No. 01-1605

In the Supreme Court of the United States

IN RE GARY A. TAYLOR, PETITIONER

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether 21 U.S.C. 848(q) provides prisoners who were sentenced to death by state courts the right to federally appointed and funded counsel in state clemency proceedings.

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This brief is submitted in response to the Court's order inviting the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. a. Following a jury trial in a Texas state court, Jack Wade Clark was convicted of murder and sentenced to death. See Pet. App. 1a. The Texas Court of Criminal Appeals affirmed his conviction and sentence, and this Court denied review. See *Clark* v. *State*, 881 S.W.2d 682 (1994) (en banc), cert. denied, 513 U.S. 1156 (1995). Clark sought and was denied habeas corpus relief in the Texas courts. See *Clark* v. *Johnson*, 202 F.3d 760, 763 (5th Cir.), cert. denied, 531 U.S. 831 (2000).

Clark then filed a petition for a writ of habeas corpus under 28 U.S.C. 2254 in the United States District Court for the Northern District of Texas. The court appointed petitioner Taylor to represent Clark in the

habeas corpus proceeding pursuant to 21 U.S.C. 848(q)(4)(B), which authorizes federal courts to appoint counsel to represent indigent prisoners who pursue Section 2254 relief. The district court denied the petition, and both the district court and the court of appeals declined to issue a certificate of appealability. See Pet. App. 1a-2a. This Court again denied review. 531 U.S. 831 (2000).

Clark submitted a clemency application to the Texas Board of Pardons and Paroles and sought a reprieve of execution from the Governor of Texas. On January 9, 2001, the Board of Pardons and Paroles denied clemency, the Governor of Texas declined to grant a reprieve, and Clark was executed. See Pet. App. 21a-22a.

b. Taylor then submitted to the district court a voucher requesting compensation and reimbursement for expenses incurred in connection with Clark's state clemency application and his request for a reprieve from the Texas Governor. See Pet. App. 2a, 21a-22a. The district court denied the request. Relying on *Chambers* v. *Johnson*, 133 F. Supp. 2d 931 (E.D. Tex. 2001), the court held that 21 U.S.C. 848(q) does not authorize compensation of federally appointed counsel for representation of state prisoners in state clemency proceedings. See Pet. App. 2a.

c. Taylor appealed. The court of appeals directed the parties to brief the question whether the court had appellate jurisdiction to review the district court's denial of payment to Taylor for his "activities" in "state clemency matters." Pet. App. 2a. In response, the Office of the Attorney General of Texas informed the court that Texas had no "interest or role" in the appeal. *Ibid.* Taylor's brief discussed both the jurisdictional question on which the court of appeals had requested briefing and the question whether "21 U.S.C. 848(q)

require[s] a federal court to pay appointed capital habeas corpus counsel for state clemency representation." See Pet. C.A. Br. iii, 8-17, 18-39.

The court of appeals affirmed the district court's order denying compensation. See Pet. App. 1a-8a. The court first concluded that it had jurisdiction to review the order. *Id.* at 2a-5a. Next, the court noted that 21 U.S.C. 848(q)(8) provides that counsel appointed to represent prisoners under Section 848(q)(4) "shall represent the defendant through 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." Pet. App. 5a (quoting 21 U.S.C. 848(q)(8)). The court explained that whether the phrase "proceedings for executive or other clemency" includes state clemency proceedings was a question of first impression in the Fifth Circuit. *Id.* at 6a.

