

No. 07-8521

In the Supreme Court of the United States
October Term, 2007

EDWARD JEROME HARBISON,
Petitioner,

v.

RICKY BELL,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

Dana C. Hansen Chavis*
Stephen M. Kissinger
Assistant Federal Community Defenders
Federal Defender Services
of Eastern Tennessee, Inc.
800 South Gay Street, Suite 2400
Knoxville, TN 37929
(865) 637-7979

*Counsel of record for Petitioner

ARGUMENT IN REPLY

Respondent's astounding opposition suggests that review be denied because the lower courts' decisions, which expressly prohibit undersigned counsel from representing Mr. Harbison during state clemency proceedings, are wrong.

Respondent boldly argues this Court's intervention is unnecessary because undersigned counsel should ignore the court of appeals' wrongful ruling and advocate clemency for Mr. Harbison pursuant to the plain language of 18 U.S.C. §3599.

Mr. Harbison agrees that the court of appeals' decision was wrongly decided, as was the case upon which it relied, *House v. Bell*, 332 F.3d 997 (6th Cir. 2003). Denying certiorari review, however, will only perpetuate the Sixth Circuit's adherence to an erroneous rule of law and the conflict between the circuits regarding the scope of federally paid, 18 U.S.C. § 3599 counsel's representation of indigent persons under state court sentences of death. Instead, this Court should grant certiorari review and set the matter for merits briefing.

Given what is essentially Respondent's "confession of error," it is arguable that this Court could grant certiorari and summarily overrule the decision below. The Sixth Circuit, however, does not stand alone in its errant interpretation of 18 U.S.C. § 3599. Rather, it is joined by the Fifth and Eleventh Circuits. See *Clark v. Johnson*, 278 F.3d 459, 462 (5th Cir. 2002), and *King v. Moore*, 312 F.3d 1365, 1367-1368 (11th Cir. 2002). Accordingly, full review is needed to resolve the circuit split and provide uniformity in the representation of indigent criminal defendants.

Notwithstanding Respondent's concession on the question presented, his opposition contains two assertions which require correction. First, his attempt to recast the question as one of funding is disingenuous. Respondent knows full well that undersigned counsel's office is already funded for the representation of indigent capital defendants and that the statutory and regulatory framework under which it expends those funds requires permission of the federal court. The argument that this Court should forgo review until and unless undersigned counsel violate the district court's order, disregard the House decision, represent Mr. Harbison in his pursuit for clemency, apply for compensation, and are denied, is nothing short of frivolous.

Second, the suggestion that the questions presented became moot when the State of Tennessee was enjoined from executing Mr. Harbison in violation of the Eighth Amendment's prohibition against cruel and unusual punishment, *Harbison v. Little*, 511 F.Supp.2d 872 (M.D.Tenn. 2007), is also without any legal or factual basis whatsoever. A question does not become moot if it is capable of repetition yet evades review. *Federal Election Commission v. Wisconsin Right to Life, Inc.*, ___ U.S. ___, 127 S.Ct. 2653, 2662 (2007). The decision below and *House v. Bell*, *supra*, remain controlling law in the Sixth Circuit. Counsel are still prohibited from petitioning Tennessee's Governor to exercise his commutation powers and spare Mr. Harbison's life.

Moreover, the presence or absence of an execution date does not affect the availability of clemency. See TENN. CONST. ART. III §6; TENN. CODE ANN. §§40-27-

101, 105. Mr. Harbison may request executive clemency at any time. The question remains as to whether he is afforded the statutory right to the assistance of counsel conferred on indigent defendants by 18 U.S.C. §3599 and as provided in the Tenth and Eighth Circuit Courts of Appeals. See *Hain v. Mullin*, 436 F.3d 1168, 1171 (10th Cir. 2006)(en banc), and *Hill v. Lockhart*, 992 F.2d 801, 803 (8th Cir. 1993).

CONCLUSION

For the foregoing reasons Petitioner respectfully requests that this Court grant the petition for a writ of certiorari and that it set this matter for briefing on the merits.

Respectfully submitted,

Dana C. Hansen Chavis*
Stephen M. Kissinger
Assistant Federal Community Defenders
Federal Defender Services
of Eastern Tennessee, Inc.
800 South Gay Street, Suite 2400
Knoxville, TN 37929
(865) 637-7979

*Counsel of record for Petitioner