No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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THIS IS A CAPITAL CASE

QUESTION PRESENTED

Whether, pursuant to 18 U.S.C. § 3599(f) and (g)(2), 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?

LIST OF PARTIES

The parties to the proceeding in the Fifth Circuit Court of Appeals were:

- United States of America, Plaintiff-Appellee
- Edgar Baltazar Garcia, Defendant-Appellant
- Mark Isaac Snarr, Defendant-Appellant

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PETITION FOR WRIT OF CERTIORARI

Petitioner Edgar Garcia respectfully requests that the Court grant a writ of certiorari to review the decision of the Fifth Circuit Court of Appeals denying his motion to recall the mandate from its denial of his direct appeal.

The petitioner is the defendant and defendant-appellant in the courts below. The respondent is the United States of America, the plaintiff and plaintiff-appellee in the courts below.

OPINIONS BELOW

The order of the Fifth Circuit Court of Appeals denying Mr. Garcia's motion to recall the mandate is at *United States v. Snarr & Garcia*, 10-40525 (5th Cir. 2018), and is reprinted in the Appendix. App. A.

The opinion of the Fifth Circuit Court of Appeals denying Mr. Garcia's direct appeal is at *United States v. Snarr & Garcia*, 704 F.3d 368 (5th Cir. 2013), and is reprinted in the Appendix. App. B. Consideration of the funding question presented in this petition begins at 704 F.3d at 402. App. B at 35.

JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Fifth Circuit Court of Appeals on the basis of 28 U.S.C. § 1254. The Court of Appeals denied Petitioner's motion to recall the mandate on July 25, 2018. On October 17, 2018, this Court granted Mr. Garcia's application and extended the

date for filing this petition to December 21, 2018. *Garcia v. United States*, 18A402. This petition follows timely pursuant to Supreme Court Rule 13.1.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The question presented implicates the following provision of the United States Code:

18 U.S.C. § 3599

(a)(1) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either—

(A) before judgment; or

(B) after the entry of a judgment imposing a sentence of death but before the execution of that judgment;

shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

* * * *

(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

A. Summary of the case presented

Congress has created an entitlement to funding for all investigative, expert, or other services found to be reasonably necessary under § 3599(f). 18 U.S.C. § 3599(a), (f); *Ayestas v. Davis*, 138 S. Ct. 1080, 1085 (2018) ("18 U. S. C. §3599(f), which makes funds available if they are "reasonably necessary"). Only services that are shown to be reasonably necessary are to be funded, but once such a showing of need is made,

the funding for the services is based upon what is reasonably necessary, rather than an arbitrary funding cap.

Prior to *Ayestas*, the Fifth Circuit treated funding decisions under § 3599(f) and (g)(2) as unreviewable budgeting decisions, rather than the resolution of questions of individual rights to funding under the statute. *United States v. Snarr*, 704 F.3d 368, 403-04 (5th Cir. 2013); App. B at 35-36; *see also In re Marcum L.L.P.*, 670 F.3d 636 (5th Cir. 2012). As a result, the Fifth Circuit adopted and endorsed the implementation of arbitrary caps on funding for investigative, expert, and other services at levels far below those found to be reasonably necessary. *Snarr*, 704 F.3d at 404-06; App. B at 36-38.

In Mr. Garcia's case, the district court found that the services of particular investigators and experts were reasonably necessary and determined the reasonably necessary levels of funding for each. With one exception, the Chief Judge did not disturb the finding that those services were reasonably necessary, nor did the Chief Judge find that any of the individual amounts found to be reasonably necessary by the district court were excessive. Instead, the Chief Judge arbitrarily capped total expenditure at an amount far below that found to be reasonably necessary, forcing defense counsel to decide which of the reasonably necessary services would be obtained and which foregone.

On appeal, the Fifth Circuit treated the Chief Judge's order under the statute as unreviewable but, considering the issue through the lens of due process, found no abuse of discretion and that Mr. Garcia had failed to "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*, 704 F.3d at 405; App. B at 37.

This Court's decision in *Ayestas* made clear that § 3599 creates an entitlement to funding in cases where, in the exercise of a broad discretion under § 3599(f), the district court finds the services to be reasonably necessary. *Ayestas*, 138 S. Ct. at 1090. *Ayestas* rejected the Fifth Circuit's caselaw holding that funding decisions are unreviewable and made clear that they are judicial decisions involving the determination of individual rights by the application of the statutory legal standard. *Id.* at 1089-92.

