NO: 18-7201

IN THE SUPREME COURT OF THE UNITED STATES

MARK ISSAC SNARR,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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While Mr. Snarr focused on the court of appeals' legal error in his petition for certiorari, the government's opposing brief spends much of its time criticizing the procedural posture in which that error was made—in a motion to recall a mandate. Its arguments were not presented below, and regardless, they do not prevail: the Fifth Circuit's standard for recalling the mandate is consistent with the rest of the circuit courts.

On the substance of Mr. Snarr's claim, the government argues that there was no error below because the standard set by *Ayestas* for funding under 18 U.S.C. § 3599(f) corresponds with the standard for funding under the Due Process Clause as described by *Ake*. That argument cannot overcome the plain difference between the two standards for funding. Moreover, that difference provides good reason to grant certiorari in light of the confusion that exists over the two standards.

I. The focus on the recall standard is irrelevant.

Under well-established Fifth Circuit precedent, the court of appeals can recall its mandate when it is "necessary in order to prevent injustice." *United States v. Tolliver*, 116 F.3d 120, 123 (5th Cir. 1997). The circumstances that amount to an injustice vary. But one situation it specifically covers is those cases in which "a subsequent decision by the Supreme Court renders a previous appellate decision demonstrably wrong." *Id.* (citing *Greater Boston Television Corp. v. F.C.C.*, 463 F.2d 268, 278 n.12 (D.C.Cir.1971)).

Consistent with this standard, Mr. Snarr sought to have the Fifth Circuit recall the mandate in his case based on this Court's decision in *Ayestas v. Davis*, 138 S.Ct. 1080 (2018). He argued that it rendered the decision in his case demonstrably wrong. The Fifth Circuit disagreed. In a brief order, the Fifth Circuit concluded that *Ayestas* has no effect on its previous decision. The Fifth Circuit claimed that "*Ayestas* has not rendered [its] decision 'demonstrably wrong,'" because it "did review the funding denial, concluding that there was no abuse of discretion." *Order* at 2.

It is this legal conclusion that Mr. Snarr seeks to challenge in his petition for certiorari. While the government eventually offers a limited response to his arguments, it now for the first time criticizes the Fifth Circuit standard under which Mr. Snarr sought recall.

Because these arguments were not presented below, they should not be considered here. This is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718, n.7 (2005). This is especially true given the problems with the government's analysis.

The government is attacking a straw man when it asserts that the courts of appeals have "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." BIO at 17 (quoting 16 Charles Alan Wright et al., *Federal Practice and Procedure* § 3938 (3d ed. 2012)). As the authority the government cited explains just a few lines later, "mandates have been recalled on a more sweeping theory that ordinary principles of finality should yield to what were perceived to be very special interests of justice." 16 Wright et. al, Federal Practice and Procedure § 3938 (Wright & Miller). And the example the treatise offers to display this trend is this Court's own decision in *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25 (1965). In that decision, this Court departed from its normal procedure and granted relief in a case that had been "final" for three years because "the court of appeals had misinterpreted the law" *and* that error had caused the petitioner to be uniquely harmed. Wright & Miller § 3938 (citing *Gondeck*, 382 U.S. at 26–27).

Consistent with *Gondeck*, the courts of appeals have used their discretion to recall a mandate when they have gotten something wrong *and* there is good reason for revisiting the decision. But that still does not set the bar unattainably high. And so, consistent with *Gondeck*, in the Fifth Circuit, a party seeking recall must show that a prior decision was demonstrably wrong. *See Tolliver*, 116 F.3d at 123. Similarly, in the Second Circuit, a party must show that there has been "[a] supervening change in governing law that calls into serious question the correctness of the court's judgment." *Sargent v. Columbia Forest Products, Inc.*, 75 F.3d 86, 90 (2d Cir. 1996); *accord Judkins v. Beech Aircraft Corp.*, 745 F.2d 1330, 1332 (11th Cir. 1984) ("Beech argues, and we agree, that this court has the power to recall its mandate if, as here, there has been a supervening change in the law.").

Comparable standards are found throughout the other circuits, allowing them to revisit a case in repose where there is good cause to do so. *See, e.g.*, *Alsamhouri v. Gonzales*, 484 F.3d 117, 121–22 & n.2 (1st Cir. 2007) (recalling mandate because court had wrongly concluded it did not have jurisdiction to decide issue raised in immigration appeal); *Am. Iron and Steel Inst. v. E.P.A.*, 560 F.2d 589, 596–97 (3d Cir. 1977) (recalling mandate because the court's decision was in conflict with that of other circuits); *Zipfel v. Halliburton Co.*, 861 F.2d 565, 567–68 (9th Cir. 1988) (recalling mandate because prior decision "departs in some pivotal aspects" from recent Supreme Court decision); *Walker v. Lockhart*, 726 F.2d 1238, 1265–66 (8th Cir. 1984) (recalling mandate to allow for review of new evidence in a habeas proceeding); *Allen v. United States*, 938 F.2d 664, 665–66 (6th Cir. 1991) (recalling mandate because defendant's prior appellate counsel failed to comply with *Anders v. California*); *United States v. Smith*, 685 F. App'x 270, 271–72 (4th Cir. 2017) (recalling mandate because appeal of motion to reduce sentence was decided incorrectly); *Pierce v. Cook & Co., Inc.*, 518 F.2d 720, 722 (10th Cir. 1975) (recalling mandate in diversity case because state law that defeated plaintiff's claim was later overruled).

