Nos. 18-7201 and 18-7482

IN THE SUPREME COURT OF THE UNITED STATES

MARK ISAAC SNARR, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

EDGAR BALTAZAR GARCIA, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Whether the court of appeals abused its discretion in declining to recall its 2013 mandate affirming petitioners' convictions and capital sentences.

IN THE SUPREME COURT OF THE UNITED STATES

_____

No. 18-7201

MARK ISAAC SNARR, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

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No. 18-7482

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(CAPITAL CASE)

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ON PETITIONS FOR WRITS OF CERTIORARI
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BRIEF FOR THE UNITED STATES IN OPPOSITION

_____

OPINIONS BELOW

The opinion of the court of appeals (Snarr Pet. App. A1-A3; Garcia Pet. App. A1-A3) is unreported. A prior opinion of the

court of appeals (Snarr Pet. App. A4-A42; Garcia Pet. App. A4-A39) is reported at 704 F.3d 368.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 2018. On October 16, 2018, Justice Alito extended the time within which to file a petition for a writ of certiorari in No. 18-7201 (Snarr) to and including December 22, 2018. On October 17, 2018, Justice Alito extended the time within which to file a petition for a writ of certiorari in No. 18-7482 (Garcia) to and including December 21, 2018. The petition for a writ of certiorari in No. 18-7201 was filed on December 20, 2018, and the petition for a writ of certiorari in No. 18-7482 was filed on December 21, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Texas, petitioners were convicted of first-degree murder within the special maritime and territorial jurisdiction of the United States, in violation of 18 U.S.C. 1111 and 2. Snarr Judgment 1; Garcia Judgment 1. The district court, following the jury's unanimous penalty-phase recommendation, imposed capital sentences. Snarr Judgment 2; Garcia Judgment 2. The court of appeals affirmed, and this Court denied certiorari. Snarr Pet. App. A4-A42; Snarr v. United States, 571 U.S. 1196 (2014) (No. 13-5675); Garcia v. United States, 571 U.S. 1195 (2014) (No. 12-10821). Several years later, the court of appeals denied

petitioners' motions to recall its mandate. Snarr Pet. App. A1-A3; Garcia Pet. App. A1-A3.

1. On November 28, 2007, petitioners, who were inmates at the federal penitentiary in Beaumont, Texas, murdered another inmate for supposedly "disrespect[ing]" them. Snarr Pet. App. A13. That day, while being escorted from outdoor recreation to their respective cells, petitioners escaped from their handcuffs and pulled out "shanks" (handmade knives). Ibid. Mistakenly believing that Snarr was about to attack Garcia, a correctional officer placed himself between the two men in an attempt to protect Garcia. But Garcia stabbed the officer in the back and Snarr stabbed him from the front; the officer managed to escape with his life despite being stabbed 23 times in 15 seconds. Petitioners then stabbed another correctional officer after he refused to hand over the keys to the inmates' cells. Snarr eventually ripped the keys from the officer's duty belt, and petitioners ran down the hall to the victim's cell. Ibid.

During the minute or so it took them to unlock the cell door, petitioners taunted the inmates inside, yelling "I'm going to kill you" and "We going to kill you." Snarr Pet. App. A13. Once they opened the door, petitioners stabbed the victim 50 times (18 in front, 32 in back), including multiple times in the "'heart, lung, and liver,' with the injury to his heart being the fatal wound." Ibid. A witness later testified that petitioners "were in a frenzy . . . repeatedly stabbing [the victim] over and over." Ibid.

Another witness testified that the victim looked like "a human being that was no longer a human being" and "more like a person who was actually run over by a truck. * * * He was pulp." Gov't C.A. Br. 115-116 (citation omitted). Only when they saw officers preparing to use riot gear to quell the violence did petitioners finally relent in their attack, yelling "That's how you get your enemy" and "Dude disrespected us, and that's what he got." Snarr Pet. App. A13.

