No. 16-6795

IN THE
Supreme Court of the United States

CARLOS MANUEL AYESTAS,

Petitioner,

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE (INSTITUTIONAL DIVISION),

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The American Bar Association is the world's largest voluntary professional membership organization and the leading organization of legal professionals in the United States.[1] Its more than 400,000 members come from all fifty states and other jurisdictions. They include prosecutors, public defenders, and private defense counsel, as well as attorneys from law firms, corporations, non-profit organizations, and governmental agencies. The ABA's membership also includes judges, legislators, law professors, law students, and non-lawyer associates in related fields.[2] Its mission is, in part, to serve the public and the legal profession by advocating for the ethical and effective representation of all clients.

The ABA's rules of professional conduct include guidelines and standards for the representation of clients in the criminal justice system generally, and specifically in the uniquely complex and high-stakes context of capital litigation. The Guidelines for the

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* certify that they authored this brief in its entirety and that no party or its counsel, nor any other person or entity other than amicus or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The parties have granted blanket consent to the filing of amicus briefs.

[2] Neither this brief nor the decision to file it should be interpreted as reflecting the views of any judicial member. No member of the ABA Judicial Division Council participated in this brief's preparation or in the adoption or endorsement of its positions.

Appointment and Performance of Defense Counsel in Death Penalty Cases, which were first adopted as ABA policy in 1989 and revised in 2003 ("ABA Death Penalty Guidelines"),[3] set forth a baseline for effective representation at every stage of a capital case and have been widely adopted by state and local bar associations and indigent defense organizations, and by court rule in many death penalty jurisdictions. The ABA Standards for Criminal Justice ("ABA Criminal Justice Standards")[4] also provide guidance on professional conduct based on the consensus views of a broad array of criminal justice professionals.

The ABA's focus has been and remains on ensuring that all clients, including capital habeas petitioners, receive quality legal representation. The ABA has provided testimony in support of the provision of funding for indigent criminal defense under the Criminal Justice Act of 1964 ("CJA"), as well as the higher funding levels for capital cases authorized by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). For more than thirty years, the ABA Death Penalty Representation

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[3] ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913 (2003).

[4] ABA Standards for Criminal Justice, *Providing Defense Services* (3d ed. 1992). The ABA published a revised edition of these standards in 2015; the guidelines cited herein, however, reflect the professional standards under which Mr. Ayestas's federal habeas counsel was obligated to operate in pursuing his application under 18 U.S.C. § 2254 and his motion for funds under 18 U.S.C. § 3599(f).

Project also has worked to improve the quality and availability of counsel in death penalty cases by recruiting counsel from law firms to represent capital clients. ABA-recruited counsel have represented over 300 individuals in capital cases, most of them in the post-conviction context. Additionally, in 2001, the ABA established the Death Penalty Due Process Review Project to research and educate the public and decision-makers on the operation of capital jurisdictions' laws and processes in order to promote fairness and accuracy in death penalty systems.

One of the recurring themes repeatedly observed by ABA-recruited pro bono counsel in capital cases, and by the various assessment teams reviewing the states' capital judicial systems, is ineffective representation resulting from inability to investigate a client's background adequately. This problem is seriously exacerbated by the Fifth Circuit's "substantial need" standard, which effectively prevents counsel from obtaining funds needed for investigation unless counsel first proves the facts that counsel needs the requested funding to develop.

The ABA, as *amicus curiae*, respectfully submits this brief in support of the Petitioner. While the ABA takes no position on the death penalty itself, the ABA urges the Court to ensure that counsel for indigent capital prisoners in federal habeas corpus proceedings – a critical and highly complex stage of litigation – are able to discharge their professional responsibilities and secure funds for the reasonably necessary services to which their clients are entitled.

SUMMARY OF ARGUMENT

Well-established standards of professional conduct, recognized in this Court's jurisprudence, require that counsel conduct an independent and adequate investigation of the facts at each stage of a case. The unusually high stakes and complex requirements of capital habeas litigation make such investigations particularly essential in federal habeas proceedings – never more so than when petitioner's claim is that prior counsel conducted an inadequate investigation. Importantly, this Court has recognized, and professional standards make clear, that counsel must conduct an adequate investigation *prior* to making ultimate strategic determinations about which claims to present and how. The life-or-death importance of investigation in capital habeas litigation is starkly illustrated by the numerous cases in which habeas petitioners with meritorious claims initially failed to obtain relief based on the inadequacy of resources to investigate those claims.

This Court also has recognized, and professional standards support, the judgment Congress made in 18 U.S.C. § 3599(f): to ensure that federal habeas serves its rights-protecting function and that the statutory guarantee of counsel in those proceedings is meaningful, petitioners are entitled to "reasonably necessary" services to support their representation. This statutory authorization of funding is essential because federal habeas counsel generally lacks the expertise, and frequently lacks the time, to carry out all tasks necessary for an investigation. Professional standards generally recommend that counsel secure

the services of investigators, mitigation specialists, and other experts as needed to ensure effective representation.

