

**THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

BRIAN J. DORSEY,)	
)	
Petitioner,)	
)	No. 15-CV-08000-RK
v.)	
)	
DAVID VANDERGRIFF, Warden,)	
Potosi Correctional Center,)	
)	
Respondent.)	

**EX PARTE MOTION TO ORDER THE MISSOURI DEPARTMENT OF
CORRECTIONS TO TRANSFER PETITIONER FOR MAGNETIC RESONANCE
IMAGING (MRI)**

COMES NOW Petitioner, Brian Dorsey, through counsel, and respectfully moves this Court, *ex parte*, to order the Missouri Department of Corrections to transfer Mr. Dorsey to Midwest Imaging Center, 20 Southtowne Drive, Potosi, MO, 63664 for purposes of magnetic resonance imaging (MRI) in anticipation and support of clemency proceedings before Governor Parsons, pursuant to 18 U.S.C. §3599 and 28 U.S.C. §1651.

In support of his motion, Petitioner shows the following:

1. Brian Dorsey was convicted of, *inter alia*, two counts of first-degree murder and was sentenced to death in the Thirteenth Circuit Court for the State of Missouri on December 1, 2008.
2. His convictions and death sentences were affirmed by the Missouri Supreme Court on July 16, 2010. *State v. Dorsey*, 318 S.W.3d 648 (Mo. banc 2010). The Supreme Court of the United States denied certiorari on October 6, 2010. *Dorsey v. Missouri*, 562 U.S. 1067 (2010).

3. Mr. Dorsey litigated and lost a 29.15 motion to vacate, set aside, or correct judgment and sentence on December 31, 2012, the denial of which was affirmed by the Missouri Supreme Court on November 12, 2014. *Dorsey v. State*, 448 S.W.3d 276 (Mo. banc 2014).
4. On December 22, 2015, Mr. Dorsey filed a Petition for Writ of Habeas Corpus under 28 U.S.C. §2254 in the Western District of Missouri. Doc. 25. On September 27, 2019, following an answer by the State and other litigation, the district court denied the petition, denied an evidentiary hearing, denied expansion of the record, and denied a certificate of appealability on any issue. Doc. 104. A 59(e) motion to alter or amend the judgment was denied on May 5, 2020. Doc. 108. A notice of appeal was filed on June 2, 2020. Doc. 109.
5. The United States Court of Appeals for the Eighth Circuit granted a certificate of appealability on February 1, 2021. After briefing and argument, on April 7, 2022, the Eighth Circuit affirmed this Court's denial of §2254 relief. *Dorsey v. Vandergriff*, 30 F.4th 752 (8th Cir. 2022).
6. A petition for writ of certiorari was filed in the United States Supreme Court on November 14, 2022. The State of Missouri sought and obtained an extension to respond, to and including January 17, 2023.
7. Pursuant to 18 U.S.C. §3599, undersigned counsel continues to represent Mr. Dorsey for purposes of executive clemency proceedings in the State of Missouri. *Harbison v. Bell*, 556 U.S. 180, 194 (2009) (“We further hold that §3599 authorizes federally appointed counsel to represent their clients in state clemency proceedings and entitles them to compensation for that representation.”).

8. “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, 411-412 (footnotes omitted).
9. 18 U.S.C. §3599(f) empowers this Court not simply to provide funding, but to authorize court-appointed counsel in capital cases to obtain reasonably necessary investigative, expert or other services on behalf of the defendant. 18 U.S.C. §3599(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).”). The statute therefore contains two separate imprimaturs—obtaining services **and** funding them. Funding alone is not always sufficient “to obtain” reasonably necessary services.
10. That same provision, 18 U.S.C. §3599(f), provides: “No *ex parte* proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality.” Hence, the statute contemplates *ex parte* proceedings in certain circumstances. Mr. Dorsey hereby shows this Court the need for confidentiality.
11. 18 U.S.C. §3006A(e) also contemplates that requests for other services will be handled on an *ex parte* basis. “Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an *ex parte* application. Upon finding, after appropriate inquiry in an *ex parte* proceeding, that the services are necessary and that the person is

financially unable to obtain them, the court, or the United States magistrate judge if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.”

