No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 2018 TERM

BILLY JACK CRUTSINGER,
Petitioner,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice
Institutional Division,
Respondent.

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

PETITION FOR FOR WRIT OF *CERTIORARI*

CAPITAL CASE

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QUESTION PRESENTED

(1) Whether establishing that requested expert services are reasonably necessary to the representation under 18 U.S.C. § 3599 requires articulation of a constitutional claim as a matter of law?

(2) Whether it is an abuse of discretion to deny requested expert services under 18 U.S.C. § 3599 when the services are intended to inform counsel about the implications of a forensic development as to DNA evidence, which the State relied on at trial and has since disclosed was false?

LIST OF PARTIES

BILLY JACK CRUTSINGER, Petitioner

LORIE DAVIS, Director, Texas Department of Criminal Justice Institutional Division. Respondent

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Petitioner, BILLY JACK CRUTSINGER, petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit in *Crutsinger v. Davis*, 898 F.3d 584 (5th Cir. 2018).

OPINIONS BELOW

The Fifth Circuit decision sought to be reviewed in *Crutsinger v. Davis*, 898 F.3d 584 (5th Cir. 2018) is attached as Appendix 1. The district court's Memorandum Opinion and Order Denying Authorization for DNA Expert, Doc 75, Case No. 4:07-CV-703-Y (N.D. Tex. Jun 5, 2017) is attached as Appendix 2. The district court's Opinion and Order Denying Reconsideration, Doc 82, Case No. 4:07-CV-703-Y (N.D. Tex. Aug. 24, 2017) is attached as Appendix 3.

JURISDICTION

The Fifth Circuit Court of Appeals opinion sought to be reviewed was entered on August 3, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

18 USCA § 3599(f) – Counsel for financially unable defendants

(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 therefore under subsection (g). ....

STATEMENT OF THE CASE WITH FACTS RELEVANT TO THE ISSUE

I. Prior Proceedings: Trial (2003), Direct Appeal (2006), and State Habeas (2007), & Federal Habeas (2008-2014)

In 2003, a Tarrant County jury convicted Crutsinger of capital murder and sentenced him to death. The conviction and death sentence was affirmed on direct appeal to the Texas Court of Criminal Appeals. *Crutsinger v. State*, 206 S.W.3d 607 (Tex. Crim. App. 2006).

In 2007, the Texas Court of Criminal Appeals denied state habeas relief. *See Crutsinger v. State*, 206 S.W.3d 607 (Tex. Crim. App. 2006). *Ex parte Crutsinger*, No. WR-63,481-01, 2007 WL 3277524 (Tex. Crim. App. Nov. 7, 2007) (not designated for publication). On November 19, 2007, Mr. Richard Alley, who had been state capital habeas counsel, filed in federal district court a Motion to Withdraw as Counsel ... [and] for Appointment of New Counsel to Represent Petitioner in [Federal] Habeas Corpus Proceedings Under 28 U.S.C. Sec. 2254 Involving a State Prisoner under Sentence of Death. ROA.13 [Doc 1].

On January 15, 2008, the federal district court granted the motion and appointed undersigned counsel, Brandt, pursuant to 21 U.S.C. § 848(q)(4)(B). In 2008, the federal district court denied a funding request for expert and investigative assistance to develop an ineffective assistance of trial counsel claim for failure to timely initiate a social history investigation. *Crutsinger v. Stephens*, 576 Fed. Appx. 422, 428-29 (5th Cir. 2014). Thereafter, and without funding to develop his claims, Mr. Crutsinger filed his federal habeas petition. ROA.95, [Doc #31].

On February 6, 2012, the district court entered its Memorandum Opinion and Judgment.[1] ROA.328; ROA.361. All the claims were denied. *Crutsinger v. Stephens*, 576 F. App'x 422, 425-425 (5th Cir. 2014). In 2012, Mr. Crutsinger filed a Certificate of Appealability (COA) in the Fifth Circuit, which the Fifth Circuit denied in 2014.

Thereafter, Mr. Crutsinger filed a petition for writ of certiorari in this United States Supreme Court. Mr. Lee B. Kovarsky, a tenured law professor at the University of Maryland, had agreed to be retained pro bono by Mr. Crutsinger as co-counsel with undersigned counsel for the limited purpose of the writ proceeding because of his experience in the Supreme Court. Ms. Brandt was also named as counsel on the pleading. The petition was denied. *Crutsinger v. Stephens*, 135 S. Ct. 1401 (2015).

Because of Professor Kovarsky's limited engagement, his representation of Mr. Crutsinger terminated at that time. Professor Kovarsky had never been state habeas counsel, nor appointed under 18 U.S.C. § 3599 to represent Mr. Crutsinger. ROA.608 (Affidavit of Kovarsky, para. 2). Other than the Supreme Court certiorari proceeding, Professor Kovarsky had not been listed as counsel of record for Mr. Crutsinger in any other matter, and provided no legal services to Mr. Crutsinger before or after that time.