The court observed, however, that the Eleventh Circuit had held that the phrases "subsequent stage[s] of available judicial proceedings" and "competency proceedings and proceedings for executive or other clemency" do "not encompass within their meanings any proceedings convened under the authority of a State." Pet. App. 6a (quoting *In re Lindsey*, 875 F.2d 1502, 1506 (11th Cir. 1989)). The court further observed that *Lindsey* had been cited favorably in *Sterling* v. *Scott*, 57 F.3d 451, 458 (5th Cir. 1995), cert. denied, 516 U.S. 1050 (1996), which held that an indigent state death row petitioner is not entitled to counsel under Section 848(q) for the purpose of exhausting his post-conviction state remedies. Pet. App. 6a. The court explained that *Sterling*, 57 F.3d at 457, had read Section 848(q)(8) in light of Section 848(q)(4)(B), which provides a right to appointed counsel only in federal proceedings. Pet.

App. 6a-7a. The court noted that the courts in *Lindsey* and *Sterling* had agreed that to permit death row petitioners to obtain federally appointed counsel to represent them in state post-conviction proceedings would effectively supplant state-court systems for the appointment of counsel in collateral review proceedings. *Id.* at 7a. The court further noted that, in *Chambers*, 133 F. Supp. 2d at 935-936, the district court had applied the principles announced in *Lindsey* and *Sterling* to deny reimbursement for representation of a death row petitioner in state clemency proceedings, and that the district court in this case had relied on *Chambers* in denying petitioner's claim for payment. Pet. App. 7a.

The court of appeals agreed with petitioner that *Sterling* does not resolve the precise question presented in this case, but the court nevertheless found *Sterling*'s discussion of Section 848(q) and its reasons for declining to read the section broadly "instructive." Pet. App. 7a. Citing *Cantu-Tzin* v. *Johnson*, 162 F.3d 295, 298-299 (5th Cir. 1998), cert. denied, 525 U.S. 1091 (1999), the court reasoned that the Fifth Circuit has continued to construe Section 848(q) narrowly, Pet. App. 7a, and concluded that "the phrase 'proceedings for executive or other clemency as may be available to the defendants' as it appears in § 848(q)(8) does not apply to state clemency proceedings" (*id.* at 8a). The court of appeals therefore affirmed the district court's order. *Ibid.*

2. a. A Texas state jury found Juan Soria guilty of murder, and he was sentenced to death. The Texas Court of Criminal Appeals initially reformed Soria's sentence to life imprisonment. See *Soria* v. *State*, No. 69,679 (June 8, 1994) (per curiam). On rehearing, however, the court reinstated the death sentence, and this Court denied review. See *Soria* v. *State*, 933 S.W.2d 46

(Tex. Crim. App. 1996), cert. denied, 520 U.S. 1253 (1997). Soria then sought and was denied habeas corpus relief in the Texas courts. See *Soria* v. *Johnson*, 207 F.3d 232, 236 (5th Cir.), cert. denied, 530 U.S. 1286 (2000).

On December 17, 1998, pursuant to 21 U.S.C. 848(q), the United States District Court for the Northern District of Texas appointed petitioners Taylor and Harris to represent Soria in habeas corpus proceedings under 28 U.S.C. 2254. On January 15, 1999, Soria filed a petition for a writ of habeas corpus. The district court denied the petition, and the district court and the court of appeals denied a certificate of appealability. See 207 F.3d at 236-251.

On June 14, 2000, Soria filed a petition for a writ of certiorari and moved for a stay of execution. While the petition was pending, Soria submitted an application for clemency to the Texas Board of Pardons and Paroles, which denied the application. See Pet. 6. State prosecutors subsequently moved in state court to have Soria examined by a psychologist, but no evaluation was conducted because Soria refused to cooperate. See Pet. 6-7. Soria eventually met with the defense psychologist, who concluded that he was not mentally competent to be executed. See Pet. 7. On July 25, 2000, the day Soria met with the defense psychologist, this Court denied his petition for certiorari and his motion for a stay of execution. See *Soria* v. *Johnson*, 530 U.S. 1286 (2000).

On July 26, 2000, petitioners filed a motion to determine competency in a Texas state court. Petitioners also filed pleadings in the Texas Court of Criminal Appeals, the United States Court of Appeals for the Fifth Circuit, and this Court. See Pet. 7; Pet. App. 29a.

