No. 15-491

In the Supreme Court of the United States

THE COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

FEDERAL COMMUNITY DEFENDER ORGANIZATION OF PHILADELPHIA,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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Capital case: Question presented

To recapitulate, the Federal Community Defender Organization (FCDO) of Philadelphia appears in Pennsylvania capital collateral review cases (under the "Post Conviction Relief Act," or PCRA), using federal resources to oppose the State. The Commonwealth's challenge to this practice was removed by the FCDO to federal court, where it was dismissed with prejudice under Rule 12(b)(6).

The issue is, has Congress created a right to federally funded counsel in state capital post-conviction proceedings, in State court, prior to completing federal habeas litigation, notwithstanding this Court's contrary decision in *Harbison v. Bell*?

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Reasons for granting the writ

1. The FCDO mistakes the question presented.

In trying to reframe the question, respondents complain of Pennsylvania's supposed efforts "to disqualify [them] from representing ... capital inmates ... in federal habeas corpus proceedings" (opposing brief, i). This is false. The issue is federally funded counsel in *State*, not *federal*, collateral review proceedings. The former, this Court has said, violates 18 U.S.C. § 3599.[1]

The FCDO's recharacterization of the issue as whether the Administrative Office of United States Courts (AO) has "exclusive authority to enforce [its] federal grants" (*id.*), meanwhile, is an illusory distinction. The scope of a grant of federal funds is defined by Congress, here via § 3599, which is precisely the question presented by the Commonwealth. The FDCO's effort to shift responsibility for its State-court conduct to the AO makes no difference. If the conduct was lawful under § 3599 there would be no need for an "only following orders" defense; and the AO in any event has no power to authorize conduct that violates the statute.

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[1] The FCDO's repeated references to the Commonwealth's supposed desire to deny indigent capital offenders "their counsel of choice" (e.g., opposing brief, 28) are also wrong, as a matter of law as well as fact. "[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006).

Under the Third Circuit's ruling, federal lawyers, over whom the State has no authority, use the power of federal funding to litigate against Pennsylvania in capital PCRA cases, from filing through evidentiary hearings and appeals, all in advance of federal habeas. This violates federal law, as explained by this Court in *Harbison v. Bell*, 556 U.S. 180 (2009).

2. The FCDO mistakes the facts.

The FCDO forgets there was never any evidentiary hearing in this case. Indeed, it extinguished the Commonwealth's attempt to conduct that hearing by removing the case to federal court. Thus, in attempting to state the facts, the FCDO offers allegations that are, to say the least, disputed. Since Pennsylvania's claim was dismissed under Rule 12(b)(6), it is axiomatic that the *Commonwealth's* allegations, not those of the FCDO, are presumed true. *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508 n.1 (2002) (citation omitted).

The FCDO nevertheless says it only "sometimes" represents federal habeas clients in State proceedings, only "to help them exhaust"; and since (the FCDO admits) federal funds "generally" may not be used to pursue State habeas, this is "only ... preparatory work" (opposing brief, 4-5). But the Third Circuit agreed with the FCDO that *whatever* it does in State court to exhaust State claims is permissible under § 3599. 790 F.3d at 472. That construction, which authorizes litigation of State habeas proceedings from beginning

to end by federally funded counsel (which is what the FCDO actually does) directly contradicts *Harbison*.

And the FCDO does an enormous amount of supposed preparatory work. A Westlaw search of capital PCRA decisions of the Pennsylvania Supreme Court since the year 2000 reveals that the FCDO represented State offenders in 151 out of 209 cases. This is over 72%. It is not the "sometimes" occurrence of "preparatory" work, but systematic representation by the FCDO of capital PCRA petitioners, in every aspect of State habeas litigation, far in advance of any federal habeas proceeding.

Even taken at face value the FCDO's self-absolving allegations violate § 3599. As this Court explained in *Harbison*, during an *active* federal habeas proceeding a federal judge might send a federal lawyer back to State court to exhaust certain claims "on a case by case basis ... in the course of her federal habeas representation." But this must occur "subsequent to" the State habeas proceeding and "in the course of" *federal* proceedings. It "is not the same" as permitting federal counsel to conduct "state habeas proceedings." 556 U.S. 189 & n. 7.

Despite claiming that using federal funds to conduct State habeas proceedings is nevertheless allowed by § 3599, the FCDO alleges that its (extensive) State habeas litigation practice uses only non-federal funds. But there would be no reason to avoid using federal funds if § 3599 allowed it. The FCDO also says that if the Commonwealth prevailed

this "would only result in [it] shouldering the financial burden" of capital representation in its own courts that is currently borne by the FCDO (opposing brief, 29). But the FCDO could not claim to be "shouldering [the Commonwealth's] financial burden" by only "sometimes" showing up to exhaust a few federal habeas claims.

