MOORE
Solicitor General

GORDON W. SMITH
Associate Solicitor General
Counsel of Record

425 Fifth Avenue North
Nashville, Tennessee 37243
(615) 741-4150
Attorneys for Respondent