Clarifying the Confusion of 21 U.S.C. § 848(q): When Indigent State Clemency Petitioners Are Entitled to Federally-Funded Counsel

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Article II, Section 2 of the United States Constitution grants a federal clemency power to the president. Similarly, each state vests a clemency power in one of its branches of government for cases arising under state law.[1] Every state has its own rules and procedures governing

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[1] *See* RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 840 (Carolina Academic Press 2d ed. 2001) ("all states provide for some form of clemency").

clemency[2] hearings and the Supreme Court of the United States has held that the discretionary nature of clemency proceedings means that state clemency hearings are "beyond judicial review."[3] They are granted as a matter of grace rather than right, and are not subject to constitutional requirements such as due process or the effective assistance of counsel.[4] State clemency proceedings, though discretionary, are nevertheless formal hearings in which a petitioner might require representation in order to ensure meaningful review of his case.[5] In 1988, Congress addressed this concern when it passed § 848 of the Anti-Drug Abuse Act, which, on its face, arguably guarantees federally-funded counsel to indigent capital defendants in state clemency proceedings.[6]

A circuit split has developed, however, as to whether the Act should be interpreted to provide such federally-funded representation. Notwithstanding the statutory language, some circuit courts continue to prohibit federally-funded counsel to indigent state clemency petitioners in capital cases. Although the Supreme Court has yet to resolve the split, the issue continues to gain steam in circuit courts. Most recently, the Tenth Circuit sitting *en banc* reversed its original position and determined that the statutory language indeed does, under certain circumstances, require federally-funded counsel for indigent state

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[2] Some confusion exists regarding the precise definition of relevant vocabulary terms such as "executive clemency," "pardon," "amnesty," "commutation," and "reprieve." For purposes of this article, "executive clemency" is the comprehensive general term, encompassing the others.

[3] Victoria J. Palacios, *Faith in Fantasy: The Supreme Court's Reliance on Commutation to Ensure Justice in Death Penalty Cases*, 49 VAND. L. REV. 311, 337 (1996). *See also* Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 464 (1981) (observing that clemency decisions "have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review"); Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 7-8 (1979) (holding that the executive branch conducts clemency hearings, free from appeal and collateral relief proceedings).

[4] *See* Ohio Adult Parole Auth. v. Woodward, 523 U.S. 272 (1998). The modern Court's understanding of the clemency power is a reflection of Chief Justice John Marshall's view of clemency. *See, e.g.*, *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866) (holding that executive clemency power is unlimited, with impeachment serving as its sole check); United States v. Wilson, 32 U.S. (7 Pet.) 150, 160 (1833) (holding that the federal clemency power is bound to the duties of the executive branch and is free from judicial review as well as the strict, inflexible procedural rules that govern the judicial process).

[5] *See* Palacios, *supra* note 3, at 345-46 (noting that the formality of some states' clemency procedures makes counsel necessary); Stephen E. Silverman, Note, *There Is Nothing Certain Like Death in Texas: State Executive Clemency Boards Turn a Deaf Ear to Death Row Inmates' Last Appeals*, 37 ARIZ. L. REV. 375, 398 (1995) (arguing that the assistance of competent counsel is required for a meaningful clemency hearing).

[6] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001(b), 102 Stat. 4181, 4393-94 (1989) (to be codified at 21 U.S.C. § 848(q)).

clemency petitioners.[7] This article examines the reasons behind some courts' decisions to stray from the statutory plain language and proposes a solution that adequately deals with the concerns of the courts without violating the language of the statute.

I present a brief background of the Anti-Drug Abuse Act of 1988 in Part I, as well as the relevant statutory language dealing with federally-funded counsel for indigent state clemency petitioners. In Part II, I examine the existing circuit split. I first present the two original diverging cases, *In re Lindsey*[8] and *Hill v. Lockhart*,[9] and then trace the trend of recent court decisions that have generally favored *Lindsey*'s reasoning, thus denying federally-funded counsel for indigent state clemency petitioners in capital cases.

In Part III, I show that the Eleventh Circuit's reasoning in *Lindsey* was flawed because its concerns are potentially applicable to judicial proceedings, but not to clemency proceedings. Next, I argue that the *Lindsey* line of cases would be more convincing had the courts based their denial of federally-funded representation at state clemency proceedings on federalism concerns rather than on an assertion of the ambiguity of the statutory language.

Finally, in Part IV, I propose a solution that resolves the circuit split in a way that adequately addresses federalism concerns without violating the plain language of the statute.

I. THE ANTI-DRUG ABUSE ACT OF 1988

Although the Constitution requires states to provide representation for indigent defendants at trial and on direct appeal, the Supreme Court has held that the constitutional mandate does not extend to post-conviction judicial proceedings.[10] The Court has also held, however, that state statutory grants of post-conviction representation for indigent state petitioners are constitutionally acceptable.[11] Like petitioners in state

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[7] *See* Hain v. Mullin, 436 F.3d 1168 (10th Cir. 2006) ("Hain v. Mullin II").

[8] 875 F.2d 1502 (11th Cir. 1989).

[9] 992 F.2d 801 (8th Cir. 1993).

[10] *See* Douglas v. California, 372 U.S. 353 (1963) (holding that the constitutional right to counsel applies not only to trial, but also to the direct appeal of a conviction); Ross v. Moffitt, 417 U.S. 600 (1974) (holding that states are not constitutionally required to provide counsel for indigent defendants on discretionary appeals); Pennsylvania v. Finley, 481 U.S. 551 (1987) (holding that there is no constitutional right to counsel in post-conviction proceedings, and thus there is no constitutional right to effective assistance of counsel in those hearings either); Murray v. Giarratano, 492 U.S. 1 (1989) (Rehnquist, C.J., plurality opinion) (holding that the *Finley* doctrine applies to capital cases).

[11] *See, e.g.*, *Finley*, 481 U.S. at 559 (holding that states have discretionary power to establish post-conviction counsel programs).

collateral judicial proceedings,[12] state clemency petitioners are not constitutionally entitled to representation.[13] By passing the Anti-Drug Abuse Act of 1988, however, Congress arguably granted counsel to state indigent capital petitioners seeking clemency, as long as the petitioner first seeks federal habeas relief.[14]

A. Overview

Just days before the federal election of 1988, Congress spent the last moments of the congressional term finalizing the provisions of a new anti-drug act.[15] The act combined two of the hottest political issues of the day, the "War on Drugs" and the death penalty, and was passed by Congress on October 21-22, 1988.[16] President Reagan signed the Anti-Drug Abuse Act of 1988 into law on November 18.[17]

The statute provides that under certain circumstances the death penalty applies to criminals acting as a part of drug-related criminal enterprises. According to the statute, a criminal enterprise exists when (1) a person violates a felony drug law provision, and (2) such violation "is part of a continuing series of violations of the federal drug laws undertaken by the person in concert with five or more other persons regarding whom the person serves as organizer, supervisor or manager and from which that individual derives substantial income or resources."[18] The death penalty is an acceptable punishment when a person, acting as a part of a criminal enterprise, "intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual"[19] or law enforcement officer.[20]

In addition to making capital punishment a viable option for new cases, the Anti-Drug Abuse Act of 1988 also established procedural safeguards designed to prevent the unwarranted infliction of the death penalty. Some of these safeguards include a bifurcated guilt/sentencing proceeding,[21] the need for the government to prove at least two statutory

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[12] For purposes of this article, the terms "post-conviction proceeding (hearing)" and "collateral proceeding (hearing)" are synonymous.

