THIS IS A CAPITAL CASE
EXECUTION SET FOR JUNE 6, 2023

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL TISIUS, Petitioner,

v.

DAVID VANDERGRIFF,
Warden, Potosi Correctional Center, Respondent.

On Petition for Writ of Certiorari
to the U.S. Court of Appeals, Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

ELIZABETH UNGER CARLYLE
Carlyle Parish LLC
6320 Brookside Plaza #516
Kansas City, Missouri 64113
elizabeth@carlyleparishlaw.com

KEITH O'CONNOR
Keith O'Connor, LLC
PO Box 22728
Kansas City, MO 64113
Mo Bar No. 63134
Phone: 816-225-7771
Keith@keithoc.com

LAURENCE E. KOMP*
Capital Habeas Unit, Chief
Federal Public Defender,
Western District of Missouri
1000 Walnut St., Ste. 600
Kansas City, MO 64106
(816) 471-8282
laurence_komp@fd.org

*Counsel of Record, Member of the Bar of the Supreme Court

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED FOR REVIEW

The U.S. District Court, after finding that certain medical testing was reasonably necessary for Mr. Tisius's clemency case, issued a sealed order requiring the respondent warden to transport Mr. Tisius for the testing. The state appealed, and the Court of Appeals first rejected Mr. Tisius's motion to dismiss the appeal for lack of jurisdiction and then found that the district court lacked jurisdiction to enter its order. To accomplish such, the court failed to give effect to Congress's express statutory language in 18 U.S.C. § 3599 and this Court's application of § 3599 in *Ayestas v. Davis*, 138 S. Ct. 1080 (2018), *Harbison v. Bell*, 556 U.S. 180 (2009), and *McFarland*, 512 U.S. 849. This case thus presents the following questions:

1. Whether extending the narrowly construed collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp*. 337 U.S. 541 (1949), to all district court transportation orders is justified?

2. Whether courts are required to construe 18 U.S.C. § 3599 in a manner consistent with this Court's pronouncements in *Ayestas* and *McFarland*?

3. Whether a federal circuit court of appeals has the authority to implicitly amend 18 U.S.C. § 3599 by failing to give effect to every clause or word of the statute?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Michael Tisius is the petitioner in this case and was represented in the Court below by Elizabeth Unger Carlyle, Keith O'Connor, and the Federal Defender for the Western District of Missouri.

David Vandergriff, Warden of Potosi Correctional Center, is the Respondent. He was represented in the court below by Assistant Missouri Attorney General Andrew Crane and Gregory Goodwin.

Pursuant to Rule 29.6, no parties are corporations.

RELATED PROCEEDINGS

United States Court of Appeals for the Eighth Circuit:
Michael Tisius v. Paul Blair, No. 22-3175

United States District Court for the Western District of Missouri:
Michael Tisius v. Richard Jennings, No. 4:17-CV-00426-SRB

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PETITION FOR WRIT OF CERTIORARI

Petitioner Michael Tisius prays that a writ of certiorari be granted to review the judgment of the Eighth Circuit Court of Appeals entered on February 7, 2023.

OPINIONS BELOW

Pursuant to *McFarland v. Scott*, 512 U.S. 849 (1994), *Harbison v. Bell*, 556 U.S. 180 (2009), and 18 U.S.C. § 3599, the district court found that investigative, expert, or other services were reasonably necessary for the representation of Mr. Tisius in his clemency case. As a result of this finding, the court ordered Respondent to convey Mr. Tisius to a nearby hospital for medical testing. The district court order related to clemency is unpublished and appears in redacted form at App. 4a-5a.

The Eighth Circuit expanded its jurisdiction under the *Cohen* collateral order doctrine and, in rewriting 18 U.S.C. § 3599 vacate the district court's order, ignored this Court's jurisprudence. *Tisius v. Vandergriff*, 55 F.4th 1153 (8th Cir. 2022). The December 19, 2022 Opinion of the Eighth Circuit Court of Appeals reversing the district court orders related to clemency is published, *id*, and appears in the Appendix (hereinafter "App.") at 1a. The Eighth Circuit's February 7, 2023, order denying panel and en banc rehearing is unpublished and appears at App. 3a.