12. The reason for authorization of *ex parte* proceedings in such circumstances is because the government has no legitimate interest in the investigation or exploration of evidence to support the defense case until that investigation or exploration blossoms into evidence to be presented on behalf of the indigent defendant. The equal protection clause of the Fourteenth Amendment bars treating similarly situated defendants fundamentally differently because of their financial status. Where a person of means would not have to reveal his strategy to the adversary in court proceedings in order to obtain reasonably necessary expert services, neither should an indigent. *United States v. Hang*, 75 F.3d 1275, 1281 (8th Cir. 1996) (Rule 17, Fed. R. Crim. P. modified so as to place “all defendants, whether impoverished or with ample financial resources, on equal footing, and it prevents the Government from securing undue discovery.”). Any other reading of these statutes “presents an indigent with a Hobson’s choice: either make no defense or disclose his whole case to the Government . . .” *Hang*, *ibid.* (citations omitted). *See generally, Ake v. Oklahoma*, 470 U.S. 68, 76 (1985) (“[J]ustice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.”).

13. A petitioner seeking the “fail-safe” of clemency proceedings needs the raw materials integral to the building of an effective clemency presentation. “[A] persuasive clemency application . . . [may include] extensive information about [a petitioner’s]

life history and cognitive impairments that was not presented during his trial or appeals.” *Harbison*, 556 U.S. at 193; 18 U.S.C. §3599(f).

14. Mr. Dorsey has a history of head trauma from, *inter alia*, auto collisions, bicycle falls, other falls, and playing starting defensive lineman on his high school football team. He also has a history of blackouts from drinking alcohol. As a result of these symptoms, undersigned counsel have obtained a prescription for an MRI scan from Dr. Joel Shenker, a neurosurgeon at the Missouri University Medical Center, attached. Counsel has also spoken to the director of the Midwest Imaging Center, which is located just 3.2 miles from Potosi Correctional Center. She confirmed that Midwest Imaging Center is able and willing to perform the MRI procedure once the court orders the transportation and billing is set up through the Federal Defender’s Office.

15. Undersigned counsel believe that an MRI scan is “reasonably necessary” to reveal organic brain damage that might mitigate the death sentences and explain his behavior in a way that impels mercy at executive clemency proceedings. 18 U.S.C. §3599(f); *Ayestas v. Davis*, 584 U.S. ___, 138 S. Ct. 1080, 1094 (2018) (the “reasonably necessary” standard defined as a “likelihood that the services will generate useful and admissible evidence . . .”).

16. The test this Court must employ is “whether a reasonable attorney would regard the services as sufficiently important.” *Ayestas*, 138 S. Ct. at 1093; *Edwards v. Roper*, 688 F.3d 449, 462 (8th Cir. 2012) (“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.”). Reasonable

attorneys routinely follow up on suggestions for mitigating evidence raised by the client’s social, biological, and medical history. *Wiggins v. Smith*, 539 U.S. 510, 523-525 (2003); *Ayestas, supra*, at 1094-1095.

17. In this case, Mr. Dorsey needs to be transported to a facility that has an MRI machine in order “to obtain” the reasonably necessary expert services for executive clemency contemplated by §3599. The plain language of §3599 contemplates a federal district court’s authority to facilitate counsel’s obtaining of such services. *Ayestas, supra*, at 1092 (“Here we are concerned . . . with services provided by experts, investigators, and the like. Such services must be ‘reasonably necessary for the representation of the [applicant]’ in order to be eligible for funding. § 3599(f). If the statutory standard is met, a court ‘may authorize the [applicant’s] attorneys to obtain such services on [his] behalf.’”)
18. Additionally, the All Writs Act, 28 U.S.C. §1651 authorizes a federal court to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”
19. To the extent that 18 U.S.C. §3599(f) empowers federal courts to authorize court-appointed counsel in capital cases to obtain reasonably necessary investigative, expert or other services on behalf of the defendant including in state clemency proceedings, *see Harbison, supra*, this Court is authorized to order the Missouri Department of Corrections to transport Mr. Dorsey to a facility where he may obtain a reasonably necessary MRI scan. Without a transportation order, Mr. Dorsey’s counsel would be unable “to obtain” the reasonably necessary services, to-wit, a MRI scan of Mr. Dorsey’s brain.

