

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 EDWARD JEROME HARBISON, :

4 Petitioner :

5 v. : No. 07-8521

6 RICKY BELL, WARDEN. :

7 - - - - - x

8 Washington, D.C.

9 Monday, January 12, 2009

10

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 1:00 p.m.

14 APPEARANCES:

15 DANA C. HANSEN CHAVIS, ESQ., Assistant Federal Community

16 Defender, Knoxville, Tenn.; on behalf of the

17 Petitioner.

18 WILLIAM M. JAY, ESQ., Assistant to the Solicitor

19 General, Department of Justice, Washington,

20 D.C.; on behalf of the United States, as amicus

21 curiae, in support of the judgment below.

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1 P R O C E E D I N G S

2 (1:00 p.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this afternoon in Case 07-8521, Harbison v.
5 Bell.

6 Ms. Chavis.

7 ORAL ARGUMENT OF DANA C. HANSEN CHAVIS

8 ON BEHALF OF THE PETITIONER

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

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

21 This case is controlled by the second
22 "shall" clause, which appears about four lines up from
23 the bottom of subsection (e). And that clause says
24 that: "Counsel shall also represent the defendant in
25 proceedings for executive or other clemency as may be

1 available to him."

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

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

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

23 MS. CHAVIS: No, Your Honor. And if I may,
24 I would like to discuss the structure of subsection (e).
25 And I believe your question would go to the very first

1 "shall" clause, which begins at line 3 of subsection
2 (e), and that would -- in that counsel that is appointed
3 under (a)(2) "shall represent the defendant in
4 subsequent stages of judicial proceedings." And for the
5 (a)(2) lawyer, the lawyer appointed under subsection
6 (a)(2), that stage of proceeding that the representation
7 begins with is described in (e) as "all available
8 post-conviction process." And then it goes on for the
9 remainder of the statute, together with the applications
10 --

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

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

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

23 MS. CHAVIS: No, Your Honor. With respect
24 to the habeas attorney the representation would begin
25 with the "all available post-conviction process." If

1 that attorney did obtain relief for the defendant or the
2 federal court granted relief for the capital defendant
3 and that case were to return to state court, then of
4 course we're not talking about continued representation
5 of the federal habeas counsel because --

6 JUSTICE SCALIA: Why not? Why not?

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

8 JUSTICE SCALIA: That would be a subsequent
9 -- a subsequent stage of available judicial proceedings,
10 his retrial in state courts.

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

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

24 JUSTICE ALITO: I don't see how that's
25 possible a plain reading of the statutory language. You

1 started out by saying you're relying on the plain
2 meaning of the statutory language.

3 MS. CHAVIS: Yes, Your Honor.

4 JUSTICE ALITO: How do you get that out of
5 the statutory language at (e)?

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

9 JUSTICE ALITO: So now you're out of the
10 plain language of the (e) and you're looking at the
11 context of the whole statute.

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

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

21 MS. CHAVIS: Yes.

22 JUSTICE ALITO: How do you explain under the
23 plain language of (e) why -- how you avoid the result
24 that once habeas counsel is appointed in federal court,
25 the counsel has to appear in all of these other

1 proceedings?

2 MS. CHAVIS: Yes --

3 JUSTICE ALITO: New trial in state court,
4 etcetera.

5 MS. CHAVIS: "In all subsequent stages of
6 judicial proceedings" is exactly what subsection (e)
7 states.

8 JUSTICE GINSBURG: But you are including
9 then -- suppose that the result of the federal habeas is
10 that the State -- that relief is granted unless the
11 State retries the defendant in X number of days. And
12 your reading I think would be the appointed counsel on
13 federal habeas would be responsible for representation
14 in all available post-conviction process, and that would
15 be an available post-conviction process.

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

19 JUSTICE GINSBURG: What would? Tell me,
20 what would fall under "all available post-conviction
21 process" in addition to clemency and competency
22 proceedings?

23 MS. CHAVIS: Your Honor, "all available
24 post-conviction process" I submit would be defined by
25 the 2254 or 2255 proceeding, now these together with

1 appropriate applications for stays and appropriate
2 motions and procedures. Now, that is a part of this
3 first clause in subsection (e) that, under appropriate
4 circumstances, may permit the federally appointed lawyer
5 to return to state court if deemed appropriate by the
6 federal court. If the federal court found that an issue
7 in the federal habeas case needed to be exhausted in
8 order to aid that judge's determination of the habeas
9 petition, then it would be appropriate for the federal
10 judge to say: Counsel, please return to state court and
11 exhaust the issue.

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

23 MS. CHAVIS: Well, Your Honor, again the key
24 here is that Congress used the word "appropriate" and
25 that's an easy legal standard for the federal judge to

1 determine. The statute does not say State
2 post-conviction process or State post-conviction case.
3 It indicates "appropriate motions or procedures." So
4 that would be for the federal judge --

5 CHIEF JUSTICE ROBERTS: I'm sorry. I'm sure
6 I'm missing something here, because the statute does say
7 "all available post-conviction process."

8 MS. CHAVIS: Yes, Your Honor, and I submit
9 that that is a reference to, if we look at (a)(2), where
10 it says, the very first line, "post-conviction
11 proceedings under 2254 and '55." So that describes all
12 available post-conviction process, describes the 2254 or
13 2255 proceedings.

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

17 MS. CHAVIS: No, Your Honor, not by a plain
18 definition of that.

19 CHIEF JUSTICE ROBERTS: Well then, if you
20 look up earlier in the statute, it says "shall represent
21 the defendant throughout every subsequent stage of
22 available judicial proceeding."

23 MS. CHAVIS: Yes.

24 CHIEF JUSTICE ROBERTS: Why doesn't it fall
25 under that?

1 MS. CHAVIS: Yes. Well, that's the key,
2 "subsequent stage." And a retrial would not be a
3 subsequent stage. That would be an entirely new case
4 back in the state court.

5 There's also a second reason why federal
6 habeas counsel would not represent the defendant in many
7 retrials or resentencings, and that would be --

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

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

11 JUSTICE ALITO: Why is it not a "subsequent
12 stage of available judicial proceeding"?

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

15 JUSTICE ALITO: Without using the word
16 "structure of the statute," because there I think you
17 get into lots of trouble -- and you started out by
18 saying the plain language of (e) and I'm still
19 struggling to understand what you're doing with the
20 plain language of (e).

21 MS. CHAVIS: Okay. Well, there is another
22 reason why federal habeas counsel would not do a State
23 retrial, and that's because under (a)(2), the clause or
24 the part of the statute that does provide for the
25 appointment of counsel, if there is already counsel

1 available then that appointment clause would not be
2 triggered.