Despite the importance of investigation in federal habeas and the clear need for reasonably necessary services to accomplish its aims, the Fifth Circuit has imposed a restrictive and circular "substantial need" rule that threatens effective representation in this crucial stage of capital litigation. As propounded by the Fifth Circuit, including in this case, the "substantial need" rule effectively requires counsel to establish a viable claim on the merits before the Circuit will authorize the funding needed to investigate the merits. If permitted to stand, the Fifth Circuit's approach will make it extraordinarily difficult or impossible for counsel representing federal habeas petitioners to meet their professional responsibilities and will jeopardize the ability of federal habeas litigation to ensure the integrity, fairness, and reliability of capital convictions and sentences.

ARGUMENT

An attorney representing a death row prisoner in federal habeas proceedings has a duty to investigate and develop potentially meritorious claims. In many cases, the investigation requires specialized services such as mitigation specialists, investigators, and mental health experts, in addition to attorneys' work. Without access to adequate funding for reasonably necessary services, counsel will be unable to meet minimum professional standards for effective representation of prisoners in capital

habeas proceedings. The Fifth Circuit's restrictive and circular "substantial need" test effectively prevents counsel representing indigent petitioners from fulfilling their professional responsibilities in this critical stage of proceedings, thereby increasing the risk of an unjust execution.

I. INVESTIGATION TO DEVELOP POTENTIALLY MERITORIOUS CLAIMS IS AN ESSENTIAL ROLE AND DUTY OF FEDERAL POST-CONVICTION COUNSEL

This Court has repeatedly confirmed what professional standards explicate: A core function of federal post-conviction counsel is to investigate claims which may have merit so that strategic decisions can be made and substantial claims for relief can be developed and presented to federal courts. Rather than investigating only those claims counsel knows from the outset will prove viable on both deficient-performance and prejudice grounds, counsel is duty-bound to conduct a reasonable investigation to determine which potential claims, if any, are ultimately viable on the merits.

Criminal defense counsel at all stages of proceedings have a "duty to investigate" issues related to guilt and punishment, and counsel's performance of that duty is crucial to ensuring adequate representation. *Strickland v. Washington*, 466 U.S. 668, 690 (1984); *see also Rompilla v. Beard*, 545 U.S. 374, 380 (2005) ("This case, like some others recently, looks to norms of adequate investigation . . . ."). As the Eleventh Circuit has observed, a defense attorney's "independent duty to

investigate and prepare" is "[a]t the heart of effective representation." *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir. 1982).

In preparing a federal habeas petition, counsel "must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief." *McCleskey v. Zant*, 499 U.S. 467, 498 (1991); *see also* ABA Death Penalty Guideline 10.15.1(C) (habeas counsel "should seek to litigate all issues, whether or not previously presented, that are arguably meritorious"). The importance of this duty is heightened in the federal habeas context by doctrines of waiver and abuse of the writ. *See McFarland v. Scott*, 512 U.S. 849, 860 (1994) (O'Connor, J., concurring).

"Claims of ineffective assistance" in particular "often require investigative work" to develop facts that may not appear in the record or in the files of ineffective prior attorneys. *Martinez v. Ryan*, 566 U.S. 1, 11 (2012). Indeed, "the inherent nature of most ineffective assistance of trial counsel claims means that the trial court record will often fail to contain the information necessary to substantiate the claim." *Trevino v. Thaler*, 133 S. Ct. 1911, 1918 (2013) (internal quotation marks omitted); *see also Ex parte Varelas*, 45 S.W.3d 627, 629-30 (Tex. Crim. App. 2001) ("In most cases, the record on direct appeal is inadequate to develop an ineffective assistance claim because the very ineffectiveness claimed may prevent the record from containing the information necessary to substantiate a claim." (internal quotation marks omitted)).

It follows that, in pursuing the limited procedural-default exception this Court identified in *Martinez* and *Trevino* – which is available only where, *inter alia*, "'there was no counsel'" in state habeas "'or counsel in that proceeding was ineffective,'" *Trevino*, 133 S. Ct. at 1921 (quoting *Martinez*, 566 U.S. at 17) – federal habeas counsel must investigate to identify "the information necessary to substantiate the claim" not effectively pursued below, *id.* at 1918 (internal quotation marks omitted). An adequate investigation by federal habeas counsel is especially critical where, as here, petitioner's claim is that his prior counsel conducted an inadequate, unreasonably narrow investigation. *See, e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 534, 538 (2003) (counsel's inadequate investigation did not reflect reasonable professional judgment and prejudiced the defendant at sentencing); *see also* ABA Death Penalty Guideline 1.1, cmt. at 933 ("Like trial counsel, counsel handling state collateral proceedings must undertake a thorough investigation into the facts surrounding all phases of the case.").

