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IN THE SUPREME COURT OF THE UNITED STATES

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 EDWARD JEROME HARBISON, :  
 Petitioner :  
 v. : No. 07-8521  
 RICKY BELL, WARDEN. :

- - - - - x  
 Washington, D.C.  
 Monday, January 12, 2009

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

DANA C. HANSEN CHAVIS, ESQ., Assistant Federal Community Defender, Knoxville, Tenn.; on behalf of the Petitioner.

WILLIAM M. JAY, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, in support of the judgment below.

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P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this afternoon in Case 07-8521, Harbison v. Bell.

Ms. Chavis.

ORAL ARGUMENT OF DANA C. HANSEN CHAVIS

ON BEHALF OF THE PETITIONER

MS. CHAVIS: Mr. Chief Justice, and may it please the Court:

This case is about a logical reading of the statute's plain language, and section 3599(a)(2) that's printed on page 1 of the blue brief provides that when a State death row inmate seeks 2254 relief, he shall be represented by counsel. He shall be appointed counsel by the Federal court. And that representation is governed by subsection (e). Subsection (e) that is on page 2a of our blue brief defines the scope of counsel's representation and also divides that representation by two clauses that begin with the word "shall."

This case is controlled by the second "shall" clause, which appears about four lines up from the bottom of subsection (e). And that clause says that counsel shall also represent the defendant in proceedings for executive or other clemency as may be available to him.

And we know that this means State clemency

1 proceedings because of the words "available" and the words  
2 "or other." For a 2254 petitioner or defendant like Mr.  
3 Harbison, the only type of clemency that is available to  
4 him is State clemency, and in order to give effect to the  
5 words "or other" that were used by Congress, we know that  
6 that must refer to State clemency because the only type of  
7 clemency that the Federal Government provides is executive  
8 clemency.

9 Now, not only is the interpretation of this  
10 statute controlled by the plain language, but this  
11 interpretation makes sense because -- and it makes sense  
12 that Congress would provide for continuous representation  
13 for capital defendants in that it fills a need, a gap in  
14 representation; it's efficient; and it also helps to  
15 improve the reliability of the death penalty as it's  
16 administered in this country.

17 CHIEF JUSTICE ROBERTS: Your interpretation  
18 would make all of the provisions of subsection (e)  
19 applicable in State proceedings, so long as there's been a  
20 2254 petition filed.

21 MS. CHAVIS: No, Your Honor. And if I may, I  
22 would like to discuss the structure of subsection (e). And  
23 I believe your question would go to the very first "shall"  
24 clause, which begins at line 3 of subsection (e), and that  
25 would -- in that counsel that is appointed under (a)(2)

1 "shall represent the defendant in subsequent stages of  
2 judicial proceedings." And for the (a)(2) lawyer, the  
3 lawyer appointed under subsection (a)(2), that stage of  
4 proceeding that the representation begins with is described  
5 in (e) as "all available post-conviction process." And  
6 then it goes on for the remainder of the statute, together  
7 with the applications --

8 CHIEF JUSTICE ROBERTS: I'm sorry. Where are  
9 you reading, the first part, "available post-conviction  
10 process"?

11 MS. CHAVIS: Right. It begins at the "and,"  
12 which is eight lines down or about seven lines up, right in  
13 the middle of subsection (e).

14 CHIEF JUSTICE ROBERTS: Well, that doesn't  
15 modify what comes before it, does it? New trial, appeals?  
16 In other words, if -- if at the end of the habeas  
17 proceeding, things start all over, then presumably the  
18 appointed counsel represents the defendant throughout all  
19 those new proceedings?

20 MS. CHAVIS: No, Your Honor. With respect to  
21 the habeas attorney, the representation would begin with  
22 the "all available post-conviction process." If that  
23 attorney did obtain relief for the defendant or the Federal  
24 court granted relief for the capital defendant and that  
25 case were to return to State court, then of course we're

1 not talking about continued representation of the Federal  
2 habeas counsel because --

3 JUSTICE SCALIA: Why not? Why not?

4 MS. CHAVIS: Well, because, Your Honor --

5 JUSTICE SCALIA: That would be a subsequent --  
6 a subsequent stage of available judicial proceedings, his  
7 retrial in State courts.

8 MS. CHAVIS: Your Honor, the retrial and the  
9 trial proceedings that's referred to in subsection (e),  
10 those are duties of counsel appointed under (a)(1) of the  
11 statute, which is on page 1a, which would be trial counsel  
12 for those defendants charged with a Federal capital crime.

13 We would not -- a habeas lawyer would not  
14 participate in a retrial because -- for a few reasons. The  
15 first reason is because of the statute and the structure of  
16 the statute, which sets out the ordinary course of the  
17 capital case, so that there's nothing subsequent, no duties  
18 listed here that are a subsequent stage for habeas counsel.  
19 Also --

20 JUSTICE ALITO: I don't see how that's possibly  
21 a plain reading of the statutory language. You started out  
22 by saying you're relying on the plain meaning of the  
23 statutory language.

24 MS. CHAVIS: Yes, Your Honor.

25 JUSTICE ALITO: How do you get that out of the

1 statutory language of (e)?

2 MS. CHAVIS: It's in context with the whole of  
3 the statute. With respect, we look at (a)(1) and (a)(2)  
4 for that context for subsection (e). So subsection --

5 JUSTICE ALITO: So now you're out of the plain  
6 language of (e), and you're looking at the context of the  
7 whole statute.

8 MS. CHAVIS: Your Honor, I would submit that  
9 looking at the context of the whole statute is in  
10 accordance with also looking at the plain language used by  
11 Congress. And we do look at -- at the statute as a whole  
12 in order to inform our definition --

13 JUSTICE ALITO: What's your answer to the plain  
14 language of (e)? That was your prime -- that was the  
15 argument you started out with, that this fell under the  
16 plain language of (e).

17 MS. CHAVIS: Yes.

18 JUSTICE ALITO: How do you explain under the  
19 plain language of (e) why -- how you avoid the result that  
20 once habeas counsel is appointed in Federal court, the  
21 counsel has to appear in all of these other proceedings?

22 MS. CHAVIS: Yes --

23 JUSTICE ALITO: New trial in State court, et  
24 cetera.

25 MS. CHAVIS: "In all subsequent stages of

1 judicial proceedings" is exactly what subsection (e)  
2 states.

3 JUSTICE GINSBURG: But you are including then.  
4 Suppose that the result of the Federal habeas is that the  
5 State -- relief is granted unless the State retries the  
6 defendant in X number of days. And your reading, I think  
7 that the -- the appointed counsel under the Federal habeas  
8 would be responsible for representation in all available  
9 post-conviction process, and that would be an available  
10 post-conviction process.

11 MS. CHAVIS: Respectfully, Your Honor, the  
12 State retrial would be an entirely new case that would not  
13 fall under "all available post-conviction process."

14 JUSTICE GINSBURG: What would? Then, tell me  
15 what would fall under "all available post-conviction  
16 process" in -- in addition to clemency and competency  
17 proceedings.

18 MS. CHAVIS: Your Honor, "all available post-  
19 conviction process" I submit would be defined by the 2254  
20 or 2255 proceeding. Now, the -- together with appropriate  
21 applications for stays and appropriate motions and  
22 procedures. Now, that is a part of this first clause in  
23 subsection (e) that, under appropriate circumstances, may  
24 permit the federally appointed lawyer to return to State  
25 court if deemed appropriate by the Federal court. If the

1 Federal court found that an issue in the Federal habeas  
2 case needed to be exhausted in order to aid that judge's  
3 determination of the habeas petition, then it would be  
4 appropriate for the Federal judge to say: Counsel, please  
5 return to State court and exhaust this issue. However --

6 JUSTICE KENNEDY: Well, but he couldn't find  
7 it's inappropriate, could he? If you're again talking  
8 about the plain language of the statute, I don't see  
9 there's much room for the district judge to say: Well,  
10 now, I'm not going to say that you have to participate in  
11 further State post-conviction proceedings. This is  
12 unexhausted claim. It seems to me under your reading of  
13 the statute, the appointed counsel, say, in an unexhausted  
14 claim instance, would have to, under the statute, represent  
15 the defendant in further State collateral post-conviction  
16 proceedings.

17 MS. CHAVIS: Well, Your Honor, again the key  
18 here is that Congress used the word "appropriate," and  
19 that's an easy legal standard for the Federal judge to  
20 determine. There -- the statute does not say State post-  
21 conviction process or a State post-conviction case. It  
22 indicates appropriate motion or procedures. So that would  
23 be for the Federal judge --

24 CHIEF JUSTICE ROBERTS: I'm sorry. I'm sure  
25 I'm missing something here, because the statute does say

1 "all available post-conviction process."

