NO: _____

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

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

— CAPITAL CASE —

QUESTION PRESENTED

Congress enacted 18 U.S.C. § 3599 to provide federal capital defendants and capital habeas petitioners with an enhanced level of representation in light of the penalty they face. Included in the statute is a provision that allows a capital defendant to obtain investigative, expert, or other services that are "reasonably necessary" for the defendant's representation.

This is not a heavy burden. To meet it, a person requesting funds need not show that the requested service is "reasonably essential" or that it fills a "substantial need."

The question presented is:

Whether the Fifth Circuit disregarded this Court's precedent when it required petitioner to show that an expert was "critical" to his case before funds could be provided.

INTERESTED PARTIES

Mr. Snarr's codefendant, Edgar Garcia, is also a party to the proceedings below.

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Mark Issac Snarr ("Petitioner") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The order of the United States Court of Appeals for the Fifth Circuit refusing to recall its mandate or to allow a petition for rehearing out of time is not published

and is included in the appendix at A-1. The decision of the court of appeals affirming petitioner's conviction and sentence is published at 704 F.3d 368 and is included in the appendix at A-4.

STATEMENT OF JURISDICTION

The order of the court of appeals was entered on July 25, 2018. Pet. App. 1a. The Court granted petitioner a 60-day extension on October 16, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). This petition is timely filed pursuant to Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3006A. "Adequate representation of defendants."

. . . .

(e) Services Other Than Counsel.—

(1) Upon Request.—

Counsel for 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. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate judge if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.

(2) Without Prior Request.—

(A)

Counsel appointed under this section may obtain, subject to later review, investigative, expert, and other services without prior authorization if necessary for adequate representation. Except as provided in subparagraph (B) of this paragraph, the total cost of services obtained without prior authorization may not exceed $800 and expenses reasonably incurred.

(B)

The court, or the United States magistrate judge (if the services were rendered in a case disposed of entirely before the United States magistrate judge), may, in the interest of justice, and upon the finding that timely procurement of necessary services could not await prior authorization, approve payment for such services after they have been obtained, even if the cost of such services exceeds $800.

(3)Maximum Amounts.—

Compensation to be paid to a person for services rendered by him to a person under this subsection, or to be paid to an organization for services rendered by an employee thereof, shall not exceed $2,400, exclusive of reimbursement for expenses reasonably incurred, unless payment in excess of that limit is certified by the court, or by the United States magistrate judge if the services were rendered in connection with a case disposed of entirely before him, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active or senior circuit judge.

. . . .

18 U.S.C. § 3599. "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 therefor under subsection (g). No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

(g)

. . . .

(2)

> Fees and expenses paid for investigative, expert, and other reasonably necessary services authorized under subsection (f) shall not exceed $7,500 in any case, unless payment in excess of that limit is certified by the court, or by the United States magistrate judge, if the services were rendered in connection with the case disposed of entirely before such magistrate judge, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active or senior circuit judge.

. . . .

STATEMENT OF THE CASE

After their motions to be tried separately were denied, petitioner Mark Issac Snarr and his codefendant Edgar Garcia prepared for trial by coordinating their defenses. Where feasible, they shared substantial resources at their joint trial, including investigators and experts. This plan made sense. Both Mr. Snarr and Mr. Garcia had similar backgrounds. Both had difficult childhoods and both had spent much of their short lives incarcerated. Both had been shaped into the people they were by their experiences in prison, and the government was using their prior misbehavior in prison as aggravating circumstances warranting the death penalty. And they were both charged with the killing of Gabriel Rhones in U.S.P. Beaumont, the prison where Mr. Rhones, Mr. Snarr, and Mr. Garcia were all incarcerated.

From the very start, the foundation of Mr. Snarr and Mr. Garcia's joint defense was to focus on the prison environment in which the two had lived for years. They

wanted to show the jury that "the failures of the prison system . . . put them in a situation where they were in an unsafe position and had no other alternative."

But as even guards testified, "prison is a world unto itself." Fact witnesses could easily fill the trial from beginning to end with anecdotes of prison gangs, illicit economies, and systemic violence. So while such a trial may have provided some perspective on Mr. Rhones's death, it would still paint an incomplete picture. Without someone to put those facts into context, it would still leave the jury without a true explanation of why Mr. Snarr and Mr. Garcia felt threatened and believed their only choice was to act on their own. Likewise, expert help was need to give the jury a true understanding of the impact these defendants' experiences had on their psychological and physiological makeup. Without this sort of expert help, jurors were apt to either conclude that the violence was senseless or to instead fill in the gaps with inaccurate, media-derived stereotypes.

