UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

BOBBY JOE LONG,

Plaintiff,

v. **CASE NO. 4:19cv213-MCR-MJF**

RON DESANTIS, Governor,
In his Official Capacity, et al.,

Defendants.
_____/

ORDER

Plaintiff Bobby Joe Long is a Florida death-row inmate scheduled to be executed at 6:00 p.m. on May 23, 2019. On May 8, 2019, Long filed suit under 42 U.S.C. § 1983, alleging that the Defendants,[1] all of whom are state actors, deprived him of rights under federal statutory law and the Constitution by precluding his federally appointed counsel from participating as co-counsel in his state clemency proceedings. Currently before the Court is Long's Motion for a Stay of Execution, ECF No. 4, pending the disposition of his § 1983 claims. Defendants oppose the stay, arguing that Long was dilatory in bringing suit and moreover that he has not

[1] Defendants are Ron DeSantis, Governor of the State of Florida; Clemency Board Members Jimmy Patronis (Florida's Chief Financial Officer), Ashley Moody (Florida's Attorney General), and Nikki Fried (Commissioner of Agriculture); as well as Julia McCall, Coordinator of the Office of Executive Clemency; Melinda Coonrod, Commissioner of the Florida Commission on Offender Review; and Susan Michelle Whitworth, Commission Investigator Supervisor of the Florida Commission on Offender Review. Each is sued in his or her official capacity.

demonstrated the existence of any elements necessary for issuance of a stay. The Court has also considered Long's reply. After careful review, the Court finds that the Motion for a Stay of Execution is due to be denied because Long cannot show a substantial likelihood of success on the merits of his claims.

I. Background

The Complaint in this case details aspects of Long's life. Long was born in October 1953 into a home filled with violence and alcohol abuse. He suffered several accidents and head injuries as a child, causing traumatic brain injury and resulting in learning difficulties. Additionally, while serving in active duty in the military in March 1974, at the age of 20, he was in a severe motorcycle accident, after which he could no longer work, his mood and temper became unpredictable and he was prone to incidents of violence. Long also suffered memory loss, headaches, balance trouble, and grew reclusive.[2]

In November 1984, Long was arrested and charged with the sexual battery and kidnapping of a woman in Florida, who fortunately escaped. During the investigation, law enforcement questioned Long about a series of unsolved sexual

[2] By declaration, Julie Kessel, M.D., states that Long has a long and well-documented history of mental disorders including epilepsy, manic depressive disorder, personality disorders, organic brain damage, and hypersexuality. ECF No. 1-1, at 178.

battery homicides, to which he later confessed. In September 1985, Long pled guilty to the first-degree murder, kidnapping, and sexual battery of Michelle Simms in Hillsborough County, Florida, as well as seven other homicides. He was sentenced to death for the murder of Simms and received life sentences for the others.[3] *See Long v. State*, 610 So. 2d 1268 (Fla. 1992) (affirming sentence on appeal after resentencing), *cert. denied*, 510 U.S. 832 (1993). Long's petition for state postconviction relief was denied.[4] *See Long v. State*, 118 So. 3d 798 (Fla. 2013).

On August 12, 2013, Long timely filed a federal habeas corpus petition in the Middle District of Florida, *see* 28 U.S.C. § 2254, and the court appointed Robert A. Norgard, Long's state postconviction counsel, to represent him in the habeas proceedings, pursuant to 18 U.S.C. § 3599.[5] The district court denied relief, *Long v. Sec'y , Fla. Dept' of Corr.*, No. 8:13cv2069-JDW, ECF No. 21 (M.D. Fla. Aug. 30, 2016), and the Eleventh Circuit denied a certificate of appealability, Case No.

[3] Long's initial death sentence for the Simms murder was reversed and remanded for a new sentencing proceeding before a new jury which again imposed a death sentence, but his life sentences and convictions based on his guilty pleas to seven other murders, in addition to crimes of kidnapping and sexual battery, were affirmed. *Long v. State*, 529 So. 2d 286, 288 (Fla. 1988).

