No. 22-6004

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

REPLY TO BRIEF IN OPPOSITION

JASON D. HAWKINS
Federal Public Defender

Jeremy Schepers (#304861)
Counsel of Record
Supervisor, Capital Habeas Unit
Office of the Federal Public Defender
Northern District of Texas
525 S. Griffin Street, Suite 629
Dallas, TX 75202
214-767-2746 • 214-767-2886 (fax)
Jeremy_Schepers@fd.org

Thomas Scott Smith
P.O. Box 354
Sherman, TX 75091-0354
(903) 868-8686
scottsmithlawyer@gmail.com

James William Marcus
Capital Punishment Clinic
University of Texas School of Law
727 E. Dean Keeton Street
Austin, Texas 78705
512-232-1475
512-232-9197 (fax)
jmarcus@law.utexas.edu

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Tracy Lane Beatty files this reply to Respondent's Brief in Opposition to Petition for a Writ of Certiorari ("BIO").

I. This Court's intervention is necessary to ensure that *McFarland* remains applicable to implementing 18 U.S.C. § 3599 in the United States Court of Appeals for the Fifth Circuit.

The Fifth Circuit failed to apply, or even cite, *McFarland v. Scott*, 512 U.S. 849 (1994), when resolving the 18 U.S.C. § 3599-related issue here: whether § 3599 confers authority to address state interference with reasonably necessary services provided by mental health experts. In defense of the lower court's opinion, the Respondent asserts that "*McFarland* is simply inapplicable in this context." BIO at 13. Respondent's contention is incredible—in both senses of the word. But, after the decision below, it is a true statement about the law of the circuit when it comes to construing § 3599.

In *McFarland* this Court confronted the question of how to construe the precursor of § 3599 when the request for services at issue—the pre-petition assistance of appointed counsel—was not governed by the express language of the statute. *Id.* at 854. This Court unambiguously held that courts implementing § 3599 must (1) construe provisions of the statute in light of their related provisions, *id.*; (2) interpret the statute so as to "give[] meaning to the statute as a practical matter," *id.* at 855; and in doing so, (3) look to both the language and purposes of all of § 3599's provisions, *id.* at 856. *McFarland* modeled this approach by looking not only at the language of

the statute but also the purpose for it. *See id.* at 855 ("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 856 ("Congress legislated against this legal backdrop in adopting § 848(q)(4)(B), and we safely assume that it did not intend for the express requirement of counsel to be defeated" by requiring prisoners to plead their claims in *pro se* petitions); *id.* at 859 ("By providing indigent capital defendants with a mandatory right to qualified legal counsel in these proceedings, Congress has recognized that federal habeas corpus has a particularly important role to play in promoting fundamental fairness in the imposition of the death penalty.").

McFarland's reliance on the policy concerns animating the statute was highlighted by the dissenting Justices, who accused the majority of straying too far from the plain text of the statute: "In its attempt to discern Congress' intent regarding the point at which § 848(q)(4)(B) makes counsel available, the Court spends a good deal of time considering how, as a 'practical matter,' the provision of counsel can be made meaningful." *Id.* at 864 (Thomas, J., dissenting, joined by Rehnquist, C.J., and Scalia, J.). The dissenters agreed that "[i]t might well be a wise and generous policy for the Government to provide prisoners appointed counsel prior to the filing of a habeas petition, but that [was] not a policy declared by Congress in the terms of § 848(q)(4)(B)." *Id.* at 869.

The majority's approach in *McFarland* remains this Court's definitive opinion on applying § 3599 when the "express language does not specify" how to resolve the petitioner's request. *See, e.g.*, *Martel v. Clair*, 565 U.S. 648, 659, (2012) ("As we have previously noted, [§ 3599's] measures 'reflec[t] a determination that quality legal representation is necessary' in all capital proceedings to foster 'fundamental fairness in the imposition of the death penalty.' *McFarland,* 512 U.S., at 855, 859 . . . . That understanding of § 3599's terms and origins goes far toward resolving the parties' dispute over what standard should apply."); *Harbison v. Bell*, 556 U.S. 180, 193 (2009) ("Congress' decision to furnish counsel for clemency proceedings demonstrates that it, too, recognized the importance of such process to death-sentenced prisoners, and its reference to 'other clemency,' § 3599(e), shows that it was familiar with the availability of state as well as federal clemency proceedings.").

The lower here published an opinion adopting the analytical framework championed by the *McFarland* dissent to reach the conclusion that federal courts may not intervene even when the State frustrates the ability to perform the routine services authorized pursuant to § 3599. The Fifth Circuit held that § 3599 permits petitioners to "obtain" services:

> 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.