In light of the uniformity of this practice, there was nothing remarkable about Mr. Snarr seeking to have the mandate withdrawn in light of *Ayestas*. Nor is it significant that Mr. Snarr's is a criminal case. While finality is important in criminal proceedings, both Mr. Snarr and society as a whole have a significant interest in seeing that justice is done. *See, e.g.*, *State v. Preciose*, 609 A.2d 1280, 1293 (N.J. 1992) ("[C]onsiderations of finality and procedural enforcement count for little when a defendant's life or liberty hangs in the balance.")

Nor does seeking to recall a mandate in a criminal case upset "Congress's highly reticulated scheme for providing postconviction relief under 28 U.S.C. § 2255."

BIO at 18. While the details of that scheme must be considered when a circuit court is considering whether to recall its mandate, *see Calderon v. Thompson*, 523 U.S. 538, 554 (1998), they do not predominate here. As the First Circuit recognized in a case similar to this one, "[t]he considerations are somewhat different where, as here, we are concerned with intra-federal proceedings and, more importantly, where the [mandate at issue] was not issued in a habeas proceeding at all but on direct review . . . ." *See Conley v. United States*, 323 F.3d 7, 14 (1st Cir. 2003).

That is the situation here. To start, comity is not at issue. When a federal court of appeals recalls its mandate in a state habeas case, it intrudes on the finality of a conviction of another sovereign. Because the consequence of that intrusion is so serious, Congress has significantly limited the power of federal courts to interfere with state convictions by limiting what issues federal courts can reach and by requiring claims of error to be reviewed under deferential standards. *See* 28 U.S.C. § 2254(b)–(e). A circuit court does not intrude on another sovereign by recalling a mandate in a federal criminal appeal.

Another significant difference is the nature of a direct appeal itself. A motion to recall a mandate based on a subsequent change in the law will only be tenable under a narrow set of circumstances. First, the defendant will have to preserve a claim related to the law in the district court—and not waive review of it. Because very few federal criminal cases go to trial, very few claims will survive guilty pleas and appeal waivers. *See, e.g.*, *Class v. United States*, 138 S.Ct. 798, 804 (2018) (A guilty plea "is a waiver also of all merely technical and formal objections of which the defendant could have availed himself by any other plea or motion.") (quoting *Commonwealth v. Hinds,* 101 Mass. 209, 210 (1869)). Next, the defendant will both have to appeal and have his claim presented on appeal. Because effective appellate advocacy requires the "winnowing out weaker arguments on appeal and focusing on those more likely to prevail," *see Smith v. Murray*, 477 U.S. 527, 536 (1986), many preserved claims won't make it into a defendant's appellate brief. Finally, after all that, there still must be a subsequent change in the law that undermines the circuit court's resolution of a claim. In the end, just like Congress's "highly reticulated scheme," the rules governing direct review form a net that catch most claims. So rather than conflict with Congress's postconviction scheme, the limited review available by recalling a mandate is entirely consistent with it.

In sum, there is nothing about the posture of this case that should prevent this Court's review. Mr. Snarr's motion to recall the mandate was based on the Fifth Circuit's failure to use the correct legal standard in his case. But despite this Court's correction in *Ayestas*, the Fifth Circuit claimed that its previous legal standard was not erroneous and denied Mr. Snarr's motion on those grounds. That presents a legal question that is ready for this Court's review.

II. The decision in *Ayestas* cannot be reconciled with the Fifth Circuit's resolution of the funding claim in Mr. Snarr's appeal.

As this Court explained in *Ayestas*, a court should authorize spending on services under 18 U.S.C. § 3599(f) if they are "reasonable necessary," which, in the context of that statute, means that "a reasonable attorney would regard the services as sufficiently important." 138 S.Ct. at 1093. In contrast, under the Fifth Circuit's test for *Ake v. Oklahoma*, 470 U.S. 68 (1985), a court need only authorize spending if it would provide evidence that is "both critical to the conviction and subject to varying expert opinion." *Snarr*, 704 F.3d at 405 (quoting *Yohey v. Collins*, 985 F.2d 222, 227 (5th Cir. 1993)).

