THE ETHICAL ARGUMENT FOR FUNDING IN CLEMENCY: THE "MERCY" FUNCTION AND THE *ABA GUIDELINES*

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I. INTRODUCTION

Clemency is routinely described by decision makers as an "extraordinary" power,[1] which legitimates our capital punishment system and provides a "fail-safe"[2] through which miscarriages of justice can be remedied. Out of step with this lofty rhetoric, however, are many of the practical realities of capital clemency representation. Among other obstacles, attorneys who represent death-sentenced clients in clemency routinely meet with considerable difficulty in securing adequate funding to perform competently and persuasively at this critical phase of a capital case.[3] This is due, at least in part, to the haphazard way in which

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1. *See, e.g.*, Ken Armstrong, *The Politics of Mercy*, THE MARSHALL PROJECT (Jan. 23, 2015), https://www.themarshallproject.org/2015/01/23/the-politics-of-mercy (quoting former Maryland Governor Robert Ehrlich about clemency, "'if you have this extraordinary power and fail to use it, the quality and quantity of justice in your jurisdiction suffers . . .'"); Tom Sherwood, *Briley Is Scheduled To Die Late Tonight*, WASH. POST (April 18, 1985, 12:00 AM), http://www.washingtonpost.com/wp-dyn/content/article/2010/03/16/AR2010031602084.html ("[the Governor's] position is that clemency is an extraordinary power . . . and he would only exercise it under extraordinary circumstances. . . .").

2. Herrera v. Collins, 506 U.S. 390, 415 (1993) ("Executive clemency has provided the 'fail safe' in our criminal justice system." (citation omitted)).

3. *See, e.g.*, Brown v. Stephens, 762 F.3d 454, 459 (5th Cir. 2014) (denying clemency funding request that failed to demonstrate "substantial need" for exceeding presumptive $7500 statutory funding cap); Fautenberry v. Mitchell, 572 F.3d 267, 271 (6th Cir. 2009) (denying clemency funding request to conduct neuropsychological assessment of brain-damaged client at

clemency funding is currently disbursed, as well as to lingering disagreement on the part of judges, clemency decision makers, and attorneys over how "robust" a capital clemency presentation should be—and what responsibility (if any) the state has to help in that regard. As a result of these issues, not only is it difficult to trust that clemency is able to serve consistently as the "fail-safe" in death penalty cases;[4] but insufficient and disparate access to clemency funding also raises serious concerns about whether capital clemency attorneys are able to perform this representation ethically pursuant to their obligations under the *ABA Guidelines for the Appointment and Performance of the Defense Counsel in Capital Cases* ("*ABA Guidelines*").[5] And while the use of executive clemency in death penalty cases has ebbed and flowed over the past several decades,[6] there are indications that this power is gaining in recognition among decision makers today—making the need for adequate funding in this area even more pressing.[7]

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clemency stage because motion didn't explain sufficiently why more recent examination was reasonably necessary for clemency representation); Wood v. Thaler, No. A-09-CA-789-SS, 2009 WL 3756847, at *5-6 (W.D. Tex. Nov. 6, 2009) (denying clemency funding request on grounds that clemency investigation into intellectual disability claim was not reasonably necessary because a court had already determined petitioner was not intellectually disabled). *But see* Matthews v. Davis, 807 F.3d 756, 761-62 (6th Cir. 2015) (finding that the district court abused its discretion in denying petitioner's request for expert funding in clemency by relying on an erroneous legal standard and failing to provide any other explanation for the denial of funds).

4. *Herrera*, 506 U.S. at 411 ("This is not to say, however, that petitioner is left without a forum to raise his actual innocence claim. For under Texas law, petitioner may file a request for executive clemency.").

5. Am. Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (rev. 2003), 31 HOFSTRA L. REV. 913 (2003) [hereinafter *ABA Guidelines*]. The *ABA Guidelines* are also available at https://www.ambar.org/2003guidelines.

6. *See, e.g.*, Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post*-Furman *Capital Cases*, 27 U. RICH. L. REV. 289, 305 (1993) ("We conclude that the exercise of executive clemency in post-*Furman* capital cases is idiosyncratic at best, and arbitrary at worst. Overall, it seems to add, rather than subtract, an element of luck in the ultimate decision of who ends up being executed.").

7. In 2016, for example, there were no recorded state commutations in death penalty cases; and in 2015, there was only one individual commutation issued (Kimber Edwards, Missouri). *See Clemency*, DEATH PEN. INF. CTR., https://deathpenaltyinfo.org/clemency (last visited Aug. 23, 2018). But 2017 saw an impressive number of cases where death-sentenced prisoners avoided execution on account of dogged and creative clemency efforts. That year, three capital prisoners saw their sentences commuted: Jason McGehee (Arkansas), Ivan Teleguz (Virginia), and William Burns (Virginia). Additionally, in Missouri, Governor Eric Greitens called off Marcelus Williams' execution and used his clemency authority to commission a Board of Inquiry to investigate possible innocence issues in the case. *See Clemency in 2017*, DEATH PEN. INFO. CTR., https://deathpenaltyinfo.org/news/past/22/2017 (last visited Aug. 23, 2018); *Virginia Governor Commutes Death Sentence of Mentally Incompetent Death-Row Prisoner*, DEATH PEN. INFO. CTR., https://deathpenaltyinfo.org/node/6968 (last visited Aug. 23, 2018). Also in 2017, the scheduled execution of John Ramirez was called off after a Texas court found that he did not have a lawyer available to him to file for clemency at the date his petition needed to be submitted. *See* Ramirez v. Davis, 675 Fed. Appx. 478, 479 (5th Cir. 2017). And in February 2018, many observers were

In Part I, this Article will discuss how the traditional view of the "minimal" rights owed to death-sentenced prisoners in clemency has contributed to the systemic inadequacy of clemency funding today. This Part will conclude with a reminder that—regardless of how murky the jurisprudence regarding capital clemency petitioners' constitutional rights may be—there is nevertheless a *statutory* right to clemency counsel and funding under 18 U.S.C. Section 3599(e) and affirmed by the Supreme Court in *Harbison v. Bell*.[8] In Part II, this Article will review the different models under which capital clemency representation is presently funded, before turning, in Part III, to an overview of the clemency counsel duties codified in the *ABA Guidelines*. In Part IV, this Article will conclude by arguing that where the federal courts hold the purse strings to clemency funding, they should look to the scope of counsel duties articulated by the *ABA Guidelines* to determine what funding is "reasonably necessary" to provide.[9] Otherwise, courts risk

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shocked when the Texas Board of Pardons and Parole offered a unanimous recommendation for clemency to Thomas "Bart" Whitaker, which prompted Governor Gregg Abbott to commute Whitaker's sentence minutes before his scheduled execution. *See* Jolie McCullough, *Minutes Before Execution, Texas Gov. Greg Abbott Commutes the Sentence of Thomas Whitaker*, TEX. TRIB. (Feb. 22, 2018), https://www.texastribune.org/2018/02/22/texas-gov-greg-abbott-thomas-whitaker-death-sentence. This commutation marks only the third time in forty years that a Texas governor has agreed to commute a death sentence on individual grounds. *See Clemency*, *supra*; *infra* note 52 (discussing the case of Raymond Tibbetts in Ohio).