[4] A successive state postconviction relief petition was also denied. *See Long v. State*, 183 So. 3d 342 (Fla. 2016).

[5] Norgard was appointed Long's state postconviction counsel in 2006. He stated in a letter to the FCOR that prior to that, he had represented Long at trial in a related case in Pasco County prosecuted shortly before he pled guilty in this case. ECF. No. 1-1, at 31.

16-16259 (11th Cir. Jan. 4, 2017).[6] The Florida Commission on Offender Review ("FCOR") then initiated clemency proceedings.

On March 8, 2018, Michelle Whitworth of the FCOR asked attorney William J. McClellan to represent Long in the clemency proceedings. McLellan signed a contract with the FCOR on March 13, 2018, but stated that he was unaware at the time of Long's federally appointed counsel.[7] In June 2018, Norgard filed a motion in the Middle District of Florida requesting the appointment of the Capital Habeas Unit (CHU) as co-counsel for Long, stating that Long was in the midst of clemency proceedings and the CHU's expertise and resources were needed. The motion was granted.[8]

---

[6] Subsequently, Long again pursued postconviction relief in state court, based on the Supreme Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), finding unconstitutional Florida's capital sentencing scheme permitting advisory recommendations by a jury. The Florida Supreme Court determined in January 2018 that the rule did not apply retroactively to Long's conviction, which had become final prior to the Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), citing *Hitchcock v. State*, 226 So. 3d 216, 217 (Fla. 2017). *See Long v. State*, 235 So. 3d 293 (Fla. 2018).

[7] The contract required McClellan to waive any compensation in excess of the $10,000 statutory cap, *see* Fla. Stat. § 940.031. McClellan states by declaration that *sometime after* he signed the contract, he learned of Long's federally appointed counsel and attempted to coordinate with him.

[8] The court initially appointed the Northern District CHU and later substituted the Middle District CHU as co-counsel by order dated December 3, 2018. *Long v. Sec'y Dep't of Corr.*, Case No. 8:13cv2069-T-27AEP, ECF No. 28 (M.D. Fla. June 21, 2018); ECF No. 32 (M.D. Fla. Dec. 3, 2018).

The FCOR scheduled a clemency interview for September 13, 2018. In advance of that date, McClellan and Norgard wrote to FCOR on several occasions. In August 2018, Norgard sent a letter requesting that he be permitted to attend the clemency interview with McClellan, who joined the request. The FCOR denied the request on August 24, 2018, by letter from Whitworth, who informed them that only McClellan, as Long's clemency-appointed counsel, could make clemency requests on Long's behalf. However, in the same letter, Whitworth also informed Norgard that "anyone is welcome to submit materials in support of inmate Long's request for clemency, which will be given full consideration." ECF No. 1-1, at 33. On August 30, 2018, McClellan advised FCOR that Long, who was deferring to Norgard's legal advice, would not attend the clemency interview on September 13 and he also requested assistance in obtaining a copy of the transcript of Long's resentencing. The FCOR responded that all records obtained by FCOR are confidential and referred him to the Archives of Florida. Emails indicate that McClellan continued to have difficulty obtaining a legible copy of the transcript. On September 11, McClellan requested a postponement of the interview, stating he could not adequately prepare without a legible copy of the transcript and that he did not have sufficient funds for mental health experts or sufficient time to review all of the records in the case prior to the scheduled interview. McClellan renewed his request

that Norgard and the CHU be allowed to serve as clemency co-counsel and attend the interview. The requests were denied and the interview was not postponed.