3 If we look at (a)(2), which is on page 1a,
4 the trigger for the appointment of counsel is that we
5 have an indigent defendant. It says "a defendant who
6 is" -- four lines down -- "a defendant who is or becomes
7 financially unable to obtain adequate representation
8 shall be appointed a lawyer."

9 In a retrial, the State must provide trial
10 counsel --

11 CHIEF JUSTICE ROBERTS: No, no, no. That
12 doesn't work. The language you just quoted is simply to
13 say when you get somebody appointed.

14 MS. CHAVIS: Yes.

15 CHIEF JUSTICE ROBERTS: You are financially
16 unable so you get somebody appointed. Then you go back
17 and say that person shall represent you through every
18 subsequent stage. It doesn't say that, oh, if you
19 suddenly get somebody else appointed, you know, then you
20 can -- then he doesn't have that obligation.

21 MS. CHAVIS: Your Honor, I would submit that
22 these circumstances that trigger the appointment do
23 carry through the appointment process in that, if you
24 look at the language used by Congress, it says "any
25 defendant who is or becomes financially unable." So

1 Congress was --

2 JUSTICE ALITO: What if the remand is for
3 State post-conviction review, and there is no attorney
4 available under State law for State post-conviction
5 review?

6 MS. CHAVIS: Yes, Your Honor, then we would
7 be looking again at the first clause of subsection (e),
8 and we would be looking at the language used by Congress
9 -- "any appropriate motions and procedures."

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

18 JUSTICE SCALIA: Excuse me. I have lost
19 you. Where is the "appropriate"? I don't see any
20 "appropriate."

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

22 JUSTICE SCALIA: It says "shall represent
23 the defendant throughout every subsequent" -- every
24 subsequent stage of available judicial proceedings.

25 MS. CHAVIS: Yes, and then it describes

1 those stages.

2 JUSTICE SCALIA: Yes, right.

3 MS. CHAVIS: And then we are at four lines
4 up from the bottom.

5 JUSTICE SCALIA: Right.

6 MS. CHAVIS: I'm sorry. Five lines up from
7 the bottom.

8 JUSTICE SCALIA: Well, it says "and all" --

9 MS. CHAVIS: And other appropriate --

10 JUSTICE SCALIA: Right.

11 MS. CHAVIS: -- motions.

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

15 MS. CHAVIS: Your Honor --

16 JUSTICE SCALIA: "Represent throughout every
17 subsequent stage of available proceedings, including
18 pretrial, trial, sentencing, motions for a new trial,
19 appeals, applications for writ of certiorari. There is
20 no "appropriate" in any of that.

21 MS. CHAVIS: Yes, sir. But, Your Honor,
22 that is --

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

1 MS. CHAVIS: Your Honor, if we were looking
2 at the possibility of exhausting a claim in State court,
3 then we wouldn't be -- none of this first part of (e)
4 would apply. That wouldn't be a pretrial proceeding.
5 That wouldn't be a trial. That wouldn't be a
6 sentencing. What that would come under would be after
7 "and all available post-conviction process," that would
8 be described as "other appropriate motions and
9 procedures."

10 JUSTICE KENNEDY: So you would interpret
11 "all available post-conviction process" as meaning
12 federal?

13 MS. CHAVIS: The habeas proceeding. Yes,
14 Your Honor.

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

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

21 CHIEF JUSTICE ROBERTS: But then the use of
22 "Federal" -- we were just talking about.

23 MS. CHAVIS: Well, that's correct, Your
24 Honor; however, when we look at post-conviction process
25 in (e), we have the context of (a)(2), that talks about

1 post-conviction proceeding under section 2254 and 2255.

2 CHIEF JUSTICE ROBERTS: I don't know why you
3 just didn't take the position and say, yes, it applies
4 to all these provisions. That doesn't seem to me a --
5 to doom your position at all. Once have you somebody
6 appointed who helps you on the Federal habeas --
7 presumably they do a lot of work, they get up to speed
8 on everything -- they ought to represent you through the
9 next stage of available proceedings.

10 MS. CHAVIS: Well, Your Honor, and that's
11 true. The interpretation of this first clause of
12 subsection (e) doesn't impact the second -- the
13 interpretation of the second clause, which says
14 specifically counsel shall represent the defendant in
15 those clemency proceedings that are available to him.

16 CHIEF JUSTICE ROBERTS: Well, you see why --
17 I mean, if you say, well, the first part is implicitly
18 only federal, that makes it very hard for you to argue
19 that the second part is not also implicitly only
20 federal.

21 MS. CHAVIS: Respectfully, Your Honor, I
22 would disagree, and that's because the words are
23 different, used by Congress. Congress is very explicit
24 in stating other clemency as may be available to the
25 defendant. There is no way that that could be

1 interpreted as federal clemency. There is no other
2 federal clemency --

3 JUSTICE KENNEDY: I just want to make clear
4 what your position is. Federal determination on habeas
5 corpus, that there are unexhausted claims, ordered to
6 return to the State court: Is the appointed counsel
7 required under the statute to represent the defendant in
8 the State court in further post-conviction proceedings?

9 MS. CHAVIS: No, and for two reasons: One
10 --

11 JUSTICE KENNEDY: Do you have to take that
12 position? But that is your --

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

14 JUSTICE KENNEDY: But that is your position?

15 MS. CHAVIS: Your Honor, that is my
16 position. However, of course, again, the interpretation
17 of this first part of this statute is separate from an
18 interpretation of the clemency clause, but for two
19 reasons the answer would be no to that question, because
20 this statute -- number one, (e) does not specifically
21 set that out as a subsequent stage of judicial
22 proceedings, okay? What it does instead is it states
23 "appropriate motions or procedures." So it would be
24 discretionary. On a case-by-case basis, the district
25 judge could determine whether he believed it was

1 appropriate, non-abusive, to return to State court to
2 exhaust a claim.

3 JUSTICE SCALIA: Well, but -- but, you know,
4 it mentions trial proceedings, trial, motion for a new
5 trial, appeals, applications for writ of certiorari.
6 And then, in the next clause it just says "and all
7 available post-conviction process." Now, you would
8 acknowledge that going back to exhaust claims that had
9 not been exhausted before the State courts would be
10 post-conviction process or not?

11 MS. CHAVIS: Not with respect to subsection
12 (e). I mean, ordinarily an exhaustion proceeding is not
13 a subsequent stage. Ordinarily, if that is what this
14 statute contemplates, is the ordinary course --

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

18 MS. CHAVIS: Yes, Your Honor.

19 JUSTICE SCALIA: Okay.

20 MS. CHAVIS: The very beginning of (w)
21 indicates "each attorney so appointed shall represent
22 the defendant throughout every subsequent stage of
23 available judicial proceedings including" -- and then it
24 recites all of those stages.