8. Harbison v. Bell, 556 U.S. 180, 183-86 (2009) (holding that Congress intended for 18 U.S.C. § 3599 to authorize the provision of federal funds to attorneys representing death-sentenced prisoners in state capital clemency proceedings); *cf.* Mullin v. Hain, 538 U.S. 957, 957 (2003) (vacating 5-4 a stay of execution that had been granted by the Tenth Circuit to consider the issue of whether Congress intended for federal funding to be available to petitioners in state clemency proceedings in light of a circuit split). While Mr. Hain was executed, the Tenth Circuit in *Hain v. Mullin*, 436 F.3d 1168 (10th Cir. 2006) (en banc) ultimately resolved the question consistently with *Harbison* (as the Supreme Court later noted). *See Harbison*, 556 U.S. at 194. For a discussion of this episode, see Eric M. Freedman, *No Execution if Four Justices Object*, 43 HOFSTRA L. REV. 639, 661-62 (2015).

9. As will be discussed throughout this Article, the statute under which the majority of capital clemency attorneys seek funding, 18 U.S.C. Section 3599, provides that courts shall authorize payment and fees for such "investigative, expert, or other services [that] are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence." 18 U.S.C. § 3599(f) (2012). While this statute primarily relates to the representation of state-death-sentenced prisoners in federal habeas proceedings, this same statute also governs the provision of federal funding for state capital clemency representation. *See Harbison*, 556 U.S. at 183-86. The question of what "reasonably necessary" means in the context of federal habeas corpus representation has long befuddled the federal courts, leading to significant disparity across jurisdictions in how and what expenses and services were being authorized for defendants in these cases. In April 2018, the Supreme Court issued a rare (for a capital case) unanimous opinion in *Ayestas v. Davis*, addressing the Fifth Circuit's imaginative interpretation of "reasonably necessary" to mean "substantial need." Ayestas v. Davis, 138 S. Ct. 1080, 1093 (2018). The Court held that "The Fifth Circuit's test . . . is arguably more demanding [than the statutory language] . . . [and that] Section 3599 appears to use the term 'necessary' to mean something less than essential." *Id.* Because the same circuits that were using standards other than the plain meaning

forcing clemency attorneys into an ethically untenable position: to either perform below the standard of care owed death-sentenced clients at this crucial stage of the capital appeals process or leave these clients to navigate state clemency proceedings unaided by the guiding hand of counsel.[10] Because clemency representation is often the last line of defense before a death-sentenced prisoner faces the executioner, it is crucial that courts meaningfully fund this critical work, and that they do so in a manner that both reflects and comports with attorneys' ethical and professional obligations at this stage of representation.

II. RECONCILING *WOODARD* AND *HARBISON*: DUE PROCESS BETWEEN A "COIN FLIP" AND "MEANINGFUL ACCESS"

Much of the difficulty capital practitioners face in securing adequate funding for clemency representation likely can be traced to the unique space clemency occupies in our death penalty system. Because clemency has traditionally been viewed as an "an act of grace" within the province of the executive branch, courts have been historically reluctant to wade into the question of what a state's capital clemency process should or should not entail.[11] This, of course, extends to the question of whether and how states provide funding for attorneys to do this work. At the same time, given the importance of the capital clemency decision—literally, one that can mean the difference between life and death—courts have been wary of conceding that there is *no* room for judicial intervention in clemency.

In 1998, a divided Supreme Court in *Ohio Adult Parole Authority v. Woodard*[12] reasoned that because a clemency determination comes after a death-row prisoner's conviction and sentence have been affirmed, the

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of "reasonably necessary" to determine funding for federal habeas corpus related expenses were doing so to determine the appropriate amount of clemency funding to disperse, as well, it is fair to assume that *Ayestas* applies in the clemency context also.

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> [The defendant] requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

Powell v. Alabama, 287 U.S. 45, 57-58 (1932).

11. United States v. Wilson, 32 U.S. (7 Pet.) 150, 160 (1833) ("A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed.").

12. 523 U.S. 272 (1998).

same rights and protections that attach to other stages of the death penalty process need not apply with equal force at clemency.[13] Instead, the Court found, the due process protections at clemency must only be "minimal."[14] The process must be somewhat less arbitrary than "flipping a coin"[15]—but not by much.[16]

Unsurprisingly, this decision left much to be desired in terms of providing the states and the federal government with guidance on how to administer their capital clemency systems. By refusing to define "minimal due process" or provide concrete examples of how it may be satisfied, the decision in *Woodard* left states with near total-discretion over how to administer their capital clemency schemes. Today, this discretion has resulted in significant variation in how capital clemency review functionally operates across jurisdictions,[17] as well as a lack of insight by practicing lawyers into what "effective" capital clemency representation can and should look like.[18] Some death-penalty states

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> It is clear that "once society has validly convicted an individual of a crime and therefore established its right to punish, the demands of due process are reduced accordingly." . . . I do not, however, agree with the suggestion . . . that, because clemency is committed to the discretion of the executive, the Due Process Clause provides no constitutional safeguards . . . . Thus, although it is true that "pardon and commutation decisions have not traditionally been the business of courts," . . . I believe that the Court of Appeals correctly concluded that some minimal procedural safeguards apply to clemency proceedings.

Ohio Adult Parole Auth., 523 U.S. at 288-89 (O'Connor, J., concurring) (citations omitted).

14. *Id.*

15. *Id.* at 289.

16. *See, e.g.*, Gissendaner v. Comm'r, Ga. Dep't of Corr., 794 F.3d 1327, 1333 (11th Cir. 2015) (holding that warden memorandum instructing prison staff not to speak to anyone representing Ms. Gissendaner, even if they had positive things to say about her, did not constitute a due process violation); Marek v. State, 8 So. 3d 1123, 1126-27 (Fla. 2009) (holding that clemency hearing held twenty years before death warrant was signed and clemency again considered did not violate due process, where all statute provided was that a clemency hearing would be held). *But see* Young v. Hayes, 218 F.3d 850, 852-53 (8th Cir. 2000) (finding due process violation where state attorney threatened to fire employee for providing favorable evidence in clemency hearing).