In the wake of *Ayestas*, Mr. Garcia sought to have the circuit court recall the mandate and reconsider his now clearly meritorious appellate claim.[1]

The panel, including the circuit's current Chief Judge and its next Chief Judge, rejected this motion on the basis that, notwithstanding *Ayestas*, its earlier decision in Mr. Garcia's case remained correct and there was no abuse of discretion in imposing an arbitrary funding cap under § 3599 despite the findings of reasonable necessity.

The circuit court's holding on the proper application of 18 U.S.C. § 3599(a), (f), and (g)(2) is clearly wrong, inconsistent with *Ayestas*, and should be immediately reversed.

[1] Edgar Garcia's Motion to Recall the Mandate and for Leave to File Out-of-Time Petition for Rehearing or Out-of-Time Reconsideration in Light of *Ayestas v. Davis* ("Motion to Recall the Mandate").

B. At trial level, a global cap on investigative and expert fees and expenses was imposed in an amount below that found to be reasonably necessary for each individual investigator and expert

Mr. Garcia and Mark Snarr were indicted, tried, convicted, and sentenced to death on a one-count indictment alleging the murder of Gabriel Rhone. The attack, captured on video, occurred in the Secure Housing Unit of U.S.P. Beaumont. The indictments were returned on January 21, 2009 and the trial proceeded in May 2010.

On March 9, 2009 the district court ordered that a proposed defense budget be submitted. Sealed Doc. 47.

Trial counsel submitted a detailed proposed budget for the pre-discovery period seeking authorization for $196,500 for investigative and expert services. Sealed Doc. 50. The submission was fourteen pages long, included a description of the known circumstances, the need for each investigator or expert, and was supported by the affidavit of a psychologist with relevant cultural expertise. *Id.* Notably, counsel sought $45,000 for mental health experts, broken down as $15,000 each for a psychiatrist, a psychologist, and an organic brain disorder specialist.

On April 27, 2009 the district court certified in part the defense preliminary case budget, at a total of $187,500 for investigative and expert services. Sealed Doc. 54. The budget categories were made up as follows, with reductions from requested amounts in parentheticals:

Blood Spatter Expert/ Crime Scene Expert	$10,000
Criminologists	$10,000
Cultural Expert (down from $19,000)	$15,000
DNA Analysis and Expert	$7,500
Investigators	$25,000
Mental Health Experts	$45,000
Mitigation Expert	$25,000
Pathologist (down from $10,000)	$5,000
Prison Experts	$25,000
Expenses	$5,000
Travel Costs	$15,000
TOTAL	$187,500

Id.; *Snarr*, 704 F.3d at 403; App. B at 39.

On April 28, 2009 the district court entered orders appointing Mr. Garcia's named cultural expert and prison expert (a psychologist with expertise in the prison environment and its effect on mental health) and authorizing payments consistent with the approved budget. Sealed Docs. 55, 56.

On September 9, 2009 the then-Chief Judge, Chief Judge Jones, refused to approve the expenditures ordered by the district court and slashed the defense budget for investigative and expert services by 65%. App. C. On September 10, 2009 Judge

Crone countersigned the Chief Judge's order and the order was filed on September 11, 2009. *Id.*

The order reduced the previously approved budget for investigative and expert services by $122,500, ordering "that the following budget for special investigative services be approved for CJA funding purposes":

Investigators and Mitigation Experts	$30,000
Mental Health Expert, Pathologist, and Psychologist	$35,000
TOTAL	$65,000

Id.; *Snarr*, 704 F.3d at 403; App. B at 39.

The order expressly declined to budget any funds for a cultural expert, tattoo expert, sociologist, criminologist, or prison expert at that time, granting leave to reapply upon a showing of what had been accomplished with the initial funding and what remained to be done. App. C.

The district court vacated its previous order approving the proposed budget and vacated its order appointing the cultural expert and prison expert. Sealed Docs. 59, 66.