A federal grand jury charged each petitioner with one count of first-degree murder within the special maritime or territorial jurisdiction of the United States, in violation of 18 U.S.C. 1111 and 2. Indictment 1. The government provided notice of its intent to seek capital sentences for both petitioners. D. Ct. Docs. 18, 19 (Feb. 4, 2009).

2. Under the Criminal Justice Act of 1964 (CJA), Pub. L. No. 88-455, 78 Stat. 552, as amended, "a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application." 18 U.S.C. 3006A(e)(1). In capital cases, if the district court finds that such "services are reasonably necessary for the representation of the defendant," it "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." 18 U.S.C. 3599(f). If the fees and expenses exceed $7500, "payment in excess of that

limit [must be] certified by the court * * * as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment [must be] approved by the chief judge of the circuit." 18 U.S.C. 3599(g)(2).

Garcia submitted a proposed budget that requested, in addition to attorney's fees, funding for the following experts, investigative services, and expenses:

Blood splatter expert/crime scene expert	$10,000
Criminologist	$10,000
DNA expert	$7,500
Cultural expert	$19,000
Expenses	$5,000
Investigators	$25,000
Mental health experts	$45,000
Mitigation expert	$25,000
Pathologist	$10,000
Prison experts	$25,000
Travel costs	$15,000
Total	$196,500

See Snarr Pet. App. A39. The district court initially approved Garcia's budget, with minor reductions to the funding for a cultural expert and a pathologist. Ibid. Snarr separately proposed a budget and obtained funds; Snarr's budget and funds are not at issue here. See Snarr Pet. 6.

After reviewing Garcia's budget under 18 U.S.C. 3599(g)(2), the chief judge of the Fifth Circuit reduced Garcia's funding for experts and investigative services to the following levels, excluding "travel and other expenses," which were "to be submitted as incurred":

Investigators and mitigation experts	$30,000
Mental health expert, pathologist, and psychologist	$35,000
Total	$65,000

See Snarr Pet. App. A39 & n.23; Garcia Supp. Pet. App. A40 (sealed). The chief judge did not approve separate funding for a "cultural expert, tattoo expert, sociologist, criminologist, or prison expert," but stated that Garcia could seek funding for such experts if he explained "how th[ose] expert[s'] services ha[d] become relevant and necessary to the defense." Garcia Supp. Pet. App. A40.

Following a hearing on Garcia's subsequent motion to reconsider the funding order, at which several expert witnesses testified, the district court submitted a memorandum to the chief judge of the court of appeals requesting approval for the following additional funding:

Mental health neurological expert	$15,000
Criminologist/prison culture expert and prison administration expert	$35,000
Cultural mitigation expert	$15,000
Total	$65,000

See Snarr Pet. App. A39.

Based on that request, the chief judge approved an additional $20,000 (plus travel and other expenses) for experts and other services. Snarr Pet. App. A39 & n.23; Garcia Supp. Pet. App. A42. The additional $20,000 could be used for any expert or service provider already approved or described in Garcia's motion for reconsideration, with the exception of the proposed "Mexican cultural expert," whom the chief judge determined would inappropriately offer "testimony * * * characterizing the defendant according to his national origin." Garcia Supp. Pet. App. A42. Defense counsel was free to determine how the funds would be expended, "subject to the tests of reasonableness and necessity as required by the CJA." Id. at A43. With this order, the total authorized funding for Garcia's experts and investigative services was $85,000, plus travel and other expenses. See Snarr Pet. App. A41.

Asserting that the funding was nevertheless inadequate, Garcia moved to strike the government's notice of intent to seek the death penalty. D. Ct. Doc. 259 (Apr. 19, 2010) (sealed). The district court denied that motion, 4/27/2010 Order, subsequently clarifying that, although Garcia could not use CJA funds for an expert on Mexican culture, he was not precluded "from presenting mitigating information regarding the effects and experiences of race, national origin, and/or culture * * * through other experts, friends, or family members," 4/30/2010 Order.

