No. _____

IN THE

Supreme Court of the United States

GARY RAY BOWLES,

Petitioner,

v.

RON DESANTIS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE WITH AN EXECUTION SCHEDULED FOR THURSDAY, AUGUST 22, 2019, AT 6:00 P.M.

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CAPITAL CASE

QUESTION PRESENTED

In *Herrera v. Collins*, this Court explained that clemency "is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." 506 U.S. 390, 411-12 (1993). For death-sentenced individuals in particular, the Court has emphasized that clemency is integral to the "functioning of our legal system," and "part and parcel of the multiple assurances that are applied before a death sentence is carried out." *Kansas v. Marsh*, 548 U.S. 163, 193 (2006) (Scalia, J., concurring). That is why the Court has called clemency "the fail safe in our criminal justice system." *Herrera*, 506 U.S. at 415 (internal quote omitted).

In *Harbison v. Bell*, the Court ruled that a federal court's appointment of counsel to represent a death-sentenced prisoner under 18 U.S.C. § 3599 includes representation in state clemency proceedings. 556 U.S. 180, 194 (2009). In enacting § 3599, Congress sought to ensure that "no prisoner would be put to death without meaningful access to the fail-safe of our justice system," and did not want "condemned men and women to be abandoned by their counsel at the last moment and left to navigate the sometimes labyrinthine clemency process." *Id*. (internal quotes omitted).

Two circuits are presently split on the extent and meaning of *Harbison*. *Compare Samayoa v. Davis*, 928 F.3d 1127 (9th Cir. 2019) *with Irick v. Bell*, 636 F.3d 289 (6th Cir. 2011). This Court now has the opportunity to resolve this circuit split over the fundamental meaning of § 3599 for state clemency proceedings.

Petitioner Gary Ray Bowles is a death-sentenced Florida prisoner scheduled to be executed on August 22, 2019. At the time of his state clemency proceedings, his

§ 3599 counsel were representing him in pending state litigation concerning whether he is intellectually disabled. Given the sensitivities of Mr. Bowles's intellectual disability litigation, and the prospect that his claim might never receive judicial review because of a procedural rule recently created by the Florida Supreme Court,[1] his § 3599 counsel sought to represent him in state clemency proceedings to ensure that the fail-safe of his process was preserved, and that Mr. Bowles, an intellectually disabled man, was not left to navigate the process alone.

But Florida state clemency officials barred § 3599 counsel from representing Mr. Bowles in state clemency proceedings, instead paying a private lawyer who had no experience with capital cases or clemency cases a flat fee of $10,000 to represent Mr. Bowles. After clemency was denied and a death warrant was signed, Mr. Bowles sought injunctive relief under 42 U.S.C. § 1983 based on the state officials' denial of his rights under § 3599. Both the district court and the court of appeals recognized that § 3599 counsel's representation extended to state clemency proceedings as far as the federal courts were concerned, but held that Florida state officials' deprivation of Mr. Bowles's § 3599 rights was in no way enforceable through § 1983.

The question presented is:

> Can state officials bar a death-sentenced individual's 18 U.S.C. § 3599 counsel from representing him in state clemency proceedings, and if not, is the remedy for the violation 42 U.S.C. 1983?

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[1] The Florida Supreme Court ultimately applied this procedural rule to refuse to review Mr. Bowles's intellectual disability claim. That ruling is the subject of a separate certiorari petition pending in this Court. *Bowles v. Florida*, No. 19-5617.

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PARTIES TO THE PROCEEDINGS

Petitioner Gary Ray Bowles, a death-sentenced Florida prisoner scheduled for execution on August 22, 2019, was the appellant in the United States Court of Appeals for the Eleventh Circuit. Respondents, Florida State officials involved in Mr. Bowles's executive clemency proceedings, were the appellees in that court.

DECISION BELOW

The Eleventh Circuit's decision is not yet reported but is available at __ F.3d __, 2019 WL 3886503, and is reprinted in the Appendix (App.) at 1.

JURISDICTION

The Eleventh Circuit's opinion was entered on August 19, 2019. App. at 1. This Court has jurisdiction under 28 U.S.C. § 1254(1).[2]

FEDERAL STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3599 provides, in relevant part:

> (a)(2) 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 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).
>
> * * *
>
> (e) 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 . . . proceedings for executive or other clemency as may be available to the defendant.

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

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[2] Petitioner requests that the Court expedite consideration of this petition in order to ensure that it is circulated together with the accompanying stay application.

STATEMENT OF THE CASE

I. Introduction

Petitioner Gary Bowles is an intellectually disabled man who is scheduled to be executed by the State of Florida on August 22, 2019, at 6:00 p.m.

Since 2017, Mr. Bowles's appointed 18 U.S.C. § 3599 counsel, the Capital Habeas Unit (CHU) of the Federal Public Defender for the Northern District of Florida, has investigated, developed, and attempted to present evidence of Mr. Bowles's intellectual disability in every forum available to him. In March 2018, while Mr. Bowles had a pending claim of intellectual disability in state court, the State of Florida initiated clemency proceedings for Mr. Bowles. The defendants in the underlying matter, officials of the State of Florida, contracted with private clemency counsel to represent Mr. Bowles without first notifying Mr. Bowles or his § 3599 counsel, and then barred every attempt by his § 3599 counsel to participate in Mr. Bowles's clemency process. Though these State officials were notified that Mr. Bowles was intellectually disabled and uniquely vulnerable to miscommunication, and that he had pending constitutional litigation concerning this disability, they barred his § 3599 counsel from even serving as co-counsel in the clemency proceedings.

