No. 18-7482

IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, *Plaintiff-Respondent,*

v.

EDGAR BALTAZAR GARCIA, *Defendant-Petitioner.*

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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SUMMARY OF REPLY

The government has conflated the quite distinct petitions of Mr. Garcia and his co-defendant, Mr. Snarr. Perhaps as a result, the government has misunderstood the question presented by Mr. Garcia, which does not seek plenary review of the circuit court's discretionary decision but instead presents a very specific question of statutory interpretation.

The chief judge's orders in this case unquestionably represent global caps on expenditure in violation of the statute. Since Mr. Garcia's petition was filed it has emerged that the circuit court has continued to endorse the use of global funding caps in capital cases. At the same time, the government argues that global funding caps, of the type imposed upon Mr. Garcia, are proper under the statute.

The Fifth Circuit applies a judicially created system of global budget caps that falls short of the intention and guarantee of congress that indigent defendants will be granted funds to provide fair compensation for those services established to be reasonably necessary for the representation of the defendant in a capital case.

An important federal question is presented, is squarely contested and should be resolved in this case.

REASONS FOR GRANTING THE PETITION

I. The government has inaccurately recast the question presented: petitioner presents a question of interpretation of a federal statute for consideration

The government has inaccurately recast the question presented as merely whether the Fifth Circuit Court of Appeal abused its discretion in denying a motion

to recall the mandate.[1] This effort misunderstands both the Fifth Circuit's holding and Mr. Garcia's petition for certiorari.

At trial, Mr. Garcia's defense was curtailed by an arbitrary funding cap that served to deny Mr. Garcia adequate funds for expert services that were found to be reasonably necessary under 18 U.S.C. §3599.[2]

On appeal, the circuit court declined to review the claim of error under the statute, believing such claims to be unreviewable.[3] Instead the circuit court reviewed the funding order to determine whether Mr. Garcia had proven that it had led to such a fundamentally unfair trial as to violate Due Process.[4] The circuit court found that the chief judge had not abused her discretion in entering her funding order and that Mr. Garcia had not proven sufficient prejudice.[5]

In *Ayestas*, this Court rejected Fifth Circuit caselaw to the effect that funding decisions under §3599 are unreviewable administrative decisions. This Court instructed that §3599 funding decisions are judicial decisions requiring the application of the legal standard articulated in the statute.[6]

This holding in *Ayestas* renders untenable any argument that a federal court may globally cap funding at an amount less than that required by the statutory standard itself. While such a discretion may exist in an administrative budgeting

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[1] *Brief in Opposition*, (I).

[2] *Petition*, 7-13.

[3] *Petition*, 13-14.

[4] *United States v. Snarr*, 704 F.3d 368, 404 & 406 (5th Cir. 2013); App. B. at 37, 38.

[5] *Snarr*, 704 F.3d at 406; App. B at 38

[6] *Ayestas v. Davis*, 138 S. Ct. 1080, 1090 (2018)

context, no such discretion exists in the statute. Instead, §3599 establishes a regime for judicial determination of the entitlement to funding for services based upon a statutorily defined legal standard.

Notwithstanding this tectonic shift in the Fifth Circuit's construction of §3599, the circuit court denied the motion to recall the mandate on the express holding that *Ayestas* "in no regard" rendered the circuit court's prior decision affirming the global funding cap order demonstrably wrong.[7]

The circuit court denied relief based upon a disputed interpretation of §3599 and the question presented asks this Court to answer the important federal question of whether global funding caps are permissible and then reverse and remand so that the correct legal standard can be applied to Mr. Garcia's motion to recall the mandate. The question presented does not seek plenary review of the circuit court's discretionary decision whether to grant the motion to recall the mandate.

II. The government confirms that an important federal question needs to be settled by this Court, arguing that arbitrary, global funding caps are authorized under §3599

The government affirmatively argues that under §3599(f), courts retain discretion to impose a global cap to limit the total amount of funding available at an amount below that found reasonably necessary[8] for each service provider.[9]

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[7] Appendix A, A-2.

[8] The phrase "reasonably necessary" is used in §3599(f) to describe the standard by which the authorization of services is to be determined. Payment for those reasonably necessary services shall then be ordered in the amount "necessary" to provide fair compensation for services of an unusual character or duration. §3599(g)(2).

[9] *Brief in Opposition* 22-23 ("courts retain discretion to limit the total amount of funds for investigative and expert service")

The government has confirmed that there is an important question of federal law to be resolved: whether global funding caps below the amounts found to be reasonably necessary are authorized under the statute.

III. The Fifth Circuit continues to apply its erroneous understanding of §3599 to authorize global funding caps

In his petition, Mr. Garcia made the point that the Fifth Circuit's endorsement of funding caps represented an ongoing jurisprudential error that would continue to be repeated if not addressed by this Court.[10] That prediction has proven to be correct.

