

No. 07-8521

IN THE SUPREME COURT OF THE UNITED STATES

EDWARD JEROME HARBISON,

Petitioner,

v.

RICKY BELL, Warden,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Did the court of appeals err in affirming the district court's denial of petitioner's motion to expand the appointment of the federal public defender to include representation at petitioner's state executive clemency proceedings?

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 503 F.3d 566. The relevant opinion of the district court (Pet. App. B) is unreported but may be found at 2007 WL 128954.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 2007. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT

Harbison was convicted in 1983 by a Hamilton County Criminal Court jury of first-degree murder, second-degree burglary, and grand larceny. The jury sentenced him to death for the murder, and the Tennessee Supreme Court affirmed the judgment. *State v. Harbison*, 704 S.W.2d 314 (Tenn.), *cert. denied*, 476 U.S. 1153 (1986).

After unsuccessfully seeking state post-conviction relief, *See Harbison v. State*, No. 03C01-9204-CR-00125, 1996 WL 266114 (Tenn.Crim.App. May 20, 1996) (app. denied Nov. 12, 1996), Harbison filed a petition for a writ of habeas corpus in the district court in 1997. The district court, under the authority of 21 U.S.C. § 848(q)(4)(B) (recodified at 18 U.S.C. § 3599 (Mar. 9, 2006)), appointed the Federal Defender Services of Eastern Tennessee, Inc., to represent Harbison "in the preparing and filing of a petition for a writ of habeas corpus pursuant to 28 United States Code

Section 2254 and all proceedings in connection therewith.” R. 5. The district court denied relief in 2001, and the court of appeals affirmed the judgment. *Harbison v. Bell*, 408 F.3d 823 (6th Cir. 2005).

In 2006, Harbison, through Federal Public Defender Services of Eastern Tennessee, Inc., filed a second “petition for writ of habeas corpus” in the district court. He alternatively requested that the district court entertain the petition as a motion for relief from the 2001 judgment under Fed.R.Civ.P. 60(b)(6). Treating the pleading as both a “second or successive habeas corpus application” under 28 U.S.C. § 2244 and a Rule 60(b)(6) motion, on November 28, 2006, the district court denied the Rule 60(b)(6) motion and transferred the successive application to the court of appeals pursuant to 28 U.S.C. § 1631 for treatment as a motion for authorization to file a second or successive habeas corpus application.

With a scheduled execution date of February 22, 2007, pending and state executive clemency proceedings apparently contemplated but not yet filed, the federal public defender who had represented Harbison in the federal habeas proceeding, filed on December 13, 2006, a motion requesting the district court to extend the appointment to include representation in Harbison’s state clemency proceedings under 18 U.S.C. § 3599(e). Respondent did not oppose the motion. On January 16, 2007, the district court denied the motion. Pet. App. B at 015-019.

On February 1, 2007, the Governor of Tennessee granted an executive reprieve to Harbison until May 2, 2007, to allow the Department of Correction to review Tennessee’s lethal-injection protocol. Following the expiration of the reprieve, the

Tennessee Supreme Court set a new execution date of September 26, 2007, for Harbison. In the meantime, Harbison appealed (No. 07-5059) from the district court's order denying the expansion of counsel's appointment.

On September 19, 2007, in a lawsuit brought by Harbison under 42 U.S.C. § 1983 challenging the constitutionality of Tennessee's lethal-injection protocol, the United States District Court for the Middle District of Tennessee enjoined the Department of Correction from executing Harbison under the protocol. *See Edward Jerome Harbison v. George Little, et al.*, No. 3:06-1206 (M.D. Tenn.). The case is now pending on appeal in the court of appeals, *Harbison v. Little*, No. 07-6225, and is being held in abeyance pending this Court's decision in *Baze v. Rees*, No. 07-5439.

On September 27, 2007, the court of appeals affirmed the judgment of the district court in this case, declining to extend counsel's appointment to state clemency proceedings. Pet. App. A at 003-004. The Tennessee Supreme Court has not set a new date for Harbison's execution. Harbison has no executive clemency application pending with the Governor of Tennessee.

ARGUMENT

THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE DISTRICT COURT'S DENIAL OF PETITIONER'S MOTION TO EXPAND THE APPOINTMENT OF THE FEDERAL PUBLIC DEFENDER TO INCLUDE REPRESENTATION AT PETITIONER'S STATE EXECUTIVE CLEMENCY PROCEEDINGS.

Petitioner contends that the court of appeals erred in affirming the district court's denial of his motion to expand the appointment of the Federal Defender Services of Eastern Tennessee, Inc. ("FDSET"), to include representation at state clemency proceedings. Petitioner asserts a conflict among the circuit courts of appeal as to whether 18 U.S.C. § 3599(e) permits federally funded counsel to represent a condemned inmate at state clemency proceedings and requests that review be granted in this case to resolve the conflict. Petitioner also seeks resolution of the question whether a certificate of appealability under 28 U.S.C. § 2253(c)(2) is necessary for an appeal from the district court's order denying the motion. For the reasons that follow, review of these issues is unwarranted.

Section 3599 provides, in pertinent part:

(a)(2) In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

...

(e) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

Under the plain provisions of this statute, an attorney appointed in a federal habeas proceeding under 28 U.S.C. § 2254, unless replaced by similarly qualified counsel, "shall represent the defendant throughout every subsequent stage of available judicial proceedings . . . and shall also represent the defendant in such . . . proceedings for executive or other clemency as may be available to the defendant."

On February 7, 1997, the district court, pursuant to 18 U.S.C. § 3599(e) (as previously codified at 21 U.S.C. § 848(q)(4)(B)), appointed FDSET to represent petitioner "in the preparing and filing of a petition for a writ of habeas corpus pursuant to 28 United States Code Section 2254 and all proceedings in connection therewith." R. 5. Since that appointment, FDSET has continuously represented petitioner throughout all subsequent federal proceedings and has not been "replaced by similarly qualified counsel."

Because under the plain terms of § 3599 FDSET was authorized to represent petitioner in state executive clemency proceedings, counsel's motion for expansion of the initial appointment was unnecessary; the statute itself furnishes the authority for continued representation. The district court's denial of the motion and the court of

appeals' affirmance are thus correct for that reason. If counsel believes, as petitioner urges here, that § 3599 authorizes state clemency representation, counsel can undertake such representation and then request compensation from the district court for those services. If counsel is denied compensation, the matter may be appealed at that time. If the denial of compensation is based on the determination that § 3599 does not authorize continuing representation at state clemency proceedings, the issue then will be squarely presented for review.

Nor does this case present an appropriate vehicle for resolution of the question whether a certificate of appealability was necessary for an appeal of the district court's order. The court of appeals affirmed the district court's ruling without deciding the certificate-of-appealability question. Pet. App. A at 004. This Court will not review issues not passed on below. *See Illinois v. Gates*, 462 U.S. 213, 217-22 (1982).

Finally, petitioner is not currently under a scheduled date for execution, and he has no clemency application pending before the Governor of Tennessee. Thus, review by this Court of the question whether state clemency representation is permitted by § 3599 would be premature. "It has long been settled that a federal court has no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, Gordon W. Smith, a member of the Bar of this Court representing the party on whose behalf service is made, do hereby certify that on this date, February _____, 2008, as required by Supreme Court Rule 29, I have served the enclosed Respondent's Brief in Opposition on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above document in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names, addresses, and telephone numbers of those served are as follows:

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