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[1] On March 21, 2018, the Supreme Court decided *Ayestas v. Davis*, 138 S. Ct. 1080 (2018). On May 9, 2018, Mr. Crutsinger filed a motion for 60(b)(6) relief from the February 6, 2012 judgment asserting his federal habeas proceeding was marred by a structural procedural defect. He argued that the federal courts denied a request under 18 U.S.C. § 3599 for investigative and expert services to investigate the effectiveness of trial counsel on the ground that such a claim was procedurally defaulted. Mr. Crutsinger further argued that the *Ayestas* decision overruled the "substantial need" standard that had been applied by the district court and the Fifth Circuit in this case. [Doc 90]. The district court denied 60(b) relief. The case is currently pending in the Fifth Circuit. [Doc 98].

Undersigned counsel Brandt has remained appointed counsel pursuant to 21 U.S.C. § 848(q)(4)(B) [now 18 U.S.C. § 3599] since her appointment in 2008. By statute, she remains "obligated" to continue to represent Mr. Crutsinger in "all available post-conviction process."

II. Current Proceeding at Issue: The District Court Ruling Denying Crutsinger's § 3599(f) Funding Motion for DNA Expert Assistance (2016)

On July 8, 2016, the Criminal District Attorney's Office for Tarrant County ("Tarrant County DA") sent a July 8, 2016 letter to Mr. Kovarsky. Presumably this office had identified Mr. Kovarsky as Mr. Crutsinger's counsel from the Supreme Court docket. ROA.609 (Affidavit of Kovarsky, para. 3). The letter was styled: "Notification of Texas Forensic Science Commission ("Commission") DNA Mixture Review." ROA.596. *See* App 04: (Doc. 72) Exhibit A: July 8, 2016 letter from Tarrant County DA.

The July 8, 2016 letter was precipitated by the DNA analysis that had been performed before the 2003 trial, and by the trial-testimony of the DNA analyst. Crutsinger's crime involved the stabbing deaths of 89-year-old Pearl Magouirk and her 71-year-old daughter, Patricia Syren, in their Fort Worth home. Both victims suffered multiple stab wounds and had their throats cut. A broken knife was found in the victims' bathroom, and blood evidence suggested the killer had been injured when it broke. Syren's Cadillac was taken from the home and later found abandoned at a bar. A DNA analyst testified at trial about biological samples taken from the broken knife, the victims' clothing, the interior of the abandoned Cadillac, men's clothing found in a trash dumpster near the abandoned Cadillac, and blood stains throughout the victims' home and garage. The analyst associated some samples with either Crutsinger or the victims, but she also identified "mixture"

samples containing DNA associated with both Crutsinger and one or both victims. ROA.581 [Doc 75 at 6].

The July 8, 2016 letter from the Tarrant County DA stated that based on the Commission's review:

> a preliminary laboratory review indicates that ***[Mr. Crutsinger's] case may potentially be impacted by [the] change in protocol [for the interpretation of DNA test results known as Combined Probability of Inclusion/Exclusion]***. .... We are currently investigating the potential options available to address the mixture issue using current mixture interpretation protocols. We will contact you once we have determined those available options.

(Emphasis supplied) ROA.502 [Doc #72].

The letter had been addressed and mailed to Professor Kovarsky at the University of Maryland's law school, but he was "rarely there over the summer." ROA.608 (Affidavit of Kovarsky, para. 3). On March 17, 2017, the Tarrant County DA sent a follow-up letter to Professor Kovarsky advising him that its DNA expert, the Tarrant County Medical Examiner's Office, was no longer proficiency tested. The March 17, 2017 letter reads:

> Our office notified you in July 2016 that ***your client's case may potentially be impacted by the Texas Forensic Science Commission's change in DNA mixture interpretation protocols***, and that the laboratory – the Tarrant County Medical Examiner's Office – could not issue an amended mixture report because they are no longer proficiency tested using the Profile Plus/COfiler amplification kits. ***We have been unable to ascertain any potential options for reinterpretation*** of the mixture profiles in this case using the current mixture interpretation protocols.

(Emphasis supplied) ROA.596 (Doc. 72) March 17, 2017 letter from Tarrant County DA.

The letter further stated that the State was planning to move forward with Mr. Crutsinger's execution notwithstanding their laboratory's inability to perform the reinterpretation. ROA.596 (Doc. 72). Mr. Kovarsky was out of the office for several weeks when the letter arrived at the law school.

His wife had given birth to their second child on March 15, 2017. He was not expecting any case mail because he had accounted for all correspondence in cases where he was counsel of record.