And so, to put on a proper defense, both Mr. Snarr and Mr. Garcia sought the help of a variety of experts. One such expert was Dr. Craig Haney. Dr. Haney has a Ph.D. in psychology and has studied prisons extensively. He is an expert on how incarceration affects prisoners psychologically. With his training and experience, he can explain how extensive incarceration dictates how people like Mr. Snarr "perceive the world, how they perceive threat, what they do about threat, how they perceive prison authorities, and whether you go to them when you have a problem with another inmate." His testimony would provide powerful mitigation evidence for both Mr. Snarr and Mr. Garcia, and a response to the government's aggravating evidence,

allowing the jurors to see how their time in prison changed them at a fundamental level, and provided an explanation for their conduct in the charged offense.

Because both men were indigent, they had to seek money from the district court for experts. Though they were presenting a joint defense, Mr. Snarr and Mr. Garcia each prepared distinct trial budgets, with some experts included on one budget and some included on the other. Dr. Haney was included in Mr. Garcia's budget. With a few small reductions, the district court approved the two defendants' trial budgets under 18 U.S.C. § 3599(f). However, because the trial budgets for both defendants exceeded $7,500, the district court's approval was not enough. The chief judge of the Fifth Circuit also had to approve the request. *See* 18 U.S.C. § 3599(g)(2). It is at that step where the trouble arose.

Without any deference to the district court's determination and without providing any reasons why, the circuit judge drastically reduced the budget that the district court had found appropriate for both Mr. Snarr and Mr. Garcia. While both had their budgets significantly reduced, Mr. Garcia's funding was reduced to the point where he could not acquire Dr. Haney's assistance. A subsequent motion to restore the funding resulted in some of Mr. Garcia's budget being restored, but it was still not enough to pay for Dr. Haney's assistance and the other experts necessary to the defense. And so Mr. Snarr and Mr. Garcia were forced to go to trial without the crucial testimony that Dr. Haney would provide.

As expected, the evidence at trial revealed a world completely alien to jurors. It was a world where an inmate could spend his time drunk or high on opiates. It was

a world where home-made knives were readily available and passed around. Even prisoners in the Special Housing Unit—the "jail's jail"—kept such contraband in their purportedly extra-secure cells.

Above all else, evidence at trial showed that the staff at U.S.P. Beaumont could not keep the inmates safe. Understaffed and undertrained, prison guards failed to follow the security protocols put in place for the prison. Yet superficial order could be maintained because guards could depend on gangs to keep prisoners in line.[1] But this came with a cost: it allowed for an environment where the gangs' rules prevailed and were enforced with violence.

Without Dr. Haney's testimony, Mr. Snarr and Mr. Garcia had no expert to explain how their experiences in this sort of environment impacted their psychological well-being and their behavior. Besides rebutting the government's aggravating evidence, Dr. Haney's expertise would have provided critical mitigating evidence that illuminated the circumstances of the crime as well as Mr. Snarr's character and background. Jurors would have had greater appreciation and insight into aspects of Snarr's experience that exemplify what has been termed an "ecology of cruelty," due either to systemic failures or aberrant behavior in prisons. *See, e.g.*, Craig Haney, *A Culture of Harm: Taming the Dynamics of Cruelty in Supermax Prisons*, Criminal Justice and Behavior, Vol. 35 No. 8, 956–984 (2008); Craig Haney,

[1] This would be neither the first nor the last time federal prison guards relied on prison gangs to maintain order. *See, e.g.*, Danielle Ivory, "After Whitey Bulger Killing, Warden of 'Misery Mountain' Faces Removal", THE NEW YORK TIMES (Nov. 30, 2018), available at: https://perma.cc/9BX8-BMKE.

et al, *Interpersonal Dynamics in a Simulated Prison*, 1 Int'l. J. Criminology & Penology 69 (1973); James G. Fox, Organizational and Racial Conflict in Maximum-Security Prisons 3–4 (1982); Craig Haney, REFORMING PUNISHMENT: PSYCHOLOGICAL LIMITS TO THE PAINS OF IMPRISONMENT (American Psychological Association 2006). Without this evidence, jurors were incapable of making a fair and accurate assessment of Mr. Snarr.