17. *See Clemency*, *supra* note 7 (dividing states into four different models of clemency determinations, with various additional individual caveats and exceptions to process); *see also* Harbison v. Bell, 556 U.S. 180, 187 (2009) ("By contrast, the States administer clemency in a variety of ways; *see, e.g.*, GA. CONST., art. IV, § 2 (independent board has clemency authority); NEV. CONST., art. 5, § 14 (governor, supreme court justices, and attorney general share clemency power); FLA. CONST., art. IV, § 8 (legislature has clemency authority for treasonous offenses)".); *see also State Information*, CAPITAL CLEMENCY RESOURCE INITIATIVE, https://www.capitalclemency.org/state-clemency-information (last visited Aug. 23, 2018) (providing in-depth information on the capital clemency process of twelve current death penalty jurisdictions).

18. The *ABA Guidelines* outline the sorts of efforts for clemency counsel that must be undertaken, but failures to meet these standards are regrettably common. *See ABA Guidelines*, *supra* note 5, at 1089-90 (Commentary to Guideline 10.15.2 "Duties of Clemency Counsel," further discussed *infra* at text accompanying notes 44-47). Raphael Holiday's case is instructive as an

have no formalized capital clemency review process,[19] whereas others have enacted intricate frameworks for processing and evaluating capital clemency applications.[20] Similarly, some states provide death-sentenced prisoners with state-funded counsel for clemency proceedings;[21] whereas many others do not. Ultimately, this patchwork of clemency processes and counsel schemes has resulted in significant arbitrariness in how seriously a death-sentenced prisoner's request for mercy is likely to be considered.[22]

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example of clemency representation that has been deemed "sufficient" by the courts. In 2015, Texas set an execution date for Raphael Holiday. His private practice attorneys appointed under the Criminal Justice Act ("CJA") dismissed his desire to apply for clemency, stating that in Texas, going through the clemency process would only give Holiday "false hope." *See* Brandi Grisson, *Condemned Man's Lawyers Stop Helping, Cite 'False Hope'*, DALLAS DAILY NEWS (Nov. 2015), https://www.dallasnews.com/news/texas/2015/11/16/condemned-mans-lawyers-stop-helping-cite-false-hope. Despite his lawyers' admonitions, Holiday wished to file a clemency petition, and brought a motion in district court seeking to substitute his privately appointed counsel for an attorney who would, in fact, seek clemency on his behalf. *See* Gretchen Sween, *Raphael Holiday was Put to Death, and His Lawyers Should Have Tried Harder to Stop It*, THE MARSHALL PROJECT (Dec. 17, 2015), https://www.themarshallproject.org/2015/12/17/raphael-holiday-was-put-to-death-and-his-lawyers-should-have-tried-harder-to-stop-it. This motion was denied, and the district court's order was appealed to the Supreme Court. By the time the appeal came before the high court, Holiday's original counsel did finally submit a cursory clemency petition, which Justice Sotomayor commented "likely would have benefitted from additional preparation by more zealous advocates." Holiday v. Stephens, 136 S. Ct. 387, 388 (2015). Ultimately, the Supreme Court found that it did not have jurisdiction to overturn the Texas court's decision not to appoint Holiday new counsel in clemency. *Id*.

19. *See, e.g.*, ALA. CONST. art. V, § 124 (vesting the Governor with the sole power to grant reprieves and commutations to persons sentenced to death); MISS. CONST. art. 5, § 124 (same).

20. *See, e.g.*, ARK. CODE ANN. § 16-93-204 (2018) (Arkansas administrative code governing process for clemency review in capital cases); OHIO REV. CODE ANN. § 2967.07 (West 2018) (General Assembly has delegated clemency authority to the Ohio Adult Parole Authority, which establishes rules for clemency review and recommendation before the Governor makes the final clemency determination).

21. *See infra* Part III.

22. Though not directly relevant to the questions addressed in this Article, an area that merits further inquiry is whether there is any relationship between *how* a state administers its capital clemency process and petitioners' overall likelihood of success. For example, are states more likely to grant clemency in death penalty cases if they implement a more "formal" process for submitting and reviewing capital clemency petitions? Or if they require a written explanation for a clemency decision or recommendation, whether that is to affirm or deny? Interestingly, Ohio—one of the states with the most "robust" processes for reviewing and responding to capital clemency petitions, even though the clemency decision ultimately rests with the governor—has recently become the state with the highest number of individual clemency grants. *See Clemency*, *supra* note 7 (showing that Ohio has granted twenty individuals clemency since 1977). Eight of these were part of a "mass grant" by Governor Richard Celeste in 1991, leaving the number of "individual" clemency grants in Ohio at twelve—the most of any state in recent years. *Id.* Obviously a number of factors would have to be controlled for to analyze how a death-row prisoner's "chances" at receiving a clemency grant may be affected by whether or not the state has adopted a formal clemency process. The number of grants out of Ohio would seem to indicate that yes, a more formalized capital clemency procedure does lead to an increase in clemency grants. But Virginia, which is a close-second to Ohio with ten individual clemency grants, leaves the power completely with the executive branch and outside of

Nine years ago, in *Harbison v. Bell*, without returning to the question of what due process rights are owed capital clemency petitioners, the Supreme Court took up the question of whether 18 U.S.C. Section 3599—the statute governing the appointment and funding of attorneys to represent state-death-sentenced prisoners in federal court—extended to state clemency representation as well. Section 3599(e) provides:

> 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, . . . and *shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant*.[23]

At issue in *Harbison* was whether "Congress intended to include state clemency proceedings within [Section 3599's] reach."[24] Specifically, petitioners argued that their federal appointment and federal funding to represent state death-row prisoners in federal habeas corpus proceedings also extended to representation of these same state prisoners in state clemency proceedings. Acting as amicus curiae,[25] the U.S. Government opposed this reading, arguing instead that the statutory language "proceedings for executive or other clemency" referred only to *federal* clemency proceedings and therefore only attorneys appointed to represent *federal* death row prisoners were to continue this representation on into clemency.[26] Under the Government's

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any formalized procedure. *See id.* (showing Virginia has granted ten capital prisoners clemency in the last four decades). Further research is warranted into the question of whether differences in how states choose to review capital clemency applications may impact prisoners' ability to receive clemency relief. This aspect of the disparateness in clemency processes is something to consider in thinking about the death penalty and arbitrariness in the context of Justice Breyer's dissent in *Glossip v. Gross*, for example. *See* Glossip v. Gross, 135 S. Ct. 2726, 2760 (2015) (Breyer, J. dissenting) ("Such studies indicate that the factors that most clearly ought to affect application of the death penalty—namely, comparative egregiousness of the crime—often do not. Other studies show that circumstances that ought not to affect application of the death penalty, such as race, gender, or geography, often do.").

23. 18 U.S.C. § 3599 (2012) (emphasis added).

24. Harbison v. Bell, 556 U.S. 180, 187 (2009).

25. Respondent, the State of Tennessee, took no position on this question. *See* Brief of Respondent at 7, *Harbison*, 556 U.S. 180 (No. 07-8521), 2008 WL 4154544. ("Question 1 presents the issue whether 18 U.S.C. § 3599 provides state prisoners the right to federally appointed and funded counsel to pursue clemency under state law. Respondent took no position on petitioner's motion in the district court and did not file any response to the motion.").