JURISDICTION

On December 19, 2022, the Eighth Circuit Court of Appeals issued an opinion and reversed the district court. App. 1a-2a. The Eighth Circuit denied a timely petition for panel and *en banc* rehearing, on February 7, 2023. App. 3a.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

28 U.S.C. § 1291

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in 28 U.S.C. §§ 1292(c), (d), 1295 of this title.

28 U.S.C. § 1292 (a) and (b)

> (a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;
>
> (2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;
>
> (3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.
>
> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there

> is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order

18 U.S.C. § 3599(f)

> Under 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 [1] authorize the defendant's attorney to obtain such services on behalf of the defendant and, [2] if so authorized, shall order the payment of fees and expenses therefor under subsection (g).

STATEMENT OF THE CASE

The underlying offense

Mr. Tisius received two sentences of death for the 2000 murders of Leon Egley and Jason Acton, jailers at the rural Randolph County Jail in Huntsville, Missouri. Mr. Tisius had been jailed with a much older and manipulative inmate, Roy Vance, and Vance convinced the childlike 19-year-old Tisius to help Vance escape. The deaths occurred when the 19-year-old Tisius and his older accomplice, Tracie Bulington, attempted unsuccessfully to help Vance break out of the jail.

This unspeakable tragedy represents, for Mr. Tisius, the culmination of a life of neglect and abuse. He was neglected and abused by his father, his mother, his

older brother, and his extended family. Although this abuse and neglect was known to others, virtually no one did anything to help. At the time of the offense, Mr. Tisius was homeless, under severe emotional stress, and powerless against the manipulation of Roy Vance.

The abuse and neglect had long term consequences. Unchallenged experts have documented his organic brain damage and seizure activity and the interplay of that brain damage and dysfunction with Mr. Tisius's post-traumatic disorder, long-standing depression, and dependent personality disorder.

Procedural history

Mr. Tisius appealed his criminal convictions and sentences. Both were affirmed by the Missouri Supreme Court. He sought state court post-conviction relief, which was denied, and the denial was affirmed by the Missouri Supreme Court. He then filed a petition for habeas corpus relief in the U.S. Western District of Missouri.

On October 30, 2020, the district court denied relief *in toto* on the merits. Thereafter, Mr. Tisius never received merits review of the district court petition. The Eighth Circuit denied Mr. Tisius's motion for a certificate of appealability, and this Court denied a petition for writ of certiorari on October 3, 2022. *Tisius v. Blair*, 143 S. Ct. 177 (2022).

On March 1, 2023, the Missouri Supreme Court entered an order setting Mr. Tisius's execution date for June 6, 2022. Prior to that time, counsel for Mr. Tisius, aware that a warrant would be requested, began to carry out their duty under

Harbison v. Bell, 556 U.S. 180 (2009), to prepare a request for executive clemency to be submitted to the Governor of Missouri.

In Missouri, the governor has power under Mo. Const. art. IV, § 7 to commute Mr. Tisius's sentence. The governor's office will consider any evidence that Mr. Tisius chooses to present in support of a request for clemency. As part of their clemency presentation, Mr. Tisius's counsel sought to have Mr. Tisius examined at a hospital in St. Louis, Missouri, about an hour from the prison where Mr. Tisius is held. The examination sought includes brain imaging and testing for his seizure activity that has not previously been conducted on Mr. Tisius's brain. Mr. Tisius expects the requested medical information to corroborate his existing expert opinions. R. Doc. 29-1 (Appendix to Habeas Petition) pp. 2-179 (App. Exs. 01-05). The prior habeas investigation showed that Mr. Tisius suffers from brain defects and dysfunction, particularly in the areas of frontal-striatal and temporal lobe functioning. R. Doc. 29-1 (Appendix to Habeas Petition) (App. Ex. 04 pp. 36-37; App. Ex. 05 pp. 27-28). Mr. Tisius also has a history of numerous head injuries and has experienced seizure activity.

