No. __________

IN THE

Supreme Court of the United States

TRACY LANE BEATTY,

Petitioner,

v.

BOBBY LUMPKIN, DIRECTOR, CORRECTIONAL INSTITUTIONS DIVISION,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

The question presented is:

Whether courts are required by *McFarland v. Scott*, 512 U.S. 848 (1994), to implement 18 U.S.C. § 3599 consistent with both the language and purpose of the statute and, if so, did Congress authorize federal courts to address state interference with authorized services under that statute.

PARTIES TO THE PROCEEDINGS BELOW

All parties appear on the cover page in the case caption.

LIST OF RELATED CASES

State court

Texas v. Tracy Lane Beatty, No. 241-0978-04, 241st District Court, Smith County, Texas (Aug. 10, 2004).

Beatty v. State, AP-75-010, 2009 WL 619191 (Tex. Crim. App. Mar. 11, 2009).

Ex parte Beatty, WR-59,939-01 (Tex. Crim. App. Oct. 27, 2004).

Ex parte Beatty, WR-59,939-02, 2009 WL 1272559 (Tex. Crim. App. May 6, 2009).

Ex parte Beatty, WR-59,939-03, 2015 WL 6442730 (Tex. Crim. App. Oct. 14, 2015).

In re Beatty, WR-59,939-04, 2020 WL 1329145 (Tex. Crim. App. March 19, 2020).

In re Beatty, WR-59,939-05, 2022 WL ___ (Tex. Crim. App. Nov. 4, 2022).

Ex parte Beatty, WR-59,939-06, 2022 WL ___ (Tex. Crim. App. Nov. 4, 2022)

Federal Court

Beatty v. Director, No. 4:09-cv-00225, 2013 WL 3763104 (E.D. Tex. July 16, 2013).

Beatty v. Stephens, No. 13-70026, 759 F.3d 455 (5th Cir. July 16, 2014).

Beatty v. Stephens, No. 14-8291, 575 U.S. 1011 (May 18, 2015).

Beatty v. Director, No. 4:09-cv-00225, 2017 WL 1197112 (E.D. Tex. March 31, 2017).

Beatty v. Davis, No. 17-70024, 755 F. App'x 343 (5th Cir. 2018).

Beatty v. Davis, No. 18-8429, 140 S. Ct. 54 (Oct. 7, 2019).

Beatty v. Director, 4:09-cv-00225 (E.D. Tex. Sept. 16, 2022).

Beatty v. Lumpkin, __ F.4th __, 2022 WL 16628396 (5th Cir. Nov. 2, 2022).

Beatty v. Collier, et al., No. 4:22-cv-03658 (S.D. Tex. Nov. 4, 2022).

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PETITION FOR A WRIT OF CERTIORARI

Tracy Layne Beatty petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The November 2, 2022, published opinion of the United States Court of Appeals for the Fifth Circuit affirming the district court is attached as Appendix A. The September 16, 2022, order of the United States District Court for the Eastern District of Texas dismissing Mr. Beatty's Motion to Compel the Texas Department of Criminal Justice to Unshackle Petitioner's Hands During Expert Evaluations is attached as Appendix B.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its judgment on November 2, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

> **(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.
>
> **(f)** Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether

> in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under subsection (g).

STATEMENT OF THE CASE

Mr. Beatty was charged with capital murder for the 2003 death of his mother, Carolyn Click. He was convicted and sentenced to death in August of 2004 in the 241st District Court in Smith County, Texas. Since then, he has challenged his conviction and sentence of death in various proceedings recounted in the "List of Related Cases," *supra*. On June 10, 2022, Mr. Beatty's execution date was scheduled for November 9, 2022.

A. Mr. Beatty had an acute mental health crisis just before his execution date was set.

In May, shortly before his execution date was set, Respondent transported Mr. Beatty from the death row facility to a psychiatric unit because he was having a mental health crisis. Appellant's Brief at 2–3, *Beatty v. Lumpkin*, No. 22-70010 (5th Cir. 2022); *Beatty v. Director*, No. 4:09-cv-00225 (E.D. Tex. Sept. 14, 2022) (Doc. 75 at 6–7). Respondent's staff observed Mr. Beatty experiencing auditory and visual hallucinations, so they placed him in crisis management status. *Id.* Mr. Beatty was actively hallucinating about guards—who had not worked at the prison in years—working 96-hour shifts to torment him. Shortly thereafter, Respondent began giving him medication designed to treat schizophrenia. *Beatty v. Collier, et al.*, No. 4:22-cv-03658 (S.D. Tex. Nov. 2, 2022) (Doc. 18 at 2).