This Court denied relief, *In re Soria*, 530 U.S. 1287 (2000), and Soria was executed that evening.

b. Following Soria's execution, petitioners each sought compensation from the district court for their representation of Soria in the clemency and competency proceedings. The district court initially authorized payment to Harris. See Pet. App. 13a-14a. On November 3, 2000, however, the district court ordered Taylor to show cause why his request for attorneys' fees and expenses should not be denied, and ordered Harris to show cause why the court should not vacate its prior approval of attorneys' fees and expenses, and why it should not order a refund of such payments. See Order to Show Cause 1-3 (Nov. 3, 2000). The order did not mention compensation for representation in competency-to-be-executed proceedings but referred only to compensation for representation in "a state clemency proceeding" or "state clemency proceedings." *Ibid.* On April 9, 2001, after considering petitioners' response, the district court entered an order denying Taylor's request for compensation and reimbursement, vacating its earlier approval of Harris's fees and expenses, and directing Harris to refund $7600 in fees and $290.78 in expenses. Pet. App. 13a-14a. That order also did not mention the request for compensation for the competency hearings but referred only to "State executive clemency proceedings" and "State clemency proceedings." *Ibid.*

c. Petitioners appealed. The court of appeals initially dismissed the appeal for want of jurisdiction. See Pet. App. 10a. Petitioners moved for reconsideration, however, and, following the court's decision in *Clark*, see *id.* at 1a-8a, the court granted the motion for reconsideration and reinstated petitioners' appeal. See *id.* at 9a-10a. The court explained that it was rein-

stating the appeal because, in *Clark*, see *id.* at 2a-5a, the court had concluded that it had appellate jurisdiction over an appeal from a district court order denying compensation under Section 848(q)(4)(B). *Id.* at 10a. Then, relying on its merits decision in *Clark*, the court held that the district court "correctly concluded that § 848(q)(8) [does] not authorize compensation for attorneys in state clemency and competency proceedings." *Ibid.* The court therefore affirmed the lower court's order denying compensation. *Ibid.*

DISCUSSION

The court of appeals correctly held that 21 U.S.C. 848(q) does not provide for federally appointed and funded counsel to represent state prisoners in state clemency proceedings. The court's decision does not squarely conflict with the decision of any other court of appeals, and it is consistent with the decisions of this Court. Accordingly, the Court should deny the petition for a writ of certiorari.[1]

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[1] The question whether Section 848(q) authorizes compensation for representation in state *competency-to-be-executed* (in addition to state *clemency*) proceedings is not properly presented. The district court's order to show cause in *Soria* referenced only claims for attorneys' fees and expenses in connection with a "state clemency proceeding" or "state clemency proceedings." See Order to Show Cause 1-3. Similarly, the district court's order denying Taylor's claim for compensation and directing Harris to refund payments already made referenced only "State executive clemency proceedings" or "State clemency proceedings." See Pet. App. 13a-14a. The order of the court of appeals referenced "competency" only in passing (*id.* at 10a), and its decision rested solely on its precedent in *Clark*, *id.* at 5a-8a, which involved only clemency proceedings. There is, accordingly, no reason for the Court to depart from its usual practice of "not decid[ing] in the first instance issues not decided below." *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999).

A. Section 848(q) Does Not Authorize Federally Appointed And Funded Counsel To Represent State Prisoners In State Clemency Proceedings

Petitioners incorrectly contend (Pet. 9-12) that 21 U.S.C. 848(q)(8) "plainly" provides for federally appointed counsel to represent state prisoners in state clemency and competency-to-be executed proceedings. When Section 848(q)(8) is construed in light of other relevant provisions of Section 848(q), it is clear that the statute does not authorize federally appointed and funded counsel to represent state prisoners in state proceedings.