20. The Supreme Court’s decision in *Shoop v. Twyford*, 596 U.S. ___, 142 S. Ct. 2037 (2022) does not curtail this Court’s authority to grant the motion. Similar to this case, Twyford sought an order from a district court for transfer from the prison to Ohio State University Medical Center for a PET/CT scan. The district court granted the motion, and the Sixth Circuit affirmed. The United States Supreme Court reversed, however, holding that the All Writs Act, 18 U.S.C. §1651, could not be used to compel transportation in aid of federal court jurisdiction in a §2254 proceeding governed by the AEDPA, because §2254(e) generally precludes the development, presentation, and consideration of new evidence in §2254 proceedings that was not a part of the state court record. The Supreme Court reasoned that “[a] transportation order that allows a prisoner to search for new evidence is not ‘necessary or appropriate in aid of’ a federal court’s adjudication of a habeas corpus action, 28 U.S.C. § 1651(a), when the prisoner has not shown that the desired evidence would be admissible in connection with a particular claim for relief.” *Twyford, supra*, at 2046.

21. Here, by contrast, Mr. Dorsey is not seeking to develop evidence to present to this Court in support of a §2254 petition; therefore, there is no reason for this Court to consider whether any evidence developed by virtue of the transportation to the facility and the ensuing MRI scan will be admissible in this Court in §2254 proceedings. Mr. Dorsey’s §2254 proceedings in this Court are concluded; Mr. Dorsey seeks to present any newly developed evidence in executive clemency proceedings before the Governor of Missouri.

22. As the United States Supreme Court made clear in explaining the breadth of §3599, “Congress ensured that no prisoner would be put to death without meaningful access to the ‘fail-safe’ of our justice system.” *Harbison, supra*, at 194 (citation omitted).
23. The Supreme Court of Missouri has defined clemency as “a declaration on record by the chief magistrate of a state or country that a person named is relieved from the legal consequences of a specific crime; or, . . . an act of grace proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed.” *State v. Jacobson*, 152 S.W.2d 1061, 1063 (Mo. 1941) (citation omitted). *See also, Noel v. Norris*, 336 F.3d 648 (8th Cir. 2003) (“clemency is extended mainly as a matter of grace, and the power to grant it is vested in the executive prerogative.”). As such, there are no procedural barriers to the presentation and consideration of evidence in support thereof. Hence, the concerns expressed by the Supreme Court in *Twyford, supra*, are not present here.
24. The Missouri Department of Corrections has previously transported Mr. Dorsey outside of Potosi Correctional Center for medical services. On or about September 22, 2022, the Missouri Department of Corrections transported Mr. Dorsey without incident to Capital Eye Center, Inc., in Jefferson City, Missouri for treatment for ophthalmic laser surgery. Likewise, the Department of Corrections similarly transported Mr. Dorsey without incident to the same off-site facility on or about August 4, 2020.

25. A nearly identical motion for transport order is currently pending on appeal before the United States Court of Appeals for the Eighth Circuit. *Tisius v. Vandergriff*, No. 22-3175.

26. The expense for the testing and transportation of Mr. Dorsey for purposes of obtaining the expert services he seeks may fairly be borne by Mr. Dorsey, and he is prepared to shoulder those expenses.

WHEREFORE, petitioner respectfully prays that this Court grant his motion ordering the Missouri Department of Corrections to transfer Mr. Dorsey, on a reasonable time and manner schedule, to Midwest Imaging Center, 20 Southtowne Drive, Potosi, Missouri, 63664, for purposes of Mr. Dorsey obtaining a necessary MRI scan of his brain.