App.6. But "obtaining" experts or lawyers does not mean that the petitioner has a § 3599 right to consult with them. The court illustrated the point at which § 3599 no

longer applies with this sentence: "I have obtained counsel, and now I would like to meet with her." *Id.* The Fifth Circuit's new precedent leaves petitioners with the right to paid service providers but no right to any services. This outcome is untenable under *McFarland*'s admonition to read each provision in light of the whole statute and its purpose.

The Respondent accuses Mr. Beatty of being "hyperbolic and undoubtedly false," BIO at 15, in arguing that a construction of § 3599 that leaves federal courts powerless to furnish *services*, and not merely federally-paid service providers without access to the client, renders the statute meaningless as a practical matter. Mr. Beatty's experts were allowed in the prison, but they could not perform the routine testing necessary to complete their evaluations. He obtained the service providers, but not the reasonably necessary services.

In refusing to apply *McFarland*, 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).

II. This Court's decisions *Shinn v. Martinez Ramirez*[1] and *Shoop v. Twyford*[2] are simply irrelevant to whether federal courts have authority or jurisdiction to furnish services under § 3599.

The issue before the lower courts, and now this Court, is whether § 3599 authorizes federal courts to address state interference with services furnished to petitioners pursuant to that statute. In every pleading below, and in this Court, the

[1] *Shinn v. Martinez Ramirez*, 142 S. Ct. 1718 (2022).

[2] *Shoop v. Twyford*, 142 S. Ct. 2037 (2022).

Respondent asserts that *Shinn* and *Twyford* compel a negative answer to this question. While it may be true that both decisions "emphasized the importance of State sovereignty during habeas review of state criminal judgments," BIO at 8, neither addressed a federal court's § 3599 jurisdiction to furnish services related to clemency proceedings—which are not habeas proceedings and do not involve federal review of state court criminal judgments. To the extent that Mr. Beatty referenced potential judicial proceedings, he alluded to a competency-for-execution claim (which only becomes ripe once a prisoner is scheduled for execution) and *state court* review of a claim that his execution may violate *Atkins v. Virginia*, 536 U.S. 304 (2002)—a claim Mr. Beatty cannot assert until taking an IQ test without handcuffs. *Shinn* and *Twyford* have no bearing in these contexts.

III. *McFarland*'s admonition to give meaningful effect to § 3599 is not limited to pre-petition services.

Respondent accuses Mr. Beatty of "[s]tretching the opinion in *McFarland* beyond the breaking point" by stating that *McFarland*'s admonition to give meaningful effect to § 3599 extends beyond pre-petition services. BIO at 13 (noting that Mr. McFarland had never had counsel; accusing Mr. Beatty of "[s]electively summarizing the procedural history behind this Court's decision in *McFarland* [to] suggest[] that his case arises out of a similar procedural posture."); *id.* at 14 ("Petitioner is not a first-time petitioner without counsel. He was appointed counsel, filed a petition, and was denied relief long ago. He has had federally appointed counsel for over thirteen years."). Respondent seems to suggest that the federal courts' responsibility to give meaningful effect to § 3599 ends when the initial habeas

petition is filed, and representation by appointed counsel in habeas corpus proceedings extinguishes the client's remaining § 3599 rights. BIO at 13–14. Respondent's argument is squarely foreclosed by this Court's § 3599 precedents.

Section § 35999(e) requires that counsel represent their clients through "all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and . . . in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant." This Court has held that Congress sought to ensure meaningful access to all of these proceedings, including clemency: "In 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 (quoting *Herrera v. Collins,* 506 U.S. 390, 415 (1993)) (emphasis added). Mr. Harbison, like Mr. Beatty, was first appointed federally funded habeas counsel many years before he sought resources for his clemency efforts. *Id.* at 182. Respondent correctly points out that Mr. Beatty's case is in a different procedural posture than Mr. McFarland's. But Respondent fails to explain how, after *Harbison*, that distinction matters. Mr. Beatty has always been very clear about the fact that the requested services were in support of his effort to seek clemency and other potentially available post-conviction process. He sought only what § 3599 guarantees, meaningful access to the "fail-safe" of our justice system and

the services necessary for counsel to discharge their duty to investigate all post-conviction process that may yet be available to Mr. Beatty.[3]

IV. Death-sentenced prisoners in Texas have no right to clemency funding other than through 18 U.S.C. § 3599.

The Respondent argues, for the first time in this litigation, that Mr. Beatty had access to many other sources for clemency-related resources. BIO at 15–16. Given the belated nature of this argument, the Respondent has waived it. Mr. Beatty will nonetheless briefly address it.