B. Counsel took reasonable, professionally appropriate steps to investigate Mr. Beatty's mental health crisis.

Mr. Beatty's deteriorating mental health raised obvious concerns for his counsel, who observed similar symptoms at a legal visit around the same time. *Beatty v. Director*, No. 4:09-cv-00225 (E.D. Tex. Sept. 14, 2022) (Doc. 75 at 7). Despite a long history of mental illness, Mr. Beatty never had an in-person evaluation by a mental health expert working on his defense team.[1] *Id.* at 6. Now with an execution date set, his clemency petition and a possible claim under *Ford v. Wainwright*, 477 U.S. 399 (1986), were ripe. *Id.* at 7. Investigating his recent acute mental health crisis was a paramount consideration when exploring those avenues.

Counsel requested records, located available mental health experts, and scheduled expert evaluations. Mr. Beatty retained the services of a neuropsychiatrist, Dr. Bhushan Agharkar, and a neuropsychologist, Dr. Daniel Martell, to evaluate him. *Id.* at Doc. 72. Their evaluations were scheduled for September, which would have given Mr. Beatty ample time to use any resulting information to pursue clemency and other available remedies in a presumptively timely manner and without the need for a stay of his execution date.

C. For years, Respondent allowed unhandcuffed evaluations of death row prisoners but he recently began requiring a court order.

While Respondent does not have a formal policy requiring it, at some point last year he began requiring a court order to remove handcuffs during evaluations. *Beatty v. Director*, No. 4:09-cv-00225 (E.D. Tex. Sept. 2, 2022) (Doc. 72 at 1). Both capital

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[1] Mr. Beatty's trial lawyers did retain two experts, but they were retained to opine on whether he was a future danger. The experts did not meet with Mr. Beatty and did not testify.

habeas petitioners and the Respondent himself have sought such orders in the past, and obtained them through short, *pro forma* unopposed motions in federal court that did not cite any law. *See, e.g.*, *Panetti v. Lumpkin*, No. 1:04-cv-00042 (W.D. Tex. June 29, 2022) (Doc. 264); *Ricks v. Lumpkin*, No. 4:20-cv-01299 (N.D. Tex. Mar. 4, 2022) (Doc. 25); *id.* at Doc. 30; *Washington v. Lumpkin*, No. 4:07-cv-00721 (S.D. Tex. Feb. 15, 2022) (Doc. 226).

D. Mr. Beatty's case was the first in which such an order was opposed.

Mr. Beatty's case was the first time Respondent opposed a death row prisoner obtaining this routine court order.[2] Here, Mr. Beatty sought the now-required court order over two months prior to his execution date, with no reason to expect that it would be opposed, much less denied. To support his request, he attached letters from both experts regarding the need for Mr. Beatty's handcuffs to be removed to conduct their intended testing in a reliable manner. *Beatty v. Director*, No. 4:09-cv-00225 (E.D. Tex. Sept. 2, 2022) (Doc. 72 at 1). Respondent opposed, asserting that the court had no jurisdiction to enter the order. *Id.* at Doc. 74. Respondent did not assert that Mr. Beatty specifically posed any safety or security risk. *See id.* Mr. Beatty argued that the text of the statute, as well as this Court's precedent in *McFarland v. Scott*, 512 U.S. 848 (1994), authorized the district court to enter the requested order. *Id.* at Doc. 75.

[2] It is also the only time, as far as undersigned counsel is aware.

E. The district court dismissed Mr. Beatty's motion on the grounds that § 3599 does not provide jurisdiction for such an order absent a pending habeas petition.