26.

> Section 3599 does not authorize federal funds for indigent state capital defendants seeking state clemency. Section 3599 provides funds for counsel for federal defendants facing a capital charge or prisoners actually sentenced to death and seeking

interpretation—which echoed the reasoning in *Woodard* that clemency is nothing more than a gift the executive may or may not choose to bestow[27]—state prisoners under sentence of death would remain subject to whatever scheme for providing clemency counsel (or not) a state deigned to provide.[28]

In concluding that the plain reading of Section 3599(e) was that the statute intended for federal funding to be available for representation of prisoners in state clemency processes, the Court explicitly rejected the Government's argument that "Congress simply would not have intended to fund clemency counsel for indigent state prisoners *because clemency proceedings are a matter of grace entirely distinct from judicial proceedings*."[29] Instead, the Court found that "Congress's decision to furnish counsel for clemency proceedings demonstrates that . . . it recognized the importance of such process to death-sentenced prisoners," and that "the sequential enumeration [of clemency at the end

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> postconviction relief in federal court. The entire structure of the statute focuses on federal proceedings, from the requirement that attorneys be admitted to practice in federal court to the types of proceedings in which attorneys are authorized to participate.

Brief for the Unites States as Amicus Curiae Supporting the Judgment Below at 7, *Harbison*, 556 U.S. 180 (No. 07-8521), 2008 WL 4580044.

27.

> Indeed, the statutory standard for granting COAs – "a substantial showing of the denial of a constitutional right," . . . would be difficult to apply to a request for clemency counsel. Although the goal of clemency is relief from the conviction or sentence, that relief comes on discretionary rather than legal grounds . . . . Neither a clemency application nor a request for counsel to pursue clemency implicates a constitutional right. And although the *handling* of a clemency application may implicate procedural due process rights, see *Ohio Adult Parole Auth. v. Woodard,* 523 U.S. 272 (1998), any claim of constitutional violation would be brought only after the clemency process had begun and would be asserted under 42 U.S.C. § 1983, not in a habeas corpus proceeding.

Brief for the Unites States, *supra* note 26, at 12 (emphasis added) (citations omitted); *see also Harbison*, 556 U.S. at 192 ("The Government's arguments about § 3599's history and purposes are laced with the suggestion that Congress simply would not have intended to fund clemency counsel for indigent state prisoners because clemency proceedings are a matter of grace.").

28.

> Petitioner and his amici devote considerable effort to establishing the relatively uncontroversial proposition that an indigent's clemency application is more likely to be persuasive with a lawyer's help than without it. Congress recognized as much in providing clemency counsel for indigent *federal* inmates who are sentenced to death. But petitioner does not provide any basis from which to conclude Congress intended federal funding for proceedings purely on the state level . . . . Congress could conclude, entirely rationally, that the federal interest in indigent defense (over and above that required by the Sixth Amendment) extends to federal-court proceedings to protect federal *constitutional* rights, but not to state clemency proceedings, which may turn on a host of practical and political considerations and in which no distinct federal rights are at stake.

Brief for the Unites States, *supra* note 26, at 30-31.

29. *Harbison*, 556 U.S. at 192 (emphasis added).

of the capital appeals process] suggests an awareness that clemency proceedings are not as divorced from judicial proceedings as the Government submits."[30]

Thus, rather than rely on the splintered and strained reasoning in *Woodard* to determine whether death-sentenced prisoners were entitled to government-funded representation at clemency, *Harbison* relied solely on existing federal law to cement capital prisoners' *statutory right to capital clemency counsel and funding*. Such a decision was necessary, the Court wrote, to vindicate capital prisoners' "meaningful access to the 'fail-safe' of our justice system."[31]

By recognizing a statutory right to federally funded clemency counsel, the Court in *Harbison* avoided the problems encountered in *Woodard* over where and how to situate clemency within the judicial process. Nevertheless—and as the next Part of this Article will show—the federal courts still seem reluctant to authorize the amount of clemency funding needed to ensure zealous and high-level representation at this critical juncture.

III. THREE MODELS FOR FUNDING CAPITAL CLEMENCY REPRESENTATION

Broadly speaking, there are currently three models in place for funding clemency representation in capital cases. The first model, which will be termed the "Federal Funds Model," relies on private attorneys who have been appointed under the Criminal Justice Act[32] to represent death-sentenced prisoners in federal habeas proceedings to continue their representation through clemency. These are the attorneys for whom the decision in *Harbison* made federal funding available under Section 3599(e), and they comprise a large portion of all attorneys performing capital clemency representation. Typically, these attorneys submit billing vouchers for hours worked, as well as discrete funding requests for other clemency-related expenses (e.g., investigative costs, travel, hiring expert witnesses) to the federal district courts for review.[33] The judges making clemency funding decisions under this model are often

30. *Id*. at 193.

31. *Id*. at 194 (citation omitted).

32. 18 U.S.C. § 3006A (2012).

33. Typically, funding for clemency is sought from the same district court that originally authorized the federal habeas proceedings appointment. For more information on how funding requests in clemency should be submitted to the District Courts for attorneys, see CJA GUIDELINES, GUIDE TO JUDICIARY POLICY, § 680 Clemency (U.S. COURTS), http://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-6-ss-680-clemency#a680_10.

faced with analyzing what expenses are "reasonably necessary"[34] to spend on capital clemency representation, without the benefit of knowing what arguments may be persuasive to the state decision maker, or when and how the clemency decision ultimately will be made. This issue will be discussed at greater length in Part IV.

The second model, the "State Funds Model," sees state courts or agencies assuming responsibility for providing and funding counsel in capital clemency representation.[35] Under this model, there is typically a "cap" on the clemency funding available, regardless of how the money is to be used in an individual case. In California, private attorneys appointed by the California Supreme Court to represent capital prisoners in clemency report being told that the total funding they will be allotted—regardless of the particular demands of the case—is roughly $10,000, or the equivalent of eighty hours of work.[36] In Florida, the Florida Commission on Offender Review ("FCOR")[37] caps the total amount of capital clemency funding available to attorneys at $10,000—$5000 is paid after the clemency petition is submitted, and an additional $5000 is paid if the attorney represents the clemency petitioner in a

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34.

> Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a 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).

18 U.S.C. § 3599 (2012) (emphasis added). In reviewing funding requests in clemency, district court judges often struggle with what "reasonably necessary" means in the clemency context, given that there is typically no way of knowing what sort of information may help a clemency claim "win" with a decision maker. Whereas in the federal habeas context, this question is typically answered by reference to what sorts of claims are cognizable on federal habeas review—and the court's assessment of whether those claims, if developed, could entitle a petitioner to relief—the fact that in most states clemency remains a wholly discretionary decision on the part of the executive makes using this same logic inapposite. *See infra* Part IV.