2 MS. CHAVIS: Yes, Your Honor, and -- and I  
3 would submit that that is a reference to -- if we look at  
4 (a)(2) -- excuse me -- where it says, post -- the very  
5 first line, post-conviction proceeding under 2254 and '55  
6 -- so that describes -- all available post-conviction  
7 process, describes the 2254 or 2255 proceedings.

8 CHIEF JUSTICE ROBERTS: So you're just saying a  
9 new trial because you succeed on habeas is not post-  
10 conviction process?

11 MS. CHAVIS: No, Your Honor, not just by a  
12 plain definition of that.

13 CHIEF JUSTICE ROBERTS: Is it -- well then, if  
14 you look up earlier in the statute, it says, "shall  
15 represent the defendant throughout every subsequent stage  
16 of available judicial proceedings."

17 MS. CHAVIS: Yes.

18 CHIEF JUSTICE ROBERTS: Why -- why doesn't it  
19 fall under that?

20 MS. CHAVIS: Yes. Well, that's the key,  
21 "subsequent stage." And -- and a retrial would not be a  
22 subsequent stage. That would be an entirely new case back  
23 in the State court.

24 And there's also a second reason why Federal  
25 habeas counsel would not represent the defendant in any

1 retrial or resentencing, and that would be because --

2 JUSTICE ALITO: Why would it not be a  
3 subsequent stage of available judicial proceedings?

4 MS. CHAVIS: I'm sorry, Your Honor?

5 JUSTICE ALITO: Why is it not a subsequent  
6 stage of available judicial proceedings?

7 MS. CHAVIS: Well, under the -- the structure  
8 of the statute, there's nothing subsequent --

9 JUSTICE ALITO: Without using the words  
10 "structure of the statute," because there I think you get  
11 into lots of trouble -- and you started out by saying the  
12 plain language of (e), and I'm still struggling to  
13 understand what you're doing with the plain language of  
14 (e).

15 MS. CHAVIS: Okay. Well, there is another  
16 reason why Federal habeas counsel would not do a State  
17 retrial, and that's because under (a)(2), the -- the clause  
18 or the part of the statute that does provide for the  
19 appointment of counsel, if there is already counsel  
20 available, then that appointment clause would not be  
21 triggered.

22 If we look at (a)(2), which is on page 1a, the  
23 trigger for the appointment of counsel is that we have an  
24 indigent defendant. It says a defendant who is -- this is  
25 four lines down -- a defendant who is or becomes

1 financially unable to obtain adequate representation shall  
2 be appointed a lawyer.

3 In a retrial, the State must provide trial  
4 counsel --

5 CHIEF JUSTICE ROBERTS: No, no, no. That  
6 doesn't -- that doesn't work. The language you just quoted  
7 is simply to say when you get somebody appointed.

8 MS. CHAVIS: Yes.

9 CHIEF JUSTICE ROBERTS: You're financially  
10 unable, so you get somebody appointed. Then you go back  
11 and say that person shall represent you through every  
12 subsequent stage.

13 MS. CHAVIS: Yes --

14 CHIEF JUSTICE ROBERTS: It doesn't say that,  
15 oh, if you suddenly get somebody else appointed, you know,  
16 then you can -- then he doesn't have that obligation.

17 MS. CHAVIS: Your Honor, I would submit that --  
18 that these circumstances that trigger the appointment do  
19 carry through the appointment process in that even if you  
20 look at the language used by Congress, it says "any  
21 defendant who is or becomes financially unable." So  
22 Congress was anticipating --

23 JUSTICE ALITO: What if the remand -- what if  
24 the remand is for State post-conviction review, and there  
25 is no attorney available under State law for State post-

1 conviction review?

2 MS. CHAVIS: Yes, Your Honor, then we would be  
3 looking again at the first clause of subsection (e), and we  
4 would be looking at the language used by Congress, "any  
5 appropriate motions and procedures."

6 And again, appropriateness is a easy legal  
7 standard applied by the courts. The Federal judge  
8 overseeing the case could determine whether -- whether  
9 returning for that State post-conviction process is  
10 appropriate. It would be just like a Federal judge  
11 determining that in order to aid its decision-making  
12 process, it needs to certify a question back to the State  
13 courts.

14 JUSTICE SCALIA: Excuse me. I have lost you.  
15 Where -- where is the "appropriate"? I don't see any  
16 "appropriate."

17 MS. CHAVIS: Your Honor, "appropriate" --

18 JUSTICE SCALIA: It says, "shall represent the  
19 defendant throughout every" -- "every subsequent stage of  
20 available judicial proceedings."

21 MS. CHAVIS: Yes, and then it describes those  
22 stages.

23 JUSTICE SCALIA: Yes, right.

24 MS. CHAVIS: And then we are at four lines up  
25 from the bottom.

1 JUSTICE SCALIA: Right.

2 MS. CHAVIS: I'm sorry. Five lines up from the  
3 bottom.

4 JUSTICE SCALIA: Well, this is "and all" --

5 MS. CHAVIS: "And other appropriate" --

6 JUSTICE SCALIA: Right.

7 MS. CHAVIS: -- motions."

8 JUSTICE SCALIA: "Other appropriate," but as  
9 far as what's covered by the first clause is concerned,  
10 "appropriate" doesn't apply to that.

11 MS. CHAVIS: Your Honor --

12 JUSTICE SCALIA: "Represent throughout every  
13 subsequent stage of available proceedings, including  
14 pretrial, trial, sentencing, motions for a new trial,  
15 appeals, applications for writ of certiorari." There is no  
16 "appropriate" with any of that.

17 MS. CHAVIS: Yes, sir. Well, Your Honor, that  
18 is --

19 JUSTICE SCALIA: And shall also represent -  
20 "and other appropriate motions and procedures," but that  
21 doesn't cover the earlier stuff.

22 MS. CHAVIS: Your Honor, if we were looking at  
23 the possibility of exhausting a claim in State court, then  
24 we wouldn't be -- none of this first part of -- of (e)  
25 would apply. That wouldn't be a pretrial proceeding. That

1 wouldn't be a trial. That wouldn't be a sentencing. What  
2 that would come under would be after "and all available  
3 post-conviction process," that would be described as "other  
4 appropriate motions and procedures."

5 JUSTICE KENNEDY: But you -- you would  
6 interpret "all available post-conviction process" as  
7 meaning Federal?

8 MS. CHAVIS: The habeas proceeding. Yes, Your  
9 Honor.

10 CHIEF JUSTICE ROBERTS: Well, then why don't we  
11 interpret the clemency provision the same way, as being  
12 limited to Federal?

13 MS. CHAVIS: Well, because, Your Honor,  
14 Congress doesn't use the word "Federal" here, and if we  
15 were to interpret it as --

16 CHIEF JUSTICE ROBERTS: Within the use of  
17 "Federal," what we were just talking about.

18 MS. CHAVIS: Well, that's correct, Your Honor;  
19 however, when we look at post-conviction process in (e), we  
20 have the context of (a)(2), that talks about post-  
21 conviction proceeding under section 2254 and 2255.

22 CHIEF JUSTICE ROBERTS: I don't know why you  
23 just didn't take the position and say, yes, it applies to  
24 all these provisions. That doesn't -- that doesn't seem to  
25 me a -- to doom your position at all. Once you have

1 somebody have appointed who helps you on the Federal habeas  
2 -- presumably they do a lot of work, they get up to speed  
3 on everything -- they ought to represent you through the  
4 next stage of available proceedings.

5 MS. CHAVIS: Well, Your Honor -- and that's  
6 true. The interpretation of this first clause of  
7 subsection (e) doesn't impact the second -- the  
8 interpretation of the second clause. It says specifically  
9 counsel shall represent the defendant in those clemency  
10 proceedings that are available to him.

11 CHIEF JUSTICE ROBERTS: Well, you see why -- I  
12 mean, if you say, well, the first part is implicitly only  
13 Federal, that makes it very hard for you to argue that the  
14 second part is not also implicitly only Federal.

