No. 18-6287

IN THE

Supreme Court of the United States

BILLY JACK CRUTSINGER,
Petitioner,

v.

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

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether this Court should expand its recent holding in *Ayestas v. Davis*, 138 S. Ct. 1080 (2018), and create a separate, broader analysis for a request for funding under 18 U.S.C. § 3599(f) when the requested services are for "auxiliary" representation?

2. Whether the Fifth Circuit erred in affirming the district court's exercise of its broad discretion to deny Crutsinger's funding request on the bases that Crutsinger did not address the potential merit of any claim he wanted to pursue, that he did not address the likelihood that the services will generate useful and admissible evidence, and that his motion was simply a request to fund a fishing expedition?

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BRIEF IN OPPOSITION

Petitioner Billy Jack Crutsinger is a Texas inmate sentenced to death for the capital murders of eighty-nine-year-old Pearl Magouirk and her seventy-one-year-old daughter Patricia Syren. He previously challenged his conviction and sentence through state direct appeal, state habeas, and federal habeas proceedings. The courts denied relief at each stage. Crutsinger returned to federal district court and requested $500 in funding under 18 U.S.C. § 3599 to pay for Bode Cellmark to conduct a preliminary review of DNA evidence, which he alleged was relevant to potential clemency, state habeas, and federal habeas proceedings.

The district court denied his request, and the Fifth Circuit affirmed the lower court's decision. The Fifth Circuit's reasoning was grounded in this Court's recent opinion in *Ayestas v. Davis*, 138 S. Ct. 1080 (2018). Crutsinger now petitions this Court for a writ of certiorari from the Fifth Circuit's affirmance. Pet. Writ Cert. 1–24 (Pet.). However, he fails to identify any compelling reasons for this Court to expand the recent holding in *Ayestas*. And under *Ayestas*, his request amounts to little more than a fishing expedition. Thus, the Court should deny Crutsinger's petition.

STATEMENT OF THE CASE

I. Facts of the Crime

The Texas Court of Criminal Appeals (CCA) summarized the facts of the offense and police investigation in its opinion on direct appeal:

> On April 6, 2003, [Crutsinger] entered the home of [Magouirk and Syren] and stabbed them both to death. [Crutsinger] then took items from the house including Syren's Cadillac and credit card. Magouirk's and Syren's bodies were discovered on April 8, 2003. While investigating the crime, officers learned that Syren's credit card was being used in Galveston, Texas. The detectives contacted the Galveston Police Department and traveled to the city to further investigate. The Galveston police determined that the person using the credit card was currently in one of several bars in Galveston. The investigation ultimately led Officer Clemente Garcia to a man later identified as [Crutsinger]. When Garcia approached [Crutsinger] and asked him his name, [Crutsinger] did not initially answer. When Garcia asked [Crutsinger] for his name again, [Crutsinger] told him his name was "David." Garcia arrested [Crutsinger] for failing to identify himself and read him his *Miranda* rights. After reading [Crutsinger] his rights, Garcia asked him again for his name, and [Crutsinger] identified himself as "David Townsend." Garcia took [Crutsinger] to the Galveston Police Department where he subsequently was able to properly identify him.
>
> While in the holding cell, [Crutsinger] was introduced to Detective John McCaskill of the Fort Worth Police Department. McCaskill asked [Crutsinger] if he could see his hands, and [Crutsinger] obliged. [Police believed the perpetrator cut himself when committing the murders and left blood at the scene.] Immediately thereafter, McCaskill left the area where [Crutsinger] was being held. A few minutes later, [Crutsinger] said that he had "messed up" and asked to speak to McCaskill. [Crutsinger] was then taken to an interview room where McCaskill met with him and again read him his rights. [Crutsinger] subsequently consented to having a DNA sample taken from him and to a search of a black duffel bag that had been in his possession when he was arrested. After McCaskill again read [Crutsinger] his legal warnings and

> [Crutsinger] again waived them, [Crutsinger] confessed in a tape[]recorded statement to killing the two women in Fort Worth and taking their property. In the confession, [Crutsinger] told officers where other evidence of the crime could be found.