Respectfully submitted,

/s/ Marshall Dayan
Assistant Federal Public Defender

/s/ Kirk J. Henderson
Assistant Federal Public Defender

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MU Neurology

1020 Hitt Street
Columbia, MO 65201
Phone: (573) 882-1515
Fax: (573) 884-0070

Name: DORSEY, BRIAN J

Arrival Date: 11/21/22

MRN: MU029589024

FIN: MU065735558

Ordering Date/Time: 11/21/22 CST

Date of Birth: [REDACTED]/72

Age: 50 Years

Sex: Male

Ordering MD: Shenker MD, PhD, Joel Isaac

Attending MD:

Ordering MD NPI: 1528037991

Height:

Weight:

Location: MU Neurology

Patient Type: Between Visit

Allergies:

Order Requisition

Order: OUTSIDE RAD REQUEST

Ordered By: Shenker MD, PhD, Joel Isaac

Order ID: 5504007447

Order Details:

Reason For Exam:

spells, altered behavior, hx substance abuse

Test Description:

MRI brain with and without contrast

Requested Time Frame:

First Available

Consult or Referral:

Referral

Special Instructions:

please use MS protocol if possible, to get high res MPRAGE with volumetric analysis

Order Diagnoses:

Order Comments:

APPENDIX B

Ordering Physician: Shenker MD, PhD, Joel Isaac

Shenker MD, PhD, Joel Isaac (E-Sig.)

Signature

Joel SHENKER 11/23/2022

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

BRIAN J. DORSEY,)
Petitioner,)
v.) Case No. 4:15-cv-08000-RK
TROY STEELE,)
Respondent.)

ORDER

Before the Court is Petitioner Brian J. Dorsey's ex parte motion filed under seal seeking relief under 18 U.S.C. § 3599 and 28 U.S.C. § 1651 ("All Writs Act"). (Doc. 116.) Specifically, Petitioner seeks an order that the Missouri Department of Corrections transport him to a medical center to obtain certain medical testing in support of an anticipated clemency application. After careful consideration and for the reasons explained below, the ex parte motion is **DENIED**.

Discussion

Petitioner is currently in the custody of the Missouri Department of Corrections, having been convicted of two counts of first-degree murder and sentenced to death. Petitioner has been denied relief on direct appeal,¹ in state post-conviction relief proceedings,² and in federal habeas relief proceedings under 28 U.S.C. § 2254.³ Petitioner continues to be represented by counsel appointed to represent him at the § 2254 proceedings pursuant to 18 U.S.C. § 3599.⁴ In the ex parte motion, Petitioner's counsel state that they believe the requested medical testing is "reasonably necessary" to support Petitioner's anticipated clemency case.

¹ *State v. Dorsey*, 318 S.W.3d 648 (Mo. banc 2010), *cert. denied*, 562 U.S. 1067 (2010).

² *Dorsey v. State*, 448 S.W.3d 276 (Mo. banc 2014).

³ *Dorsey v. Steele*, No. 4:15-08000-CV-RK, 2019 WL 4740518 (W.D. Mo. Sept. 27, 2019), *aff'd*, *Dorsey v. Vandergriff*, 30 F.4th 752 (8th Cir. 2022), *reh'g denied*, No. 20-2099, 2022 WL 2180219 (8th Cir. June 16, 2022), *petition for cert. filed*, No. 22-6091 (U.S. Sept. 2, 2022). The petition for certiorari now pending before the United States Supreme Court is currently awaiting response, due by January 17, 2023.

⁴ Section 3599 expressly contemplates for death penalty cases (1) appointment of counsel to represent those defendants in § 2254 habeas proceedings who are otherwise financially unable to obtain adequate representation, and (2) that such appointment will continue "throughout every subsequent stage of available judicial proceedings, including . . . proceedings for executive or other clemency as may be available to the defendant." § 3599(a)(2) & (e); *see Harbison v. Bell*, 556 U.S. 180, 194 (2009) (holding that § 3599 authorizes federally appointed counsel to represent defendants in state clemency proceedings).