[13] *See supra* note 4.

[14] *See* 21 U.S.C. § 848(q)(4)(B) (2000); 21 U.S.C. § 848(q)(8) (2000).

[15] *See* Peggy M. Tobolowsky, *Drugs and Death: Congress Authorizes the Death Penalty for Certain Drug-Related Murders*, 18 J. CONTEMP. L. 47, 51-53 (1992).

[16] *Id.* at 53.

[17] *Id.*

[18] *Id.* (citing 21 U.S.C. § 848(c)).

[19] 21 U.S.C. § 848(e)(1)(A).

[20] 21 U.S.C. § 848(e)(1)(B).

[21] 21 U.S.C. § 848(i).

aggravating factors beyond a reasonable doubt,[22] and a prohibition against imposing the death sentence on defendants who were less than 18 years old at the time the crime was committed, or who are mentally retarded or significantly mentally disabled.[23]

B. Counsel for Indigent Capital Defendants

Perhaps the most notorious statutory safeguard of the Anti-Drug Abuse Act of 1988, however, is its grant of counsel to indigent capital defendants. Not only does the statute explicitly require counsel where the Supreme Court has held counsel to be constitutionally compelled (i.e., at trial and on direct appeal),[24] but it also seems to require indigent capital defendants to be represented during state post-conviction judicial proceedings as well as state clemency hearings.[25]

Two specific provisions of the Act particularly strengthen the right to counsel for capital defendants. The first "made the appointment of counsel mandatory for indigent capital defendants pursuing federal habeas relief."[26] It states in pertinent part:

> In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, 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 . . . .[27]

Section 2254 of title 28 refers to petitioners who have been sentenced to death for state crimes and seek federal habeas corpus relief.[28] Section 2255 refers to those seeking similar relief from federal death sentences.[29] In order to qualify under section 2254, a petitioner must show that he has "exhausted the remedies available in the courts of the State; or there is an absence of available State corrective process; or circumstances exist that render such process ineffective to protect the rights of the applicant."[30]

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[22] 21 U.S.C. § 848(j).

[23] 21 U.S.C. § 848(l).

[24] 21 U.S.C. § 848(q)(4)(A).

[25] 21 U.S.C. § 848(q)(8). For Supreme Court precedent denying constitutional protections such as the right to counsel for petitioners in post-conviction proceedings, see *supra* note 4.

[26] Celestine Richards McConville, *The Right to Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel*, 2003 WIS. L. REV. 31, 46 (2003).

[27] 21 U.S.C. § 848(q)(4)(B).

[28] 28 U.S.C. § 2254 (2000).

[29] 28 U.S.C. § 2255 (2000).

[30] 28 U.S.C. § 2254(b). No such exhaustion requirement exists for § 2255 petitioners.

Having satisfied the state exhaustion requirements, an indigent capital petitioner is thus entitled under the statute to federally-appointed counsel during the habeas hearing.[31] This provision is constitutionally uncontroversial because it purports to use federal funds[32] to pay counsel representing indigent petitioners in federal habeas proceedings.

The controversy surrounds the second relevant statutory provision, in which the Anti-Drug Abuse Act of 1988 seems to extend the right of counsel for indigent capital petitioners past the federal habeas hearing. It appears to require federal funding for counsel representing indigent defendants in various subsequent state proceedings, including petitions for state clemency. The relevant provision states:

> 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*.[33]

While the plain language of the statute seems straightforward, courts are nevertheless divided as to whether this provision requires federally-funded counsel to represent indigent state clemency petitioners. Before presenting my proposed interpretation of the statute, it is first necessary to explore the arguments presented by the diverging judicial opinions,

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[31] For analysis of the state exhaustion requirement as a prerequisite for federal habeas relief, see *Rose v. Lundy*, 455 U.S. 509 (1982) (holding that (1) a federal habeas hearing can only proceed if all claims have been exhausted at the state level and (2) a federal habeas application with some exhausted claims and some unexhausted claims must be entirely denied). *See also* Duckworth v. Serrano, 454 U.S. 1 (1981) (holding that the state exhaustion requirement for federal habeas proceedings minimizes friction between state and federal judicial systems because the state has the first opportunity to correct its own violations of federal rights); Braden v. 30th Judicial Cir. Ct. of Ky., 410 U.S. 484 (1973) (noting that the exhaustion doctrine is designed to prevent federal disruption of state court proceedings and protect the role of state courts in upholding federal law); *Ex parte* Royall, 117 U.S. 241, 251 (1886) (noting that "the public good requires that [the relationship between state courts and federal courts] be not disturbed by unnecessary conflict").

[32] 21 U.S.C. § 848(q)(10) establishes the rate at which federal funds will be used to compensate attorneys representing indigent defendants under the statute.

[33] 21 U.S.C. § 848(q)(8) (emphasis added).

especially the reasoning that has led some circuits to declare that § 848(q) does not allow indigent state clemency petitioners to receive federally-funded representation, even though the plain language of the statute seems to indicate otherwise.

II. EVALUATION OF THE CIRCUIT SPLIT

Four circuits have heard cases involving federal compensation for counsel in state clemency proceedings under § 848(q)(8).[34] Three of those circuits originally held that the Anti-Drug Abuse Act of 1988 does not allow federal funding for the representation of indigent petitioners in state executive clemency hearings, but the Tenth Circuit has recently reversed its position.[35] Currently, the Eighth and Tenth Circuits interpret the statute as providing federally-funded counsel at state clemency proceedings at least under some circumstances.[36] However, the Fifth Circuit has concluded that the only plausible interpretation of the statute is to deny such representation at state clemency hearings.[37] In doing so, the Fifth Circuit adopted and extended the holding in *In re Lindsey*,[38] a 1989 Eleventh Circuit case that did not directly involve a dispute over state clemency proceedings.

A. The Reasoning of In re Lindsey

Petitioner Lindsey, a death row prisoner in Alabama, sought federal court-appointed counsel under § 848(q) for state judicial proceedings following his federal habeas hearing.[39] Lindsey filed a federal habeas corpus petition without first having exhausted his claims in state court. After his federal habeas hearing, Lindsey requested that the federal district court appoint counsel to represent him under the provision of § 848(q)(8), which states that indigent capital petitioners are entitled to federally funded counsel in all "subsequent stage[s] of available judicial proceedings"[40] following federal habeas petitions entered under 28

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[34] *See* Hain v. Mullin II, 436 F.3d 1168 (10th Cir. 2006); King v. Moore, 31 F.3d 1365 (11th Cir. 2002); Clark v. Johnson, 278 F.3d 459 (5th Cir. 2002); Hill v. Lockhart, 992 F.2d 801 (8th Cir. 1993).

