No. 19-5651

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

REPLY BRIEF FOR PETITIONER

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

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I. Respondents' Arguments Highlight the Circuit Split and Need for Clarification from this Court on § 3599 and *Harbison*

In opposition to this Court's review, Respondents argue primarily that Mr. Bowles's petition "presents no important question of federal law," does not present a circuit split, and has no merit because in the underlying action the state-official defendants are entitled to qualified immunity. Brief in Opposition (BIO) at 6, 8.

First, Respondents' argument on the merit of the underlying action is incorrect. The defendants in this case are not entitled to qualified immunity because Mr. Bowles's 42 U.S.C. § 1983 actions seeks only declaratory and injunctive relief. *See, e.g., Morse v. Frederick*, 551 U.S. 393, 432-33 (2007) (Breyer, J., concurring in part, dissenting in part) ("A "qualified immunity" defense applies in respect to damages actions, but not to injunctive relief."); *Ratliff v. DeKalb County, Ga.*, 62 F.3d 338, 340 n.4 (11th Cir. 1995) ("[Q]ualified immunity is only a defense to personal liability for monetary awards resulting from government officials performing discretionary functions, qualified immunity may not be effectively asserted as a defense to a claim for declaratory or injunctive relief.").

Respondents' remaining two arguments—that Mr. Bowles's petition does not present an important question of federal law or a circuit split—misunderstand Mr. Bowles's underlying action and actually highlight the federal issue and circuit split that justify this Court's intervention.

Respondents take the position that § 3599 "does not create any rights when a state provides counsel under the controlling precedent of *Harbison v. Bell*, 556 U.S.

180, 189 (2009) . . . [s]ince [Mr.] Bowles had a state-furnished clemency counsel, he was not entitled to federally funded counsel under § 3599 for state clemency proceedings." BIO at 10-11. But Respondents fail to acknowledge that their position falls squarely on one side of a circuit split. Respondents' interpretation of § 3599 is exactly how the Sixth Circuit and Ninth Circuit have split on the question of what § 3599 actually authorizes in state clemency proceedings. Respondents' argument is exactly the interpretation of *Harbison* adopted by the Sixth Circuit in *Irick v. Bell*, 636 F.3d 289 (6th Cir. 2011). In *Irick*, the Sixth Circuit concluded 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," *Irick*, 636 F.3d at 291, and as support of this position, quoted *Harbison*: "[§ 3599](a)(2) provides for counsel only when a state petitioner is unable to obtain adequate representation," *id.* (quoting *Harbison*, 556 U.S. at 189). This is the same proposition that Respondents put forth as the meaning of what § 3599 authorizes, and is even a citation to the same portion of the *Harbison* opinion.

But Respondents' interpretation of § 3599 and *Harbison* was just recently squarely rejected by the Ninth Circuit in *Samayoa v. Davis*, 928 F.3d 1127 (9th Cir. 2019). In *Samayoa*, the Ninth Circuit acknowledged *Irick*'s finding that "[i]n *Harbison*, the Supreme Court 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," *Samayoa*, 928 F.3d at 1130 (quoting *Irick*, 636 F.3d at 291). But *Samayoa* went on to hold the opposite, stating "[w]e find this

reasoning unpersuasive," *id*. Samayoa held 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." *Id*. at 1131.

What Respondents misunderstand is that *Samayoa* and *Irick* fundamentally disagree about whether § 3599, under this Court's interpretation in *Harbison*, authorizes federally-funded representation in state clemency *regardless of the actions of states*. In the context of a state providing clemency counsel, *Irick* (and Respondents) would conclude that § 3599 no longer authorizes federal representation, while *Samayoa* would compel the opposite result. While the issue of interpreting § 3599 and *Harbison* arose in different procedural postures in *Irick* and *Samayoa* than in Mr. Bowles's case (those cases involved the appointment and funding of § 3599 counsel), the fundamental disagreement is the same here. Mr. Bowles argues that he was entitled to the representation of his § 3599 counsel in state clemency proceedings, regardless of Respondents' actions either in contracting independent counsel or in refusing to allow his § 3599 counsel to serve as state clemency counsel or co-counsel. These questions necessarily implicate the questions of what right does § 3599 create, what is its scope, and what did this Court mean in its ruling in *Harbison*. These are important federal questions that Respondents' arguments only serve to highlight.

II. Mr. Bowles Has Not Been Dilatory, and Respondents Misconstrue the Relevant Legal Standard for a Stay of Execution

Respondents argue that this Court's intervention is not justified because Mr. Bowles delayed in bringing his § 1983 action "over a year," and "waited until a warrant was signed," and could have brought the suit as soon as his § 3599 counsel

was denied entry to his clemency interview. BIO at 8. Respondents also contend that delay is a "fifth factor" that Mr. Bowles must affirmatively prove for a stay. *See* BIO at 6 ("[Mr.] Bowles failed to establish the five factors which a Petitioner is required to meet in order to be eligible for the equitable remedy for a stay."); *id*. at 17 (fifth section entitled "Delay in Bringing the Action").

Importantly, neither the Eleventh Circuit nor the district court—despite Respondents pressing their dilatoriness arguments in those courts too—found that Mr. Bowles unnecessarily delayed filing his complaint. The Eleventh Circuit's conclusion that "the balance of equities" did not favor a stay, App. at 33, was limited to the broader issue of the finality of criminal judgments and alleged harm to the public and victims' families that could result from staying an execution, App. at 33-36.[1] The court did not discuss any specific delay on Mr. Bowles's part.

Respondents' argument is based on a misunderstanding of when Mr. Bowles's § 1983 action accrued for the purposes of timeliness. Eleventh Circuit precedent is clear that "[a] cause of action under [42 U.S.C. §§ 1983 and 1985] will not accrue, and thereby set the limitations clock running, until the plaintiffs know or should know (1) that they have suffered the injury that forms the basis of their complaint and (2) who

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[1] In the course of that analysis, the Eleventh Circuit seemed to suggest that such harm should be measured from the date of Mr. Bowles's crime. This makes little sense because the intervening time between the date of a crime and the signing of a death warrant, in general and certainly in this case, is primarily spent in litigation that is a matter of right designed to protect our justice system from unconstitutional executions. The timing of this litigation is not up to the litigant, it is up to the courts, and is frequently affected by things having nothing to do with the litigant. While the State and victims' families have an interest in the conclusion of capital litigation, their interest does not outweigh the proper resolution of appropriate legal challenges.

has inflicted the injury." *Chappell v. Rich*, 340 F.3d 1279, 1283 (11th Cir. 2003); *see also McNair v. Allen*, 515 F.3d 1168, 1174 (11th Cir. 2008). Thus, Mr. Bowles did not have a complete cause of action—i.e., that state-official defendants violated his federal rights by interfering with clemency representation by his § 3599 counsel—until his clemency proceedings ended, which was not until June 11, 2019, when his death warrant was signed. Mr. Bowles filed the underlying § 1983 action just weeks later. Respondents' violation continued for the duration of the clemency proceedings. Mr. Bowles was not dilatory in filing his § 1983 action.

CONCLUSION

The 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 21, 2019