No. 16-6795 (CAPITAL CASE)

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 PETITIONER

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QUESTION PRESENTED

Whether the Fifth Circuit erred in holding that 18 U.S.C. § 3599(f) withholds "reasonably necessary" resources to investigate and develop an ineffective-assistance-of-counsel claim that state habeas counsel forfeited, where the claimant's existing evidence does not meet the ultimate burden of proof at the time the § 3599(f) motion is made.

PARTIES TO THE PROCEEDING

Petitioner is Carlos Manuel Ayestas, appellant below.

Respondent is Lorie Davis, Director, Texas Department of Criminal Justice (Institutional Division).

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OPINIONS BELOW

The opinion of the Fifth Circuit affirming the district court's denial of petitioner's § 3599 motion is reported at 817 F.3d 888 and reprinted in the Joint Appendix ("JA") at 377. The Fifth Circuit's amended opinion, issued after petitioner sought rehearing, is reported at 826 F.3d 214 and reprinted at JA 398. The district court's opinion denying the §3599 motion is unreported and reprinted at JA 351.

JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. §§ 2241 and 2254. The court of appeals had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. The judgment of the court of appeals was entered on June 10, 2016. The petition for a writ of certiorari was filed on November 7, 2016, within the time allowed under extensions granted by Justice Thomas, and granted on April 3, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reproduced in appendices to this brief. *See* Statutory Appendix, *infra*, at 1sa-6sa.

INTRODUCTION

Congress has enacted a statutory scheme designed to ensure that poverty does not preclude effective legal representation for individuals facing criminal penalties. The Criminal Justice Act generally provides indigent defendants with a right to such representation, in the form of counsel and services necessary to develop and prove a case. In a

distinct provision, Congress has enlarged those guarantees for indigent individuals facing the death penalty. This capital provision, 18 U.S.C. § 3599, requires higher-quality lawyers, greater funding, and representation across every phase of capital representation in federal court.

The specific guarantee of "representation" in the capital provision encompasses a right to counsel along with "investigative, expert, or other services" that are "reasonably necessary for the representation" in the post-conviction phase. 18 U.S.C. § 3599(f). The question presented here is whether a post-conviction claimant must show a "substantial need" for representation-related services in order to establish that the services are "reasonably necessary" under § 3599(f). The question all but answers itself, and every interpretive clue confirms that the answer is no.

The Fifth Circuit's "substantial need" test is inconsistent with § 3599(f)'s text and structure. It demands a higher showing of need than the statute's plain language requires. It also conflicts with the statute's conception of what a "representation" entails. The Fifth Circuit holds that a court should find a substantial need for funding under § 3599(f) only when the inmate can demonstrate the merit and procedural viability of the claim that the requested services would support. But under Congress's design, a capital representation under § 3599(f) will include the use of services to develop possible issues, including claims asserted in post-conviction litigation. A test that directs courts to prematurely judge the merit of uninvestigated claims cannot be squared with § 3599(f)'s provision

for capital representations that encompass investigations.

The statute's history confirms this interpretation. Congress borrowed the language at issue here from the Criminal Justice Act. There, the language had taken on a particular meaning: courts understood "necessary" to mean "reasonably necessary" and authorized representation-related services when a reasonable attorney working with finite means would devote resources to the requested services. Congress incorporated this meaning when it chose the same language for § 3599(f).

In precluding even services that a reasonable attorney would pursue, the substantial need test sharply narrows the reasonable necessity standard that Congress incorporated into § 3599(f). The test impedes the statute's operation and frustrates Congress's intent to ensure that indigent defendants have a reasonable opportunity to develop their claims and defenses. The test is not needed to police frivolous requests: the reasonableness standard that properly applies to § 3599(f) already functions effectively, permitting courts to deny services that do not clear the statutory standard.

The § 3599(f) motion here sought services that are reasonably necessary to the representation. The Fifth Circuit assumed trial counsel's deficiency, and for good reason. Faced with evidence of mental illness and substance abuse, trial counsel never investigated those issues and never sought to have a mental health professional evaluate Mr. Ayestas (who was later diagnosed as schizophrenic, while in prison). In fact, trial counsel performed almost no inves-

tigation, and offered the jury only a two-minute mitigation presentation that focused on Mr. Ayestas's progress in learning English while incarcerated. State habeas counsel did little more, ignoring his mitigation specialist's recommendation to undertake a meaningful investigation into Mr. Ayestas's life history.

Reviewing this case history, federal habeas counsel reasonably perceived that Mr. Ayestas might have a Sixth Amendment ineffective-assistance-of-counsel claim, and that the procedural default of that claim could be excused by state habeas counsel's own deficiencies. Federal habeas counsel reasonably sought § 3599(f) services to initiate the appropriate mitigation investigation omitted by prior counsel. That investigation was calculated to identify and develop mitigating facts that might have swayed the jury, had it heard them.

The Fifth Circuit refused investigative services for want of "substantial need"—because Mr. Ayestas could not show, at the time he made the § 3599(f) motion, that trial counsel's failure to meaningfully investigate caused him prejudice. But § 3599(f) does not require Mr. Ayestas to support his request with the very evidence the request is calculated to discover. His statutory right to representation in post-conviction litigation includes the opportunity to reasonably investigate his claims, as the request here sought to do.

The substantial need test subverts § 3599(f)'s purpose of providing meaningful representation to individuals facing the death penalty. The judgment below should be reversed.

STATEMENT OF THE CASE

A. Statutory Background

The statutory provision at issue in this case entitles indigent persons facing the death penalty to "investigative, expert, or other services" that are "reasonably necessary" to the "representation." 18 U.S.C. § 3599. Section 3599 enlarges, in capital cases, the resources otherwise available to indigent criminal litigants under the Criminal Justice Act (the "CJA").

The CJA was enacted in 1964, following *Gideon v. Wainwright*, 372 U.S. 335 (1963), and an Attorney General's study of obstacles to the effective representation of indigent criminal defendants. Attorney General Robert Kennedy explained to Congress that "defense services" are as important to adequate representation as competent counsel:

> [T]he poor man cannot hire an investigator to find the witnesses and evidence which may be indispensable to his case. He cannot retain a physician, psychiatrist, or handwriting expert. The importance of skilled investigation is underscored in police work every day. It works the same way for the defense.

S. Rep. No. 88-346, at 8 (1963) (statement of Robert F. Kennedy, Att'y Gen. of the United States).

The CJA's stated purpose was to "promote the cause of criminal justice by providing for the representation of defendants who are financially unable to obtain an adequate defense in criminal cases in the courts of the United States." Criminal Justice Act of 1964, Pub. L. No. 84-455, 78 Stat. 552 (1964) (codi-

fied at 18 U.S.C. § 3006A) ("Adequate Representation of Defendants")). The CJA entitled indigent defendants to "representation"—both counsel and "investigative, expert, and other services necessary to an adequate defense." *Id.* § 3006A(a). An indigent defendant could request such services by ex parte application to the court, which was instructed to authorize "reasonable compensation" for them, up to a statutory limit, upon a finding "that the services are necessary and that the defendant is financially unable to obtain them." *Id.* § 3006A(e). As originally enacted, the CJA covered only defendants charged with "felonies or misdemeanors," from their initial appearances through direct appeal. *Id.* § 3006A(a).

The CJA required each federal district to implement representation plans arranging for representation "by private attorneys," "by attorneys furnished by a bar association or a legal aid agency," or some combination of both. *Id.* § 3006A(a). Through 1970 amendments to the Act, Congress also authorized districts to establish public defender organizations to provide CJA representation. Pub. L. No. 91-447, sec. 1, § 3006A(h), 84 Stat. 916, 919 (1970). The 1970 amendments extended § 3006A to post-conviction proceedings, providing that indigent federal post-conviction claimants could "be furnished representation ... whenever the ... court determines that the interests of justice so require." *Id.*, sec.1, § 3006A(g) (applying to "[a]ny person … seeking relief under section 2241, 2254, or 2255 of title 28," among others).

When Congress restored the federal death penalty in the Anti-Drug Abuse Act of 1988,[1] it augmented the statutory protections for capital cases in federal court. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001(b), 102 Stat. 4181, 4387-88. The 1988 Act included a new provision, then codified at 21 U.S.C. § 848(q) (1988 ed.), creating "enhanced rights of representation" in the capital context, in light of the "seriousness of the possible penalty and … the unique and complex nature of the litigation." *Martel v. Clair*, 565 U.S. 648, 659 (2012); *see* 134 Cong. Rec. H7259-02, H7259 (daily ed. Sept. 8, 1988) (statement of Rep. Conyers) ("Capital cases involve a complex and highly specialized body of law and procedures, and inexperienced court appointed attorneys have often had difficulty coping with such cases.").

These "enhanced rights" sought to improve the quality of capital representations—§ 848(q) imposed heightened qualification requirements for counsel in capital cases, for example. 102 Stat. at 4394 (21 U.S.C. § 848(q)(5), (6), (7) (1988 ed.)); *see McFarland v. Scott*, 512 U.S. 849, 855 n.2 (1994) (explaining that § 848(q) requires federal post-conviction attorneys "meet more stringent experience criteria" than attorneys for noncapital defendants under the [CJA]"). Congress also expanded the availability of resources in capital cases. Section 848(q) guaranteed representation from the commencement of the federal proceeding until any execution, and did not require post-conviction claimants to establish that

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[1] Congress did not immediately enact a new capital sentencing statute after the Court re-authorized the death penalty in *Gregg v. Georgia*, 428 U.S. 153 (1976).

appointed representation was required by the "interests of justice." *Supra* at 6; 102 Stat. 4394 (21 U.S.C. § 848(q)(8) (1988 ed.)). Rather, the protections of § 848(q)—including the provision for representation-related services—applied automatically in all capital post-conviction litigation under 28 U.S.C. §§ 2254 and 2255:

> (4)(B) 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 and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).
>
> …
>
> (9) Upon a finding in ex parte proceedings that *investigative, expert or other services are reasonably necessary for the representation of the defendant*, whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore, under paragraph (10)….