The private clemency counsel Florida retained for Mr. Bowles had never represented an individual facing the death penalty at any stage of proceedings—trial, appellate, postconviction, or habeas—nor was he qualified under Florida law to do so. He had never represented a client in intellectual disability-related proceedings, nor did he have any experience or training in litigating intellectual disability claims.

Pursuant to the terms of his flat-fee contract, he did not have funding for experts or investigation, and had not been trained in how to investigate and prepare a professionally appropriate clemency presentation.

Unsurprisingly, Mr. Bowles's state-retained clemency counsel failed to act as meaningful counsel. State-retained counsel failed to speak with any lay or expert witnesses, failed to seek Mr. Bowles's full case file, allowed critical factual inaccuracies to go uncorrected during Mr. Bowles's only opportunity for a clemency presentation, and submitted a clemency petition that was less than eight double-spaced pages in length from title to signature, and was rife with typographical, formatting, and substantive errors. In fact, the clemency petition that state-retained counsel submitted on Mr. Bowles's behalf was copied nearly word for word from another death-sentenced inmate's petition, included two instances where Mr. Bowles was erroneously called the other inmate's name, and included facts that were true for the other inmate, but not Mr. Bowles. State-retained counsel failed to meaningfully investigate or present Mr. Bowles's intellectual disability as a basis for clemency. And because state officials barred the only counsel that knew Mr. Bowles and understood his intellectual disability litigation—his § 3599 counsel, the CHU—it was akin to Mr. Bowles having no counsel at all in the proceedings.

What is fundamentally at issue in this case is the meaning of § 3599. The actions of the defendants in the underlying action, all officials of the State of Florida, prevented Mr. Bowles from receiving representation he was entitled to under § 3599. The defendants have argued throughout the course of this litigation that § 3599

counsel may never appear in clemency proceedings in the State of Florida, either as sole clemency counsel or as co-counsel to state-furnished counsel.

Mr. Bowles now faces imminent execution, having never had a clemency proceeding where he was represented by competent counsel who could fairly present his compelling grounds for clemency—the strong evidence of his intellectual disability. This is particularly impactful because Mr. Bowles has been barred by state and federal procedural rules, respectively, from presenting the merits of his intellectual disability claim in any court. The violations of Mr. Bowles's § 3599 rights as they relate to clemency therefore represented a breakdown in "the fail-safe of our justice system," leaving Mr. Bowles effectively alone "at the last moment and left to navigate" the clemency process without his trusted attorneys. *See Harbison*, 556 U.S. at 194. Yet the district court and court of appeals approved of this outcome below, because in their view the state officials' violations of § 3599 rights are not enforceable.

This Court's intervention is urgently needed if § 3599(e)'s mandate that counsel "*shall* represent the defendant throughout every subsequent stage of available judicial proceedings, including . . . proceedings for executive or other clemency," is to have any meaning at all. 18 U.S.C. § 3599(e) (emphasis added).

II. Procedural History

A. Mr. Bowles's Death Sentence and Appointment of § 3599 Counsel

Mr. Bowles pleaded guilty to first-degree murder in Duval County, Florida in 1996. The state court imposed a death sentence, which was affirmed by the Florida Supreme Court on direct appeal. *Bowles v. State*, 804 So. 2d 1173 (Fla. 2001), *cert*

denied, *Bowles v. Florida*, 536 U.S. 930 (2002). Mr. Bowles was denied state postconviction relief. *Bowles v. State*, 979 So. 2d 182 (Fla. 2008). In 2008, Mr. Bowles, filed a petition for federal habeas corpus relief under 28 U.S.C. § 2254 in the United States District Court for the Middle District of Florida. *Bowles v. Sec'y, Fla. Dep't of Corr.,* No. 3:08-cv-791, ECF No. 1 (M.D. Fla.). The District Court denied the petition, *id*. at ECF No. 18, and the Eleventh Circuit affirmed. *Bowles v. Sec'y, Fla. Dep't of Corr.*, 608 F.3d 1313, 1317 (11th Cir. 2010), *cert denied*, 562 U.S. 1068 (2010).

On September 27, 2017, the Capital Habeas Unit (CHU) of the Federal Public Defender for the Northern District of Florida was appointed under 18 U.S.C. § 3599 to represent Mr. Bowles in further proceedings. *Bowles v. Sec'y, Fla. Dep't of Corr.*, No. 3:08-cv-791, ECF No. 33 (M.D. Fla.). On December 5, 2017, the CHU moved unopposed for authorization under § 3599 to litigate Mr. Bowles's intellectual disability in state court for the first time. *Id*., ECF No. 34. On December 6, 2017, the district court granted his request. *Id*., ECF No. 35.

At the time of Mr. Bowles's death sentence, *Atkins v. Virginia*, 536 U.S. 304 (2002), had not yet recognized the Eighth Amendment's prohibition of executing individuals with intellectual disabilities. Later, when Mr. Bowles was litigating his initial state postconviction motion, Florida courts only allowed intellectual disability claims for individuals with IQ scores of 70 and below. In 2014, this bright-line IQ score cutoff was held unconstitutional in *Hall v. Florida*, 134 S. Ct. 1986 (2014).

On October 19, 2017, less than one year after *Walls v. State*, 213 So. 3d 340 (Fla. 2016), made *Hall* retroactive in Florida, Mr. Bowles, through his § 3599 counsel,

filed a successive motion for state postconviction relief, arguing that his execution would violate the Eighth Amendment because he is intellectually disabled. Mr. Bowles's § 3599 counsel, the CHU, investigated and developed this evidence of his intellectual disability, and subsequently proffered a qualifying IQ score of 74, expert reports of three mental health professionals diagnosing or finding evidence of intellectual disability, more than a dozen sworn statements evidencing Mr. Bowles's significant adaptive deficits throughout his childhood, adolescence, and adulthood, and the declarations of the only two mental health professionals that had previously evaluated Mr. Bowles, attesting that they had not evaluated him for intellectual disability, and did not dispute his present diagnosis.