3. A jury found both petitioners guilty of first-degree murder. Snarr Pet. App. A13-A14. In accordance with the Federal Death Penalty Act of 1994 (FDPA), 18 U.S.C. 3591 et seq., the district court convened a sentencing hearing. 18 U.S.C. 3593(b). In the "eligibility" phase of the bifurcated hearing, jurors were asked to determine whether at least one of the intent factors in 18 U.S.C. 3591(a)(2) and at least one of the statutory aggravating factors in 18 U.S.C. 3592(c) were present. See 18 U.S.C. 3593(d) and (e)(2); see generally Jones v. United States, 527 U.S. 373, 376-377 (1999). The jury unanimously found that petitioners intentionally killed the other inmate, which satisfied the intent requirement in 18 U.S.C. 3591(a)(2). 5/12/2010 Eligibility Phase Tr. 510-512. The jury also unanimously found several statutory aggravating factors: petitioners each had two or more prior convictions for felonies involving serious bodily injury or death, 18 U.S.C. 3592(c)(4); petitioners "knowingly created a grave risk of death to 1 or more persons in addition to the victim," 18 U.S.C. 3592(c)(5); petitioners "committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse," 18 U.S.C. 3592(c)(6); petitioners "committed the offense after substantial planning and premeditation," 18 U.S.C. 3592(c)(9); Garcia had two or more prior convictions involving the distribution of controlled substances, 18 U.S.C. 3592(c)(10); and Garcia previously had been convicted of

a serious federal drug offense, 18 U.S.C. 3592(c)(12). 5/12/2010 Eligibility Phase Tr. 510-513.

Under the FDPA, the jury may recommend a sentence of death only if it determines that "all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, [that] the aggravating factor or factors alone are sufficient to justify a sentence of death." 18 U.S.C. 3593(e); see Jones, 527 U.S. at 377-378 & n.2. Here, in the "selection" phase, the jury unanimously determined that the aggravating factors -- including nonstatutory aggravating factors, such as petitioners' future dangerousness and the victim's vulnerability (from having been locked, defenseless, in a cell when petitioners attacked), 5/12/2010 Selection Phase Tr. 11-12; 5/24/2010 Selection Phase Tr. 1634-1635, 1644-1645 -- outweighed the mitigating factors. 5/24/2010 Selection Phase Tr. 1653-1644, 1657-1658. The jury unanimously recommended, and the district court imposed, a capital sentence. Ibid.; Snarr Judgment 2; Garcia Judgment 2.

4. The court of appeals affirmed. Snarr Pet. App. A4-A42.

a. Petitioners filed a joint brief in the court of appeals raising 19 issues. Pet. C.A. Joint Br. (sealed) (Aug. 8, 2011). The nineteenth issue alleged that the court of appeals (through its chief judge) had "denied Garcia, tried simultaneously with Snarr, due process by overruling the district court and denying

the funding necessary for Garcia to present a punishment case. The error is reflected in the death sentence against Snarr because the two defendants were tried together." Id. at 32-33; see id. at 215. In the argument section of their brief, petitioners recounted (id. at 215-224) the relevant facts and then asserted that "a defendant possesses a due process right to the assistance of a non-psychiatric expert when the testimony to be obtained is 'both critical to the conviction and subject to varying expert opinion.'" Id. at 224 (citation omitted). After describing (id. at 224-232) the facts and holdings of several cases, petitioners asserted that the court of appeals' funding decision "denied Garcia a fair trial, and impinged upon the due process rights of Snarr since he was tried simultaneously," and that petitioners "were denied their rights to due process and a fair trial." Id. at 232.

The court of appeals agreed with petitioners that it had jurisdiction to consider that claim. Snarr Pet. App. A39-A40. At the time, circuit precedent barred appellate review of CJA funding orders. See In re Marcum LLP, 670 F.3d 636 (5th Cir. 2012) (per curiam) (interpreting 18 U.S.C. 3006A(e)(3)). But the court found that precedent inapposite because petitioners here "d[id] not directly appeal the chief judge's order." Snarr Pet. App. A40. "Rather, their claim is that as a result of that order, they lacked the funds necessary to present an adequate defense, and therefore were denied due process." Ibid. Because petitioners' was a due-

process claim, the court observed, Marcum did not foreclose jurisdiction. Ibid.