Crutsinger v. State, 206 S.W.3d 607, 609 (Tex. Crim. App. 2006).

II. Procedural History

A. Prior postconviction proceedings

In September 2003, Crutsinger was convicted of capital murder and sentenced to death. ROA.1854–56. The CCA affirmed Crutsinger's conviction and sentence on direct appeal, *Crutsinger*, 206 S.W.3d at 613, and this Court denied his petition for a writ of certiorari, *Crutsinger v. Texas*, 549 U.S. 1098 (2006). Crutsinger also filed a state habeas application. The state trial court entered findings of fact and conclusions of law recommending relief be denied. ROA.3249–3310. The CCA adopted these findings and conclusions and dismissed the application. *Ex parte Crutsinger*, No. WR-63,481-01, 2007 WL 3277524, at *1 (Tex. Crim. App. Nov. 7, 2007).

Crutsinger then initiated federal habeas proceedings. He filed a federal habeas petition alleging, among other claims, that he was "actually innocent of the offense of capital murder because he lacked the necessary mens rea for the commission of capital murder," e.g., that "a long-standing addiction to alcohol" resulted in a "settled insanity" such that he could not formulate the necessary intent under Texas's capital murder scheme. ROA.156–62. The federal district court denied him relief, denied him a Certificate of

Appealability (COA), and denied his motion under Federal Rule of Civil Procedure 59(e) to alter the judgment. ROA.328–61; 440–47.[1] The Fifth Circuit denied Crutsinger's request for a COA, ROA.469–82, and this Court denied his petition for certiorari, ROA.486–87.

B. Crutsinger's motion for funding

On April 27, 2017, Crutsinger filed a motion for funding under § 3599 in federal district court. ROA.496–99. Attached to this motion was a letter from the Tarrant County District Attorney's Office (DAO) dated July 8, 2016, regarding the analysis of DNA that was used as evidence in Crutsinger's trial. Pet. App. 4; ROA.502. Relevant to his motion, the letter indicated that the Texas Forensic Science Commission had reviewed DNA mixture interpretation protocols related to the statistical method of Combined Probability of Inclusion/Exclusion. Pet. App. 4. Based on that review, the DAO noted that a "preliminary laboratory review indicate[d] that [Crutsinger's] case *may potentially* be impacted by this change in protocol." *Id.*

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[1] As part his initial federal habeas proceedings Crutsinger sought funding for investigatory services, which the district court denied. ROA.63–72 (unsealed order denying the request for funding). After this Court's decision in *Ayestas*, and well after the conclusion of his federal habeas proceedings, he filed in the district court a motion for relief from judgment under Federal Rule of Civil Procedure 60(b). The district court found that the motion was truly a second-or-successive federal habeas petition; thus, it transferred the matter to the Fifth Circuit. *Crutsinger v. Davis*, No. 4:07-CV-00703, 2018 WL 3743881 (N.D. Tex. Aug. 17, 2018). That decision is currently on appeal in the Fifth Circuit. *Crutsinger v. Davis*, No. 18-70027 (5th Cir.). However, the funding denial challenged in those proceedings is separate and apart from the decision Crutsinger attacks here.

The letter included a lab review of the case which noted that two test areas may be affected by the new protocol: evidence number 27 at test area 4 (27T4)—a stain on the pocket of a denim shirt found in the dumpster by Crutsinger's motel which the initial testing showed was a mixture of DNA from Syren and Magouirk—and evidence number 30 at test area 1 (30T1)—a stain on the pocket of denim jean shorts found in the same dumpster which the initial testing showed was a mixture of DNA from Syren, Magouirk, and Crutsinger. *Id.*; *see also* ROA.5084–85 (testimony at trial regarding these test areas). The letter notified Crutsinger that the lab could not issue an amended report regarding these mixture interpretations because their analysts were no longer proficiency tested for those particular protocols. *Id.*