Long declined to appear at the clemency interview on the advice of Norgard. FCOR Commissioner Coonrod noted on the record that that Long's failure to appear forfeited the interview and any future interviews, but she advised that he could submit additional information if he desired to do so. ECF No. 1-1, at 49. McClellan appeared and was allowed to make a presentation. He discussed Long's brain injuries, criminal history, and record of military service. Again, McClellan requested a continuance, referencing that he had received more than 30 boxes of information about the case collected by Norgard and that the CHU could facilitate updated testing to better understand Long's mental condition if they had more time.

In October 2018, Norgard and the CHU submitted a joint letter to the FCOR and the Clemency Board, objecting to their exclusion from the process and requesting a supplemental interview for Long so they could appear and present expert testimony on his behalf. He attached a number of materials, including the declaration of psychiatrist Dr. Julie Kessel, who had evaluated Long and recommended further testing. In November 2018, McClellan submitted a memorandum in support of clemency together with exhibits. No hearing was scheduled. On April 23, 2019, the Office of Executive Clemency notified McClellan

that the Governor had denied clemency for Long, and a warrant was signed for his execution. Long filed this suit on May 8, 2013.

II. Discussion

A. Clemency Proceedings

"[T]he Constitution vests in the President a pardon power, [but] it does not require the States to enact a clemency mechanism." *Herrera v. Collins*, 506 U.S. 390, 414 (1993). However, clemency is so "deeply rooted" in our legal tradition as to be recognized as not only an act of mercy but also "the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Id.* at 411-12 & 414 (noting that all states that authorize capital punishment have constitutional or statutory provisions for clemency). As such, the Supreme Court considers it the "'fail safe' in our criminal justice system." *Harbison v. Bell*, 556 U.S. 180, 192 (2009) (quoting *Herrera*, 506 U.S. at 415). Because not constitutionally required, "pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review." *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 276 (1998).

Constitutional scrutiny for this process is therefore "minimal." *Id.* at 288-90 (O'Connor, J., concurring[9]).

The Eleventh Circuit has emphasized that this minimal scrutiny "does not justify judicial intervention into state clemency proceedings" outside "extreme situations." *Gissendaner v. Comm'r, Georgia Dep't of Corr.*, 794 F.3d 1327, 1331 (11th Cir. 2015) (quoting *Faulder v. Tex. Bd. of Pardons & Paroles*, 178 F.3d 343, 344 (5th Cir. 1999)). For instance, whatever limitations are imposed by the Due Process Clause, they do not reach beyond notice and an opportunity to participate in an interview.[10] *Id.* (even the state's "violation of a state procedural law does not itself give rise to a due process claim"). Also, where a state has a clemency process, there is no independent constitutional right to counsel in a clemency hearing. *See White v. Singletary*, 70 F.3d 1198, 1201 (11th Cir. 1995) (citing *Coleman v. Thompson*, 501 U.S. 722, 756-57 (1991) for the proposition that there is "no right to counsel beyond first appeal in pursuing state discretionary or collateral review"). By

[9] *See Wellons v. Comm'r, Ga. Dep't of Corr.*, 754 F.3d 1268, 1269 n. 2 (11th Cir. 2014) (recognizing Justice O'Connor's concurring opinion was "the fifth and decisive vote" and thus "set binding precedent").

[10] Only "extreme circumstances" offend due process, such as "(1) 'a scheme whereby a state official flipped a coin to determine whether to grant clemency,' or (2) 'a case where the State arbitrarily denied a prisoner *any* access to its clemency process.'" *Gissendaner,* 794 F.3d at 1333 (quoting *Woodard*, 523 U.S. at 289 (O'Connor J., concurring)).

federal statute, Congress has created a means of appointing and funding counsel for a federal capital habeas petitioner. *See* 18 U.S.C. § 3599. The statute, which defines the scope of that federally funded habeas representation, extends the representation to a subsequent clemency proceeding that may be available to the petitioner in state court. *See* 18 U.S.C. § 3599(e); *see also Harbison v. Bell*, 556 U.S. 180, 185–88 (2009).