Although these evaluations identified numerous impairments, additional medical data would provide a complete assessment of Mr. Tisius's brain defects and dysfunction and further inform any medical opinions supporting the clemency case. Prior to the denial of certiorari, Mr. Tisius invoked the procedures provided by Congress in 18 U.S.C. § 3599, and this Court's precedent of *Harbison v. Bell*, 556 U.S. 180 (2009) and *Ayestas v. Davis*, 138 S. Ct. 1080 (2018), for clemency purposes.

Uncontradicted expert reports presented to the habeas court have opined that Mr. Tisius's brain deficits could be the result of physical or structural deformities in this area of the brain or in the pathways between the parts of the brain. The symptoms and the concentration of deficits established in the neuropsychological testing indicate that more damage and dysfunction may be present in addition to what the previous evaluations already has revealed. There is a reasonable likelihood that the requested services will provide relevant details concerning Mr. Tisius's brain damage and dysfunction and the resulting effects upon his cognition, emotions, and behavior.

On September 23, 2022, and September 29, 2022, the district court entered two *ex parte* and sealed orders related to the clemency investigation. Mr. Tisius's counsel faxed the orders to the warden on September 23 and September 30 (a transportation order), respectively.[1]

On October 3, 2022, at 10:28 a.m., the state sent an email to counsel for Mr. Tisius indicating that it was aware of the orders. R. Doc. 115-1. That same day, the state filed a motion in the Missouri Supreme Court requesting that Court to set an execution date for Mr. Tisius. R. Doc. 113-1.

On October 6, 2022, the state filed its motion to vacate and unseal the orders. (R. Doc. 112). The state neither moved for expedited briefing nor a stay of the orders pending a ruling on the motion. Even after the state received the CM/ECF notice

[1] The testing that was the subject of the September 23 order has occurred and therefore that issue is no longer before the Court. The second order is the subject of this petition.

reminding the state of Local Rule 7.0 (c)(2) of the U.S. District Court for the Western District of Missouri, indicating Mr. Tisius's response deadline was October 20, 2022, and the state's reply deadline was 14 days after Mr. Tisius filed his pleading, the state did nothing to accelerate the briefing schedule.

On October 17, 2022, 11 days after filing its motion and after normal business hours, the state filed a motion to stay the orders pending a ruling on its motion to vacate. R. Doc. 112. In that motion, the state informed the district court of its intention to change forums if the stay were not entered or the orders were not vacated by noon on October 20, 2022, less than 72 hours later. Mr. Tisius's counsel responded to both the motion to vacate and the motion for stay on October 18, 2022. R. Docs. 113, 114.

The district court did not rule on October 20. The state filed notice of appeal at 12:18 p.m. on October 20, referencing the orders. On October 25, the district court entered a text order denying the state's motions as moot. R. Doc. 120.

After filing notice of appeal, the state filed a motion to stay the orders with the Eighth Circuit, as well as a motion to expedite the appeal. Mr. Tisius filed a motion to dismiss the appeal for lack of jurisdiction.

In its response to Mr. Tisius's motion to dismiss, the state denied any lack of diligence, indicating that it had moved for stay "when it became apparent that the district court would not timely hear the Warden's challenges." Resp. to Mn. Dismiss, p. 8.

On October 21, 2022, the Eighth Circuit granted the state's motions and denied Mr. Tisius's motion. App. 6a. After expedited briefing and no argument, the Eighth Circuit vacated the district court orders.[2] App. 1a-2a.