The funding motion attached a second letter from the DAO dated March 17, 2017. Pet. App. 5; ROA.507–08. This letter stated that the DAO was unable to ascertain a potential option for reinterpretation of the mixture profiles using the current protocols. Pet. App. 5. However, the DAO noted there was "significant DNA evidence not impacted by the changed mixture interpretation protocol . . . [and] significant non-DNA evidence which" inculpated Crutsinger in the murders. *Id.* Thus, the DAO concluded that the lab's inability to complete an amended mixture report for these two test areas was not an impediment to the DAO "enforcing the sentence in this case . . . ." *Id.* Based on these letters and a quote from Bode Cellmark for a two hour "Case review/

Consultation/ Affidavit Preparation," Crutsinger asked the court for $500 to hire Bode Cellmark to "conduct an initial review and screening of the bench notes/data underlying" the mixture profiles from the two test areas. Pet. App. 6; ROA.496.

The district court issued an opinion and order denying the funding request for two reasons: (1) the DNA review that Crutsinger sought fell outside the scope of § 3599; and (2) he did not identify a constitutional claim that the preliminary review by Bode Cellmark would be used to develop nor did he otherwise make a showing that the services were reasonably necessary. Pet. App. 2 at 5–14; ROA.581–94. Importantly, the court expressly stated that it was "not requiring Crutsinger to show a 'substantial need' for the requested DNA services nor . . . requiring him at this point to demonstrate procedural viability of a claim." Pet. App. 2 at 13–14. Crutsinger then filed a motion for reconsideration of that decision which the district court also denied. ROA.638–46. In its order denying reconsideration the court again emphasized that it did not employ the "substantial need" test; rather, "[i]t asked only that Crutsinger (1) identify a constitutional claim and (2) articulate how the requested funds would be used to develop it." Pet. App. 3 at 7–8; ROA.644–45.

Crutsinger appealed the lower court's denial of funding in the Fifth Circuit. After Crutsinger filed his initial brief, but *before* Respondent Lorie Davis (the Director) filed her brief and Crutsinger filed his reply, this Court

handed down its decision in *Ayestas*. Relying on that decision, the Fifth Circuit found the district court did not abuse its broad discretion in denying relief. Pet. App. 1 at 3; *Crutsinger v. Davis*, 898 F.3d 584 (5th Cir. 2018). Importantly, the Fifth Circuit observed that the district court's "assessment cohere[d] neatly with [this Court's] most recent pronouncements in *Ayestas*." Pet. App. 1 at 3.

REASONS FOR DENYING THE WRIT

I. Crutsinger Provides No Compelling Reason Why this Court Should Expand Its Holding in *Ayestas*.

In his first question Crutsinger asks the Court to extend its recent holding in *Ayestas*. His proposed rule would essentially allow an inmate to engage on a fishing expedition in an effort to turn over every stone when the requested funding is for "auxiliary representation services." The expansion he now seeks, however, would circumvent the guiding principles of that case. Even if this Court were inclined to create a new rule allowing for such fishing expeditions, this case is a poor vehicle. The services he wants funded—a preliminary review of the DNA analysis conducted for two items in his case—would ultimately prove useless because he has conceded his identity as the rapist-murderer and confessed to the crime. Further, there was an overwhelming amount of other DNA evidence—ten other items not implicated here—and non-DNA evidence at trial proving Crutsinger's guilt.

A. The Court should not allow Crutsinger to circumvent the guiding principles of *Ayestas*.

In *Ayestas* this Court unanimously made clear that when a petitioner requests funding for other services under § 3599(f)—e.g., for investigators, experts—the appropriate standard to apply is "reasonably necessary," i.e., "whether a reasonable attorney would regard the services as sufficiently important." 138 S. Ct. at 1093. The "[p]roper application" of this standard is "guided by [three] considerations": "[1] the potential merit of the claims that the applicant wants to pursue, [2] the likelihood that the services will generate useful and admissible evidence, and [3] the prospect that the applicant will be able to clear any procedural hurdles standing in the way." *Id.* at 1094.

The key to this analysis is "the likelihood that the contemplated services will help the applicant win relief." *Id.* This Court continued:

> After all, the proposed services must be "reasonably necessary" for the applicant's representation, and it would not be reasonable—in fact, it would be quite unreasonable—to think that services are necessary to the applicant's representation if, realistically speaking, they stand little hope of helping him win relief.