Section 848(q) contains a variety of provisions related to appellate procedures in federal capital cases and the appointment and compensation of counsel in federal capital proceedings. Sections 848(q)(1)-(3) describe the appellate procedures that govern federal capital cases, and Sections 848(q)(4)-(10) are concerned with appointment and compensation of counsel. Section 848(q)(4) provides:

> (A) 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 at any time * * * shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).
>
> (B) In any post conviction proceeding under section 2254 or 2255 of Title 28 seeking to vacate

> or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

21 U.S.C. 848(q)(4). Paragraphs (5), (6), and (7) concern the qualifications that are required for appointed counsel, and paragraphs (9) and (10) concern reimbursement for necessary services and compensation of counsel. See 21 U.S.C. 848(q)(5)-(7), (9), (10). Section 848(q)(8), on which petitioners rely, concerns representation by counsel in proceedings subsequent to the collateral review proceedings for which counsel was appointed. It 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, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

21 U.S.C. 848(q)(8).

Petitioners argue (Pet. 9-12) that the plain meaning of "such competency proceedings and proceedings for

executive or other clemency as may be available" in Section 848(q)(8) includes both state and federal proceedings. Accordingly, petitioners claim that they are entitled to compensation for representing Clark and Soria during their state clemency proceedings and Soria in competency-to-be-executed proceedings. See *Hill* v. *Lockhart*, 992 F.2d 801, 803 (8th Cir. 1993) (affirming denial of compensation for representation in state clemency proceedings but establishing criteria for payment in future cases); *Gordon* v. *Vasquez*, 859 F. Supp. 413, 418 (E.D. Cal. 1994) (holding that, under plain meaning of statute, federally appointed attorneys are to be paid for representing defendant in state forums); *Strickler* v. *Greene*, 57 F. Supp. 2d 313, 315 (E.D. Va. 1999) (holding that statute entitles defendant to representation by federally paid attorneys in state clemency proceedings); *Lowery* v. *Anderson*, 138 F. Supp. 2d 1123, 1125-1126 (S.D. Ind. 2001) (same).

Petitioners' argument, however, incorrectly reads the language of Section 848(q)(8) in isolation from its context and the remaining provisions of Section 848(q). That approach ignores the well established principle that a statute must be read as a whole because "the meaning of statutory language, plain or not, depends on context." *Hollaway* v. *United States*, 526 U.S. 1, 7 (1999) (quoting *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994), and *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)). See, *e.g.*, *Pollard* v. *E.I du Pont de Nemours & Co.*, 532 U.S. 843, 852 (2002); *Textron Lycoming Reciprocating Engine Div.* v. *United Automobile Workers*, 523 U.S. 653, 657 (1998); *Bailey* v. *United States*, 516 U.S. 137, 145 (1995).

The surrounding provisions of Section 848(q) leave no doubt that the Section is concerned with the conduct of *federal* capital review proceedings. As noted above,

Sections 848(q)(1) through (3) specify the procedures governing appellate review of capital cases. Those provisions plainly apply only to federal cases, even though they nowhere use the adjective "federal" to limit their scope. Section 848(q)(4)(A) also contains an implicit limitation to federal cases. It mandates appointment of counsel for indigent defendants "in every criminal action in which a defendant is charged with a crime which may be punishable by death" (21 U.S.C. 848(q)(4)(A)), but Congress obviously did not intend for federal courts to appoint, and the federal government to fund, counsel in state capital trials and direct appeals. Section 848(q)(4)(B), the provision under which petitioners were appointed, also deals only with federal proceedings: it authorizes appointment of counsel only in federal collateral review proceedings under 28 U.S.C. 2254 and 2255. See 21 U.S.C. 848(q)(4)(B). In addition, Sections 848(q)(5) and (6), which establish minimum qualifications for appointed counsel, contemplate that counsel will represent the defendant in federal, not state, proceedings because they require that counsel have experience in the relevant federal courts. See 21 U.S.C. 848(q)(5) ("at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is tried for not less than five years"); 21 U.S.C. 848(q)(6) ("at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years").