The Sixth Circuit has held that the language of § 848(q)(8) does not allow federally-funded counsel in state judicial proceedings, but has not specifically extended that holding to state clemency petitioners. *See* House v. Bell, 332 F.3d 997 (6th Cir. 2003).

[35] *See* Hain v. Mullin II, 436 F.3d 1168 (10th Cir. 2006).

[36] *Id.*; Hill v. Lockhart, 992 F.2d 801 (8th Cir. 1993).

[37] Clark v. Johnson, 278 F.3d 459 (5th Cir. 2002).

[38] 875 F.2d 1502 (11th Cir. 1989).

[39] *Id.*

[40] 21 U.S.C. § 848(q)(8).

U.S.C. § 2254.[41] The Eleventh Circuit denied Lindsey's claim, holding that the phrases "subsequent stage of judicial proceedings" as well as "proceedings for executive or other clemency" from § 848(q)(8) cannot apply to state proceedings.[42] The court based its denial of Lindsey's claims on three arguments: (1) following Lindsey's interpretation would supplant state systems for appointing counsel, (2) granting Lindsey's petition would disrupt proper judicial sequence developed from federalism concerns, and (3) if Congress had intended such a novel result as sought by Lindsey, it would have used "unmistakable terms" to state as much.[43]

Lindsey held that allowing the above mentioned statutory language to apply on both the state and federal levels would, first, "have the practical effect of supplanting state-court systems for the appointment of counsel in collateral review cases."[44] The court's concern was that indigent state capital defendants would be able to petition for federal habeas review and immediately receive federally-funded counsel. Defendants such as Lindsey would then take advantage of that representation at the state level, rendering futile any state mechanism for appointing counsel to indigent defendants because a petitioner could receive a federally-appointed attorney for state as well as federal judicial proceedings.[45]

The court's second concern was that Lindsey's interpretation of the statute would encourage indigent capital defendants to ignore the proper sequence for seeking post conviction relief by immediately filing futile federal habeas petitions just to secure federally appointed counsel for future state judicial proceedings, thus violating fundamental principles of federalism.[46] The court feared that capital state defendants would bypass state collateral review and immediately file a futile petition for federal habeas relief just to secure federally-appointed counsel. Armed with federal representation, the defendant would then return to state collateral proceedings. Such a process would disrupt the established sequence of exhausting state avenues for relief prior to seeking federal relief and thus raise federalism concerns because defendants could seek federal habeas relief for a violation on the state level before the state judicial system had an adequate opportunity to resolve the error itself.[47] Principles of

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[41] *Lindsey*, 875 F.2d at 1505-06.
[42] *Id.* at 1506-07.
[43] *Id.*
[44] *Id.* at 1506.
[45] *See id.*
[46] *Id.* at 1506-07.
[47] *Id.*

federalism dictate that no federal relief be sought until all available avenues of state relief have been completely exhausted.[48]

Third, the court held that if Congress had intended to introduce the substantial change in accepted judicial practice argued by Lindsey, "it would have stated so in unmistakable terms."[49] Notwithstanding its first two concerns, the court noted that Congress could potentially fund counsel to assist capital state prisoners in state collateral hearings, but the language of § 848(q) does not unambiguously evince such congressional intent.[50] The court would have been convinced if the statute explicitly stated that federally-funded counsel would be provided for "all inmates seeking collateral review of death sentences, regardless of whether such review was sought in state or federal court."[51] Because § 848 lacks such language, however, the court refused to interpret the statute to cause such drastic change in the judicial process.[52]

The three arguments put forward by the Eleventh Circuit in *In re Lindsey* made no distinction between "judicial proceedings" and "proceedings for executive clemency." Its holding regarding the clemency language, however, is dicta since the facts of the case did not involve clemency proceedings. Nevertheless, the *Lindsey* court applied its analysis to the issues involving federal representation of indigent state clemency petitioners as well as those involving federal representation in state judicial proceedings. Therefore, although the facts did not require it, the Eleventh Circuit was the first to evaluate § 848(q)'s clemency language and it ultimately concluded that the statute does not provide federally-funded counsel for indigent petitioners in state executive clemency proceedings.

B. An Alternative to Lindsey: Hill v. Lockhart

Four years later, in the second major case involving federally-funded representation for indigent state clemency petitioners under § 848(q), the Eighth Circuit in *Hill v. Lockhart* heard a case that directly involved the clemency language. Unlike the *Lindsey* court, however, the Eighth Circuit differentiated between "judicial proceedings" and "clemency proceedings."[53] It agreed with the Eleventh Circuit's three reasons for denying federal funding for representation in state judicial proceedings, but noted that "the issue is far less clear, however, in cases

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[48] *Id.* at 1508.
[49] *Id.* at 1507.
[50] *Id.* at 1508-09.
[51] *Id.* at 1507.
[52] *Id.* at 1509.
[53] Hill v. Lockhart, 992 F.2d 801 (8th Cir. 1993).

involving state . . . clemency proceedings, which frequently are not commenced until state *and* federal postconviction relief have been denied and an execution date has been set."[54] The *Hill* court noted that the plain language of § 848(q) was evidence of congressional intent to ensure compensated counsel at clemency proceedings.[55] However, the *Hill* court also noted that "Congress did not intend to encourage futile federal habeas petitions filed only to obtain attorney compensation for state proceedings."[56]

The Eighth Circuit attempted to strike a balance between the plain statutory language and the threat of frivolous federal habeas petitions by holding that the language of § 848(q) regarding clemency proceedings should be understood to provide federally-funded representation for indigent state petitioners when (1) the request comes as part of a non-frivolous federal habeas petition, (2) state law does not provide for representation in clemency proceedings, and (3) the attorney requests compensation for state proceedings before performing the services.[57] Thus, in contrast with the *Lindsey* court, the Eighth Circuit held that § 848(q) requires federally-funded representation for indigent state clemency petitioners at least under some circumstances.

C. Lindsey*'s Recent Influence*

The Fifth and the Tenth Circuits both originally rejected the *Hill* understanding of § 848(q) in favor of the *Lindsey* court's interpretation, but the Tenth Circuit ultimately reversed its position and adopted a plain language reading of the statutory language. In *Sterling v. Scott*, the Fifth Circuit followed the Eleventh Circuit's reasoning in the *Lindsey* decision with respect to state post-conviction judicial proceedings, but explicitly made no holding regarding the clemency issue, as that issue was not before the court.[58] In 2002, however, the Fifth Circuit heard a case that dealt directly with the clemency language of § 848(q).