The court of appeals determined, however, that the due-process claim lacked merit. Citing Ake v. Oklahoma, 470 U.S. 68 (1985), the court explained that "[t]o demonstrate reversible error on the basis that he lacked inadequate funds for expert witnesses," "a defendant must 'establish a reasonable probability that the requested experts would have been of assistance to the defense and that denial of such expert assistance resulted in a fundamentally unfair trial.'" Snarr Pet. App. A41 (quoting Yohey v. Collins, 985 F.2d 222, 227 (5th Cir. 1993)). The court determined that petitioners had failed to make that showing for three reasons.

First, the court of appeals found petitioners' claim that they had been denied the "right to present cultural, prison, and neurological experts" to be factually unsupported. Snarr Pet. App. A41. The court stressed that the chief judge had "ultimately authorized Garcia $85,000 for experts and investigators" and "largely permitted Garcia to distribute those funds as he saw fit." Ibid. The court observed that although Garcia could not hire a "cultural expert," the district court expressly permitted him to introduce that evidence through other witnesses. Ibid. And it noted that Garcia in fact introduced "evidence of his cultural background through family members, as well as an expert psychologist." Ibid.

Second, the court of appeals determined that petitioners had been able to introduce the evidence that the cultural, prison, and neurological experts would have presented. The court observed that petitioners' experts had "provided extensive evidence about" the alleged mitigating factors, including "the impact on Garcia of his upbringing, his culture, and his life in prison." Snarr. Pet. App. A41. The expert psychologist, in particular, "was able to present much, if not all, of the evidence Garcia believed to be vital for mitigation purposes." Ibid. The court thus found no "reasonable probability" that additional experts "would have been of assistance and that their absence resulted in a fundamentally unfair trial." Ibid.

Finally, the court observed that the government's case was "especially strong" and that petitioners had failed to "advance[] a credible argument that additional experts would have changed the jury's calculus." Snarr Pet. App. A42.

b. The court of appeals denied petitioners' joint petition for rehearing en banc and issued its mandate in March 2013. See C.A. Doc. 512176313, at 1-2 (Mar. 15, 2013); C.A. Doc. 512185087 (Mar. 25, 2013). This Court denied petitioners' respective petitions for writs of certiorari. Snarr v. United States, 571 U.S. 1196 (2014) (No. 13-5675); Garcia v. United States, 571 U.S. 1195 (2014) (No. 12-10821).

5. More than five years after the mandate issued, petitioners each moved the court of appeals to recall its mandate

and to grant leave to file an out-of-time petition for rehearing or, in the alternative, to grant out-of-time reconsideration of the chief judge's funding order. C.A. Doc. 514552632 (July 12, 2018) (Garcia Mot.); C.A. Doc. 514556730 (July 16, 2018) (Snarr Mot.). The court denied those motions. Snarr Pet. App. A1-A3.

a. Petitioners contended that recalling the mandate was warranted on the theory that this Court's intervening decision in Ayestas v. Davis, 138 S. Ct. 1080 (2018), had rendered the court of appeals' rejection of petitioners' inadequate-funding claim "demonstrably wrong." Garcia Mot. 7 (citation omitted); see Snarr Mot. 6.

Ayestas held that funding decisions under 18 U.S.C. 3599(f) are subject to direct appellate review, abrogating the Fifth Circuit's contrary rule. 138 S. Ct. at 1090. Ayestas also rejected the "substantial need" standard used by the Fifth Circuit at the time to determine whether expert, investigative, and other services are "reasonably necessary for the representation of the defendant" under 18 U.S.C. 3599(f). 138 S. Ct. at 1092-1093. "What the statutory phrase calls for," Ayestas explained, "is a determination by the district court, in the exercise of its discretion, as to whether a reasonable attorney would regard the services as sufficiently important." Id. at 1093.