102 Stat. at 4393-94 (21 U.S.C. § 848(q)(4), (9) (1988 ed.)) (emphasis added).

In 1996, as part of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-

132, 110 Stat. 1214, Congress made a "technical amendment" to § 848(q)(9), clarifying that ex parte requests under the section required a "proper showing … concerning the need for confidentiality," and that the court, "[u]pon a finding that investigative, expert, or other services are reasonably necessary for the representation" of the defendant, "may authorize" the defendant's attorneys to obtain them. 110 Stat. at 1226 (21 U.S.C. § 848(q)(9) (1996 ed.)).

In 2006, § 848(q) was repealed and substantially re-enacted as 18 U.S.C. § 3599, "Counsel for financially unable defendants," as part of the USA Patriot Improvement and Reauthorization Act. Pub. L. No. 109-177, sec. 221, § 848(q), 120 Stat. 192, 231 (2006). Section 3599 does not alter § 848(q)(9)'s provision for "investigative, expert, or other services [that] are reasonably necessary for the representation of the defendant." 120 Stat. at 232 (18 U.S.C. § 3599(f)). Like § 848(q), § 3599 applies at every stage of a capital representation, including proceedings under 28 U.S.C. § 2254. *See* 120 Stat. at 231 (18 U.S.C. § 3599(a)(2) (providing for "adequate representation or investigative, expert or other reasonably necessary services" "[i]n any post conviction proceeding under section 2254 or 2255 of title 28")). And § 3599 specifically provides for compensation of counsel at higher rates than under the CJA, and imposes a higher cap on expenses for representation-related services. *See Martel*, 565 U.S. at 659 (comparing § 3599(g)(1), with § 3006A(d) (2006 ed.), and § 3599(f), (g)(2) (2006 ed.), with § 3006A(e) (2006 ed.)).

B. Factual and Procedural Background

1. State Proceedings

a. Trial

Petitioner Carlos Manuel Ayestas grew up in Honduras, but shuttled between Honduras, Mexico, and the United States after he turned 18 in 1987. JA 307-08.[2] He worked occasionally in Mexico, staying with a family in Guadalajara. JA 308. Mr. Ayestas settled for a while in Long Beach, California, where he stayed with a relative and fathered a son. JA 309-10. Mr. Ayestas was living in Texas in 1995.

On September 5, 1995, Santiaga Paneque was found murdered in her home, strangled during an apparent robbery. Law enforcement identified Ferderico Zaldivar, Roberto Meza, and Mr. Ayestas as suspects. On September 19, 1995, Assistant District Attorney Kelly Siegler wrote a memorandum recommending that the State seek the death penalty against Mr. Ayestas, on the basis of two aggravating factors: that Ms. Paneque was 67 years old and murdered in her home; and that Mr. Ayestas "is not a citizen." JA 39. Mr. Ayestas was arrested in Kenner, Louisiana on September 21, 1995, and charged with capital murder. JA 44, 164.

Four months later, on January 16, 1996, the state court appointed Diana Olvera to represent Mr.

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[2] Mr. Ayestas is also known as "Denys Humberto Zelaya Corea," or "Dennis," and is occasionally identified by this name in the proceedings below.

Ayestas at his capital trial. ROA 686.[3] Connie Williams also represented Mr. Ayestas. JA 157. On February 15, 1996, trial counsel moved the state court for the appointment of an investigator, John Castillo, a former police officer who opened a private investigator service. ROA 686.[4] For nearly fifteen months, trial counsel took no further action to prepare for Mr. Ayestas's capital trial. Castillo met with Olvera and Mr. Ayestas in January and February 1996, but conducted no investigation until May 7, 1997—about a month before jury selection was to begin—when Olvera told him that the "case was set for trial" so he should "resume" his investigation. ROA 686.

At that point, Castillo had Mr. Ayestas complete a questionnaire providing basic information about his personal history. ROA 686-88. Mr. Ayestas indicated on the questionnaire that he had experienced multiple head traumas (while playing soccer, in a motorcycle accident in which he wore no helmet, and in a car accident that required X-rays of his head). ROA 687-88. Mr. Ayestas reported that he still had bad headaches. ROA 688. He informed Castillo that he had been drinking since he was sixteen years old, and that he regularly used cocaine; he was under the influence of alcohol and cocaine on the day of the murder. *Id.*

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[3] "ROA" citations refer to the Record on Appeal in *Ayestas v. Stephens*, No. 15-70015 (5th Cir. May 14, 2015).

[4] The trial court granted this motion when it was renewed on June 3, 1997, ten days before the start of jury selection. ROA 686.

Trial counsel did little with this information. They did not follow up on any of the red flags about Mr. Ayestas's head injuries, potential mental health issues, and substance abuse. *Id.* They did not meet with a single family member, friend, or acquaintance in California, Mexico, Louisiana, or Texas, where Mr. Ayestas spent much of his adult life. They never obtained the records identified in the questionnaire as necessary to a comprehensive assessment of Mr. Ayestas's personal, psychological, and social history. ROA 687-88. They did not have Mr. Ayestas evaluated by any mental health professional.

About two weeks before jury selection began on June 13, 1997, Olvera and Castillo decided to reach out to Mr. Ayestas's family in Honduras. Through a letter dated May 29, 1997, Castillo contacted Mr. Ayestas's family for the first time. ROA 5953. On June 10, three days before jury selection, Olvera wrote a letter to Mr. Ayestas's mother, identifying herself as Mr. Ayestas's attorney, and advising that the trial was scheduled for July 7, 1997 in Houston, Texas. Olvera said that it was important for them to speak. ROA 5955. Mr. Ayestas's mother received this letter on June 18 and contacted Olvera. JA 102.

On July 2, 1997, five days before trial began, Olvera wrote again to Mr. Ayestas's family in Honduras, stating that she needed his "mother and two older sisters to testify" during sentencing. ROA 5957-58. Mr. Ayestas's mother thought Olvera was going to fax her a letter that she could take to the U.S. Embassy in Tegucigalpa explaining why she needed to travel to the United States, but the letter never arrived. JA 93, 103, 113. The family mem-

bers' visa requests were denied, and no family members appeared at trial. *Id.*

The guilt phase of Mr. Ayestas's trial began on July 7, 1997 and lasted two days. ROA 1680-82. Trial counsel presented no witnesses in Mr. Ayestas's defense, and he was convicted. The sentencing phase began on July 10, 1997 and lasted less than a day. The state presented evidence about Mr. Ayestas's prior criminal offenses and behavior, along with testimony from the decedent's son. Trial counsel again presented no witnesses. The entire sentencing-phase case for the defense consisted of three letters from an instructor who taught Mr. Ayestas's English class in prison, attesting that he was a "serious and attentive" student. JA 41-43. Trial counsel attempted to introduce evidence that Mr. Ayestas had no criminal record in Honduras, but they had not prepared evidence linking the records—which referred to Mr. Ayestas by his given name, "Denys Huberto Zelaya Corea" (*supra* at 10 n.2)—to Mr. Ayestas. The trial court refused to admit them, and trial counsel's mitigation presentation lasted two minutes. ROA 4709-10.

During closing arguments, the state emphasized the absence of any mitigating evidence, and in particular the absence of any evidence that Mr. Ayestas had mental health or substance abuse problems. ROA 4747 ("Does he have anything there that would lead you to conclude there is some type of mitigation, anything at all? There is no drug problem. There's no health problem. There is no alcohol problem."). The jury found against Mr. Ayestas on the three "special issues" required under Texas law. The jury determined (1) that Mr. Ayestas would be a future

danger, Tex. Code Crim. Proc. art. 37.071, § 2(b)(1); (2) that Mr. Ayestas intended to cause death or anticipated a loss of life, *id.* § 2(b)(2); and (3) that there were no mitigating circumstances sufficient to spare Mr. Ayestas's life, *id.* § 2(e). JA 67-70. The court sentenced Mr. Ayestas to death. ROA 1682-83. If a single juror had dissented on a single special issue, no death sentence could have been imposed. Tex. Code Crim. Proc. art. 37.071, § 2(g).

The Texas Court of Criminal Appeals ("TCCA") affirmed the conviction and sentence on November 4, 1998. JA 115-38. Mr. Ayestas did not seek certiorari review from this Court.

b. State Habeas

Mr. Ayestas began the state habeas process while his direct appeal was pending, as Texas law requires. *See* Tex. Code Crim. Proc. art 11.071 § 4(a). On January 19, 1998, the TCCA appointed Gary Hart to represent Mr. Ayestas. ROA 667. On or about February 10, 1998, Hart retained mitigation specialist Tena Francis and her colleague Gerald Bierbaum to consult on the representation. ROA 668.