Florida law provides for clemency. The Governor has discretion to commute a sentence with the approval of two cabinet members. Fla. Const. art IV, § 8; Fla. Stat. § 940.01(1). Florida's clemency rules provide that the Florida Parole Commission may conduct an investigation that includes an interview of the defendant, after which the Commissioners prepare a final report on their findings that is forwarded to the clemency board, and either the clemency board or the Governor may request or set a hearing. Florida Rules of Clemency 15. By statute, clemency counsel "may" be appointed, and the board of clemency is required to maintain a list of private counsel who are available for the appointment. Fla. Stat. § 940.031(1). By statute, the board has the "sole discretion" as to whether to appoint clemency counsel, and "[t]he provision of counsel for executive clemency under this section does not create a statutory right to counsel in such proceedings." Fla. Stat.

§ 940.031(3). The Governor may issue a warrant for execution when the executive clemency process has concluded. *See* Fla. Stat. § 922.052.

B. Long's Section 1983 Claims

Long brings suit pursuant to § 1983, which provides a civil cause of action when a person acting under color of state law deprives another "of any rights, privileges, or immunities secured by the Constitution and laws," which includes rights conferred by federal statutes.[11] 42 U.S.C. § 1983. Specifically, Long argues that he is entitled to a stay of execution on grounds that the Defendants' decision to exclude his federally appointed counsel from representing him in the state clemency proceedings deprived him of a federal statutory right provided in 18 U.S.C. § 3599 and also deprived him of a constitutional right to "meaningful" representation, which Long asserts is guaranteed under the Sixth Amendment because Florida has made clemency a "critical stage" in his criminal proceedings.

It is well settled that a court may grant a preliminary injunction, including a stay of execution, only on the moving party's proof that: "(1) he has a substantial likelihood of success on the merits; (2) he will suffer irreparable injury unless the

[11] A § 1983 action is considered the "appropriate vehicle" for challenging the constitutionality of a clemency proceeding. *Banks v. Sec'y Fla. Dep't of Corr.*, 647 F. App'x 910, 913 n.4 (citing *Valle v. Sec'y Fla. Dep't of Corr.*, 654 F.3d 1266, 1267 (11th Cir. 2011)).

injunction issues; (3) the stay would not substantially harm the other litigant; and (4) if issued, the injunction would not be adverse to the public interest." *Brooks v. Warden*, 810 F.3d 812, 818 (11th Cir. 2016) (quoting *Powell v. Thomas*, 641 F.3d 1255, 1257 (11th Cir. 2011)) (emphasis omitted). The Court finds that Long has not established a substantial likelihood of success on either claim asserted, and thus, his requested relief must be denied. *See Hill v. McDonough*, 547 U.S. 573, 584 (2006) (stay of execution requires "showing a significant possibility of success on the merits"); *DeYoung v. Owens*, 646 F.3d 1319, 1324 (11th Cir. 2011) (denying a stay of execution for the failure to demonstrate a substantial likelihood of success on the merits).

1. Section 3599

Turning first to the statutory claim, it is well settled that an action to enforce a statutory right under § 1983 requires "the violation of a federal right, not merely a violation of federal law." *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997). To decide whether a statutory provision creates a federal right, courts consider: (1) whether it is evident that Congress intended to benefit the plaintiff, (2) whether the right is not too vague to be enforced without straining the judiciary, and (3) whether the statute unambiguously imposes a binding and mandatory obligation. *Id.* (also noting that these factors create only a rebuttable presumption that the right is

enforceable under § 1983). Importantly, "only unambiguously conferred rights, as distinguished from mere benefits or interests, may be enforced under § 1983." *31 Foster Children v. Bush*, 329 F.3d 1255, 1269 (11th Cir. 2003) (citing *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002)).