REASONS FOR GRANTING THE WRIT

QUESTION 1

A. The Eighth Circuit ignored utterly ignored 28 U.S.C. § 1291 when it accepted jurisdiction of the state's appeal.

"Finality as a condition of review is an historic characteristic of federal appellate procedure" that dates back to the Judiciary Act of 1789. *Cobbledick v. United States*, 309 U.S. 323, 324 (1940). That finality requirement was long ago codified in 28 U.S.C. § 1291, which "confers on federal courts of appeals jurisdiction to review 'final decisions of the district courts.'" *Mohawk Indus.*, 558 U.S. at 103. "[T]he finality requirement embodied in § 1291 is jurisdictional in nature." *Firestone Tire & Rubber Co. v. Risjord, 44*9 U.S. 368, 379 (1981).

Justice Gorsuch's dissent in *Shoop v. Twyford*, 142 S.Ct. 2037 (2022), noted: "The District Court's transportation ruling was an interlocutory order, not a final judgment. To address its merits, the Court would first have to extend the collateral order doctrine to a new class of cases." *Id.* at 2051 (Gorsuch, J., dissenting); *see also id.* at 2047-50 (Breyer, J., dissenting).

[2] The orders were vacated, but were not unsealed.

The *Twyford* dissenters all premised their jurisdictional arguments on the principle that appellate jurisdiction lies only over "final decisions of the district courts." 28 U.S.C. § 1291. This foundational principle of the federal judicial system, derived from the Judiciary Act of 1789 and the corresponding precedent, require that the district court orders in this case must stand. By their nature, these orders were not final. But the Eighth Circuit summarily without comment denied Mr. Tisius's motion to dismiss the appeal for lack of jurisdiction. App. 6a.

It is clear that the order at issue here did not dispose of any pending litigation. It is not a "final order" within the meaning of § 1291.

The Eighth Circuit disregarded *sub silentio* a 240+-year-old jurisdictional statute This Court should grant certiorari on the basis of this Court's well-established and recognized precedent giving effect to that staute. Sup. Ct. R. 10 (a); Sup. Ct. R. 10 (c).

B. The Eighth Circuit ignored utterly ignored 28 U.S.C. § 1292 and *Cohen v. Beneficial Indus. Loan Corp.* 337 U.S. 541 (1949) when it extended discretionary jurisdiction to this collateral order.

Under 28 U.S.C. § 1292, collateral orders may be reviewed under certain circumstances. It is clear that the order here does not fall within the listed bases for review listed in the statute.[3] Under 28 U.S.C. § 1292(b), a judge may certify that "such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may

[3] The statute permits interlocutory appeals from orders (1) involving injunctive relief, (2) involving receivers, or (3) adjudicating rights in admiralty cases. 28 U.S.C. § 1292(a). Neither of these orders remotely fit into those categories.

materially advance the ultimate termination of the litigation." The district court did not include such language in its orders. Further, the state failed to make a timely request that the district court amend the orders to include the language required by § 1292(b).

Thus, the court below was left to parse the discretionary review of collateral orders permitted under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-47 (1949). That case set out a three-part test for discretionary review of collateral orders. To qualify, the issue to be reviewed must (1) be separate from the merits of the case, (2) be unreviewable if there is no interlocutory appeal, and (3) present an important question of law. The order here does not meet the second and third requirements.

The District Court's orders were interlocutory in nature. Thus, they were not final judgments, and, at the time notice of appeal was filed the state had a pending motion in the district court to reconsider and vacate those orders.

The state has failed to establish the need to extend the collateral order doctrine to a new class of cases, which would be required for review here. *See Cohen*, 337 U. S. at 545-47. This Court has repeatedly held that the class of appealable interlocutory orders is narrow and should remain so. *Digital Equipment Corp. v. Desktop-Direct, Inc.,* 511 U.S. 863, 868 (1994) (holding that an appeal from the granting of voluntary dismissal by the plaintiff was not immediately appealable). This Court has also frequently "admoni[shed]" other courts to keep "the class of collaterally appealable orders . . . 'narrow and selective.'" *Mohawk*

Industries, Inc. v. Carpenter, 558 U. S. 100, 113 (2009). If anything, this "admonition has acquired special force in recent years with the enactment of legislation designating rulemaking . . . as the preferred means for determining whether and when prejudgment orders should be immediately appealable." *Id.* at 113–14 (noting that Congress amended the Rules Enabling Act, 28 U. S. C. § 2071 et seq., "to authorize this Court to adopt rules 'defining when a ruling of a district court is final for the purposes of appeal under section 1291' (quoting 28 U.S.C. § 2072(c)))".)