In April 2017, when he returned to his office, Professor Kovarsky was confused as to why he was receiving correspondence from the Tarrant County DA's Office. ROA.608 (Affidavit of Kovarsky, para. 4) and called and spoke with Mr. Condor, an Assistant DA in the Tarrant County DA's office. Professor Kovarsky told Mr. Condor that he no longer represented Mr. Crutsinger. Mr. Condor acknowledged the mistake of his office and that he would attempt to locate the appropriate recipient for notice.

On April 7, 2017, Mr. Kovarsky contacted undersigned counsel because he knew that Brandt at least at one point had been Mr. Crutsinger's appointed counsel under § 3599. On April 10, 2017, Professor Kovarsky scanned the letter and sent it to Brandt. ROA.608 (Affidavit of Kovarsky, para. 5). Given the notice from the State of Texas to Mr. Crutsinger that: (1) the reinterpretation protocols could impact his case; (2) the State's expert was not qualified to conduct the reinterpretation and did not know of other reinterpretation options; and (3) the State would go forward in the setting of an execution date; Mr. Crutsinger, through undersigned counsel Ms. Brandt, contacted Bode Cellmark Forensics LabCorp Speciality Testing Group to suggest potential options for reinterpretation.

In response, Bode Cellmark quoted a $500 estimate. It advised Ms. Brandt that before it could respond to the inquiry, it needed to review and evaluate the bench notes/raw data from the Tarrant County Medical Examiner's Office. It further advised that once a review of the bench notes/data review was done, Bode Cellmark Forensics would be in a position to advise if it could conduct the reinterpretation or suggest other options for reinterpretation of the mixture profiles. *See*

Appendix 6: ROA.509 [Doc 72-3] ("Please determine whether we could do our own mixture stats or if it would need probabilistic testing gentoyping like True Allele.").

On April 27, 2017, Mr. Crutsinger, through undersigned counsel Ms. Brandt, filed in the district court an Opposed Motion to Authorize Counsel to Retain the DNA Expert Services of Bode Cellmark in amount of $500. ROA.496. The motion requested authorization to retain Bode Cellmark to review the bench notes/data of the State, to ascertain any potential options for reinterpretation of the mixture profiles in this case, and to advise undersigned counsel. ROA.496. Mr. Crutsinger also stated that once the review was conducted, and based on the advice of the expert, Mr. Crutsinger might then return to the court to seek additional services. ROA.496.

On May 5, 2017, the district court denied authorization to retain the expert services because the services were beyond the scope of representation coverage under § 3599. ROA.581 [Doc 75 at 12]. The order recited that "state-furnished representation [pursuant to TEX. CODE CRIM. PROC. art. 64] renders [Crutsinger] ineligible for §3599 counsel." Order, ROA.581 [Doc 75 at p. 8].

The order additionally held that Mr. Crutsinger could not seek these services for clemency purposes because "Crutsinger has not shown that an execution date is set, which would trigger the clemency process." Order, ROA.581 [Doc 75 at p. 10].

Finally, the Order ruled in the alternative "that Crutsinger has not made the required showing that the requested services are reasonably necessary for the representation." Order, ROA.581 [Doc 75 at pp. 12, 2]. It ruled:

> The Court does, however, expect Crutsinger to identify a constitutional claim and articulate how the requested funds would be used to develop it. There was a significant amount of DNA testimony at trial, as well as other, non-DNA evidence connecting Crutsinger to the crime. This evidence is in the state court record, which he used to litigate his federal habeas petition. ***Contrary to his assertion, the absence***

> ***of a DNA expert does not prevent Crutsinger from claiming he is factually innocent. Nor does it prevent him from articulating how his exclusion from a DNA sample could demonstrate his actual innocence.*** In this regard, Crutsinger does not even discuss the evidence that would be subjected to the new protocol or its significance to the case. As presented, the motion is simply a request to fund a fishing expedition, and it should be denied.

(Emphasis supplied) Order [Doc 75, p.14].

On June 12, 2016, Mr. Crutsinger filed a Motion for Reconsideration of the denial-of-funding order. ROA.595 [Doc.76]. The motion argued the district court had erred by misapprending both the facts and the law. As to the facts, Mr. Crutsinger asserted that the order was mistaken in holding that Mr. Crutsinger already had counsel appointed by the state. Mr. Crutsinger attached an affidavit of Professor Kovarsky in which Professor Kovarsky states the court's order was mistaken in identifying him as Mr. Crutsinger's state-afforded counsel and explained why. ROA.609 (Affidavit of Kovarsky, paras. 6-9). The motion also stated that the representation of former state habeas counsel, Richard Alley, had terminated on the disposition of the state habeas application. Undersigned counsel Brandt was Mr. Crutsinger's only lawyer, appointed under § 3599, and by that appointment remained obligated to represent Mr. Crutsinger in all available post-conviction process, including clemency, until a court ordered her to withdraw. *See Wilkins v. Davis*, 832 F.3d 547, 558 (5th Cir. 2016), *citing Battaglia v. Stephens*, 824 F.3d 470 (5th Cir. 2016).