Section 3599 provides in relevant part that a § 2254 petitioner seeking to vacate or set aside a state-imposed death sentence who is "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." 18 U.S.C. § 3599(a)(2). Subsections (b) through (f) define the necessary background and experience required of attorneys, the scope of the representation, and the type of services that may be funded. The scope of the representation is defined in subsection (e) as follows:

> 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.

18 U.S.C. § 3599(e). Thus, under the statute, once federal counsel is appointed, the attorney is obligated "to represent the prisoner 'throughout every subsequent state of available judicial proceedings,' including 'all available postconviction process' in state and federal court (such as state clemency proceedings), until 'replaced by similarly qualified counsel.'" *Chavez v. Sec'y, Fla. Dep't of Corr.,* 742 F.3d 940, 944 (11th Cir. 2014) (quoting § 3599(e)) (citing *Harbison*, 556 U.S. at 185-88 (2009)).

Long argues that the appointment of federal counsel under § 3599 created an enforceable federal right for him to have his federal counsel appear and represent him in Florida's clemency proceedings. Long contends that this right is enforceable against infringement by state actors under § 1983 because § 3599 (1) identifies a particular subclass of person to benefit, *i.e.*, habeas petitioners seeking to vacate a death sentence who are financially unable to obtain adequate representation; (2) the right is not too vague to be enforced; and (3) it plainly requires federally appointed counsel to appear in clemency proceedings. *See Blessing*, 520 U.S. at 340-41 (reciting the factors for determining whether a federal statute creates a federal right). The Court disagrees.

To enforce a federal statutory right through § 1983, a court must determine that Congress "unambiguously conferred" a statutory right that can be remedied

through a private cause of action. *Gonzaga Univ.*, 536 U.S. at 283-85. Long has cited no case in which a court has determined that § 3599 creates a federal right enforceable against state actors under § 1983, requiring the state to permit federally appointed counsel to appear in a state clemency proceeding. Long relies on *Harbison v. Bell*, 556 U.S. 180, 185–88 (2009).

The Supreme Court in *Harbison v. Bell* held, in circumstances where the state was not authorized to appoint clemency counsel, "that § 3599 authorizes federally appointed counsel to represent their clients in state clemency proceedings and entitles them to compensation for that representation." 556 U.S. 180, 194 (2009). *Harbison* was not a § 1983 case, and it thus did not address or analyze whether § 3599 creates a privately enforceable federal right to counsel in a state clemency proceeding. Instead, the Court decided that the district court overseeing Harbison's federal habeas petition had abused its discretion by not expanding the scope of the federally appointed habeas counsel's representation to include the state clemency proceedings. *Harbison*, 556 U.S. at 185-86. The Court determined, after considering the statute's language, structure, and legislative history, that Congress intended to *authorize* federally appointed counsel to appear in state clemency proceedings and receive compensation where the state does not provide counsel. *See id.* at 192–93. Contrary to broadly recognizing a federal right under § 3599 that

federally appointed counsel must be allowed appear in all clemency proceedings, the Supreme Court in *Harbison* recognized that federally appointed counsel would not provide all authorized services, such as representation at clemency, in every case. *See* 556 U.S. at 188 (appointed counsel is not expected to provide each service enumerated in subsection (e) for every client). Instead, the Court explained that the federal representation was intended to "fill[] a gap" in circumstances, such as clemency proceedings, where states are not constitutionally required to provide counsel. *Harbison*, 556 U.S. at 191 (discussing legislative history of the statute).

Authorizing federal counsel to appear in state clemency proceedings is a far cry from recognizing an enforceable right to have federal counsel appear. The Court concludes that nothing in *Harbison* or § 3599 unambiguously confers an enforceable federal right in all clemency proceedings to have federally appointed counsel appear in conflict with a state's process, and especially not where the state process provides counsel. The proper remedy for the denial of federally funded representation under the statute would be an appeal of the district court's decision (in the habeas case) either to deny counsel or decline to expand the scope of the representation. Moreover, recognizing the right Long asserts on the facts presented would require the state to accept the appearance of federal counsel in clemency proceedings, overriding the state's discretion and conflicting with the state's own procedure,

potentially raising serious federalism concerns.[12] This also could potentially give rise to conflicting advice between federal counsel and state counsel and disrupt the state process.