Francis prepared an investigation plan, which noted that the jury had heard virtually no mitigation evidence concerning Mr. Ayestas's background. JA 81. Francis reported that trial counsel "had compiled no bio-psycho-social history of Mr. Ayestas," and that this investigation would have to start anew in the post-conviction representation. JA 266. She wrote to Hart:

> The jury heard nothing about this defendant's: family, real character, life experiences in Honduras, mental health, possible mental illness, substance abuse history, educational background, physical or psychological trauma he suffered, etc. We must collect this information now to see what his attorneys missed. We will begin by conducting a comprehensive social history of the client.

JA 81. Francis further explained that "a competent social history would have to be comprehensive and include ... numerous witness interviews" with individuals from Honduras, California, Mexico, and Houston. JA 267.

The investigation plan also addressed the need to investigate Mr. Ayestas's mental health, due to his substance abuse and the "high rate of comorbidity between substance [] abuse and mental illness." JA 83, 269. Francis explained that "[i]n some cases, drug use brings about the symptoms of a mental illness," while "[i]n other cases, drug addiction begins as a means by the drug user to self-medicate systems of mental illness." JA 269. Francis concluded that a "comprehensive investigation into the bio-psychosocial history of Mr. Ayestas was warranted in order to explore the issues related to addiction and mental health." JA 81-83, 269.

Hart did not follow Francis's recommendation that a thorough background investigation be conducted. He explored the circumstances of Mr. Ayestas's arrest in Louisiana, and interviewed Mr. Ayestas's mother and two sisters. ROA 699-700. But he did nothing to investigate issues of Mr. Ayestas's

mental health or substance abuse. Nor did he pursue mitigating (or any other) evidence in the places where Mr. Ayestas had spent significant time—California, Mexico, and Texas, along with Honduras. *Id.* Francis, who had worked with Hart on other cases, later attested that Hart was generally not "concerned about conducting a comprehensive mitigation investigation," and that he did not "seek adequate funding for them." JA 265. Francis was concerned that Hart was overworked, and that his solution when overextended was to "limit[] investigation and ... rais[e] mostly record-based claims." *Id.*

The state habeas application that Hart eventually filed included a narrow claim of ineffective assistance of trial counsel ("IATC"), regarding just the failure to "secure the attendance at the punishment phase of trial of any of [Mr. Ayestas's] family members from Honduras." ROA 5270. Hart did not assert any claim related to trial counsel's failure to develop other mitigating evidence, such as evidence related to Mr. Ayestas's mental health.

Mr. Ayestas suffered a serious psychotic episode while his state application was pending. ROA 770-74. A psychiatrist subsequently diagnosed him with schizophrenia, undifferentiated type during an outpatient psychiatric follow-up.[5] JA 141-46. In 2003, a psychologist reported to Hart that Mr. Ayestas showed signs of "delusional thinking that clearly

[5] Mr. Ayestas was in his mid-thirties at the time. As explained *infra* at 48-50, clinically significant symptoms of schizophrenia typically emerge gradually over a period of years, and are most likely to surface in males when they are in their early to mid-twenties.

needs to be monitored. He told me that he has been placed on antipsychotic medication recently and clearly his mental status needs to be evaluated closely." ROA 776.

In answering the state habeas application in 2005, the state submitted an affidavit from Olvera directed at rebutting Mr. Ayestas's IATC claim. Olvera asserted that Mr. Ayestas "did not acquiesce to having his family contacted until after jury selection was completed." JA 149. Eighteen months later, Olvera submitted a revised affidavit stating that Mr. Ayestas agreed to her contacting his family "right before jury selection began," correcting the inconsistency between her previous sworn timeline and the documented fact that she contacted the family seventeen days before jury selection commenced. JA 157. Mr. Ayestas has attested that he never instructed Olvera not to contact his family, and that he in fact had no objection to her contacting his family. JA 154.

On September 10, 2008, the TCCA denied Mr. Ayestas's application for state habeas relief, substantially adopting the findings of fact and conclusions of law offered by the state.[6] JA 199-200. The court relied on Olvera's initial affidavit to find that she was not ineffective in failing to get Mr. Ayestas's family to attend trial. JA 165-66. The court held that Mr. Ayestas's "numerous, initial assertions that he did not want his family contacted and … trial counsel's extensive efforts to attempt to secure the presence of [Mr. Ayestas's] family from

[6] The TCCA declined to adopt six findings of fact and five conclusions of law not relevant here. JA 200.

Honduras after [Mr. Ayestas] changed his mind" precluded a finding of ineffectiveness. JA 190.

2. Federal Proceedings

On September 11, 2009, Mr. Ayestas filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Southern District of Texas, through new counsel appointed under the CJA. ROA 8. He alleged seven claims, including, for the first time, a Sixth Amendment IATC claim under *Wiggins v. Smith*, 539 U.S. 510 (2003). ROA 14. The *Wiggins* claim asserted that trial counsel did not conduct a reasonable sentencing investigation, resulting in the failure to discover and present mitigating evidence regarding Mr. Ayestas's mental health and substance abuse. ROA 14-33. Mr. Ayestas filed his first § 3599(f) motion for a mitigation investigation on January 25, 2011. ROA 479.

The next day, on January 26, 2011, the district court granted respondent's motion for summary judgment and entered judgment for respondent on all issues raised by Mr. Ayestas's habeas petition. JA 201. The court held that Mr. Ayestas's *Wiggins* claim was unexhausted and procedurally barred. JA 209-15. At the time, a state inmate could not excuse procedural default of an IATC claim by demonstrating the ineffectiveness of state habeas counsel. *See id.* The court also denied the § 3599(f) motion, finding that Mr. Ayestas had not established a substantial need for investigative assistance. JA 235-37. The Fifth Circuit denied a certificate of appealability ("COA"). JA 241-56.

After Mr. Ayestas's federal habeas petition was denied, the Court decided *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), holding that deficient state habeas representation can excuse the default of an IATC claim. On October 9, 2012, Mr. Ayestas filed a petition for a writ of certiorari. Pet., *Ayestas v. Thaler*, No. 12-6656 (U.S. Oct. 9, 2012). While Mr. Ayestas's petition was pending, the Court decided *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), clarifying that *Martinez* applies in Texas. On June 3, 2013, the Court granted Mr. Ayestas's petition for certiorari, vacated the Fifth Circuit's judgment, and remanded the case to the Fifth Circuit for further consideration in light of *Trevino*. JA 259. The Fifth Circuit remanded to the district court with instructions to "reconsider [Mr.] Ayestas's procedurally defaulted ineffective assistance of counsel claims in light of *Trevino*." JA 263.

On remand, Mr. Ayestas again filed a § 3599(f) motion for a mitigation specialist. JA 271. That motion described trial counsel's deficient mitigation investigation, including their failure to consult with any mental health expert notwithstanding Mr. Ayestas's known history of severe substance abuse and other warning signs that Mr. Ayestas had mental health issues. JA 280-81. The § 3599(f) motion likewise documented state habeas counsel's deficiency in failing to carry out the mitigation investigation recommended by his investigator. JA 279-80.

The new § 3599(f) motion also detailed how the background investigation was necessary to evaluate Mr. Ayestas's mental health. It identified changes in Mr. Ayestas's behavior and demeanor that suggested

the presence of mental illness, and described many areas of his background that trial counsel had failed to explore, including his childhood poverty and dysfunction. JA 282-84. Attached to the motion was an investigation plan prepared by an experienced mitigation specialist. JA 290-315. The plan proposed to focus on Mr. Ayestas's time in California and Mexico, where Mr. Ayestas had lived during periods when his mental health problems may have visibly worsened, and which his prior counsel had altogether ignored. JA 290, 307-13. The investigation plan documented details about the scope, goals, and projected costs of the investigation. JA 313-15.

The district court denied Mr. Ayestas's habeas petition, § 3599(f) motion, and a COA on the underlying claims. JA 351, 365. The court ruled that the default of Mr. Ayestas's *Wiggins* claim was not excused under *Martinez* because state habeas counsel had performed adequately. JA 361-62. And the court concluded that the claim itself lacked merit because trial counsel had not been deficient. JA 358-61. The court doubted that evidence of substance abuse, had it been developed, "would have changed the outcome" of Mr. Ayestas's sentencing or state habeas proceedings because the crime was "brutal" and Mr. Ayestas had a criminal history. JA 361-62.

Having decided the merit of the *Wiggins* claim and that *Martinez* did not excuse its default, the district court denied the § 3599(f) motion for resources to develop these arguments. JA 362-63. The court held that Mr. Ayestas could not show a substantial need for § 3599(f) resources because he had failed to demonstrate the ineffectiveness of either trial or state habeas counsel, and had not demonstrated "a

reasonable probability that his claimed evidence of substance abuse would have changed the outcome of either his trial or his state habeas corpus proceeding." JA 363.[7]

The Fifth Circuit denied a COA on the underlying constitutional claims and affirmed the district court's order denying funding for services under § 3599(f). JA 377. With respect to the underlying *Wiggins* claim, the Fifth Circuit agreed with the district court that the claim was neither viable nor meritorious. JA 384-91. The Fifth Circuit held that trial counsel's investigation was not deficient because trial counsel had gathered Mr. Ayestas's school records, were "aware of the substance abuse," and had spoken with Mr. Ayestas's family by phone, to the extent permitted by his "demand that contact not be made with his family." JA 388. The court also noted—incorrectly—that Mr. Ayestas was "examined by a psychologist" before trial. *Id*.