The Court emphasized, however, that "[p]roper application of" that rule "requires courts to consider the potential merit of the claims that the applicant wants to pursue." Ayestas, 138 S. Ct.

at 1094. The Court observed that "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." Ibid. The Court thus explained that Section 3599(f) "cannot be read to guarantee that an applicant will have enough money to turn over every stone." Ibid. And it made clear that "courts have broad discretion in assessing requests for funding" and that "there may even be cases in which it would be within a court's discretion to 'deny funds after a finding of "reasonable necessity."'" Ibid. (citation omitted).

b. The court of appeals denied petitioners' motions to recall the mandate on the ground that Ayestas did not render its 2013 decision "'demonstrably wrong,'" as required for the "extraordinary" remedy of recalling the mandate. Snarr Pet. App. A2.

First, the court of appeals explained that Ayestas's holding that funding denials under 18 U.S.C. 3599 are reviewable on appeal did not render its 2013 decision demonstrably wrong, because that decision in fact "did review the funding denial, concluding that there was no abuse of discretion." Snarr Pet. App. A2. The court observed that its 2013 decision "considered and rejected" the "sole[]" claim in petitioners' 2018 motion: the "alleged denial of funding for a prison expert." Ibid.

Second, the court of appeals determined that its 2013 decision was not demonstrably wrong under Ayestas's interpretation of

Section 3599(f) because although petitioners did not receive the full amount they requested, they "ultimately had $85,000 at their disposal -- including '$20,000 specifically for prison and neurological experts.'" Snarr Pet. App. A2 (citation omitted). The court observed that because petitioners were "relatively free to use their funds as they saw fit," they "were not denied the opportunity to present a prison expert." Ibid. (emphasis omitted). And the court noted that petitioners' expert psychologist had been "'able to present much, if not all, of the evidence [that petitioners] believed to be vital for mitigation purposes,'" including "'extensive evidence about the impact on the defendants of,' among other things, 'life in prison.'" Ibid. (brackets and citation omitted).

6. Separately, petitioners each had filed motions for postconviction relief under 28 U.S.C. 2255. See Mot. for Relief Under 2255, United States v. Garcia, No. 13-cv-723 (E.D. Tex. Feb. 24, 2015), ECF No. 31 (sealed); Mot. for Collateral Relief Pursuant to 28 U.S.C. § 2255, United States v. Snarr, No. 13-cv-724 (E.D. Tex. Feb. 20, 2015), ECF No. 23 (sealed). After petitioners filed their respective motions to recall the mandate of the court of appeals, the district court granted the government's unopposed motions to stay the postconviction proceedings pending resolution of this case. See 7/31/2018 Order, Garcia, supra (No. 13-cv-723), ECF No. 98; 7/31/2018 Order, Snarr, supra (No. 13-cv-724), ECF No. 75.

ARGUMENT

Petitioners contend (Snarr Pet. 10-17; Garcia Pet. 16-29) that the court of appeals erred in denying their motions to recall the 2013 mandate in light of this Court's 2018 decision in Ayestas v. Davis, 138 S. Ct. 1080. The court of appeals did not abuse its broad discretion in declining to recall the mandate, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. Courts of appeals "have an inherent power to recall their mandates, subject to review for an abuse of discretion." Calderon v. Thompson, 523 U.S. 538, 549 (1998). But in light of the "'profound interests in repose,'" a court's power to recall a mandate "can be exercised only in extraordinary circumstances." Id. at 550 (citation omitted); see 16 Charles Alan Wright et al., Federal Practice and Procedure § 3938, at 862 (3d ed. 2012) (Wright & Miller). Setting aside circumstances such as "correct[ing] mere clerical errors," Calderon, 523 U.S. at 557, recalling a mandate is an action "of last resort, to be held in reserve against grave, unforeseen contingencies," id. at 550, such as "fraud upon the court, [which] call[s] into question the very legitimacy of the judgment," id. at 557; see Wright & Miller § 3938, at 863.