Id. This Court stressed that § 3599 "cannot be read to guarantee that an applicant will have enough money to turn over every stone." *Id.* The Court also emphasized that district courts still retain "broad discretion," and circuit courts still review the decisions of the lower courts for an abuse of that discretion. *Id.*

Crutsinger now asks this Court to crack open the carefully considered holding in *Ayestas* and create a different standard when the requested services are related to "auxiliary representation." Pet. 14–17. He first argues that the holding of *Ayestas* was limited to a "particular context": when a petitioner has filed a federal habeas petition and seeks investigative funding to help plead and prove the claims for relief. *Id.* at 14–15. Crutsinger claims he instead seeks funding for "auxiliary representation services" in a context necessarily *outside* pleading a claim for habeas relief, e.g. clemency, and that when the requested services are of this particular "auxiliary" type, a court should look at the potential "utility" of the requested services to the specific proceeding instead of using the three guiding considerations enumerated in *Ayestas*. *Id.* at 15–16. Thus, Crutsinger argues the Fifth Circuit misapplied *Ayestas* when denying his request for funding for "auxiliary representation services."

This Court did not cabin its holding in *Ayestas* nor make any such distinction. Rather, the unanimous Court quoted Ayestas's own brief in stressing the point that "an applicant must 'articulat[e] specific reasons why the services are warranted'—*which includes demonstrating that the underlying claim is a least 'plausible'* . . . ." *Ayestas*, 138 S. Ct. at 1094 (emphasis added) (quoting Br. for Pet'r 43). The Court did not distinguish its holding or the guiding considerations as useful only within the context of preparing a federal habeas petition.

And to adopt the separate analysis that Crutsinger now suggests would prove unworkable for two reasons. First, the "touchstone" when requesting "auxiliary representation services," *see* Pet. 15–16, would be a less stringent control than the principles laid out in *Ayestas*. Thus, it would be easier for someone in Crutsinger's position—after federal habeas proceedings were completed—to obtain funding than for someone like Ayestas in the middle of such proceedings.

Second, to read § 3599 as Crutsinger does, the word "clemency" would become a magical incantation to which courts could never say no, thus eviscerating any and all discretion. As this Court emphasized, "§ 3599(f) cannot be read to guarantee that an applicant will have enough money to turn over every stone." *Ayestas*, 138 S. Ct. at 1095. And as the Fifth Circuit observed, "petitioners cannot invoke clemency to end-run *Ayestas*'s emphasis on the 'utility of further investigation and expert involvement." Pet. App. 1 at 3 (quoting *Ayestas*, 138 S. Ct. at 1094).

Crutsinger also attempts to expand this Court's holding in *Harbison v. Bell*, 556 U.S. 180 (2009). There, the Court only discussed the scope of representation by an attorney under § 3599. *Id.* at 183–94. The Court held simply that counsel appointed under § 3599 was authorized to represent indigent clients in state clemency proceedings and entitled to compensation for that representation. *Id.* at 194. It made no mention of funding for other services

under § 3599(f). In fact, it rejected the argument that § 3599 requires federally funded counsel to represent a client in any state habeas proceeding occurring after appointment merely because such proceedings are also technically "available postconviction process." *Id.* at 190 ("That state postconviction litigation sometimes follows the initiation of federal habeas because a petitioner has failed to exhaust does not change the order of proceedings contemplated by the statute.").

The district court relied in large part on *Harbison* when it held that § 3599 does not contemplate the provision of federal counsel in post-petition DNA proceedings. Pet. App. 2 at 8–12. The district court noted that this Court carefully cabined its holding that representation under § 3599(a)(2) includes state clemency proceedings. *Id.* at 5–8. First, the lower court observed that § 3599(a)(2) "provides for counsel only when a state petitioner is unable to obtain adequate representation." *Id.* at 6–7 (quoting *Harbison*, 556 U.S. at 189).