The Fifth Circuit further held that Mr. Ayestas had not established prejudice supporting his *Wiggins*

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[7] About a month after the district court's decision, while Mr. Ayestas's motion to alter or amend the judgment was pending, Mr. Ayestas's counsel discovered the Siegler Memorandum noted *supra* at 10. ROA 1132; JA 37-40. The district court and court of appeals refused to stay the federal proceeding under *Rhines v. Weber*, 544 U.S. 269 (2005), to permit state-court exhaustion of claims related to the Memorandum. *See* ROA 1152; JA 367; JA 396-97. Mr. Ayestas will seek appropriate relief in state court when this federal litigation concludes, as needed, consistent with Texas's abstention rule. *Ex parte Soffar*, 120 S.W.3d 344, 345 (Tex. Crim. App. 2003) (noting the court's practice of "automatically dismiss[ing] writ applications when the applicant also has a writ pending in federal court that relates to the same conviction").

claim, because (1) a jury would not have found evidence regarding Mr. Ayestas's substance abuse mitigating "in light of the brutality of the crime," and (2) the chance that a jury would have found mental health evidence mitigating was "at best [] conceivable, but not substantially likely." JA 389. The court also held that the default of this claim was not excused under *Martinez*, because state habeas counsel could not be deficient for failing to raise a meritless claim. JA 390.

As for Mr. Ayestas's § 3599(f) motion, the court concluded that the district court had not abused its discretion in denying it. JA 386. The court explained that Mr. Ayestas was required to establish a "'substantial need' for [] services to pursue a claim that is not procedurally barred." JA 385. This standard required a "viable constitutional claim, not a meritless one, and not simply a search for evidence that is supplemental to evidence already presented." *Id*. The court "interpret[ed]" the district court's ruling "as being that any evidence of ineffectiveness, even if found, would not support relief." *Id*. And the court agreed that § 3599(f) investigative resources were properly denied because Mr. Ayestas's *Wiggins* claim was "meritless" and thus not "viable." JA 386.

In a rehearing petition, Mr. Ayestas identified various misstatements about the record in the court's opinion. In response, the court revised and supplemented its decision, acknowledging that its no-deficiency holding had depended on the erroneous statement that Mr. Ayestas had been examined by a psychologist before trial. JA 398-99. The court concluded that its "analysis [was] nonetheless unchanged" because "even if [Mr.] Ayestas had

shown that there had been deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984), he did not show prejudice." JA 399. The court did not disturb its conclusion that no prejudice resulted from any deficiency "in light of the brutality of the crime." JA 389.

SUMMARY OF THE ARGUMENT

The CJA provides basic rights of "representation" for indigent people facing criminal punishment, and § 3599 enhances those rights for capital litigants, in consideration of "the seriousness of the possible penalty and … the unique and complex nature of the litigation." *Martel*, 565 U.S. at 659 (quotation omitted). To that end, the statute authorizes funding for counsel, along with "investigative, expert, and other services" that are "reasonably necessary for the representation." 18 U.S.C. § 3599(f). This provision applies to all stages of the representation, including post-conviction litigation under § 2254.

When courts in the Fifth Circuit apply § 3599(f) during post-conviction proceedings, however, they authorize "investigative, expert, or other services" only if the movant can show a substantial need for them. Under that standard, courts withhold services unless the movant can establish the merit and viability of a claim those services would support—and they adjudge a claim "meritless" if the movant cannot establish the underlying constitutional violation when the § 3599(f) motion is made.

The substantial need test contradicts § 3599(f), as every interpretive tool makes plain. It conflicts with the statute's text: "substantial" and "reasonable" denote different degrees of need. The test also narrows

the meaning of "representation" more than the statute's structure can bear, as § 3599 contemplates that a post-conviction representation will include the investigation and development of *possible* claims. *McFarland*, 512 U.S. at 858.

Section 3599(f)'s history also forecloses the substantial need test: Congress borrowed the language of § 3599(f) from the CJA, and that language came with a settled interpretation centered on the "reasonableness" of the request. Under the reasonableness standard that Congress incorporated into § 3599(f), representation-related services should be funded whenever a reasonable private attorney allocating limited resources would use them. A test that short-circuits the development of claims is at odds with Congress's intent because reasonable attorneys begin client representations by investigating issues, not "claims" of known merit and viability, as courts interpreting the analogous provision in the CJA appreciated.

Most fundamentally, the substantial need test frustrates Congress's purpose in enacting § 3599(f): to "promote effective representation for persons threatened with capital punishment." *Martel*, 565 U.S. at 660. In a case like this one, where the errors at issue concern prior counsel's failure to develop an adequate record, § 3599(f) authorizes resources to investigate whether counsel's deficiencies prejudiced the sentencing outcome. A standard that prematurely judges "merit" based on a record that is undeveloped *because of prior counsel's failings* deprives litigants of the enhanced representation Congress intended.

The Fifth Circuit's substantial need test is not necessary to avoid funding frivolous services: the longstanding reasonableness standard sufficiently polices abuse. Litigants still must carry the burden of establishing that the requested services are reasonably necessary, and courts retain discretion to deny baseless motions. Under Congress's design, courts can effectuate the statute's purpose without authorizing unwarranted requests.

In this case, Mr. Ayestas requested services that were "reasonably necessary for the representation," because a reasonable attorney allocating limited resources would have pursued the proposed investigation. Mr. Ayestas's § 3599(f) motion followed his federal habeas counsel's identification of a potentially meritorious claim: that trial counsel's limited sentencing investigation had doomed his chances of avoiding the death penalty. Trial counsel failed to meaningfully investigate Mr. Ayestas's background and ignored his known history of substance abuse. Counsel failed to investigate warning signs of mental illness subsequently diagnosed by a state psychologist, and never had Mr. Ayestas evaluated by a mental health professional. The jury heard essentially no mitigating evidence. Under these circumstances, counsel reasonably concluded that a federal habeas investigation could lead to the discovery of mitigating evidence that—had it been developed and presented to the jury—could well have moved a single juror to reject a death sentence. Such evidence could also excuse the procedural default of the IATC claim (that is, show its "viability"), by establishing that the claim is substantial.

Mr. Ayestas's request was denied only because the courts below applied the wrong § 3599(f) test. The Fifth Circuit held that because Mr. Ayestas could not establish the merit and viability of his IATC claim at the time he requested representation-related services, he could not show a substantial need to develop it. But Mr. Ayestas's IATC claim at the very least has *possible* merit, and thereby warrants further investigation. The Fifth Circuit itself assumed that trial counsel was deficient; it affirmed the denial of § 3599(f) services based on its conclusion that Mr. Ayestas could never show prejudice. That conclusion, however, cannot fairly be drawn without giving Mr. Ayestas the opportunity to identify and present the evidence that trial counsel failed to discover. The Fifth Circuit's use of merit and viability to decide access to § 3599(f) services inverts Congress's intent that post-conviction representations under § 3599 would encompass the use of "investigative, expert, or other services" to prove up claims.

The Fifth Circuit's substantial need test cannot be squared with § 3599(f)'s text, history, structure, or purpose. The judgment applying that test below should be reversed.

ARGUMENT

I. SECTION 3599(f) AUTHORIZES FUNDING FOR INVESTIGATIVE SERVICES THAT ARE REASONABLY NECESSARY TO THE REPRESENTATION, WITHOUT ANY SHOWING OF SUBSTANTIAL NEED

A. The Fifth Circuit's Substantial Need Test Is Incompatible With § 3599(f)'s Plain Meaning, Structure, And Purpose

Section 3599(f) authorizes funding for "investigative, expert, and other services" that are "reasonably necessary for the representation" in capital cases. The Fifth Circuit holds that § 3599(f) authorizes such funding only when a movant can establish a "*substantial* need" for the services. JA 384-86 (emphasis added). The Fifth Circuit's substantial need test is incompatible with the statute's text and structure, as well as Congress's purpose to enhance the representation of individuals facing capital punishment.

The substantial need test is not merely an interpretation of the statutory requirement that services be "reasonably necessary." It contravenes the text of the statute. "Reasonable" and "substantial" describe different degrees of necessity. *Compare, e.g.*, *Reasonable*, BLACK'S LAW DICTIONARY 1265 (6th ed. 1996) ("Fair, proper, just, moderate, suitable under the circumstances."), *with Substantial*, BLACK'S LAW DICTIONARY 1428 (6th ed. 1996) ("Of real worth and importance; of considerable value; valuable….").[8] A

[8] *Accord Reasonable*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Fair, proper, or moderate under the circumstances;

"substantial" need test requires a higher showing than "reasonable" need, contrary to § 3599(f)'s plain meaning. *See Matthews v. White*, 807 F.3d 756, 760 (6th Cir. 2015) ("The statute requires a showing that expert assistance is 'reasonably necessary,' so a rule that requires a showing of 'substantial' necessity inappropriately implies that the movant must carry a heavier burden than that contemplated by the statute." (citation and quotation omitted)). Courts may not "rewrite the statute that Congress has enacted"; the fact that the substantial need test purports to do so is reason alone to reject it. *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1949 (2016); *see also, e.g.*, *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) ("[W]hen the statutory language is plain, we must enforce it according to its terms."); *Corley v. United States*, 556 U.S. 303, 316 (2009) (rejecting construction that would "confuse [two] critically distinct terms").