The district court agreed with Respondent and dismissed Mr. Beatty's motion for lack of jurisdiction. App.19. It held that § 3599 "provides funding to indigent capital defendants for attorneys and related services but does not confer jurisdiction on the federal court to compel state action." *Id.* at 15. The court recognized that while § 3599 allowed death sentenced prisoners to obtain services, it held that it could not mandate that the State allow those services to be delivered. *Id.* at 16. The court appeared to limit its ruling to cases with no pending habeas petition. *Id.* at 16–17.

F. Mr. Beatty's incomplete preliminary evaluations confirmed the need for unhandcuffed testing.

Mr. Beatty proceeded with his expert evaluations, recognizing that they would be incomplete. Drs. Agharkar and Martell met with Mr. Beatty but were unable to administer critically important tests because Respondent would not remove his handcuffs. *Beatty v. Collier, et al.*, No. 4:22-cv-03658 (S.D. Tex. Oct. 25, 2022) (Doc. 1-1 at 12–13, 16, 19). Dr. Martell's limited, preliminary evaluation found that Mr. Beatty "demonstrated areas of neurocognitive weakness," and that the "identification of deficit areas within this very abbreviated neuropsychological test battery is a strong indication of the need for the proper administration of a complete and comprehensive neuropsychological test battery in order to test and characterize his neurocognitive abilities properly, and in accordance with professional standards." *Id.* at 14, 16. Dr. Martell explained that, due to Mr. Beatty being handcuffed:

> I was unable to administer any formal IQ testing. Obtaining reliable IQ testing is critical for the determination of Intellectual Disability

> pursuant to *Atkins v. Virginia*, and also establishes a baseline for establishing deficit areas when compared to his other neuropsychological test scores. Similarly, I was unable to administer complete academic achievement testing which is a critical component for establishing the adaptive deficits required to diagnose Intellectual Disability pursuant to *Atkins v. Virginia*.

Id. at 13. Additional testing by Dr. Martell could also identify "neurocognitive deficits in several areas including lateralized brain dysfunction, sensory-perceptual deficits, frontal lobe/executive decision-making impairment, or problems with attention, memory, and complex information processing." *Id.* at 16.

Dr. Agharkar's limited, preliminary evaluation was likewise stymied by Respondent's refusal to remove Mr. Beatty's handcuffs. Dr. Agharkar observed that Mr. Beatty "is clearly psychotic and has a complex paranoid delusional belief system." *Id.* at 19. Mr. Beatty lives in a "complex delusional world" where he believes that there is a "vast conspiracy of correctional officers who . . . 'torture' him via a device in his ear so he can hear their menacing voices." *Id.* However, Mr. Beatty's handcuffs prevented Dr. Agharkar from administering neurological tests that would have been "a valuable part" of the examination. *Id.* Those critical, unadministered tests "detect areas of abnormal brain functioning which potentially could explain Mr. Beatty's symptoms." *Id.*

Respondent's obstruction forced Mr. Beatty to file an incomplete clemency petition. He included the following, noting that he was unable to present available mental health evidence:

[Mr. Beatty cannot complete this portion of the argument because, as explained below, TDCJ refused to remove his handcuffs for the psychiatric and psychological evaluations by Mr. Beatty's experts. TDCJ has taken the position that it will not remove the handcuffs unless a court orders it to do so. However, TDCJ opposed Mr. Beatty's motion on the basis that the court has no jurisdiction to issue such an order. Mr. Beatty is pursuing further judicial remedies to remove the impediment imposed by TDCJ and thus below requests a 180-day reprieve. In light of the preliminary findings described below—for example, Mr. Beatty "is clearly psychotic and has a complex paranoid delusional belief system," Ex. 03 at 2—counsel are confident that a professionally adequate evaluation would produce additional compelling evidence that should be considered by the Board and Governor]

* * * *

G. The Fifth Circuit issued an expansive, published opinion regarding the authority of federal courts under § 3599 without reference to Mr. Beatty's *McFarland*-based arguments or even a citation to this Court's opinion.