Second, it clarified that not *every* proceeding that comes later in time after an appointment of counsel falls within the meaning of "subsequent" stages of available judicial proceedings. *Id.* at 7–8 (quoting *Harbison*, 556 U.S. at 190). Based on its analysis of *Harbison*, the district court found that the sought-after DNA expert authorization was outside the scope of § 3599 (discussed at length below, *see* Reasons III). *Id.* at 8. Neither this Court's

reasoning in *Ayestas* nor *Harbison* supports the rule Crutsinger proposes. Indeed, the adoption of such a rule runs counter to the holdings and framework of both cases.

B. Crutsinger's case is ill-suited to create his proposed new rule because the DNA review which he seeks would ultimately prove useless.

Even if this Court were inclined to expand its holding in *Ayestas*, this case would be a poor vehicle. As the district court noted, Crutsinger's funding request has been vague, to a fatal degree, in discussing the evidence Bode Cellmark would review or its significance to the case. Pet. App. 2 at 14. However the letter from the DAO specifically points to two test areas that may be affected by the new mixture protocol: evidence number 27 at test area 4 (27T4)—a stain on the pocket of a denim shirt found in the dumpster by Crutsinger's motel which the initial testing showed was a mixture of DNA from Syren and Magouirk—and evidence number 30 at test area 1 (30T1)—a stain on the pocket of denim jean shorts found in the same dumpster which the initial testing showed was a mixture of DNA from Syren, Magouirk, and Crutsinger. Pet. App. 4; *see also* ROA.5084–85 (testimony at trial regarding these test areas). It is important to note that only one of the two test areas implicated Crutsinger; the other simply identified his two victims.

But as the district court remarked in its order, Pet. App. 2 at 14, and the DOA in its second letter regarding the mixture issue, ROA.507, there was an

overwhelming amount of other DNA and non-DNA evidence at trial proving Crutsinger's guilt. The jury heard testimony that ten other items contained DNA linking Crutsinger to the crime. ROA.5082–86. Specifically, several stains from inside the victims' house matched his DNA. ROA.5082–83 (stains from the drawers, garage, dishwasher, and floor tiles). DNA from Syren's blood-soaked shorts and Magouirk's pants, as well as other pieces of the victims' clothing, matched him. ROA.5086. His DNA also matched samples taken from the seatbelt and steering wheel of Syren's stolen Cadillac. ROA.5085.

Beyond the DNA evidence, and truly most indicative of his guilt, Crutsinger confessed to the crime and included facts demonstrating guilt not known to law enforcement. ROA.4919–20. He directed officers to where he left Syren's stolen Cadillac and where he disposed of the keys to that car. ROA.4920. He also confessed to using Syren's stolen credit card at Kentucky Fried Chicken (KFC) on April 6th, at Factory Brand Shoes on April 7th, and at Joe's Crab Shack to purchase a t-shirt on April 8th. *Id.* All of this was verified by the credit card statement. ROA.4937–38. Further, a witness testified he saw Crutsinger at his motel (where the dumpster with the clothing was found) with a bag of KFC on April 6th. ROA.4939. Another witness testified that she was working at Factory Brand Shoes on April 7th when Crutsinger used a credit card with a woman's name on it to purchase a pair of shoes. ROA.4943. And

when Crutsinger was picked up by law enforcement, he was wearing a Joe's Crab Shack t-shirt. ROA.4920.

The district court also noted that Crutsinger raised a claim in his federal habeas petition that runs contrary to any challenge regarding identity he would now allege. Pet. App. 2 at 14. He did assert an "actual innocence" claim on federal habeas that was truly a claim of legal, rather than factual, innocence. ROA.156–62. Therein, he maintained that his long-term abuse of alcohol resulted in brain damage that produced a "settled insanity" such that he was not able to form the requisite mens rea for capital murder in the commission of these killings. *Id.* But a necessary premise to this claim is that Crutsinger in fact killed Magouirk and Syren. In its order denying his federal habeas petition the district court also remarked that the expert report provided by Crutsinger did "not opine that he did not intend to stab the victims to death, but provide[d] a motive and explanation as to why he intentionally killed them." ROA.360.