15 MS. CHAVIS: Respectfully, Your Honor, I would  
16 disagree, and -- and that's because the words are  
17 different, used by Congress. Congress is very explicit in  
18 stating other clemency as may be available to the  
19 defendant. There's no way that that can be interpreted as  
20 Federal clemency. There is no other Federal clemency;  
21 there's only executive --

22 JUSTICE KENNEDY: I just want to make clear  
23 what your position is. Federal determination on habeas  
24 corpus, that -- that there are unexhausted claims ordered  
25 returned to the State court. Is the appointed counsel

1 required under the statute to represent the defendant in  
2 the State court, further post-conviction proceedings?

3 MS. CHAVIS: No, and for two reasons.

4 JUSTICE KENNEDY: Do you have to take that  
5 position? But that is your --

6 MS. CHAVIS: Your Honor, I don't have to.

7 JUSTICE KENNEDY: But that is your position.

8 MS. CHAVIS: Your Honor, that is my position.  
9 However, of course, again, the interpretation of this first  
10 part of this statute is separate from an interpretation of  
11 the clemency clause.

12 But for two reasons the answer would be no to  
13 that question, because the statute -- number one, (e) does  
14 not specifically set that out as a subsequent stage of  
15 judicial proceedings. Okay? What it does instead is it  
16 states appropriate motions or procedures. So it would be  
17 discretionary. On a case-by-case basis, the district judge  
18 could determine whether he believed it was appropriate,  
19 non-abusive, to return to State court to exhaust a claim.

20 JUSTICE SCALIA: Well, but -- but, you know, it  
21 -- it mentions trial proceedings, trial, sentencing,  
22 motions for new trial, appeals, applications for writ of  
23 cert. And then in the next clause, it just says, "and all  
24 available post-conviction process." Now, you -- you would  
25 acknowledge that -- that going back to exhaust claims that

1 hadn't been exhausted before the State courts would be  
2 post-conviction process or not?

3 MS. CHAVIS: Not with respect to subsection  
4 (e). And ordinarily an exhaustion proceeding is not a  
5 subsequent stage. Ordinarily, if that's what the -- the  
6 statute contemplates, is the ordinary course --

7 JUSTICE SCALIA: "Subsequent stage" does not  
8 apply to this clause. I'm reading the clause "and all  
9 available post-conviction process."

10 MS. CHAVIS: Yes, Your Honor.

11 JUSTICE SCALIA: Okay?

12 MS. CHAVIS: The very beginning of (e)  
13 indicates "each attorney so appointed shall represent the  
14 defendant throughout every subsequent stage of available  
15 judicial proceedings, including" -- and then it recites all  
16 of those stages.

17 JUSTICE SCALIA: Right.

18 JUSTICE STEVENS: But if it did not have the  
19 "including" phrase, if it just stopped there, would it then  
20 include proceedings necessary to exhaust the State  
21 remedies? I'm a little unclear why you think it does not  
22 include necessary -- proceedings necessary to exhaust State  
23 remedies.

24 MS. CHAVIS: I'm sorry, Your Honor, if I wasn't  
25 clear. It may include. It does not require. It may

1 include going back to State court to exhaust.

2 JUSTICE STEVENS: But why doesn't the word  
3 "shall" require it?

4 MS. CHAVIS: Because, Your Honor, we're -- when  
5 we're talking about an exhaustion proceeding or returning  
6 to State court, it can only fit under this part of (e) that  
7 says that it would be an appropriate motion or procedure.  
8 That's the only thing that you could define a State  
9 proceeding under in this -- in this statute.

10 CHIEF JUSTICE ROBERTS: If you step back and  
11 look at the structure, it seems to me unusual that your  
12 interpretation would be correct. It seems to me that it  
13 would be more likely that Congress wanted this counsel to  
14 continue on in State proceedings, trials.

15 The clemency thing seems a little bit more  
16 removed. It's a different -- different argument -- you  
17 know, we're guilty, but show us mercy -- than what may well  
18 be the same sort of argument on the subsequent State  
19 proceeding as was raised in the Federal habeas. I mean, if  
20 -- if I were writing this, I would want them to continue in  
21 the subsequent State proceedings before I'd want them to  
22 continue -- before I'd want to have them represent the  
23 defendant in clemency.

24 MS. CHAVIS: And I understand that, Your Honor,  
25 but I think also, if we look at the representation as it

1 does occur in the real world, we have the AEDPA, we have  
2 this Court's decisions that -- that structure the -- the  
3 capital litigation so that State court exhaustion normally  
4 comes before the Federal habeas process.

5 But, again, there are these two separate  
6 clauses. The first goes to judicial proceedings; the  
7 second clause goes to -- to nonjudicial proceedings,  
8 including competency, because this Court in *Ford v.*  
9 *Wainwright* indicated that we need not have a judicial  
10 proceeding, a judicial determination of competency. So  
11 Congress has separated out competency and separated out  
12 clemency, knowing that -- that those are stages of a  
13 capital case that come at the very end of the Federal  
14 habeas, that the Federal habeas counsel would be in the  
15 best position to represent that defendant at that point --

16 JUSTICE GINSBURG: So let's go back to the  
17 earlier question. So what else fits under "all available  
18 post-conviction process" other than competency and  
19 clemency? What else?

20 MS. CHAVIS: Your Honor, competency and  
21 clemency are in their own "shall" clause, mandatory clause,  
22 in and of themselves. They're not included in the -- the  
23 post-conviction process.

24 JUSTICE GINSBURG: Right. So but what -- what  
25 would be included?

1 MS. CHAVIS: The post-conviction process would  
2 refer to anything in the 2254, the 2255. For example, it  
3 -- it could be the discovery motions; it could be -- it  
4 could be motions in aid of an evidentiary hearing; it could  
5 be motions in aid of an appeal. So that -- that's a  
6 descriptor.

7 JUSTICE ALITO: But only things in Federal  
8 court.

9 MS. CHAVIS: Your Honor, that is it my reading  
10 of -- of "all available post-conviction process," as  
11 referring to the 2254, 2255.

12 JUSTICE STEVENS: Does that seem reasonable  
13 that Congress would have -- suppose you had a real  
14 complicated case with five or six issues in it, and they  
15 find out one issue is not exhausted. The capital case has  
16 been around for 2 or 3 years. Did Congress think, well,  
17 you've got to go on your own when you go back to the State  
18 court now and exhaust that one claim?

19 MS. CHAVIS: No, Your Honor. I don't think  
20 Congress contemplated that, and that's why I think they  
21 included this language "appropriate motions and procedures"  
22 to encompass a return to State court where --

23 JUSTICE STEVENS: Now, where is that language  
24 again, "appropriate motions and" --

25 MS. CHAVIS: It's four lines up from the -- or

1 five lines up from the -- the bottom, the end of that line  
2 -- "appropriate" --

3 JUSTICE STEVENS: No, but that's in the next --  
4 next clause.

5 MS. CHAVIS: That's in the first "subsequent  
6 stage" clause.

7 JUSTICE STEVENS: But why does -- why does that  
8 limit the interpretation that -- of the words "subsequent  
9 stage" -- "throughout every subsequent stage of available  
10 judicial proceedings"? And isn't the State collateral  
11 proceeding which is necessary to exhaust a remedy fall  
12 right within that language?

13 MS. CHAVIS: Your Honor, it may.

14 JUSTICE STEVENS: What?

15 MS. CHAVIS: It may. However, in our -- my  
16 reading of the statute, when we look at the subsequent  
17 stage, exhaustion ordinarily comes before Federal habeas.  
18 It would be, you know, an unordinary situation where you  
19 would have to go back and exhaust. But I believe that the  
20 statute contemplates that with "appropriate motions and  
21 procedures."

22 But of course, Congress could have contemplated  
23 that the Federal lawyer continue to represent the defendant  
24 in exhaustion proceedings. Back when the statute was --  
25 was created, Congress was looking at the States and looking

1 at the fact that States were not providing counsel for  
2 capital defendants in these cases. And Congress --

3 JUSTICE ALITO: But I thought it was your  
4 position that it didn't apply in that situation.

5 MS. CHAVIS: I'm sorry, Your Honor?

6 JUSTICE ALITO: I thought it was your position  
7 that it did not apply in that situation.

8 MS. CHAVIS: That it wasn't mandatory. It  
9 doesn't require. What it says is appropriate --

10 JUSTICE ALITO: So you think it's  
11 discretionary.

12 MS. CHAVIS: Yes.

13 JUSTICE ALITO: The court can -- as a matter of  
14 discretion, can order the -- the counsel who's appointed to  
15 represent the -- the petitioner in the habeas to go back  
16 and handle the exhaustion of a claim in State court.