In most cases applying §3599, funding motions and orders are sealed. However, a recent capital case in which the funding requests and orders were not sealed demonstrates that the Fifth Circuit continues to apply §3599 to permit the imposition of arbitrary budget caps.

On October 12, 2018, Terry Pritchford, a death sentenced Mississippi inmate pursuing federal habeas relief sought §3599 funding for a fact investigator, a mitigation investigator and a psychologist. The district court denied funding for a mitigation specialist and approved as reasonably necessary the services of a fact investigator and psychologist but held that only a portion of the requested $12,750 and $10,800 plus expenses should be approved.

Without specifying how much was certified as necessary for each service provider, the court ordered "a total of $15,000 for these services, subject to final approval from the chief judge of the United States Court of Appeals for the Fifth

[10] *Petition*, 27-28.

Circuit." *Pitchford v. Hall*, 18-cv-02 (N.D. Miss. Nov. 26, 2018); U.S. Dist. LEXIS 202959.

The chief judge subsequently approved this order, which set a global cap on spending for reasonably necessary services below the amount requested.[11]

Subsequently, Mr. Pitchford sought authorization for a further $6,500 plus expenses for a forensic science expert.[12] On March 13, 2019, the request for additional funding was denied by the district court, *inter alia* because the purpose for the request was too attenuated from the statute.[13] Recognizing the primacy of funding caps in the Fifth Circuit, on March 18, 2019, Mr. Pitchford moved to reallocate funds from his existing expert approvals to be spent on the requested forensic scientist. *Id.* at Doc #67. Three days later the district court authorized the use of the forensic crime specialist and ordered defense counsel to use discretion in allocating time and expenses from the previous budget cap of $15,000 for the services.[14]

Mr. Garcia's petition addresses an important federal question of statutory interpretation that the Fifth Circuit has answered by approving arbitrary global caps on reasonably necessary services.

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[11] *Pitchford v. Hall*, 18-cv-02 (N.D. Miss. Mar 13, 2019); Doc #66 ("As an initial matter, the Court notes that it has already granted, and the Fifth Circuit has approved, funding in the amount of $15,000 for Pitchford to secure investigative and psychological services in this case.")

[12] *Pitchford v. Hall*, 18-cv-02 (N.D. Miss. Nov. 26, 2018), Doc #64 & 65.

[13] *Pitchford v. Hall*, 18-cv-02 (N.D. Miss. Mar 13, 2019); Doc #66

[14] *Pitchford v. Hall*, 18-cv-02 (N.D. Miss. Mar 21, 2019); Doc #68.

This Court should answer this important federal question by reaffirming that §3599 requires courts to resolve a justiciable, rather than bureaucratic, issue and to do so by applying the statutorily expressed legal standard to each application for services.

IV. The government's efforts to suggest the question presented is not properly raised in this proceeding are unavailing

a. Contrary to the government's position, the chief judge's order is clearly a global funding cap and the question before this Court is squarely presented

The government takes the position that the chief judge's order "did not purport to impose any kind of 'global cap' on the requested funds."[15] This is untenable.

The chief judge's first order, the "Partial Budget Order," expressly ordered that the approved budget for special investigative services was a combined $30,000 for investigators and mitigation experts and a combined $35,000 for a mental health expert, pathologist and psychologist.[16]

The chief judge's second order, the "Second Partial Budget Order," expressly ordered that an additional $20,000 be added to the previous budget for special investigative services that may be approved for CJA funding purposes and that the additional funds could be used for all approved experts, including those previously approved.[17] The chief judge's order stated that additional funds for the requested

[15] *Brief in Opposition* 23.

[16] Appendix C, A-40.

[17] Appendix D, A-42.

services would not be approved "absent a most compelling justification such as surprise."[18]

Subsequently, the chef judge advised the district court that she would not approve any additional funds in this case.[19]

The chief judge's orders cannot be construed as finding that the amount certified by the district court for any individual investigator or expert was inappropriate or unnecessary.[20] To the contrary, the orders permitted payment of the full amount certified as necessary to provide fair compensation by the district court to be paid to *each* individual service provider but capped total expenditure so that those reasonably necessary services could not actually be funded.

Thus, it is clear that the chief judge did not find as to any particular service provider that the amount requested by Mr. Garcia and certified by the district court was not necessary to provide fair compensation for services of an unusual character or duration. Indeed, any such conclusion would be wholly unsupported by the detailed factual record and the findings of the district judge. Rather, the chief judge selected an arbitrary figure as a cap for all spending for services and directed that defense counsel determine how the funds were to be expended.

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[18] Appendix D, A-43.

[19] On April 1, 2010 the district court denied requests for additional funds for a psychologist, mitigation specialist and investigator without passing on whether the services were reasonably necessary but simply as a function of being made aware that the chief judge would not approve any more funds in the case. Appendix D, A-44 to 46.