Moreover, the Fifth Circuit's substantial need test conflicts with the statute's structure. As applied, it calls for courts to prematurely evaluate a claim's "merit" and "viability," at the time the motion is made. JA 362-63, 384-86; *see Ward v. Stephens*, 777 F.3d 250, 266 (5th Cir. 2015) ("The denial of

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sensible"); *Reasonable*, BLACK'S LAW DICTIONARY 1138 (5th ed. 1979) ("Fair, proper, just, moderate, suitable under the circumstances. Fit and appropriate to the end in view."); *Substantial*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Important, essential, and material; of real worth and importance" or "[c]onsiderable in amount or value; large in volume or number."); *Substantial*, BLACK'S LAW DICTIONARY 1280 (5th ed. 1979) ("Of real worth and importance; of considerable value; valuable.").

funding will be upheld when it would only support a meritless claim, when it would only supplement prior evidence, or when the constitutional claim is procedurally barred."); *Allen v. Stephens*, 805 F.3d 617, 638 (5th Cir. 2015) (same). But § 3599(f) provides for services that are "reasonably necessary for the *representation*," and contemplates that the statutory right to representation will include the investigation and development of claims. *See* 18 U.S.C. § 3599(a), (f); *see also supra* at 5-9. That feature of Congress's design was essential to this Court's holding in *McFarland* that the § 848(q) right to counsel must apply before the formal initiation of a habeas proceeding: the petitioner would need an attorney to procure the "services of investigators and other experts [which] may be critical in the preapplication phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified." 512 U.S. at 855. Section 3599(f) services are necessary precisely because they allow lawyers to explore the merit of a "possible claim."

In requiring a movant to demonstrate the merit of a claim as a pre-condition for authorizing the representation-related services needed to *make* that very showing, the substantial need test turns Congress's scheme on its head. The purpose of § 3599(f) is to *enhance* capital representations, ensuring that capital cases in particular are properly investigated and litigated. A claim's merit and viability frequently emerge through investigation, as this Court has recognized. *See, e.g.*, *Trevino*, 133 S. Ct. at 1919; *McFarland*, 512 U.S. at 855; *see also infra* II.B. The investigation of trial counsel's

performance, for example, may confirm deficiency and reveal evidence whose absence at trial was prejudicial, or it might not. But any test that withholds services based on an *ex ante* merits determination guts the congressionally-intended function of § 3599(f) to facilitate inmates' identification and development of issues that foreclose their death sentences.

By thwarting counsel's ability to discover and plead relevant factual allegations, the substantial need test poses a "substantial risk" that meritorious claims will "never ... be heard"—and Congress presumably "did not intend for the express requirement" of investigative services "to be defeated in this manner." *McFarland*, 512 U.S. at 856. Section 3599(f) does not require litigants to prove their claims before investigating them.

B. Section 3599(f)'s Origins In § 3006A Confirm That The Substantial Need Test Is Wrong

Congress borrowed the language at issue here from the CJA, and enacted § 848(q) (now codified at § 3599) against the backdrop of more than two decades of judicial decisions interpreting that language. The CJA authorized "investigative, expert, or other services" that are "necessary" to the representation. Courts evaluated necessity according to a reasonableness standard, awarding services when a private attorney stewarding limited resources would procure them. "[W]hen 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general

matter, the intent to incorporate its judicial interpretations as well.'" *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 85-86 (2006) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998)); *see Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."). The Fifth Circuit's substantial need test conflicts with the meaning that Congress incorporated into § 3599(f), and must be rejected for that further reason.

1. As explained *supra* at 5-9, before 1988, § 3006A governed funding for services in "all federal criminal cases and habeas litigation, regardless whether the matter involved a capital or non-capital offense." *Martel*, 565 U.S. at 658. When Congress revived the federal death penalty in 1988, it also enacted § 848(q) to govern representation "in capital cases, thus displacing § 3006A for persons facing execution (but retaining that section for all others)." *Martel*, 565 U.S. at 659. In "spinning off § 3599, Congress enacted a set of reforms to improve the quality of lawyering in capital litigation" and to provide those facing the death penalty with "enhanced" protections—including more funding for supporting services. *Id*. at 659-60. But it patterned the essential language authorizing necessary "investigative, expert, or other services" on § 3006A(e). *See supra* at 5-9.

By 1988, courts interpreted § 3006A(e)'s reference to "necessary" services as requiring funding of ser-

vices that were "*reasonably* necessary." *See United States v. Durant*, 545 F.2d 823, 827 (2d Cir. 1976) ("'Necessary' should at least mean 'reasonably necessary.'"); *United States v. Schultz*, 431 F.2d 907, 911 (8th Cir. 1970) ("Considering the purpose of § 3006A(e) of the [CJA] to provide the accused with a fair opportunity to prepare and present his case, the application of the accused's counsel for such services must be evaluated on a standard of reasonableness."). Congress specifically embraced this judicial interpretation in the text of § 848(q). *Supra* at 7-8.

Lower courts had also coalesced around a test for determining when services were reasonably necessary. These decisions adopted a standard under which services were reasonably sought if "privately retained counsel, under similar circumstances, where his client's resources are not unlimited, would seek the service for his client." *United States v. Jonas*, 540 F.2d 566, 569 n.3 (7th Cir. 1976); *see United States v. Alden*, 767 F.2d 314, 318 (7th Cir. 1984); *Brinkley v. United States*, 498 F.2d 505, 510 (8th Cir. 1974); *United States v. Bass*, 477 F.2d 723, 725 (9th Cir. 1973); *United States v. Theriault*, 440 F.2d 713, 717 (5th Cir. 1971) (Wisdom, J., concurring); *see also Durant*, 545 F.2d at 827; *United States v. Tate*, 419 F.2d 131, 132-33 (6th Cir. 1969).[9] The Fifth Circuit's

[9] Although the D.C. Circuit had not expressly adopted the private attorney standard by 1988, *see United States v. Chavis*, 476 F.2d 1137, 1143 (D.C. Cir. 1973), its test was understood to be consistent with that approach, *see United States v. Greschner*, 802 F.2d 373, 377 n.3 (10th Cir. 1986); Comment, *Developing Standards for Psychiatric Assistance for Indigent Defendants under the Criminal Justice Act*, 59 Iowa L. Rev. 726 (1974), and it has since adopted the private attorney standard

substantial need test did not emerge until 1997, nearly a decade *after* Congress enacted § 848(q). *See infra* at 35-39.

The CJA reasonableness standard ultimately incorporated into § 3599(f) was rooted in the Act's history and purpose, and followed from "'the Congressional purpose in adopting the statute [] to seek to place indigent defendants as nearly as may be on a level of equality with nonindigent defendants.'" *Theriault*, 440 F.2d at 716 (Wisdom, J., concurring) (quoting *Tate*, 419 F.2d 131). Courts applying the reasonableness standard authorized funding for services "when underlying facts reasonably suggest that further exploration may prove beneficial to the accused in the development of a defense to the charge." *Schultz*, 431 F.2d at 911. Courts noted that "the judgment of the defense attorney in making his findings of necessity" should be accorded "healthy respect," but that the judgment of the district court would control the authorization of services. *Theriault*, 440 F.2d at 717 (Wisdom, J., concurring); *see Brinkley*, 498 F.2d at 510. Congress "legislated against this legal backdrop in adopting" § 848(q). *McFarland*, 512 U.S. at 856. It presumably intended to incorporate into § 848(q) the settled judicial interpretation of reasonable necessity under the CJA. *See supra* at 30-31; *see also Pierce v. Underwood*, 487 U.S. 552, 567 (1988) (where Congress reenacts a statute that has "been given a consistent judicial interpretation," it is presumed to endorse "the settled judicial interpretation").

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under § 3006A(e), *see, e.g.*¸ *United States v. Boroughs*, 613 F.3d 233, 239 (D.C. Cir. 2010).

The Court has previously interpreted another provision in § 3599 by reference to its sister provision in § 3006A. In *Martel*, the Court held that, to fill a gap in § 3599(e)'s substitution-of-counsel provision, it was appropriate to borrow the standard applicable under § 3006A(c). Recognizing that § 3599 was designed to *enlarge* the protections of § 3006A, the Court reasoned that it made no sense to read "a more stringent test" into § 3599(e) than had applied under § 3006A(c). *Martel*, 565 U.S. at 660. In the absence of any indications that Congress intended a different rule for § 3599, the Court held that the "interests of justice" standard governing motions for the substitution of counsel under § 3006A(c) likewise applied to such motions under § 3599(e).

The indications that Congress intended to incorporate the § 3006A standard into § 3599 are even clearer here than in *Martel*, because here there is no gap in § 3599: Congress explicitly borrowed the reasonable necessity provision virtually word-for-word from § 3006A(e). *Supra* at 5-9; *see Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 590-91 (2010) ("[C]lose textual correspondence" with a similar statutory provision "supports an inference that Congress understood the statutory formula it chose … consistent with Federal Court of Appeals interpretations."). The single difference between the provisions only confirms that Congress intended to adopt the prevailing interpretation of § 3006A(e). Section 3599(f)'s requirement of "reasonable" necessity aligned the text of the statute with the judicial interpretation of "necessity" in the CJA, ratifying the "reasonableness" standard by which courts applied that language. *See, e.g.*,

Brinkley, 498 F.2d at 510 ("[T]he trial judge should tend to rely on the judgment of the defense attorney if the latter makes a reasonable request in circumstances in which he would independently engage such services if his client had the financial means to support his defenses. This is nothing more than the 'reasonableness standard' which we applied in *United States v. Schultz*." (quotation and citations omitted)); *see also Bass*, 477 F.2d at 725; *Theriault*, 440 F.2d at 717 (Wisdom, J., concurring).