In *Clark v. Johnson*, the Fifth Circuit held that the three-part *Lindsey* analysis, which the *Sterling* court followed, should apply to representation in clemency proceedings in the same way that it applies to state post-conviction judicial proceedings.[59] The Fifth Circuit's holding in *Johnson* played two major roles in the development of clemency

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[54] *Id.* at 803.
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] 26 F.3d 29, 31-32 (5th Cir. 1994), *vacated*, 513 U.S. 996 (1994).
[59] 278 F.3d 459, 462 (5th Cir. 2002) (denying federal compensation to counsel for representation provided during state clemency proceedings).

jurisprudence under § 848(q). First, it adopted the Eleventh Circuit's dicta analysis as the basis for deciding that § 848(q) does not provide federal funding for indigent state clemency petitioners.[60] Second, by adopting the Eleventh Circuit's analysis, the Fifth Circuit refused to accept the Eighth Circuit's theory that § 848(q) allows federal funding for representation in state clemency hearings under certain circumstances.[61]

Following the Fifth Circuit's lead, the Eleventh Circuit officially extended its own *Lindsey* analysis by specifically holding that § 848(q) does not provide federal funding for representation in state clemency proceedings.[62] The court held in *King v. Moore* that the same three considerations announced in *Lindsey* for denying federally-funded counsel in state post-conviction judicial proceedings also apply to denying such funding in state clemency hearings.[63] In addition, the *King* court noted that "nothing in the legislative history indicates to us that Congress decided to pay . . . lawyers to represent defendants in state proceedings."[64] Given the absence of "unmistakable terms" to the contrary (as noted in *Lindsey*), the court held that the last-minute nature of the addition of the relevant language and the lack of floor debate on the amendment must result in the denial of federally-funded counsel in state clemency hearings.[65]

In 2003, the Tenth Circuit joined the Fifth and Eleventh Circuits by applying the *Lindsey* reasoning to cases involving federal compensation for counsel in state clemency proceedings.[66] In *Hain v. Mullin I*, the court rejected *Hill* in favor of the *Lindsey*/*King* line of reasoning because it worried that "every state capital defendant unsuccessful in seeking federal habeas relief would be entitled to federally appointed and funded counsel to represent them in state clemency proceedings."[67] On January 23, 2006, however, the Tenth Circuit reconsidered its position. In *Hain v. Mullin II*,[68] the Tenth Circuit sitting *en banc* rejected the *Lindsey*/*King*

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[60] *Id.* at 463 ("'proceeding 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").

[61] *Id.*

[62] *See* King v. Moore, 31 F.3d 1365, 1367 (11th Cir. 2002).

[63] *Id.* at 1368 (holding that "federal" is an implied modifier for every use of "proceedings" in § 848(q)).

[64] *Id.* at 1367.

[65] *Id.*

[66] Hain v. Mullin, 324 F.3d 1146, 1150 (10th Cir. 2003) ("Hain v. Mullin I") (holding that an interpretation of the clemency provision of § 848(q) that allows federal funding for state clemency representation "defies common sense and would produce absurd results"), *vacated*, 327 F.3d 1177 (10th Cir. 2003).

[67] *Id.* at 1150.

[68] 436 F.3d 1168 (10th Cir. 2006).

analysis. The Tenth Circuit found it unnecessary to reach the *Lindsey*/*King* concerns because "Section 848(q) employs clear and precise language, admitting of no ambiguity and leaving no room for interpretation."[69] Accordingly, the Tenth Circuit concluded that § 848(q) requires federally-appointed counsel for indigent state clemency petitioners.[70] Unlike the Eighth Circuit in *Hill*, the Tenth Circuit did not attempt to reconcile the plain statutory language with policy considerations such as federalism concerns, which the dissent specifically cited as a flaw in the majority's approach.[71] Instead, *Hain v. Mullin II* states that the inquiry begins and ends with the plain statutory language.[72]

Currently, then, two circuits (the Fifth and Eleventh) have held that § 848(q)'s clemency provision does not entitle indigent state capital petitioners to federally-funded counsel in clemency proceedings. The Eighth and Tenth Circuits have both held that the language of § 848(q) allows such compensation, at least in some cases. Interestingly, the position of the Fifth and Eleventh Circuits is founded upon the three principal concerns expressed by the *Lindsey* court in a decision that only indirectly dealt with § 848(q)(8)'s clemency language. While this reasoning is potentially convincing as applied to state post-conviction judicial proceedings (the relevant issue in *Lindsey*), the Fifth and Eleventh Circuits have erred in extending the same analysis to state clemency proceedings.

III. ERROR OF RELYING ON THE REASONING IN *LINDSEY*

The Fifth and Eleventh Circuits have erred in relying on the reasoning in *Lindsey* as the basis for denying federal funding to indigent state clemency petitioners. The three-part *Lindsey* analysis was potentially relevant to the issue before that court, which was whether § 848(q) requires federally-funded counsel in state post conviction "judicial proceedings." It is not applicable, however, to an analysis of whether the statutory language requires federally-funded counsel in

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[69] *Id.* at 1171.

[70] *Id.* at 1175.

[71] *Id.* at 1178-79 (Briscoe, J., dissenting) ("Indeed, if [we accept the majority's analysis], we would have the odd, and potentially unconstitutional, result of a federal court (i.e., the federal district court that first appointed counsel pursuant to § 848(q)(4)(B)) effectively overseeing state proceedings.").

[72] *Id.* at 1172 (majority opinion) ("One need look no further than the statute's plain language to see that Congress has directed that counsel appointed to represent state death row inmates during § 2254 proceedings must represent the defendant throughout every subsequent stage of available judicial proceedings including proceedings for executive or other clemency as may be available to the defendant.") (internal quotations omitted).

"proceedings for executive clemency." By failing to analytically differentiate between the two, the Fifth and Eleventh Circuits have based their denial of federal funds to compensate counsel representing indigent state clemency petitioners on flawed analysis.[73] Although the Fifth and Eleventh Circuits strayed from the plain statutory language, however, their holdings are not necessarily incorrect. Flawed reasoning does not necessarily lead to a mistaken outcome. The argument that indigent state clemency petitioners are not entitled to federally-funded counsel would have been more convincing had it been strictly founded on specific federalism concerns relating to clemency proceedings rather than the concerns enumerated in the *Lindsey* decision.

A. Three-Part Lindsey *Reasoning Is Inapplicable to Clemency Proceedings*

The Fifth and Eleventh Circuits based their holdings, which deny federally-funded representation to indigent state clemency petitioners, on the three concerns of the *Lindsey* court. As noted above, however, the *Lindsey* decision dealt directly with federally-funded counsel at state post-conviction judicial, rather than clemency, proceedings. The *Lindsey* court's concerns for (1) supplanting state mechanisms for appointing counsel, (2) disrupting the proper sequence for seeking collateral review, and (3) the lack of "unmistakable terms" in the statutory language, while potentially applicable to the issue of federally-funded counsel in state judicial proceedings, are inapplicable to current cases involving clemency proceedings.

1. Supplanting State Systems for Appointing Counsel

Lindsey's first reason for not interpreting § 848(q)(8) to provide federal funds for state clemency representation is that such an interpretation would supplant state systems for the appointment of counsel.[74] Despite the Fifth and Eleventh Circuits' willingness to accept this explanation as the basis for denying federal funds to state clemency petitioners, it does not support the denial of such funds.

The provision providing federally-funded representation at state clemency proceedings only applies if the capital petitioner is "unable to obtain adequate representation."[75] If state systems, either through the

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[73] While the Eighth Circuit was on the right track when it acknowledged the distinction between judicial proceedings and clemency proceedings, its solution, although more convincing than the *Lindsey* analysis, is also unsatisfactory. *See infra* text accompanying notes 121–124.

