

Opinion of SCALIA, J.

## SUPREME COURT OF THE UNITED STATES

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No. 07–8521

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EDWARD JEROME HARBISON, PETITIONER *v.*  
RICKY BELL, WARDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT

[April 1, 2009]

JUSTICE SCALIA, with whom JUSTICE ALITO joins, concurring in part and dissenting in part.

I agree with the Court that Harbison was not required to obtain a certificate of appealability under 28 U. S. C. §2253(c)(1)(A) before appealing the District Court’s denial of his motion to expand counsel’s appointment. See *ante*, at 2–3. I do not agree, however, that 18 U. S. C. §3599 gives state prisoners federally funded counsel to pursue state clemency. While purporting to adopt a “straightforward reading of the statute,” *ante* at 5, the Court in fact selectively amends the statute—inserting words in some places, twisting their meaning elsewhere. Because the statute is most naturally and coherently read to provide federally funded counsel to capital defendants appearing in a federal forum, I would affirm the decision of the Sixth Circuit and hold that Harbison was not entitled to federally funded counsel to pursue state clemency.

### I

Title 18 U. S. C. §3599(a)(2) provides for the appointment of counsel as follows:

“In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate

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representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

Section 3599(e) defines the scope of appointed counsel's representation:

"Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant."

As the Court notes, the first of these provisions entitled Harbison to counsel for §2254 proceedings. And the second of them, without any express qualification, provides for counsel's continued representation through "such . . . proceedings for executive or other clemency as may be available to the defendant," which in petitioner's case would include state clemency proceedings. The Court thus concludes that the statute's "plain language" provides Harbison federally funded counsel to represent him in state clemency proceedings. *Ante*, at 5.

But the Court quickly abandons its allegedly "plain" reading of the statute when it confronts the subsection that precedes these two, which provides:

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"Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either—

“(A) before judgment; or

“(B) after the entry of a judgment imposing a sentence of death but before the execution of that judgment;

“shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).” §3599(a)(1).

The Court states that “(a)(1) describes federal capital defendants.” *Ante*, at 4. But according to the Court’s mode of analysis, that is not so. Subsection (a)(1), like subsection (e), contains no language limiting its application to *federal* capital defendants. It provides counsel to indigent defendants in “every criminal action in which a defendant is charged with a crime which may be punishable by death.” §3599(a)(1) (emphasis added). Why, then, is subsection (a)(1) limited to *federal* capital defendants? Because, as the Court notes, “the statute is primarily concerned with federal criminal actions and (a)(1) includes no language suggesting that it applies more broadly.” *Ante*, at 6 (footnote omitted).

Quite right. Section 3599 was enacted as part of a bill that created a new federal capital offense, see *ibid.*, n. 3, and it is perfectly reasonable to assume that a *federal* statute, providing *federally* funded counsel, applies in *federal* proceedings only, even where the statute contains no such express limitation. Cf. *Barron ex rel. Tiernan v. Mayor of Baltimore*, 7 Pet. 243, 247–248 (1833). But there

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is no basis for adopting that reading with respect to only *half* the statute. If subsection (a)(1) is limited to federal proceedings, then subsection (e), which likewise contains no express federal limitation, is similarly limited. We cannot give the same silence (omission of the limiting word “federal”) in adjacent and simultaneously enacted subsections of the same law (§3599) divergent meanings.

The Court advances two arguments for reading subsection (e) more broadly. First, it claims that unlike subsection (a)(1), “subsection (a)(2) refers to state litigants.” *Ante*, at 6. It most certainly does not. It refers to *proceedings* under §2254 and §2255—proceedings under *federal* statutes providing *federal* causes of action in *federal* court. Read together, subsections (a)(1) and (a)(2) provide federally funded counsel for persons convicted of capital crimes who are appearing in federal court. Subsection (a)(2) neither undermines the Court’s earlier statement that “the statute’s primary focus is federal” proceedings, nor gives the Court license to insert words selectively into the statutory text.

The Court next reasons that the phrase “executive or *other* clemency” suggests that subsection (e) includes state clemency proceedings. Since (the argument goes) federal clemency is exclusively executive, the word “other” must refer to state clemency, or else it would be superfluous. But the drafting history, which the Court thinks relevant, *ante*, at 10–11, defeats the inference the Court wishes to draw. The current text of subsection (e) first appeared in a version of the bill that included what is now subsection (a)(1) (which the Court concedes deals only with federal proceedings), but *not* subsection (a)(2) (which the Court would deem applicable to state proceedings). 134 Cong. Rec. 22995 (1988). In other words, at the time of its introduction, subsection (e) applied only to federal defendants, and the phrase “or other clemency” was unquestionably superfluous.

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In any event, the Court’s reading places a great deal of weight on avoiding superfluity in a statute that is already teeming with superfluity. Item: Subsection (a)(2) needlessly refers to §2255 proceedings even though subsections (a)(1) and (e) taken together would provide federal capital defendants with counsel in §2255 proceedings. Item: Subsection (a)(2) provides counsel “in accordance with subsections (b) through (f)” even though subsections (b) and (c) have no conceivable relevance to subsection (a)(2).<sup>\*</sup> Item: Subsection (e) provides counsel “throughout every subsequent stage of *available* judicial proceedings,” including “all *available* post-conviction process” (emphasis added). The first use of the term “available” is already of dubious value (is counsel expected to represent a defendant in *unavailable* proceedings?) but its needless repetition is inexplicable. In a statute that is such a paragon of shoddy draftsmanship, relying upon the superfluity of “or other” to extend the statute’s application from federal to state proceedings is quite absurd—and doubly absurd when that extension is illogically limited to the subsection in which “or other” appears.

