

In The
Supreme Court of the United States

IN RE: GARY A. TAYLOR AND WILLIAM S. HARRIS,
Petitioners.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

PETITIONERS' SUPPLEMENTAL BRIEF

GARY A. TAYLOR
P.O. Box 90212
Austin, Texas 78709-0212
(512) 301-5100

WILLIAM S. HARRIS
307 W. Seventh Street,
Suite 1905
Fort Worth, Texas 76102
(817) 332-5575

Petitioners

CHARLES D. WEISSELBERG
Counsel of Record
ELISABETH SEMEL
DEATH PENALTY CLINIC
University of California
School of Law (Boalt Hall)
Berkeley, California
94720-7200
(510) 643-8159

RONALD W. BREAUX
SARAH TEACHOUT
HAYNES AND BOONE
901 Main St., Suite 3100
Dallas, Texas 75202-3789
(214) 651-5000

*Attorneys for Petitioners
Gary A. Taylor and
William S. Harris*

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SUPPLEMENTAL BRIEF

This supplemental brief is filed in response to the invited Brief for the United States as *Amicus Curiae*, and also presents additional materials (previously provided to the Solicitor General) that underscore the split among the circuits.

DISCUSSION

We must remember what is at stake here. Clemency is the failsafe in our criminal justice system; in certain circumstances, it alone can prevent a miscarriage of justice. The Eighth Amendment forbids the execution of those who are not sufficiently competent to understand that they are about to be executed. Nowhere in its brief does the United States dispute the central importance of clemency or competency procedures or the need for lawyers for individuals who face the sanction of death.

This is a straightforward case. By seeking to implement 21 U.S.C. § 848(q), the petitioners do no more than ask the Court to enforce the plain meaning of the statute as understood by twenty-five death penalty states. In *McFarland v. Scott*, 512 U.S. 849 (1994), these states told this Court:

“[W]here Congress intended the 1988 amendments to affect state proceedings, it clearly knew how to accomplish this result. One provision provides that counsel appointed under the 1988 amendments ‘shall also represent the defendant in . . . proceedings for executive or other clemency as may be available to the defendant.’ 21 U.S.C. § 848(q)(8). Clemency proceedings usually follow the conclusion of post-conviction proceedings and typically occur on the eve of a scheduled execution. Congress likely concluded that appointed counsel – who by the time of any clemency proceedings would be intimately familiar with the facts and legal questions of a case –

should be under a duty to assist with this stage of the capital case.”

Brief of California, et al. as *Amici Curiae*, *McFarland v. Scott*, No. 93-6497 (filed Feb. 14, 1994), at 25. The language of the statute is clear and it should be the uniform law of the land.

1. The circuits are split and the issue is exceedingly important.

In the cases below, the Fifth Circuit ruled that there is no right to appointed counsel under § 848(q) in state clemency or competency proceedings. *See* Petition for Writ of Certiorari (“Pet.”) 5, 8, 15; Pet. App. 8a, 10a. As the United States concedes, the Eleventh Circuit is aligned with the Fifth. *See* Brief for The United States as *Amicus Curiae* (filed Nov. 6, 2002) (“Gov.Br.”) 11-13; Order, *King v. Moore*, No. 02-13717-P (11th Cir. July 24, 2002) (reprinted *infra* at 1a-2a). By contrast, the Eighth Circuit has held that the plain language of § 848(q) “insure[s] that indigent state petitioners receive ‘reasonably necessary’ competency and clemency services from appointed, compensated counsel.” *Hill v. Lockhart*, 992 F.2d 801, 803 (8th Cir. 1993). Contrary to the government’s assertion (*see* Gov.Br. 15-16), *Hill* directly conflicts with the Fifth and Eleventh Circuits.

First, *Hill* speaks in mandatory language: if the lawyer has filed a non-frivolous federal habeas corpus petition, and counsel seeks appointment in clemency or competency proceedings and shows that state funding is unavailable, appointment and compensation are required. *See Hill*, 992 F.2d at 803. That is precisely how *Hill* has been interpreted by the district courts within the Eighth Circuit. As the orders reprinted in the Supplemental Appendix (*infra*, 8a-25a) make clear, appointment and compensation under § 848(q) for state clemency representation have now become routine in federal courts in Missouri and Arkansas, by far the most active death penalty states within the Eighth Circuit. And federal

district courts in other states read and apply *Hill* this way too. See *Lowery v. Anderson*, 138 F. Supp. 2d 1123, 1125-26 (S.D. Ind. 2001); *Strickler v. Greene*, 57 F. Supp. 2d 313, 316-17 (E.D. Va. 1999).