In *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863 (1994), this Court dismissed the appeal from an order vacating a voluntary dismissal. The Court found the order not final, and not involving a sufficiently important point of law to warrant interlocutory review. The Court noted, "We have . . . repeatedly stressed that the 'narrow' exception [to finality] should stay that way and never be allowed to swallow the general rule." *Id.* at 867.

The Court explained why the fact that later review will not be possible is insufficient to meet the *Cohen* requirements:

> [A]n erroneous district court decision will, as a practical matter, sound the "death knell" for many plaintiffs' claims that might have gone forward if prompt error correction had been an option. But if immediate appellate review were available every such time, Congress's final decision rule would end up a pretty puny one, and so the mere identification of some interest that would be "irretrievably lost" has never sufficed to meet the third *Cohen* requirement.

Id. at 872.

The Eighth Circuit disregarded *sub silentio* the statute and this Court's *Cohen* precedent. This Court should grant certiorari on the basis of this Court's well-established and recognized *Cohen* precedent. Sup. Ct. R. 10 (a); Sup. Ct. R. 10 (c).

QUESTIONS 2 & 3

A. The Eighth Circuit's decision conflicts with this Court's precedent, and presents an intra-circuit split.

The panel's decision conflicts with this Court's decisions in *Ayestas v. Davis*, 138 S. Ct. 1080 (2018), and *McFarland v. Scott*, 512 U.S. 849 (1994). It also conflicts with Eighth Circuit precedent, *Edwards*, 688 F.3d 449. These conflicts were not acknowledged or discussed by the panel in its decision.

Under § 3599, a district court may grant a request for investigative services to develop claims that, due to ineffective assistance of counsel, prior counsel failed to investigate, develop, and present. *Ayestas*, 138 S. Ct. at 1088. When "a reasonable attorney would regard the services as sufficiently important[,]" district courts should grant the petitioner's request." *Id.* at 1093.

In *Ayestas*, this Court held that § 3599 grants courts "judicial," rather than administrative, power. 138 S. Ct. at 1088-92. The *Ayestas* Court then elaborated that under § 3599(f), a district court must first determine that a requested service is "reasonably necessary" for the representation. *Id.* at 1092. Once the court determines that a service is reasonably necessary, the court may then authorize counsel to obtain that service. *Id.* In other words, the district court's determination whether to authorize counsel to obtain a specific service is a judicial decision

separate from the determination of whether and/or how much funding to authorize counsel to utilize. *See id.* ("[W]e reject respondent's argument that the adjudication of the funding issue is nonadversarial and administrative.").

The Eighth Circuit agreed that § 3599 grants courts judicial power, as well as administrative. App. 1a. The Eighth Circuit expressly cited and restated this pertinent aspect of *Ayestas* in its opinion. App. 1a. This Court's recognition in *Ayestas* is not without legal consequence. As this Court has recognized: "[T]he power to create a faculty of any sort, must infer the power to give it the means of exercise. A grant of the end is necessarily a grant of the means." *Osborn v. Bank of U.S.*, 22 U.S. 738, 809 (1824). Thus, if the district court had the power to determine that the services were reasonably necessary for the representation, then the court necessarily must also have the power to order that the services be completed.

However, the Eighth Circuit's subsequent conclusion that § 3599 is merely a funding statute that does not allow the district court to authorize counsel to obtain services directly contradicts *Ayestas*. Under the *Ayestas* decision, the district court properly used its statutorily granted discretionary power to determine that medical testing was reasonably necessary for the representation of Mr. Tisius and accordingly to authorize Mr. Tisius to obtain this service as part of his representation.