In light of Section 848(q)'s focus on federal capital cases and on state capital cases only insofar as they are subject to collateral attack in the federal courts, those courts that have read Section 848(q) as a whole have confined the scope of Section 848(q)(8) to proceedings in federal forums. See *Sterling*, 57 F.3d at 458; *Lindsey*, 875 F.2d at 1506; see also *King* v. *Moore*, No.

02-13717-P (11th Cir. July 24, 2002) (denying appointment of counsel to pursue state clemency proceedings based on *Lindsey* and *Clark*).

That construction of Section 848(q)(8) is also supported by traditional principles of both statutory interpretation and federalism. It is well settled that "Congress is unlikely to intend any radical departures from past practice without making a point of saying so." *Jones* v. *United States*, 526 U.S. 227, 234 (1999); see *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 543 (1994) (applying that principle in construing the bankruptcy code); *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 693-694 (1983) (applying that principle in construing statute governing attorney's fee award). Petitioners have provided no evidence—and the government is aware of none—that Congress has *ever* authorized the federal courts to appoint, and the federal government to fund, counsel to pursue state remedies in state clemency or competency-to-be-executed proceedings. Accordingly, the reading of Section 848(q) advanced by petitioners would be a radical departure from past practice, and the Fifth and Eleventh Circuits correctly declined to adopt that reading without a clearer indication of congressional intent. See, *e.g.*, *Sterling*, 57 F.3d at 457 ("we are reluctant to say that § 848(q)(8) should be read to express congressional intent for so sweeping an idea that the federal government will pay attorneys for a state defendant to pursue state remedies in state courts").

Closely related considerations of federalism likewise support that conclusion. Just as Congress does not undertake a radical departure from past practice without making its intent clear, it is presumed not to alter the federal-state balance without a similarly clear expression of intent. See *United States* v. *Bass*, 404 U.S.

336, 349 (1971); *FTC* v. *Bunte Bros.*, 312 U.S. 349, 351, 354-355 (1941); *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 513 (1940). Where statutory intent is ambiguous, the Court will not attribute to Congress an intent to intrude on state governmental functions. See *Raygor* v. *Regents of the Univ. of Minn.*, 122 S. Ct. 999, 1007 (2002); *Gregory* v. *Ashcroft*, 501 U.S. 452, 470 (1991). This principle "is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory*, 501 U.S. at 461.

In the present case, as two courts of appeals, including the court below in an earlier case, have recognized, see *Lindsey*, 875 F.2d at 1506-1507; *Sterling*, 57 F.3d at 457-458, the interpretation of Section 848(q) advanced by petitioners would dramatically alter the traditional federal-state balance. As the court said in *Sterling*, 57 F.3d at 457, in the context of the proposed federal appointment of counsel to pursue unexhausted state remedies:

> It would seem indelicate on our part, absent an express intent on the part of Congress, to permit intrusion into the state judicial process by having lawyers who are practicing before state courts, representing state court defendants and petitioners pursuant to state court rules, to have their qualifications set by federal statute (21 U.S.C. § 848(q)(5), (6)) and to be answerable, at least in part, to federal judges for their conduct. Counsel who are appointed and qualified and whose pay is approved by federal judges are ultimately controlled by and responsible to federal courts. It is not too difficult to see that the hand of the federal

> court may well find its way further into state court proceedings and the independence of state courts unnecessarily interfered with and compromised thereby.

Such concerns about federalism apply with equal force in the context of clemency proceedings.