First, none of the resources identified by the Respondent provide resources for pursuing clemency. There are resources for litigating initial state habeas applications and *post-filing* resources for successive state habeas applications. BIO at 15–16. The Texas Code of Criminal Procedure also provides counsel in DNA testing proceedings and incompetency-for-execution proceedings. *Id.* And, as Respondent notes, there is now a statewide public defender that represents death-sentenced prisoners in state habeas proceedings (the office is statutorily prohibited from engaging in federal habeas representation). This office did not exist at time of Mr. Beatty's initial habeas proceedings.[4] Because none of the resources cited by the Respondent support

[3] The Respondent notes that not all claims Mr. Beatty sought to investigate were eventually pled. BIO at 17–18. This Court has recognized that even when habeas claims are unsuccessful, the facts developed in support of them "may provide the basis for a persuasive clemency application." *Harbison*, 556 U.S. at 193. For example, regardless of whether Mr. Beatty's serious mental illness and recent decompensation manifests in delusions that render him incompetent for execution (i.e. his delusions are precisely focused on the reasons for his punishment), the fact of his mental illness, his psychosis, and his delusional beliefs about the device implanted in his head that broadcasts his thoughts to others could provide the basis for a persuasive clemency application.

[4] Had the Respondent raised this argument in the district court, Mr. Beatty could have made a record of the following: (1) his lawyer did not learn of Mr. Beatty's execution date until June 30, 2022, twenty days after the order was entered; and, (2) on July 1, 2022, Mr. Beatty's counsel reached to the statewide

clemency work, representation in Texas clemency proceedings is routinely performed by federally-appointed counsel and funded through § 3599.

Second, the availability of funding is not the issue in this case. Respondent fails to explain how any of those resources would have cleared the obstacle posed by Respondent's refusal to unhandcuff Mr. Beatty for mental health evaluations.

V. The question presented is not moot because, if this Court grants the requested stay and reverses the court below, Mr. Beatty will be able to present new evidence in a future clemency petition.

Respondent argues that "[a]ny issue related to clemency is moot" because the Texas Board of Pardons and Paroles denied Mr. Beatty's clemency application on November 7, 2022. BIO at 16. But an issue is moot only when it has become "impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013) (emphasis added) (internal quotation marks omitted). If this Court stays Mr. Beatty's execution and thereafter reverses the Fifth Circuit's decision concerning a district court's power under § 3599, Mr. Beatty will have the opportunity to file a renewed clemency petition in advance of a future execution date. This is effectual relief under any definition.

Mr. Beatty drew this Court's attention to the availability of a renewed, subsequent clemency application in his cert petition, yet Respondent incorrectly implies that clemency is a one-and-done event. In fact, the Texas statute governing clemency explicitly contemplates the submission of "successive" or even "repetitious"

public defender office for assistance in this case and was informed several days later that the office had no capacity to assist in this matter.

applications. 37 Tex. Admin. Code § 143.43(l).[5] And this makes good sense. Circumstances change. Some individuals demonstrate increased rehabilitation, remorse, or religious faith over time, and some suffer from mental conditions that deteriorate precipitously. To ensure that executive clemency—that "historic remedy for preventing miscarriages of justice," *see Harbison*, 556 U.S. at 192—has teeth, an executive must exercise his substantial discretion based upon current information about the individual whose fate lies in his hands.

Mr. Beatty's opportunity to submit a renewed clemency petition containing the results of completed, unhandcuffed evaluations is a "concrete interest" that precludes any finding of mootness here. *See Knox v. Servs. Employees*, 132 S. Ct. 2277, 2287 (2012). Severe or rapidly deteriorating mental illness, properly documented and diagnosed, is precisely the kind of information executives rely upon in deciding whether to commute death sentences. *See* Death Penalty Information Center, *List of Clemencies Since 1976*, *available at https://deathpenaltyinfo.org/facts-and-research/clemency/list-of-clemencies-since-1976* (listing mental illness as supporting clemency grants in at least eight cases). So too is intellectual disability, reliably diagnosed under current legal standards. *See id.* (listing intellectual disability, formerly referred to as mental retardation, as supporting at least six commutations). Several Texas death sentences have been commuted on this basis. *See* Steve Barnes, *National Briefing | Southwest: Texas: Governor Commutes Death Sentence*, N.Y.