Even assuming an enforceable federal right can be said to exist under § 3599, a position this Court rejects, Long is not entitled to it on the facts presented because a petitioner is only eligible for the federally funded representation under the statute if he is not able to obtain representation. Section 3599(a)(2) provides that an indigent habeas petitioner is eligible for federally funded representation if "unable to obtain adequate representation." § 3599(a)(2). As explained by the Sixth Circuit, based on the structure of § 3599, "a defendant who cannot qualify for federally appointed counsel under subsection (a) has no claim to counsel under subsection (e)." *Irick v. Bell*, 636 F.3d 289, 291 & n.2 (6th Cir. 2011). The Sixth Circuit in *Irick* affirmed the denial of authorization for federal funding for counsel's representation of a capital habeas petitioner in a state court competency-to-be-executed proceeding because the state law provided counsel. The court concluded, "[a]bsent clear

[12] Although the Supreme Court in *Harbison* rejected a similar federalism argument, it did so interpreting the scope of representation in the context of a state clemency system that did not authorize the appointment of counsel so the state had no position or interest in the issue. The case does not discuss whether the statute creates a private cause of action for a federal right enforceable against a state actor.

direction from the United States Supreme Court or Congress, we decline to obligate the federal government to pay for counsel in state proceedings where the state itself has assumed that obligation."[13] *Id.* at 291. The Eleventh Circuit has recognized this limitation as well and expressed agreement with *Irick's* reading of the statute, stating it "makes good sense." *Lugo v. Sec'y, Fla. Dept' of Corr.*, 750 F.3d 1198, 1214 (11th Cir. 2014) (citing *Irick* favorably and rejecting a claim that § 3599 entitles a state prisoner to federally paid counsel in subsequent state postconviction proceedings, noting that such an expansive reading of the statute would greatly "increase the cost of implementing § 3599" and "would have the practical effect of supplanting state-court systems for the appointment of counsel in collateral review cases" (internal quotations omitted)).

Long argues that eligibility is irrelevant and no longer at issue because he was already appointed federal counsel and thus subsection (e) is at issue.[14] The Court

[13] In discussing the scope of representation authorized under § 3599, the *Harbison* Court also explained that § 3599(e) would not require federally appointed counsel to represent a defendant awarded a retrial in state court because states are constitutionally required to provide counsel for indigent defendants at trial. 556 U.S. at 189. This also lends support for the conclusion that there is no federal right to federally funded counsel under § 3599 where counsel is otherwise provided.

[14] Long argues that the availability of state-provided representation is irrelevant to his claim because the statute requires his federal attorney to continue "[u]nless replaced by similarly qualified counsel upon the attorney's own motion or the motion of the defendant," 18 U.S.C. § 3599(e), and there was no such motion. The Court rejects this argument. Subsection (e), defining the scope of the federal representation, requires the appointed attorney to continue unless

disagrees because nothing in the statute precludes a court from reexamining whether the habeas petitioner is eligible for the appointment of habeas counsel. Although Long remained indigent, his ability "to obtain adequate representation" materially changed when the state provided counsel. As noted, Florida's clemency process authorizes the clemency board to appoint private counsel to represent a person sentenced to death in those proceedings, *see* Fla. Stat. § 940.031, and importantly, the FCOR did appoint counsel from the state's list of qualified clemency attorneys and permitted him to appear at the interview.[15] This eliminated any need for the federally appointed counsel to fill the gap recognized in *Harbison* and thereby rendered Long ineligible for federal representation in clemency under § 3599(a)(2). The Court notes that the Middle District of Florida, which had jurisdiction over Long's habeas proceeding, declined authorization for Long's federally funded counsel to appear in state court proceedings to challenge the lethal injection procedure, citing *Irick*. *Long v. Sec'y , Fla. Dept' of Corr.*, No. 8:13cv2069-JDW, ECF No. 38 (M.D. Fla. May 3, 2019). That decision is instructive and bolsters this

---

that attorney or the defendant moves for a substitution of counsel in the federal proceeding and is replaced by that court. It does not speak to the impact of the availability of a state court attorney in a state proceeding.