35. *See* FLA. STAT. § 940.031 (2018) (giving the Florida Commission on Offender Review the authority to "contract with an Attorney/Legal Entity to represent a person sentenced to death for relief by Executive Clemency").

36. This information comes with interviews with capital practitioners in California and is also suggested by *Supreme Court Policies Regarding Cases Arising From Judgements of Death*, CAL. SUPREME COURT (Jan. 1, 2008), http://www.courts.ca.gov/documents/PoliciesMar2012.pdf. *See id.* at 13, 18 (stating that the allowable compensation rate for representation in clemency is $145 per hour and that "[r]epresentation in clemency before the Governor of California: 40-80 hrs"). Thus, at the maximum compensation rate and number of hours, the total compensation rate for clemency representation alone would be $11,600. According to California practitioners, however, the Court is more likely to approve a "lump sum" amount for *both* habeas and clemency representation, and is unlikely to entertain requests for additional funds beyond that lump sum. Email from Rachel Schaefer (June 14, 2018, 3:05 PM) (on file with author).

37. *Florida Commission on Offender Review*, OFFICE OF EXEC. CLEMENCY, https://www.fcor.state.fl.us/clemency.shtml (last visited Aug. 23, 2018).

hearing.[38] This total sum of $10,000 is represented in the capital clemency attorney contract as non-negotiable, and it is intended to cover both the attorney's compensation for representation, as well as any out-of-pocket expenses she might incur.[39] That is to say, attorneys appointed under the State Funds Model seemingly can choose whether to keep the money allotted them as compensation for their individual work on the case; or to spend this money on other aspects of the representation, such as traveling to conduct witness interviews, hiring a mitigation or other investigator, or employing the use of expert services.[40] This model raises

38. FLA. STAT. § 940.031(2) ("It is the intent of the Legislature that the fee prescribed under this section comprises the full and complete compensation for appointed private counsel."); *see also* Agreement Between Florida Commission on Offender Review and John Doe (2015) (on file with author) [hereinafter Redacted FCOR Contract]. In many cases, a clemency hearing is not authorized by the Board, thus leaving the total compensation for clemency representation—to cover both hours worked and any additional expenses—at only $5000. Additionally, the state occasionally has found that clemency hearings conducted more than a decade ago are nevertheless considered a "sufficient" opportunity to be heard under Florida's rules for executive clemency, even if significantly new information about the prisoner has come to light in the years following his initial clemency application (e.g. evidence of his good behavior and adjustment to life in prison). This is because in Florida, clemency review used to take place immediately following the direct appeal, rather than at the end of the state and federal appeals process, which is now the case in most states (and newly the case in Florida). As a result, some clemency decisions about cases set for execution *today* are being made on the basis of clemency processes that took place more than two decades ago. For a discussion of precisely such an instance, see, for example, Mann v. Palmer, 713 F.3d 1306, 1316 (11th Cir. 2013) ("Mann cannot show any violation of his due process rights in the clemency proceedings conducted by the State of Florida. The Governor conducted a full clemency hearing in 1985 before he signed Mann's first death warrant. Court-appointed counsel represented Mann at that hearing. And Florida law did not obligate the Governor to grant Mann a second clemency hearing before he signed Mann's current death warrant [in 2012].").

39. *See* Redacted FCOR Contract, *supra* note 38. Importantly, practitioners in Florida who have been appointed under 18 U.S.C. Section 3599 to represent death-sentenced clients in federal habeas corpus proceedings have reported being denied continuation of their appointment into clemency proceedings under Section 3599(e), presumably due to the availability of Florida's own program for providing state-funded clemency counsel through the FCOR. Whether the refusal to reappoint federal habeas counsel to continue on in clemency and receive federal funds for this representation constitutes a deprivation of the statutory right to the continuation of counsel into clemency contemplated by *Harbison* has not yet been litigated. Suffice it to say, the inability of certain death-row prisoners to access federal funding and representation under Section 3599(e), despite not seeking substitution of counsel, is another troubling aspect of the way in which clemency representation differs arbitrarily across jurisdictions.

40. In July of 2016, an attorney who was hired under this model to represent a death-sentenced prisoner in clemency sued the State of Florida and the FCOR, alleging that the terms of the clemency representation contract—and in particular, the compensation structure—violated the contract's explicit requirement of "competent representation." Corrected Amended Complaint for Declaratory Judgement at 12, Parmer v. Florida, No. 2016-CA-001189 (Fla. Cir. Ct. July 19, 2016). Included within the complaint was a record of email correspondence between the attorney and the FCOR concerning the attorney's need to hire an investigator to conduct a thorough investigation into her client's case, including into a potential innocence claim. The FCOR responded to this request that "[t]he Commission will only provide payment as outlined in our agreement. No additional funding for an investigator or for you is available." *Id.* at 6-7. Although the suit was

a host of ethical concerns, which will be discussed in more detail in Part IV.

The third model for funding capital clemency representation is by conducting this work through state or federal public defender offices, meaning that clemency representation and expenses are compensated and covered by attorney salaries and office budgets. This can be called the "Institutional Defender Model." Under this model, expenses for discrete aspects of capital clemency representation—like hiring experts, investigators, videographers, etc.—are funded through the defender office's internal budget and earmarked and distributed upon consideration of other case needs and expenses. This model allows defender offices to set aside the funds they anticipate needing for clemency, but also requires them to make preliminary judgments that may require subsequent revision as to where and on what cases their financial and staff resources are best spent. Nevertheless, given that clemency case budgets are still determined internally, the Institutional Defender Model typically allows for more flexibility in regards to clemency expenditures than either the Federal or the State Funds Models, and is preferable in that it does not pit the interests of the attorney against the interests of the client by authorizing only a "lump sum" for clemency expenses.[41]

IV. THE *ABA GUIDELINES*' ARTICULATION OF THE DUTIES OF CAPITAL CLEMENCY COUNSEL

As the previous Parts show, significant disparities still exist in how capital clemency representation is funded across jurisdictions. Under the State Funds Model, practitioners typically have no flexibility in the amount of money they are allotted, regardless of the intended purpose of those funds. Under the Institutional Defender Model, offices will make decisions regarding how much attorney time and overall budget to expend on a given clemency case explicitly in light of the individual circumstances. As mentioned previously, however, the majority of clemency funding after the 2009 decision in *Harbison* now comes through the federal courts to counsel appointed under 18 U.S.C. Section 3599. This means that the federal district courts are now serving as the primary decision makers for how much money to authorize for clemency

ultimately dismissed as the client for whom the attorney was seeking clemency received relief from the death penalty in the judicial process, it demonstrates both the inflexibility of the FCOR to consider individual circumstances in making funding decisions, as well as the awareness among clemency attorneys in Florida generally of the ethical problems that this current funding model raises.