[5] Indeed, the clemency petition denied on November 7, 2022 was not Mr. Beatty's first; he also sought and was denied clemency before his scheduled execution date in 2015.

Times (Mar. 13, 2004), https://www.nytimes.com/2004/03/13/us/national-briefing-southwest-texas-governor-commutes-death-sentence.html; *Child Killer's Death Sentence Commuted to Life in Prison*, Houston Chron. (Mar. 9, 2007), https://www.chron.com/news/houston-texas/article/Child-killer-s-death-sentence-commuted-to-life-in-1800646.php. Precisely the type of evidence Mr. Beatty sought to develop—and was actively prevented by the State from developing—is what parole boards and governors *actually* rely upon in making their weighty life-or-death decisions. The issue of whether a district court has authority under § 3599 to prevent state interference with the development of critical clemency evidence is not moot, and this case remains an ideal vehicle through which this Court can reach it.

VI. The cases relied on by Respondent, and the court below, are materially distinguishable from Mr. Beatty's case and, more importantly, in no way justify the Fifth Circuit's repudiation of *McFarland*'s controlling precedent governing the proper framework for construing § 3599.

Respondent and the court below relied on several court of appeals decisions as consistent with the Fifth Circuit's decision below. Unlike the lower court's decision, none of the cited decisions adopted the *McFarland* dissent's position on construing § 3599. And, as noted in Mr. Beatty's Petition at 17, a concurrence to the Sixth Circuit decision described the same scenario posited by the Fifth Circuit—a State barring appointed counsel from consulting with the client—and reached the opposite conclusion: there is "jurisdiction under § 3599(f) to address that case when it arises, and to remedy any such interference." *Baze v. Parker*, 632 F.3d 338, 346–47 (6th Cir.

2011) (Cole, J., concurring). *Baze*, however, did not involve state interference with routine § 3599 services, but that is what happened to Mr. Beatty.

In *Baze*, the petitioner sought an order compelling prison employees to sit for interviews with his investigator. 632 F.3d at 340. As the Sixth Circuit characterized the controversy, "Here, Baze requests that the district court order state prison officials to *provide him with information that he can use* in a state clemency proceeding." *Id*. at 341 (emphasis added). The Sixth Circuit held that while § 3599 authorized the investigative services, it did not authorize a federal court to compel cooperation with the investigator or create a right to acquire information from the prison over all possible obstacles. *Id*. at 343.

But here, Mr. Beatty did not seek discovery from Respondent or his staff, nor did he assert any right compel Respondent to provide information in support of his clemency application. At issue below was whether Mr. Beatty's experts would have *access to the client*, not court compelled access to the Respondent's staff for purposes of interviewing them. *Baze* has no bearing on Mr. Beatty's request for the routine accommodation of the reasonably necessary services of his mental health experts.

The other authority relied upon by the Fifth Circuit is even further afield. In *Leavitt v. Arave*, 682 F.3d 1138 (9th Cir. 2012), the petitioner sought to compel a third party—the Blackfoot Police Department—"to submit for forensic testing blood samples taken from the crime scene." *Id.* at 1141. The petitioner argued that such discovery was warranted in support of a pending motion under Fed. R. Civ. P. 60(b). In the alternative, the petitioner invoked § 3599(f). The Ninth Circuit dispensed with

the alternative § 3599 argument with a one-sentence citation to *Baze*. *Id.* Unlike Mr. Leavitt, Mr. Beatty is not seeking discovery, much less discovery from a third party. The Ninth Circuit's denial of such discovery is irrelevant to the limited issue before this Court.[6]

CONCLUSION

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

Respectfully submitted,

JASON D. HAWKINS
Federal Public Defender

by

/s/ Jeremy Schepers
Jeremy Schepers (#304861)
Counsel of Record
Supervisor, Capital Habeas Unit
Office of the Federal Public Defender
Northern District of Texas
525 S. Griffin St., Ste. 629
Dallas, TX 75202
214-767-2746 • 214-767-2886 (fax)
Jeremy_Schepers@fd.org

Thomas Scott Smith
P.O. Box 354
Sherman, TX 75091-0354
(903) 868-8686
scottsmithlawyer@gmail.com

James William Marcus
Capital Punishment Clinic
University of Texas School of Law
727 E. Dean Keeton Street
Austin, Texas 78705
512-232-1475
512-232-9197 (fax)
jmarcus@law.utexas.edu

DATED: November 9, 2022

[6] The court below also cited *Rhines v. Young*, 941 F.3d 894, 895 (8th Cir. 2019), but acknowledged that the Eighth Circuit dismissed the appeal without deciding the merits.