[15] Defendants have pointed out that under Florida law, Norgard would not even be eligible to represent Long in the clemency proceeding. *See* Fla. Stat. § 27.711(11).

Court's conclusion that Long was not eligible for federal representation in the clemency proceeding because state counsel was provided. Long effectively wants his choice of counsel, which he is not entitled to.[16] *See Wheat v. United States*, 486 U.S. 153, 159 (1988) (stating that an indigent defendant is entitled to appointed counsel, but not to the appointed counsel of his choice).

Finally, again assuming a federal right is implicated, the Court finds no merit in Long's argument that he was unable to obtain "adequate representation" from McClellan's appointment. This is a mere eligibility standard in the statute. Federal representation is available to the indigent petitioner who is unable to obtain adequate representation, § 3599(a)(2), period. This does not create an ineffective assistance standard. Nonetheless, the Court notes that McClellan is a Florida attorney who was qualified to be listed on Florida's registry of attorneys available to serve as clemency counsel. Thus, adequate representation was available for purposes of subsection (a)(2).

[16] Despite the apparent benefit to maintaining the continuity of counsel through clemency with the federally appointed attorney who is well-positioned to represent the client, having likely accumulated a great deal of knowledge about the defendant and his case, as recognized in *Harbison*, 556 U.S. at 193-94, there is no federal guaranty to the best possible attorney. Federally funded counsel is only appointed if the indigent prisoner is "unable to obtain adequate representation," § 3599(a)(2). Moreover, nothing prevents the federally appointed attorney from passing relevant information to the state-appointed attorney, as occurred in this case.

2. Constitutional Claim

As noted earlier, and as Long fully recognizes, there is no constitutional right to state clemency, to a clemency hearing, or to counsel in a clemency hearing. *See generally, Woodard*, 523 U.S. at 279-85 (1998); *Herrera*, 506 U.S. at 41; *White*, 70 F.3d at 1201. Long does not assert a due process claim or challenge Florida's clemency procedures. Instead, he argues that in creating a mandatory executive clemency procedure, Florida has converted clemency into a "critical stage" of his criminal proceedings, *see* Fla. Stat. § 922.052 (stating the Governor may sign a warrant for execution "if the executive clemency process has concluded"), and thus the Sixth Amendment right to counsel attached. Long argues that this right requires "meaningful" counsel and that McClellan's performance was not "meaningful" on several grounds. Long further argues that McClellan was financially conflicted due to the statutory cap on his compensation, was unable to review the voluminous materials of Long's case, was not qualified, did not undertake an adequate representation under professional guidelines, and caused Long not to participate in his clemency interview.

Long offers no support for his assertion that the state's clemency procedure rises to the level of a critical stage in his criminal proceedings to which a Sixth Amendment right to meaningful counsel attached, and the Court finds none.