Because Congress not only legislated against the backdrop of a consistent judicial interpretation, but also "voice[d] its approval" of that interpretation by incorporating it into the statutory text, *United States v. Bd. of Comm'rs of Sheffield*, 435 U.S. 110, 134 (1978), Congress codified § 3006A(e)'s prevailing "judicial gloss" in § 3599(f), including the private attorney rule that courts used in practice. *Holmes v. Secs. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) (quotations omitted); *see also SEC v. W.J. Howey Co.*, 328 U.S. 293, 298 (1946) (where Congress uses "a term the meaning of which had been crystallized by … prior judicial interpretation" it is "reasonable to attach that meaning to the term as used by Congress, especially [where] such a definition is consistent with the statutory aims").

2. The Fifth Circuit's substantial need test deviates sharply from the judicial interpretation of "reasonable necessity" that prevailed when Congress spun § 848(q) off from § 3006A, and it is unsupported by any rationale recommending it as the better interpretation of § 3599(f).

The substantial need test first appeared in Fifth Circuit case law in *Fuller v. Johnson*, 114 F.3d 491 (5th Cir. 1997), where the appeals court apparently misapplied the COA standard requiring a "substantial showing of the denial of a constitutional right." *Id.* at 495-96; *see* 28 U.S.C. § 2253(c). The test next surfaced in *Clark v. Johnson*, 202 F.3d 760 (5th Cir. 2000), which—though not citing *Fuller* on this point—again applied the COA "substantial showing" requirement to hold that the denial of funding had not impinged a constitutional right. *See id.* at 768 ("[B]ecause we find that [petitioner] has failed to establish that he had a substantial need for the assistance of an expert forensic pathologist under the statute, he was not denied a constitutional right that would require the issuance of a COA."). The Fifth Circuit has since relied on these passages from *Fuller* and *Clark* as articulating the statutory standard for reasonable necessity, repeatedly affirming the denial of funding for services because capital petitioners could not demonstrate a substantial need for them. *See, e.g.*, *Riley v. Dretke*, 362 F.3d 302, 307 (5th Cir. 2004) ("This Court has construed 'reasonably necessary' to mean that a petitioner must demonstrate 'a substantial need' for the requested assistance." (citing *Clark*, 202 F.3d at 768, and *Fuller*, 114 F.3d at 502)). The court has never further "explained why [this] heightened standard is appropriate" under § 3599(f). *Matthews*, 807 F.3d at 760 (expressing Sixth Circuit disagreement with the substantial need test).[10]

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[10] The Eleventh Circuit has endorsed the Fifth Circuit's substantial need rule, but likewise has never explained how the term "reasonably necessary" could possibly be construed as

In operation, the substantial need test denies funding for services whenever the court concludes that the movant's claim, as substantiated when the § 3599(f) motion is made, would fail on the merits or is otherwise not viable. *See* JA 362-63, 384-86; *Ward*, 777 F.3d at 266. Section 3599(f) movants thus face "a 'catch 22' in having to demonstrate that there is some relevant evidence [they] could discover without first having the funding to pursue that evidence." Order, *Tong v. Stephens*, No. 4:10-cv-02355 (S.D. Tex. Sept. 22, 2014), ECF No. 56, at 4; *see also Patterson v. Johnson*, 2000 WL 1234661, at *2 (N.D. Tex. Aug. 31, 2000) ("[I]t makes little sense" to force a habeas petitioner "to first try to make a good faith claim of constitutional violation [without] supplying him with the resources to investigate [his] claim's factual basis and validity.").

The Fifth Circuit's substantial need test looks nothing like the reasonableness standard applied by courts when § 848(q) was enacted. As explained above, the consensus judicial interpretation at that time was that services should be authorized when "underlying facts reasonably suggest that further exploration may prove beneficial to the accused in the development of a defense to the charge." *Schultz*, 431 F.2d at 911; *see also Brinkley*, 498 F.2d at 509-12 (holding that the trial court "should have granted defendant's request for an independent psychiatric examination" under § 3006A(e) because "[d]efense counsel should have been allowed to ex-

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requiring capital defendants to show a "substantial need" for the requested services. *See, e.g.*, *United States v. Brown*, 441 F.3d 1330, 1363-64 (11th Cir. 2006).

plore the possible effects of LSD on appellant and the issue of whether these effects might amount to insanity under our definition of that defense"); *Durant*, 545 F.2d at 827-28 (finding that defendant was improperly denied funding for an expert under § 3006A(e) because "[h]ad one been authorized, counsel might have been able to make several challenges" to the government's fingerprint evidence); *United States v. Patterson*, 724 F.2d 1128, 1131 (5th Cir. 1984) (holding that district court erred in denying funding for an expert under § 3006A(e) because "the assistance of an expert undoubtedly would have facilitated [defendant's] cross-examination of the government's expert" and it was "clear that the lack of an expert hampered [defendant's] ability to prepare and present an adequate defense"). The reasonableness standard did not require movants to demonstrate merit and viability, as the Fifth Circuit now says they must.

There also is no basis for grafting § 2253(c)'s "substantial showing" standard for certifying appeals onto § 3599(f)'s reasonable necessity provision. The two statutes serve distinct functions. Congress conditioned plenary appellate process on a showing of a substantial constitutional violation on the understanding that claims have been fully developed and examined in the federal district court. Section 3599(f) exists to enable the development of those claims. Indeed, the substantial need test *interferes* with the proper functioning of § 2253(c) because it makes estimates about a claim's merit less reliable, undercutting the basis for withholding plenary appellate review. Section 3599(f) exists precisely so that factual evidence, claims, and defenses in capital

cases can be developed, producing trust in the outcome of the district court proceeding.

Every available interpretive clue points in a single direction: when Congress enhanced the statutory right to representation for those facing the death penalty, it did not intend to make it *harder* to secure representation-related services. *Martel*, 565 U.S. at 659-60; *McFarland*, 512 U.S. at 855. The more stringent substantial need test cannot be reconciled with the reasonableness standard that Congress incorporated into § 3599(f).

C. The Statutory Reasonableness Standard Enables Courts To Award Appropriate, Context-Specific Funding

Section 3599(f) adopts a single standard, reasonable necessity, for the award of services in a capital representation. That standard is flexible enough to apply across all the phases of a capital representation—at trial, on appeal, during federal post-conviction review, and during certain state post-conviction and clemency proceedings. *See supra* at 9; *see also, e.g.*, *Martel*, 565 U.S. at 662 ("[Section] 3599 reaches not just habeas petitioners but also criminal defendants" in federal death penalty trials); *Harbison v. Bell*, 556 U.S. 180, 194 (2009) (holding that § 3599 "authorizes federally appointed counsel to represent their clients in state clemency proceedings"). Section 3599(f)'s reasonableness standard also enables the development of meritorious claims without obligating courts to fund frivolous services.

1. The Fifth Circuit has not broadly applied its substantial need test in all phases of capital

representation, and it is difficult to see how it could: there is no record by which a defendant in a capital trial, for example, could establish the "merit" and "viability" of his defenses before investigating them. A trial attorney cannot show that the mitigating evidence she would like to develop will move the jury in the face of the state's case, and a court could not possibly analyze a § 3599(f) capital trial request in that way. *See* Br. in Opp. to Cert. 25-26 (admitting that a court "could not conclude that a criminal defendant was guilty and deny investigative funding" necessary to develop a defense on that basis); *cf. Brown v. Stephens*, 762 F.3d 454, 460 (5th Cir. 2014) (holding, in clemency context, that a § 3599(f) movant "must show that the requested services are *reasonably necessary* to provide the Governor and Board of Pardons and Paroles the information they need in order to determine whether to exercise their discretion to extend grace to the petitioner in order to prevent a miscarriage of justice" (emphasis added)).

The fact that the substantial need framework does not translate across the many phases in which § 3599(f) applies further signals the test's deficiency, since Congress is not generally understood to give the same statutory phrase different meanings in different contexts. *See Martel*, 565 U.S. at 661-62 (recognizing that "whatever standard [was] adopt[ed] for § 3599" must apply in multiple legal contexts, "because the section offers counsel on the same terms to capital defendants and habeas petitioners"); *Clark v. Martinez*, 543 U.S. 371, 378 (2005) ("To give these same words a different meaning for each category would be to invent a

statute rather than interpret one."); *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972) (a "legislative body generally uses a particular word with a consistent meaning in a given context").[11]

More broadly, the substantial need framework's limitations highlight a deeper problem with the test: it incorrectly presupposes that the record developed in prior phases will always suffice to identify and analyze the errors that occurred in those proceedings. That assumption is frequently wrong, particularly where (as here) the error concerns prior counsel's failure to *develop* a record. The substantial need test invites speculation about the merit and viability of claims in the absence of information needed to properly analyze those issues. It thus precludes the development of potentially meritorious claims, contrary to Congress's design. *See, e.g.*, Joint Advisory Concerning Campbell's Intellectual Disability Claim, *Campbell v. Davis*, No. 4:00-cv-03844 (S.D. Tex. May 10, 2017), ECF No. 138 (discussing agreement of the parties to a conditional grant of writ of habeas corpus after a finding that petitioner was intellectually disabled even though the Fifth Circuit initially affirmed the district court's denial of funding for intellectual testing).