The Fifth Circuit had jurisdiction over the district court order under 28 U.S.C. § 1291. In affirming the district court's dismissal, the Fifth Circuit did not limit its analysis to cases in which there is no pending habeas petition. It held that § 3599 "is a funding law, not a law that grants federal courts authority to oversee the scope and nature of federally funded legal representation." App.3. The court held that it would not stray "into purported policy justifications for the law's existence," relying on a concurring opinion from Justice Thomas in *Harbison v. Bell*, 556 U.S. 180 (2009). *Id.* at 4. It rejected Mr. Beatty's textual interpretation of the statute *Id.* at 6. In doing so, it explained that § 3599 does not even empower federal courts to compel the state to

allow appointed counsel to meet with their death-sentenced clients. *Id.* The court held that § 3599 does nothing more that "merely allow[] district courts to determine what services are 'reasonably necessary' and then to provide funds for those services." *Id.* at 7. Despite Mr. Beatty's extensive reliance on *McFarland* for, *inter alia*, the proposition that courts must construe § 3599 in such a way to provide meaningful access to services, the Fifth Circuit failed to discuss, distinguish, or even cite this Court's dispositive opinion.

REASONS FOR GRANTING THE WRIT

Mr. Beatty seeks review of the United States Court of Appeals for the Fifth Circuit's decision below repudiating *McFarland*'s definitive instructions to courts implementing § 3599. *McFarland* held that the statute must be construed in light of the legislative purpose for the provision: to provide meaningful access to counsel and other services. The court below without discussion of, or even citation to, *McFarland* held just the opposite: after "[r]uling out policy-based arguments," App.5, the court held that the plain text of the statute—divorced from its purpose—did not authorize federal courts to furnish actual services to indigent death-sentenced prisoners. Instead, the Fifth Circuit concluded, the rights guaranteed by § 3599 are observed in full when a service provider is hired and paid—regardless of whether prisons prevent the services from being actually delivered.

The Fifth Circuit's application of § 3599 directly conflicts with *McFarland*'s holding that, when the "express language [of the statute] does not specify" the resolution of a § 3599 request for services, federal courts must arrive at one that is consistent with the legislative purpose and "gives meaning to the statute as a

practical matter." *Id.* at 854–55. Here, the Fifth Circuit's refusal to acknowledge, much less apply, *McFarland* led it to conclude that § 3599 leaves federal courts powerless to address the Respondent's interference with reasonably necessary § 3599 services.

This Court's intervention is necessary because the Fifth Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c).

I. This Court's intervention is necessary to correct binding Fifth Circuit precedent that ignores and directly conflicts with the majority opinion in *McFarland v. Scott*.

A. *McFarland* authoritatively construed § 3599 in light of its purpose: to provide meaningful access to counsel and other services for indigent capital defendants.

McFarland held that the legislative intent of § 3599 required that federal courts give meaningful effect to its promise of representation and services. Mr. McFarland sought the pre-application assistance of counsel, which the district court denied because there was no pending habeas application, thus no pending post-conviction proceeding. *McFarland*, 512 U.S. at 853. The Fifth Circuit affirmed, holding that no "legal alchemy" allowed it to overlook the absence of a pending habeas petition. *McFarland v. Collins*, 7 F.3d 47, 49 (5th Cir. 1993), *rev'd sub nom*. *McFarland v. Scott*, 512 U.S. 849 (1994). This Court reversed and held that then-Section 848(q)(4)(B)[3] granted federal courts the authority to appoint counsel *before* a habeas petition was filed. *McFarland*, 512 U.S. at 854–57.

[3] Section 848(q) was the predecessor to § 3599. For present intent and purpose these provisions are materially identical.

The *McFarland* holding required no legal alchemy. Instead, this Court examined the text of the statute in conjunction with its purpose. *McFarland* recognized that the "express language [of the statute] does not specify" a solution to Mr. McFarland's problem. *Id.* at 854. Yet, this Court's interpretation was "the only one that gives meaning to the statute as a practical matter." *Id.* at 855. Among other practical realities of the justice system, the *McFarland* majority credited Congress with recognizing the fatal consequences of denying necessary pre-application services to an indigent death-sentenced person.[4] This Court grounded its decision on Congress's policy objective: "Congress' provision of a right to counsel under § 848(q)(4)(B) reflects a determination that quality legal representation is necessary in capital habeas corpus proceedings in light of 'the seriousness of the possible penalty and . . . the unique and complex nature of the litigation.'" *Id.* at 855 (quoting § 848(q)(7)). Thus, the majority looked to "[t]he language *and purposes* of § 848(q)(4)(B) and its related provisions" to "establish that the right to appointed counsel includes a right to legal assistance in the preparation of a habeas corpus application." *Id.* at 856 (emphasis added).