In their joint appeal, Mr. Snarr and Mr. Garcia challenged the circuit judge's decision restricting Mr. Garcia's budget, arguing that Mr. Garcia was improperly denied funds under 18 U.S.C. § 3599. The government opposed the claim on both procedural and substantive grounds. Relevant here, the government argued that the appellate court lacked jurisdiction to review funding decisions under 18 U.S.C. § 3599.

The Fifth Circuit concluded it could consider the issue, but not on the basis advanced in Mr. Snarr and Mr. Garcia's brief. Rather than considering whether Mr. Garcia's trial budget was improperly reduced under 18 U.S.C. § 3599, it instead considered whether the denial of funds impinged on Mr. Garcia's due process rights under *Ake v. Oklahoma*, 470 U.S. 68 (1985). *See United States v. Snarr*, 704 F.3d 368, 403–05 (5th Cir. 2013). Considering the issue only under *Ake*, the Fifth Circuit determined that Mr. Garcia was not improperly denied funding. *Id.* at 405–06. And finding no reversible error, the Fifth Circuit affirmed Mr. Snarr's and Mr. Garcia's convictions and death sentences.

Sometime later, this Court granted certiorari in *Ayestas v. Davis*, 138 S. Ct. 1080 (2018), another case out of the Fifth Circuit. In *Ayestas*, the petitioner argued that he was improperly denied funding under 18 U.S.C. § 3599, and this Court granted certiorari on that issue. 138 S. Ct. at 1088. Among other things, the respondent argued that this Court could not even reach that issue because the denial of funding was an administrative decision, not a judicial one, and that this Court did not have jurisdiction to review an administrative decision. *Id.* at 1088–89.

This Court rejected the challenge to its jurisdiction. Although funding issues under 18 U.S.C. § 3599 (and the related Criminal Justice Act statute, 18 U.S.C. § 3006A) are generally considered *ex parte*, and reviewed by a single circuit judge, they are still judicial in nature. Because they are judicial, this Court and lower courts had jurisdiction to consider the petitioner's claim. *Id.* at 1089–92.

On the merits, this Court held that district courts have broad discretion to grant or deny funding under 18 U.S.C. § 3599. In exercising its discretion, courts must "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." *Id.* at 1094. Yet as long as the requested services are "reasonably necessary," or if "a reasonable attorney would regard the services as sufficiently important," the request should be granted. *Id.* at 1092–93.

Based on this Court's decision in *Ayestas*, Mr. Snarr sought to have the Fifth Circuit recall its mandate in his case and consider a petition for rehearing. (App. A-

43). He argued that *Ayestas* rendered the decision in his case demonstrably wrong because the Fifth Circuit had concluded that it did not have jurisdiction to consider the denial of funds under 18 U.S.C. § 3599. (App. A-48 to A-51). He further argued that *Ayestas* required a recall of the mandate because it refuted the standard under which the funding claim was originally decided. (App. A-51 to A-53).

The Fifth Circuit denied the motion. (App. A-3). It stated that *Ayestas* did not render its decision demonstrably wrong because it did review the denial of funding and found no abuse of discretion. It further stated that the denial of funds for a prison expert had been specifically addressed and rejected. According to the Fifth Circuit, "*Ayestas* in *no regard* renders [its] decision 'demonstrably wrong.'" (emphasis added) (App. A-2).

REASONS FOR GRANTING THE WRIT

In *Ayestas v. Davis*, 138 S.Ct. 1080 (2018), this Court corrected the Fifth Circuit's error and spelled out the precise legal standard to be used for funding decisions under 18 U.S.C. § 3599. Despite the simplicity of that decision, the Fifth Circuit is ignoring it. Worse, the Fifth Circuit is compounding the error *Ayestas* corrected by conflating the legal standard for § 3599 with the legal standard for funding requests made under *Ake v. Washington*. Moreover, the appellate court's order signals that, if left unchecked, the Fifth Circuit intends to avoid application of this Court's *Ayestas* in other capital cases as well.

I. The Fifth Circuit has ignored this Court's decision in *Ayestas v. Davis* and continues to use the wrong legal standard for funding under 18 U.S.C. § 3599.