Second, as the petition points out, the *Hill* court ruled that these procedural requirements should be met before state competency or clemency representation can be considered “reasonably necessary” under former 21 U.S.C. § 848(q)(10). The statute has since been amended to remove the requirement that the district court make a specific determination that the attorney’s time was “reasonably necessary.” See Pet. 13-14 n.3; *Hill*, 992 F.2d at 803. The government speculates that in light of the amendment, the Eighth Circuit might decline to authorize clemency and competency representation. See Gov.Br. 16. But this argument turns this amendment on its head. By removing a *barrier* to compensation for an attorney’s time, Congress only made the mandatory duty to provide clemency and competency counsel even clearer. Congress left intact the requirement that counsel appointed for the 28 U.S.C. § 2254 petition “*shall* also represent the defendant” in clemency and competency proceedings. § 848(q)(8) (emphasis added). Inasmuch as appointed habeas counsel “shall” provide clemency and competency representation for an indigent state capital defendant, a judicial determination that such representation is “reasonably necessary” would be redundant for the defendant who has no other ability to obtain counsel.¹

Third, the government proposes that had counsel for Mr. Clark and Mr. Soria sought compensation in the Eighth Circuit, their request would have been denied

¹ As explained *infra* at page 9, even though the statute has been amended, it would be proper for a district court to ask appointed counsel to demonstrate that no state funds are available and that counsel has filed a non-frivolous habeas corpus petition before seeking reimbursement for clemency and competency representation.

because “there is no evidence” that they followed the *Hill* procedures. See Gov.Br. 16. This argument is a diversion, as the Fifth Circuit unequivocally ruled that the statute does not provide for clemency or competency representation at all. Even so, there is no doubt that the petitioners provided clemency and competency representation after litigating non-frivolous habeas corpus petitions, and there is no whisper of a suggestion that Texas actually provides money for this work. The government is left with the sole objection that counsel failed to seek prior court approval for representation that the statute itself requires.

The holdings of the Fifth and Eleventh Circuits directly conflict with that of the Eighth Circuit. And it now appears that the Sixth Circuit follows the Eighth. The Sixth Circuit recently approved payment for one of Alton Coleman’s appointed lawyers for federal habeas corpus and state clemency representation. The court’s approval letter, counsel’s voucher and excerpts from counsel’s timesheets are reprinted *infra* at 3a-7a.²

The issue at hand is pressing, and the Court should not postpone addressing it. The petition in this case was filed on April 25, 2002. Between April 25 and November 11, the United States executed thirty-five men and women, twenty in Texas alone. Texas has twelve executions scheduled between November 19, 2002 and February 25, 2003.³

² Mr. Coleman had several cases, which were consolidated and severed at different points in time. See *Coleman v. Mitchell*, 268 F.3d 417, 425 n.2 (6th Cir. 2001). It is clear from the timesheets and the docket number that this is his state conviction from Ohio, and the clemency proceedings were before state authorities. Mr. Coleman was executed by the State of Ohio on April 26, 2002. See *Executions in the U.S. 2002*, available at: <http://www.deathpenaltyinfo.org/dpicexec02.html> (last visited November 10, 2002).

³ See *Executions in the U.S. 2002*, *supra*; *Upcoming Executions*, available at: <http://www.deathpenaltyinfo.org/executionalert.html> (last visited November 10, 2002).

The circuits are split, the issue is of surpassing importance, and review should be granted to ensure that more indigent defendants are not put to death without lawyers to assure meaningful clemency and competency review.⁴

⁴ In a footnote in its brief, the United States suggests that the question of the application of the statute to competency-to-be-executed proceedings may not be properly presented. *See* Gov.Br. 7 n.1. The government is wrong on both the facts and the law.