APPENDIX C

As relevant here, § 3599(f) provides as follows:

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 therefore under subsection (g). No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

As an initial matter, the Court is not convinced that Petitioner has satisfied § 3553(f)'s confidentiality requirement to pursue this request ex parte. Several federal courts, including the Eastern District of Missouri, have concluded that the showing to proceed ex parte under § 3553(f) requires identification of some case-specific need for confidentiality rather than a generic confidentiality interest otherwise common to all capital cases. *Jones v. Stephens*, No. 4:05-CV-638-Y, 2014 WL 2446116, at *1 (N.D. Tex. May 30, 2014) (citing *Patrick v. Johnson*, 37 F. Supp. 2d 815, 816 (N.D. Tex. 1999); other citations omitted); *Barnett v. Roper*, No. 4:03CV00614 ERW, 2010 WL 1268030, at *1 (E.D. Mo. Apr. 1, 2010). Indeed, as the Southern District of Ohio has recognized, by its plain terms, § 3599(f) "conveys a clear legislative intent to forestall, except upon a specific showing of the need for confidentiality, any filing or consideration of *ex parte* motions seeking funds for expert/investigative assistance." *Garner v. Mitchell*, No. 1:98-cv-870, at *2 (S.D. Ohio Apr. 28, 2010). A brief review of § 3599(f)'s legislative history seems to support this conclusion.⁵

In his ex parte motion, Petitioner states that confidentiality is required to preserve the defense strategy and argues that the government has no interest in the "investigation or exploration of evidence to support the defense" until that evidence is presented on behalf of Petitioner in the

⁵ In 2006, Congress added § 3599, which was virtually the same as had previously been enacted at 21 U.S.C. § 848(q)(4)-(10). *See* Pub. L. 109-177, tit. II, sub. tit. B, § 221, 120 Stat. 192 (2006) (codified at § 3599); 21 U.S.C. § 848(q)(4)-(10) (2005). As to the prior enactment of the provision under § 848(q), subsection (9) had, since 1996, provided much the same as § 3599(f) does today: "No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality." *See* Pub. L. 104-132, tit. 1, § 108, 110 Stat. 1214 (1996). Before 1996, however, § 848(q)(9) had provided for ex parte proceedings as a matter of course. *See* 21 U.S.C. § 848(q)(9) (1995) (stated: "Upon a finding in ex parte proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant . . . the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore[.]").

anticipated clemency proceeding. In Missouri, the executive clemency process, governed by statute (Mo. Rev. Stat. § 417.800) and the Missouri Constitution (Mo. Const. art. IV, sec. 7), does not appear to necessarily invoke an adversarial process. *See State ex rel. Lute v. Mo. Bd. of Prob. & Parole*, 218 S.W.3d 431, 435 (Mo. banc 2007) (explaining the executive clemency process in Missouri).

In addition, Petitioner cites to other federal statutes and rules under which indigent defendants are entitled to seek similar relief on an ex parte basis as a matter of course. *See* 18 U.S.C. § 3006A(e) (authorizing ex parte proceedings as a matter of right for requests for services for persons represented by counsel appointed under the Criminal Justice Reform Act); *United States v. Hang*, 75 F.3d 1275, 1281 (8th Cir. 1996) (recognizing that Rule 17(b) – which authorizes ex parte application for witness subpoenas as a matter of course for indigent defendants – “places all defendants, whether impoverished or with ample financial resources, on equal footing, and it prevents the Government from securing undue discovery”). The difference here, though, is the specific statutory language utilized in § 3599(f), which suggests some showing of a need for confidentiality is required to proceed ex parte. Nonetheless, under the circumstances here, the Court will permit Petitioner’s ex parte motion to remain under seal at this time.⁶

Next, the Court considers whether it has authority to provide Petitioner the relief he requests – that is, to order that the Missouri Department of Corrections transport Petitioner to a medical facility to undergo desired medical testing in support of his anticipated clemency request. In his ex parte motion, Petitioner relies on two statutes under which he argues the Court has authority to issue the desired order: 18 U.S.C. § 3599 and 28 U.S.C. § 1651. After careful review, the Court concludes it does not have the authority to grant Petitioner’s request.