The Eighth Circuit has expressly adopted the *Ayestas* approach into its own jurisprudence. In *Edwards v. Roper*, defense counsel sought funding authorization from the district court under § 3599(f) for a mental health evaluation of the

petitioner to determine his competence to proceed with a habeas petition. 688 F.3d 449, 462 (8th Cir. 2012). The Court offered the following framework for § 3599(f) determinations: "A court may authorize defense counsel to obtain 'investigative expert, or other services' upon a finding that the services are 'reasonably necessary for the representation of the defendant.' Upon such authorization, the court shall order the payment of fees and expenses for such services." *Id.* (citing 18 U.S.C. § 3599(f), (g)(2)).

In short, in accordance with this Court's precedent, the Eighth Circuit had concluded that the plain language of the statute conferred two distinct powers upon district courts. The Eighth Circuit's conclusion was consistent also with this Court's recognition that such a judicial authorization fully accorded with the fundamental principle that "the judicial power should be competent to give efficacy to the constitutional laws of the legislature." *Cohens v. Virginia*, 19 U.S. 264, 415 (1821).

The Eighth Circuit also ignored and violated the principles of this Court's preeminent decision on habeas jurisdiction, *McFarland v. Scott*, 512 U.S. 849 (1994). In *McFarland*, the Supreme Court held that the predecessor to § 3599 permitted the appointment of counsel prior to the filing of an application for habeas relief. *Id.* at 849. The Court concluded that the right to legal assistance incorporates preapplication assistance and explained that "services of investigators and other experts may be critical in the preapplication phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified." *Id.* at 855. The court explained further that to effectuate legislative intent, the only

interpretation of the statutory provision that gave "meaning to the statute as a practical matter" was to incorporate preapplication counsel and services into the broader statutory right to legal assistance. *Id.* at 855-58. This is because "the right to counsel necessarily includes a right for that counsel *meaningfully* to research and present a defendant's habeas claims." *Id.* at 858 (emphasis added).

This Court has continued to uphold its *McFarland* conclusion. In *Harbison v. Bell*, 556 U.S. 180 (2009), this Court interpreted § 3599 to extend representation and services to state clemency proceedings and post-habeas state court proceedings. In *Christeson v. Roper*, 574 U.S. 373 (2015), this Court, reversing the Eighth Circuit, held that the § 3599 mandatory provisions must be given effect; this conclusion relied on *McFarland.*

The Eighth Circuit here completely failed to address *McFarland* or to explain its reasoning about why *McFarland* does not apply to Mr. Tisius's case. In fact, the decision fails altogether to even cite *McFarland*, much less distinguish *McFarland* from Mr. Tisius's case.

Based on *McFarland*, Mr. Tisius's right to have counsel meaningfully research and present his habeas claims has been triggered, as counsel has been already appointed. 512 U.S. at 858. § 3599 unambiguously provides that this right continues throughout clemency unless or until the capital proceeding is terminated, either by execution, (as held by the this Court in *Harbison,* 556 U.S. at 194) or by vacatur of the death sentence (as held by this Court in *Christeson*, 574 U.S. at 374).

In Mr. Tisius's case, this right to have counsel meaningfully research his clemency case includes medical testing so that counsel may present relevant aspects of Mr. Tisius's mental health and cognitive dysfunctions in his clemency application. Clemency applications unquestionably fall within the period in which the right attaches under § 3599. *Harbison*, 556 U.S. at 193. Yet, this Court's decision does not explain why it should not be bound by the Supreme Court's holdings in *McFarland* or its progeny cases in deciding Mr. Tisius's case.

Because the Eighth Circuit refused to follow this Court's *Ayestas*, *McFarland*, *Christeson*, *Harbison* precedent, this Court should grant certiorari. Sup. Ct. R. Prac. 10 (a); Sup. Ct. R. Prac. 10 (c).

B. The Eighth Circuit constructively amended 18 U.S.C. § 3599 by failing to give effect to the statute's plain language and altering its effect and engaging in statutory reconstruction in contravention of previous decisions of this Court and the Eighth Circuit.