17 MS. CHAVIS: Absolutely, Your Honor. Just like  
18 this Court in *Rhines v. Weber* said, it's discretionary as  
19 to whether this -- as to whether the Federal judge is going  
20 to determine that we are going to hold this case in  
21 abeyance. We're going to stay this case while we -- while  
22 counsel goes back to exhaust some claims.

23 JUSTICE SCALIA: Ms. Chavis, what do you do  
24 about(a)(1)? That also does not -- is not limited by its  
25 terms --

1 MS. CHAVIS: Correct.

2 JUSTICE SCALIA: -- to Federal prisoners.  
3 Would you argue that -- it says, "in every criminal action  
4 in which a defendant is charged with a crime which may be  
5 punishable by death."

6 MS. CHAVIS: It does, Your Honor.

7 JUSTICE SCALIA: "A defendant who is or becomes  
8 financially" -- so even in the original State trial, he's  
9 entitled to a Federal defender. Is that right?

10 MS. CHAVIS: No, Your Honor. For --

11 JUSTICE SCALIA: Why not? It doesn't -- it  
12 isn't limited to Federal trials.

13 MS. CHAVIS: Well, Your Honor, in this case, in  
14 (a)(1), we would -- we -- because (a)(1) sets out the  
15 factors that trigger the appointment of counsel, we have to  
16 have a defendant who's charged with a capital crime, who's  
17 indigent, and who otherwise doesn't have a lawyer.

18 JUSTICE SCALIA: Right. It says he "shall be  
19 entitled to the appointment of one or more attorneys."

20 MS. CHAVIS: That's correct. But, Your Honor,  
21 for a State capital trial, for a State capital direct  
22 appeal, the States do provide counsel, and Congress would  
23 know that that States would have to provide counsel  
24 under --

25 JUSTICE SCALIA: So what? I mean, it -- it

1 still is -- is unqualified. And -- and part of your  
2 argument -- it's not your only argument, but a large part  
3 of your argument is since it is unqualified in -- in (e),  
4 the last clause, it has to include State. Well, you could  
5 say the same about (a)(1).

6 MS. CHAVIS: Your Honor, certainly last clause  
7 of (e) is unqualified and unambiguous; however, (a)(1),  
8 there is a qualifier in that it says "unable to obtain  
9 adequate representation."

10 JUSTICE SCALIA: Oh, but -- but --

11 MS. CHAVIS: If -- if a State provides  
12 representation, then you don't have a federally appointed  
13 counsel.

14 JUSTICE SCALIA: Oh, so if the State doesn't  
15 provide counsel, the Federal Government will provide it,  
16 and the States can -- can recede from their obligation to  
17 provide counsel. Right?

18 MS. CHAVIS: Your Honor, I think this Court  
19 would have problems under Gideon --

20 JUSTICE SCALIA: Why?

21 MS. CHAVIS: -- if the States do not --

22 JUSTICE SCALIA: Why? So long as he has  
23 counsel, we don't care who pays for it.

24 MS. CHAVIS: Well --

25 CHIEF JUSTICE ROBERTS: It says "adequate

1 representation." And then later on it says the lawyers we  
2 appoint here have to have 5 years' experience, 3 years'  
3 experience in felony trials. I think that's a lot better  
4 than most of the attorneys who are going to be appointed  
5 under the State system. So I would say, look, this statute  
6 itself recognizes that this person you have appointed under  
7 the State system is not adequate. They say you've got to  
8 have 5 years/3 years. So I want one of those.

9 MS. CHAVIS: Well, Your Honor, again, the  
10 answer to that question under (a)(1) is that you would not  
11 get federally appointed counsel when you have counsel  
12 available to you otherwise. And -- and that simply is the  
13 fact that the -- the States do provide for counsel.

14 JUSTICE SCALIA: What -- what about expert  
15 services? I think most States don't provide for that.

16 MS. CHAVIS: Well, Your Honor --

17 JUSTICE SCALIA: The Federal Government will  
18 provide expert -- compensation for the use of experts when  
19 the States won't?

20 MS. CHAVIS: That -- that is --

21 JUSTICE SCALIA: Under (a)(1).

22 MS. CHAVIS: That is part of (a)(1), and it's  
23 part of (a)(2). However, you still have to have -- you  
24 still have to have those -- those three circumstances  
25 present.

1 JUSTICE SCALIA: Sure.

2 MS. CHAVIS: And I believe that that -- that  
3 still would not -- the States, if they provide any sort of  
4 resources at all, and if they provide a lawyer, then  
5 certainly the trigger for appointment isn't -- isn't  
6 available under (a)(1).

7 JUSTICE SCALIA: It seems -- it seems to me,  
8 counsel, that the mere fact that it doesn't mention Federal  
9 explicitly is -- is not a very strong argument unless  
10 you're going to take the position that even (a)(1) applies  
11 to Federal and State.

12 And -- and really what you're -- the only  
13 strong string to your bow is that it says "executive or  
14 other clemency." And -- and there -- there seems to be no  
15 Federal clemency except executive clemency, I guess. I  
16 guess.

17 Can Congress declare something that has been a  
18 crime no longer a crime and set the guy loose? I don't  
19 know. Is that clemency?

20 MS. CHAVIS: Your Honor, it's the Constitution  
21 that determines the -- the Federal authority for clemency.  
22 So Congress cannot effect that. The -- the only type of  
23 clemency --

24 JUSTICE SCALIA: Well, it says -- it says the  
25 President can. It doesn't say Congress can't. Does it say

1 Congress can't?

2 MS. CHAVIS: No, Your Honor, it does not say  
3 that.

4 JUSTICE SCALIA: I didn't think so.

5 CHIEF JUSTICE ROBERTS: You put a lot of weight  
6 on -- I mean, the -- the problem arises because Congress  
7 did not specify whether it was limited to Federal or State.  
8 And yet you're saying they were -- what they clearly meant  
9 to do when they said "executive or other clemency" was to  
10 signal implicitly that it must cover State because there's  
11 no other kind of clemency. It's -- it's kind of a real  
12 round-about way to make that point, isn't it?

13 MS. CHAVIS: Well, Your Honor, if --

14 CHIEF JUSTICE ROBERTS: Somebody is not going  
15 to sit there and say, oh, we put "other" in because we know  
16 that in the Federal system it's only executive, but in the  
17 State system there might be others.

18 MS. CHAVIS: Your Honor --

19 CHIEF JUSTICE ROBERTS: That guy wouldn't  
20 suddenly say, well, maybe we should say this is meant to  
21 cover the State system.

22 MS. CHAVIS: Your Honor, these are the words  
23 that Congress used. They know that the -- that the States  
24 provide for forms of clemency other than executive  
25 clemency. We know that -- that Congress specifically

1 stated they wanted the defendant to be represented in that  
2 clemency proceeding that's available to him. And in -- in  
3 these cases, like this 2254 case --

4 JUSTICE SCALIA: And we know that they read  
5 this text carefully before they voted for it. Right?

6 MS. CHAVIS: Yes, Your Honor.

7 JUSTICE SCALIA: We don't know any of that.

8 MS. CHAVIS: No, Your Honor --

9 JUSTICE SCALIA: These are all assumptions.  
10 That's all.

11 MS. CHAVIS: The -- the language of the statute  
12 is the best intent of Congress. Yes, Your Honor.

13 If I have any time remaining, I'd like to  
14 reserve it for rebuttal.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
16 Mr. Jay.

17 ORAL ARGUMENT OF WILLIAM M. JAY

18 ON BEHALF OF THE UNITED STATES,

19 AS AMICUS CURIAE,

20 IN SUPPORT OF THE JUDGMENT BELOW

21 MR. JAY: Mr. Chief Justice, and may it please  
22 the Court:

23 Section 3599 authorizes federally funded  
24 representation only in the three categories of proceedings  
25 specified in subsection (e). At least three distinct

1 aspects of the statute's text and structure show that the  
2 only proceedings included are Federal proceedings before a  
3 Federal officer.

4 First, as Justice Scalia pointed out during the  
5 previous argument, the word "Federal" does not appear  
6 anywhere in the statute, including in (a)(1). Several other  
7 terms in the statute, including the phrase "every criminal  
8 proceeding," plainly refer to Federal proceedings and  
9 Federal proceedings only. Congress plainly saw no need to  
10 include the modifier "Federal" to make that limitation  
11 manifest.

12 Second, the statute requires that appointed  
13 attorneys have Federal qualifications based on experience  
14 practicing in Federal court, and it requires that Federal  
15 judges exercise significant oversight of the attorney's  
16 representation. Both these Federal requirements for  
17 qualifications and Federal requirements for oversight make  
18 sense only if the proceedings that the -- that the  
19 qualifications and oversight pertain to are Federal ones.