The Reconsideration Motion further asserted that the order was also mistaken about the nature of Mr. Crutsinger's request. Although Chapter 64 does provide a qualified right to counsel upon a preliminary showing, TEX. CRIM. CODE PROC. Art 64.01 is not applicable at all. This is because the provision allows a prisoner to file a motion and obtain post-conviction DNA testing of biological evidence in the state's possession; however, Mr. Crutsinger was not seeking acess to

biological evidence in order to conduct DNA testing of it. Rather, he sought expert services to review the relevant information to ascertain reinterpretation options.

As to the law, the motion urged that the district court had mistakenly concluded that the services were not sought in connection with a "subsequent" stage of proceedings covered by § 3599. Specifically, Mr. Crutsinger argued that the timing of his request had been driven by a change in the Texas Forensic Science Commissions' DNA mixture interpretation protocols that occurred long after undersigned counsel's appointment to represent Mr. Crutsinger under § 3599.[2] ROA.595 [Doc 76]. His request for services to review and reinterpret prior testing according to the new protocols could not have been made before the protocols changed and Mr. Crutsinger had received notice in 2017 from the State that the change could impact his case.

Moreover, Mr. Crutsinger argued that he identified the services as being relevant to representation in executive clemency proceedings and in potential successive state and federal habeas corpus proceedings. ROA.595 [Doc 76]. He further argued that the district court's reliance on the absence of an execution date to "trigger" clemency proceedings was error, for three reasons.

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[2] *Harbison v. Bell*, 556 U.S. 180 (2009), instructs that the determination of whether a proceeding is "subsequent" depends on when federal habeas counsel is appointed:

> Counsel's responsibilities commence at a different part of subsection (e) depending on whether she is appointed pursuant to subsection (a)(1)(A), (a)(1)(B), or (a)(2). When she is appointed pursuant to (a)(1)(A), she is charged with representing her client in all listed proceedings. When she is appointed pursuant to (a)(1)(B) (i.e., after the entry of a federal death sentence), her representation begins with "appeals." And when she is appointed pursuant to (a)(2), her representation begins with the § 2254 or § 2255 "post-conviction process." Thus, counsel's representation includes only those judicial proceedings transpiring "subsequent" to her appointment. It is the sequential organization of the statute and the term "subsequent" that circumscribe counsel's representation, not a strict division between federal and state proceedings.

Id. at 188.

First, the State had already notified counsel for Mr. Crutsinger in the letter that it intended to set a date, making clemency proceedings imminent. ROA.595 [Doc 76]. Second, no statute or administrative rule in Texas required an execution date to be set before clemency could be sought. ROA.595 [Doc 76]. And third, nothing in § 3599 permits a court to withhold clemency representation from a death-sentenced prisoner until an execution date is set. ROA.595 [Doc 76].

On August 24, 2017, the district court denied reconsideration. ROA.638 [Doc 82]. The court re-imposed its ruling that counsel and expert services were available under state law and that § 3599 permitted it to withhold expert services on that basis. ROA.639 [Doc 82]. It also held that, notwithstanding that the change in the Texas Forensic Science Commission's DNA mixture interpretation protocols postdated Mr. Crutsinger's entitlement to counsel under § 3599, neither additional state habeas corpus proceedings nor "DNA reinterpretation" constituted a stage "subsequent" to the federal habeas corpus proceeding. ROA.644 [Doc 82].

In making the ruling that the request was outside the scope of § 3599, the court ignored Mr. Crutsinger's argument that the services were reasonably necessary for representing him in clemency.

The district court also re-imposed its finding that the services were not reasonably necessary. The court held this was because Mr. Crutsinger had not identified "an issue that he intends to raise in any such proceeding." ROA.644 [Doc 82]. The court believed that this standard was acceptable because it did "not require Crustinger to show the potential merit of a claim," but only asked that he (1) identify "a constitutional claim;" and (2) "articulate how the requested funds would be used to develop it." ROA.645 [Doc 82].

III. Current Proceeding at Issue: The Fifth Circuit Opinion Affirming the District Court's Denial of § 3599(f) Funding for DNA Expert Assistance (2017)

On September 11, 2017, Mr. Crutsinger filed his notice of appeal to the Fifth Circuit "from all Memorandum Opinions and Orders arising from Billy Jack Crutsinger's requests for authorization of ancillary services for expert assistance, pursuant to 18 U.S.C. § 3599, including by way of example but not limitation: Doc 75, and Doc 82." ROA.647 [Doc 83].