With respect to the facts, counsel in *Soria* clearly informed the district court that they were seeking compensation for competency representation, and counsel described their competency work in great detail. *See* Pet. App. 27a-31a. The court clearly rejected counsels' request for compensation for the competency work. *See* Pet. App. 13a-15a; Payment Voucher and Out of Court Hourly Worksheet submitted Sept. 14, 2000 by William Harris; Payment Voucher and CJA Form 30 Worksheet submitted Oct. 24, 2000 by Gary Taylor. On appeal, the court of appeals correctly described the district court's holding and the question before the circuit: "whether district court [sic] correctly concluded that § 848(q)(8) did not authorize compensation for attorneys in state clemency *and* competency proceedings." Pet. App. 10a (emphasis added). Though the Fifth Circuit found that *Clark v. Johnson (In re: Taylor)*, 278 F.3d 459 (5th Cir. 2002) was controlling in resolving this issue, that court clearly recognized that the question of competency representation was before it, just as that question had been before the district court.

With respect to the law, even if the two lower courts had mischaracterized counsels' requests as relating only to clemency representation, that mischaracterization could not prevent this Court from reaching the issue. *See Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000) (an issue is preserved for review when the lower court is "fairly put on notice" of its substance); *New York City Transit Authority v. Beazer*, 440 U.S. 568, 583 n.24 (1979) ("The failure of the Court of Appeals to address the statutory issue decided by the District Court does not, of course, prevent this Court from reaching the issue.")

2. The plain language of § 848(q) is in harmony with the text and purpose of the entire statute, and raises no legitimate federalism concerns.

Section 848(q)(8) uses mandatory and expansive language: a state capital defendant who files a federal habeas corpus petition is entitled to appointed counsel for that case and, unless replaced, the same lawyer *shall* continue to represent the defendant in *such* clemency and competency proceedings *as may be available*. Given that the only clemency proceedings available to a state defendant are those before a state authority, the choice of mandatory and expansive language by Congress plainly requires that appointed and compensated counsel continue to represent the client in these subsequent state proceedings. The government argues that after reviewing the entire statute, this Court should rewrite § 848(q)(8) to supply some missing terms. “Such competency proceedings” should read “such *federal* competency proceedings,” and “proceedings for executive or other clemency” should be modified to read “*federal* proceedings for executive or other clemency *that may be created in the future*.” But “Congress expresses its purpose by words. It is for [this Court] to ascertain – neither to add nor to subtract, neither to delete nor to distort.” *Board of Educ. of Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176, 190 n.11 (1982) (quoting *62 Cases of Jam v. United States*, 340 U.S. 593 (1951)). But the overall statute affords no basis to rewrite the section. Further, the operation of the statute – properly understood – raises no substantial federalism concerns, which may well explain why the State of Texas has expressly disclaimed any interest in this case.

The plain language of § 848(q)(8) fits seamlessly with the overall purpose and scheme of § 848(q). Section 848(q) revised the federal death penalty, and at the same time expressly addressed the need for counsel for state and federal capital defendants. Section 848(q)(8) sets forth the right to counsel for people convicted in capital cases who

seek federal post-conviction relief, including state prisoners, as this Court affirmed in *McFarland*. *See id.*, 512 U.S. at 854. Additionally, this Court acknowledged that Congress sought to provide “quality legal representation” to indigent state petitioners due to the “seriousness of the possible penalty” and the “unique and complex nature” of capital defense. *Id.* at 855 (quoting 21 U.S.C. § 848(q)(7)).

The government argues that the “remaining provisions” of § 848(q) undercut the plain language of § 848(q)(8) because many of them refer to procedures available only to federal criminal defendants. *See Gov.Br. 8-12*. The statute revised the federal death penalty in the wake of *Furman v. Georgia*, 408 U.S. 238 (1972), and the government is correct that several statutory provisions apply only in federal prosecutions. Nevertheless, Congress expressly required counsel for both state and federal death-sentenced prisoners from the point they file their petitions for federal post-conviction relief, and in all proceedings thereafter. Section 848(q) treats federal and state capital defendants equally from the moment they seek § 2254 or § 2255 relief. In a change from prior law, both are now entitled to counsel in these post-conviction proceedings. And the same lawyer must, unless replaced, continue to represent the client in clemency and competency proceedings.

This statutory scheme makes sense. Congress was fully aware – as this Court is aware – that clemency and competency proceedings generally arise *after* state and federal habeas corpus efforts are concluded,⁵ and that these are vital and unique proceedings. Additionally, clemency and competency review often depends upon the facts of the underlying litigation, leaving the current

⁵ *See, e.g., Herrera v. Collins*, 506 U.S. 390, 411-12 (1993) (“Clemency . . . is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.”).

counsel in the best position to represent the client. *See* Brief of California et al., *McFarland v. Scott*, at 25. Far from contravening the context of the statute, continuous legal representation for these unique and complex matters effectuates and is consistent with the overall purpose of the statute.