In recognizing this obligation and defining its parameters, the Court has looked to prevailing norms of practice as reflected in ABA professional guidelines and standards. *See, e.g.*, *Wiggins*, 539 U.S. at 524 (finding counsel's investigation in connection with capital sentencing was unreasonable in light of "well-defined norms" discussed in ABA guidelines). The ABA guidelines and standards serve as "guides to determining what is reasonable," and what obligations are incumbent upon an attorney who agrees to undertake a capital

representation. *Rompilla*, 545 U.S. at 387; *Wiggins*, 539 U.S. at 524; *Strickland*, 466 U.S. at 688; *see also Williams v. Taylor*, 529 U.S. 362, 396 (2000) (citing ABA Standards for Criminal Justice to support determination that "trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background").

The importance of habeas counsel's duty to investigate is well-supported in the ABA Death Penalty Guidelines and the ABA Criminal Justice Standards. The ABA Death Penalty Guidelines "applied the clear requirements for investigation set forth in the earlier Standards to death penalty cases," providing explicit and "forceful directive[s]" for capital counsel. *Rompilla*, 545 U.S. at 387 n.7. "[T]hese Guidelines are not aspirational. Instead, they embody the current consensus about what is required to provide effective defense representation in capital cases." ABA Death Penalty Guideline 1.1, History of Guideline.

Post-conviction counsel has an "ongoing obligation[]" to conduct a thorough and independent investigation of the case, and to review continually whether prior counsel's theory of the case should be modified in light of subsequent developments. ABA Death Penalty Guidelines 10.7(A), 10.15.1(E); *see also Wiggins*, 539 U.S. at 522 (discussing counsel's duty to conduct a thorough investigation). To fulfill this obligation, "[t]wo parallel tracks of post-conviction investigation are required." ABA Death Penalty Guideline 10.15.1, cmt. at 1086. One track focuses on "the capital case," including prior counsel's performance at trial and in any state post-

conviction proceedings. *Id.; see also id.* Guideline 10.7(B)(1) (counsel must investigate "the defense provided to the client at all prior phases of the case"). The other track "focuses on the client," with the goal of "assembling a more-thorough biography of the client than was known at the time of trial," which allows counsel to identify "mitigation that was not presented previously." *Id.* Guideline 10.15.1, cmt. at 1086. To develop potential claims at this stage, "collateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation." *Id.* at 1085. Indeed, to the extent counsel determines the official record of proceedings is not complete, counsel has a duty to "supplement it as appropriate." *Id.* Guideline 10.7(B)(2).

Importantly, this Court has recognized that one reason the duty to investigate is essential is that it enables counsel to advise the client and to make strategic decisions regarding a representation. *See, e.g.*, *Wiggins*, 539 U.S. at 523 ("[W]e focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background was itself reasonable."); *Williams,* 529 U.S. at 396 (counsel's failure to uncover and present mitigating evidence at sentencing was not justifiable as a tactical decision because counsel had not "fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background"); *McFarland,* 512 U.S. at 855 ("The services of investigators and other experts may be critical in the preapplication phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified.").

Investigation is "necessary to making an informed choice among possible defenses," not only in the guilt stage but also at sentencing. *Wiggins*, 539 U.S. at 511.

The ABA Death Penalty Guidelines likewise are clear that habeas counsel should conduct a thorough investigation *before* determining which claims are viable and should be raised in a petition. *See* ABA Death Penalty Guideline 10.8(A)(2). After all,

> [c]ounsel cannot responsibly advise a client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the client's competency to make such decisions, unless counsel has first conducted a thorough investigation with respect to both [the guilt and penalty] phases of the case.

ABA Death Penalty Guideline 10.7, cmt. at 1021. For this reason also, counsel may not decline to investigate based on a belief that investigation would be futile or even based on a client's expressed desires. *See id.*

This Court also has held repeatedly that constitutional error may occur where counsel fails to thoroughly investigate a defendant's background in order to identify and develop mitigating factors for sentencing. *See, e.g.*, *Rompilla*, 545 U.S. at 385-86; *Wiggins*, 539 U.S. at 534-35; *Williams*, 529 U.S. at 393. "Mitigating evidence unrelated to

dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." *Williams*, 529 U.S. at 398. Thus, "investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" *Wiggins*, 539 U.S. at 524 (emphasis in *Wiggins*) (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C) (1989)). "[A]mong the topics counsel should consider presenting," depending on the facts in a given case, "are medical history, educational history, employment and training history, *family and social history*, prior adult and juvenile correctional experience, and religious and cultural influences." *Id.* (emphasis in *Wiggins*) (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.8.6 (1989)). Where prior counsel failed to adequately investigate potential mitigation factors, habeas counsel's investigation may be time-consuming, but is imperative and potentially outcome-determinative.