The Fifth Circuit issued a published opinion. The opinion did not address at all the district court's ruling that Mr. Crutsinger was required to seek funding from the state court under TEX. CODE CRIM. PROC. Art. 64. *See* USDC Order, ROA.581 [Doc 75 at p. 8]. Instead, the Fifth Circuit opinion was limited to the denial of funding and the reasonable necessity standard.[3]

The Fifth Circuit ruled:

> Crutsinger resists *Ayestas* on three bases, none persuasive. First, he suggests § 3599(f) "does not require [that he] identify a viable constitutional claim" and that *Ayestas* is distinguishable because it was "about authorization of auxiliary services in a habeas corpus proceeding in which the habeas petition had already been filed." That distinction is unpersuasive. *Ayestas* offers general guidance on the meaning of "reasonable necessity," with the touchstone being the "utility" of the service to prospects of eventual relief. That Crutsinger "does not have a pending habeas corpus petition" does not relieve him of the burden to explain how funding might conceivably advance his position. And of course, that burden demands more than a gesture toward the state's abundance of caution.
>
> Alternatively, Crutsinger claims that, "because the development is forensic," the lawyer "is in no position to posit what constitutional claims, if any, may flow from it." The implied suggestion is that lawyers lack the necessary imagination and forethought to opine plausibly on how the DNA evidence might be relevant to Crutsinger's case. The district court rightly dismissed that view as facially untrue. Lawyers are well positioned to forecast the potential legal relevance of further review and forensic investigation.

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[3] "Because we agree that Crutsinger failed to show the funding was reasonably necessary, we need not address the district court's alternative holding that the requested review falls outside of the scope of § 3599." *Crutsinger v. Davis*, 898 F.3d 584, 586, n.4 (5th Cir. 2018).

> Finally, Crutsinger claims his lawyer must fully "understand the facts of his case—including how subsequent changes in forensic science relevant to his case may impact it—before asking the executive to grant him clemency." But petitioners cannot invoke clemency to end-run *Ayestas*'s emphasis on the "utility" of further investigation and expert involvement. *See Ayestas*, 138 S.Ct. at 1094. Doing so would directly thwart *Ayestas*'s admonition against "fishing expedition[s]." *See id.* (*quoting United States v. Alden*, 767 F.2d 314, 319 (7th Cir. 1984)).
>
> Neither in the district court nor in his briefing on appeal does Crutsinger explain how further review and DNA testing could conceivably support claims for relief or a case for clemency. The district court was thus well within its discretion to deny funding.

Crutsinger v. Davis, 898 F.3d 584, 587 (5th Cir. 2018).

REASONS FOR GRANTING THE WRIT

Section 3599 of Title 18, U.S.C., grants a right of representation to prisoners under a sentence of death and who are financially unable to afford representation in collateral and other proceedings, including executive clemency. The statute grants a right to appointment of counsel, as well as investigative and expert services that are reasonably necessary to effectuate the representation.

The scope of representation granted to prisoners by Section 3599 is broad, and is not limited to habeas corpus proceedings. The statute provides that, once attached, the representation extends "throughout every subsequent stage of available judicial proceedings." *Id.* § 3599(e). This includes "all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures." *Id*. It also includes competency proceedings. *Id*. The representation rights granted by § 3599 extend even beyond judicial proceedings and include "proceedings for executive or other clemency as may be available to the defendant." *Id*. *See also Harbison v. Bell*, 556 U.S. 180, 185-86 (2009) (representation extends to state clemency proceedings).

I. This Supreme Court should grant certiorari to decide whether establishing the reasonable necessity of auxiliary representation services requires articulation of a constitutional claim as a matter of law

In *Ayestas v. Davis*, 138 S. Ct. 1080 (2018), this Court overruled the Fifth Circuit's adoption and use of a "substantial need" test for ascertaining the reasonable necessity of auxiliary representation services under 18 U.S.C. § 3599. Instead, *Ayestas* affirmed a "reasonable attorney" rule for evaluating § 3599(f) requests: a court should authorize § 3599(f) services when a reasonable attorney would use them. *Ayestas* emphasized that the reasonable attorney standard should be

interpreted by reference to the "way in which § 3599's predecessors were read by the lower courts." *Id*. The "abundan[t]" CJA precedent adopted by the *Ayestas* Court provides a bounded approach to requests for services. *Id*. (*citing United States v. Alden*, 767 F.2d 314, 318-19 (7th Cir. 1984)). Under this precedent, a court should authorize auxiliary services "in circumstances in which a reasonable attorney would engage such services for a client having the independent financial means to pay for them." *Alden*, 767 F.2d at 318-19 (quotation and citations omitted).