41. *See generally infra* Part IV.

representation (both in terms of attorney hours and expenses), even though there is very little in the language of Section 3599 to help guide the courts in making these decisions. The statute only provides that fees and expenses should be "reasonably necessary"[42] and suggests a presumptive cap of $7500 "unless payment in excess of that limit is certified by the court . . . as necessary to provide fair compensation for services of an unusual character or duration . . . ."[43]

As discussed in Part I of this Article, courts have been historically reluctant to involve themselves in questions about clemency. But while the decision in *Harbison*, by putting the federal courts in charge of overseeing these expenses, brought clemency representation closer in line with other aspects of capital case work, it did not resolve the lingering question of "how" clemency representation should be conducted or assessed. That said, courts are not without guidance as to how to assess clemency funding requests and how to think about what sorts of expenses—both in terms of attorney hours and others—are appropriate to extend in this unique stage of representation. The *ABA Guidelines*' "Duties of Clemency Counsel" can help courts answer the question of what fees and services are "reasonably necessary" to approve—and by using the *Guidelines* as a touchstone for evaluating clemency funding requests, courts can also avoid putting clemency attorneys appointed under *Harbison* into a situation where their compensation forces them to perform below before the standard of care articulated by the *Guidelines*.

In the nearly thirty years since the *ABA Guidelines* were first published, the description of capital clemency counsel's roles and duties has become more detailed. The first iteration of the *ABA Guidelines* in 1989 set out clemency counsel's duties as follows:

> 11.9.4 Duties of Clemency Counsel
>
> A. Clemency counsel should be familiar with the procedures for and permissible substantive content of a request for clemency.
>
> B. Clemency counsel should interview the client, and any prior attorneys if possible, and conduct an investigation to discover information relevant to the clemency procedure applicable in the jurisdiction.
>
> C. Clemency counsel should take appropriate steps to ensure that clemency is sought in as timely and persuasive a manner as possible.[44]

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42. 18 U.S.C. § 3599(g)(2) (2012).

43. *Id.*

44. GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES, 11.9.4, Duties of Clemency Counsel (1989) (AM. BAR ASS'N, amended 2003) [hereinafter ABA ORIGINAL GUIDELINES]. The original *Guidelines* are available at

Compared to the other guidelines in the 1989 edition, 11.94 provided relatively little by way of concrete steps an attorney must take in this representation. The most extensive of the articulated duties of clemency counsel was 11.9.4(B): to "conduct an investigation to discover information relevant to the clemency procedure applicable in the jurisdiction."[45] Under 11.9.4(C), while clemency attorneys were to "take appropriate steps" to ensure that clemency was sought "in as timely and persuasive a manner as possible," these steps were not defined.[46] Nor was any concrete expectation of clemency counsel outlined, other than the attorney's responsibility to "interview the client" and "any prior attorneys, if possible."[47] The 1989 *Guidelines*—while adopting the view that seeking clemency for a death-sentenced client was an attorney's professional and ethical duty—did not articulate the precise content of that duty as fully as the 2003 version of the *Guidelines* would.

In the 2003 *Guidelines*, the language concerning capital clemency counsel's role and specific duties became considerably more affirmative and precise.[48] Today, under ABA Guideline 10.15.2(B), clemency counsel is required to conduct an investigation *in accordance with Guideline 10.7*, which is the guideline that governs the investigation during the post-conviction phase of a capital case. 10.15.2(C) requires that clemency presentations be *persuasively* and *appropriately* tailored to the unique characteristics of "*each client, case, and jurisdiction*."[49] 10.15.2(D) requires clemency counsel to "ensure that the process governing consideration of the client's application is substantively and procedurally just"—and if it is not—to "seek appropriate redress."[50]

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http://ambar.org/1989guidelines.

45. ABA ORIGINAL GUIDELINES, *supra* note 44, at 11.9.4(B).

46. *Id.* at 11.9.4(C).

47. *Id.*

48. *See ABA Guidelines*, *supra* note 5, at 1088 (Guideline 10.15.2: Duties of Clemency Counsel).

> A. Clemency counsel should be familiar with the procedures for and permissible substantive content of a request for clemency. B. Clemency counsel should conduct an investigation in accordance with Guideline 10.7. C. Clemency counsel should ensure that clemency is sought in as timely and persuasive a manner as possible, tailoring the presentation to the characteristics of the particular client, case and jurisdiction. D. Clemency counsel should ensure that the process governing consideration of the client's application is substantively and procedurally just, and, if it is not, should seek appropriate redress.

Id.

49. *Id.* (emphasis added).

50. *Id.*

Where before, the *Guidelines* urged clemency counsel to conduct an investigation into "information relevant to the clemency procedure applicable," the 2003 *Guidelines* explicitly treat clemency representation as a vital extension of the capital post-conviction process.[51] Moreover, in requiring clemency counsel to "conduct an investigation *in accordance with rule 10.7*," the *ABA Guidelines* relate the duties of counsel at clemency to the duties of counsel representing a death-sentenced prisoner in court. Importantly for the question of how much funding is appropriate to expend at clemency, the investigation required under ABA Guideline 10.7 is non-trivial. Under this rule, counsel "at every stage" of a capital case has an obligation, among other things, to conduct "thorough and independent investigations relating to the issues of both guilt and penalty," "a full examination of the defense provided to the defendant at all prior phases of the case," and to "satisfy themselves independently that the official record of the proceedings is complete and to supplement it as appropriate."[52]

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51. Importantly, this is exactly the sort of reasoning that the Court relied on in *Harbison* in evaluating why Congress may have intended for federal funds to be available to state-death-sentenced prisoners at clemency. *See supra* text accompanying note 30.

52. *ABA Guidelines*, *supra* note 5, at 1015 (Guideline 10.7: Investigation). Courts should also take into account that it is not always the case that a clemency attorney will receive a complete record at the time of appointment and that simply ensuring the case record is complete can require significant attorney time and expense. This is why models for funding clemency representation like California's—capping the number of attorney hours at eighty (or about two weeks' worth of work)—will necessarily raise ethics issues in individual cases. There are guaranteed to be certain clemency cases where so much time has passed between when the case was last intensively "worked" by an attorney and the clemency appointment that several weeks may be needed just to get up to speed with the case and recover all relevant documents and materials. After completing the record, it must be reviewed, and after reviewing the record, important strategy decisions regarding the clemency approach must be made. While in some cases such limited expenditure for clemency representation as contemplated by California, Florida, and sometimes even the federal courts *may* be appropriate—for example, where the attorney at clemency has been zealously representing the client and developing claims for years—in many cases, crucial information is still woefully underdeveloped at this stage and needs to be worked up at clemency. Raymond Tibbetts's case out of Ohio is one such example, where the information presented fully for the first time at clemency was so important, it inspired a juror from the original trial to advocate for clemency on Mr. Tibbetts's behalf. Ross Geiger wrote a letter to Ohio Governor John Kasich after reading the Parole Board's report recommending against clemency for Tibbetts, citing the inaccurate and misleading portrait of mitigating evidence painted by the defense at trial. Had he heard mitigating information presented at Mr. Tibbetts's clemency hearing during trial, he wrote, he "almost certainly" would have voted for a life sentence rather than the death penalty. Karen Kasler, *Juror Reaches Out to Gov. Kasich to Spare the Life of a Convicted Killer*, WKSU (Feb. 5, 2018), http://wksu.org/post/juror-reaches-out-gov-kasich-spare-life-convicted-killer#stream/0. This independent outreach prompted Governor Kasich to issue Mr. Tibbetts a rare reprieve of execution to ask the Parole Board to reconsider its recommendation against clemency. Marilyn Icsman, *Juror's Letter to Kasich Prompts Second Clemency Hearing for Cincinnati Killer on Death Row*, CINCINNATI.COM (June 14, 2018, 5:54 PM), https://www.cincinnati.com/story/news/2018/06/14/jurors-letter-kasich-prompts-second-clemency-hearing-man-death-row/699369002. Although the Parole Board again