[74] *In re* Lindsey, 875 F.2d 1502, 1506 (11th Cir. 1989).

[75] 21 U.S.C. § 848(q)(4)(B) (2000).

courts or otherwise, are already providing clemency representation to indigent capital petitioners, adequate representation is available and § 848(q)(8) does not take effect. The promise of federally-funded clemency counsel only applies to capital petitioners from states that do not already provide adequate help, thus federally-funded clemency counsel cannot directly supplant existing state mechanisms.[76] Nevertheless, there exists a threat that states will discontinue their state-funded systems for providing clemency counsel because the federal government will thus be forced to pay for the same services, and thus § 848 will indirectly supplant the state systems. States that allow counsel in clemency proceedings might be less likely to provide state-funded representation for indigent clemency petitioners because § 848(q) forces the federal government to foot the bill for the same service following the defendant's habeas petition. However, in other cases involving similar policy issues the Supreme Court has held that, under the Spending Clause, Congress can condition the payment of federal funds on specific statutory requirements.[77] Thus, the threat that states will alter their policies in order to receive federal funding has been considered insufficient by itself to declare federal legislation unlawful.[78] The risk that federally-funded counsel will supplant state-funded representation for indigent clemency petitioners is therefore insufficient, absent additional constitutional conflicts, to reach a conclusion inconsistent with the statute's plain language.

2. Disrupting the Proper Sequence for Seeking Collateral Relief

Lindsey's second reason for denying federal funding for representation in state clemency hearings is that petitioners will ignore proper judicial sequence and file futile federal habeas petitions just to receive federal representation in subsequent proceedings.[79] This concern was valid with respect to judicial proceedings at the time of *Lindsey* because petitioners could seek habeas relief in federal court before exhausting their claims in state court, only to return to state court with

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[76] *See* Hain v. Mullin II, 436 F.3d 1168, 1173 n.6 (10th Cir. 2006) (holding that "when a state refuses to pay for counsel at clemency proceedings, the defendant remains unable to obtain adequate representation, and such representation is funded under the statute").

[77] *See, e.g.*, South Dakota v. Dole, 483 U.S. 203 (1987) (holding that the Spending Clause allows Congress to condition federal funding on a state's waiver of its constitutional rights).

[78] *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448 (1980); Lau v. Nichols, 414 U.S. 563 (1974); Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275 (1958); Oklahoma v. Civil Serv., 330 U.S. 127 (1947).

[79] *Lindsey*, 875 F.2d at 1506-07.

federally-funded counsel. Such an interpretation would give indigent state capital defendants an incentive to bypass state collateral proceedings and jump directly to federal habeas review, which would violate the proper sequence, developed from concerns for federalism, of seeking state relief before filing for federal review. However, such a concern is inapplicable to current clemency proceedings for at least two reasons.

First, clemency hearings fall outside the scope of both state and federal judicial proceedings. The incentive to seek clemency relief is unaltered by connecting clemency representation to federal habeas representation. A capital defendant has two main avenues of potential relief: the judicial process and the clemency process. The two operate under different rules, are generally administered by different governmental branches, and can be exhausted in any sequence. The judicial process is more likely to bring relief than are clemency proceedings,[80] but capital defendants can file clemency petitions at any time during the post-conviction judicial process. However, the discretionary nature of clemency proceedings and the relative unlikelihood of success are two factors that encourage defendants to seek clemency only as a last resort.[81] Thus, the provision of § 848(q)(8) that compensates counsel with federal funds for representing indigent defendants in state clemency hearings following a federal habeas petition does not create an incentive to file habeas petitions before exhausting all state claims. Federalism principles dictate that state judicial relief be exhausted before relief is sought in federal court, but the parallel nature of judicial and clemency proceedings make the sequence with which the two are exhausted immaterial to ensuring a just outcome. Therefore, § 848(q)'s promise of federally-funded counsel at clemency hearings does nothing to disrupt the incentives associated with seeking clemency after exhausting all judicial avenues for relief.

Second, and more importantly, the Eleventh Circuit decided *Lindsey* in 1989, seven years before Congress passed the Antiterrorism and Effective Death Penalty Act ("AEDPA").[82] As amended by the

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[80] *See, e.g.*, Palacios, *supra* note 3, at 348 (noting that the recent decline in death penalty commutations has led some to claim that "the clemency power is now defunct").

[81] *See, e.g.*, Ohio Adult Parole Auth. v. Woodward, 523 U.S. 272, 284 (1998) (calling clemency "a final and alternative avenue of relief"); COYNE & ENTZEROTH, *supra* note 1, at 838 ("After exhausting her state and federal avenues of relief, a capital defendant has one last place she can turn for relief: executive clemency."); Silverman, *supra* note 5, at 385 ("Most clemency applications are made after a condemned man has exhausted all his appeals.").

[82] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, Title I, § 104, 110 Stat. 1218 (to be codified at 28 U.S.C. § 2254(b)).

AEDPA, the habeas corpus statutes make it potentially fatal for a state prisoner to file "shell" habeas petitions. A federal court can dismiss with prejudice any habeas petition filed before the prisoner has exhausted his state avenues of judicial relief.[83] Additionally, the AEDPA states that the one-year statute of limitations is not tolled if the petitioner prematurely files for habeas relief.[84] State capital prisoners will not risk forever forfeiting their chance to seek meaningful habeas review of their case merely to obtain federal counsel for potential clemency proceedings. Therefore, the AEDPA has resolved the *Lindsey* court's concern that state prisoners will disrupt the proper sequence of post-conviction review. State defendants now face a strict penalty for filing frivolous or premature federal habeas petitions in an attempt to secure federally-funded counsel in either subsequent state judicial or clemency proceedings.

3. Lack of "Unmistakable Terms"

The final consideration expressed in *Lindsey*, which has led the Fifth and Eleventh Circuits to deny federal funds as compensation for representing indigent state clemency petitioners, was that if Congress intended all indigent capital state clemency petitioners to receive federal assistance, "it would have stated so in unmistakable terms."[85] In conjunction with this argument, the Eleventh Circuit also noted that the legislative history does not indicate that Congress intended to place such a burden on the federal treasury by using federal funds to pay for state clemency petitions.[86] The court expected that such a novel interpretation would be "too big and innovative" to have been passed at the end of a congressional session and without any recorded debate.[87] According to the *Lindsey* court, these concerns lead to the conclusion that § 848(q)(8) only ensures federally-funded counsel in post-conviction and clemency proceedings for federal defendants. At least with respect to state clemency proceedings, however, these concerns are unfounded. Two principal features comprise the argument for the unambiguous nature of the statutory text in § 848(q)(8), and thus the use of federal funds to compensate counsel in state clemency hearings involving indigent petitioners. These two factors establish that Congress did in fact employ "unmistakable terms" in the Anti-Drug Abuse Act of 1988.

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[83] *See* 28 U.S.C. § 2254(b) (2000).
[84] *See* 28 U.S.C. § 2244(d)(2) (2000).
[85] *In re* Lindsey, 875 F.2d 1502, 1506 (11th Cir. 1987).
[86] King v. Moore, 312 F.3d 1365, 1367 (11th Cir. 2002).
[87] *Id.* at 1368.