Ayestas itself involved a particular context in which the request for auxiliary services was made: a prisoner who filed a habeas corpus application in federal district court raising a Sixth Amendment claim for relief and for which he sought investigative services to develop further. In that context, the *Ayestas* Court observed that "[a] natural consideration" informing whether requested services are reasonably necessary "is the likelihood that the contemplated services will help the applicant win relief." *Ayestas*, 138 S. Ct. at 1094. Thus, in the context of a habeas corpus proceeding in the district court in which auxiliary services are specifically requested to help plead and prove claims for relief, "[p]roper application of the 'reasonably necessary' standard . . . requires courts to consider the potential merit of the claims that the applicant wants to pursue, the likelihood that the services will generate useful and admissible evidence, and the prospect that the applicant will be able to clear any procedural hurdles standing in the way." In short, "utility" from the perspective of the reasonable attorney is the touchstone. *Id*.

The scope of representation afforded by § 3599 is broad, and thus the contexts under which investigative and expert services might be requested vary. While the context of the *Ayestas* petitioner's request for representation services "naturally" required consideration of the plausibility of "claims," requests for services are not always made in such a context, *e.g.*, a proceeding for

executive clemency. In such situations, the "potential merit of claims," generation of "useful and admissible evidence," and "clear[ance of] any procedural hurdles" may not be useful metrics of utility. Moreover, some representation duties are fundamental and must be afforded notwithstanding what "claims" may exist, as withholding them would have the effect of denying effective representation. After all, § 3599's provision of quality representation is not limited only to prisoners who have meritorious claims for relief.

Because § 3599 extends the representation right to clemency proceedings, *Harbison*, *supra*, it necessarily also extends the availability of auxiliary representation services where reasonably necessary to the representation in such a proceeding. Clemency applicants do not present "constitutional claims" to executive officials. Clemency applications seek political relief from the executive. *See Harbison*, 556 U.S. at 192 (clemency "proceedings are a matter of grace entirely distinct from judicial proceedings"). They may, and usually do, premise such a request on bases having nothing to do with any constitutional claim, including residual doubt about guilt and moral culpability. *See Herrera v. Collins*, 506 U.S. 390, 411-12 (1993) ("[c]lemency is deeply rooted in our Anglo–American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted").

In *Brown v. Stephens*, 762 F.3d 454 (5th Cir. 2014), the Fifth Circuit formulated a rule for determining the reasonable necessity to clemency representation of auxiliary services: "when a [Texas] petitioner requests funds for investigative services for the purpose of clemency proceedings, the petitioner 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." *Id*. at 460.

The published *Crutsinger* decision below relied on *Ayestas* to add a gloss to the rule in *Brown*: the movant must also articulate a constitutional claim the services will be directed towards producing. This *per se* rule will thwart most requests for auxiliary representation services related to clemency, because clemency representation is not fundamentally about identifying or asserting constitutional error.

The *Ayestas* decision articulated a general rule that it applied in a particular context. The Fifth Circuit mistook the context for the general rule, and in the process narrowed the rule in such a fashion as to put auxiliary representation resources for clemency beyond the reach of most prisoners. A death-sentenced prisoner attempting to use clemency as the "fail safe" of our criminal justice system by demonstrating his execution will constitute a miscarriage of justice will be out of luck in the Fifth Circuit after *Crutsinger*, because a miscarriage of justice is not a constitutional claim. *See Herrera*, 506 U.S. at 411 (declining to recognize actual innocence as a constitutional claim cognizable in a habeas corpus proceeding). *See also Foster v. Quarterman*, 466 F.3d 359, 367 (5th Cir. 2006) ("actual-innocence is not an independently cognizable federal-habeas claim"). The Court should grant certiorari to decide whether the Fifth Circuit's interpretation of *Ayestas* to require articulation of a constitutional claim in all cases before auxiliary representation services may be authorized is correct.

II. Alternatively, this Supreme Court should grant certiorari and summarily reverse the court below on the ground that it was an abuse of discretion to deny services under the circumstances

Alternatively, the Court should grant certiorari and summarily reverse the Fifth Circuit's judgment. The Fifth Circuit ruled that "*Crutsinger* resists *Ayestas* on three bases, none persuasive." *Crutsinger*, 898 F.3d at 587. To the contrary as further described below, Mr. Crutsinger demonstrated that "a reasonable attorney would regard the services as sufficiently important." *Ayestas*, 138 S. Ct. at 1084.

A. A reasonable attorney would regard Crutsinger's preliminary request – a request for DNA expert services to learn what the potential options are for reinterpretation of the mixture profiles – as sufficiently important to her representation

The Tarrant County District Attorney's Office ("ADA") had advised that a preliminary laboratory review by the Texas Forensic Science Commission ("Commission") indicated that Mr. Crutsinger's case may potentially be impacted by the change in protocol. However, the ADA also advised of the Tarrant County Medical Examiner's inability to "issue an amended mixture report because they are no longer proficiency tested using the Profile Plus/COfiler amplification kits," *and* that it had "been unable to ascertain any potential options for reinterpretation of the mixture profiles in this case using the current mixture interpretation protocols." *See* Appendix 5: [Doc. 72] March 17, 2017 letter from Tarrant County DA.