The surpassing importance of the duty to investigate is demonstrated, crucially and unfortunately, by the fact that "inadequate investigation by defense attorneys . . . ha[s] contributed to wrongful convictions in both capital and non-capital cases." ABA Death Penalty Guideline 10.7, cmt. at 1017. The duty to investigate is thus not unique to the capital context or to habeas proceedings. Counsel's professional obligations in the capital context stem from the broader obligation

of all criminal defense counsel "to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to" relevant facts. ABA Criminal Justice Standard 4-4.1(a).

Still, in a capital case, counsel's "duty to investigate the case thoroughly . . . is intensified (as are many duties) by the unique nature of the death penalty." ABA Death Penalty Guideline 10.7, cmt. at 1016. Moreover, in the capital context, even if guilt is determined correctly, inadequate investigation concerning the sentencing phase raises the risk that the death penalty will be imposed "in spite of factors which may call for a less severe penalty." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978). The disturbingly high rate of error as to both guilt and sentence demonstrates that "the trial record is unlikely to provide either a complete or accurate picture of the facts and issues in the case" for a variety of reasons, including the possibility that "the trial attorney did not conduct an adequate investigation in the first instance." ABA Death Penalty Guideline 10.15.1, cmt. at 1086.

The importance of investigation in the federal habeas stage is also starkly illustrated by the numerous cases in which such investigation allowed counsel to develop claims that ultimately led to relief from a death sentence. This Court has vacated death sentences where investigation in federal habeas revealed a viable claim based on intellectual disability, *see Brumfield v. Cain*, 135 S. Ct. 2269, 2282-83 (2015), or on juror bias and prosecutorial misconduct, *see Williams,* 529 U.S. at 440 (2000). In both cases, *state* habeas courts had *denied* funding

for investigators to pursue the petitioner's claims. *See Brumfield*, 135 S. Ct. at 2275; *Williams*, 529 U.S. at 442.

The following additional examples are drawn from the experience of attorneys representing capital petitioners through the ABA's Death Penalty Representation Project:

- Joe Lee Guy: Mr. Guy was four months away from a scheduled execution date when lawyers at Dorsey & Whitney took over his case. The firm's new investigation revealed, among other things, that the investigator hired by Mr. Guy's previous defense counsel had befriended the victim's mother, coached her in her testimony against Mr. Guy, and became the sole beneficiary of her estate worth between $500,000 and $750,000. *See Guy v. Dretke*, No. CIV.A. 5:00-CV-191-C, 2004 WL 1462196, at *1 (N.D. Tex. June 29, 2004). The new investigation also discovered significant mitigation evidence that had not been presented previously, including the facts that Mr. Guy (a) had an IQ of 77, (b) suffered traumatic childhood abuse at the hands of his mother, (c) was abandoned as a child by both parents, and (d) had an alcoholic father who was murdered. *See* Howard Witt, *Death Row Inmate Wins Sympathy*, Chi. Trib., June 23, 2004. After an evidentiary hearing, the federal district court granted habeas relief based on ineffective assistance of counsel and remanded for a new penalty-phase trial. *See*

Guy, 2004 WL 1462196, at *2. Mr. Guy ultimately received a life sentence.

- Alberto Martinez Carreon: After state post-conviction relief was summarily denied, Manatt Phelps & Phillips took over the case. The firm conducted a full investigation with the help of several experts and investigators, some of whom traveled to Mexico where Mr. Carreon was born. *See* Pet. for Review of Denial of PCR at 51, *Arizona v. Carreon*, 2016 WL 1603009 (Mar. 14, 2016) (pending). The investigation discovered substantial mitigation evidence never presented to the jury about Carreon's abusive, impoverished childhood in Tijuana. *See id.* Among other things, a relative who came to rescue Carreon as a child from one of his parents' violent fights reported that she had found him so malnourished that he was on the verge of death and unable even to raise his head or arms. *See id.* at 64. The case is pending.

- Quintez Wren Hodges: Skadden, Arps, Slate, Meagher & Flom took over Mr. Hodges's case in 2006 and conducted a full investigation of several claims not previously investigated. The federal district court vacated Mr. Hodges's death sentence on multiple grounds, finding that he was entitled to relief based on his showings that (a) the prosecution knowingly presented false testimony during the sentencing phase of the trial, (b) the jury was improperly instructed at sentencing, and (c) Mr. Hodges was prejudiced at sentencing

> by the ineffective assistance of his counsel, who was suffering a mental breakdown at the time and conducted no investigation. *Hodges v. Epps*, No. 1:07CV66-MPM, 2010 WL 3655851, at *38-39 (N.D. Miss. Sept. 13, 2010), *aff'd*, 648 F.3d 283 (5th Cir. 2011).