25 JUSTICE SCALIA: Right.

1 JUSTICE STEVENS: But if it did not have the
2 including phrase, if it just stopped there, would it
3 then include proceedings necessary to exhaust the State
4 remedies? I'm a little unclear why you think it does
5 not include necessary proceedings -- proceedings
6 necessary to exhaust State remedies.

7 MS. CHAVIS: I'm sorry, Your Honor, if I
8 wasn't clear. It may include. It does not require. It
9 may include going back to State court to exhaust.

10 JUSTICE STEVENS: Why doesn't the word
11 "shall" require it?

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

18 CHIEF JUSTICE ROBERTS: If you step back and
19 look at the structure, it seems to me unusual that your
20 interpretation would be correct. It seems to me that it
21 would be more likely that Congress wanted this counsel
22 to continue on in State proceedings, trials.

23 The clemency thing seems a little bit more
24 removed. It's a different argument -- you know, we're
25 guilty, but show us mercy -- than what may well be the

1 same sort of argument on the subsequent State proceeding
2 as was raised in the Federal habeas. I mean, if I were
3 writing this, I would want them to continue in the
4 subsequent State proceedings before I would want them to
5 continue -- before I would want to have them represent
6 the defendant in clemency.

7 MS. CHAVIS: And I understand that, Your
8 Honor, but I think also, if we look at the
9 representation as it does occur in the real world, we
10 have the AEDPA, we have this Court's decisions that
11 structure the -- the capital litigation so that State
12 court exhaustion normally comes before the Federal
13 habeas process.

14 But, again, there are these two separate
15 clauses. The first goes to judicial proceedings; the
16 second clause goes to -- to nonjudicial proceedings,
17 including competency, because the Court in Ford v.
18 Wainwright indicated that we need not have a judicial
19 proceeding, a judicial determination of competency so
20 Congress has separated out competency and separated out
21 clemency, knowing that those are stages of a capital
22 case that come at the very end of Federal habeas, that
23 the Federal habeas counsel would be in the best position
24 to represent that defendant at that --

25 JUSTICE GINSBURG: This goes back to my

1 earlier question: So what else fits under "all
2 available post-conviction process" other than competency
3 and clemency? What else?

4 MS. CHAVIS: Your Honor, competency and
5 clemency are in their own "shall" clause, mandatory
6 clause, in and of themselves. They are not included in
7 the -- the post-conviction process.

8 JUSTICE GINSBURG: Right. But what would be
9 included?

10 MS. CHAVIS: The post-conviction process
11 would refer to anything in the 2254 to 2255. For
12 example, it could be the discovery motions; it could
13 be -- it could be notions in aid of an evidentiary
14 hearing; it could be motions in aid of an appeal. So,
15 that's the descriptor.

16 JUSTICE ALITO: But only things in Federal
17 court?

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

21 JUSTICE STEVENS: Does that seem reasonable
22 that Congress would have -- suppose you had a real
23 complicated case with five or six issues in it, and they
24 find out one issue is not exhausted. The capital case
25 has been around for two or three years. Does Congress

1 think, well, you've got to go on your own when you go
2 back to the State court and try and exhaust that one
3 claim?

4 MS. CHAVIS: No, Your Honor. I don't think
5 Congress contemplated that, and that's why I think they
6 included this language "appropriate motions and
7 procedures," to encompass a return to State court where
8 --

9 JUSTICE STEVENS: Now, where is that
10 language again, "appropriate motions" --

11 MS. CHAVIS: It's four lines up -- five
12 lines up from the bottom, the end of that line --
13 "appropriate" --

14 JUSTICE STEVENS: No, but that's in the next
15 clause.

16 MS. CHAVIS: That's in the first "subsequent
17 stage" clause.

18 JUSTICE STEVENS: Why does that limit the
19 interpretation that -- of the words "subsequent stage"
20 -- "throughout every subsequent stage of available
21 judicial proceedings"? And doesn't the State collateral
22 proceeding which is necessary to exhaust a remedy fall
23 right within that language?

24 MS. CHAVIS: Your Honor, it may.

25 JUSTICE STEVENS: What?

1 MS. CHAVIS: It may. However, in our -- my
2 reading of the statute, when we look at the subsequent
3 stage, exhaustion ordinarily comes before Federal
4 habeas. It would be, you know, an unordinary situation
5 where you would have to go back and exhaust. But I
6 believe the statute contemplates that with "appropriate
7 motions and procedures."

8 But of course, Congress could have
9 contemplated that the Federal lawyer continue to
10 represent the defendant in exhaustion proceedings. Back
11 when the statute was created, Congress was looking at
12 the States and looking at the fact that States were not
13 providing counsel for capital defendants in these cases.
14 And Congress --

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

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

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

20 MS. CHAVIS: That it wasn't mandatory. It
21 doesn't require. As is appropriate --

22 JUSTICE ALITO: So you think it's
23 discretionary.

24 MS. CHAVIS: Yes.

25 JUSTICE ALITO: The court can -- as a matter

1 of discretion, can order the counsel who is appointed to
2 represent the Petitioner in the habeas to go back and
3 handle the exhaustion of a claim in State court"?

4 MS. CHAVIS: Absolutely, Your Honor, just
5 like this Court in Rhines v. Webber said it's
6 discretionary as to whether this -- as to whether the
7 Federal judge is going to determine that we are going to
8 hold this case in abeyance, we are going to stay this
9 case while we -- while counsel goes back to exhaust some
10 claims.

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

13 MS. CHAVIS: Correct.

14 JUSTICE SCALIA: -- to federal prisoners.
15 Would you argue that it says "in every criminal action,
16 which defendant is charged with a crime that is
17 punishable by death."

18 MS. CHAVIS: It does, Your Honor.

19 JUSTICE SCALIA: So even in the original
20 State trial, he is entitled to a federal defendant; is
21 that right?

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

23 JUSTICE SCALIA: Why not? It doesn't limit
24 it to Federal trials.

25 MS. CHAVIS: Well, Your Honor, in this case,

1 in (a)(1), we would -- because (a)(1) sets out the
2 factors that trigger the appointment of counsel, we have
3 to have a defendant who is charged with a capital crime,
4 who is indigent, and who otherwise doesn't have a
5 lawyer.

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

9 MS. CHAVIS: That's correct, but, Your
10 Honor, for a State capital trial, for a State capital
11 direct appeal, the States do provide counsel, and
12 Congress would know that States have to provide counsel
13 under --

14 JUSTICE SCALIA: So what? I mean, it still
15 is -- is unqualified.

16 MS. CHAVIS: No.

17 JUSTICE SCALIA: And part of your argument,
18 not your only argument but a large part of your
19 argument, is since it is unqualified in (E), the last
20 clause, it has to include State. Well, you could say
21 the same about (a)(1).