While the FCDO managed to block the State's attempt to hold an evidentiary hearing on its allegation that it uses no federal money to represent State defendants in 72% of Pennsylvania's capital PCRA cases, common sense makes it an impossibility. An FCDO attorney receives a salary from federal funds, works from an office leased with federal funds, and is assisted by staff, investigators, and facilities (computers, printers, desks, stationary) funded from the federal treasury. The cost of its exclusively-State-court activity is reflected in the fact that federal funding for the FCDO in Pennsylvania exceeds that for California (Commonwealth's petition, 8 n.1). The FCDO conceded in the district court that it uses federal as well as non-federal money to fund its State habeas activities.[2]

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[2] Counsel for FCDO: "So at the end of the day there is -- the services that are provided in State Court are an admixture in all or virtually all of our cases. They are an admixture of Federally funded activities, in our judgment, and non-Federally, or privately financed activities. Now we again have a view as to whether a particular activity is appropriately funded by the Federal Government. We believe it is in sync with the view of the

(continued...)

3. The Circuit Court decided, on the merits, "the issue squarely presented by the merits."

In *Harbison v. Bell* this Court concluded that 18 U.S.C. § 3599 prohibits federally funded counsel from appearing in State habeas proceedings in advance of federal habeas proceedings. Further, a State defendant is "*ineligible* for § 3599 counsel," 556 U.S. at 189 (emphasis added), where, as here, the State *affords* free counsel; *see* Pa.R.Crim.P. 904.

Since FCDO counsel nevertheless systematically appear in Pennsylvania PCRA proceedings, the State raised § 3599 in its own courts. The FCDO lawyers used their federal status to remove the case to a federal court, which rejected the State's claim under § 3599, finding that the statute permits precisely what it prohibits. Pennsylvania's claim was held to be "preempted" by the very law that supports it; and the Commonwealth as a mere "private party" could not even invoke the federal forum into which it was brought against its will.

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[2](...continued)
Administrative Office" (transcript, *Mitchell v. Wetzel*, 11-cv-02063, N.T. 6/27/13, 35); *Harris,* district court opinion of August 22, 2013 (App. 241) ("according to the FCDO, its state court activities are a mixture of federally funded activities and privately funded activities"). In 2011, the president of the Defender Association, the corporate parent of the FCDO, was quoted as saying that "federal money paid for most of the work" the FCDO did in State court, and that "federal statutes allowed" this (*The Philadelphia Inquirer*, May 16, 2011).

The Circuit Court observed that whether 18 U.S.C. § 3599 allows the federal government to provide counsel in State habeas "is the question squarely presented by the merits of this case." 790 F.3d at 474. Yet the FCDO claims there is nothing to review. Supposedly there was no ruling on Pennsylvania's claim: the Circuit Court "did not decide any issue about section 3599" (opposing brief, 14).

The Circuit Court ruled on the merits, notwithstanding Respondent's strategic effort to obtain the benefits of a merits ruling without the appearance of one. The FCDO, after all, concedes that § 3599 "[does] *not* authorize" it to pursue State habeas (opposing brief, 4, emphasis added). It thus argued below that the Commonwealth's case should be dismissed without reaching that very inconvenient question.

But the ruling was on the merits all the same. The Circuit Court's assertion that the Commonwealth's § 3599 claim was barred by what it called "conflict preemption" was premised on its conclusion that the Commonwealth's view of the statute – that it bars federally funded lawyers from litigating State habeas cases – was wrong. The Court explained that the State's claim "conflicts" with § 3599 because the statute supposedly permits exactly what the Commonwealth says it prohibits. To the contrary, the Circuit Court said, while "federally funded counsel [are not] *required*" in State habeas proceedings under § 3599, *Harbison* "never stated that federally funded counsel would be *prohibited* from" those proceedings.

790 F.3d at 474-475 (original emphasis). This reasoning, that §3599 *permits* the disputed conduct, was plainly a ruling on the merits.

It was also, of course, error. Pennsylvania's claim did not "conflict" with § 3599; it was *based on* § 3599.

The Circuit Court's "private right of action" analysis, in the view of the FCDO, would bar the State's § 3599 claim. But this was an alternative holding, and does not alter the fact that in ruling on the "conflict" theory the Circuit Court ruled on the merits of the Commonwealth's claim. Further, the private right of action analysis was incoherent, because this case was removed from State court. *See Arizona v. Manypenny*, 451 U.S. 232, 242-243 (1981) (removal is "purely derivative ... neither enlarging nor contracting the rights of the parties").[3] Unlike a federal court, State court jurisdiction is not restricted by Article III.[4] A State may invoke federal law in its own courts. *Haywood v. Drown*, 556 U.S. 729, 734 (2009) ("federal law is as much the law of the several States as are the laws passed by their legislatures"); *New York v. United*

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[3] The Court also incorrectly claimed the State had conceded this point (*see, e.g., Commonwealth's first step brief for appellant*, 37 ["The private right of action doctrine is inapplicable"]).