First, the ordinary meaning of the statutory language dictates that indigent state capital defendants should receive federally-funded counsel in clemency proceedings. Because we must assume that Congress "says in a statute what it means and means in a statute what it says there,"[88] a correct understanding of the meaning and intent of any law must begin with a correct understanding of the words employed by Congress. The Supreme Court has held that courts must attempt to "give effect, if possible, to every clause and word."[89] It is an accepted canon of statutory interpretation that the terms used by Congress are given their ordinary meaning.[90]

The pertinent language in § 848(q)(8) states that attorneys appointed and compensated under the Anti-Drug Abuse Act of 1988 "shall also represent the defendant in . . . proceedings for executive or *other clemency* as may be available to the defendant."[91] The first step in understanding whether Congress intended this language to provide federal funding for state as well as federal clemency hearings is to examine the ordinary meaning of the phrase "executive or other clemency proceedings" as applied to capital defendants.

Ordinary use of the clause indicates that it explicitly applies to both federal and state proceedings. Clemency is considered the final avenue of relief for both capital federal defendants and capital state defendants.[92] However, the federal clemency power lies exclusively within the federal executive branch. The President of the United States is the only one that can grant clemency to federal prisoners.[93] The Constitution does not require the states to enact clemency procedures of their own. Nevertheless, the clemency power has existed in America since colonial times.[94] The Supreme Court noted that "[t]he original [s]tates were reluctant to vest the clemency power in the executive."[95] Although the state clemency power has "gravitated to the executive over time,"[96] several states still vest the clemency power in the state legislative or

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[88] Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992).

[89] Duncan v. Walker, 533 U.S. 167, 174 (2001) (citation omitted).

[90] *See, e.g.*, WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 819-22 (West 3d ed. 2001) (noting that courts typically assume that legislatures employ words in their ordinary sense).

[91] 21 U.S.C. § 848(q)(8) (2000) (emphasis added).

[92] *See* COYNE & ENTZEROTH, *supra* note 1, at 838.

[93] U.S. CONST. art. II, § 2, cl. 1.

[94] Herrera v. Collins, 506 U.S. 390, 414 (1993).

[95] *Id.* (citation omitted).

[96] *Id.*

judicial branches, rather than in the executive branch.[97] Therefore, § 848(q)(8)'s language, which grants federally-funded counsel to petitioners in "executive and other clemency proceedings," must apply to both federal and state petitioners. Otherwise, the phrase "other clemency proceedings" would be meaningless as federal petitioners can only seek clemency through executive proceedings. Only state petitioners could seek clemency through "other proceedings," such as those within the power of the state legislative or judicial branches. The United States Supreme Court has instructed that wherever possible, courts must give effect to every word and clause of a statute.[98] In this case, the plain statutory language requires courts to hold that Congress intended federally-funded counsel for indigent state *and* federal clemency petitioners.

Even courts that have denied federal funding for indigent state clemency petitioners concede that the ordinary meaning of the plain language in § 848 (q)(8) refers to both state and federal clemency proceedings.[99] Therefore, given the ordinary meaning of the statutory language providing that counsel appointed under the statute be compensated for representing indigent petitioners[100] in any available "executive or other clemency proceedings," Congress articulated in "unmistakable terms" its intent to supply federally-funded attorneys in both state and federal clemency hearings.[101]

Second, when read in light of § 848(q)(4)(B), it becomes unequivocally clear that Congress intended § 848(q)(8) to use federal funds to compensate counsel representing indigent petitioners in state clemency proceedings. While the ordinary meaning of statutory language is important to understanding congressional intent, that language's statutory context will inevitably bear on determining an accurate

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[97] *See, e.g.*, McLaughlin v. Bronson, 537 A.2d 1004, 1006-07 (Conn. 1988) ("[i]n Connecticut, the pardoning power is vested in the legislature"); FLA. CONST. art. IV, § 8 ("the legislature may grant a pardon"); NEV. CONST. art. V, § 14 ("The governor, justices of the supreme court, and attorney general [may] . . . commute punishments . . . and grant pardons[] after convictions.").

[98] Duncan v. Walker, 533 U.S. 167, 174 (2001).

[99] *See, e.g.*, Hain v. Mullin I, 324 F.3d 1146, 1150 n.3 (10th Cir. 2003) (denying federal funding for indigent state clemency petitioners, but noting that state clemency proceedings just as easily fall within the statutory reference to "executive clemency" as do federal clemency proceedings).

[100] The terms "defendant" and "petitioner" as used in § 848(q) are synonymous for the purposes of this analysis. *See* Strickler v. Greene, 57 F. Supp. 2d 313, 316 n.5 (E.D. Va. 1999).

[101] *See, e.g.*, Gordon v. Vasquez, 859 F. Supp. 413, 418 (E.D. Cal. 1994) (holding that the "plain meaning" of the statute requires federally-funded representation for indigent state clemency petitioners).

definition for the pertinent terms. Such is the case for the "executive clemency proceedings" language in § 848(q)(8), which can only be correctly understood in the context of § 848(q)(4)(B). This subsection specifically states, in pertinent part, that federally-funded counsel will be provided "in any post conviction proceeding brought under 28 U.S.C. § 2254."[102] Recall that 28 U.S.C. § 2254 provides that capital defendants convicted under state law can seek a remedy through federal habeas corpus proceedings after exhausting all claims in state court. Thus, federally-funded counsel is provided for indigent state prisoners who are seeking federal relief through habeas corpus proceedings. Section 848(q)(8) requires that counsel continue to represent such state prisoners beyond the habeas proceedings and into clemency hearings. For § 2254 habeas petitioners, clemency proceedings are only available through the state because all § 2254 petitioners have committed state crimes.

Therefore, the plain language of § 848(q)(8) cannot be so limited as to allow federally-funded representation at federal executive clemency hearings only. An indigent state prisoner, having filed for habeas relief according to 28 U.S.C. § 2254, has only one option for clemency relief: the state. The most plausible reading of the statutory language, then, is to allow federal funding in state executive clemency hearings because Congress explicitly required representation for indigent state prisoners seeking clemency following their federal habeas hearing filed under 28 U.S.C. § 2254.[103]

The ordinary meaning of the terms used in § 848(q)(8) along with the contextual understanding provided by § 848(q)(4)(B) unambiguously lead to the conclusion that the Anti-Drug Abuse Act of 1988 intended federally-funded counsel to represent indigent petitioners in both federal and state clemency hearings. Since the plain statutory language is unambiguous, courts should allow federally-funded representation at state clemency proceedings involving indigent petitioners according to § 848(q)(4)(B) and § 848(q)(8).[104]

The Fifth and Eleventh Circuits have held, however, that the statutory language is insufficient to grant federal counsel to indigent state clemency petitioners. The *Lindsey* line of cases sought an understanding of congressional intent in the statute's legislative history and found no evidence of intent to compensate state clemency attorneys with federal

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[102] 21 U.S.C. § 848(q)(4)(B) (2000).