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

1 JUSTICE SCALIA: Oh, but -- but --

2 MS. CHAVIS: If the State provides
3 representation, then you don't have a federally
4 appointed counsel.

5 JUSTICE SCALIA: So -- so if the State
6 doesn't provide counsel, the Federal Government will
7 provide it, and the States can recede from their
8 obligation to provide counsel, right.

9 MS. CHAVIS: Your Honor, I think this Court
10 would have problems under Gideon -- if the States cannot
11 --

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

14 MS. CHAVIS: Well --

15 CHIEF JUSTICE ROBERTS: It says "adequate
16 representation." And then later on it says the lawyers
17 we appoint here has to have five years of experience,
18 three years experience in felony trials. I think that
19 is a lot better than most of the attorneys who are going
20 to be appointed under the State system. So I would say:
21 Look, this statute itself recognizes that this person
22 you have appointed under the State system is not
23 adequate. They say you have got to have five
24 years/three years, so I want one of those.

25 MS. CHAVIS: Well, Your Honor, again, the

1 answer to that question under (a)(1) is that you would
2 not get federally appointed counsel when you have
3 counsel available to you otherwise. And that simply is
4 the fact, that the States do provide for counsel.

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

7 MS. CHAVIS: Well, Your Honor --

8 JUSTICE SCALIA: The Federal Government will
9 provide expert -- compensation for the use of experts
10 when the States won't?

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

12 JUSTICE SCALIA: Under (a)(1)?

13 MS. CHAVIS: That is part of (a)(1), and
14 it's part of (a)(2). However, you still have to have --
15 you still have to have those -- those three
16 circumstances present.

17 JUSTICE SCALIA: Sure.

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

23 JUSTICE SCALIA: It seems -- it seems to me,
24 counsel, that the mere fact that it doesn't mention
25 "federal" explicitly is -- is not a very strong argument

1 unless you are going to take the position that even
2 (a)(1) applies to federal and state. And -- and really
3 what you are -- the only strong strength to your bow is
4 that it says "executive or other clemency." And -- and
5 there -- there seems to be no federal clemency except
6 executive clemency, I guess. I guess.

7 Can Congress declare something that has been
8 a crime no longer a crime and set the guy loose? I
9 don't know. Is that "clemency"?

10 MS. CHAVIS: Your Honor, it's the
11 Constitution that determines the -- the federal
12 authority for clemency. So Congress cannot effect that.
13 There is -- the -- only --

14 JUSTICE SCALIA: It says here the President
15 can. It doesn't say Congress can't. Does it say
16 Congress can't?

17 MS. CHAVIS: No, Your Honor, it does not say
18 that.

19 CHIEF JUSTICE ROBERTS: You put a lot of
20 weight on -- I mean, the problem arises because Congress
21 did not specify whether it was limited to federal or
22 state. And yet you are saying they were -- what they
23 clearly meant to do when they said "executive or other
24 clemency" was to signal implicitly that it must cover
25 state because there is no other kind of clemency. It's

1 -- it's kind of a real round-about way to make that
2 point, isn't it?

3 MS. CHAVIS: Well, Your Honor --

4 CHIEF JUSTICE ROBERTS: Somebody's not going
5 to sit there and say, oh, we put "other" in because we
6 know that in the federal system it's only executive, but
7 in the State system there might be others.

8 MS. CHAVIS: Your Honor --

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

12 MS. CHAVIS: Your Honor, these are the words
13 that Congress used. They know that the -- that the
14 States provide for forms of clemency other than
15 executive clemency. We know that -- that Congress
16 specifically stated they wanted the defendant to be
17 represented in that clemency proceeding that is
18 available to him. And in -- in these cases --

19 JUSTICE SCALIA: And we know that they read
20 this text carefully before they voted for it, right?

21 MS. CHAVIS: Yes, Your Honor.

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

23 MS. CHAVIS: Your Honor --

24 JUSTICE SCALIA: These are all assumptions.
25 That's all.

1 MS. CHAVIS: The -- the language of the
2 statute is the best intent of Congress, yes, Your Honor.

3 If I have any time remaining, I would like
4 to reserve it for rebuttal.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.
6 Mr. Jay.

7 ORAL ARGUMENT OF WILLIAM M. JAY
8 ON BEHALF OF THE UNITED STATES,
9 AS AMICUS CURIAE,
10 IN SUPPORT OF THE JUDGMENT BELOW

11 MR. JAY: Mr. Chief Justice, and may it
12 please the Court:

13 Section 3599 authorizes federally funded
14 representation only in the three categories of
15 proceedings specified in subsection (e). At least three
16 distinct aspects of the statute's text and structure
17 show that the only proceedings included are federal
18 proceedings before a federal officer.

19 First, as Justice Scalia pointed out during
20 the previous argument, the word "federal" does not
21 appear anywhere in the statute, including in (a)(1).
22 Several other terms in the statute, including the phrase
23 "every criminal proceeding," plainly refer to federal
24 proceedings and federal proceedings only. Congress
25 plainly saw no need to include the modifier "federal" to

1 make that limitation manifest.

2 Second, the statute requires that appointed
3 attorneys have federal qualifications based on
4 experience practicing in federal court and it requires
5 that federal judges exercise significant oversight of
6 the attorney's representation. Both these federal
7 requirements for qualifications and federal requirements
8 for oversight make sense only if the proceedings that
9 the qualifications and oversight pertain to are federal
10 ones. Third, if Petitioner were right that --

11 JUSTICE STEVENS: May I just make sure I
12 understand your position. Does (a)(2) authorize the --
13 the federal judge to appoint counsel for a -- a person
14 on death row under a state death conviction under 2254
15 or 2255?

16 MR. JAY: For that -- for that habeas -- for
17 that person's federal habeas petition --

18 JUSTICE STEVENS: Yes.

19 MR. JAY: -- it requires the appointment of
20 -- of a federal habeas attorney qualified to practice in
21 federal court.

22 JUSTICE STEVENS: So he is -- he is entitled
23 to a lawyer in the -- in the federal collateral review
24 of a State death penalty case?

25 MR. JAY: In the federal review, that's

1 correct.

2 JUSTICE STEVENS: And what in the statute
3 limits the scope of that review?

4 MR. JAY: Well, subsection (e) limits the
5 scope of that review, Justice Stevens. It specifies the
6 types of proceedings that the attorney is -- is
7 permitted to -- permitted and, indeed, required to --

8 JUSTICE STEVENS: But you agree that (e)
9 applies to State prisoners?

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

13 JUSTICE STEVENS: In the -- for a State
14 prisoner in a federal collateral proceeding?

15 MR. JAY: We agree -- we agree with that,
16 Your Honor, because we think that term "proceeding" --

17 JUSTICE STEVENS: What, then, in that
18 proceeding does the word "clemency" refer to? Is that
19 clemency by the President of the United States?