B. Clemency Proceedings

i. Florida's Clemency Scheme

Clemency in Florida is derived both from the Florida Constitution and state statute. *See* Fla. Const. Art. IV, sec. 8(a) ("Except in cases of treason and in cases where impeachment results in conviction, the governor may . . . with the approval of two members of the cabinet . . . commute punishment . . . ."); Fla. Stat. § 940.01 (same). All clemency is governed by the Rules of Executive Clemency,[3] which were created by the Clemency Board, and last amended in 2011.

Within the Rules of Executive Clemency, there are 19 rules. However, only a select few apply to clemency for capital inmates. Rule 15 is the operative rule for the

[3] *Available at*: https://www.flgov.com/wp-content/uploads/2011/03/2011-Amended-Rules-for-Executive-Clemency.final_.3-9.pdf (last visited Aug. 20, 2019).

mechanics of clemency for capital inmates in Florida. Rule 15 provides that in all cases in which death has been imposed, the Florida Parole Commission (now known as the Florida Commission on Offender Review (FCOR)), conducts an "investigation into all factors relevant to the issue of clemency and provide[s] a final report to the Clemency Board." Rule 15(B). A capital inmate is given the opportunity for a clemency "interview" before FCOR, Rule 15(B), and they are entitled to a copy of the transcript of the clemency interview upon request, Rule 15(G). A transcript of the clemency interview is also available upon request to the state attorney or the victim's family. Rule 15(G). Commutation of a death sentence can be ordered by the Governor with the approval of at least two members of the Clemency Board. Rule 15(I).

By statute, the Clemency Board "may appoint private counsel to represent a person sentenced to death for relief by executive clemency . . . ." Fla. Stat. § 940.031(1). This statute went into effect on July 1, 2014.[4] The statute provides that

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[4] Before the 2014 enactment of Fla. Stat. § 940.031, providing for the private contracting scheme at issue herein, Florida circuit courts were responsible for appointing clemency counsel for death-sentenced individuals, and thus there was another forum apart from 42 U.S.C. § 1983 for any clemency related concerns. Such a forum no longer exists.

The bill that resulted in this change was a sweeping change to Florida's clemency scheme to remove all judicial involvement in ensuring death-sentenced persons had clemency counsel. *See* H.B. No. 5303, 23rd Leg., 2nd Reg. Sess. (Fla. 2014) ("An act relating to counsel in proceedings for executive clemency; amending ss. 27.51 and 27.511, F.S.; deleting provisions concerning the power of a trial court to appoint the public defender, office of criminal conflict and civil regional counsel, or other attorney in proceedings for relief by executive clemency; correcting cross-references; amending s. 27.5303, F.S.; deleting provisions concerning the appointment of a public defender or attorney by the court to represent an indigent defendant in death penalty executive clemency proceedings; amending s. 27.5304, F.S.; deleting provisions concerning compensation of an appointed attorney representing a defendant in executive clemency proceedings; creating s. 940.031, F.S.;

private counsel retained by the Clemency Board can be compensated at an amount "not to exceed $10,000, for attorney fees and costs incurred in representing the person for relief by executive clemency . . . ." Fla. Stat. § 940.031(2). This compensation is "paid out of the General Revenue Fund from funds budgeted to [FCOR]." Fla. Stat. § 940.031(2). The statute states it "does not create a statutory right to counsel" in clemency proceedings. Fla. Stat. § 940.031(3).

While § 940.031 provides for a method of retaining and compensating attorneys who represent individuals in capital clemency proceedings, it does not prescribe any qualifications for such attorneys. The application, which is less than two pages in length, asks only for biographical information and for the applicant to check all that apply from the following list:

> ☐ I am a member in good standing with the Florida Bar.
> ☐ I have read the qualifications herein and agree to these qualifications.
> ☐ I am familiar with the fees, costs and expense provisions set by law, including the fee limitations prescribed in § 940.031, Fla. Stat.
> ☐ I will not solicit compensation from the inmate I am appointed to represent.
> ☐ I will notify the Clemency Coordinator of any formal complaint filed by the Florida Bar against me, any non-confidential agreements entered into between myself and the Florida Bar, and any claim of ineffective assistance of counsel that has been set for a hearing before a judge or magistrate.
> ☐ I agree to be readily accessible to the inmate and to meet the inmate in person, prepare for and attend the Clemency interview before the Parole Commission at death row, file a clemency petition on behalf of the inmate, and attend a

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providing for clemency counsel representation of defendants in executive clemency proceedings; providing for compensation . . .").

clemency hearing before the Governor and Cabinet, if scheduled.

- ☐ I am familiar with the Rules of Executive Clemency, including Rule 15 as it related to Commutation of Death Sentences, and I will adhere to the Rules.
- ☐ I will cooperate and abide by the contract entered into between the Florida Parole Commission and me for performance of services under this agreement.
- ☐ I agree to continue representing the inmate until my services are no longer required by the Board of Executive Clemency.