## II

The Court’s reading of subsection (e) faces a second substantial difficulty. Subsection (e) provides that counsel, once appointed,

“shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for

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\* Subsection (b) details the requisite qualifications for a lawyer appointed “before judgment”; but appointments under subsection (a)(2) are made only after judgment. Subsection (c) requires that a lawyer appointed after judgment have been “admitted to practice *in the court of appeals* for not less than five years” (emphasis added); but the postconviction proceedings dealt with by subsection (a)(2) take place in federal *district court*.

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new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures.” §3599(e).

In other words, once counsel is appointed under (a)(2), petitioner is entitled to federal counsel “throughout every subsequent stage of available judicial proceedings.” The Government argues that, if subsection (e) is not limited to federal proceedings, then a §2254 petitioner who obtains federally funded counsel will retain that counsel, at federal expense, in all “subsequent” state-court proceedings, including the retrial that follows the grant of federal habeas relief. The Court disagrees, on the ground that a new trial represents the “commencement of new judicial proceedings.” *Ante*, at 9.

I need not enter that controversy. What is clear, at least, is that (if subsection (e) includes state proceedings) federally funded counsel would have to represent petitioners in subsequent state habeas proceedings. The Court tries to split the baby here, conceding that “a district court may determine on a case-by-case basis that it is appropriate for federal counsel to exhaust [in state court] a claim in the course of her federal habeas representation.” *Ante*, at 9–10, n. 7. The Court tries to derive this discretionary authority from subsection (e)’s provision for representation by federal counsel in “other appropriate motions and procedures.” §3599(e) (emphasis added). But that provision is *in addition to*, rather than *in limitation of*, subsection (e)’s unqualified statement that counsel “shall represent the defendant throughout every subsequent stage of available judicial proceedings, including . . . all available post-conviction process.” The provision then continues: “*together with* applications for stays of execution and other appropriate motions and procedures.” (Emphasis added.)

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There is no way in which this can be read to limit the requirement that counsel represent the defendant in “every subsequent stage of available judicial proceedings,” which would include habeas proceedings in state court.

The Court seeks to avoid this conclusion by saying that “[s]tate habeas is not a stage ‘subsequent’ to federal habeas,” because “[p]etitioners must exhaust their claims in state court before seeking federal habeas relief.” *Ante*, at 9. This is a breathtaking denial of reality, confusing what *should be* with what *is*. It is rather like saying that murder does not exist because the law forbids it. To be sure, petitioners are *supposed to* complete state postconviction proceedings before pursuing relief in federal court. But they often do not do so, and when they do not our opinions permit them to seek stays or dismissals of their §2254 petitions in order that they may thereafter (*subsequently*) return to state court to exhaust their claims. See *Rhines v. Weber*, 544 U. S. 269, 277–278 (2005); *Pliler v. Ford*, 542 U. S. 225, 228 (2004). Additionally, inmates may—as petitioner did in this case—file successive state habeas petitions after §2254 proceedings are complete. See *Harbison v. State*, No. E2004–00885–CCA–R28–PD, 2005 WL 1521910, \*1 (Tenn. Crim. App., June 27, 2005). These subsequent state proceedings are not rare but commonplace, and it is inconceivable (if state proceedings are covered) that subsection (e) does not refer to them. Indeed, one would think that subsection (e) refers especially to them. And what kind of an incoherent statute would it be that allows counsel for *de-facto*-subsequent federal habeas claims that *should have been* brought earlier (see §3599(a)(2)) but does not allow counsel for subsequent state habeas claims that have the same defect?

If §3599(e) includes state proceedings (as the Court holds), and if “subsequent” is given its proper scope (rather than the tortured one adopted by the Court)—then §3599(a)(2)’s limitation of federally provided counsel to

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only *federal* habeas proceedings would amount to a dead letter. A capital convict could file for federal habeas without first exhausting state postconviction remedies, obtain a stay or dismissal of that federal petition, and return to state court along with his federally funded lawyer. Indeed, under our decision in *McFarland v. Scott*, 512 U. S. 849 (1994), he need not even file an unexhausted federal habeas petition; he can file a stand-alone “motion requesting the appointment of habeas counsel,” *id.*, at 859, and obtain federally funded counsel that he can then take back for the subsequent state proceedings. The question persists: Why would §3599(a)(2) provide counsel in only *federal* habeas proceedings, when §3599(e) makes it so easy to obtain federally funded counsel for *state* habeas proceedings as well?

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Concededly, §3599 contains no express language limiting its application to proceedings in a federal forum. And yet Harbison, the Government, and the Court all read part of that section to refer to federal proceedings only. The Court’s refusal to extend that limitation to the entirety of §3599 is untenable. It lacks a textual basis and has the additional misfortune of producing absurd results, which the majority attempts to avoid by doing further violence to the statutory text. I would read the statute as providing federal counsel to capital convicts appearing in a federal forum, and I accordingly would affirm the judgment of the Sixth Circuit.