20 MR. JAY: We think, Your Honor, that a -- a
21 habeas petitioner who is coming to federal court under
22 section 2254 has available to him no proceedings for
23 clemency because the term "proceedings" --

24 JUSTICE STEVENS: Even though the statute
25 says so in so many words?

1 MR. JAY: Well, it's -- I -- it's -- the
2 menu of services, if you will, set out in subsection (e)
3 applies both to lawyers who are appointed under (a)(1)
4 who are doing work in federal court for federal
5 defendants facing a federal capital charge and also for
6 attorneys appointed under (a)(2) who are representing
7 habeas petitioners under section 2254.

8 Because the term "proceedings" -- it is our
9 position -- each time it appears in subsection (e)
10 refers to federal proceedings before a federal officer,
11 a 2254 petitioner has available to him no proceedings
12 for executive or other clemency. That person can obtain
13 the services that are -- that are available to him under
14 subsection (e), which includes representation throughout
15 the 2254 proceedings.

16 JUSTICE STEVENS: Now, supposing on the eve
17 of execution he wanted to apply for a stay of execution.
18 He'd be entitled to representation before a federal
19 judge, right?

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

21 JUSTICE STEVENS: But what if the federal
22 judge says, you have to -- under our practice you can't
23 get a federal stay without first exhausting your attempt
24 to get a State stay. Could he represent the defendant
25 applying for -- in the State court for a stay of

1 execution in that situation?

2 MR. JAY: Subsection (e) would not authorize
3 that, Your Honor.

4 JUSTICE STEVENS: So he would have to get a
5 separate counsel to -- to go to the State court because
6 -- even though the federal judge required him as a
7 normal matter of practice to exhaust the State remedy
8 under the very limited situation of a stay on the eve of
9 execution?

10 MR. JAY: Well, Your Honor, State courts
11 also appoint counsel --

12 JUSTICE STEVENS: I understand that, but he
13 would have no right to have his federal lawyer get paid
14 for doing that work?

15 MR. JAY: Would not get paid by the Federal
16 Government for litigating a matter in State court that
17 may have no connection to federal law.

18 JUSTICE STEVENS: Just for this, for the
19 stay application on the eve of execution?

20 MR. JAY: Well, Your Honor, I -- it would
21 not be a federal judicial proceeding, and, therefore, it
22 would not be covered under subsection (a)(2).

23 JUSTICE STEVENS: It comes in with the --
24 the general language "other appropriate motions and
25 procedures," and so forth. That's got to be tailored

1 back to mean other appropriate motions and procedures in
2 a federal tribunal?

3 MR. JAY: We -- we think that the federal
4 limitation applies throughout the section --

5 JUSTICE STEVENS: You think that is
6 perfectly clear from the text of the statute?

7 MR. JAY: I am sorry, Justice Stevens?

8 JUSTICE STEVENS: Do you think that is
9 perfectly clear from the text of the statute?

10 MR. JAY: Well, Your Honor, I think that the
11 federal limitation is apparent from a number of aspects
12 of the statute, including the fact that Congress didn't
13 use the "federal" modifier anywhere else in the statute.

14 JUSTICE STEVENS: It could have used the
15 "federal" modifier very easily just by inserting the
16 word "federal" in places.

17 MR. JAY: Well, if it had inserted the word
18 "federal" in some places and left it out in others, that
19 might be probative intent -- probative evidence that
20 Congress intended the -- the other instances to be
21 federal and State as well. But we don't have that here.
22 We have -- we have terms that are clearly indicated to
23 be federal only in nature such as every criminal
24 proceeding in (a)(1).

25 CHIEF JUSTICE ROBERTS: You don't doubt in

1 the scenario Justice Stevens hypothesized that the
2 federal defender would in fact represent the person
3 before the State court. You are in an emergency stay
4 situation. He's -- he's allowed to go to federal court.
5 He does so. The federal judge says, you got to go back
6 to State court. There's 12 hours left. He's not going
7 to say, you know, get another lawyer. He's going to
8 represent the person before the state court. And I
9 gather he can do that; he's just not going to get paid
10 for that.

11 MR. JAY: But the -- subsection (e) doesn't
12 bar the lawyer from doing that. And two points on that:
13 There might be other sources of funding available; and
14 indeed, the same lawyer who need not be a federal
15 defender -- he may be a panel attorney appointed -- who
16 is in private practice appointed from the district
17 court's panel of available attorneys who meet the
18 federal qualifications.

19 CHIEF JUSTICE ROBERTS: So he presumably --

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

21 CHIEF JUSTICE ROBERTS: So he presumably is
22 spending a huge amount of time and resources on this --
23 in the nature of these proceedings, and you want to go
24 back and say, all right, on this day you spent six hours
25 redoing your papers that were filed before the Federal

1 judge to file them before the State judge, and you don't
2 get paid the whatever -- how -- what do CJA attorneys
3 get paid these days?

4 MR. JAY: In capital cases for fiscal year
5 2008 it's \$170 an hour.

6 CHIEF JUSTICE ROBERTS: So he goes back and
7 says: Look, you don't get that; you know, you get the
8 \$15,000 you spent on the last ten days on this but you
9 don't get the \$810. That -- does it seem reasonable to
10 impose that burden on the public defender?

11 MR. JAY: Well, Your Honor --

12 CHIEF JUSTICE ROBERTS: Since you know as a
13 practical matter, because of professional responsibility
14 that person is going to represent the defendant in the
15 State court proceedings.

16 MR. JAY: Well, Your Honor, the limitations
17 in subsection (e) are there for a reason, and it's
18 precisely because the State -- the State post-conviction
19 process that would become available under Petitioner's
20 reading of the statute is certainly not limited to a few
21 hours spent on the eve of execution in State court. It
22 potentially could include returning to State court for
23 any form of post-conviction process at any time after
24 the Federal habeas application is filed.

25 JUSTICE BREYER: Would we have to reach that

1 question here? I mean, I don't understand three things
2 that you've said. You said it says Federal; I don't see
3 any place it says Federal. It doesn't use that word.

4 Then you say it doesn't say Federal and State; in my
5 copy it does say Federal and State. It talks about 2254
6 and 2255. So if I just read this in English, it says
7 that once you appoint the person, and it's either State
8 or Federal, 2254 or 2255, that person shall also
9 represent the defendant in such competency proceedings
10 and proceedings for executive or other clemency as may
11 be available to the defendant. QED, end of the case.

12 All right, now why isn't it?

13 MR. JAY: I think it isn't, Justice Breyer,
14 because 2254 is not a reference to proceedings in State
15 court. A 2254 proceeding is in Federal court, it
16 involves Federal constitutional issues and a Federal
17 constitutional challenge to the legitimacy of the --

18 JUSTICE BREYER: That's right. That's
19 right, because they are referring to people who are
20 under State death penalty or Federal death penalty, and
21 what it says is that they shall get a person to
22 represent them in these later habeas proceedings. And
23 then it adds that that person -- and no point quoting it
24 again; you heard what I just said -- it adds that that
25 person will represent them in clemency proceedings.