Three justices dissented in *McFarland* because, in their view, the result was "at odds with the terms of [the] statutory provision[]." *McFarland*, 512 U.S. at 864 (Thomas, J., dissenting, joined by Rehnquist, C.J., and Scalia, J.). The dissenters disagreed with the majority's "attempt to discern Congress' intent regarding the point

[4] *See id.* at 856 ("Congress legislated against this legal backdrop in adopting § 848(q)(4)(B)"), *id.* at 857 n.3 ("Section 848(q)(4)(B) bestows upon capital defendants a mandatory right to counsel . . . that is unknown to other criminal defendants.").

at which § 848(q)(4)(B) makes counsel available," stating that "here, as in any case of statutory interpretation, our primary guide to Congress' intent should be the text of the statute." *Id.* at 865. They concluded that "[t]he clear import of the provision is that an indigent prisoner is not entitled to an attorney or to other services under the section *until* a 'post conviction proceeding under section 2254' exists—that is, not until after such a proceeding has been commenced in district court." *Id.* (emphasis in original)

Justice Thomas later re-urged this approach to construing § 3599—*i.e.* without considering the legislative purposes of the statute—in a concurring opinion in *Harbison v. Bell*, 556 U.S. 180 (2009). In *Harbison*, this Court again considered the legislative purposes of the statute and found that it "emphasizes continuity of counsel, and Congress likely appreciated that federal habeas counsel are well positioned to represent their clients in the state clemency proceedings that typically follow the conclusion of § 2254 litigation." *Id.* at 193. Thus, the Court held that § 3599 services extend to state clemency proceedings was well as *some* other available postconviction proceedings. *Id.* at 188–94.

Justice Thomas joined the result but "disagree[d], however, with the assumption that § 3599 must be limited to 'federal' proceedings in at least some respects." *Id.* at 197. Justice Thomas echoed his *McFarland* dissent, stating "[t]his Court is not tasked with interpreting § 3599 in a way that it believes is consistent with the policy outcome intended by Congress." *Id.* at 198.

The *McFarland* majority, however, unambiguously held that courts must consider both the text and purpose of the statute when applying § 3599 to "give[] meaning to the statute as a practical matter." 512 U.S. at 855. This Court's discussion of Congress's intent was not *obiter dictum*; it was the basis for the holding. *See Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949) ("[W]here a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*."). Thus, *McFarland*'s reading of § 3599—and its predicate finding of legislative purpose—binds inferior courts, including the Fifth Circuit, and the statute cannot be "defeated" by a text-based interpretation that prevents death-sentenced prisoners from actually receiving § 3599 services. *Id.* at 856.

B. The Fifth Circuit's published decision below wholly ignored *McFarland* and instead adopted the dissent's approach to § 3599 as the law of the circuit.

In the courts below, Mr. Beatty vigorously asserted that *McFarland* compelled the conclusion that federal courts had the authority under § 3599 to address the Respondent's effort to block access to routine § 3599 services. To be clear, contrary to various mischaracterizations of his arguments by the Respondent and courts below, Mr. Beatty has never asserted § 3599 "authoriz[es] courts to take any and every step that a prisoner may request related to the provision of expert services." App.4 Instead, he argued merely that a federal court furnishing services pursuant to § 3599 may address a state's effort to frustrate those services by denying appointed counsel or other service providers with the ability to perform those services.

Mr. Beatty's argument was, like the *McFarland* decision, based on *both* the text and legislative purpose of the statute. He devoted an entire section of his brief to

discussing why *McFarland*'s authoritative construction of § 3599 supported his argument under the heading "[t]he Supreme Court has construed § 3599 as conferring on death-sentenced prisoners the right to *meaningful* representation and services." Appellant's Brief at 11–15. When the Respondent failed to acknowledge or address Mr. Beatty's *McFarland*-based argument, Mr. Beatty replied that "Respondent inexplicably ignores *McFarland*, which established that jurisdiction under § 3599 does not require a pending habeas petition." Reply at 1. Mr. Beatty devoted the first three and a half pages of his reply brief to explaining why "[b]y ignoring *McFarland*, Respondent necessarily ignores the Supreme Court's clear guidance that § 3599 must be interpreted in such a way that it protects the prisoner's right to *meaningful* representation, which includes 'a right for [appointed] counsel meaningfully to research and present a defendant's habeas claim.'" Reply at 2–3.