20 Third, if Petitioner were right that --

21 JUSTICE STEVENS: May I just make sure I  
22 understand your position? Does (a)(2) authorize a Federal  
23 judge to appoint counsel for a -- a person on death row  
24 under a State death conviction under 2254 or 2255?

25 MR. JAY: For that -- for that habeas -- for

1 that person's Federal habeas petition --

2 JUSTICE STEVENS: Yes.

3 MR. JAY: -- it requires the appointment of --  
4 of a Federal habeas attorney qualified to practice in  
5 Federal court.

6 JUSTICE STEVENS: So he -- he is entitled to a  
7 lawyer in the -- in the Federal collateral review of a  
8 State death penalty case?

9 MR. JAY: In the Federal review, that's  
10 correct, Justice Stevens.

11 JUSTICE STEVENS: And what in the statute  
12 limits the scope of that review?

13 MR. JAY: Well, subsection (e) limits the scope  
14 of that review, Justice Stevens. It specifies the types of  
15 proceedings that the attorney is -- is permitted to --  
16 permitted and, indeed, required --

17 JUSTICE STEVENS: But -- but you agree that (e)  
18 applies to State prisoners.

19 MR. JAY: We agree that (e) sets out the scope  
20 of services to be provided by the appointed attorney during  
21 the 2254 proceeding.

22 JUSTICE STEVENS: In the -- for a State  
23 prisoner in a Federal collateral proceeding?

24 MR. JAY: We agree -- we agree with that, Your  
25 Honor, because we think that term "proceedings" each

1 time --

2 JUSTICE STEVENS: And -- and what, then, in  
3 that proceeding does the word "clemency" refer to? Is that  
4 clemency by the President of the United States?

5 MR. JAY: We think, Your Honor, that a habeas  
6 petitioner who's coming to Federal court under section 2254  
7 has available to him no proceedings for clemency because  
8 the term "proceedings" --

9 JUSTICE STEVENS: Even though the statute says  
10 so in so many words.

11 MR. JAY: Well, it's -- the menu of services,  
12 if you will, set out in subsection (e) applies both to  
13 lawyers who are appointed under (a)(1) who are doing work  
14 in Federal court for Federal defendants facing a Federal  
15 capital charge and also for attorneys appointed under  
16 (a)(2) who are representing habeas petitioners under  
17 section 2254.

18 Because the term "proceedings" -- it is our  
19 position -- each time it appears in -- in subsection (e)  
20 refers to Federal proceedings before a Federal officer. A  
21 2254 petitioner has available to him no proceedings for  
22 executive or other clemency. That person can obtain the  
23 services that are -- that are available to him under  
24 subsection (e), which includes representation throughout  
25 the 2254 proceedings.

1 JUSTICE STEVENS: Now, supposing, on the eve of  
2 execution, he wanted to apply for a stay of execution, he'd  
3 be entitled to representation before a Federal judge.  
4 Right?

5 MR. JAY: That's correct, Your Honor.

6 JUSTICE STEVENS: But what if the Federal judge  
7 says, you have to -- under our practice you can't get a  
8 Federal stay without first exhausting your attempt to get a  
9 State stay. Could he represent the defendant applying for  
10 a -- in the State court for a stay of execution in that  
11 situation?

12 MR. JAY: Subsection (e) would not authorize  
13 that, Your Honor.

14 JUSTICE STEVENS: So he'd have to get a  
15 separate counsel to -- to go to the State court because --  
16 even though the Federal judge required him as a normal  
17 matter of practice to exhaust the State remedy under the  
18 very limited situation of a stay on the eve of execution.

19 MR. JAY: Well, Your Honor, State courts also  
20 appoint counsel.

21 JUSTICE STEVENS: Well, I understand that.

22 MR. JAY: There's nothing --

23 JUSTICE STEVENS: But he would have no right to  
24 have his Federal lawyer get paid for doing that work?

25 MR. JAY: Would not get paid by the Federal

1 Government for litigating a matter in State court that may  
2 have no connection to Federal law.

3 JUSTICE STEVENS: For litigating that -- just  
4 for the -- this, for the stay application on the eve of  
5 execution?

6 MR. JAY: Well, Your Honor, I -- it would not  
7 be a Federal judicial proceeding, and, therefore, it would  
8 not be covered --

9 JUSTICE STEVENS: Oh, I understand.

10 MR. JAY: -- by subsection (a)(2).

11 JUSTICE STEVENS: But it comes in with the --  
12 the general language of "other appropriate motions and  
13 procedures," and so forth. That's got to be tailored back  
14 to mean other appropriate motions and procedures in a  
15 Federal tribunal.

16 MR. JAY: We -- we think that the Federal  
17 limitation applies throughout the text of 3599.

18 JUSTICE STEVENS: You think that's perfectly  
19 clear from the text of the statute?

20 MR. JAY: I am sorry, Justice --

21 JUSTICE STEVENS: You think that's perfectly  
22 clear from the text of the statute?

23 MR. JAY: Well, Your Honor, I think that the  
24 Federal limitation is apparent from a number of aspects of  
25 the statute, including the fact that Congress didn't use

1 the "Federal" modifier anywhere else in the statute.

2 JUSTICE STEVENS: And it could have used the  
3 "Federal" modifier very easily just by inserting the word  
4 "Federal" at appropriate places.

5 MR. JAY: Well, if it had inserted the word  
6 "Federal" in some places and left it out in others, that  
7 might be probative intent -- probative evidence that  
8 Congress intended the -- the other instances to be Federal  
9 and State as well. But we don't have that here. We have  
10 -- we have terms that are clearly indicated to be Federal  
11 only in nature such as every criminal proceeding in (a)(1).

12 CHIEF JUSTICE ROBERTS: You don't doubt in the  
13 scenario Justice Stevens hypothesized that the Federal  
14 defender would, in fact, represent the person before the  
15 State court. You are in an emergency stay situation. He's  
16 -- he's allowed to go to Federal court. He does so. The  
17 Federal judge says, you got to go back to State court.  
18 There's 12 hours left. He's not going to say, you know,  
19 get another lawyer. He's going to represent the person  
20 before the State court. And I gather he can do that. He's  
21 just not going to get paid for that.

22 MR. JAY: I -- right -- subsection (e) doesn't  
23 bar the lawyer from doing that. And two points on that:  
24 There might be other sources of funding available; and  
25 indeed, the same lawyer who need not be a Federal defender

1 -- he may be a panel attorney appointed -- who's in private  
2 practice appointed from the district court's panel of  
3 available attorneys who meet the Federal qualifications.

4 CHIEF JUSTICE ROBERTS: So he presumably --

5 MR. JAY: He may be appointed as well.

6 CHIEF JUSTICE ROBERTS: -- is spending a huge  
7 amount of time and resources on this -- in the nature of  
8 these proceedings, and you want to go back and say, all  
9 right, on this day you spent 6 hours redoing your papers  
10 that were filed before the Federal judge to file them  
11 before the State judge, and you don't get paid the --  
12 whatever -- how -- what do CJA attorneys get paid these  
13 days?

14 MR. JAY: In capital cases for fiscal year  
15 2008, it's \$170 an hour.

16 CHIEF JUSTICE ROBERTS: So he goes back and  
17 says, look, you don't get that. You know, you get the  
18 \$15,000 you spent in the last 10 days on this, but you  
19 don't get the \$810. That -- does it seem reasonable to  
20 impose that burden on the public defender?

21 MR. JAY: Well, Your Honor --

22 CHIEF JUSTICE ROBERTS: Since you know as a  
23 practical matter, because of professional responsibility,  
24 that person is going to represent the defendant in the  
25 State court proceedings.

1           MR. JAY: Well, Your Honor, the limitations in  
2 subsection (e) are -- are there for a reason, and it's  
3 precisely because the State -- the State post-conviction  
4 process that would become available under Petitioner's  
5 reading of the statute is certainly not limited to a few  
6 hours spent on the eve of execution in State court. It  
7 potentially could include returning to State court for any  
8 form of post-conviction process at any time after the  
9 Federal habeas application is filed. Whether --

10           JUSTICE BREYER: Would we have to reach that  
11 question here?

12           I mean, I don't understand three things that  
13 you've said.

14           You've said that it says "Federal." I don't  
15 see any place it says "Federal." It doesn't use that word.

16           Then you say it doesn't say "Federal and  
17 State." In my copy it does say "Federal and State."

18           It talks about 2254 and 2255. So if I just  
19 read this in English, it says that once you appoint the  
20 person, and it's either State or Federal -- it's 2254 and  
21 2255 -- that person shall also represent the defendant in  
22 such competency proceedings and proceedings for executive  
23 or other clemency as may be available to the defendant.