Although Texas disclaimed any interest or role in the instant case, see Pet. ii, other States might reasonably be concerned that the federal courts would encroach upon state sovereignty if the federal government appointed and paid for counsel for state death row prisoners who are pursuing state remedies in state forums. The conduct of the State of California in *Gordon* v. *Vasquez*, *supra*, is instructive. In that case, the issue was whether the district court would provide federal funds to a state capital habeas corpus petitioner to investigate unexhausted state claims. The court initially ordered the Attorney General of California to brief the issue, but then concluded that the State was not an interested party, ordered that the State's briefing and appearance be stricken, and remanded the case to a federal magistrate judge. See 859 F. Supp. at 415. California, however, did not acquiesce in the court's finding that it was not an interested party, but rather sought to appeal the order striking its appearance. See *ibid.*[2]

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[2] Petitioners argue (Pet. 11-12) that the statutory phrase "proceedings for executive or other clemency as may be available to the defendant" (Section 848(q)(8)) must encompass state clemency proceedings because only executive clemency is available in the federal system. Congress may, however, have included the words "or other" to ensure counsel not just in those clemency proceedings currently available in the federal system but also in whatever federal clemency proceedings might become available. Absent any other support for the view that Congress intended Section 848(q)

B. The Court of Appeals' Decision Does Not Directly Conflict With The Eighth Circuit's Decision In *Hill* v. *Lockhart*

Contrary to petitioners' contention (Pet. 13-17), there is no direct conflict among the courts of appeals on the question presented in the petition. In *Hill*, 992 F.2d at 803-804, the court *affirmed* the district court's *denial* of compensation to the counsel-claimant. The portion of the opinion on which petitioners rely was therefore essentially advisory, establishing conditions under which compensation might be available in the future.[3]

Moreover, the Eighth Circuit in *Hill* interpreted an earlier version of Section 848(q) than the one the Fifth Circuit interpreted in this case. That version of the statute provided that counsel would be compensated only for services that were "reasonably necessary." See 21 U.S.C. 848(q)(10) (1988); *Hill*, 992 F.2d at 803. Based on that language, and the court's concern that a "state that has elected to impose the death penalty should provide adequate funding for the procedures it has adopted to properly implement that penalty," the court established three prerequisites for compensation

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to authorize federally appointed and funded counsel in state proceedings, Congress's inclusion of the phrase "or other" is not a sufficiently clear indication of Congressional intent to depart radically from past practice and to encroach upon traditional principles of federalism in that fashion.

[3] District courts in the Eighth Circuit are generally compensating counsel for representation in state proceedings when the criteria set out in *Hill* are satisfied. See, *e.g.*, *Lingar* v. *Bowersox*, No. 89-1954-C-7 (E.D. Mo. May 11, 2000) (order granting motion for attorney's fees for representation in state clemency proceedings); *Rodden* v. *Delo*, No. 91-0384-CV-W-9 (W.D. Mo. Feb. 11, 1999) (approving compensation for counsel to seek executive clemency from Governor of Missouri).

for services performed in connection with state clemency and competency-to-be-executed proceedings: (1) the underlying federal habeas petition must not be frivolous: (2) state law must not provide for compensation for such services; and (3) in most cases, the request for compensation must precede the performance of the services. *Ibid.* As petitioner notes (Pet. 13-14 n.3), under the current version of Section 848(q), the "reasonably necessary" limitation is no longer included in the provision governing compensation for counsel's time. See 21 U.S.C. 848(q)(10). It is far from clear that the Eighth Circuit would construe Section 848(q) to authorize compensation by the federal government for counsel's services in connection with state proceedings absent a statutory provision that supports the three limitations that the court believed necessary to prevent abuse of such a funding provision. Thus, it is not certain that the Eighth Circuit would interpret the current version of Section 848(q) to authorize compensation for representation in state proceedings.

In any event, there is no evidence that either petitioner requested compensation before representing Clark and Soria in their respective state clemency and competency-to-be-executed proceedings. It therefore appears that the Eighth Circuit, if it had applied *Hill*, would have denied petitioners' requests for compensation. Because petitioners would not be entitled to compensation even under the Eighth Circuit's approach, this case is not an appropriate vehicle to resolve any tension between that approach and the approach of the Fifth and Eleventh Circuits.