Despite the amount of ink spilled discussing it, the Fifth Circuit failed to even cite *McFarland* let alone apply this Court's authoritative opinion on construing § 3599. Incredibly, the Fifth Circuit adopted an approach that plainly conflicts with *McFarland*: it applied the analysis urged by the *McFarland* dissenters and Justice Thomas' *Harbison* concurrence. Regardless of its preference, Fifth Circuit was not free to select this approach and disregard the established precedent of a superior court. It was bound to consider the legislative purpose of § 3599, not its preferred reading of the text untethered from the statute's purpose.

The Fifth Circuit started from a premise at steep odds with *McFarland*:

> [W]e may not use policy in such a way to rewrite Congress's laws. As is the case for statutory interpretation in general, and *for this law in*

> *particular, our court* "is not tasked with interpreting § 3599 in a way that it believes is consistent with the policy outcome intended by Congress." *Harbiso*, [sic] 556 U.S. at 198 (Thomas, J., concurring in the judgment).

App.5 (emphasis added). Consistent with its adoption of this approach to § 3599, the Fifth Circuit explicitly foreclosed examination of the purposes of the statute when resolving Mr. Beatty's request: "*Ruling out policy-based arguments*, then, we must turn to whether the plain language of the statute empowers a federal court to compel state officials to disregard their prison-visitation procedures in connection with the federal court's funding of expert services. It does not." *Id.* at 5–6[5] (emphasis added); *but see McFarland*, 512 U.S. at 856 (examining "[t]he language *and purposes* of § 848(q)(4)(B) and its related provisions") (emphasis added).

The Fifth Circuit's total disregard for *McFarland* would have been harmless had it nonetheless adhered to this Court's decision. But *McFarland* held that, in the absence of direct statutory text governing the petitioner's request, courts must "give[] meaning to the statute as a practical matter[,]" consistent with "Congress' . . . determination that quality legal representation is necessary in capital habeas corpus proceedings in light of 'the seriousness of the possible penalty and . . . the unique and complex nature of the litigation.'" 512 U.S. at 855 (quoting § 848(q)(7)). The Fifth Circuit categorically refused to follow this Court's plain instructions.

[5] Once again, the court mischaracterized the relief Mr. Beatty sought. Unhandcuffed mental health evaluations are a routine occurrence on Texas's death row. A plethora of other security measures—including leg irons, waist chains, security personnel, and more—ensure the safety of all involved. Mr. Beatty never requested or suggested that the court instruct the Respondent to disregard all procedures for these routine evaluations.

Instead, the Fifth Circuit found that Mr. Beatty's request "stray[ed] from the statute's text and into purported policy justifications for the law's existence," App.4. But Mr. Beatty's arguments were based on what *McFarland* requires: construing § 3599 in accordance with its purpose. The court below starkly departed from the holding in *McFarland* that Congress's intent to provide quality services to indigent capital habeas petitioners would be "defeated" unless the statute was interpreted to "give meaning to the statute as a practical matter." 512 U.S. at 855. Doing so was a direct repudiation of *McFarland*.

C. The Fifth Circuit's refusal to construe § 3599 in light of its legislative purpose renders it meaningless as a practical matter.

In the wake of the published opinion below, death-sentenced prisoners in the Fifth Circuit are no longer "entitled to . . . the furnishing of such other services" identified that statute. 18 U.S.C. § 3599(a)(2). Courts in the Fifth Circuit retain the authority to authorize the hiring of professionals who *could* provide the reasonably necessary services and to pay them, but those courts must sit idly by if a prison prevents those services from being delivered. The lower court's own illustration of its rule leaves no doubt about the potentially extreme consequences of its new precedent.