Additionally, 10.15.2(d)'s statement that clemency attorneys must "ensure that the process governing consideration of the client's application is substantively and procedurally just, and if it is not, should seek appropriate redress," illuminates clemency counsel's obligations more fully than the 1989 *Guidelines*. The 2003 statement came after *Ohio Adult Parole Authority v. Woodard* held that there *are* certain rights that require vindication and protection in clemency, but before *Harbison*, which further confirmed that "far from regarding clemency as a matter of mercy alone, [clemency is] . . . the 'fail safe' in our criminal justice system."[53] But for attorneys to be able to vindicate these rights, access the "fail safe" of the justice system, and represent clients in accordance with the minimum standards articulated by the *Guidelines*, they require adequate compensation and sufficient access to investigative, expert, and other assistance.

V. ETHICAL DILEMMAS IN CLEMENCY REPRESENTATION: BRINGING "REASONABLY NECESSARY" EXPENSES IN LINE WITH THE *ABA GUIDELINES*

Simply put, all of the models under which clemency representation is currently being funded have the potential to give rise to serious ethical quandaries for attorneys. The State Funds Model is particularly problematic, however, in that it is the most likely to set an explicit cap on the money allotted. As discussed, in Florida, the explicit cap on funding does not even differentiate between attorney's hours and expenses specific to the case work-up, such as hiring experts, or traveling to conduct an investigation or secure a witness affidavit. As a

recommended against a clemency grant, on July 20, 2018, Governor Kasich announced his decision to commute Mr. Tibbetts's sentence to life in prison without the possibility of parole. *Kasich Grants Reprieve to Cleveland Jackson and Commutes Sentence of Raymond Tibbetts*, JOHN R. KASICH, GOVERNOR OF OHIO (July 20, 2018), http://governor.ohio.gov/Media-Room/Press-Releases/ArticleId/954/kasich-grants-reprieve-to-cleveland-jackson-and-commutes-sentence-of-raymond-tibbetts-7-20-18. Without the extraordinary work done by Mr. Tibbetts's attorneys to bring forth the wealth of mitigating information at clemency that the jury had never heard at trial, Mr. Geiger would not have come forward, and clemency almost certainly would not have been granted. It is probably no surprise that in this case, Mr. Tibbetts's attorneys were funded for clemency investigation and representation under the Institutional Defender Model. Mr. Tibbetts was represented in his clemency efforts by the Office of the Federal Public Defender for the Southern District of Ohio, which employs salaried attorneys and uses existing office resources for funding its clemency work in individual cases. As discussed early, this model more easily allows for a full reinvestigation of the case to be completed at clemency, as the *ABA Guidelines* require. And in this case, conducting this reinvestigation—which likely would have been prohibitively expensive and time-consuming for an attorney operating under a "capped" fee model—clearly bore fruit. Similar examples of new information being brought to bear at the clemency stage appear in the *ABA Guidelines*. *See ABA Guidelines*, *supra* note 5, at 1089 n.356.

53. Harbison v. Bell, 556 U.S. 180, 193 (2009).

result, attorneys are actually expected to use the money provided for clemency representation as their own compensation, rather than to ensure a clemency case is properly investigated and presented. The up-to $10,000 that FCOR allows for clemency representation is a flat fee; i.e., the *most* money the agency will pay to attorneys representing a capital prisoner in clemency. Flat fees and fee caps in capital cases have long pitted the interests of attorneys against their clients, which is why the *ABA Guidelines* have long advocated strongly against these funding practices. "Flat payment rates or arbitrary ceilings should be discouraged since they impact adversely upon vigorous defense."[54]

> These realities [of capital defense work] underlie the mandate of this guideline that members of the death penalty defense team be fully compensated at a rate commensurate with the provision of high quality legal representation. *The Guidelines' strong disapproval of flat fees, statutory caps, and other arbitrary limitations on attorney compensation is based upon the adverse effect such schemes have upon effective representation*.[55]

There is no question that the Florida scheme for funding clemency representation explicitly conflicts with the *Guidelines*. While other State Funding Models, like California's, are less explicit about imposing a hard cap on funds for clemency representation, practitioners nonetheless report that the typical practice is to allot a lump sum for each clemency case, which the court will not then deviate from.[56] This practice for allotting clemency funding also contradicts the general principle of the *Guidelines* that each capital case is unique, and therefore that decisions regarding funding and case expenses need to be made on an individualized basis.[57] While attorneys operating under these schemes may do everything in their power to represent their clients ethically, it is the way in which these compensation models are structured that gives rises to ethical problems in these cases.[58]

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54. *See* ABA ORIGINAL GUIDELINES, *supra* note 44 (Commentary to Guideline 10.1, Compensation).

55. *ABA Guidelines*, *supra* note 5, at 984-88 (Commentary to Guideline 9.1, Funding and Compensation) (emphasis added).

56. Email from Rachel Schaefer (June 19, 2018, 10:16 AM) (on file with author).

57. *See, e.g.*, *ABA Guidelines*, *supra* note 5, at 957 (noting as commentary to Guideline 4.1 that "[i]t bears emphasis that every situation will also have its own unique needs. The demands of each case—and each stage of the same case—will differ.").

58. Here, practitioners should remember that clemency counsel's duties under the *Guidelines* also include a responsibility to challenge procedurally or substantively unjust procedures. "Clemency counsel should ensure that the process governing consideration of the client's application is substantively and procedurally just, and, if it is not, should seek appropriate redress." *ABA Guidelines*, *supra* note 5, at 1088 (Guideline 10.15.2(D)).

The Federal Funds Model confronts clemency practitioners with a different set of ethical difficulties. First, while under 18 U.S.C. Section 3599 there are no "flat fees" or "hard caps," there are still *presumptive caps* on how much money should be spent on clemency.[59] Although clemency funding under this Model accounts for attorney hours and "other" expenses separately, practitioners report that courts are nonetheless particularly strict about the "total" amount of money they are willing to authorize in clemency—meaning that they will look at how much a clemency case might cost overall, and make a subjective determination as to whether that amount seems reasonable. The longstanding notion that clemency is "not traditionally . . . the business of the courts"[60] appears to persist in the haphazard manner in which clemency funding is being disbursed under *Harbison*.