Courts should follow federal statutes. It is error to reconstruct or reconstitute a statute to limit or modify its meaning. "Redoing" a statute is the prerogative of the Legislative Branch, not the Judicial Branch.

The Eighth Circuit does violence to the plain language of 18 U.S.C. § 3599 and several of this Court's and the Eighth Circuit's earlier decisions regarding statutory interpretation. While briefed to the court below, these conflicts with controlling authority were neither acknowledged nor discussed in the panel's decision. The panel's limiting construction of the federal statute should not be

permitted. As noted by this Court, the Eighth Circuit has "no authority to amend" a federal statute. *Shinn v. Ramirez*, 142 S. Ct. 1718, 1736 (2022).

"Clemency is deeply rooted in our Anglo–American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Herrera v. Collins*, 506 U.S. 390, 411-12 (1993) (footnote omitted). Clemency is "'the 'fail safe' in our criminal justice system.'" *Harbison*, 556 U.S. at 192 (quoting *Herrera*, 506 U.S. at 415); *Harbison*, 556 U.S. at 193 ("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 Eighth Circuit recognized that "[this] Court has recognized that § 3599 authorizes federally appointed counsel to represent a defendant in related state clemency proceedings[.]" App. 3a (citing *Harbison*).

In Mr. Tisius's habeas case, uncontradicted medical experts opined that Mr. Tisius's demonstrated brain deficits could be the result of physical or structural deformities in this area of the brain or in the pathways between the parts of the brain. The symptoms and the concentration of deficits established in his neuropsychological testing indicate that more damage and dysfunction may be present in addition to what his prior evaluations already have revealed.

Mr. Tisius (and his counsel) believed that additional details concerning his brain damage and dysfunction and the resulting effects upon his cognition,

emotions, and behavior would be relevant to his clemency case. Accordingly, Mr. Tisius requested the district court to direct the respondent warden to transport him to a medical facility to obtain testing relevant to his application for executive clemency. The district court, applying the "reasonably necessary" test of § 3599(f), granted the request "for good cause shown."

In reversing the district court, the Eighth Circuit amended out the plain language of 18 U.S.C. § 3599 regarding authorization of services. The express language of 18 U.S.C. § 3599 provides the district court with the power to enter these orders. Congress permitted such, and the Eighth Circuit itself recognized, *in this case*, that § 3599 applies to clemency cases and grants judicial power, not administrative power.

But despite its own recognition of § 3599's grant of judicial power in this case, to overturn the district court, the Eighth Circuit concluded that the district court did not have that power after all. This Court should take notice that, to accomplish this statutory reconstruction, the actual text of 18 U.S.C. § 3599 is conspicuously absent from the panel's decision.

Congress provided the following in Section 3599(f):

> Under 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 **[1] authorize the defendant's attorney to obtain such services on behalf of the defendant and, [2] if so authorized, shall order the payment of fees and expenses therefor under subsection (g).**

18 U.S.C. § 3599(f) (emphasis added).

The express language approved by Congress and signed into law explicitly conferred two separate and distinct powers on the district court: first, the power to authorize counsel to obtain reasonably necessary investigative services, and second, if those services are authorized, the power to authorize funds for those services.

The clause allowing the court to authorize the petitioner's attorney to obtain services is independent from the clause that allows the court to order the payment of fees and expenses. It is linked by the conjunctive "and." "And" is used as a way of starting a new sentence/topic but relating it to the previous sentence/topic. Thus, the district court is not limited to merely authorizing funding for counsel to obtain investigative services — the court may also authorize counsel to obtain such services, especially because the court has determined that such services are reasonably necessary for the representation of the defendant. And Congress said the same. But the Eighth Circuit, holding that "§ 3599 is a funding statute, not a mechanism that grants federal courts authority to oversee and compel state officials to act in furtherance of clemency proceedings," (App. 1a), ignored the first clause of the statute. In misconstruing the plain language of § 3599, the panel ignored Congress's unambiguous instruction and overlooked a material point of law.