It is clear from the record that any assertion of actual innocence (or claim otherwise putting identity at issue) would completely lack merit. And it is impossible to discern what results could come from a review of the DNA testing that would be probative even in clemency proceedings. Especially in light of this, Crutsinger fails to provide this Court with a compelling reason why it should expand, if not gut, the recent holding of *Ayestas*.

II. Using this Court's Sound Reasoning in *Ayestas*, the Fifth Circuit Properly Affirmed the District Court's Denial of Funding Because Crutsinger Did Not State a Constitutional Claim Nor Explain how the Requested Funds Would Be Used to Develop that Claim.

As explained in Crutsinger's petition for certiorari, his motion for funding in the district court:

> 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. 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.

Pet. at 8 (citing ROA.496). However, Crutsinger did not assert what he hoped to discover or how he planned to utilize this information in a postconviction proceeding. Rather, his brief motion was continuously couched in terms such as "might."

In its order denying his funding motion the district court found that Crutsinger failed to show the requested services were "reasonably necessary." Pet. App. 2 at 12. The court clarified that it was "not requiring Crutsinger to show a 'substantial need' for the requested DNA services nor . . . requiring him at this point to demonstrate procedural viability of a claim." *Id.* at 13–14. Rather, the court simply expected "Crutsinger to identify a constitutional claim and articulate how the requested funds would be used to develop it." *Id.* at 14. The court reiterated this in its order denying Crutsinger's motion for

reconsideration: "he has not identified an issue that he intends to raise in any such proceeding and has not, therefore, shown a reasonable necessity for such funds." Pet. App. 3 at 7.

The Fifth Circuit observed that the district court's analysis in its orders, written before this Court's decision in *Ayestas*, "coheres neatly" with the holding and framework laid out therein. Pet. App. 1 at 3. That court was unpersuaded by Crutsinger's distinction between funding for services in a federal habeas versus an auxiliary proceeding (the same distinction he makes here). As the court stated, even though Crutsinger does not have a pending habeas petition, he is "not relieve[d from] 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." *Id.*

And as the Fifth Circuit also observed, "petitioners cannot invoke clemency to end-run *Ayestas*'s emphasis on the 'utility of further investigation and expert involvement. Doing so would directly thwart *Ayestas*'s admonition against 'fishing expedition[s].'" Pet. App. 1 at 3 (quoting *Ayestas*, 138 S. Ct. at 1094). The court concluded: "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." *Id.*

Crutsinger's continued refusal to identify a constitutional claim, or to simply explain how further review could support a claim for relief or clemency, is fatal to his funding request. There is little doubt that a petitioner pursues DNA testing primarily, if not solely, to put identity at issue, i.e., to claim "I am not the killer." *Cf.* 18 U.S.C § 3600(a)(7) (federal statute for DNA testing requiring identity to be an issue in the case); Tex. Code Crim. Proc. art. 64.03(a)(1)(C) (state statute for DNA testing requiring the same). And nothing prevents Crutsinger from now alleging such a claim of actual innocence.

Indeed, he should not need DNA results to know whether he committed the murders or is innocent. As the district court noted:

> . . . 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.

Pet. App. 2 at 14. Yet, in his briefs before the lower and appellate courts, Crutsinger did not designate which pieces of evidence or test areas he seeks to have reexamined.

Further, as explained above, *see* Reasons I.B., any potential reinterpretation of the two items to which DAO letters point could not overcome the overwhelming amount of other DNA and non-DNA evidence used at trial, including Crutsinger's confession to the crime. Crutsinger's motion for

funding did not identify a constitutional claim and amounted to little more than a fishing expedition. And any reinterpretation would plainly have no impact on any further postconviction or clemency proceeding. Thus, the district court did not abuse its broad discretion under *Ayestas* in denying funding, and the Fifth Circuit was correct in affirming that decision.