Petitioners claim neither a fraud on the court nor any other grave or unforeseen circumstances. Instead, they allege only that the court of appeals applied an incorrect legal standard -- more specifically, that the court of appeals failed to anticipate this

Court's subsequent clarification of the governing legal standard. See Snarr Pet. 11-17; Garcia Pet. 16-27. Even if correct, that would not be an "extraordinary circumstance[]" warranting recall of the mandate. Calderon, 523 U.S. at 550. This Court regularly clarifies or abrogates legal rules adopted by courts of appeals; were that sufficient to justify recalling the mandate in a case long past final judgment, recall would become the norm, rather than a remedy "of last resort." Ibid.

Lower courts have thus uniformly rejected requests for "recall of a mandate, destroying finality and repose, simply on the ground that the court of appeals reached a wrong decision." Wright & Miller § 3938, at 887; see, e.g., United States v. Ford, 383 F.3d 567, 568 (7th Cir. 2004) (per curiam) (denying motion to recall mandate in light of intervening Supreme Court decision), cert. denied, 543 U.S. 1074 (2005) (No. 04-7348); Goodwin v. Johnson, 224 F.3d 450, 459-460 (5th Cir. 2000) (same), cert. denied, 531 U.S. 1120 (2001) (No. 00-7584); Wright & Miller §3938, at 887 n.51 (listing cases). And to the extent petitioners address the procedural posture here, the only justification they offer for the extraordinary remedy of recalling the mandate is the asserted incorrectness of the original 2013 decision. Cf. Garcia Pet. 27.

The interests in finality are even stronger when, as here, the case involves a criminal conviction. "Finality is essential to both the retributive and the deterrent functions of criminal law." Calderon, 523 U.S. at 555. Recalling the mandate years

after a conviction is final simply because, in retrospect, the court of appeals might have erred would undermine those functions. It also would circumvent Congress's highly reticulated scheme for providing postconviction relief under 28 U.S.C. 2255 -- a scheme that expressly limits when and under what circumstances relief is available. For example, federal prisoners generally have only one year from the date the conviction becomes final to seek postconviction relief. 28 U.S.C. 2255(f)(1). That period is extended only in limited circumstances, including if this Court "newly recognize[s]" a right and that right is made "retroactively applicable to cases on collateral review." 28 U.S.C. 2255(f)(3); see Teague v. Lane, 489 U.S. 288, 310 (1989) (plurality opinion); cf. 28 U.S.C. 2255(h)(2) (authorizing second or successive petitions raising "a new rule of constitutional law, made retroactive to cases on collateral review by [this] Court, that was previously unavailable"). Those explicit statutory limitations would be largely irrelevant if a prisoner could circumvent them by the simple expedient of seeking recall of the mandate instead.

Calderon accordingly made clear that a state prisoner seeking recall of the mandate in a federal habeas case under 28 U.S.C. 2254 faces an even higher burden than a litigant in a different type of case. In that habeas context, a "court abuses its discretion [by recalling its mandate] unless it acts to avoid a miscarriage of justice as defined by our habeas corpus

jurisprudence." 523 U.S. at 558. The Court adopted that standard to address the "central concern" of the federal postconviction statutes "that the merits of concluded criminal proceedings not be revisited" absent "a strong showing of actual innocence," and to ensure that recall of the mandate "is limited to the most rare and extraordinary case." Ibid. There is no good reason to apply a different rule to federal prisoners seeking to recall the mandates in their direct criminal appeals. The interests in finality and repose apply equally to federal and state convictions, and it is just as important to prevent federal prisoners from circumventing Congress's carefully reticulated postconviction scheme under 22 U.S.C. 2255 as it is to prevent state prisoners from doing the same under 22 U.S.C. 2254. See Calderon, 523 U.S. at 553, 558.

Indeed, petitioners here already have pending motions under 28 U.S.C. 2255, and can attempt to seek relief under Ayestas -- to the extent it is retroactively available to them -- in those proceedings, subject to the limitations Congress has imposed in those proceedings. Petitioners have not attempted to, and cannot, show that the extraordinary relief of recalling the mandate in their direct appeal is either necessary or justified.