24 Q.E.D. End of the case.

25           All right, now why isn't it?

1           MR. JAY: I think it isn't, Justice Breyer,  
2 because 2254 is not a reference to proceedings in State  
3 court. A 2254 proceeding is in Federal court. It involves  
4 Federal constitutional issues in a Federal constitutional  
5 challenge to the legitimacy of the --

6           JUSTICE BREYER: That's right. That's right.  
7 They're referring to people who are under State death  
8 penalty or Federal death penalty. And what it says is that  
9 they shall get a person to represent them in these later  
10 habeas proceedings. And then it adds that that person --  
11 and no point quoting it again. You heard what I just said.  
12 It adds that that person will represent them in clemency  
13 proceedings.

14           Now, is there any reason for thinking that  
15 Congress -- and contrary to some things mentioned, I  
16 believe that probably Congressman Conyers did read what he  
17 wrote. He certainly referred to it enough in speeches, and  
18 those speeches make very clear to me that that's what he  
19 had in mind, what it says. Now, other people can read it  
20 differently, but -- but I -- I mean, I've read it. I read  
21 the language. What's the answer?

22           JUSTICE SCALIA: I thought this was a Federal  
23 law. Is this a Conyers law? Is that what it is here?

24           JUSTICE BREYER: He happened to be the person  
25 who wrote it, and it's referred to in the Solicitor

1 General's brief. And on page 21 -- I took what you said, I  
2 went back and looked it up, just as you might have  
3 suggested I would by putting in the relevant citations.  
4 Okay?

5 So having looked it up, as implicitly you  
6 suggested, I think Conyers knew what he said. I think he  
7 did mean those words to say what it says, but you can  
8 convince me to the contrary. That's why I raise it.

9 MR. JAY: Well, I --

10 JUSTICE SCALIA: Did his colleagues know what  
11 he said?

12 JUSTICE BREYER: Yes, they did.

13 CHIEF JUSTICE ROBERTS: I'm sorry. Counsel,  
14 you lead.

15 (Laughter.)

16 CHIEF JUSTICE ROBERTS: We'll direct our  
17 questions to counsel.

18 JUSTICE BREYER: My experience in Congress is  
19 that the Members of Congress do know the kinds of things  
20 that they are voting on. Maybe others have different  
21 experiences.

22 MR. JAY: Well, Your Honor, let me answer your  
23 point about Congressman Conyers first because I think that  
24 the suggestion in Petitioner's brief is that Congressman  
25 Conyers was -- had misinterpreted the text of his own

1 amendment. And as we have shown, the text of the amendment  
2 proposed by Congressman Conyers in the House and the text  
3 of the amendment proposed by Senator Levin in the Senate  
4 using the -- using virtually the -- the identical language,  
5 each of them provided no funding for --

6 JUSTICE BREYER: I think you're wrong about  
7 that. The reason I think you're wrong about that is that  
8 that language to which you refer is language that  
9 Congressman Conyers himself introduced in response to a  
10 bill by Representative Gekas, and in Representative Gekas'  
11 bill he referred, just like this one, to both State  
12 defendants and to the Federal defendants. And the purpose  
13 of Conyers' amendment, which was to substitute for the  
14 Gekas amendment, was to extend, not to limit, what Gekas  
15 has done. And he introduced lots of information, all of  
16 which referred almost uniquely to State defendants.

17 That's then picked up in the Senate, and the  
18 Senate, which is Levin, is trying to do precisely what  
19 Conyers was trying to do in the House, which we know from  
20 the fact that he said it.

21 Now, I can't find anything in that legislative  
22 history that supports the statement that you made on page  
23 21, that this initially was meant to refer only to people  
24 under Federal sentence of death.

25 MR. JAY: Well, Your Honor, the text of

1 Congressman Conyers' amendment wiped out the Gekas  
2 amendment. It replaced subsections (q)(1) through (q)(4)  
3 of the Gekas amendment. Subsection (q)(4) is what you are  
4 referring to, referring to 2254 petitioners. Congressman  
5 Conyers replaced that with his -- with a lengthy piece of  
6 legislation that is the predecessor of what appears in the  
7 statute today, and it made no provision whatsoever for 2254  
8 petitioners, even those appearing in Federal court.

9           Now, your previous question to me, which I  
10 didn't get -- which I'd like to come back to, is about the  
11 2254 representation. When a State prisoner comes to  
12 Federal court raising a constitutional challenge to his  
13 conviction in a 2254 proceeding, there there's a direct  
14 Federal interest. You know, Federal rights are at stake,  
15 and it makes sense that Congress was providing counsel for  
16 the vindication of those Federal rights.

17           That is not so with the clemency proceedings  
18 before a State governor, which are a matter of grace, they  
19 don't turn on Federal issues, and they don't deal with an  
20 inmate under a Federal sentence of death.

21           CHIEF JUSTICE ROBERTS: What do you do with  
22 "other"? I mean, there is no "other" clemency for Federal  
23 defendants. Right? It's just executive clemency?

24           MR. JAY: We think, Your Honor, that the  
25 purpose of that phrase, which was added, as I -- as I tried

1 to explain in my previous answer, was added at a time when  
2 there was no -- there was no funding available for a 2254  
3 petitioner. We think the purpose of that language is to be  
4 as capacious as possible when a Federal defendant seeks  
5 clemency, and that proceeding -- recognizing that the  
6 proceedings for clemency in which counsel might be helpful  
7 might include proceedings that don't take place before the  
8 Chief Executive himself, and there are a couple of examples  
9 -- throughout history, Presidents have enlisted the  
10 assistance of various people, including individuals who  
11 don't work for the executive branch.

12 JUSTICE SOUTER: Well, I understand that, but  
13 it's still executive clemency.

14 MR. JAY: We agree, Your --

15 JUSTICE SOUTER: When -- when the -- when the  
16 clemency decision is made, it's not being made by these  
17 other people who are helping out the President. It's --  
18 it's being made by the executive.

19 MR. JAY: We don't disagree with that at all,  
20 Justice Souter, but we think that the phrase "or other" was  
21 simply Congress' attempt to make sure that proceedings  
22 before these other officers were --

23 JUSTICE SCALIA: Should the Constitution be  
24 amended, it would cover that. Right?

25 MR. JAY: Should the Constitution be amended to

1 permit -- to permit legislative clemency, I think that -- I  
2 think that that is right.

3           But at any rate, the phrase "or other," we  
4 don't think that it's a sub silentio or at least a very  
5 subtle way of indicating State clemency because, as we've  
6 pointed out in our brief, the existence of non-executive  
7 clemency in the States is -- in every State that has the  
8 death penalty, clemency is a matter -- is a decision made  
9 by the governor or his appointees or other executive  
10 officials.

11           JUSTICE STEVENS: Mr. Jay, would you comment on  
12 this general reaction I had to -- when I read the statute?  
13 I had the impression that most lawyers appointed under this  
14 statute would be to represent defendants in State execution  
15 cases, and there -- there are a few cases where they're  
16 Federal death penalty cases, but not very many across the  
17 whole spectrum. Am I right about that?

18           MR. JAY: In terms of the numbers of clients,  
19 yes, you are, Your Honor.

20           JUSTICE STEVENS: Yes. So the case is  
21 primarily dealing with the representation of State  
22 defendants in capital proceedings, and the number of cases  
23 in Federal proceedings where at the last minute there's a  
24 plea for executive clemency is very rare. And you think  
25 this particular provision we're debating here was really

1 intended just to take care of the rare case where a Federal  
2 defendant is on death row seeking executive clemency, and  
3 not even to consider all the cases in which -- in State --  
4 that originate in State trials, where there's a lot of  
5 applications for executive clemency. You think it was  
6 intended to focus on that very narrow category.

7 MR. JAY: Well, we think the entire statute is  
8 intended to focus on when -- when Federal rights and  
9 Federal interests are at stake in the administration of the  
10 death penalty. And in the clemency context, because  
11 clemency does not actually -- does not involve the  
12 vindication of a Federal right or a -- a constitutional  
13 right at all, that the number of instances where the  
14 clemency process actually involves such a Federal right  
15 is --

16 JUSTICE STEVENS: You say it --

17 MR. JAY: -- limited to the category --

18 JUSTICE STEVENS: There are occasionally  
19 Federal constitutional questions and sometimes arguments  
20 made in Federal clemency -- I mean, in State clemency  
21 proceedings and Federal clemency proceedings.