[103] *See Hain*, 324 F.3d at 1152-53; *Strickler*, 57 F. Supp. 2d at 315.

[104] *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION 20 (Princeton 1997) (arguing that "Congress can enact foolish statutes as well as wise ones, and it is not for the courts to decide which is which").

funds.[105] The lack of legislative history only makes the language more significant, however, since it is the sole source from which we can establish congressional intent. By demanding more than the plain statutory language in interpreting the act, the *Lindsey* court is faulting the results produced by the law. Such concerns are not within the jurisdiction of the courts, but are policy considerations that should be left to Congress.[106] Courts may only deviate from the plain statutory meaning when it produces results so absurd "as to shock the general moral or common sense."[107] Certainly, interpreting the plain statutory language of § 848(q) to allow federally-funded attorneys to represent indigent state clemency petitioners is at least a reasonable interpretation, if not the only plausible one.

Therefore, the *Lindsey* court's concerns for (1) supplanting state mechanisms for appointing counsel, (2) disrupting the proper sequence for seeking collateral review, and (3) the lack of "unmistakable terms" in the statutory language are inapplicable to clemency proceedings.

Although the Fifth and Eleventh Circuits have relied on unconvincing reasoning to deny federally-funded counsel to indigent capital petitioners in state clemency hearings, their conclusion is not necessarily unwarranted. Each court relied on *Lindsey*, which supplied unsatisfactory analysis. Nevertheless, following the statutory plain language would result in at least one major constitutional concern. State clemency proceedings have long been immune from both judicial review and federal involvement. States have wide-ranging discretion to dictate their own clemency procedures and are not constitutionally required to allow clemency petitioners the benefit of legal representation at those hearings.[108] Therefore, the plain language of the Anti-Drug Abuse Act of 1988 potentially violates principles of federalism in so far as it forces Congress to provide federally-funded counsel to all indigent state clemency petitioners, even if the state does not allow counsel in its clemency hearings. Although the courts do not explicitly rely on it, this federalism concern is the strongest argument in favor of the conclusion reached by the Fifth and Eleventh Circuits.

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[105] *See* King v. Moore, 312 F.3d 1365, 1367 (11th Cir. 2002) (holding that the legislative history holds no evidence of congressional intent to grant federally-funded counsel to indigent state clemency petitioners).

[106] *See* Laborers Health and Welfare Trust Fund for N. Cal. v. Advanced Lightweight Concrete, 484 U.S. 539, 551 (1988) (explaining that Congress "has the authority to amend the legislation," while the courts' authority "is limited to interpreting it").

[107] Crooks v. Harrelson, 282 U.S. 55, 60 (1930).

[108] *See generally* White v. Singletary, 70 F.3d 1198 (11th Cir. 1995).

B. Federalism Concerns

Although the plain language of the Anti-Drug Abuse Act of 1988 grants federally-funded counsel to indigent state clemency petitioners, courts might nevertheless deny such representation because of federalism concerns. The individual states have traditionally enjoyed nearly unfettered discretion in establishing their own clemency procedures. The procedures (and even the very existence) of state clemency proceedings lie entirely within the jurisdiction of the state, and since they are a matter of grace rather than right, ordinary constitutional procedural requirements do not apply,[109] including the right to counsel. The Supreme Court has held that a prisoner's clemency petition represents a "unilateral hope" that the state will consider freeing him as a matter of grace.[110] State clemency procedures, then, are discretionary by nature. They are not the "business of [the] courts."[111] Similarly, state clemency authority "would cease to be a matter of grace" if federal constitutional/procedural requirements governed state clemency proceedings.[112] While capital state clemency petitioners retain a "residual life interest,"[113] they are not constitutionally entitled to counsel, or even an unbiased decision maker.[114] Throughout American history, the existence and procedures of state clemency have been free from judicial and federal interference. States have traditionally been able to deny counsel in clemency proceedings, since such proceedings are merely a matter of grace.[115]

Wherever possible, courts will not attribute to Congress the intent to intrude on traditionally state-controlled governmental functions.[116] This is the essence of federalism, a principle that "is nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere."[117] Although the plain language of § 848(q)(8) requires the federal government to fund indigent state clemency petitioners, states might be concerned that such an interpretation of the statute would allow federal encroachment upon a traditional area of state sovereignty. States have long been able to dictate their own clemency procedures, including

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[109] *See supra* note 4.
[110] Ohio Adult Parole Auth. v. Woodward, 523 U.S. 272, 282 (1998).
[111] *Id.* (citing Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 464 (1981)).
[112] *Id.*
[113] *Id.* at 281.
[114] *See, e.g.*, Perry v. Brownlee, 122 F.3d 20 (8th Cir. 1997).
[115] *See* White v. Singletary, 70 F.3d 1198, 1201 (11th Cir. 1995) (citing Coleman v. Thompson, 501 U.S. 722, 756-57 (1991)).
[116] *See, e.g.*, Raygor v. Regents of the Univ. of Minn., 534 U.S. 533, 546 (2002).
[117] Gregory v. Ashcroft, 501 U.S. 452, 461 (1991).

whether to allow and fund counsel at clemency hearings. The statutory language of the Anti-Drug Abuse Act of 1988, however, would take the issue of clemency counsel away from the states and give it to the federal government. The plain language of § 848, therefore, presents a direct conflict between Congress and traditional state sovereignty to dictate procedure at state clemency proceedings.

Congress, then, is encroaching on state authority when it tells the states that all indigent capital state clemency petitioners are entitled to federally-funded counsel regardless of whether the state denies them such representation. Such a violation of the principles of federalism might dictate that § 848, regardless of the clarity of the plain language, not be interpreted as granting federally-funded counsel to all indigent state capital clemency petitioners. The Fifth and Eleventh Circuits should have followed this line of reasoning to their conclusion rather than relying on the *Lindsey* reasoning and asserting the ambiguity of the statutory language.

IV. BALANCE BETWEEN PLAIN LANGUAGE AND FEDERALISM CONCERNS

The Fifth and Eleventh Circuits never questioned the constitutionality of Congress establishing procedural requirements in state clemency hearings.[118] Such concerns might be sufficient to deny federally-funded representation to state clemency petitioners. An accepted canon of statutory interpretation dictates that statutes should be interpreted, whenever reasonable, to avoid constitutional conflicts such as federalism concerns.[119] The "plain language" of the statute, however, dictates that indigent state capital clemency petitioners are always entitled to legal representation appointed either by the state or the federal government.[120] Nevertheless, courts should have federalism concerns given this federal encroachment on an area that has historically been granted complete state discretionary authority. Thus, courts are seemingly faced with a conflict between the plain statutory language and the need to preserve state sovereignty regarding clemency proceedings.

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[118] The *Lindsey* court did hold that adopting a "plain language" interpretation would produce federalism concerns in so much as it would result in the waiver of the state exhaustion requirement, but no such exhaustion concern applies to clemency proceedings, especially after the passage of the AEDPA. *See In re* Lindsey, 875 F.2d 1502, 1506-07 (11th Cir. 1989).