Because § 848(q)(8) is part of a comprehensive scheme, the government also goes astray when it insists that Congress would not have intended a “radical departure” without a “clearer indication of congressional intent.” *See* Gov.Br. 12. What this argument fails to recognize is that all of § 848(q) was a break from past practice; the statute created the post-*Furman* federal death penalty and sought to shore up protections for all capital defendants, state *and* federal, in post-conviction and other proceedings. Viewing § 848(q)(8) in context, as the government reminds us to do, reveals an unmistakable congressional intent to modify past practice.⁶

Further, § 848(q) raises no substantial federalism concerns. Section 848(q)(8) provides counsel in such

⁶ One other “plain meaning” point bears mentioning. While federal clemency is exclusively executive (*see* U.S. CONST., art. II, § 2, cl. 1), the states have other forms of clemency. *See* Pet. 11-12. The Court must presume that Congress was aware of the practice in the states when it enacted § 848(q). *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) (presuming that Congress was aware of the contours of state workers’ compensation schemes in enacting federal legislation). By providing for counsel in “executive *or other clemency* as may be available to the defendant,” Congress must have intended to encompass state proceedings, the only clemency proceedings that can be “other” than executive. The government attempts to give meaning to “other clemency” by suggesting that Congress was leaving open the possibility that other forms of federal clemency “might become available.” *See* Gov.Br. 14 n.2. It strains credulity to believe that Congress included the phrase to keep open the possibility of a constitutional amendment.

clemency and competency proceedings “as may be available.” Thus, the statute merely affords funding for counsel in proceedings that already exist under the laws of each state. This is not an unusual concept. Congress established the Legal Services Corporation, which provides legal assistance for poor people in state and federal court. *See* 42 U.S.C. §§ 2996, *et seq.* Further, in 42 U.S.C. § 1988, Congress provided for attorneys’ fees in civil rights cases, including litigation brought in state courts. *See Maine v. Thiboutout*, 448 U.S. 1, 10-11 (1980). Section 848(q) does not require the states to establish any new procedures or to take any action whatsoever.

Moreover, § 848(q) does not interfere with any efforts by the states to provide counsel on their own. While the government has identified several states that do provide compensation for state clemency and competency-to-be-executed representation (*see* Gov.Br. 18), Texas and many other active death penalty states do not. The statute addresses this gap but does not undermine any funding efforts in the states. Section 848(q)(4)(B) provides for counsel when a defendant is “financially unable to obtain adequate representation or . . . other reasonably necessary services.” If a state affords adequate counsel for state clemency or competency proceedings, the defendant is not “unable to obtain” such services, and is thus not entitled to federally-funded counsel. The district courts can require appointed counsel to show that funds are unavailable from the state when counsel submit their requests for reimbursement under § 848(q).

Finally, though the government cites several cases calling for a clear expression of intent before altering the federal-state balance (*see* Gov.Br. 12-13), the government’s cases relate to proposed interpretations of federal statutes

that would actually intrude on state functions to a kind and degree not present here.⁷ There is no tension between § 848(q) and state procedures. The federalism claim is a phantom.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GARY A. TAYLOR
WILLIAM S. HARRIS
Petitioners

CHARLES D. WEISSELBERG
Counsel of Record
ELISABETH SEMEL
DEATH PENALTY CLINIC*

RONALD W. BREAUX
SARAH TEACHOUT
HAYNES AND BOONE

Attorneys for Petitioners
Gary A. Taylor and
William S. Harris

Berkeley, California
November 2002

⁷ See *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533 (2002) (tolling statute of limitations for state law claims against nonconsenting states); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (interfering with state law qualifications for state judges); *United States v. Bass*, 404 U.S. 336 (1971) (federal criminal liability for conduct traditionally made criminal by the states); *FTC v. Bunte Bros.*, 312 U.S. 349 (1941) (FTC jurisdiction over purely local business); *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940) (application of the Sherman Act to a purely local strike).

* Francis Martin and Sarah Ray, law students at the University of California School of Law (Boalt Hall), assisted in preparing this brief.