[4] The FCDO says that the doctrine "reflects a substantive determination about congressional intent" (opposing brief, 27, emphasis omitted). But that intent, to limit the scope of federal court jurisdiction, is inoperative when the jurisdiction in question is that of the State, and the federal court is merely the forum.

States, 505 U.S. 144, 178 (1992) (federal law is "enforceable in every State"); *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) ("we have consistently held that state courts have inherent authority ... to adjudicate claims arising under the laws of the United States"). It obviously may likewise do so in a case removed to a federal forum. And of course, a State is no mere private actor. *Massachusetts v. E.P.A.*, 549 U.S. 497, 518 (2007) ("States are not normal litigants for purposes of invoking federal jurisdiction").

But for this petition, Pennsylvania is forever out of court on this issue. If it again raises its § 3599 claim in its own courts the issue will be removed to federal court and unceremoniously extinguished. The FCDO, despite conceding that § 3599 prohibits it from using federal funds in Pennsylvania PCRA proceedings, will continue to do just that. The disputed ruling was clearly on the merits. To contend otherwise is merely artful pleading.

4. The ruling on the merits conflicts with other Circuits.

The FCDO denies any conflict with other Circuits, even though "[e]very [other federal] court that has addressed this issue agrees that Congress did not intend federal resources to be used for ... exhausting claims in state court." *Thompson v. Thomas*, 2008 WL 2096882 *5 n.7 (D. Haw. May 19, 2008) (unreported).

The FDCO reads the cases to hold that a federal court "should not" appoint federal counsel "to pursue

state habeas remedies," not that federally-funded lawyers cannot do so "pro bono or using non-federal funds" (opposing brief, 18). But no one is disputing what FCDO lawyers may do when acting "pro bono" without federal funding. The problem is that the FCDO does use federal funds, and in fact uses more federal money in Pennsylvania than is expended in California, because the bulk of its practice takes place in Pennsylvania courts, not federal courts. As already discussed, its allegations to the contrary are presumed false since the State's claim was dismissed under 12(b)(6).

Other Circuits, moreover, hold under § 3599 that federal courts *may* not (as opposed to "should not") appoint federally funded lawyers in State habeas proceedings. They *may* not, because it would violate the intent of Congress and federalism. *E.g., Gary v. Warden, Georgia Diagnostic Prison*, 686 F.3d 1261, 1278 (11th Cir. 2012) (also noting the "fundamental policy against federal interference with state criminal prosecutions" and "the States' interest in administering their criminal justice systems free from federal interference"). The Circuit Court's ruling here conflicts with every other federal court that has considered the issue.

5. The issue is likely to recur.

The FCDO argues that certiorari is unwarranted because this issue is unlikely to recur. That is a surprising stance, given its assertion that the Third Circuit's unique view of § 3599 should – and will – be

"implemented uniformly throughout the country" (opposing brief, 29).

Applying that idea of proper implementation of § 3599 "throughout the country" is exactly what to expect if the instant decision stands. The ratchet of federal power moves in only one direction, and federally funded lawyers, who (as this case proves) are beyond the power of a State to supervise or control, will inevitably compromise the independence of other State criminal justice systems.[5]

And even if that were not so (though it is), even lawful federal intrusions "frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (citations omitted). Absent review Pennsylvania will be permanently without a remedy for the FCDO's use of federal funds to effectively, and unlawfully, take over a substantial and important part of its criminal justice system. If it is indeed "[b]eyond question" that "the authority of States over the administration of their criminal justice systems lies at the core of their sovereign status," *Oregon v. Ice*, 555 U.S. 160, 170

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[5] That respondents claim to be a kind of federal Robin Hood, taking from the United States treasury to financially assist the Commonwealth's capital PCRA system (opposing brief, 29), is also not a reason to deny review. Pennsylvania cannot afford the FCDO's largesse, being unable to economically compete with the litigation practices and squads of expert witnesses the FCDO can bring to bear with lavish federal funding.

(2009), this case seriously degrades that sovereign status and the federal system. For these reasons, certiorari is warranted.

Conclusion

For the reasons set forth above, the Commonwealth respectfully requests this Court to grant its petition for writ of certiorari.

Respectfully submitted,

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