

CAPITAL CASE QUESTIONS PRESENTED

Every jurisdiction that authorizes the death penalty provides for clemency, which is of vital importance in assuring that the death penalty is carried out justly. But, in this case the District Court held Mr. Harbison's federally-funded lawyers could not present, on his behalf, a clemency request to Tennessee's governor. The denial of clemency counsel contravenes basic principles of justice.¹ As Chief Justice Rehnquist noted in *Herrera v. Collins*:²

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.

Indeed, the clemency power exists because "the administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt."³ Thus, executive clemency is the "'fail safe' in our criminal justice system."⁴ A system which includes capital punishment but does not provide a meaningful opportunity for executive clemency is "totally alien to our notions of criminal justice."⁵

Yet, the lower courts arbitrarily denied Mr. Harbison's federally-funded habeas counsel permission to represent him in state clemency proceedings after the State had denied him counsel for that purpose. The District Court and the Court of Appeals for the Sixth Circuit not only defied Congress' explicit directions to provide clemency counsel for the condemned, but denied Mr. Harbison a meaningful opportunity to present compelling facts mitigating his guilt and the punishment of death to the only person presently able to consider them, the Governor of the State of Tennessee.

¹ See Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and its Structure*, 89 Va. L. Rev. 239, 240-43, 252-54 (April 2003) (discussing how clemency is integral to the administration of justice and how the criminal justice system relies on clemency).

² 506 U.S. 390, 411-12 (1993).

³ *Ex parte Grossman*, 267 U.S. 87, 120-21 (1925).

⁴ *Herrera*, 506 U.S. at 415; Heise, *Mercy by the Numbers*, *supra*, 89 Va. L. Rev. at 252 ("the need for clemency's error correction function is at its highest in the death penalty setting").

⁵ *Gregg v. Georgia*, 428 U.S. 153, 200 n.50 (1976) (opinion of Justices Stewart, Powell, and Stevens).

Equally troubling, the Sixth Circuit barred Harbison from appealing the denial of clemency counsel by refusing to grant a certificate of appealability on the issue.

In order to harmonize the law of the circuits and to decide an important issue regarding the appeals court's jurisdiction, this Court should resolve the following questions:

1. Does 18 U.S.C. §3599(a)(2) and (e) (recodifying *verbatim* former 21 U.S.C. §848(q)(4)(B) and (q)(8)), permit federally-funded habeas counsel to represent a condemned inmate in state clemency proceedings when the state has denied state-funded counsel for that purpose?
2. Is a certificate of appealability required to appeal an order denying a request for federally-funded counsel under 18 U.S.C. §3599(a)(2) and (e)?