[20] *Cf. Brief in Opposition*, 24.

b. Mr. Garcia pressed and the circuit court passed on the propriety of the chief judge's orders setting the arbitrary funding caps

The government argues that Mr. Garcia has forfeited his attack on the chief judge's orders, even though Mr. Garcia pressed his attack below and the circuit court passed on the issue by expressly finding that the chief judge's orders were not an abuse of discretion, even in light of *Ayestas*.[21]

As previously described, Mr. Garcia argued on direct appeal that the chief judge had abused her discretion under the statute and committed clear error by reversing the holdings of the district court as to the approval of the experts and amounts to be approved.[22] Mr. Garcia specifically complained that the effect of the chief judge's order slashing the total amount of funding available was to deny him the use of a neurological expert, an expert in institutional psychology and the cultural expert.[23]

In his motion to recall the mandate, Mr. Garcia described the course of the funding orders, explicitly described the chief judge's order as "capping the defense funding," described the subsequent inability to obtain the reasonably necessary services due to the funding cap and argued that *Ayestas* showed the earlier decision to be demonstrably wrong.[24]

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[21] *Brief in Opposition,* 22.

[22] *Petition,* 13-14.

[23] *Original Brief*, 232 et. seq.

[24] *Motion to Recall the Mandate*, 1-5 & 8-10.

The circuit court expressly held that the chief judge's order was not an abuse of discretion and that *Ayestas* in no way rendered its earlier decision demonstrably wrong.[25]

This is not a case where a grant of certiorari is precluded because the "the question presented was not pressed or passed upon below."[26]

c. Mr. Garcia is clearly able to show prejudice from the circuit court's error

The government repeats, without correction, the circuit court's error in limiting Mr. Garcia's motion below to a complaint about the failure to fund a "prison expert" and argues that Mr. Garcia has failed to show prejudice.[27] This is demonstrably wrong – not only was the failure to adequately fund the prison expert not the sole complaint brought by Mr Garcia, it was not even the primary complaint. Instead, it was Mr. Snarr's sole complaint.

The most pithily expressed, but certainly not the only, prejudice suffered by Mr. Garcia as a result of the failure to provide funds for reasonably necessary services was the absence of neuropsychological testing prior to trial.

When funding was capped, previously approved neuropsychological testing was cancelled. Post-trial testing has now established that Mr. Garcia has suffered throughout his life from significant brain damage, probably as a result of childhood lead poisoning. The jury that sentenced Mr, Garcia to die was unaware of this critical

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[25] Appendix A, A-2.

[26] *United States v. Williams*, 504 U.S. 36, 41 (1992).

[27] *Brief in Opposition,* 20-21; *cf. Petition,* 14-15.

fact as a direct result of the global funding cap imposed by the chief judge in violation of Mr. Garcia's rights under §3599(f) and (g).

V. The government's effort to argue the merits of motion to recall the mandate is misplaced

The government leans heavily upon its claimed need for finality and misapplies this Court's decision in *Calderon*[28] to argue that the underlying motion to recall the mandate should never be granted.[29]

Petitioner does not dispute that the government has a legitimate interest in finality, nor that a motion to recall the mandate is an extraordinary remedy. However, the government misapplies *Calderon's* particular cautions about the use of a motion to recall the mandate in the context of federal review of a state conviction – a posture which calls for greater restraint. The government seeks to argue the motion to recall the mandate out of existence but this is simply not, nor should it be, the law.

This is a federal death penalty case where, if Mr. Garcia's argument is correct, he was denied his entitlement to funds for his defense as guaranteed by congress and was subjected to an unfair trial, the accuracy of whose result is directly called into question.

Further, this is not a last minute application for review. Mr. Garcia's case remains in the early stages of federal habeas review pursuant to 28 U.S.C. §2255 with many constitutional claims timely filed and awaiting full development and review.

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[28] *Calderon v. Thompson*, 523 U.S. 538 (1998).

[29] *Brief in Opposition,* 16-19.

Concurrent reconsideration of an erroneous ruling from the direct appeal cannot be said to meaningfully interfere with the government's interest in finality and its ability to carry out the death sentence it procured at trial.

On the other hand, because the death penalty is unique in both its severity and finality, the Constitution imposes an acute need for reliability in capital sentencing proceedings.[30] The Constitution requires that a death sentence be policed by the courts at all stages with an especially vigilant concern for procedural fairness and for the accuracy of factfinding.[31] In a federal death penalty case, as opposed to habeas review of a state court conviction, this requirement is undiluted by considerations of comity and federalism.

CONCLUSION

It is respectfully submitted that this Court should grant certiorari to consider whether, under 18 U.S.C. §3599, a global cap may be imposed on investigative and expert fees and expenses in a capital case in an amount below that found to be reasonably necessary for each individual investigator and expert.

Respectfully submitted,

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Dated: August 26, 2019

[30] *Monge v. California*, 524 U.S. 721, 732 (1998).

[31] *Id.*