In a motion to recall, Mr. Snarr asked the Fifth Circuit to correct a serious error that occurred in the appellate court's review of his case. In his direct appeal, Mr. Snarr and his codefendant argued that they had been improperly denied funding under 18 U.S.C. § 3599. In response to jurisdictional arguments raised by the government, the Fifth Circuit did not consider whether funding was improperly denied under § 3599, but instead only considered whether there the denial of funding amounted to a due process violation under *Ake v. Oklahoma*, 470 U.S. 68 (1985). *See United States v. Snarr*, 704 F.3d 368, 403–05 (5th Cir. 2013). In *Ayestas*, this Court not only held that there were no jurisdictional barriers to reviewing statutory funding decisions on direct appeal, but also held that the Fifth Circuit had been using the wrong legal standard for those decision. 138 S.Ct. at 1089–94. In light of *Ayestas*, the Fifth Circuit should have granted Mr. Snarr's motion and recalled its mandate.

Instead, the Fifth Circuit refused. Without even acknowledging its previous jurisdictional ruling or the use of the *Ake* standard, the Fifth Circuit concluded that there was no conflict between its decision in Mr. Snarr's case and *Ayestas*. In other words, while claiming to follow *Ayestas*, the Fifth Circuit has instead ignored it.

First off, *Ayestas* refuted the jurisdictional argument the government had made in Mr. Snarr's case. There is no doubt after *Ayestas* whether appellate courts can review the denial of funding under § 3599. *See Ayestas*, 138 S.Ct. at 1092.

Second, *Ayestas* sets out the legal standard for funding under § 3599 that leaves it irreconcilable with the *Ake* standard used in Mr. Snarr's appeal. Under the *Ake* standard used by the Fifth Circuit, funding need only be provided upon a showing that it would produce 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)). In contrast, *Ayestas* explained that to qualify for funding under 18 U.S.C. § 3599, the requestor need only show that the funds are "reasonably necessary." 138 S.Ct. at 1092 (citing 18 U.S.C. § 3599(f)). Put another way, funds for an expert must be provided under § 3599(f) if "a reasonable attorney would regard the services as sufficiently important." *Id.* at 1093. That is not a high burden. This standard does not require a showing that the expert is "reasonably essential," nor does it require a showing of a "substantial need." *Id.* If neither of those interpretations are proper, then certainly *Ake*'s demand that the evidence be "critical" cannot appropriate for 18 U.S.C. 3599(f). It defies logic for a standard to demand that something be at once both critical and still just merely reasonably necessary. The Fifth Circuit contradicts *Ayestas* when it concludes that review of Mr. Snarr's funding claim under the *Ake* standard is what § 3599 requires.

The *Ayestas* decision certainly gave the Fifth Circuit no basis to conflate the *Ake* standard with that the standard approved for § 3599. In fact, there is no mention of *Ake* at all in the *Ayestas* decision itself. If the *Ake* standard were relevant, or even comparable, it would have been mentioned in the Court's decision. But the *Ake* decision did not even get a passing reference.

Similarly, *Ake* itself gives the Fifth Circuit no reason to ignore *Ayestas*. When this Court decided *Ake* in 1985, the Criminal Justice Act was almost two decades old. In fact, *Ake* cites the Criminal Justice Act, as well as a number of similar state statutes, to point out that providing funds for experts would not effect a sea change in criminal proceedings, as indigent defendants had already been receiving such funds before the Supreme Court said that due process required it in some situations. *See Ake v. Oklahoma*, 470 U.S. 68, 79–80 & n.4. But while the Criminal Justice Act is mentioned to justify the result, *Ake* does not identify the Criminal Justice Act as establishing what due process requires. Given that 18 U.S.C. 3599 was adapted from 18 U.S.C. § 3006A of the Criminal Justice Act *after* the decision in *Ake*, it follows that the standard under § 3599 would similarly be distinct.

This Court said in *Ayestas* that the Fifth Circuit set too high of a bar for funding under § 3599. Rather than accept that ruling, it has decided that its previous decisions under the incorrect standard are correct. The integrity of this Court's decisions demand that certiorari be granted.

II. If the Fifth Circuit's misinterpretation and misapplication of *Ayestas* is not corrected, it threatens the integrity of other capital cases.

If the Fifth Circuit error could be cabined to the present case, its defiance of precedent would still present much cause for alarm. But it cannot. The appellate court's use of the wrong standard is in no way fact-bound. At very least, it threatens

the integrity of the numerous death penalty cases that are working their way through the Fifth Circuit.