C. The Court of Appeals' Decision Is Fully Consistent With *McFarland* v. *Scott*

Petitioners also mistakenly contend (Pet. 18-22) that the decision of the court of appeals "runs counter" to this Court's decision in *McFarland* v. *Scott*, 512 U.S. 849 (1994). *McFarland* did not address whether Section 848(q) authorizes federally appointed counsel to represent state prisoners in state proceedings. *McFarland* held only that a state capital defendant may invoke his right under Section 848(q)(4)(B) to appointed counsel in *federal* habeas corpus proceedings before filing a full, formal habeas petition by moving for the appointment of habeas counsel, and that a district court may enter a stay of execution to permit that invocation. 512 U.S. at 859.

To the extent that *McFarland* has any relevance to the question presented in this case, it counsels against petitioners' proposed interpretation of Section 848(q). Petitioners' interpretation would permit abuse of the Court's holding in *McFarland* that counsel may be appointed before a federal habeas petition is actually filed. Under petitioners' interpretation, a state capital defendant who had not yet exhausted his available state remedies could file a motion in federal court for the appointment of habeas counsel under Section 848(q)(4)(B) and, once federal habeas counsel was appointed, use that counsel to pursue his unexhausted state claims in state court. It was the potential for such abuse of the right at issue in *McFarland* that led to two courts of appeals to reject the interpretation of Section 848(q)(8) that petitioners now propose. See *Lindsey*, 875 F.2d at 1506-1507; *Sterling*, 57 F.3d at 456-458. There is therefore no merit to petitioners' claim that

the decision of the court of appeals "runs counter" to this Court's decision in *McFarland*.

Petitioners advance policy arguments (Pet. 22-27) that counsel play an important role in state clemency and competency proceedings. But those policy arguments are properly addressed to state legislatures, rather than to this Court. It is up to the States, and not the federal government, to determine whether counsel should be appointed to represent indigent state prisoners in state proceedings related to state-imposed death sentences and to defray the costs of a decision that counsel should be provided. In fact, many States already provide compensation for representation in state clemency and competency-to-be-executed proceedings, either by statutes or rules that specifically address such representation[4] or as part of the general responsibilities of the state public defender office.[5]

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[4] See, *e.g.*, Cal. Sup. Ct. Policies Regarding Cases Arising from Judgments of Death, Policy 3, § 2.1 (Jan. 16, 2002) (clemency and competency); Colo. Rev. Stat. § 16-8-303(1)(b) (2001) (competency); Fla. Stat. Ann. §§ 27.702, 922.07, 925.035(4) (West 2001 & Supp. 2002) (clemency and competency); N.M. R. Crim. P. 5-802(F)(1) NMRA (2002) (habeas corpus actions, which include competency claims); N.Y. Correct. Law § 656(3) (McKinney 1987 & Supp. 2000) (competency); Ohio Rev. Code Ann. § 2949.28(B)(3) (Anderson 1999) (competency); Tenn. Code Ann. § 40-30-306 (1997) (clemency and competency); Wyo. Stat. Ann. § 7-13-902(h) (Michie 1977 & Supp. 1995) (competency).

[5] See, *e.g.*, Ky. Rev. Stat. Ann. § 31.010 (Michie 1998) (interpreted to cover competency); N.C. Gen. Stat. § 7A-451(c) (1999 & Supp. 2000) (post-conviction remedies, which include competency proceedings); N.C. Indigent Defense Service Rule 2C.2 (interpreted to cover clemency and competency); Pa. R. Crim. P. 904(C) (interpreted to cover competency); Utah Code Ann. § 78-35a-202 (1996 & Supp. 2002) (same); Va. Code Ann. § 19.2-163.7 (Michie

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2002

2000 & Supp. 2001) (same); Wash. Rev. Code Ann. § 10.73.150(3) (West 2002) (same).