In parsing § 3599, the court below stated that "[t]he ordinary use of the phrase 'obtain counsel' or 'obtain expert assistance' is to *hire* the relevant kind of professional." App.6. The court noted that language from this Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), observed a distinction between obtaining a lawyer and consulting with one: "if an indigent detainee being interrogated is not informed of his right to *appointed* counsel, then the right to counsel 'would often be

understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one.'" *Id.* (quoting *Miranda*, 384 U.S. at 473). The Fifth Circuit reasoned that "[w]ere 'obtain' to mean 'receive all the benefits associated with hiring,' then the Supreme Court's distinction between consultation and obtainment would not make sense. Neither would the following sentence from a detained person: 'I have obtained counsel, and now I would like to meet with her.'" *Id.* Thus, in the Fifth Circuit, the § 3599 right counsel now means only that death sentenced prisoners may have a lawyer, but if the prison refuses to allow counsel to meet with them, § 3599 is powerless to remedy that obstruction.

Here, the Fifth Circuit held that § 3599 guarantees only the same circumscribed rights when it comes to expert services:

> The same is true here. Section 3599 authorizes counsel to obtain experts that are reasonably necessary for post-conviction representation. In other words, the statute says that if counsel for an indigent prisoner can find a reasonably necessary expert, counsel has permission to be compensated for hiring that expert.

Id.[6] Thus, like the client who has a lawyer with whom he cannot consult with, § 3599 confers only a right to hire and pay reasonably necessary experts but carries no right

[6] The Court further stated that "[i]f a state official violates a prisoner's right to counsel, and that prisoner's counsel is being paid for by the federal government instead of the prisoner himself, then that prisoner must avail himself of the same recourse as a prisoner who is paying for his own counsel." *Id.* This statement is fails to recognize that all of § 3599 is an exclusive benefit to indigent death row prisoners.

Only indigent prisoners have a right to counsel under § 3599, which likely reflects a judgment by Congress that courts need not fund the representation of wealthy death-sentenced prisoners. The wealthy person facing the death penalty has no remedy for the deprivation of counsel because he has no right to counsel. To hold that indigent prisoners' remedies for the deprivation of counsel must be limited to the nonexistent rights available to the wealthy would essentially eliminate an indigent's right to court-funded counsel. The Fifth Circuit was simply wrong. Otherwise, an indigent prisoner could not appeal the denial of § 3599 resources, as in *Ayestas v. Davis*, 138 S. Ct. 1080 (2018), because a wealthy death row prisoner does not possess the same right of appeal.

to services from them much less the right to meaningful representation that the *McFarland* guarantees.

While there are undoubtedly limits to federal court's § 3599 authority, the Fifth Circuit goes too far in holding that it "could *never* be invoked for a non-pecuniary request." *Baze v. Parker*, 632 F.3d 338, 346 (6th Cir. 2011) (Cole, J., concurring) (emphasis added). The *Baze* concurrence invokes the same scenario described by the Fifth Circuit—a client hires a lawyer but cannot meet with them—but comes to the opposite conclusion: when "state action . . . prevents the § 3599–appointed attorney from meeting with the defendant or otherwise consulting with the defendant about services the court found to be 'reasonably necessary,'" "nothing in § 3599(f) prohibits a federal court from finding . . . that state action frustrated the 'services' a federal court authorized counsel to obtain" and there is "jurisdiction under § 3599(f) to address that case when it arises, and to remedy any such interference." *Id.* at 346–47.

The Fifth Circuit has adopted the dissenting view in *McFarland* that § 3599 should be interpreted without regard to the legislative purpose that animates it. By the Fifth Circuit's own telling, federal courts are empowered only to appoint and pay attorneys, investigators, and experts because § 3599 establishes no enforceable right for the indigent client to ever meet or consult with them. This result is untenable under *McFarland* because it deprives § 3599 of any practical meaning. Absent this Court's intervention, *McFarland*'s reading of § 3599 is no longer the law in the Fifth Circuit.

II. This case is an appropriate vehicle for addressing the Fifth Circuit's repudiation of *McFarland*.

A. The Fifth Circuit's rejection of *McFarland* will reverberate far beyond the facts or posture of this case.

The Fifth Circuit's published ruling has broad application to indigent death-sentenced prisoners seeking services pursuant to § 3599 at any stage of the proceedings. The court of appeals effectually prohibits all federal district courts in the states of Texas, Louisiana, and Mississippi—three states with the death penalty—from issuing any orders ancillary to their bare funding authorizations for counsel and service providers.