Were it not for the fact that they were represented by pro bono counsel that had the resources to investigate to develop their claims, Mr. Guy, Mr. Carreon, and Mr. Hodges would likely be dead or on death row today. But as Congress recognized, the system of justice in capital cases must not, and cannot, depend on the availability of pro bono services from law firms and lawyers willing and able to undertake an extensive financial commitment to ensure adequate investigation.[5]

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[5] As a practical matter, at any time, the number of attorneys able to undertake a capital habeas representation – including the required investigation – on a pro bono basis is limited. Notably, more than 80 percent of private attorneys are solo practitioners or practice in firms with 100 or fewer attorneys. Am. Bar Ass'n, Lawyer Demographics – Year 2016, http://goo.gl/CRsjXL. Because small and medium-sized firms often have higher staffing utilization levels and lower profit margins than large firms, it is more difficult for them to make an extensive, open-ended commitment – like that required by a capital habeas representation – without assurance of adequate compensation for their time and funding for reasonably necessary services. *See* ABA Standing Committee on Pro Bono and Public Service, *Supporting Justice III: A Report on the Pro Bono Work of America's Lawyers*, 5 (Mar. 2013). In the ABA's efforts to recruit pro bono counsel for capital cases, we have noted that inadequate funding for expert and investigative members of the defense team is a substantial deterrent to *(cont'd)*

These examples illustrate the devastating human cost, and cost to the legitimacy of our justice system, when investigations in capital habeas are frustrated.

II. INVESTIGATION OFTEN REQUIRES SPECIALIZED SERVICES FOR WHICH INDIGENT PETITIONERS LACK FUNDS

The investigation required at the federal habeas stage often requires specialized services such as investigators, mitigation specialists, and mental health experts, especially when attorneys in prior stages failed to develop the facts relevant to potentially promising claims. This Court has recognized the need for these services, and Congress has provided funding to ensure access to these services for indigent petitioners. Professional guidelines make clear that, without funding for reasonably necessary services, it may become difficult or impossible for habeas counsel to fulfill their investigative obligations.

To ensure that access to habeas counsel is a meaningful safeguard for due process – and that post-conviction proceedings in capital cases meaningfully examine the constitutionality of trials and appeals – defense counsel must have not only the requisite skills and experience but also the time and resources necessary to provide quality representation. *Cf. Trevino*, 133 S. Ct. at 1921 (counsel must have adequate time and resources to

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attorneys and firms deciding whether they are able to represent an indigent capital client.

ensure a "meaningful opportunity" to develop and present a claim of ineffective assistance at trial). For this reason, and because ineffective-assistance claims in particular "often require investigative work," *Martinez*, 566 U.S. at 11-12, "[t]he services of investigators and other experts may be critical in the preapplication phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified," *McFarland*, 512 U.S. at 855.

Ineffective assistance of counsel claims, by their nature, often are not obvious from a cold record, or even apparent from state habeas pleadings where state post-conviction counsel has failed to investigate. *See Trevino*, 133 S. Ct. at 1919; *Martinez*, 566 U.S. at 11-12. Failure of the federal courts to provide adequate funding for investigative services, including the services of mitigation specialists and mental health experts, "results in the inability to attract qualified counsel to take on capital cases and, where adequate counsel might be found, the inability of that counsel to conduct the necessary and thorough investigation of both guilt and penalty phase issues required at every stage of a capital case." Emily M. Olson-Gault, Testimony, *Birmingham, Alabama Hearing Before the Judicial Conference of the United States Committee to Review the Criminal Justice Act Program*, 3 (Feb. 18, 2016) (footnote omitted).

As the Court also has recognized, Congress enacted Section 3599 to provide "enhanced rights of representation" for defendants and petitioners in capital cases, including "more money for

investigative and expert services." *Martel v. Clair*, 565 U.S. 648, 659 (2012) (citing 18 U.S.C. § 3599(f)). Congress has done so "in light of what it calls 'the seriousness of the possible penalty and . . . the unique and complex nature of the litigation.'" *Id.* (quoting 18 U.S.C. § 3599(d)). The enactment of Section 3599 "reflects a determination that quality legal representation is necessary" in capital proceedings to ensure "fundamental fairness in the imposition of the death penalty." *McFarland*, 512 U.S. at 855, 859. Crucially, Congress knew that such legal representation would in many cases require "investigative, expert, or other services," and so provided for defense counsel's ability to obtain funding for such services where "reasonably necessary for the representation." 18 U.S.C. § 3599(f). Just as "Congress's provision of a right to counsel" under the statute "reflects a determination that quality legal representation is necessary in capital habeas corpus proceedings," the fact that the same statute provides for "'the defendant's attorneys to obtain such services' from the court," *McFarland*, 512 U.S. at 855, reflects Congress's determination that quality legal representation in some cases necessarily entails such services. The Court can "safely assume that [Congress] did not intend for the express requirement of counsel to be defeated," *id.* at 856, by interposing a restrictive rule that would deny services "reasonably necessary for the representation of the defendant," 18 U.S.C. § 3599(f).