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[11] The flexibility of an objective reasonableness standard, in contrast, is why it has been adopted in such a wide array of contexts. *See, e.g.*, *Strickland v. Washington*, 466 U.S. 668 (1984) (ineffective assistance of counsel); *J.D.B. v. North Carolina*, 564 U.S. 261 (2011) (*Miranda* custody analysis); *United States v. Leon*, 468 U.S. 897 (1984) (good-faith exception to the exclusionary rule); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (qualified immunity); *Mincey v. Arizona*, 437 U.S. 385 (1978) (exigency exception to Fourth Amendment's warrant requirement).

2. The substantial need test is unsupportable as a matter of statutory interpretation for all the reasons discussed above, but it is also wrong as a matter of policy (assuming policy could ever overcome the statute's text, history, structure, and purpose). Fifty years of experience with the reasonableness standard—analyzing what a reasonable attorney of limited resources would pursue—shows that it is workable, and that it sufficiently empowers courts to deal with frivolous requests for services. *See Jerman*, 559 U.S. at 597 (rejecting argument that holding "portends ... grave consequences" because, among other things, the relevant statute "contain[ed] several provisions that expressly guard against abusive lawsuits"). Courts have extensive experience analyzing the reasonableness of attorney decisionmaking and strategy in the context of applicable professional norms, which is a touchstone not only of § 3599(f) but also of the analysis required under *Strickland*. *See Martel*, 565 U.S. at 660 (use of a well-established rule "enables courts to rely on experience and precedent, with a standard already known to work effectively"); *Wiggins*, 539 U.S. at 524 (noting that the Court has "long … referred [to the ABA standards] as 'guides to determining what is reasonable'").

Moreover, courts applying a reasonableness rule through the private attorney standard have long recognized that it does not authorize the court to

grant "frivolous applications." *Durant*, 545 F.2d at 827.[12] Movants must carry the burden of establishing necessity by articulating specific reasons why the services are warranted. *See, e.g.*, *United States v. Pitts*, 346 F. App'x 839, 841-42 (3d Cir. 2009) ("[T]o meet this burden, a defendant must demonstrate with specificity, the reasons why such services are required." (quotation omitted)); *United States v. Kennedy*, 64 F.3d 1465, 1470 (10th Cir. 1995) (finding that "general allegations, without any specific showing," fail to meet this burden); *United States v. Sanchez*, 912 F.2d 18, 22 (2d Cir. 1990) (maintaining a movant "must articulate a reasonable basis for the requested services" (quotation and alterations omitted)). And under the reasonableness standard, a "district court [may] satisfy itself that a defendant may have a plausible [claim or] defense before granting" his § 3599(f) motion. *Alden*, 767 F.2d at 318-19. Courts may even deny funds after a finding of "reasonable necessity," if doing so serves the statute's purpose. *See* 18 U.S.C. § 3599(f); *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) (recognizing that judicial discretion requires "the principled application of standards consistent with [a statute's] purposes"). Courts do not have latitude to rewrite statutes for reasons of public policy, *see, e.g.*, *Jerman*, 559 U.S. at 604, but the substantial need test does not even have public policy to commend it.

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[12] Federal Rule of Civil Procedure 11 provides an additional backstop against frivolous motions. *See Jerman*, 559 U.S. at 600.

II. MR. AYESTAS ESTABLISHED A REASONABLE NEED FOR INVESTIGATIVE SERVICES UNDER § 3599(f)

Evaluated under a standard that comports with the text, history, structure, and purpose of § 3599(f), Mr. Ayestas's application for investigative services should have been granted. A reasonable attorney working with limited resources would have pursued the investigation that Mr. Ayestas requested.

A. Mr. Ayestas Is Entitled To Funding For Investigative Services Because They Are Reasonably Necessary To The Representation

Mr. Ayestas's substance abuse, social history, and mental health have never been adequately investigated. Trial counsel conducted virtually no investigation into Mr. Ayestas's personal background and no investigation at all into signs that he suffered from mental illness, including his multiple head traumas and history of substance abuse. State habeas counsel did little more, ignoring the recommendation of his own mitigation specialist that he should undertake the background and mental health investigation that trial counsel had not performed. *See supra* at 14-16. Federal habeas counsel reasonably perceived that Mr. Ayestas had a Sixth Amendment IATC claim, and that proper development of the claim could lead to mitigating evidence more compelling than trial counsel's two-minute presentation about Mr. Ayestas's prison English classes. The request to develop that evidence was reasonably necessary to the representation.

1. The Fifth Circuit's decision assumed that trial counsel's performance was deficient. JA 389. Indeed it was: trial counsel did not pursue any of the multiple red flags concerning Mr. Ayestas's mental health problems, and never had Mr. Ayestas evaluated by a mental health professional. Trial counsel did not even perform the most perfunctory investigation into his background. They reached out only to Mr. Ayestas's Honduran family, and even then only shortly before trial. *Supra* at 12. Trial counsel did not explore any of Mr. Ayestas's many contacts in the United States and Mexico, where he had spent much of his adult life. *Supra* at 12.[13] The sentencing evidence counsel offered failed to meaningfully address mitigation, as the state reminded the jury in arguing for a death sentence. *Supra* at 13-14.

The requested § 3599(f) services were reasonably necessary to discover and plead what a proper pretrial investigation would have unearthed, based on the very red flags that trial counsel ignored. Any reasonable lawyer representing Mr. Ayestas would seek to explore his mental health and history of substance abuse in order to ascertain whether and how he was prejudiced by his trial counsel's deficient representation, and would therefore seek a social history to inform a psychiatric assessment. The requested investigation was also reasonably necessary to establish excuse for the default of Mr. Ayestas's *Wig-*

[13] This account credits Olvera's disputed assertion that Mr. Ayestas told her not to contact his family until the time of trial. Her version of events is open to doubt, however, given that she later revised her sworn story to conform to other events in the established case timeline, and given Mr. Ayestas's affidavit disputing her recollection. *Supra* at 17.

gins claim, which was not preserved by Mr. Ayestas's state habeas counsel.[14]

Mr. Ayestas's § 3599(f) motion on remand requested services that were reasonably necessary to make these showings. The motion was narrowly tailored to focus the initial investigation on time Mr. Ayestas spent in California and Mexico, reflecting habeas counsel's reasonable belief that important, previously undiscovered evidence about mental health and substance abuse could be found in those places. JA 290, 307-13. The proposed investigation was not duplicative because prior counsel had investigated only (limited) evidence in Honduras and Louisiana, not in California or Mexico. Mr. Ayestas did not request expert services, reserving a request for such services (subject to a distinct reasonable necessity showing) pending the results of the proposed investigation. JA 287.

2. Investigative services should be allowed under § 3599(f) where the "underlying facts reasonably suggest that further exploration may prove beneficial to the accused in the development of a defense to the charge." *Schultz*, 431 F.2d at 911; *see also McFarland*, 512 U.S. at 855. Here, any reasonable counsel of even limited resources would have investigated further. Even the Fifth Circuit acknowledged that, at this preliminary stage, it was "conceivable" that a proper mitigation investigation would show that Mr. Ayestas "had entered the early

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[14] Under *Martinez* and *Trevino*, state habeas counsel's failure to assert the *Wiggins* claim could be excused if the claim is substantial, and if state habeas counsel was deficient. *Infra* at 51-54.

stages of an as-yet undiagnosed mental illness" by the time of the offense. JA 389.

Nevertheless, the Fifth Circuit held that the § 3599(f) motion was properly denied because Mr. Ayestas's *Wiggins* claim was meritless and not viable. JA 386-91. Even if trial counsel had been deficient, the court concluded, the motion did not show that it was "substantially likely" that a single juror would have swayed from death in light of the "brutality of the crime." JA 389. The court held that the default of the claim was not excused for similar reasons: state habeas counsel could not be faulted for having failed to raise a meritless claim. JA 390.

That holding faithfully applied the Fifth Circuit's substantial need test, contrary to § 3599(f). Mr. Ayestas could not demonstrate that the omitted mitigation investigation prejudiced him without evidence of what a reasonable investigation would have uncovered. Indeed, few indigent *Wiggins* claimants lacking adequate state habeas representation would ever be able to present a court with that information. *See infra* 51-54. In requiring Mr. Ayestas to satisfy an impossible standard, the Fifth Circuit misapplied § 3599(f) for all the reasons discussed *supra* at 27-43.

The Fifth Circuit's § 3599(f) decision cannot properly be rooted in the court's conclusion that the "brutality of the crime" precludes a sentencing-phase Sixth Amendment violation. JA 389. That proposition is legally erroneous: as the Court recently reiterated, a petitioner may satisfy *Strickland*'s prejudice prong even when the state "emphasized the brutality of [the] crime and [the

petitioner's] lack of remorse." *Buck v. Davis*, 137 S. Ct. 759, 768 (2017); *id.* at 776 ("[S]everal considerations convince us that it is reasonably probable—notwithstanding the nature of [petitioner's] crime and his behavior in its aftermath—that the proceeding would have ended differently had counsel rendered competent representation."). The suggestion that sufficient brutality avoids the need to analyze the possible impact of further mitigation evidence also contradicts the Court's precedents recognizing Sixth Amendment violations in highly aggravated cases. *See*, *e.g.*, *Williams v. Taylor*, 529 U.S. 362, 367-68, 399 (2000) (concluding that petitioner was prejudiced by trial counsel's failure to discover mitigation evidence notwithstanding evidence that petitioner had fatally beaten a man with a mattock for declining to loan him two dollars and committed two separate violent assaults on elderly victims); *Rompilla v. Beard*, 545 U.S. 374, 378, 381-83 (2005) (holding that trial counsel was ineffective in failing to conduct reasonable mitigation investigation, in case including such significant aggravation as commission of torture). The notion that brutality is determinative is all the more inappropriate in a jurisdiction such as Texas where the jury is asked not to weigh aggravating and mitigating factors, but only to decide whether there is sufficient mitigation to warrant a sentence other than death. *See supra* at 13-14.