Given this information from the State of Texas, and consistent with *Ayestas* and the ABA and Texas Guidelines for the appointment of post-conviction counsel, a reasonable attorney would regard a request for DNA expert services as sufficiently important in order to try to learn what the

State attempted to learn about the true nature of its trial evidence. These guidelines admonish counsel to conduct thorough and independent investigations relating to the issue of both guilt and penalty, including "a searching inquiry to assess whether any constitutional violations may have taken place, including ... claims involving dubious or flawed forensic scientific methods." *See* ABA Guideline 10.7, reprinted in 31 HOFSTRA L. REV. 913, 1015 (2003);[4] GUIDELINES AND STANDARDS FOR TEXAS CAPITAL COUNSEL, Guideline 12.2B. Duties of Habeas Counsel.[5]

Following therefrom, Mr. Crutsinger filed a motion in the district court in which he made a request of $500.00 for the DNA expert services of Bode Cellmark, who would be tasked to review and assess the bench notes and data of the Tarrant County M.E., and to advise undersigned counsel of the potential reinterpretation options.

Notwithstanding that Mr. Crutsinger showed reasonable necessity, the Fifth Circuit imposed an undue burden on Mr. Crutsinger to "'articulat[e] specific reasons why the services are warranted'—which includes demonstrating that the underlying claim is at least 'plausible.'" *Crutsinger*, 898 F.3d at 587. The opinion characterizes Mr. Crutsinger's request to consult with a DNA expert about the matter as merely "a gesture toward the state's abundance of caution," *Crutsinger*, 898 F.3d at 587, and rejected the first basis of Mr. Crutsinger's argument – that § 3599(f) "does not require [that he] identify a viable constitutional claim," *Crutsinger*, 898 F.3d at 587.

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[4] ABA Guidelines 10.7 admonishes that "[c]ounsel at every stage have an obligation to conduct thorough and independent investigations relating to the issue of both guilt and penalty."

[5] Texas Guideline 12.2B provides: "c. ... Counsel has a duty to conduct a searching inquiry to assess whether any constitutional violations may have taken place, including – but not limited to – claims involving dubious or flawed forensic scientific methods, ..."

The court also rejected the third basis of Mr. Crutsinger's argument – that "his lawyer must fully 'understand the facts of his case—including how subsequent changes in forensic science relevant to his case may impact it—before asking the executive to grant him clemency.'" The Fifth Circuit recast the argument as an attempt by Mr. Crutsinger to "invoke clemency to end-run *Ayestas*'s emphasis on the 'utility' of further investigation and expert involvement." *Crutsinger*, 898 F.3d at 587.

It is logistically impossible for Mr. Crutsinger to carry the two-prong burden-of-proof – (1) to identify a constitutional claim, and (2) articulate why the claim is plausible – imposed by the Fifth Circuit. At this juncture in the litigation, counsel for Mr. Crutsinger cannot identify a constitutional claim because she must first learn if there are even any potential options for reinterpretation of the mixture profiles.

In summary, the lower courts' rulings are in conflict with *Ayestas* because Mr. Crutsinger demonstrated that a reasonable attorney would regard the services as sufficiently important, and that they are reasonably necessary to providing effective representation.

B. Applicants who "forecasted" a constitutional claim – as the Fifth Circuit required that Mr. Crutsinger do - have been denied funding by the lower district courts, who recharacterize those claims as "speculative"

The Fifth Circuit also rejected Mr. Crutsinger's second basis, the assertion that where as here "'the development is forensic,' the lawyer 'is in no position to posit what constitutional claims, if any, may flow from it.'" The court wrote: "Lawyers are well positioned to ***forecast*** the potential legal relevance of further review and forensic investigation." *Crutsinger*, 898 F.3d at 587.

In cases in which capital habeas petitioners have "forecasted" claims, the district courts have recharacterized such "forecasts" as "speculative claims 'founded on mere suspicion and surmise,'" and "fishing expeditions." Consider *Hines v. Cockrell*, 2001 WL 1661670, at *1 (N.D. Tex. 2001), a case from the Northern District of Texas, where the *Crutsinger* case is venued.

The Order of the district court in *Hines* ruled:

> Petitioner [Hines] ties his request to his federal habeas claim that the state trial court erred in denying him a continuance of the trial to conduct his own DNA tests to refute the State's evidence that his boxer shorts were stained with the complainant's blood. He contends that additional testing may prove that he was harmed by the trial court's refusal to permit the continuance and testing. Implicit in this argument is the assumption that the additional testing would eliminate the complainant as the source of the blood on petitioner's underwear. There are at least two flaws in petitioner's reasoning. ***First, the argument that the complainant would be eliminated as a source of the blood through the additional DNA testing is purely speculative***. Secondly, and more significantly, petitioner's argument rests upon his erroneous view that the source of the stains on his underwear was "crucial" to the jury's ultimate determination of his culpability.