No other qualifications exist for capital clemency representation, either by statute in Florida or by practice in the contracting conducted by the Office of Executive Clemency or FCOR.[5]

While clemency is an executive function in Florida, the Florida Legislature has statutorily prescribed that a death sentence cannot be carried out without the undertaking of the "clemency process." Specifically, although the legislature has empowered the Governor to initiate, with the signing of a warrant, the execution of a

[5] Under Florida's contracting scheme, clemency attorneys are neither required to be qualified under Fla. Stat. § 27.710, which provides for the "certification of minimum requirements" of attorneys permitted to represent death-sentenced individuals in postconviction and collateral proceedings (along with Fla. Stat. § 27.704(2)), nor are they required to be qualified under the Florida Rules of Criminal Procedure, Rule 3.112(k), which describes the qualifications for lead counsel in post-conviction proceedings for individuals facing the death penalty. In fact, Florida law actually prohibits such qualified counsel who are actively representing a death-sentenced client in postconviction to participate in capital clemency. *See* Fla. Stat. § 27.711(11) ("An attorney appointed under s. 27.710 to represent a capital defendant may not represent the capital defendant during a retrial, a resentencing proceeding, a proceeding commenced under chapter 940 [Executive Clemency], a proceeding challenging a conviction or sentence other than the conviction and sentence of death for which the appointment was made, or any civil litigation other than habeas corpus proceedings.").

death-sentenced individual, the Governor is only permitted to issue such a warrant if "the executive clemency process has concluded . . . ." *See* Fla. Stat. § 922.052(b), (c).

ii. Mr. Bowles's Clemency Proceedings

The Governor of Florida—through the FCOR and pursuant to Florida's executive clemency scheme—initiated clemency proceedings for Mr. Bowles in March 2018, while his intellectual disability litigation was still pending. In fact, FCOR privately retained clemency counsel for Mr. Bowles before notifying him or his § 3599 counsel, the CHU, that clemency had been initiated. After learning of the clemency proceedings, Mr. Bowles's § 3599 counsel attempted to formally participate in the clemency process, not only to provide critical information to the clemency board regarding Mr. Bowles's intellectual disability, but also to protect Mr. Bowles's rights, given that the Clemency Board was seeking a personal interview of Mr. Bowles, an intellectually disabled man, outside the presence of the very attorneys who were conducting his intellectual disability litigation. But Florida's state clemency officials barred the CHU from formally participating in the proceedings, and refused to allow CHU counsel to be present at the interview.

Mr. Bowles's state-retained clemency counsel had no death penalty experience or qualifications, affirmatively waived any investigative, expert, or other fees associated with his representation, failed to speak with any lay or expert witnesses or seek Mr. Bowles's full case file, was unfamiliar with Mr. Bowles's background, and undertook none of the necessary precursors to a competent clemency presentation. During the clemency interview, Mr. Bowles's only opportunity for in-person advocacy

for clemency, state-retained counsel, acknowledged how his unfamiliarity with Mr. Bowles's case and intellectual disability. Indeed, the issue of Mr. Bowles's intellectual disability went substantively unaddressed, with only superficial references by his counsel during the clemency interview. Additionally, Mr. Bowles's state-retained counsel, due to his unfamiliarity with Mr. Bowles and intellectual disability generally, failed to assist Mr. Bowles as he appeared to struggle to understand the questions posed to him. State-retained counsel also failed to intervene when Mr. Bowles was repeatedly questioned by FCOR about matters bearing on his pending intellectual disability litigation, outside the presence of § 3599 counsel who represented him in that litigation, or when FCOR actively denigrated that litigation, and questioned whether Mr. Bowles had any disability at all.

Because the Florida officials forced Mr. Bowles to proceed into clemency without adequate representation, he was deprived of the chance to offer a meaningful presentation of his life history and intellectual disability as grounds for mercy. Information regarding Mr. Bowles's life and intellectual disability—which was crucial to a determination of whether clemency was appropriate in Mr. Bowles's case—was never presented. Mr. Bowles's state-retained counsel failed to present information that Mr. Bowles was born into an emotionally and unstable family marked by alcoholism and deprivation, was abandoned by his mother at the age of three, and when he was finally reunited with her at the age of six, he was neglected by her and physically abused by her string of husbands. His state-retained counsel never presented information that he was sexually abused beginning at the age of

eight, and introduced to drugs, alcohol, and inhalants between the ages of eight and ten, resulting in hospitalization.

State-retained counsel also presented no information about how Mr. Bowles's life was made tragically more difficult by his intellectual and adaptive deficits, which began in his childhood. He was unable to think abstractly, and fell behind his peers in school. At the age of thirteen, Mr. Bowles was beaten to a life-threatening degree by his stepfather. When his mother refused to take protective action for Mr. Bowles's sake, he left home and—unable to find traditional employment due to his young age and low intellectual functioning—was forced to sell his body as a child prostitute in order to obtain food and shelter. He was transient, repeatedly sexually victimized by older men, and unable to navigate the world on his own. His dependence on others made it impossible to escape the cycle of sexual victimization, which furthered Mr. Bowles's trauma and led him to self-medicate symptoms of post-traumatic stress disorder with drugs and alcohol.

Any information about the effect of Mr. Bowles's intellectual disability on his life also went unaddressed. Mr. Bowles's deficits were severe and obvious, and he was described by individuals who knew him as forgetful, gullible, naïve, immature, socially inept, impulsive, and lacking a sense of consequences for his actions. He had impaired language skills, could not keep up in conversations, struggled with memory, and could not perform day-to-day tasks such as utilizing public transportation, using money, or seeking employment. He had no formal system of social support, and due to his myriad deficits, nearly every day of his life was a struggle to survive.

Instead of any of this compelling information about Mr. Bowles's life and intellectual disability, state-retained counsel submitted a clemency petition that was less than eight double-spaced pages in length from title to signature, and rife with typographical, formatting, and substantive errors. Over 1,300 of its approximately 1,825 words were copied and pasted directly from the unrelated clemency application of death row inmate Stephen Booker, including two instances where Mr. Bowles was erroneously identified as "Mr. Booker" and a notation that Mr. Bowles had been on death row for over thirty years (which was true of Mr. Booker, but not Mr. Bowles). Elsewhere in the application, state-retained counsel indicated that Mr. Bowles had been on death row since 1994, though Mr. Bowles did not even plead guilty until 1996.