"[U]nder the Sixth and Fourteenth Amendments, a criminal defendant is entitled to effective assistance of counsel during trial, during the penalty phase of a capital case, and at various critical stages of a criminal prosecution where substantial rights of a criminal accused may be affected," such as appeals, a pretrial lineup, or a preliminary hearing. *Williams v. Turpin*, 87 F.3d 1204, 1209 (11th Cir. 1996) (internal marks and citations omitted). Criminal prosecutions are concerned with "adjudicating the guilt or innocence of a defendant." *Woodard*, 523 U.S. at 285 (Rehnquist, J.) (quoting *Evitts v. Lucey*, 469 U.S. 387, 393 (1985)). While Long does not argue otherwise, it bears repeating that even in the context of state post-conviction proceedings, the Supreme Court has explicitly held that there is no constitutional right to an attorney. *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Murray v. Giarratano*, 492 U.S. 1 (1989) (applying the rule to capital cases). Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings. *Coleman*, 501 U.S. at 752, *abrogated in part by Martinez v. Ryan*, 566 U.S. ----, 132 S. Ct. 1309 (2012) (creating a narrow exception that allows petitioners to claim ineffective assistance of post-conviction counsel as a means of overcoming the procedural default of ineffective-assistance-of-trial/appellate-counsel claims). *See Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982) (where there is no constitutional right to counsel there can be no deprivation

of effective assistance); *see also* 28 U.S.C. § 2261(e) ("The ineffectiveness or incompetence of counsel during State or Federal postconviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2254."). Nothing requires a different result in the context of the even more discretionary relief available through clemency after the conclusion of all criminal proceedings. *White,* 70 F.3d at 1201 (noting there is no constitutional right to counsel in clemency).

Therefore, Long's argument that in creating a mandatory executive clemency procedure, Florida has converted clemency into a "critical stage" of his criminal proceeding implicating the Sixth Amendment guaranty of counsel is unavailing. The fact that Florida's clemency proceeding is a necessary step to obtaining a death warrant, *see* Fla. Stat. § 922.052, does not elevate the discretionary clemency proceeding to a constitutionally protected "critical stage" of the criminal proceedings. *See generally, Gardner v. Garner*, 383 F. App'x 722, 728-29 (10th Cir. 2010) (noting a constitutional right to counsel does not exist in postconviction proceedings nor does it extend to clemency based on a state-created interest). Although clemency is considered a "fail safe" to safeguarding life and thus warrants some minimal due process protection, *see Woodard*, 523 U.S. at 289 (O'Connor, J. concurring), clemency remains a discretionary process and is ultimately about

mercy, not "adjudicating the guilt or innocence of a defendant," *id.* at 285 (Rehnquist, J.) (quoting *Evitts v. Lucey*, 469 U.S. 387, 393 (1985)). Consequently, any claim that Long had a constitutional right to counsel or that McClellan was ineffective in Long's clemency proceedings is futile because it would not be cognizable.[17]

The Court finds no substantial likelihood of success on the merits of Long's claims. Moreover, these claims could have been brought in September when it was clear that the FCOR was excluding the federally appointed counsel from participating in their capacity as appointed counsel. A court considering a stay must apply "a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Hill*, 547 U.S. at 584 (quoting *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004)). Long waited until two weeks before his execution to file

[17] Even assuming *arguendo* that a right to meaningful counsel under the Sixth Amendment attached in this instance, the factual record does not provide a basis to support a likelihood of success on such a claim. The Sixth Amendment right to the effective assistance of counsel requiring "meaningful representation" only requires reversal if counsel's deficient performance resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). Prejudice cannot be shown because the procedure is discretionary and Long failed to appear at his interview. Any purported conflict based on the statutory funding cap or McClellan's inability to fully explore the record or obtain expert testimony in the six months' notice period, even if deficient, was not likely to result in a different outcome. The board was apprised of Long's brain injuries and the financial and time constraints. The fact that McClellan was not successful does not mean he was constitutionally ineffective or not "meaningful," assuming this standard even applies.

his § 1983 action even though the claim for which he seeks injunctive relief—the exclusion of federally appointed counsel—has been available since September of 2018, when counsel was excluded from the interview, and did not depend on the final resolution of the clemency proceedings.

Accordingly, the Motion for Stay of Execution, ECF No. 4, is **DENIED**.

DONE AND ORDERED this 16th day of May 2019.

M. Casey Rodgers

M. CASEY RODGERS
UNITED STATES DISTRICT JUDGE