22 MR. JAY: There are sometimes such arguments  
23 made but there is no such thing as a Federal constitutional  
24 right to clemency, and indeed the governor or the  
25 President --

1 JUSTICE STEVENS: But there's arguably a  
2 Federal right, a constitutional right, to a fair proceeding  
3 in a clemency application.

4 MR. JAY: Well, there is a -- in a capital  
5 clemency proceeding, the Court has recognized a -- a  
6 limited due process right, but that is not the sort of  
7 right that would be vindicated in a -- in a habeas  
8 proceeding at all.

9 JUSTICE SCALIA: Well, Mr. Jay, I -- I assume  
10 that (a)(1), which provides for the appointment of counsel  
11 to conduct the trial in a -- in a capital case, would not  
12 have very much application either, would it?

13 MR. JAY: That's right, Your Honor; (a)(1)  
14 applies only in Federal proceedings.

15 JUSTICE SCALIA: Only in Federal capital cases,  
16 of which there are very, very few.

17 MR. JAY: That's correct, Your Honor. So many  
18 of the -- many of the provisions in (e), even on  
19 Petitioner's reading which places great reliance on the  
20 "subsequent stage" language, many of these provisions, such  
21 as pretrial proceedings, trial, sentencing, would apply  
22 only to the limited number of Federal death penalty  
23 defendants. We don't think that --

24 JUSTICE KENNEDY: Is the government's principal  
25 concern in this case the possibility, the potential,

1 assuming the Petitioner prevails, of appointment of counsel  
2 in State post-conviction collateral proceedings, i.e., when  
3 there are unexhausted claims? Apparently the Sixth Circuit  
4 en banc addressed this. And in your brief you indicate  
5 that there's a number of additional claims filed. Is -- is  
6 that the principal thrust of your concern, rather than  
7 clemency?

8 MR. JAY: It is the principal thrust of our  
9 concern. I think that's fair to say, Justice Kennedy. And  
10 that's because the term "proceedings," which appears three  
11 times in subsection (e), we think that either that that's  
12 limited to Federal proceedings each time it appears or it's  
13 not each time it appears. So --

14 JUSTICE KENNEDY: Do you think there's no way  
15 to interpret the statute so that it could include State  
16 clemency proceedings but only Federal post-conviction  
17 review proceedings in judicial -- before judicial  
18 tribunals?

19 MR. JAY: We don't see a way to have a Federal  
20 limitation before judicial proceedings and not have it  
21 before clemency proceedings.

22 JUSTICE SCALIA: Well, sure. You could -- you  
23 could put all your weight on the "other" -- "executive or  
24 other" -- and you could say that's the only provision where  
25 it's apparently clear from the text that -- that State

1 proceedings were included. Assuming you are wrong, that  
2 there are non-executive State clemency proceedings -- you  
3 are sure that there aren't?

4 MR. JAY: Well, our position, Your Honor, is  
5 that in every State with the death penalty, the clemency  
6 decision is made either by the -- in most cases, by the  
7 governor or by gubernatorial appointees or by other  
8 executive officials. And the Petitioner has suggested that  
9 gubernatorial appointees, for that purpose, might be  
10 "other." But, there is -- there are no -- we've been able  
11 to find no instances of, for example, legislative clemency  
12 in a capital case. That is limited.

13 There are constitutional provisions that the  
14 Tenth Circuit relied on to assert that there is such an  
15 institution of legislative clemency. That's limited to  
16 treason against the State, a noncapital felony or mostly  
17 noncapital felony that we -- we can't find a treason  
18 against the State prosecution since the 1940s.

19 JUSTICE SOUTER: Of course, it would have made  
20 sense for Congress to use "other" as a way of referring to  
21 the States simply because it would have been a matter of  
22 indifference to Congress whether a State process was  
23 executive or was other in some way, in effect just leaving  
24 the issue open as -- as an irrelevance.

25 MR. JAY: I think if your premise, Justice

1 Souter, were -- is right, that Congress intended to fund --  
2 fund proceedings on both levels, then I -- I suspect that  
3 that's right, that it would be a matter of indifference to  
4 Congress which form the State clemency process took. But  
5 we think that Congress intended to fund only those  
6 proceedings in which there are Federal rights or Federal  
7 interests at stake, and State clemency proceedings do not  
8 meet that qualification. And the --

9 JUSTICE SOUTER: Okay, but that -- that still  
10 leaves you with the question that the -- what the -- what  
11 the words "or other" can possibly refer to, given the  
12 present state of Federal law -- Federal constitutional law,  
13 unless they refer to State proceedings.

14 MR. JAY: Well, the phrase is -- the phrase is  
15 ambiguous. We've turned to legislative history to  
16 partially resolve that ambiguity, because, as -- as we have  
17 set out in our brief and I alluded to earlier, they were  
18 added -- they were added at a time when funding wasn't  
19 contemplated for 2254 proceedings at all.

20 But even if that -- even if that weren't the  
21 case, we would think that because of the impact on the  
22 Federal-State balance that would -- that would result from  
23 funding these State -- State proceedings, that that's not  
24 the kind of clear statement that would qualify.

25 And so I mentioned before, one of the two

1 possibilities that we see for what "or other" might mean,  
2 which would be --

3 JUSTICE SCALIA: Excuse me. What do you mean  
4 by the Federal-State balance? Because this is funding  
5 somebody to argue against the interests of the States,  
6 isn't it?

7 MR. JAY: It is, Your Honor.

8 JUSTICE SCALIA: I mean, assuming the State has  
9 convicted somebody, you are arguing against the State.

10 MR. JAY: That's true, Your Honor. But we --

11 JUSTICE SCALIA: And the Federal Government is  
12 funding that.

13 MR. JAY: The Federal Government would be  
14 funding that.

15 We see another instance in which there is a --  
16 an impact on the Federal-State balance, which is the fact  
17 that -- that if, on Petitioner's reading, the attorney must  
18 return -- must go to State court or go into State  
19 proceedings and continue the representation there, they  
20 still answer to the Federal judge, who supervises their  
21 appointment, supervises their qualifications, and  
22 determines whether and to what extent they will be paid.  
23 And of critical importance, the Federal judge determines  
24 when the attorney will be permitted to withdraw. And the  
25 Federal judge may not permit such a withdrawal, unless and

1 until the Federal judge can find another attorney who meets  
2 the same qualifications for the Federal appointment.

3           So you would have, on Petitioner's reading, an  
4 attorney appointed by a Federal court who would go into  
5 State judicial proceedings and would be unable to ask the  
6 State tribunal before whom he or she was appearing for  
7 permission to withdraw from the engagement. He or she  
8 would have to return to the Federal court for that  
9 permission. We see that as a direct -- direct infringement  
10 on the State tribunal process.

11           JUSTICE STEVENS: May I just be clear on -- on  
12 one thing on your position, Mr. Jay? Is it your view that  
13 the Federal judge may not allow the lawyer to do anything  
14 in -- in an unexhausted claim, or does he have some  
15 discretion?

16           MR. JAY: Well, I think -- this statute, Your  
17 Honor, doesn't deal with discretion. It deals with  
18 "shall." And -- so we don't think that it's possible under  
19 this statute.

20           It is possible. Now, there is another  
21 provision in Federal court for the appointment of counsel,  
22 the Criminal Justice Act, 18 U.S.C. 3006(A), and that  
23 provision, which was in existence long before this statute,  
24 used to permit discretionary appointment of counsel in 2254  
25 cases. And it -- it does contain a provision for some

1 ancillary representation. It is possible that an attorney  
2 might be able to invoke that provision, which has its own  
3 legislative history --

4 JUSTICE STEVENS: What is the government's  
5 position on that issue?

6 MR. JAY: I don't -- I don't think we have a --  
7 have a position on that issue, because it --

8 JUSTICE STEVENS: It seems to me that issue  
9 would arise more often than the issue we're fighting about  
10 in this case.

11 MR. JAY: It -- it might, Your Honor, because  
12 the Criminal Justice Act applies to noncapital cases as  
13 well. But I have not seen it litigated. And so, I don't  
14 think that we've taken a position on it. But that is --  
15 that is a potential source for discretionary funding.

