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

No. 22-7398

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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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 v. Scott*, 512 U.S. 849 (1994). 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 a statute?

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QUESTION 1

Cohen Question Ripe for Review

Distilled to its essence, the state's main contention is that the Eighth Circuit acted properly because the jurisdictional question is settled law. This ignores the limitations Congress enacted in the Judiciary Act of 1789 and this Court's previous religious and vigorous enforcement of those provisions for 240 years. Mr. Tisius does not dispute that this Court in a footnote addressed the issue in *Shoop v. Twyford*, 142 S. Ct. 2037 (2022). However, as noted by Justice Gorsuch, the jurisdictional question was discussed in "a terse footnote." *Id.* at 2050 (Gorsuch, J., dissenting). It merits a full explication.

Without citation of authority, the state suggests that this order was not "collateral" because is was not related to the original judgment.[1] But as this Court held in *Harbison v. Bell*, 556 U.S. 180 (2009), the district court retains jurisdiction after judgment with respect to appointing counsel, authorizing services, and approving payment. Those orders, *Harbison* held, are not ordinarily final judgments. *Id.* at 183. Thus any appeal is subject to the collateral order doctrine.

[1] The state complains that it has not seen the motions and orders. It moved to unseal the orders in district court, but did not await a ruling on that motion before appealing to the Eighth Circuit. R. Docs. 114, 116. No motion to unseal was filed in the Eighth Circuit, so the state should not be heard to complain about this now."

The state spends some time offering alternative bases for jurisdiction. The state speculates on theories as evidence by their use of "apparently." BIO p. 12. However, the Eighth Circuit never addressed how it apparently possessed jurisdiction. *See* App. 1a-2a. Rather than provide a means for certiorari denial, the state presents subsidiary questions on jurisdiction that would be addressable with the *Cohen* question presented to this Court. There should not be apparent jurisdiction—there should be actual jurisdiction.

The state asserts **all** transportation orders are immediately appealable. BIO p. 11. As the Government warned in its Briefing in *Shoop v. Twyford*, there would be dramatic day-to-day consequences of the federal court's ability to operate if **all** transportation orders are immediately appealable. Brief for United States as Amicus Curiae Supporting Neither Party at 8, 12-17, 23-25, *Shoop v. Twyford*, 142 S. Ct. 2037 (2022) (No. 20-3346) (available at: https://www.supremecourt.gov/DocketPDF/21/21-511/217910/20220307185350603_No.%2021-511%20Shoop.pdf).

Thus, the long-standing premise of the *Cohen* collateral doctrine appears to have been radically changed according to the state. But 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 repeatedly "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))).

This Court opened a door in a "terse" manner in *Twyford*. This Court should grant certiorari to provide the bright-line test, lest **all** transportation orders become immediately appealable, as the state suggests and the Solicitor General previously warned.

QUESTIONS 2 & 3

The state also seeks avoidance of 18 U.S.C. § 3599, *Ayestas v. Davis*, 138 S. Ct. 1080 (2018), *Harbison v. Bell*, 556 U.S. 180 (2009), and *McFarland v. Scott*, 512 U.S. 849 (1994). The federal circuit court cases the state cites simply do not give effect to the plain language of the statute. And as this Court has said, modifying a statute is a legislative function not a judicial function. *See, e.g., Shinn v. Ramirez*, 142 S. Ct. 1718, 1736 (2022) ("Here, however, § 2254(e)(2) is a statute that we have no authority to amend."); *McQuiggin v. Perkins*, 569 U.S. 383, 402 (2013) ("Where Congress has erected a constitutionally valid barrier to habeas relief, a court *cannot* decline to give it effect."); *Fedorenko v. United States*, 449 U.S. 490, 513 (1981) ("As

this Court has previously stated: 'We are not at liberty to imply a condition which is opposed to the explicit terms of the statute. . . . To [so] hold . . . is not to construe the Act but to amend it.'" (quoting *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 38 (1934))).

The state misses the point by conceding that *Ayestas* viewed § 3599 as an exercise of judicial authority. BIO p. 23. This alone demonstrates the flawed view employed by the Eighth Circuit in then limiting § 3599 as a meager administrative/funding function. This Court "got it right" even with all the subsequent encroachments on this Court's precedent by various inferior federal courts. When "a reasonable attorney would regard the services as sufficiently important[,]" district courts should grant the petitioner's request." *Ayestas*, 138 S. Ct. at 1093. This Court's precedent should be respected.[2]

The state's discussion of *McFarland v. Scott*, 512 U.S. 849 (1994), robs it of its precedential value. BIO pp. 23-24. Regardless, the Eighth Circuit 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.

The state gives minimal value to *Harbison. Harbison* should not be so minimized. Relying on *McFarland*, this Court held § 3599 continues the right to

[2] The state failed to address the Eighth Circuit's authority supportive of Mr. Tisius's contention. *Edwards v. Roper*, 688 F.3d 449 (8th Cir. 2012).

counsel throughout clemency proceedings unless or until the capital proceeding is terminated by execution. *Harbison,* 556 U.S. at 194.

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, the Eighth Circuit's decision does not explain why it should not be bound by this Court's holdings in *McFarland* or its progeny cases in deciding Mr. Tisius's case.

The state insists the plain language of § 3599 supports the Eighth Circuit's ruling. But just like the Eighth Circuit, the state does not provide § 3599's actual language. Congress provided the following in § 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). Mr. Tisius respectfully suggests the statute was omitted because the language demonstrates the Eighth Circuit's decision modified § 3599(f). As noted by this Court, the Eighth Circuit has "no authority to amend" a federal statute. *Shinn*, 142 S. Ct. at 1736.

In *Rhines v. Young*, 140 S. Ct. 8 (2019), 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, 896 (8th Cir. 2019)). As noted by the state, Mr. Tisius exhausted his request with the Missouri Governor. BIO p. 9[3] Thus, neither procedural hurdle from *Rhines* exists in this case—the issue is ripe and ready to be reviewed. Mr. Tisius's right to seek clemency is "the 'fail safe' in our criminal justice system." *Harbison*, 556 U.S. at 192 (quoting *Herrera v. Collins*, 506 U.S. 390, 415 (1993)).

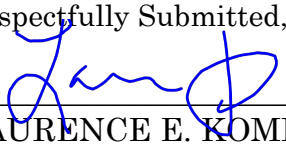
Mr. Tisius respectfully asserts a federal statute enacted by Congress and this Court's precedent regarding that statute should be fully respected. The Eighth Circuit failed in this respect. This Court should grant certiorari.

[3] The governor agreed to the testing within the prison concerned in one of the orders, which is not before this Court. Dist. Dkt. 109. That testing was conducted without incident, and revealed that Mr. Tisius's blood lead level is 700% higher than normal, which is relevant to his clemency application.

CONCLUSION

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

Respectfully Submitted,



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