III. Crutsinger's Request for Funds Falls Outside the Scope of § 3599.

Although the Fifth Circuit expressly did not address this, Pet. App. 1 at 4, the district court alternatively concluded that Crutsinger's request for DNA expert authorization was outside the scope of § 3599. Pet. App. 2 at 8–12. The district court relied on its interpretation of *Harbison* as discussed above, *see* Reasons I. *Id.* at 8. Specifically, the district court recognized that Texas's Chapter 64 provides adequate representation for that purpose. *Id.* That chapter provides that a convicted person is entitled to counsel during a proceeding under this chapter, if that person shows that: (1) he is indigent; (2) he wishes to submit a motion under that chapter; and (3) there are reasonable grounds for the motion to be filed. Tex. Code Crim. Proc. art. 64.01(c). A person establishes "reasonable grounds" by showing that: the biological evidence exists, the evidence is in a condition that it can be tested, the identity of the perpetrator is or was an issue, and this is the type of case in which exculpatory DNA results would make a difference. *Ex parte Gutierrez*, 337 S.W.3d 883, 891 (Tex. Crim. App. 2011).

The lower court recognized that "Crutsinger [did] not attempt to show that this statute would not avail him in his efforts to obtain DNA testing." Pet. App. 2 at 8. Crutsinger attempted to distinguish his instant request from the "normal" Chapter 64 request by arguing that he is only seeking an expert to evaluate whether retesting is possible, not that he is seeking retesting itself. Pet. App. 3 at 3–4. But such an argument appears premature when Crutsinger has not tried in any way to engage the already-established state court mechanism for evaluating whether exculpatory DNA evidence exists.

Crutsinger does not attempt to explain why an expert is necessary to establish reasonable grounds under Chapter 64; rather, he merely assumes one is necessary to make the initial showing under that Chapter. However, he does not need Bode Cellmark to establish the first two requirements—that the evidence exists and is in a condition to be tested; the Tarrant County Medical Examiner's office (or whoever currently houses the evidence and/or material) could attest to this. Crutsinger also does not need Bode Cellmark to assert the third and fourth requirements—that the identity of the perpetrator was at issue in his case and *that the exculpatory DNA results would make a difference*. As discussed at length above, *see* Reasons II, and in the district court's denial of funds, he has yet to affirmatively claim that identity is still at issue, and he cannot demonstrate how the results could be exculpatory such that they would affect the verdict of guilt. However, he does not need a DNA expert to make

that allegation. Crutsinger simply fails to show that Texas law does not provide adequate representation.

The district court also found that the requested DNA services are not a "subsequent stage" of judicial proceedings under § 3599. Pet. App. 2 at 9. The DNA services at issue are similar in nature to a subsequent state habeas writ—they may depend on the facts of a given case, may depend on the timing of advances in science or the discovery of new evidence, and may occur after the initiation of the federal habeas process. *See id.*; *see generally* Tex. Code. Crim. Proc. art. 11.071 § 5 (statute governing subsequent state habeas applications); *Rhines v. Weber*, 544 U.S. 269 (2005) (defining the framework for allowing a petitioner to stay federal habeas proceedings while they file a subsequent state habeas application to exhaust claims).

Even so, this Court rejected the argument that § 3599 requires federally funded counsel to represent a client in any state habeas proceeding occurring after appointment merely because such proceedings are also technically "available postconviction process." *Harbison*, 556 U.S. at 190 ("That state postconviction litigation sometimes follows the initiation of federal habeas because a petitioner has failed to exhaust does not change the order of proceedings contemplated by the statute."). Ergo, the district court was reasonable to similarly find that § 3599 does not require federally funded

counsel to represent Crutsinger in a subsequent DNA proceeding. As the Eleventh Circuit has held:

> § 3599 does not provide for federally-funded counsel to assist someone standing in [petitioner]'s shoes in pursuing a DNA motion, the results of which might serve as the basis for an extraordinary motion for a new trial. As the language of § 3599(e) and the Court's opinion in *Harbison* indicate, federally-funded counsel is available only for *certain* subsequent proceedings.

Gary v. Warden, Ga. Diagnostic Prison, 686 F.3d 1261, 1274 (11th Cir. 2012). Although these arguments were not considered by the Fifth Circuit, they provide further reasoning to deny Crutsinger's petition.

CONCLUSION

Crutsinger provides no compelling reasons why this Court should expand its holding in *Ayestas*. Further, he still has not identified an issue that he intends to raise nor shown a reasonable necessity for the requested funds in succeeding on that issue. For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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