Hines v. Cockrell, 2001 WL 1661670, at *2. *See generally Patrick v. Johnson*, 48 F.Supp.2d 645, 646 (N.D.Tex.1999) (statute not designed to provide funding to investigate speculative claims "founded on mere suspicion and surmise").

C. Despite its protest to the contrary, the lower courts continue to impose the same pre-*Ayestas* requirements in this post-*Ayestas* case: that an Applicant plead and prove a viable claim before the court will provide funding to investigate, develop and present a viable claim

Despite the disclaimer by the Fifth Circuit that the district court's ruling "coheres" with *Ayestas*, these courts are applying the very same pre-*Ayestas*, two-prong requirements to this post-*Ayestas* funding request: that an applicant plead and prove a viable claim before it will provide services to investigate, develop and present a viable issue or claim.

This is evident in the district court's Memorandum Opinion and Order, which posits a factual innocence claim, and then requires Mr. Crutsinger to articulate how the funding will overcome the "significant amount of DNA ... [and] non-DNA evidence connecting Crutsinger to the crime." The Order ruled:

> ***To be clear, the Court is not requiring Crutsinger to*** to show a "substantial need" for the requested DNA services nor is the Court requiring him at this point to ***demonstrate procedural viability of a claim.*** The Court does, however, expect Crutsinger to identify a constitutional claim and articulate how the requested funds would be used to develop it. ***There was a significant amount of DNA testimony at trial, as well as other, non-DNA evidence connecting Crutsinger to the crime.*** This evidence is in the state court record, which he used to litigate his federal habeas petition. ***Contrary to his assertion, the absence of a DNA expert does not prevent Crutsinger from claiming he is factually innocent. Nor does it prevent him from articulating how his exclusion from a DNA sample could demonstrate his actual innocence***. In this regard, Crutsinger does not even discuss the evidence that would be subjected to the new protocol or its significance to the case. As presented, the motion is simply a request to fund a fishing expedition, and it should be denied.

Appendix 2: Memorandum Opinion and Order Denying Authorization for DNA Expert, [Doc 75 at 13-14].

Taking the same position, the Fifth Circuit opinion recites that Mr. Crutsinger failed to "explain how the results of review and further DNA testing might advance such a claim" and

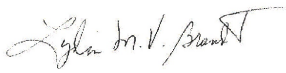
"demonstrat[e] that the underlying claim is at least 'plausible,'" *Crutsinger*, 898 F.3d at 587. Further, throughout the *Crutsinger* opinion the Fifth Circuit made its tacit, premature merits determination that the funding application was a "futile," "fishing expedition." *See Crutsinger*, 898 F.3d at 587, n. 5. (citing *Accord United States v. Hamlet*, 480 F.2d 556, 557 (5th Cir. 1973) (per curiam) (upholding trial court's refusal to fund psychiatric services based on the conclusion that "the request for psychiatric services was ... lacking in merit' because there was 'no serious possibility that appellant was legally insane at any time pertinent to the crimes committed.'").

In summary, the lower courts' rulings are in conflict with *Ayestas*, that held "a funding applicant must not be expected to prove that he will be able to win relief if given the services he seeks." *Ayestas*, 138 S.Ct. at 1094. The Fifth Circuit should have held that the district court's denial of a motion requesting $500 in expert consultation services concerning a disclosure the State made that it presented false forensic evidence at trial was an abuse of discretion because learning the true nature of the evidence presented in a capital trial against one's client is a request that any reasonable attorney would make.

CONCLUSION

For all of the aforementioned reasons, Mr. Crutsinger respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,



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APPENDICES

CRUTSINGER v. DAVIS

Appendix 1 *Crutsinger v. Davis*, 898 F.3d 584 (5th Cir. 2018)

Appendix 2 *Crutsinger v. Davis*, Memorandum Opinion and Order Denying Authorization for DNA Expert, (Doc 75) Case No. 4:07-CV-703-Y (N.D. Tex. Jun 5, 2017)

Appendix 3 *Crutsinger v. Davis*, Opinion and Order Denying Reconsideration, (Doc 82) Case No. 4:07-CV-703-Y (N.D. Tex. Aug. 24, 2017)

Appendix 4 (Doc. 72) July 8, 2016 letter from Tarrant County DA

Appendix 5 (Doc. 72) March 17, 2017 letter from Tarrant County DA

Appendix 6 April 20, 2017 Bode Cellmark Estimate of Services