First, as to the Court’s authority under § 3599, the answer is clear that the Court’s authority under the funding statute does not authorize the Court to order the specific relief Petitioner requests. In *Tisius v. Vandergriff*, __ F. 4th __, 2022 WL 17748240 (8th Cir. 2022), the Eighth Circuit recently held that § 3599 does not authorize a federal court to order state officials to act in furtherance of a defendant’s state clemency proceeding. In *Tisius*, the defendant sought (and

⁶ The Court will not issue this order under seal, however, in the interests of justice and open court proceedings. In doing so, the Court notes that this approach is consistent with a recent opinion issued by the Eighth Circuit concerning a defendant’s ex parte motion under § 3599: although the underlying filings remain under seal, the Eighth Circuit’s opinion is not sealed. *See Tisius v. Griffith*, No. 4:17-cv-00426-SRB (W.D. Mo.) (doc. 121-1).

obtained) from the district court two orders pursuant to § 3599, directing the warden of the state correctional facility where defendant was confined and the Missouri Department of Corrections to transport defendant to a hospital to undergo medical testing in support of his executive clemency proceeding. *See id.* at *1. On appeal, the Eighth Circuit held that § 3599 “does not permit the district court to compel state officials to act in furtherance of state clemency proceedings.” *Id.* In doing so, the Eighth Circuit expressly joined the Fifth, Sixth, Eleventh, and Ninth Circuits, to hold 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.” *Id.* (citing *Beatty v. Lumpkin*, 52 F.4th 632, 634-35 (5th Cir. 2022); *Bowels v. Desantis*, 934 F.3d 1230, 1242-44 (11th Cir. 2019); *Leavitt v. Arave*, 682 F.3d 1138, 1141 (9th Cir. 2012); *Baze v. Parker*, 632 F.3d 338, 342-43 (6th Cir. 2011)). Accordingly, bound by this precedent, the Court is not authorized under § 3599 to provide Petitioner the relief he seeks.

In addition to § 3599, Petitioner also argues that the Court has authority under the All Writs Act, 28 U.S.C. § 1651, to order that he be transported to an outside facility undergo desired medical testing. In relevant part, the All Writs Act authorizes federal courts to “issue all writs necessary or appropriate to aid in their jurisdictions and agreeable to the usages and principles of law.” § 1651(a). By its terms, however, the All Writs Act is not an independent source of authority under which the Court can act. *Ark. Blue Cross & Blue Shield v. Little Rock Cardiology Clinic, P.A.*, 551 F.3d 812, 821 (8th Cir. 2009) (the All Writs Act “is not an independent source of subject matter jurisdiction”) (citations omitted); *accord United States v. Denedo*, 556 U.S. 904, 914 (2009) (“The authority to issue a writ under the All Writs Act is not a font of jurisdiction.”) (citation omitted). The Eighth Circuit does not appear to have addressed this specific issue.⁷ In *Baze*, the Sixth Circuit did address this issue directly, and held that whether considered independently or in

⁷ As the Eighth Circuit noted in *Tisius*, the issue was expressly raised in an earlier case, *Rhines v. Young*, 941 F.3d 894, 895 (8th Cir. 2019), and while the court ultimately dismissed *Rhines* on mootness or exhaustion grounds, prior to doing so, it noted that

[a] majority of the panel . . . tentatively concluded that [the Court] should affirm a district court’s conclusion that it lacked authority under 18 U.S.C. § 3599 and the All Writs Act, 28 U.S.C. § 1651(a), to order South Dakota prison officials to allow an inmate sentenced to death to meet with experts retained by appointed counsel for the purposes of preparing a clemency application.