This commonsense interpretation of the statute is confirmed by the history of Section 3599(f). When Congress initially enacted this statutory provision in 1988, there was substantial concern that identifying

counsel willing and able to represent death-row prisoners in federal habeas proceedings was becoming increasingly difficult. *See* 134 Cong. Rec. H7285 (daily ed. Sep. 8, 1988) (Statement of Rep. Conyers). When the provision was amended as part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Congress was acutely aware of the fact that funding for specialized services to support investigation was needed at the habeas stage. *See, e.g.*, 141 Cong. Rec. S7819 (daily ed. June 7, 1995) (Statement of Sen. Biden) ("[T]he defendant needs the same tools available to him or her that a wealthy defendant would need or the prosecutor needs. . . . Do not be misled by the notion that the trial is over, therefore, there is no other factfinding to go on, you do not need an investigator."); *id.* at S7816-17 (Statement of Sen. Feingold) (noting "instances of States not providing sufficient resources to assigned defense counsel for proper investigation of a case" and the "significant disadvantage" at which such inadequate investigative resources puts capital defendants "[c]ompared to the resources available to an aggressive prosecutor"). Then-ABA President John J. Curtin, Jr., noted in his testimony that the Supreme Court's recent decision in *McCleskey v. Zant* had clarified "the intensive level of pre-filing investigation" that constitutes the due diligence standard for capital habeas attorneys. *Habeas Corpus Issues: Hearing Before the House of Representatives Committee on the Judiciary, Subcommittee on Civil and Constitutional Rights*, 102nd Cong. 497-98 (July 17, 1991) (statement of John J. Curtin, Jr., ABA President).

"National standards on defense services have consistently recognized that quality representation *cannot be rendered unless* assigned counsel have access to adequate supporting services." ABA Death Penalty Guideline 4.1, cmt. at 955 (emphasis added) (internal quotation marks omitted). While the need for such services may arise in a variety of criminal defense contexts, it "is particularly acute in death penalty cases." *Id.* Where support services are reasonably necessary, these services should be provided by persons independent of the government and counsel should have the right to communicate with them confidentially "to the same extent as would counsel paying such persons from private funds." *Id.* Guideline 4.1(B)(2).

These services may be particularly important to a thorough investigation at the post-conviction stage. *See id.* Guideline 4.1, cmt. at 955. Investigators are often "indispensable to discovering and developing the facts that must be unearthed . . . in post-conviction proceedings," both because they have specialized expertise that counsel lacks and because counsel often simply has too many other duties to discharge. *Id.* at 954. Likewise, mitigation specialists "possess clinical and information-gathering skills and training that most lawyers simply do not have," and the time and ability to gather and incorporate what may be critical information for the defense case. *Id.* at 959; *see also* ABA Death Penalty Guideline 10.1 (capital habeas representation "requires enormous amounts of time, energy, and knowledge," and counsel ordinarily cannot be expected to shoulder that burden alone). Additionally, "[t]he circumstances of a particular

case will often require specialized research and expert consultation." *Id.* Guideline 10.7, cmt. at 1026. For example, where, as here, the petitioner "is a relatively recent immigrant, counsel must learn about," *inter alia*, "the circumstances of his upbringing in his country of origin." *Id.*

"In particular," given the prevalence of mental impairments and severely traumatic backgrounds among those convicted of capital crimes, "mental health experts are essential to defending capital cases." *Id.* Guideline 4.1, cmt. at 956. "Evidence concerning the defendant's mental status is relevant to numerous issues that arise at various junctures during [capital] proceedings," and "the defendant's psychological and social history and his emotional and mental health are often of vital importance to the jury's decision at the punishment phase." *Id.*; *see, e.g.*, *Porter v. McCollum*, 558 U.S. 30, 40 (2009) (reversing denial of habeas relief where counsel failed to investigate and present evidence related to, *inter alia*, defendant's "mental health or mental impairment"). Empirical research confirms that mental health evidence, if competently documented and credibly presented, frequently (and appropriately) "is considered by jurors to be highly mitigating." John H. Blume et al., *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 Hofstra L. Rev. 1035, 1039 (2008). Thus, where mental health is at issue, "a psychologist or other mental health expert may well be a needed member of the defense team" or at least a mental health evaluation may be needed. ABA Death Penalty Guideline 10.4, cmt. at 1004; *see also id.* Guideline

4.1, cmt. at 956 ("Creating a competent and reliable mental health evaluation consistent with prevailing standards of practice is a time-consuming and expensive process.").

