

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

13 APPEARANCES:

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

23 MS. CHAVIS: Yes, Your Honor.

24 JUSTICE ALITO: How do you get that out of the  
25 statutory language of (e)?

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

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

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

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

16 MS. CHAVIS: Yes.

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

21 MS. CHAVIS: Yes --

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

24 MS. CHAVIS: "In all subsequent stages of  
25 judicial proceedings" is exactly what subsection (e)

1 states.

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

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

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

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



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

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

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

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

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

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

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

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

16 MS. CHAVIS: Yes.

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

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

23 And there's also a second reason why Federal  
24 habeas counsel would not represent the defendant in any  
25 retrial or resentencing, and that would be --

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

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

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

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

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

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

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

1 be appointed a lawyer.

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

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

7 MS. CHAVIS: Yes.

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

12 MS. CHAVIS: Yes --

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

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

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

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

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

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

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

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

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

22 JUSTICE SCALIA: Yes, right.

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

25 JUSTICE SCALIA: Right.

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

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

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

5 JUSTICE SCALIA: Right.

6 MS. CHAVIS: -- motions."

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

10 MS. CHAVIS: Your Honor --

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

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

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

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

1 that would come under would be after "and all available  
2 post-conviction process," that would be described as "other  
3 appropriate motions and procedures."

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

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

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

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

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

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

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

1 -- presumably they do a lot of work, they get up to speed  
2 on everything -- they ought to represent you through the  
3 next stage of available proceedings.

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

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

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

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



1 the State court, further post-conviction proceedings?

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

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

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

6 JUSTICE KENNEDY: But that is your position.

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

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

19 JUSTICE SCALIA: Well, but -- but, you know, it  
20 -- it mentions trial proceedings, trial, sentencing,  
21 motions for new trial, appeals, applications for writ of  
22 cert. And then in the next clause, it just says, "and all  
23 available post-conviction process." Now, you -- you would  
24 acknowledge that -- that going back to exhaust claims that  
25 hadn't been exhausted before the State courts would be

1 post-conviction process or not?

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

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

9 MS. CHAVIS: Yes, Your Honor.

10 JUSTICE SCALIA: Okay?

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

16 JUSTICE SCALIA: Right.

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

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

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

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

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

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

23 MS. CHAVIS: And I understand that, Your Honor,  
24 but I think also, if we look at the representation as it  
25 does occur in the real world, we have the AEDPA, we have

1 this Court's decisions that -- that structure the -- the  
2 capital litigation so that State court exhaustion normally  
3 comes before the Federal habeas process.

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

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

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

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

25 MS. CHAVIS: The post-conviction process would

1 refer to anything in the 2254, the 2255. For example, it  
2 -- it could be the discovery motions; it could be -- it  
3 could be motions in aid of an evidentiary hearing; it could  
4 be motions in aid of an appeal. So that -- that's a  
5 descriptor.

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

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

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

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

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

24 MS. CHAVIS: It's four lines up from the -- or  
25 five lines up from the -- the bottom, the end of that line

1 -- "appropriate" --

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

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

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

12 MS. CHAVIS: Your Honor, it may.

13 JUSTICE STEVENS: What?

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

21 But of course, Congress could have contemplated  
22 that the Federal lawyer continue to represent the defendant  
23 in exhaustion proceedings. Back when the statute was --  
24 was created, Congress was looking at the States and looking  
25 at the fact that States were not providing counsel for

1 capital defendants in these cases. And Congress --

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

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

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

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

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

11 MS. CHAVIS: Yes.

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

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

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

25 MS. CHAVIS: Correct.

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

5 MS. CHAVIS: It does, Your Honor.

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

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

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

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

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

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

24 JUSTICE SCALIA: So what? I mean, it -- it  
25 still is -- is unqualified. And -- and part of your



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

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

9 JUSTICE SCALIA: Oh, but -- but --

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

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

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

19 JUSTICE SCALIA: Why?

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

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

23 MS. CHAVIS: Well --

24 CHIEF JUSTICE ROBERTS: It says "adequate  
25 representation." And then later on it says the lawyers we

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

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

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

15 MS. CHAVIS: Well, Your Honor --

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

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

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

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

25 JUSTICE SCALIA: Sure.

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

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

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

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

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

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

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

3 JUSTICE SCALIA: I didn't think so.

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

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

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

17 MS. CHAVIS: Your Honor --

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

21 MS. CHAVIS: Your Honor, these are the words  
22 that Congress used. They know that the -- that the States  
23 provide for forms of clemency other than executive  
24 clemency. We know that -- that Congress specifically  
25 stated they wanted the defendant to be represented in that

1 clemency proceeding that's available to him. And in -- in  
2 these cases, like this 2254 case --

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

5 MS. CHAVIS: Yes, Your Honor.

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

7 MS. CHAVIS: Your Honor --

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

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

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

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

16 ORAL ARGUMENT OF WILLIAM M. JAY

17 ON BEHALF OF THE UNITED STATES,

18 AS AMICUS CURIAE,

19 IN SUPPORT OF THE JUDGMENT BELOW

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

22 Section 3599 authorizes federally funded  
23 representation only in the three categories of proceedings  
24 specified in subsection (e). At least three distinct  
25 aspects of the statute's text and structure show that the

1 only proceedings included are Federal proceedings before a  
2 Federal officer.