2. The court of appeals did not abuse its discretion in declining to recall its mandate for the additional reason that the outcome of its 2013 decision does not conflict with Ayestas.

a. Under Ayestas, requested CJA funds are "'reasonably necessary'" under 18 U.S.C. 3599(f) if "a reasonable attorney would

regard the services as sufficiently important." Ayestas, 138 S. Ct. at 1093 (citation omitted). Ayestas emphasized, however, that courts "enjoy broad discretion" over CJA funding decisions, and that the statutory standard "requires courts to consider the potential merit of the claims that the applicant wants to pursue [and] the likelihood that the services will generate useful and admissible evidence," among other factors. Id. at 1094.

That analysis is, in substance, what the court of appeals undertook in its 2013 decision. The court expressly found that petitioners "ha[d] failed to establish a reasonable probability that the requested experts would have been of assistance and that their absence resulted in a fundamentally unfair trial." Snarr Pet. App. A41. The court made that finding not only because petitioners' experts and other witnesses "w[ere] able to present much, if not all, of the evidence" that the requested cultural, prison, and neurological experts would have presented, ibid., but also because "the government's case against [petitioners] was especially strong," as evidenced in part by the jury's overwhelming rejection of the vast majority of petitioners' proffered mitigating factors, id. at A41-A42. The court thus necessarily determined that additional funds likely would not have generated additional "useful and admissible" evidence, and that in any event petitioners' claims lacked "potential merit." Ayestas, 138 S. Ct. at 1094.

Although Ayestas rejected the Fifth Circuit's then-prevailing test that the defendant demonstrate a "'substantial need'" for the requested services, the court of appeals' 2013 decision here did not rely on that "arguably more demanding" test. 138 S. Ct. at 1093. Nor did it "h[o]ld that the funding decisions were unreviewable decisions" under In re Marcum LLP, 670 F.3d 636 (5th Cir. 2012) (per curiam), which Ayestas later abrogated. Garcia Pet. 13 (emphasis omitted). It instead found reviewable, and directly addressed, petitioners' claim that "as a result of [the funding] order, they lacked the funds necessary to present an adequate defense, and therefore were denied due process." Snarr Pet. App. A40 (emphasis omitted).

To the extent petitioners suggest (Snarr Pet. 8, 11; Garcia Pet. 6-7, 14) that the Fifth Circuit's pre-Ayestas law prejudiced them by effectively requiring them to frame their argument as a due-process claim under Ake v. Oklahoma, 470 U.S. 68 (1985), they cannot show that the application of Ake made a difference here. Applying principles of due process, the court of appeals asked whether petitioners "establish[ed] a reasonable probability that the requested experts would have been of assistance to the defense" and whether "denial of such expert assistance resulted in a fundamentally unfair trial." Snarr Pet. App. A41 (citation omitted). As discussed at p. 20, supra, that is substantially similar to the required inquiry under Ayestas: whether the requested services "will generate useful and admissible evidence"

and whether they "will help the applicant win relief." 138 S. Ct. at 1094.

b. Petitioners contend (Garcia Pet. 16-26) that the court of appeals abused its discretion because "the Chief Judge's order of December 18, 2009, unequivocally set an arbitrary funding cap" on spending under 18 U.S.C. 3599. Garcia Pet. 19 (internal citation omitted); see id. at 16 (asking this Court to decide whether "a global cap may be imposed on investigative and expert fees and expenses" under 18 U.S.C. 3599 "in an amount below that found to be reasonably necessary") (emphasis omitted). As a threshold matter, the argument has been forfeited because petitioners have never raised it before, not even in their motions to recall the mandate. See Pet. C.A. Joint Br. 3-4, 32-33, 215, 224-232; Snarr Mot. 1-13; Garcia Mot. 1-13. This Court should therefore decline to address it in the first instance. See United States v. Williams, 504 U.S. 36, 41 (1992) (noting this Court's "traditional rule" precluding a grant of certiorari when "'the question presented was not pressed or passed upon below'") (citation omitted); see also Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

In any event, petitioners' argument lacks merit because courts retain discretion to limit expenditures under 18 U.S.C. 3599(f). The CJA makes clear that after finding investigative, expert, or other services to be reasonably necessary, "the court may authorize the defendant's attorneys to obtain such services."