Despite the Fifth Circuit's explicit assertion that it was reviewing Mr. Snarr's (and Mr. Garcia's) funding claim under the *Ake* standard, the government nonetheless argues that the difference between the two was inconsequential. It claims that the *Ayestas* "analysis is, in substance, what the court of appeals undertook in its 2013 decision." BIO at 20.

The basis for the government's argument is the superficial similarities between the test from *Ayestas* and the test the court of appeals used in deciding whether Mr. Snarr's funding claim had merit: it asked (in part) whether there was a "reasonable probability that the requested experts would have been of assistance to the defense." *Snarr*, 704 F.3d at 405 (quoting *Yohey*, 985 F.2d at 227). The government argues that this standard is less onerous than the one rejected in *Ayestas*, and because Mr. Snarr failed "to establish a reasonable probability that the requested experts would have been of assistance," there was no harm. BIO 20–21 (quoting *Snarr*, 704 F.3d at 405).

The trouble with the government's argument is that while the test the court of appeals used and the one established in *Ayestas* used similar words, they ultimately asked a different question. This is shown by how the court of appeals analyzed the claim. Instead of asking whether Mr. Snarr's counsel would have found the expert's testimony useful, it instead focused on the fact that evidence covering similar related ground was introduced by another expert and therefore made the remaining experts unnecessary. *See Snarr*, 704 F.3d at 405. In other words, it asked whether it was "critical" to the defense, as the court of appeals' *Ake* standard directs. *See Yohey*, 985 F.2d at 227.[1] And in the bigger picture, this is not surprising. It would be odd for the court of appeals to test for compliance with *Ake* by using a test that is more demanding than what *Ake* itself requires.

The test the Fifth Circuit used in Mr. Snarr's appeal also focused heavily on what the outcome would have been if the funding request had been granted. *Snarr*, 704 F.3d at 405. That differs from what the statute demands. To get funding for an expert under 18 U.S.C. § 3599(f), "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 (emphasis in original). Instead, a person seeking funding need only show that funding would be reasonably necessary, meaning the resulting evidence useful and admissible. Because the court of appeals did not use that test in Mr. Snarr's appeal, it erred when it denied Mr. Snarr's motion to recall the mandate.

[1] The court of appeals decision in *Yohey* demonstrates this same focus. In that case, the petitioner had requested the assistance of a ballistics expert in his state trial, and challenged the denial of the expert under *Ake* in federal habeas proceedings. *Yohey*, 985 F.2d at 223–25, 227. The court of appeals affirmed the denial of his *Ake* claim not because his trial attorney did not believe the expert was reasonably necessary—he did—but because he could not show that the ballistics expert was critical. *Id.* at 227.

III. The government's argument confirms that there is a conflict that needs correcting.

As Mr. Snarr described in his petition, there is a confusion among the circuit courts on how to treat funding requests under 18 U.S.C. § 3599(f) and the nearly identical 18 U.S.C. § 3006A(e)(1). As described more fully there, a majority of the courts of appeals conflate funding under § 3006A(e)(1) with that required by *Ake*, while a minority understand § 3006A(e)(1) to be more generous, consistent with this Court's decision in *Ayestas*.

The government's response returns to the same points as before: it argues that there is no confusion or conflict among the circuits because the standard for funding under *Ake* and the standard for funding under § 3006A(e)(1) and § 3599(f) are essentially the same. BIO at 24–25. But as already explained above, that conclusion does not follow. While they do cover much of the same ground, the standard set for funding in *Ayestas* cannot be reconciled with the standard set in *Ake.* Simply put, the *Ayestas* standard is more generous than the *Ake* standard.

But if the government's argument is correct, it proves too much. If, as the government claims, the *Ake* and *Ayestas* standards are essentially the same, then, whether it was intended or not, the *Ayestas* decision must have clarified how *Ake* claims should be considered. Under that view, going forward, state and federal courts are going to have to consider *Ayestas* when deciding *Ake* claims—even though the latter decision is never once named in *Ayestas.* The decision in *Ayestas* gives no hint that it intended to create such confusion. But if it did, then even under the government's argument, the petition for certiorari should be granted to clear up this confusion.

In short, whether this Court accepts Mr. Snarr's view of the conflict among the circuits or the government's view that the *Ayestas* standard is the same as the *Ake* standard, this case is worthy of this Court's attention.

CONCLUSION

When the court of appeals denied Mr. Snarr's motion to recall the mandate, it ignored this Court's decision in *Ayestas* and committed a legal error. Rather than dispel the significance of that fact, the government's opposition further illustrates the underlying confusion that prevails over funding standards.

The petition for writ of certiorari should be granted.

Respectfully submitted: June 26, 2019

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