1 Now, is there any reason for thinking that
2 Congress ---and contrary to some things mentioned, I
3 believe that probably Congressman Conyers did read what
4 he wrote. He certainly referred to it enough in
5 speeches, and those speeches make very clear to me that
6 that is what he had in mind, what it says. Now other
7 people can read it differently, but I -- I mean, I've
8 read it. I read the language. What's the answer?

9 JUSTICE SCALIA: I thought this was a
10 Federal law. Is this a Conyers law; is that what it is
11 here?

12 JUSTICE BREYER: He happens to be the person
13 who wrote it, and it's referred to in the Solicitor
14 General's brief, and on page 21, I took what you said, I
15 went back and looked it up, just as you might have
16 suggested I would by putting in the relevant citations,
17 okay?

18 So having looked it up, as implicitly you
19 suggested, I think Conyers knew what he said. I think
20 he did mean those words to say what it says, but you can
21 convince me to the contrary. That's why I raised it.

22 MR. JAY: Well, I --

23 JUSTICE SCALIA: Did his colleagues know
24 what he said?

25 JUSTICE BREYER: Yes, they did.

1 CHIEF JUSTICE ROBERTS: I'm sorry. Counsel,
2 you lead.

3 (Laughter.)

4 CHIEF JUSTICE ROBERTS: We direct our
5 questions to counsel.

6 JUSTICE BREYER: My experience in Congress
7 is that the members of Congress do know the kinds of
8 things that they are voting on; maybe others have
9 different experience.

10 MR. JAY: Well, Your Honor, let me answer
11 your point about Congressman Conyers first, because I
12 think that the suggestion in Petitioner's brief is that
13 Congressman Conyers was -- had misinterpreted the text
14 of his own amendment, and as we have shown, the text of
15 the amendment proposed by Congressman Conyers in the
16 House and the text of the amendment proposed by Senator
17 Levin in the Senate using the same -- using virtually
18 the identical language, each of them provided no funding
19 for --

20 JUSTICE BREYER: I think you are wrong about
21 that. The reason I think you are wrong about that is
22 that that language to which you refer is language that
23 Congressman Conyers himself introduced in response to a
24 bill by Representative Gekus, and in Representative
25 Gekus's bill he referred, just like this one, to both

1 State defendants and to the Federal defendants. And the
2 purpose of Conyers' amendment, which was to substitute
3 for the Gekus amendment, was to extend, not to limit,
4 what Gekus has done. And he introduced lots of
5 information, all of which referred almost uniquely to
6 State defendants.

7 That's then picked up in the Senate, and the
8 Senate, which is Levin, is trying to do precisely what
9 Conyers was trying to do in the House, which we know
10 from the fact that he said it.

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

15 MR. JAY: Well, Your Honor, the text of
16 Congressman Conyers' amendment wiped out the Gekus
17 amendment. It replaced subsections (q)(1) through
18 (q)(4) of the Gekus amendment. Subsection (q)(4) is
19 what you are referring to, referring to 2254
20 petitioners. Congressman Conyers replaced that with a
21 lengthy piece of legislation that is the predecessor of
22 what appears in the statute today, and it made no
23 provision whatsoever for 2254 petitioners, even those
24 appearing in Federal court.

25 Now, your previous question to me, which I

1 didn't get -- which I would like to come back to, is
2 about the 2254 representation. When a State prisoner
3 comes to Federal court raising a constitutional
4 challenge to his conviction in a 2254 proceeding, there
5 is a direct Federal interest and his Federal rights are
6 at stake, and it makes sense that Congress was providing
7 counsel for the vindication of those Federal rights.
8 That is not so with the clemency proceedings before a
9 State governor, which are a matter of grace, they don't
10 turn on Federal issues, and they don't deal with an
11 inmate under a Federal sentence of death.

12 CHIEF JUSTICE ROBERTS: What do you do with
13 "other"? I mean, there is no "other" clemency for
14 Federal defendants, right? It's just executive
15 clemency?

16 MR. JAY: We think, Your Honor, that the
17 purpose of that phrase, which was added, as I tried to
18 explain in my previous answer, was added at a time when
19 there was no -- there was no funding available for a
20 2254 petitioner. We think the purpose of that language
21 is to be as capacious as possible when a Federal
22 defendant seeks clemency, and that the -- recognizing
23 that the proceedings for clemency in which counsel might
24 be helpful might include proceedings that don't take
25 place before the Chief Executive himself, and there are

1 a couple of examples.

2 Throughout history presidents have enlisted
3 the assistance of various people, including individuals
4 who don't work for the Executive Branch.

5 JUSTICE SOUTER: I understand that, but it's
6 still executive clemency.

7 MR. JAY: We agree, Your Honor.

8 JUSTICE SOUTER: When a clemency decision is
9 made, it's not being made by these other people who are
10 helping out the president. It's being made by the
11 executive.

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

16 JUSTICE SCALIA: Should the Constitution be
17 amended it would cover that, right?

18 MR. JAY: Should the Constitution be amended
19 to permit -- to permit legislative clemency, I think
20 that that -- I think that that is right. But at any
21 rate, the phrase "or other," we don't think that it's a
22 sub silentio or at least a very subtle way of indicating
23 State clemency, because as we pointed out in our brief,
24 the existence of non-executive clemency in the States
25 is -- in every State that has the death penalty,

1 clemency is a matter -- is a decision made by the
2 governor or his appointees or other executive officials.

3 JUSTICE STEVENS: Mr. Jay, would you comment
4 on this general reaction I had when I read the statute?
5 I had the impression that most lawyers appointed under
6 this statute would be to represent defendants in State
7 execution cases, and there are a few cases where there
8 are Federal death penalty cases, but not very many
9 across the whole spectrum. Am I right about that?

10 MR. JAY: In terms of the numbers of
11 clients, yes, Your Honor.

12 JUSTICE STEVENS: But you're primarily
13 dealing with the representation of State defendants in
14 capital proceedings, and the number of cases in Federal
15 proceedings where at the last minute there is a plea for
16 executive clemency is very rare. And you think this
17 particular provision we are debating here was really
18 intended just to take care of the rare case where a
19 Federal defendant is on death row seeking executive
20 clemency, and not even to consider all the cases in
21 which -- in State -- before -- that originate in State
22 trials, where there is a lot of applications for
23 executive clemency. You think it was intended to focus
24 on that very narrow category?