16 But the suggestion that subsection (e) permits  
17 some exercise of discretion because of the inclusion of  
18 "and other appropriate motions and procedures," I don't  
19 think that works in this case to cabin the necessary  
20 implications of Petitioner's reading, because the three  
21 categories of proceedings are judicial proceedings,  
22 competency proceedings, and proceedings for executive or  
23 other clemency. And each of the examples, from pretrial  
24 proceedings down through applications for stays of  
25 execution and other appropriate motions and procedures,

1 fall into the category of judicial proceedings.

2           It's our position that those are to be Federal  
3 proceedings, not proceedings in State court. Anything that  
4 -- that is on that list, from -- again from pretrial  
5 proceedings down through -- at least through all available  
6 post-conviction process, that's -- that's not  
7 discretionary, and we don't think that the district court  
8 could decide that, even though something were available  
9 post-conviction process, it was not to be funded because  
10 the district court deemed it not to be appropriate.

11           And many of the filings that a habeas counsel  
12 might wish to make in State court, if the Petitioner's  
13 reading were adopted, would fall under the category of  
14 available post-conviction process, a successive writ of  
15 habeas corpus or a writ of coram nobis, such as the -- the  
16 one that Petitioner litigated in the Tennessee Court of  
17 Criminal Appeals while his Federal habeas proceeding was  
18 pending.

19           JUSTICE GINSBURG: But all this is dependent  
20 upon the defendant showing that he is financially unable to  
21 obtained adequate representation. And if he is in the  
22 State court, then that's the answer to it. It's the only  
23 when he isn't. And I thought in the clemency cases,  
24 particularly, there was no funds in State court.

25           MR. JAY: There are some funds on -- on the

1 State level, and I'd like to come back to how Tennessee  
2 handles that in a moment. But as a -- as a general answer  
3 to your question, the statute does not make clear that if  
4 Petitioner can obtain counsel at no cost to himself, that  
5 he's no longer eligible for Federal counsel under this  
6 provision, because he, after all, would still be indigent.  
7 And I think the situation that occurred here in the  
8 Tennessee courts highlights the -- the difficulty that  
9 would be raised by creating a -- by permitting funding for  
10 State proceedings.

11 The Tennessee post-conviction defender is  
12 authorized by statute to represent inmates under a sentence  
13 of death in post-conviction and clemency proceedings in  
14 State court, and he has discretion over the clemency  
15 portion.

16 The post-conviction defender in this case  
17 declined to use his -- to use his resources to represent  
18 Petitioner in the clemency proceedings, because he -- he  
19 determined that he didn't have the resources and he was  
20 focusing on other cases. So, at least as a matter of  
21 Tennessee law, that that option was available to him, but  
22 it's not been suggested that he is not himself financially  
23 unable to obtain counsel.

24 So, in -- in any instance like that in which  
25 there is -- there are, in some circumstances, State-funded

1 counsel available, I think you would set -- you would  
2 create a powerful incentive for the State to say it wishes  
3 to go second, that allowed the Federal -- allow Federal  
4 funding to come first and State funding to come second, and  
5 for the Federal Government to respond in like measure.

6 JUSTICE SCALIA: And that's the government's  
7 position, that under this provision, even if -- even if  
8 State funding -- well, you say State isn't covered anyway.

9 MR. JAY: Right. Our position, Justice Scalia,  
10 is --

11 JUSTICE SCALIA: Assuming State funding is  
12 covered -- assuming representation in the State is covered,  
13 it does seem to be the case that the test of whether you  
14 get some -- some Federal lawyer appointed is not whether  
15 you don't have a State lawyer, but rather whether you can  
16 pay for counsel. Right?

17 MR. JAY: Whether you as a personal matter --

18 JUSTICE SCALIA: Can pay.

19 MR. JAY: -- are financially unable.

20 JUSTICE SCALIA: That's strange.

21 MR. JAY: And the -- the test for appointment  
22 is also based on when the -- at the time when the defendant  
23 is or becomes financially unable, there's no reference in  
24 the statute to when -- to the defendant becoming  
25 financially able again. It has been interpreted in some

1 instances to permit revisiting that financial ability  
2 decision, but in circumstances unlike what we are  
3 discussing here, where the State provides free counsel.

4 CHIEF JUSTICE ROBERTS: Counsel, you don't  
5 really think the fact that this provision was recodified  
6 helps your argument at all, do you?

7 MR. JAY: Well, it doesn't hurt, Your Honor,  
8 and we do think that it helps because --

9 CHIEF JUSTICE ROBERTS: When I see that  
10 argument, particularly in a gray brief, that strikes me as  
11 tantamount to a confession of error.

12 MR. JAY: Well, I'm certainly not here to  
13 confess to error, Your Honor. We -- we do think that it --  
14 that it helps our argument because, to the extent that  
15 there's any ambiguity or there's any doubt left in the  
16 Court's mind, I think the fact that Congress chose to use  
17 the same words again --

18 CHIEF JUSTICE ROBERTS: You were earlier  
19 resisting the notion that the particular legislative  
20 history here showed anything because of how broadly it may  
21 have been familiar, but there's no evidence at all that  
22 when Congress recodified this language, it was in fact  
23 aware of the different court of appeals decisions you cite.  
24 Right?

25 MR. JAY: Other than the general presumption

1 that this Court applies in these ratification cases, that's  
2 right, Your Honor. We can't -- we can't point to a  
3 particular committee report or colloquy.

4 The -- the term "proceeding" has to be given a  
5 consistent construction across section 3599(e). Clemency  
6 proceedings, judicial proceedings, and competency  
7 proceedings, we submit, are made clear by the text and  
8 structure of the statute to refer only to Federal  
9 proceedings. Adopting Petitioner's reading, even if --  
10 even though in this case it refers only to a clemency  
11 proceeding, would inevitably lead to Federal funding for --  
12 for any proceeding on the State level that meets one of the  
13 descriptions set out in subsection (e).

14 Clemency would be a particularly poor candidate  
15 for such funding because a clemency decision before a State  
16 governor, which may indeed be initiated before the --  
17 before the inmate comes to Federal court for a habeas  
18 petition, implicates no Federal rights and implicates no  
19 Federal interests.

20 For those reasons we submit the judgment of the  
21 court of appeals should be affirmed. Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you, Mr. Jay.

23 Ms. Chavis, you have a minute left.

24 REBUTTAL ARGUMENT OF DANA C. HANSEN CHAVIS

25 ON BEHALF OF THE PETITIONER

1 MS. CHAVIS: Thank you, Your Honor.

2 The word "proceedings" in subsection (e) is  
3 given meaning by Congress by the words that Congress used,  
4 and when it says "proceedings for clemency," it means  
5 proceedings for that clemency that's available to the  
6 defendant. Subsection (a)(2) put 2254 defendants and 2255  
7 defendants on the same footing, and if we don't give effect  
8 to the "or other" language or the "available" language in  
9 the clemency clause, then we're rendering those words  
10 meaningless. We're -- and we're saying that -- that  
11 Congress somehow sub silentio read out 2254 defendants from  
12 the clemency clause.

13 In addition, Your Honor, I'd just like to point  
14 out that giving a lawyer for an -- giving an attorney for a  
15 person on death row to present a case for clemency before  
16 the clemency decisionmaker is not an intrusion on the  
17 States. If it were, we would see the States lined up here  
18 in opposition to our interpretation of the case, and they  
19 have not done that. In particular in this case, the State  
20 of Tennessee takes no position, and at least four other  
21 times this -- this statute has been litigated. Other death  
22 penalty States have taken no position. So there simply is  
23 no intrusion in -- in providing a person a lawyer, and we  
24 have heard from 11 governors representing 7 other death  
25 penalty States that say it's very important for them to be

1 fully informed when they make this life-or-death decision  
2 when they're presented with these capital clemency  
3 petitions.

4 CHIEF JUSTICE ROBERTS: How often is clemency  
5 granted in Tennessee?

6 MS. CHAVIS: Your Honor, clemency has been  
7 granted one time since Furman that I am aware of, Your  
8 Honor.

9 CHIEF JUSTICE ROBERTS: One time in the last  
10 how many decades?

11 MS. CHAVIS: That would be the last 20 or 30,  
12 Your Honor. We've just recently started having executions.

13 If I -- if I may just add one other factor Your  
14 Honor. Clemency was granted four times in 2008 throughout  
15 the country.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 The case is submitted.

18 (Whereupon, at 2:00 p.m., the case in the  
19 above-entitled matter was submitted.)

20

21

22

23

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25

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