Tisius, 2022 WL 17748240, at *1 (citing *Rhines*, 941 F.3d at 895-96).

conjunction with § 3599, the All Writs Act did not provide the district court with the “enforcement power” to provide the requested relief in support of a clemency application. 632 F.3d at 345-46; *see also LeCroy v. United States*, 975 F.3d 1192, 1197 n.1 (11th Cir. 2020) (relying on *Baze* in rejecting defendant’s argument that the “All Writs Act protects the court’s jurisdiction under 18 U.S.C. § 3559 to appoint counsel”).

In *Clinton v. Goldsmith*, 526 U.S. 529 (1999), the Supreme Court examined the limitations of the All Writs Act, recognizing that the statute provides authority and power only “to the issuance of process ‘in aid of’ the issuing court’s jurisdiction.” *Id.* at 534 (citation omitted). In other words, “the express terms of the [All Writs] Act confine the power . . . to issuing process ‘in aid of’ [the issuing court’s] existing statutory jurisdiction; the Act does not enlarge that jurisdiction.” *Id.* at 534-35 (citations and quotation marks omitted). In *Clinton*, then, the Supreme Court held that beyond the United States Court of Appeals for the Armed Forces’ “narrowly circumscribed” jurisdiction (as defined by statute), the All Writs Act did not provide any authority to so act. *Id.* at 535-36. As this legal principle is applied here, because § 3599 does not provide the Court the authority to grant the relief Petitioner requests, the All Writs Act – whether alone or in conjunction with § 3599 – does not permit the Court to grant Petitioner the relief he seeks, either. Put another way, unless the Court has some jurisdiction to act otherwise in the matter, the All Writs Act does not itself authorize the Court to act. Here, the only source of authority or jurisdiction on which Petitioner relies is § 3599. But, as the Eighth Circuit recently held, § 3599 is merely a funding statute, and no more. Petitioner must therefore point to some other jurisdictional basis on which the Court may act; Petitioner points to no other source of authority or jurisdiction for the Court to oversee the development of a state prisoner’s state clemency application in the manner requested.

Conclusion

For these reasons, Petitioner’s ex parte motion (Doc. 116) is **DENIED**.

IT IS SO ORDERED.

s/ Roseann A. Ketchmark
ROSEANN A. KETCHMARK, JUDGE
UNITED STATES DISTRICT COURT

DATED: January 11, 2023

United States Court of Appeals
For the Eighth Circuit

No. 23-1078

Brian J. Dorsey

Petitioner - Appellant

v.

David Vandergriff

Respondent - Appellee

Appeal from United States District Court
for the Western District of Missouri - Kansas City

Submitted: June 30, 2023
Filed: July 6, 2023
[Unpublished]

Before LOKEN, GRUENDER, and GRASZ, Circuit Judges.

PER CURIAM.

Missouri prisoner Brian Dorsey, who has been sentenced to death for two murders, appeals the district court's¹ denial of his motion to order the Missouri

¹The Honorable Roseann A. Ketchmark, United States District Judge for the Western District of Missouri.

Department of Corrections to transfer him to a facility for magnetic resonance imaging, which he sought in support of state clemency proceedings.

With respect to Dorsey's reliance on 18 U.S.C. § 3599, this court has already determined that “[s]ection 3599's authorization for funding neither confers nor implies an additional grant of jurisdiction to order state officials to act to facilitate an inmate's clemency application,” *Tisius v. Vandergriff*, 55 F.4th 1153, 1155 (8th Cir. 2022), *cert. denied*, No. 22-7398, 2023 WL 3804604 (U.S. June 5, 2023), and this panel is bound by that decision, *see Mays v. Bd. of Educ. of Hamburg Sch. Dist.*, 834 F.3d 910, 918 n.4 (8th Cir. 2016). As to Dorsey's reliance on the All Writs Act, 28 U.S.C. § 1651, that statute does not provide the district court the authority to grant the relief requested.

Accordingly, we affirm. *See* 8th Cir. R. 47B.