B. The legal question is cleanly presented here because Mr. Beatty has a clear right to § 3599 services for purposes of pursuing clemency.

Indigent capital petitioners who are appointed counsel and/or services under § 3599 retain that statutory protection through their clemency proceedings. *Harbison*, 556 U.S. at 183. That includes Mr. Beatty, who is unquestionably eligible for § 3599 services to pursue clemency and other available remedies.

Respondent argued in the courts below that Mr. Beatty had not established that this particular expert service was reasonably necessary. However, neither court took up the merits of that question. The single question decided below, and submitted to this Court now, is a threshold one regarding the authority § 3599 grants to federal district courts. There are no procedural issues or merits rulings here, only a straightforward legal question. The path for this Court is thus straightforward: grant certiorari, reverse the Fifth Circuit, and remand for further review in light of *McFarland*. The legal question at issue is cleanly presented.

C. The question is not moot because Mr. Beatty's neuropsychological and psychiatric evaluations will be admissible in his clemency proceedings.

Nor is there any question as to the viability of Mr. Beatty's psychological evaluations in future proceedings. He seeks unhandcuffed expert evaluations to pursue executive clemency. Neither this Court's authority governing admission of new evidence in federal habeas proceedings, nor the limited scope of habeas proceedings under Section 2254, are relevant to the ability to present information in support of a clemency petition.

Although he has already filed his clemency petition concerning the current execution date, this Court's grant of Mr. Beatty's stay request and reversal of the courts below would allow him to present new evidence before the next execution date he receives. Mr. Beatty will be able to use the results of the unhandcuffed evaluations to file a new clemency petition. *See* 37 Tex. Admin. Code § 143.43(a), (l) (contemplating successive applications).

D. This case presents the precise concerns articulated in Justice Sotomayor's opinion respecting denial of certiorari in *Rhines v. Young*, and Judge Cole's concurrence in *Baze v. Parker*.

After South Dakota denied Charles Rhines access to his mental health experts for purposes of preparing his capital clemency application, this Court denied certiorari on a Petition with similarities to Mr. Beatty's. As Justice Sotomayor pointed out, however, in respecting the denial of certiorari in that case, the Court of Appeals for the Eighth Circuit had dismissed Mr. Rhines' appeal as "either moot, or . . . not . . . fully exhausted." *Rhines v. Young*, 140 S. Ct. 8, *8 (Nov. 4, 2019) (Mem.) (Sotomayor, J., respecting denial of certiorari) (quoting *Rhines v. Young*, 2019 WL

5485274, *1 (8th Cir. Oct. 25, 2019). In contrast, neither procedural hurdle exists in this case.

Justice Sotomayor also observed that Mr. Rhines had "already been evaluated by several psychiatric experts in a different context." *Id.* In stark contrast, Mr. Beatty has never received an in-person evaluation until this September, and Respondent's interference rendered that evaluation incomplete. At this time, his current experts have been unable to complete their evaluations, due to the prison's refusal to remove his handcuffs. *See supra.* Mr. Beatty has been unable to present necessary mental health information when seeking clemency. The facts of Mr. Beatty's case thus present the exact scenario Justice Sotomayor predicted when she wrote: "By closing the prison doors in this context, a State risks rendering this fundamental process [of executive clemency] an empty ritual." 140 S. Ct. 8, *9 (Sotomayor, J., respecting denial of certiorari).

Similarly, Judge Cole concurred when the Sixth Circuit denied relief to Ralph Baze, after the district court denied his request to compel prison employees to sit for defense interviews for purposes of a clemency application. Although the issue presented in *Baze* was distinguishable from the issue raised here, Judge Cole expressed concern with the majority's "suggestion that Section 3599(f) could never be invoked for a non-pecuniary request." *Baze*, 632 F.3d at 346. Judge Cole pointed to the potential for state action to "frustrate[] the 'services' a federal court authorized counsel to obtain[,]" opining that federal courts would have jurisdiction "to address

that case when it arises, and to remedy any such interference." *Id.* at 347. Mr. Beatty's is precisely that case, too.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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