Thus, depending on the circumstances of a given case, whether an investigation is as thorough as *Wiggins* requires may depend upon counsel's ability to access reasonably necessary support services. *See* ABA Death Penalty Guideline 4.1(B). Indeed, in *Wiggins* it was a licensed social worker who uncovered "powerful" mitigating evidence regarding "petitioner's bleak life history" that this Court found might have changed the sentencing decision if only it had been presented to the jury. *Wiggins*, 539 U.S. at 516, 534. Commenters suggest that the need for specialized services has only grown in more recent years. *See, e.g.*, Hannah Jacobs Wiseman, *Pro Bono Publico: The Growing Need for Expert Aid*, 60 S.C. L. Rev. 493, 495 (2008) ("Increasingly, experts are necessities in legal cases, and low income individuals without access to quality expert testimony are at a strong disadvantage."); Craig M. Cooley, *Mapping the Monster's Mental Health and Social History: Why Capital Defense Attorneys and Public Defender Death Penalty Units Require the Services of Mitigation Specialists*, 30 Okla. City U. L. Rev. 23, 119 (2005) ("In the end, given the enormity of mitigation investigations and what is at stake, capital defense attorneys and public defender death penalty units need to increasingly rely on their colleagues in the mental health and social work communities to effectively represent capital defendants during the penalty phase.").

The ABA Death Penalty Representation Project has found that "[w]hen counsel fails to provide effective representation, it is often due to limitations such as fee caps and the *failure to fully fund expert and investigative members* of the defense team." Emily M. Olson-Gault, Testimony, *Birmingham, Alabama Hearing Before the Judicial Conference of the United States Committee to Review the Criminal Justice Act Program*, 3 (Feb. 18, 2016) (emphasis added). In light of Congress's provision for funding of reasonably necessary services and this Court's recognition of the importance of such services in federal habeas, there is no reason habeas counsel should be put at risk of having to violate professional norms by forgoing the assistance of mitigation specialists, investigators, or mental health experts whose services are reasonably necessary to a representation.

III. THE FIFTH CIRCUIT'S "SUBSTANTIAL NEED" TEST BLOCKS ESSENTIAL FUNDING AND PREVENTS COUNSEL FROM MEETING THEIR ETHICAL OBLIGATIONS

The Fifth Circuit's "substantial need" rule effectively denies counsel necessary resources to conduct the investigation that is needed to meet minimum professional standards for effective representation. In failing to appreciate the importance of investigation to litigation strategy and the development of claims, it frustrates and even blocks such factual development. Investigation is essential to capital prisoners receiving full and fair consideration of the constitutionality of their convictions and death sentences. Counsel taking on

the extensive burden of a capital habeas representation should be able to do so secure in the knowledge that they will be able to meet their professional duties as attorneys.

The Fifth Circuit interprets the language "reasonably necessary" in 18 U.S.C. § 3599(f) to require that the petitioner demonstrate a "'substantial need' for such services to pursue a claim." *Ayestas v. Stephens*, 817 F.3d 888, 896 (5th Cir. 2016). Not only does the "substantial need" rule appear on its face to interpose a higher standard than the statute requires, but as interpreted by the Fifth Circuit it effectively constitutes a preliminary determination of the merits of the claim that the services are sought to support. *See id.* at 896 (to obtain funds under § 3599(f) "[t]here must be a viable constitutional claim, not a meritless one"); *id.* at 898 (rejecting funding "because Ayestas cannot show that his claim is viable"). Requiring counsel to prove the merits of a claim without funding, in order to obtain funding to investigate the merits of that claim, is circular. It is also self-evidently unfair and impracticable, and it impermissibly jeopardizes the availability of funds that Congress has authorized for the performance of investigative functions that this Court recognizes are essential.

The decision in this case presents a striking example of the Fifth Circuit's paradoxical reasoning. Mr. Ayestas argued below, relying on *Martinez* and *Trevino*, that to prove his prior lawyers were ineffective "he must be allowed to develop and discover what his prior lawyers should have developed or discovered." *Id.* at 895. In short, Mr.

Ayestas did what other prisoners bringing ineffective-assistance claims based on inadequate investigation have done after *Martinez*: he pleaded and briefed that claim without having factually developed all aspects of it – especially the prejudice showing, which necessarily requires an understanding of what an adequate investigation would have uncovered – then moved under 18 U.S.C. § 3599(f) for the resources he needed, including a specific, detailed 20-page investigative plan created by an experienced mitigation specialist. Petitioners who fail to bring such claims in a timely manner risk waiving them. *See, e.g.*, *In re Paredes*, 587 F. App'x 805, 824-26 (5th Cir. 2014) (affirming denial of relief and denying stay of execution where Rule 60(b) motion based on *Martinez* and *Trevino* was not timely filed); *Fowler v. Joyner*, 753 F.3d 446, 466 (4th Cir. 2014) ("[E]ven if such *Martinez*-based claims existed, they have been waived by [petitioner's] failure to raise the issue below . . . ."). Mr. Ayestas's briefing identified several critical areas of further investigation that were needed, but of course could not identify more specifically how prior counsel's failure to pursue those investigations would have changed the picture at sentencing until the facts were developed through a thorough investigation during federal proceedings utilizing the necessary specialists.