Despite repeated attempts to intervene and participate, defendants in the underlying action refused § 3599 counsel's attempts to act as clemency counsel or co-counsel. Mr. Bowles's clemency proceedings officially ended on June 11, 2019, when the Governor of Florida denied Mr. Bowles clemency and, at the same time, signed a warrant for his execution.

C. Mr. Bowles's § 1983 Action

After clemency was denied and a death warrant was signed, Mr. Bowles filed a 42 U.S.C. § 1983 action in the Northern District of Florida, based on the violation of his § 3599 right to counsel in his clemency proceedings, along with a motion to stay his scheduled August 22, 2019, execution. App. at 231; 338.

On July 19, 2019, the district court denied Mr. Bowles's stay motion, finding that § 3599 was not enforceable through § 1983. The district court limited its ruling

only to whether § 3599 creates a federal right enforceable through § 1983. *See* App. at 80-88. The district court found that while § 3599 met the first two elements of the test for § 1983 enforceability, as described in *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997), it failed the third element because the statute "does not place an obligation on the States at all." App. at 85. Instead, the district court found, § 3599 only created an obligation for the appointed attorney. App. at 85-86. The district court additionally found that § 3599 does not "require state courts or executive bodies to allow the federally appointed attorney to appear and practice before them." App. at 86.[6]

D. The Eleventh Circuit's Decision Below

On August 1, 2019, Mr. Bowles appealed the district court's ruling to the United States Court of Appeals for the Eleventh Circuit, and on August 2, 2019, he filed a motion for a stay of his execution pending the appeal. App. at 89.

On August 19, 2019, the Eleventh Circuit denied Mr. Bowles's stay motion, finding that § 3599 was not enforceable in § 1983. *See* App. at 1-79. Although the district court found that § 3599 met the first two *Blessing* factors—that Congress intended § 3599 to benefit individuals like Mr. Bowles, and that the right protected by § 3599 was not "vague and amorphous," *Blessing*, 520 U.S. at 340-41—the

[6] As even the district court recognized below, "one would assume the Clemency Board would want to hear from the attorney most qualified to speak on the defendant's behalf and present the best information possible, leaving no stone unturned . . . . [i]t is unclear how excluding the CHU from the clemency proceeding and instead appointing an attorney unfamiliar with Bowles's history and possible intellectual disability contributes to the integrity or reliability of the clemency determination." App. at 87-88 (the district court went on to conclude, however, "but that is not the issue presented before this Court.").

Eleventh Circuit found that § 3599 met none of the *Blessing* factors. App. at 19-32. Concerning the first *Blessing* factor, the court found that while § 3599 contained "the kind of individually focused language that indicated that Congress may have intended the statute to benefit certain individuals," it did not ultimately meet the first factor because "[t]he right [Mr.] Bowles seeks to vindicate is not the appointment or compensation of counsel but the right to have his federally appointed counsel appear at a state clemency interview where the State has appointed another attorney to do so" and when it was "against the State's wishes." App. at 21.

Regarding the second *Blessing* factor, that the right was not vague or amorphous, the court found that § 3599 failed because "[t]he statute says nothing about when and how and under what circumstances the provisions of § 3599 are to override clemency rules and procedures." App. at 27. The court further noted, "[w]e do not think Congress would enact such a far-reaching and intrusive right as the one [Mr.] Bowles asserts without also providing an objective benchmark to measure the extent of that right and gauge how it is to be enforced." *Id*.

Of the third *Blessing* factor, the court found that although § 3599 "does use some mandatory language," it does "not even indirectly obligate the state to do anything," and "does not say that clemency officials shall or must allow counsel appointed by a federal court under § 3599 to appear and represent the petitioner in a state clemency proceeding." App. at 28.

While concurring in the result, on the basis of the analysis of the third *Blessing* factor alone, Judge Martin also expressed serious concerns about the state officials'

refusal to allow Mr. Bowles's § 3599 counsel's participation in his clemency proceedings. Specifically, Judge Martin noted:

> I also write separately to express my view that both Mr. Bowles and the Florida Commission on Offender Review (the "Commission") could have benefitted by having counsel from the [CHU] continue to represent Mr. Bowles in his state clemency proceedings. It is puzzling that the Commission barred the knowledgeable and willing CHU lawyers from representing Mr. Bowles. Just as I must acknowledge that Mr. Bowles may not enforce a legal right to be represented by counsel from the CHU, neither was there any legal impediment to those lawyers appearing on his behalf. Thus, it is not only mysterious but possibly tragic that counsel was turned away.
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> * * *
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> For me, the Commission's decisions to bar the appearance of experienced counsel casts a shadow over Mr. Bowles's clemency proceeding.
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> * * *
>
> This is especially troubling because neither the District Court's records no the records before this Court offer any explanation as to why the Commission turned away CHU counsel.

App. at 38-43.

REASONS FOR GRANTING THE WRIT

I. State Officials Should Not Be Allowed to Arbitrarily Frustrate the Right to Representation Granted to Death-Sentenced Individuals by 18 U.S.C. § 3599

The ultimate questions in this case are whether Mr. Bowles, a man with intellectual disability, having had counsel appointed to him under § 3599, had a federal right to that counsel's representation in clemency proceedings, and if so, whether state officials could refuse his § 3599 counsel any meaningful participation in representing him in the last available forum.

Section 3599 provides, in relevant part:

> (2) 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 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).
>
> * * *
>
> (e) 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.

18 U.S.C. § 3599(a)(2), (a)(2)(e) (emphasis added).

In *Harbison v. Bell*, this Court found that "§ 3599 authorizes federally appointed counsel to represent their clients in state clemency proceedings and entitles them to compensation for that representation." 556 U.S. at 194.