Of course, 18 U.S.C. § 3599 provides a source of funds for those facing the federal death penalty. But the same statute also allows state prisoners who are challenging their death sentences to receive funding for experts and investigators. With that in mind, it must be noted that the Fifth Circuit encompasses some of the most active death penalty states—Texas, Louisiana, and Mississippi. Recent statistics show that they rank third, tenth, and fifteenth in the number of prisoners on death row. *See* NAACP Legal Defense Fund, "Death Row USA" (July 1, 2018), available at: https://www.naacpldf.org/wp-content/uploads/DRUSASummer2018.pdf. Even those rankings understate the relative amount of death penalty litigation that occurs within the circuit. For example, in the years 2017 and 2018, Texas has so far executed a total of 20 people—seven in 2017 and thirteen in 2018. By comparison, the state that has executed the next highest number of people is Alabama, and its combined total for those years is only five—three in 2017 and two in 2018.

If the Fifth Circuit is not corrected, there is a serious threat that the trouble that occurred in Mr. Snarr's case will occur in other cases. And in light of both the number of death penalty cases that are handled in the circuit, the error has more room to spread than it would in many other circuits. This weighs heavily in favor of granting certiorari.

III. There is a split among the appellate courts on how *Ake* relates to statutory funding decisions that this Court must resolve.

While Mr. Snarr's claim involves 18 U.S.C. § 3599(f), that statute uses the nearly the same language as 18 U.S.C. 3006A(e)(1). And while 18 U.S.C. § 3599(f) gives courts authority to provide funds in death penalty cases when those funds are "reasonably necessary," 18 U.S.C. 3006A(e)(1) provides similar authority in non-death penalty cases when the funds are "necessary." Given the near identical language and the fact that § 3599 was derived from § 3006A, there is no reason to expect those statutes to be interpreted differently. *See, e.g.*, *Northcross v. Bd. of Ed. of Memphis City Schools*, 412 U.S. 427, 428 (1973) ("The similarity of language in [two separate statutes] is, of course, a strong indication that the two statutes should be interpreted pari passu."); also *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears.").

Because the two phrases should have the same meaning, confusion concerning one of the phrases indicates confusion concerning the other. So, to the extent that the courts of appeals interpret § 3006A(e)(1) differently, it reveals confusion regarding the proper interpretation of § 3599.

And the reality is that the courts of appeals are inconsistent on how *Ake* relates to funding decisions under § 3006A. Sometimes the courts of appeals seem to recognize a clear distinction between the minimum that *Ake* demands under the due process clause and what § 3006A(e)(1) offers indigent defendants. *See, e.g. United*

States v. Roman, 121 F.3d 136, 143–44 (3d Cir. 1997); *United States v. Kennedy*, 64 F.3d 1465, 1473 (10th Cir. 1995); *United States v. Fazzini*, 871 F.2d 635, 637 (7th Cir. 1989)

More frequently, though, courts treat § 3006A as if merely provided statutory authorization for courts to comply with the *Ake* decision. *See, e.g.*, *United States v. Thornberg*, 676 F.3d 703, 706–07 (8th Cir. 2012); *U.S. v. Bah*, 574 F.3d 106, 118–19 (2d Cir. 2009); *United States v. Chase*, 499 F.3d 1061, 1066–67 (9th Cir. 2007); *United States v. Hoffman*, 612 Fed. Appx. 162, 168 (4th Cir. 2015) (unpublished), *as amended* (June 2, 2015); *United States v. Rendelman*, 495 Fed. Appx. 727, 730–31 (7th Cir. 2012) (unpublished); *United States v. Fuenmayor-Arevalo*, 490 Fed. Appx. 217, 226 (11th Cir. 2012) (unpublished); *United States v. Parker*, 288 Fed. Appx. 94, 95 (4th Cir. 2008) (unpublished).

The extent of this confusion provides further reason to grant certiorari in this case. While the Fifth Circuit's error with regard to § 3599 threatens to infuse error in capital cases, the confusions with regard to § 3006A threatens to infuse error in any criminal case in which a defendant cannot afford resources reasonably necessary to his defense. The sooner the misunderstanding is corrected, the better.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted: December 20, 2018

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AFFIDAVIT OF SERVICE

Nathan A. Phelps, Research and Writing Attorney for the District of Utah, hereby attests that pursuant to Supreme Court Rule 29, the preceding Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit and the accompanying Motion for Leave to Proceed *In Forma Pauperis* were served on counsel for the Respondent by enclosing a copy of these documents in an envelope, first-class postage prepaid or by delivery to a third party commercial carrier for delivery within 3 calendar days, and addressed to:

Noel Franscisco
Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Ave, N.W.
Washington, D.C. 20530-001

It is further attested that the envelope was deposited with the United States Postal Service on December 20, 2018 and all parties required to be served have been served.

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Clerk of Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

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