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

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

19 Third, if Petitioner were right that --

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

24 MR. JAY: For that -- for that habeas -- for  
25 that person's Federal habeas petition --

1 JUSTICE STEVENS: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 JUSTICE STEVENS: Now, supposing, on the eve of



1 execution, he wanted to apply for a stay of execution, he'd  
2 be entitled to representation before a Federal judge.  
3 Right?

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

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

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

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

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

20 JUSTICE STEVENS: Well, I understand that.

21 MR. JAY: There's nothing --

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

24 MR. JAY: Would not get paid by the Federal  
25 Government for litigating a matter in State court that may

1 have no connection to Federal law.

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

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

8 JUSTICE STEVENS: Oh, I understand.

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

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

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

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

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

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

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

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

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

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

21 MR. JAY: But the -- subsection (e) doesn't bar  
22 the lawyer from doing that. And two points on that: There  
23 might be other sources of funding available; and indeed,  
24 the same lawyer who need not be a Federal defender -- he  
25 may be a panel attorney appointed - who's in private

1 practice appointed from the district court's panel of  
2 available attorneys who meet the Federal qualifications.

3 CHIEF JUSTICE ROBERTS: So he presumably --

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

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

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

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

20 MR. JAY: Well, Your Honor --

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

25 MR. JAY: Well, Your Honor, the limitations in

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

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

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

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

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

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

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

24 All right, now why isn't it?

25 MR. JAY: I think it isn't, Justice Breyer,

1 because 2254 is not a reference to proceedings in State  
2 court. A 2254 proceeding is in Federal court. It involves  
3 Federal constitutional issues in a Federal constitutional  
4 challenge to the legitimacy of the --

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

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

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

23 JUSTICE BREYER: He happened to be the person  
24 who wrote it, and it's referred to in the Solicitor  
25 General's brief. And on page 21 -- I took what you said, I

1 went back and looked it up, just as you might have  
2 suggested I would by putting in the relevant citations.  
3 Okay?

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

8 MR. JAY: Well, I --

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

11 JUSTICE BREYER: Yes, they did.

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

14 (Laughter.)

15 CHIEF JUSTICE ROBERTS: We direct our questions  
16 to counsel.

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

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

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

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

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

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

24 MR. JAY: Well, Your Honor, the text of  
25 Congressman Conyers' amendment wiped out the Gekas



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

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

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

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

23 MR. JAY: We think, Your Honor, that the  
24 purpose of that phrase, which was added, as I -- as I tried  
25 to explain in my previous answer, was added at a time when

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

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

13 MR. JAY: We agree, Your --

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

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

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

24 MR. JAY: Should the Constitution be amended to  
25 permit -- to permit legislative clemency, I think that -- I

1 think that that is right.

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

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

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

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

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

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

15 JUSTICE STEVENS: You say it --

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

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

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

25 JUSTICE STEVENS: But there's arguably a

1 Federal right, a constitutional right, to a fair proceeding  
2 in a clemency application.

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

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

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

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

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

23 JUSTICE KENNEDY: Is the government's principal  
24 concern in this case the possibility, the potential,  
25 assuming the Petitioner prevails, of appointment of counsel

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

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

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

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

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

1 there are non-executive State clemency proceedings -- you  
2 are sure that there aren't?

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

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

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

24 MR. JAY: I think if your premise, Justice  
25 Souter, were -- is right, that Congress intended to fund --

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

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

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

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

24 And so I mentioned before, one of the two  
25 possibilities that we see for what "or other" might mean,



1 which would be --

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

6 MR. JAY: It is, Your Honor.

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

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

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

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

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

1 the same qualifications for the Federal appointment.

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

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

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

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

1 might be able to invoke that provision, which has its own  
2 legislative history --

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

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

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

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

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

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

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

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

24           MR. JAY: There are some funds on -- on the  
25 State level, and I'd like to come back to how Tennessee

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

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

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

23           So, in -- in any instance like that in which  
24 there is -- there are, in some circumstances, State-funded  
25 counsel available, I think you would set -- you would

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

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

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

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

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

17 JUSTICE SCALIA: Can pay.

18 MR. JAY: -- are financially unable.

19 JUSTICE SCALIA: That's strange.

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

1 decision, but in circumstances unlike what we are  
2 discussing here, where the State provides free counsel.

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

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

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

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

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

24 MR. JAY: Other than the general presumption  
25 that this Court applies in these ratification cases, that's

1 right, Your Honor. We can't -- we can't point to a  
2 particular committee report or colloquy.

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

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

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

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

22 Ms. Chavis, you have a minute left.

23 REBUTTAL ARGUMENT OF DANA C. HANSEN CHAVIS

24 ON BEHALF OF THE PETITIONER

25 MS. CHAVIS: Thank you, Your Honor.



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

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

1 when they're presented with these capital clemency  
2 petitions.

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

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

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

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

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

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 The case is submitted.

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

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