25 MR. JAY: Well, we think the entire statute

1 is intended to focus on when Federal rights and Federal
2 interests are at stake in the administration of the
3 death penalty. And in the clemency context, because
4 clemency does not actually -- does not involve the
5 vindication of a Federal right -- or a constitutional
6 right at all, the number of instances where the clemency
7 process actually involves such a Federal case is a
8 limited --

9 JUSTICE STEVENS: There are occasionally
10 Federal constitutional question and sometimes arguments
11 made in Federal clemency -- I mean, in State clemency
12 proceedings and Federal clemency proceedings.

13 MR. JAY: There are sometimes such arguments
14 made but there is no such thing as a Federal
15 constitutional right to clemency, and indeed the
16 governor is --

17 JUSTICE STEVENS: But arguably there is
18 Federal right or constitutional right to a fair
19 proceeding in a clemency application?

20 MR. JAY: Well, there is a -- in a capital
21 clemency proceeding, the Court has recognized a limited
22 due process right, but that is not the sort of right
23 that would be vindicated in a habeas proceeding at all.

24 JUSTICE SCALIA: Mr. Jay, I assume that
25 (a)(1), which provides for the appointment of counsel to

1 conduct the trial in a capital case, would not have very
2 much application either, would it?

3 MR. JAY: That's right, Your Honor, (a)(1)
4 applies only in federal proceedings.

5 JUSTICE SCALIA: Only in federal capital
6 cases, of which there are very, very few.

7 MR. JAY: That's correct, Your Honor. So
8 many of the -- many of the provisions -- even on
9 Petitioner's reading, which places great reliance on the
10 subsequent stage language -- many of these provisions
11 such as pretrial proceedings, trial sentencing, would
12 apply only to the limited number of federal death
13 penalty defendants.

14 JUSTICE KENNEDY: The government's principal
15 concern in this case is the possibility to potential,
16 assuming the Petitioner prevails, of appointment of
17 counsel in State post conviction collateral proceedings,
18 i.e., when there are unexhausted claims. Apparently the
19 Sixth Circuit in bank addressed this, and in your brief
20 you indicated there is a number of additional claims.
21 Is that the principle thrust of your concern rather than
22 clemency?

23 MR. JAY: It is the principle thrust of our
24 concern, I think that's fair to say, Justice Kennedy.
25 And that's because the word "proceedings," which appears

1 three times in subsection E, we think that either that
2 is limited to federal proceedings each time it appears
3 or it's not each time it appears.

4 JUSTICE KENNEDY: You think there is no way
5 to interpret that the statute so that it could include
6 state clemency proceedings but only federal post
7 conviction review proceedings in judicial -- before
8 judicial tribunals?

9 MR. JAY: We don't see a way to have a
10 federal limitation before judicial proceedings and not
11 have it before --

12 JUSTICE SCALIA: Surely, you could. You
13 could put all I don't remember weight on the other
14 executive or other -- and you could say that's the only
15 provision where it's apparently clear from the text that
16 State proceedings were included.

17 Assuming you are wrong, that there are
18 non-executive State clemency proceedings, you are sure
19 that there aren't?

20 MR. JAY: Well, our position, Your Honor, is
21 that in every State with the death penalty, the clemency
22 decision is made either by -- in most cases, by the
23 governor or gubernatorial appointees or by other
24 executive officials. And the Petitioner has suggested
25 that gubernatorial appointees for that purpose might be

1 "other." But, there is -- there are no -- we have been
2 able to find no instances of, for example, legislative
3 clemency in the capital case. That is limited.

4 The constitutional provisions that the Tenth
5 Circuit relied on that there is such an institution of
6 legislative clemency, that's limited to treason against
7 the State, a noncapital felony or mostly noncapital
8 felony that we can't find a treason against the State
9 prosecution since the 1940's.

10 JUSTICE SOUTER: Of course, it would have
11 made sense for Congress to use to other -- as a way of
12 referring to the states simply because it would have
13 been a matter of indifference to Congress whether a
14 State process was executive or was other in some way, in
15 effect, just leaving the issue open as an irrelevance.

16 MR. JAY: I think if your premise,
17 Justice Souter, were right, that Congress intended to
18 fund proceedings on both levels, then I suspect that
19 that is right, that it would be a matter of indifference
20 to Congress which form the State clemency process took.
21 But we think that Congress intended to fund only those
22 proceedings in which there are federal rights or federal
23 interests at stake, and State clemency proceedings do
24 not meet that qualification.

25 JUSTICE SOUTER: That still leaves you with

1 the question that the -- what the words "or other" can
2 possibly refer to, given the present state of federal
3 law and federal constitutional law, unless they refer to
4 State proceedings.

5 MR. JAY: Well, the phrase is -- the phrase
6 is ambiguous. We turn to legislative history to
7 partially resolve that ambiguity, because as we have set
8 out in our brief and I alluded to earlier, they were
9 added -- they were added at a time when funding wasn't
10 contemplated for 2254 proceedings at all.

11 Even if that -- even if that weren't the
12 case, we would think that because of the impact on the
13 federal-State balance that would result from funding the
14 State proceedings, that that's not the kind of clear
15 statement that would qualify. So I mentioned before,
16 one of the two possibilities that we see for what "or
17 other" might mean --

18 JUSTICE SCALIA: Excuse me, what do you mean
19 by the federal-State balance? Because this is funding
20 somebody to argue against the interests of the State,
21 isn't it?

22 MR. JAY: It is, Your Honor.

23 JUSTICE SCALIA: I mean, assuming the state
24 has convicted somebody, you are arguing against the
25 State.

1 MR. JAY: That's true, Your Honor.

2 JUSTICE SCALIA: And the federal government
3 is funding that.

4 MR. JAY: The federal government would be
5 funding that.

6 We see another instance in which there is an
7 impact on the federal-State balance, which is the fact
8 that if, on Petitioner's reading, the attorney must
9 return -- must go to State court or go into State
10 proceedings and continue the representation there, they
11 still answer to the federal judge who supervises their
12 appointment, supervises their qualifications, and
13 determines whether and to what extent they will be paid.
14 And of critical importance, the federal judge determines
15 when the attorney will be permitted to withdraw. And
16 the federal judge may not permit such a withdrawal,
17 unless and until the federal judge can find another
18 attorney who meets the same qualifications for a federal
19 appointment.

20 So you would have, on Petitioner's reading,
21 an attorney appointed by federal court who would go into
22 State judicial proceedings and would be unable to ask
23 the State tribunal before whom he or she was appearing
24 for permission to withdraw from the engagement. He or
25 she would have to return to the federal court for that

1 permission. We see that as a direct -- direct
2 infringement on the State tribunal process.

3 JUSTICE STEVENS: May I just be clear on one
4 thing on your position, Mr. Jay? Is it your view that
5 the federal judge may not allow the lawyer to do
6 anything in an unexhausted claim, or does he have some
7 discretion?