> Under a straightforward reading of the statute, subsection (a)(2) triggers the appointment of counsel for habeas petitioners, and subsection (e) governs the scope of appointed counsel's duties. See § 3599(a)(2) (stating that habeas petitioners challenging a death sentence shall be entitled to "the furnishing of ... services in accordance with subsections (b) through (f)"). Thus, once federally funded counsel is appointed to represent a state prisoner in § 2254 proceedings, she "shall also represent the defendant in such ... proceedings for executive or other clemency as may be available to the defendant." § 3599(e). Because state clemency proceedings are "available" to state petitioners who obtain representation pursuant to subsection (a)(2), the statutory language indicates that appointed counsel's authorized representation includes such proceedings.

Harbison, 556 U.S. at 185-86. In so holding, *Harbison* concluded that "the plain language of the statute dictates the outcome of this case." *Id*. at 185.

Federal courts have also found the plain, mandatory language of § 3599 in defining the authorization of representation; for example, courts have found that counsel appointed under § 3599 are *obligated* to represent an individual in subsequent proceedings, and thus need not go to a federal district court for approval to participate in state clemency proceedings. *See, e.g., Wilkins v. Davis*, 832 F.3d 547, 558 (5th Cir. 2016) ("[§ 3599 counsel] acted within the authorized scope of her appointment; she represented Wilkins in 'available post-conviction process' . . . including . . . 'proceedings for executive or other clemency,' as authorized by § 3599. [§ 3599 counsel] did not need to seek reauthorization from the district court before representing Wilkins in these subsequent proceedings."); *Chavez v. Sec'y, Fla. Dep't of Corr.*, 742 F.3d 940, 944 (11th Cir. 2014) ("Once federal counsel is appointed under § 3599, that attorney's representation extends 'throughout every subsequent State of available judicial proceedings,' including 'all available postconviction process' in state and federal court (such as state clemency proceedings), until 'replaced by similarly qualified counsel.'") (internal citation omitted).

These interpretations of § 3599—by this Court in *Harbison*, and lower federal courts that routinely find state clemency representation obligatory and authorized immediately upon the appointment of § 3599 counsel—are impossible to square with the Eleventh Circuit's holding in Mr. Bowles's case that § 3599 did not create a federal right. The far simpler and correct conclusion is that the mandatory language providing for representation in specifically delineated proceedings does exactly what it says: grants a right to beneficiaries of the statute to the very benefit it obligates.

The federal district court and the Eleventh Circuit's findings that § 3599 did not create a federal right principally because, in their view, it did not place an obligation on the states, misunderstands § 3599 and the necessary result of what it authorizes. If the provision in § 3599(e) that counsel *shall* represent their clients in clemency is mandatory—as *Harbison* and federal courts described above have concluded that it is—this binds states to *recognize* that counsel in those delineated proceedings, otherwise that portion of the statute would be meaningless. *See United States v. Forey-Quintero*, 626 F.3d 1323, 1327 (11th Cir. 2010) ("A basic premise of statutory construction is that a statute is to be interpreted so that no words shall be discarded as being meaningless . . .") (internal citation omitted).

The distinction the Eleventh Circuit failed to recognize—that by telling one actor, § 3599 counsel, what they *must* do within state clemency proceedings, the statute is necessarily telling other actors where they *may not* interfere, and thus imposing an obligation not to do so—demonstrates why Mr. Bowles has a federal right in § 3599. In analyzing whether a statute is enforceable in § 1983, other courts have reasoned similarly on this very question. *See, e.g., Coastal Counties Workforce, Inc. v. LePage*, 284 F. Supp.3d 32, 51 (D. Maine 2018) (although language in a statute provided for what local areas "may" do, it "still imposes a mandatory obligation," because that necessarily means it "places that mandatory obligation *on other actors not to interfere* with the local areas' ability.") (emphasis added).

Interference is exactly what is at issue here. Section 3599(e)'s requirement that attorneys appointed under subsection (a)(2), "[u]nless replaced by similarly qualified

counsel . . . *shall represent* the defendant throughout every subsequent stage of available judicial proceedings, including . . . proceedings for executive or other clemency" does not contain the exception that the Eleventh Circuit suggests—namely, that states can choose to ignore this mandatory right given to death-sentenced individuals with § 3599 counsel. If there was such an exception to the requirement of counsel in those necessarily state proceedings, Congress would have said so. *See In re Griffith*, 206 F.3d 1389, 1394 (11th Cir. 2000) (noting that "[w]here Congress knows how to say something but chooses not to, its silence is controlling") (internal quotation omitted).

The language of § 3599 is mandatory about *who counsel is*, and *Harbison* reads this statute as directing that § 3599 counsel is to serve as clemency counsel, regardless of any state-furnished counsel, in a state clemency proceeding. This is an obligation on the states to recognize, or at least not preclude, the formal participation of § 3599 counsel as clemency counsel. States cannot wholly eliminate the § 3599 rights of death-sentenced individuals by barring their federally appointed attorneys for no reason apart from the federal nature of their authorization to represent them. Such a result cannot be squared with this Court's interpretation of congressional intent, which has understood that "[i]n authorizing federally funded counsel to represent their state clients in clemency proceedings, Congress ensured that no prisoner would be put to death without meaningful access to the 'fail-safe' of our justice system." *Harbison*, 556 U.S. at 194.