Black's Law Dictionary defines "authorize" as "[t]o give legal authority; to empower" or "[t]o formally approve; to sanction." Black's Law Dictionary (11th ed. 2019). "Obtain" means "[t]o succeed either in accomplishing (something) or in having it be accomplished; to attain by effort." Black's Law Dictionary (11th ed. 2019). Thus, the plain wording of § 3599(f) provided the district court jurisdiction to

"empower" defense counsel to "attain" or "succeed in accomplishing" the reasonably necessary expert services for clemency. This authorization clause is independent from the clause that empowered the district court to pay the expert's fees once the authorized act was completed.

Moreover, the panel's misconstruction of § 3599 conflicts with decisions from not only this Court, but with other decisions from the Eighth Circuit as well. By holding that § 3599 grants funding power only, the Eighth Circuit violates the longstanding principle "that a court should give effect, if possible, to every clause or word of a statute." *Moskal v. United States*, 498 U.S. 103, 109-10 (1990) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)) (citing *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)). This principle is more than a century old.

Before the instant case, the Eighth Circuit likewise found that failure to give effect to a statute's language "would contradict fundamental principles of statutory construction." *Herman*, 172 F.3d at 1081. The Eighth Circuit also ignored when it previously held that "we must construe a statute 'so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" *Pharm. Care Mgmt. Ass'n*, 852 F.3d at 728–29 (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009) (internal quotations omitted)). Innumerable cases from this Court and the Eighth Circuit rely on this principle of statutory construction.

Under these decisions and the unambiguous language of § 3599, there is only one reasonable interpretation of § 3599 — that the district court may authorize counsel to obtain reasonably necessary investigative services, and after doing so,

may then authorize the petitioner to obtain such services and funding for them. The Eighth Circuit's decision eviscerates long-settled tenets of statutory construction and thereby fails to give the language of § 3599 full effect.

With the unambiguous language of § 3599, Congress explicitly granted district courts the power to order exactly what the district court authorized here. In refusing to allow the district court to exercise its express statutory power to authorize Mr. Tisius's transportation to a medical facility for testing to support his clemency application, the panel's holding contravenes Congress's instruction. Because the panel's opinion overlooks a material point of law, resulting in a conflict with Supreme Court decisions and previous Eighth Circuit decisions, this Court should grant certiorari. Sup. Ct. R. Prac. 10 (a); Sup. Ct. R. Prac. 10 (c).

C. The issue is ripe and ready for review.

In *Rhines*, 140 S. Ct. 8, this Court recently had occasion to consider a similar § 3599 question, but that case was not ripe for review. As Justice Sotomayor pointed out, respecting the denial of certiorari, the Eighth Circuit had dismissed Mr. Rhines's appeal as "either moot, or . . . not . . . fully exhausted." *Rhines*, 140 S. Ct. at 8 (Sotomayor, J., respecting denial of certiorari) (quoting *Rhines v. Young*, 941 F.3d 894, 1 (8th Cir. 2019). In contrast, neither procedural hurdle exists in this case — it is ripe and ready to be reviewed.

CONCLUSION

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

Respectfully Submitted,

LAURENCE E. KOMP
Capital Habeas Unit, Chief
Federal Public Defender
Western District of Missouri
1000 Walnut St., Ste. 600
Kansas City, MO 64106
(816) 471-8282
laurence_komp@fd.org

ELIZABETH UNGER CARLYLE
Carlyle Parish LLC
6320 Brookside Plaza, #516
Kansas City, MO 64113
Mo. Bar No. 41930
(816) 525-6540
elizabeth@carlyleparishlaw.com

KEITH O'CONNOR
Keith O'Connor, LLC
PO Box 22728
Kansas City, MO 64113
Mo Bar No. 63134
Phone: 816-225-7771
Keith@keithoc.com

COUNSEL FOR PETITIONER

*Counsel of Record, Member of the Bar of the Supreme Court