8 MR. JAY: Well, I think -- this statute,
9 Your Honor, doesn't deal with discretion. It deals with
10 shall. And -- so we don't think it is possible under
11 this statute. It is possible.

12 Now, there is another provision in federal
13 court to the appointment of counsel, the Criminal
14 Justice Act 18 U.S.C. 3006 capital A, which was in
15 existence long before this statute, used to permit
16 discretionary appointment of counsel in 2254 cases. It
17 does contain a provision for some ancillary
18 representation. It is possible that an attorney might
19 be able to invoke that provision which has its own
20 legislative --

21 JUSTICE STEVENS: What is the government's
22 position on that issue?

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

25 JUSTICE STEVENS: It seems to me that issue

1 would arise more often than the issue we are fighting
2 about in this case.

3 MR. JAY: It -- it might, Your Honor,
4 because the Criminal Justice Act applies to noncapital
5 cases as well. But I have not seen it litigated. And
6 so, I don't think we have taken a position on it. But
7 that is -- that is a potential source for discretionary
8 funding.

9 But the suggestion that subsection E permits
10 some exercise of discretion because of the inclusion of
11 "and other appropriate motions and procedures," I don't
12 think that works in this case to cabin the necessary
13 implications of Petitioner's reading, because the three
14 categories of proceedings are judicial proceedings,
15 competency proceedings and proceedings for executive or
16 other clemency, and each of the examples from pretrial
17 proceedings down through applications for stays of
18 execution and other appropriate motions and procedures
19 fall into the category of judicial proceedings.

20 It is our position that those are to be
21 federal proceedings, not proceedings in State court.
22 Anything that is on that list, from -- again from
23 pretrial proceedings down through -- at least to all
24 available post conviction process, that is not
25 discretionary, and we don't think that the district

1 court could decide that even though something were
2 available post conviction process, it was not to be
3 funded because the district court deemed it not to be
4 appropriate.

5 And many of the filings that a habeas
6 counsel might wish to make in State court, if the
7 Petitioner's reading were adopted, would fall under the
8 category of available post conviction process, a
9 successive writ of habeas corpus or a writ of coram
10 nobis, such as the one that Petitioner litigated in the
11 Tennessee Court of Criminal Appeals while its federal
12 habeas proceedings was pending.

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

20 MR. JAY: There are some funds on the State
21 level, and I would like to come back to how Tennessee
22 handles that in a moment. But as a general answer to
23 your question, the statute does not make clear that if
24 Petitioner can obtain counsel at no cost to himself,
25 that he is no longer eligible for federal counsel under

1 this provision, because he, after all, would still be
2 indigent. And I think the situation that occurred here
3 in the Tennessee courts highlights the difficulty that
4 would be raised by creating a -- by permitting funding
5 for State proceedings.

6 The Tennessee post conviction defender is
7 authorized by statute to represent inmates under a
8 sentence of death in post conviction and clemency
9 proceedings in State court, and he has discretion over
10 the clemency portion.

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

19 So, in any instance like that in which there
20 is -- there are, in some circumstances, State-funded
21 counsel available, I think he would set up -- you would
22 create a powerful incentive for the State to say it
23 wishes to go second that allow federal -- allow federal
24 funding to come first and state funding to come second,
25 and for the federal government to respond in like

1 measure.

2 JUSTICE SCALIA: And that's the government's
3 position, under this provision, even if -- even if State
4 funding -- well, as you say State isn't covered anyway.

5 MR. JAY: Right. Our position,
6 Justice Scalia, is --

7 JUSTICE SCALIA: Assuming State funding is
8 covered, assuming representation in the State is
9 covered, it does seem to be the case that the test of
10 whether you get some Federal lawyer appointed is not
11 whether you don't have a State lawyer, but rather
12 whether you can pay for counsel, right?

13 MR. JAY: Whether you as a personal
14 matter --

15 JUSTICE SCALIA: Can pay.

16 MR. JAY: -- are financially unable.

17 JUSTICE SCALIA: That's strange.

18 MR. JAY: And the ultimate test for
19 appointment is also based on when the defend -- at the
20 time the defendant is or becomes financially unable,
21 there is no reference in the statute to when -- to the
22 defendant becoming financially able again. It has been
23 interpreted in some instances to permit revisiting that
24 financial ability decision, but in circumstances unlike
25 what we are discussing here, where the State provides

1 free counsel.

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

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

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

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

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

23 MR. JAY: Other than the general presumption
24 that this Court apply ins these ratification cases,
25 that's right, Your Honor; we can't -- we can't point to

1 any particular report or colloquy. The term proceeding
2 has to be given a consistent construction across section
3 3599(e). Clemency proceedings, judicial proceedings and
4 clemency proceedings, we submit, are made clear by the
5 text and structure of the statute to refer only to
6 Federal proceedings. Adopting Petitioner's reading,
7 even if -- even though in this case it refers only to a
8 clemency proceeding, would inevitably lead to Federal
9 funding for any proceeding on the State level that meets
10 one of the descriptions set out in subsection (e).
11 Clemency would be a particularly poor candidate for such
12 funding because a clemency decision before a State
13 governor, which may indeed be initiated before the --
14 before the inmate comes to Federal court for habeas
15 petition, implicates no Federal rights and implicates
16 indicates no Federal interests. For those reasons we
17 submit judgment of the Court of Appeals should be
18 affirmed. Thank you all.

19 CHIEF JUSTICE ROBERTS: Thank you, Mr. Jay.
20 MS. CHAVIS, you have a minute left.

21 REBUTTAL ARGUMENT OF DANA C. HANSEN CHAVIS
22 ON BEHALF OF THE PETITIONER

23 MS. CHAVIS: Thank you, Your Honor.

24 The word proceedings in subsection (e) is
25 given meaning by Congress by the words that Congress

1 used, and when it says proceedings for clemency, it
2 means proceedings for that clemency that is available to
3 the defendant. Subsection (a)(2) put 2254 defendants
4 and 2255 defendants on the same footing, and if we don't
5 give affect to the "or other" language or the available
6 language in the clemency clause, then we are rendering
7 those words meaningless. We're -- and we are saying
8 that Congress somehow sub silentio read out 2454
9 defendants from the clemency clause.

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

1 CHIEF JUSTICE ROBERTS: How often has
2 clemency been granted in Tennessee?

3 MS. CHAVIS: Your Honor, clemency has been
4 granted one time since Furman, that I am aware of, Your
5 Honor.

6 CHIEF JUSTICE ROBERTS: One time in the last
7 how many decades?

8 MS. CHAVIS: That would be the last 20 or
9 30, Your Honor. We just recently started having
10 executions.

11 If I -- if I might may just add one other
12 factor. Clemency was granted four times in 2008
13 throughout the country.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.
15 The case is submitted.

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

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