The frustration of Mr. Bowles's federal right herein is not inconsequential. In no way did Mr. Bowles have a clemency proceeding that allowed for full or thoughtful consideration of his intellectual disability, either as a fact or as a basis for mercy in sparing his life. As set forth in the uncontested allegations in Mr. Bowles's § 1983 complaint, not only was Mr. Bowles's clemency proceeding insufficient, but it was also actively harmful to him and his intellectual disability litigation in a manner that would have been entirely prevented had he been allowed his § 3599 counsel's representation. Mr. Bowles's compelling basis for clemency—not just that he is intellectually disabled, but that *no court will even entertain this diagnosis* due to procedural barriers—make the recognition and enforcement of his § 3599 rights all the more imperative.[7]

II. Where a State Denies a Death-Sentenced Individual's Ability to Vindicate his Rights Under § 3599, There Must Be a Remedy

This Court in *Harbison* noted that § 3599's provisions giving death-sentenced individuals federally funded counsel specifically for state clemency proceedings indicates that Congress "recognized the importance of such process to death-

[7] To the extent that the Eleventh Circuit found that Mr. Bowles was not harmed by state officials' actions, that finding is not only wrong for the reasons above, but also irrelevant to § 1983 analysis. There is no prejudice analysis in the determination of whether an enforceable right exists for the purposes of § 1983. This Court has delineated clear factors for that determination, *see Blessing*, 520 U.S. at 340-41, and an appellate court's opinion of the value of the underlying right is not one of them. The Eleventh Circuit's "prejudice" analysis is especially problematic because it completely misunderstands the right asserted. It is not that Mr. Bowles could or could not have benefitted that much more from his § 3599 counsel's representation—though certainly a fair reading of the underlying facts would indicate he would have—the *interference itself* in § 3599 counsel's ability to represent their client from start to finish in the clemency proceedings is deprivation of the right.

sentenced prisoners . . . ." *Harbison*, 556 U.S. at 193. Thus, "[w]hen Congress authorized federally funded counsel to represent clients in clemency proceedings, it plainly 'did not want condemned men and women to be abandoned by their counsel at the last moment and left to navigate the sometimes labyrinthine clemency process from their jail cells.'" *Holiday v. Stephens*, 136 S. Ct. 387, 387 (2015) (Sotomayor, J.) (quoting *Harbison*, 556 U.S. at 194).

Based on this Court's jurisprudence and the plain language of § 3599, it is beyond dispute that Congress intended § 3599 to ensure that death-sentenced individuals had meaningful representation in state clemency proceedings. However, because § 3599 does not itself contain a mechanism for vindicating the plain legislative intent of this statute, a secondary question presented by Mr. Bowles's petition is whether, assuming § 3599 provides a right, § 1983 provides an appropriate vehicle to vindicate that right.

Section § 1983 protects federal rights originating from both the United States Constitution and federal statutes. *Gonzaga University v. Doe*, 536 U.S. 273, 279 (2002). Section 1983 as a remedial vehicle for the deprivation of constitutional and federal rights is not effected by a state's willingness to independently recognize that right. In fact, it was specifically enacted to provide for such an enforcement mechanism regardless of whether a state wanted to recognize that right itself. *See, e.g.*, *Howlett v. Rose*, 496 U.S. 356, 380 (1990) (noting a "state court cannot 'refuse to enforce the right arising from the law of the United States [through § 1983] because of conceptions of impolicy or want of wisdom on the part of Congress in having called

into play its lawful powers.'") (citations omitted). This is because "[t]he federal law is law in the State as much as laws passed by the state legislature." *Id*.

If Mr. Bowles has a federal right in § 3599, that right should be enforceable in § 1983. That Florida does not want to recognize the effect of § 3599—in this case, who must act in whole or in part as clemency counsel—is of no consequence for that rights enforceability through § 1983. Florida officials like the defendants in the underlying action should not be able to abridge a federal right without there being an enforcement mechanism for that violation, as the Eleventh Circuit held. Just as "[c]onduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 . . . cannot be immunized by state law," so too should conduct not be immunized by a state's willful disregard of *the effect* of the right in the name of federalism. *Howlett*, 496 U.S. at 376 (internal quotation omitted). Importantly, "[t]o the extent that § 1983 may be seen as infringing on state sovereignty, Congress, in adopting § 1983 over a century ago, made the determination that such infringement was not only tolerable but necessary to ensure the vindication of federal rights within the states." *Larsen v. Pennsylvania*, 152 F.3d 240, 248 (3d Cir. 1998). If Mr. Bowles has a federal right in § 3599, it is of little value if he has no mechanism by which to enforce violations and infringements on that right; this is exactly the scenario in which § 1983 plays a critical and historical role in the enforcement of such rights.

The question of statutory interpretation is not merely academic for Mr. Bowles, given the nexus with his intellectual disability claim. Mr. Bowles was left with only his state-furnished counsel, who had no death penalty experience or qualifications,

affirmatively waived any investigative, expert, or other fees associated with his representation, failed to speak with any lay or expert witnesses or seek Mr. Bowles's full case file, was unfamiliar with Mr. Bowles's background, and took none of the necessary precursors to a competent clemency presentation. Because of the actions of officials of the State of Florida in excluding Mr. Bowles's § 3599 counsel, the issue of Mr. Bowles's intellectual disability went substantively unaddressed, with only superficial references by his state-retained counsel during the clemency presentation, which themselves showed that he was unfamiliar with Mr. Bowles's intellectual disability and background. Given that Mr. Bowles already had § 3599 counsel appointed prior to the initiation of clemency proceedings, and because that counsel was *obligated* to represent him in that subsequent proceeding, his only remedy for vindication of that right was § 1983. This Court should grant review to speak clearly on the appropriate remedy for the vindication of § 3599 rights.

