SUPREME COURT OF THE UNITED STATES

No. 07–8521

EDWARD JEROME HARBISON, PETITIONER *v.*
RICKY BELL, WARDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[April 1, 2009]

JUSTICE THOMAS, concurring in the judgment.

I agree that under 28 U. S. C. §2253(c)(1)(A), a certificate of appealability was not required to seek appellate review of the issue in this case. See *ante*, at 2–3; see also *post*, at 1 (SCALIA, J., concurring in part and dissenting in part). I further agree with the Court that 18 U. S. C. §§3599(a)(2) and (e) entitle eligible state postconviction litigants to federally funded counsel in available state clemency proceedings. See *ante*, at 2, 5. As even JUSTICE SCALIA acknowledges in his dissenting opinion, the statute "contains no express language limiting its application to proceedings in a federal forum." *Post*, at 8; see also *ante*, at 1 (ROBERTS, C. J., concurring in judgment) ("Nothing in the text of §3599(e) excludes proceedings for available *state* clemency . . ."). By its express terms, the statute "entitle[s]" eligible litigants to appointed counsel who "shall represent the defendant . . . in such . . . proceedings for executive or other clemency as may be available to the defendant." §§3599(a)(2), (e). Because the statute applies to individuals challenging either state or federal convictions, see §3599(a)(2), and because state clemency is the only clemency available to those challenging state convictions, §§3599(a)(2) and (e) necessarily entitle eligible state postconviction litigants to federally funded counsel in state clemency proceedings.

I disagree, however, with the assumption that §3599 must be limited to "federal" proceedings in at least some respects. *Ante*, at 6; *ante*, at 1–2 (ROBERTS, C. J., concurring in judgment); *post*, at 3–4. The majority and dissent read such a limitation into subsection (a)(1) of the statute. But that subsection, like subsection (a)(2), "contains no language limiting its application to *federal* capital defendants. It provides counsel to indigent defendants in '*every* criminal action in which a defendant is charged with a crime which may be punishable by death.'" *Post*, at 3 (quoting §3599(a)(1)). The majority, then, compounds its error by attempting to discern some distinction between subsections (a)(1) and (a)(2), to which it properly declines to add an extratextual "federal" limitation, see *ante*, at 5–6. The dissent seizes on this inconsistency between the majority's interpretation of subsections (a)(1) and (a)(2), but responds by incorrectly reading a parallel "federal" limitation into subsection (a)(2), see *post*, at 3–4. In the dissent's view, "it is perfectly reasonable to assume" that subsection (a)(2) is limited to federal postconviction proceedings—including clemency proceedings—"even where the statute contains no such express limitation." *Post,* at 3.

THE CHIEF JUSTICE, in contrast, finds a "federal" limitation in a clause of subsection (e) that is not before this Court in order to cabin the reach of today's decision. He observes that the text of subsection (e) includes no "federal" limitation with respect to any of the proceedings listed in that subsection. But THE CHIEF JUSTICE finds a way to avoid this "problematic result" by adding a different limitation to §3599. In his view, the "best" reading of the phrase "subsequent stage[s] of available judicial proceedings" is one that excludes "state judicial proceedings after federal habeas" proceedings because they are "new"—not "subsequent"—judicial proceedings. *Ante*, at 2. Without this limitation, THE CHIEF JUSTICE explains, "[he]

might be forced to accept the Government's invitation to insert the word 'federal' into §3599(e)—a limitation that would have to apply to clemency as well"—because he finds it "highly unlikely that Congress intended" for there to be no federal limitation at all in subsection (e). *Ante,* at 1–2.

This Court is not tasked with interpreting §3599 in a way that it believes is consistent with the policy outcome intended by Congress. Nor should this Court's approach to statutory construction be influenced by the supposition that "it is highly unlikely that Congress intended" a given result. See *ante,* at 1 (ROBERTS, C. J., concurring in judgment). Congress' intent is found in the words it has chosen to use. See *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U. S. 83, 98 (1991) ("The best evidence of [Congress'] purpose is the statutory text adopted by both Houses of Congress and submitted to the President"). This Court's interpretive function requires it to identify and give effect to the best reading of the words in the provision at issue. Even if the proper interpretation of a statute upholds a "very bad policy," it "is not within our province to second-guess" the "wisdom of Congress' action" by picking and choosing our preferred interpretation from among a range of potentially plausible, but likely inaccurate, interpretations of a statute. *Eldred* v. *Ashcroft*, 537 U. S. 186, 222 (2003); see also *TVA* v. *Hill*, 437 U. S. 153, 194 (1978) ("Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute"). "Our task is to apply the text, not to improve upon it." *Pavelic & LeFlore* v. *Marvel Entertainment Group, Div. of Cadence Industries Corp.*, 493 U. S. 120, 126 (1989).

This statute's silence with respect to a "federal" limitation in no way authorizes us to assume that such a limitation must be read into subsections (a) and (e) in order to

blunt the slippery-slope policy arguments of those opposed to a plain-meaning construction of the provisions under review, see *ante*, at 8–9. And Congress' silence certainly does not empower us to go even farther and incorporate such an assumption into the text of these provisions. *Post*, at 7–8. Moreover, the Court should not decide a question irrelevant to this case in order to pre-empt the "problematic" results that might arise from a plain-text reading of the statutory provision under review. See *ante*, at 2 (ROBERTS, C. J., concurring in judgment). Whether or not THE CHIEF JUSTICE's construction of the "subsequent stage of available judicial proceedings" clause of subsection (e) is correct, it is irrelevant to the proper interpretation of the clemency clause of subsection (e). Even if the statute were to authorize federal postconviction counsel to appear in state proceedings other than state clemency proceedings, a question not resolved by today's decision, that conclusion would not provide a legitimate basis for adopting the dissent's atextual interpretation of the clemency clause of subsection (e). The "best" interpretation of the clemency clause does not turn on the unresolved breadth of the "subsequent stage of available judicial proceedings" clause.

Rather, the Court must adopt the interpretation of the statute that is most faithful to its text. Here, the absence of a "federal" limitation in the text of subsections (a) and (e) of §3599 most logically suggests that these provisions are not limited to federal clemency proceedings. "If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think is the preferred result." *Lamie* v. *United States Trustee*, 540 U. S. 526, 542 (2004) (internal quotation marks and ellipses omitted). Accordingly, I concur in the judgment.