The Fifth Circuit acknowledged that Mr. Ayestas "indeed offered" a "substantiated argument, not speculation, about what [his] prior counsel did or omitted doing." *Ayestas,* 817 F.3d at 896. The court's determination nevertheless that a mitigation specialist was not reasonably necessary, even to

support a "substantiated argument," because the petitioner could not show that his claim ultimately was "viable" and not "meritless" precludes development of the claim by prejudging its merits. In particular, the denial of funding for a mental health evaluation precludes the development of evidence to show the impact of Mr. Ayestas's since-diagnosed schizophrenia on his mental state at the time of the crime. *See id.* at 897-98. The Fifth Circuit ultimately recognized that Mr. Ayestas had not in fact been examined by a psychologist – correcting an erroneous finding on which the original panel opinion appeared to rely significantly, *id.* at 897 – and reiterated its decision only as to prejudice. *Ayestas v. Stephens*, 826 F.3d 214, 215 (5th Cir. 2016); *see also Ayestas*, 817 F.3d at 896 (interpreting the district court's ruling "as being that any evidence of ineffectiveness, even if found, would not support relief"). Thus, even where the Fifth Circuit acknowledges – or at least does not rule out the possibility – that the record from state proceedings is infected with prior counsel's ineffectiveness, a petitioner may not access the funds authorized by § 3599(f) unless he can prove *based on that infected record* that he was prejudiced by not having his claim investigated.[6]

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[6] In Texas, as in numerous other states, the state habeas process frequently allows for only a stunted investigation, partly due to strict deadlines. AM. BAR ASS'N, TEXAS DEATH PENALTY ASSESSMENT REPORT at xiii. As the ABA's state assessment team found in its research, "due to ineffective trial, appellate, and state habeas counsel, many inmates with claims of constitutional magnitude may be executed without a court *(cont'd)*

As at least one district court in the Fifth Circuit has recently acknowledged, the Circuit's rule forces petitioners to "face[] something of a 'catch 22' in having to demonstrate that there is some relevant evidence he could discover without first having the funding to pursue that evidence.'" Order at 4, *Tong v. Stephens*, No. 4:10-cv-2355 (S.D. Tex. Sept. 22, 2014). By virtually guaranteeing the denial of necessary resources to perform one of capital habeas counsel's primary functions – investigation – the Fifth Circuit's approach not only deprives capital habeas petitioners of reasonably necessary services under 18 U.S.C. § 3599(f), but also effectively deprives them of their statutorily guaranteed right to counsel. In so doing, the Fifth Circuit's standard threatens to defeat this Court's jurisprudence and Congress's intent:

> Title 18 U.S.C. § 3599 entitles indigent defendants to the appointment of counsel in capital cases, including habeas corpus proceedings. By providing indigent capital defendants with a ***mandatory right to qualified legal counsel*** in these proceedings, Congress has recognized that federal

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ever reviewing their case on the merits." *Id.* at xii. The Fifth Circuit's restrictive standard for authorizing funding for reasonably necessary support services thus compounds an already fraught state process and raises a serious risk that an inmate may be executed without ever having effective assistance in presenting a claim of actual innocence or mitigation.

> habeas corpus has a particularly important role to play in promoting fundamental fairness in the imposition of the death penalty.

Christeson v. Roper, 135 S. Ct. 891, 893 (2015) (emphasis added) (internal quotation marks omitted); *see also Trevino*, 133 S. Ct. at 1916-17 (2013) (recognizing "the historic importance of federal habeas corpus proceedings as a method for preventing individuals from being held in custody in violation of federal law").

The Fifth Circuit's approach prevents counsel from discharging their ethical responsibilities, frustrates statutory guarantees of representation, and jeopardizes due process. If the decision below is allowed to stand, the "substantial need" test will threaten to make *Martinez* and *Trevino* a dead letter for indigent petitioners. Counsel will rarely if ever be able to show more than a "substantiated argument" regarding both deficient performance and prejudice before obtaining funds necessary to develop the claims. Consequently, counsel will not be able to discharge their professional obligations in federal habeas representation, and the statutory guarantees of 18 U.S.C. § 3599(f) will effectively be unavailable.

Such an outcome threatens more than attorneys' ability to act consistent with professional standards. It threatens also the integrity, fairness, and reliability of the habeas process, of capital sentences, and ultimately of our criminal justice system.

CONCLUSION

For the foregoing reasons, *amicus curiae* American Bar Association respectfully urges this Court to reverse the judgment of the Court of Appeals.

Respectfully submitted,

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