III. This Court Should Resolve the Circuit Split on the Relationship Between § 3599 and the Effect of State-Furnished Counsel, Which Necessarily Implicates the Meaning of § 3599 Itself

Although this Court clarified that "§ 3599 authorizes federally appointed counsel to represent their clients in state clemency proceedings and entitles them to compensation for that representation," courts have struggled to define what exactly it means to "authorize" counsel for state clemency proceedings. *Harbison*, 556 U.S. at 194. Two federal circuits are presently split on an issue closely tied to that which Mr. Bowles's petition presents: whether counsel appointed under § 3599 can represent individuals in state clemency proceedings where a state-furnished counsel is

provided. *Compare Samayoa v. Davis*, 928 F.3d 1127 (9th Cir. 2019) *with Irick v. Bell*, 636 F.3d 289 (6th Cir. 2011). While this may seem a narrow issue, the decisions resulting in this split ask the same fundamental question with broad consequences: what *is* the meaning of § 3599 for state clemency proceedings? The Sixth Circuit and the Ninth Circuit have developed opposite jurisprudence on this broader issue, which also implicates the question presented in Mr. Bowles's petition.

The Sixth Circuit in *Irick v. Bell*, found that under its reading of § 3599 and *Harbison v. Bell*, state-furnished counsel makes an individual ineligible for representation under § 3599, even for those proceedings specifically within the scope of § 3599(e). *Irick v. Bell*, 636 F.3d 289, 292 (6th Cir. 2011). The court found that "*Harbison* . . . arrived at its holding only after noting that state law did not authorize the appointment of state public defenders for the purpose of pursuing state clemency proceedings," and found that a predicate question to whether § 3599 counsel was authorized to represent their client in a § 3599(e) was whether or not state-furnished counsel was provided. Thus, *Irick* concluded that "[t]he relevant consideration under § 3599 is whether a state affords adequate representation . . . Tennessee has provided Irick with adequate representation. Accordingly, Irick's attorneys are not entitled to additional compensation pursuant to § 3599." *Irick*, 636 F.3d at 292.

In *Samayoa*, the Ninth Circuit considered an appeal of a district court's denial of a motion to appoint additional clemency counsel pursuant to § 3599. *Samayoa,* 928 F.3d at 1128. Specifically, Samayoa's pro bono federal counsel had moved in the district court for the appointment of additional counsel because "he 'ha[d] never done

a clemency proceeding and needs the expertise of an agency accustomed to such a process,'" and noted that he needed help with completing "a full clemency investigation and petition, as well as the filing of petitions under *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Ford v. Wainwright*, 477 U.S. 399 (1986)." *Id*. The federal district court, however, denied this motion for appointment, "concluding that because California provides for state-appointed clemency counsel, 'Petitioner does not appear to qualify for the appointment of federal counsel under § 3599(a)(2).'" *Id*. The district judge reasoned that Samayoa must direct his request to the California Supreme Court, who had previously appointed clemency counsel. *Id*.

California argued that Samayoa was not entitled to clemency counsel being appointed under § 3599 because "the district court can appoint additional counsel under § 3599 *only if* Samayoa can show 'he is unable to obtain adequate representation from the state to pursue executive clemency.'" *Id*. at 1130 (emphasis added). The Ninth Circuit rejected the argument and reasoning of the State, instead finding that under a "straightforward reading of § 3599(e)," as in *Harbison*, "[t]he availability of state appointment of clemency counsel is irrelevant to federally appointed counsel's ongoing representation of a death-row client in state clemency proceedings." *Id*. (internal quotation omitted). The Ninth Circuit emphasized the mandatory language of § 3599(e), which states that an attorney appointed under the federal statute "*shall* represent the defendant" in subsequent proceedings, including clemency. *Id*. (emphasis in original) (internal citation omitted). "This language does not invite a blanket exception if the state also provides for clemency counsel." *Id*.

Thus, Samayoa's federal counsel was "authorized under § 3599(e) to continue to represent Samayoa in his California clemency petition, regardless of any provisions under California law regarding state appointment of clemency counsel." *Id*. at 1131. Further, the Ninth Circuit found that the existence of state-provided counsel also did "not bar the district court from appointing additional counsel simply because a defendant can obtain representation through other sources." *Id*. at 1132.

The Ninth Circuit's opinion in *Samayoa* also explicitly rejected the reasoning of the Sixth Circuit in *Irick*. The Ninth Circuit called the reasoning of *Irick* "unpersuasive," and found that "[n]owhere in the [*Harbison*] Court's statement of the question on certiorari or in its discussion of the case did it condition the scope of § 3599(e) on the state's failure to provide clemency counsel." *Samayoa*, 928 F.3d at 1131. *Samayoa*, while the first Court of Appeals to reject the reasoning of *Irick*, was not the first federal court to do so. *See, e.g., Mickey v. Davis*, No. 93-00243, 2018 WL 3659298, *4 (N.D. Cal. Aug. 2, 2018) (rejecting the reasoning of *Irick* after examining the context of the language from *Harbison* and finding it to be inapposite as applied to appointment of clemency counsel).

This Court should grant review to address the question Mr. Bowles presents, which is closely related to the central divergence of the Sixth and Ninth Circuit. Though *Samayoa* and *Irick*, narrowly construed, are about the appointment and funding of counsel under § 3599, the underlying issue is what § 3599 actually authorizes, and whether state actors can frustrate the obligations of federal counsel representing death-sentenced individuals under federal law. Here, an intellectually

disabled man did not have meaningful access to the "fail safe" of our justice system due to the State of Florida's frustration of his § 3599 rights, and this Court should take this opportunity to speak clearly on what rights he had under § 3599.

CONCLUSION

This Court should grant a stay of Mr. Bowles's execution, and grant a writ of certiorari to review the decision below.

Respectfully submitted,

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AUGUST 20, 2019