18 U.S.C. 3599(f) (emphasis added). As Ayestas recognized, although "Section 3599's predecessor declared that district courts 'shall authorize' funding for services deemed 'reasonably necessary,'" in 1996 "Congress changed the verb from 'shall' to 'may,'" thereby making it "perfectly clear" that courts "enjoy broad discretion" to make funding determinations under Section 3599. 138 S. Ct. at 1094 (citations omitted); see 21 U.S.C. 848(q)(9) (1994), repealed by Terrorist Death Penalty Enhancement Act of 2005, Pub. L. No. 109-177, Tit. II, § 222, 120 Stat. 232 (2006).

It follows that courts retain discretion to limit the total amount of funds for investigative and expert services. The CJA "cannot be read to guarantee that an applicant will have enough money to turn over every stone." Ayestas, 138 S. Ct. at 1094. Indeed, "there may even be cases in which it would be within a court's discretion to 'deny funds after a finding of "reasonable necessity."'" Ibid. (citation omitted). Petitioners provide no meaningful basis to second-guess the chief judge's factbound and discretionary determination that a total of $85,000 for Garcia and additional funds for Snarr to spend as they saw fit (including for prison and neurological experts) was sufficient in the circumstances of this case.

Moreover, contrary to petitioners' assertion (Garcia Pet. 16-24), the chief judge did not purport to impose any kind of "global cap" on the requested funds. Id. at 16 (emphasis omitted); see

Garcia Supp. Pet. App. A40, A42-43. Instead, the chief judge's orders are most naturally construed as merely disagreeing with the district court's determination of how much money was "necessary to provide fair compensation for services of an unusual character or duration." 18 U.S.C. 3599(g)(2); see Garcia Supp. App. A40, A42-A43. That determination fell squarely within the chief judge's power to approve the ultimate amount of funding. See 18 U.S.C. 3599(g)(2) (requiring that any "excess payment" over $7500 be "approved by the chief judge of the circuit").

3. Petitioners do not identify any circuit conflict on the question presented. Instead, they allege (Snarr Pet. 15-16) "confusion" and "inconsisten[cy]" among the circuits about whether 18 U.S.C. 3006A(e)(1) -- which authorizes funding for "investigative, expert, or other services necessary for adequate representation" in non-capital cases -- implements the minimum due-process standards under Ake or implements some other standard. Even if such confusion existed, this case -- which concerns whether it was an abuse of discretion for the court of appeals not to recall its mandate -- would not be a suitable vehicle for resolving it.

In any event, petitioners' assertion of a circuit conflict is incorrect. None of the published cases they cite (Snarr Pet. 16) expresses confusion about the funding standards under 18 U.S.C. 3006A(e)(1), and all of them agree that the analysis under Section 3006A substantially overlaps with the due-process inquiry under

Ake, such that both types of claims will rise or fall "[f]or largely the same reasons." United States v. Kennedy, 64 F.3d 1465, 1473 (10th Cir. 1995); see, e.g., United States v. Bah, 574 F.3d 106, 118-119 (2d Cir. 2009) (analyzing 18 U.S.C. 3006A(e)(1) and Ake together); United States v. Roman, 121 F.3d 136, 144 (3d Cir. 1997) (same), cert. denied, 522 U.S. 1061 (1998) (No. 97-6852); United States v. Fazzini, 871 F.2d 635, 637 (7th Cir. 1989) (same) United States v. Thornberg, 676 F.3d 703, 706-707 (8th Cir. 2012) (same); United States v. Chase, 499 F.3d 1061, 1066 (9th Cir. 2007) (same). If anything, given the similarity of the language in Sections 3006A(e)(1) and 3599(f), those cases simply underscore that petitioners were not prejudiced by the application of Ake in the court of appeals' 2013 decision here. And they provide no support for the extraordinary remedy of recalling a years-old mandate to reopen otherwise final criminal judgments.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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