3. Reasonable federal habeas counsel—familiar with the deficiencies of the prior investigation and knowing that Mr. Ayestas was later diagnosed as schizophrenic—would pursue a post-conviction

investigation even before every contour of the constitutional violation was fully understood. With a schizophrenia diagnosis, a social history investigation is necessary to determine the likely onset of the mental illness—typically between a person's late teens and mid-thirties, with peak emergence for males in the early to mid twenties. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* ("DSM-V") 102 (5th ed. 2013). The history and trajectory of Mr. Ayestas's mental illness could provide factual support for his constitutional claims, including information that would aid in establishing prejudice. *See, e.g.*, *Wiggins*, 539 U.S. at 524-26.

Clinically significant symptoms of schizophrenia develop gradually and can occur over a period of years. DSM-V at 101-02. The disease manifests as the "prodromal" and "premorbid" phases in its beginning stages, which "are typically characterized by impairments sometimes severe, in the person's judgment, perception, and ability to function." JA 282-83 n.6. An individual developing schizophrenia is often unaware that he is mentally ill, however. *See* DSM-V at 101. Someone developing symptoms will thus frequently report no prior mental health problems. And many with schizophrenia attempt to cope by self-medicating with drugs and alcohol. Thomas R. Kosten & Douglas M. Ziedonis, *Substance Abuse and Schizophrenia: Editors' Introduction*, 23 Schizophrenia Bull. 181, 183 (1997).

That Mr. Ayestas was diagnosed with paranoid schizophrenia when he was in his mid-thirties is significant. He had a history of noncriminal behavior when he was younger, and the disease thus

likely set in over the years leading up to the offense. *See supra* at 16. Given how the disease progresses, Mr. Ayestas may have experienced the onset of schizophrenia, or the prodromal phase, before the crime, while living in Mexico, California, and Texas. Mr. Ayestas's § 3599(f) motion identified California and Mexico as locations for the proposed investigation, which could lead to witnesses who observed behaviors supporting the conclusion that Mr. Ayestas was suffering from schizophrenia in 1995 or earlier. Investigating his background at those locations would also be important to identifying any mental health problems *other* than schizophrenia—none of which were considered or investigated by prior counsel.[15]

Counsel representing a habeas petitioner has a duty to "conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition." *McCleskey v. Zant*, 499 U.S. 467, 498 (1991); *see also Porter v. McCollum*, 558 U.S. 30, 39 (2009) (per curiam) ("It is unquestioned that under the prevailing professional norms[,] counsel ha[s] an 'obligation to conduct a thorough investigation of the defendant's background.'" (quoting *Williams*, 529 U.S. at 396); *Wiggins*, 539 U.S. at 527 (finding that inef-

[15] The proposed investigation could also discover signs of trauma, which may "precipitate the development of mental illness." JA 312. Indeed, federal habeas counsel has already discovered that during one trip through Mexico, Mr. Ayestas was held captive by a human smuggler for weeks, until his family paid for his release—exactly the type of traumatic event that would inform an appropriate mental health evaluation. JA 309.

fective assistance of counsel inquiry must "consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further").[16] Here, reasonable habeas counsel would seek evidence of disease onset and any other mental health information pertinent to a potential diagnosis. JA 300.

B. The Disposition Of Mr. Ayestas's § 3599(f) Motion Demonstrates How Unsuited The Substantial Need Test Is For *Wiggins* Claims Defaulted By State Habeas Counsel

This case starkly illustrates how a substantial need test thwarts investigation into *Wiggins* violations that state habeas counsel has ignored. *Wiggins* claims are a species of IATC challenge that almost always involve evidence outside the trial record. Inmates seeking to excuse the default of these claims will, *by definition*, be unable to ground their request for representation-related services in facts sufficient to show prejudice.

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[16] The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913 (rev. ed. 2003), capture a professional norm requiring attorneys to conduct a mental health investigation where the facts available to counsel suggest that the investigation could conceivably uncover critical information. As the Guidelines explain, the engagement of mitigation specialists is particularly valuable because they "have the clinical skills to recognize such things as congenital, mental or neurological conditions, to understand how these conditions may have affected the defendant's development and behavior, and to identify the most appropriate experts to examine the defendant or testify on his behalf." *Id.* at 959.

Wiggins claims are especially dependent on "investigative work" and "evidence outside the trial record." *Martinez*, 132 S. Ct. at 1317-18. A petitioner generally cannot show he was prejudiced by trial counsel's deficient investigation without some post-conviction investigation into the facts that a reasonable trial investigation would have discovered. As a result, a *Wiggins* claim depends on subsequent counsel's ability to "investigate [the defendant's] background, determine whether trial counsel had adequately done so, and then develop evidence about additional mitigating background circumstances." *Trevino*, 133 S. Ct. at 1919. The substantial need test cripples a petitioner's ultimate ability to plead (much less prove) the merits of that type of claim. *See Porter*, 558 U.S. at 41 (to assess prejudice, court considers "the totality of the available mitigation evidence—both that adduced at trial and the evidence adduced in the habeas proceeding").

The problem is particularly pronounced when the procedural default follows from state habeas counsel's own failure to investigate. In *Martinez*, this Court held that a *Wiggins* claim can be considered on the merits in a federal habeas proceeding where the default is caused by state habeas counsel's deficient performance. *See* 132 S. Ct. at 1320. But a defaulted *Wiggins* claim necessarily involves an undeveloped record. When trial and state post-conviction counsel are each inadequate, both state court proceedings will fail to produce the fact development necessary to demonstrate a meritorious claim. A petitioner like Mr. Ayestas will thus arrive in federal court without

ever having had the opportunity to develop factual support for the issue that requires § 3599(f) services. *See, e.g.*, *Martinez*, 132 S. Ct. at 1317 ("To present [an IATC claim] at trial in accordance with the State's procedures, ... a prisoner likely needs an effective [state post-conviction] attorney.").

The substantial need test penalizes IATC claimants for the very deficiencies that *Martinez* is meant to address. The Fifth Circuit's rule rests on the assumption that federal habeas claimants leave state court with detailed evidence sufficient to substantiate their claims. As *Martinez* recognizes, however, that assumption is sometimes incorrect—a claimant like Mr. Ayestas may lack substantiation for his IATC claim when he arrives in federal court not because the claim is meritless, but because he has never had effective counsel to explore it. *Id.* at 1315; *see id.* at 1318 ("[T]he initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim.").

Section 3599(f) does not require courts to authorize every *Wiggins* investigation. Where a request to conduct a prejudice investigation is not tied to credible allegations of deficient performance, for example, a § 3599(f) motion may be denied. In this case, however, the § 3599(f) motion cannot be denied for want of deficiency—the factual issues relevant to deficiency are contested, and the Fifth Circuit's holding assumed, correctly, that trial counsel was deficient.

The Fifth Circuit's decision in this case exhibits virtually every problem that arises when courts apply the substantial need test to procedurally defaulted *Wiggins* claims. Congress enacted § 3599(f) to improve the representations of capital litigants, and thus confidence in the constitutionality of the judgments supporting execution. The substantial need test comprehensively conflicts with that regime and should be rejected.

CONCLUSION

The judgment for the court of appeals should be reversed and the case should be remanded for further proceedings.

Respectfully submitted,

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June 9, 2017

STATUTORY APPENDIX

STATUTORY APPENDIX A

U.S. CONST. AMEND. VI

Rights of Accused in Criminal Prosecutions

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATUTORY APPENDIX B

U.S. CONST. AMEND. XIV

Citizenship; Privileges and Immunities; Due Process; Equal Protection; Appointment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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STATUTORY APPENDIX C

18 U.S.C. § 3599

Counsel for Financially Unable Defendants

(a)(1) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either–

(A) before judgment; or

(B) after the entry of a judgment imposing a sentence of death but before the execution of that judgment;

shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

(2) 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 and the furnishing of such other services in accordance with subsections (b) through (f).

(b) If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the

prosecution is to be tried for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court.

(c) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

(d) With respect to subsections (b) and (c), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

(e) 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.

(f) Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under subsection (g). No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

(g)(1) Compensation shall be paid to attorneys appointed under this subsection at a rate of not more than $125 per hour for in-court and out-of-court time. The Judicial Conference is authorized to raise the maximum for hourly payment specified in the paragraph up to the aggregate of the overall average percentages of the adjustments in the rates of pay for the General Schedule made pursuant to section 5305 of title 5 on or after such date. After the rates are raised under the preceding sentence, such hourly range may be raised at intervals of not less than one year, up to the aggregate of the overall average percentages of such adjustments made since the last raise under this paragraph.

(2) Fees and expenses paid for investigative, expert, and other reasonably necessary services authorized under subsection (f) shall not exceed $7,500 in any case, unless payment in excess of that limit is certified by the court, or by the United States magistrate judge, if the services were rendered in connec-

tion with the case disposed of entirely before such magistrate judge, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active or senior circuit judge.

(3) The amounts paid under this paragraph for services in any case shall be disclosed to the public, after the disposition of the petition.