There is another complication in the way that clemency funding assessments are being made under the Federal Funds Model. 18 U.S.C. Section 3599(e) only outlines the presumptively "reasonable" cost of federal habeas representation, which it sets at $7500 (a figure that is now widely understood to be significantly less than what is required to conduct zealous representation at this stage). Aside from the language that attorneys appointed under this statute "shall" continue to represent their clients in clemency, there is no additional explanation of what that representation should entail. And, as explained earlier in this Article, clemency processes and procedures are so distinct that what may amount to "reasonable" representation in one state might be seriously deficient in another. As a result, the "reasonably necessary" language—which for the most part only relates to expenses "reasonably necessary" to vindicate a cognizable claim in federal habeas corpus proceedings—provides only partial guidance for judges seeking to parse this language in the clemency context.

In April 2018, the Supreme Court issued a rare unanimous decision in *Ayestas v. Davis* rebuking the Fifth Circuit's interpretation of "reasonably necessary" under Section 3599 to mean "substantial need."[61]

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59. "Fees and expenses paid for investigative, expert, and other reasonably necessary services authorized under subsection (f) shall not exceed $7,500 in any case, unless payment in excess of that limit is certified by the court. . . ." 18 U.S.C. § 3599(g)(2) (2012). While practitioners still face difficulty in certain jurisdictions receiving as much funding for federal habeas representation as is clearly needed, the $7500 presumptive cap for this stage of representation is rarely enforced today. Judges seem to be aware that doing federal habeas representation "well" will require significantly more money expended than the $7500 cap. At clemency, however, courts appear more inclined to use this cap as a reasonable ceiling for all clemency related expenses.

60. Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 464 (1981).

61. Ayestas v. Davis, 138 S. Ct. 1080, 1093 (2018) ("The Fifth Circuit's test—'substantial need'—is arguably more demanding.").

(While the case was specifically concerned with funding in the federal habeas context, given that it addresses precisely the same statute and language as governs clemency funding, its holding is relevant to the issues here.) There, the Court clarified, "What the statutory phrase calls for . . . is a determination by the district court, in the exercise of its discretion, as to whether a reasonable attorney would regard the services as sufficiently important, guided by the considerations we set out more fully below."[62] The considerations the Court then set out included looking at the plain meaning of the word "reasonable"[63] as well as looking to the "potential merit of the claims that the applicant wants to pursue, the likelihood that the services will generate useful and admissible evidence, and the prospect that the applicant will be able to clear any procedural hurdles standing in the way."[64] In sum, *Ayestas* stands for the proposition that "reasonably necessary" under Section 3599 turns on a twofold inquiry: first, a consideration of whether the services requested are what a reasonable attorney would regard as "sufficiently important;" and second, an assessment of whether these services are likely to generate "useful" and usable information.

In the clemency context, of course, the second part of this inquiry will remain subjective given the particularities of a state's clemency process, decision maker, salient political issues, etc. In a way, this part of the inquiry should be *easier* to surmount in clemency than in federal habeas corpus cases, given that there are almost never "procedural bars" to the *type* of evidence an attorney can present in clemency. And the first part of the *Ayestas* inquiry—that a court should look to what a "*reasonable attorney would regard as sufficiently important*"—is critically important to bringing the funding currently allotted by the federal courts in clemency in line with the ethical duties enshrined in the *ABA Guidelines.*[65] In seeking clemency funding before a federal district court, a "reasonable" attorney would of course look to the scope of duties articulated under the *Guidelines* to assess what sort of work is necessary to perform. And if the federal courts start approving attorney hours and funding requests in clemency with an eye to what the *Guidelines* expect of counsel at this stage—including conducting a full investigation of the case in line with Guideline 10.7, tailoring the clemency presentation to the characteristics of the particular client, case, and jurisdiction, and seeking appropriate redress if the clemency process

62. *Id.* at 1093.

63. *Id.* (defining "reasonable" to mean "fair, proper, or moderate under the circumstances" (quoting *Reasonable*, BLACK'S LAW DICTIONARY (10th ed. 2014)).

64. *Id.* at 1094.

65. *Id.* at 1093 (emphasis added).

is not substantively and procedurally just—many of the current obstacles to ethical representation in clemency would fall away.

VI. CONCLUSION

The Supreme Court reminds us that "in authorizing federally funded counsel to represent their state clients in clemency proceedings, Congress ensured that no prisoner would be put to death without meaningful access to the 'fail-safe' of our justice system."[66] Just as 18 U.S.C. Section 3599(e) and *Harbison* provide a clear entitlement to federally appointed counsel with access to federal funding, the *ABA Guidelines* and the Court's recent decision in *Ayestas* help the courts understand the substantive content of this entitlement. A determination of what expenses are "reasonably necessary" to expend in clemency should be informed both by the specific obligations codified by the *ABA Guidelines*, as a "reasonable attorney" would use these to inform her duties in capital representation; *and* by an understanding of the ongoing significance of this stage of the death penalty process and its potential to stop an unjust execution.[67]

In failing to sufficiently fund clemency representation, however, courts and other bodies risk forcing clemency counsel to choose between their own compensation, their ability to investigate their client's case at guilt and punishment, their ability to appropriately "tailor" the clemency presentation to the unique characteristics of their client, case, and clemency jurisdiction, and the time needed to research and prepare a potential in-court challenge to a state's clemency process. In so doing, clemency funding authorities run the risk of forcing attorneys to fall below the standard of care articulated by ABA Guideline 10.15.2—something which the federal courts, especially, should be careful not to condone.[68] Inadequate funding for clemency representation threatens to undermine the only process through which a death-sentenced prisoner can seek relief from an unjust sentence where the judicial process has been exhausted. And as Justice Renhquist famously observed, "clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice"[69] in these cases. So long as the United States continues to exercise its

66. Harbison v. Bell, 556 U.S. 180, 194 (2009).

67. *See supra* note 6 and accompanying text.

68. *See* Model Justice Act, explaining that courts should be mindful to ensure that appointed attorneys "comply with the *ABA Guidelines*." GUIDE TO JUDICIARY POLICY, vol. 7A, app. 2A, § XIV(C)(1) (U.S. COURTS 2016), http://www.uscourts.gov/sites/default/files/vol07a-ch02-appx2a.pdf.

69. Herrera v. Collins, 506 U.S. 390, 410-11 (1998).

prerogative to take the lives of individuals who have broken its laws, so too must it ensure that its "historic remedy" for avoiding miscarriages of justice in such cases is not diluted or weakened by disparate and arbitrary clemency funding determinations.