[119] *See, e.g.*, Nat'l Labor Relations Bd. v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) (holding that petitioner had no jurisdiction over lay teachers employed by church-operated schools because to allow petitioner jurisdiction over such matters presented significant risks that the First Amendment would be infringed).

[120] *See supra* text accompanying notes 88–107.

I propose a compromise position that balances the "plain language" conclusion of the Eighth and Tenth Circuits with the concerns of the Fifth and Eleventh Circuits. The Tenth Circuit adopted a clear plain language interpretation without regard for constitutional conflicts such as federalism concerns. The Eighth Circuit was also unwilling to disregard the plain statutory language, but attempted to limit its application so as to address the accompanying procedural and constitutional conflicts. The Fifth and Eleventh Circuits adopted the *Lindsey* conclusion, which, by straying from the plain statutory language, would result in no federal funding for counsel representing indigent petitioners seeking state executive clemency. First, I will explain the inadequacy of the Eight Circuit's compromise in *Hill v. Lockhart*, and second, I will detail my proposed compromise, which would allow federal funding for indigent state clemency petitioners under circumstances determined by the individual states.

A. Inadequacy of the Hill *Compromise*

The Eighth Circuit attempted a compromise in *Hill v. Lockhart*, but it failed to resolve the relevant federalism concerns. The *Hill* court proposed that § 848(q) be understood to permit federally-funded counsel to indigent state clemency petitioners when (1) the request comes as part of a non-frivolous federal habeas petition, (2) state law does not provide funding for representation in clemency proceedings, and (3) the attorney requests compensation for state proceedings before performing the services.[121] Although this solution cautiously satisfies the statutory plain language, it does not address the federalism concerns presented by Congress's attempt to establish its own procedural requirements for state clemency proceedings.

The Eighth Circuit's first and third requirements for granting federally-funded counsel to indigent state clemency petitioners were directly addressed by the AEDPA. Both requirements are designed to ensure that state petitioners do not file premature "shell" habeas petitions in an attempt to secure federal counsel for subsequent proceedings, including clemency. With the passage of the AEDPA, the threat of frivolous habeas petitions is less substantial than it was when the court decided *Hill* in 1993.[122] The Eighth Circuit's second requirement, that state law does not already fund clemency counsel for indigent petitioners, is borrowed from the *Lindsey* court.[123] As noted above, the

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[121] Hill v. Lockhart, 992 F.2d 801, 803 (8th Cir. 1993).
[122] *See supra* text accompanying notes 82–85.
[123] *See supra* text accompanying notes 44–45.

concern that the statute will supplant state mechanisms for providing clemency counsel is insufficient to ignore the plain statutory language. In addition, as will be noted below, the language of the Anti-Drug Abuse Act itself adequately addresses this concern.

The Eighth Circuit recognized that the plain statutory language required federally-funded counsel in state clemency proceedings. It also recognized that freely following the plain language would cause substantial conflicts between the federal government and the states. As a result, the *Hill* court attempted to apply the plain language with some qualifications. However, those qualifications failed to address the principal federalism concerns that now confront courts interpreting § 848(q). For example, a petitioner from a state that chooses to deny representation to indigent clemency petitioners could nevertheless satisfy the *Hill* requirements and receive federally-funded counsel at his clemency hearing. Such a result allows the federal government to violate the state's established clemency procedural guidelines.

B. Proposed Solution

The plain statutory language of § 848(q)(8) provides that any capital habeas petitioner convicted under state law is entitled to federally-funded counsel at the habeas proceeding and at state clemency proceedings.[124] However, a simple acceptance of this interpretation would violate principles of federalism. My proposed solution recognizes that courts can follow the plain statutory language without violating principles of federalism.

My proposal is centered on the understanding that states have the authority to determine the threshold question of whether they will permit counsel to represent capital clemency petitioners. The Supreme Court has held that the discretionary nature of state executive clemency hearings keeps them separated from the judicial system and due process standards, thus allowing states to deny representation in clemency proceedings if they so desire.[125]

If a state exercises its option to deny all capital petitioners within its jurisdiction counsel during clemency proceedings, I propose that an indigent petitioner not be appointed federally-funded counsel to represent him in those proceedings. This proposal allows states to determine the procedures of their own clemency hearings without violating the plain statutory language of the Anti-Drug Abuse Act of 1988. The statutory

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[124] 21 U.S.C. § 848(q)(4)(B) (2000) (stating that the counsel provision applies to "any post conviction proceeding under section 2254").

[125] *See* Ohio Adult Parole Auth. v. Woodward, 523 U.S. 272, 273-74 (1998).

language of § 848(q)(8) provides that federally-funded attorneys appointed during the habeas hearing "shall also represent the defendant in such . . . proceedings for executive or other clemency *as may be available to the defendant*."[126] In a state that denies counsel to all clemency petitioners, a clemency hearing with counsel is unavailable to the defendant, and thus falls outside the realm of § 848(q)(8). By denying counsel to all indigent clemency petitioners, a state has made the ultimate determination that neither state-funded nor federally-funded counsel is available to the defendant, and thus § 848(q) is inapplicable.

If a state does not exercise its discretion in denying representation in clemency proceedings, it then has the option of providing adequate counsel at the state level for indigent capital defendants. If adequate state counsel is provided, § 848(q)(4)(B) explicitly denies the appointment of federally-funded counsel since the petitioner is no longer "unable to obtain adequate representation" without the statute. In such a situation, the statutory language recognizes that it is unnecessary to use federal funds to represent a state clemency petitioner. Because indigent state clemency petitioners have access to adequate representation through the state, § 848(q)(8) does not apply.

If a state allows representation in clemency proceedings, but chooses not to provide adequate representation itself, however, the statute is applicable and federally-funded counsel shall be provided for indigent petitioners seeking federal habeas relief followed by state clemency relief. In § 848(q)(8), Congress required that federal funds be used to compensate counsel in any clemency proceedings "available to the defendant." Because state law has not denied representation to clemency petitioners, a clemency hearing with the assistance of counsel is available to them. Under these circumstances, the state has decided to allow representation during its clemency proceedings, so § 848(q) does not conflict with state law. If such counsel is not provided at the state level, the federal government is free to supply the representation in accordance with § 848(q)'s plain language without violating principles of federalism.

V. CONCLUSION

The plain language of § 848(q) of the Anti-Drug Abuse Act of 1988 dictates that indigent state capital clemency petitioners are entitled to federally-funded representation. Two of the four circuits that have decided cases on point, however, have ignored the plain statutory language and determined that § 848(q) never provides federally-funded

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[126] 21 U.S.C. § 848(q)(8) (emphasis added).

counsel to indigent state clemency petitioners. The courts that deny federally-funded representation to state clemency petitioners base their conclusion on the reasoning presented in *In re Lindsey*, but such reasoning is more applicable to federally-funded counsel at state judicial, rather than clemency, proceedings. Instead of relying on the reasoning in *Lindsey*, the courts could have presented a stronger case for straying from the plain statutory language if they had reached the same conclusion because of federalism concerns. My proposed solution resolves the existing circuit split by balancing the need to adhere to the plain statutory language with the need to uphold established principles of federalism.