Mr. Garcia moved to reconsider the denial of funding and on October 30, 2009 the district court conducted an extensive evidentiary hearing on the reasonable necessity for the requested funding. *Snarr*, 704 F.3d at 403; App. B at 36. At that hearing Mr. Garcia "presented various witnesses who testified as to the necessity for Garcia to retain prison, cultural, and neurological experts. A contractor with the

Federal Death Penalty Resource Council also testified that Garcia's proposed budget was reasonable." *Id.*

Of particular note, in the wake of the reduced budget, counsel had retained Dr. Jolie Brams, a psychologist, as a mitigation specialist.[2] In addition to the other expert witnesses at the hearing, Dr. Brams testified to the need for a mental health expert with specific expertise in prisons and prison adaptation as well as a cultural expert with appropriate experience to address Mr. Garcia's atypical cross-cultural history and the significance of his developmental period spent in a cartel family. Dr. Brams specifically testified that both of these areas were outside the scope of her experience and expertise. Dr. Brams reserved her strongest opinion for the need for an expert to conduct a neurological assessment due to both a history and clinical impression of neurological deficits, once again an area beyond her expertise.

Upon Mr. Garcia's motion to reconsider, the district court found as to each particular investigator or expert that the services and amount of funding sought were reasonably necessary. Sealed Doc. 91. The district court submitted to the Chief Judge a nine-page memorandum dated November 24, 2009, requesting advance authorization of these funds, detailing the necessary services, why they were required, and as to each, the district court's specific findings that the requested

[2] At the hearing, counsel specifically identified Dr. Brams as a mitigation specialist and not a mental health expert. Sealed Doc. 75 at 64-66. In response to inquiry from the district court, counsel referenced the district court's April 27 funding order, Sealed Doc. 53, and confirmed that Dr. Brams was being billed as a mitigation specialist under the line items of that budget. Sealed Doc. 75 at 64-66. *See also* American Bar Association (ABA) Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 4.1(2) ("The defense team should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.").

services were "reasonable and necessary to Mr. Garcia's defense." Memorandum Judge Crone to Chief Judge Jones at 2-8. The district court also explicitly certified "that the estimated expenses appear necessary to provide fair compensation for services of an unusual character or duration and are required for an adequate defense in this capital case." *Id.* at 9.

The funds certified by the district court were as follows:

Criminologist/ Prison Culture Expert and Prison Administration Expert[3]	$35,000
Cultural Mitigation Expert	$15,000
Mental Health Neurological Expert	$15,000
TOTAL	$65,000

The district court's order specifically stated that it was only preliminary approval and that the funds were subject to approval by the Fifth Circuit. The deadline for defense disclosure of intent to rely upon mental health evidence and for disclosure of expert witnesses passed without any defense filing and the motion to continue the trial due to the paralysis caused by the lack of funding was denied.

On December 18, 2009 the Chief Judge entered a Second Partial Budget Order reducing the funding approved by the district court from $65,000 to $20,000. App. D.

[3] A distinction should be drawn between the two types of prison expert discussed in this case. They are: prison culture expert, being a mental health expert with training and experience in the psychological environment of prison as well as the aversive psychological effects of isolation and secure housing environments; and prison administration expert, being someone with expertise in the proper procedure for maintaining high risk inmates, the institutional failures in this regard at Beaumont, and the ability to safely house the defendant in the future.

This order was not countersigned by the district court judge but operated as the Chief Judge's order alone.

By this second order, Mr. Garcia "was granted approval for an additional $20,000 for experts and other services. Garcia was denied funds for a 'Mexican cultural expert,' however, based on the chief judge's ruling that 'it would be inappropriate for testimony to be adduced by either party characterizing the defendant according to his national origin.'" *Snarr*, 704 F.3d at 403; App. B at 36. The order provided that the additional $20,000 could be used for any of the service providers previously approved or described in Mr. Garcia's motion for reconsideration except the Mexican cultural expert. The order provided that defense counsel would determine how the funds were to be expended, subject to their use being reasonable and necessary.

The order barred expenditures in excess of the pre-approved cap and barred defense counsel from re-urging funding "without a most compelling justification such as surprise." *Id.*

A review of the text of the order and its effect makes clear that this was an order in the form of a budgetary cap on the total expenditures for investigative and other expenses that served to cap total expenditure at an amount far below that found to be reasonably necessary and without purporting to disturb the finding of reasonable necessity (except as to the Mexican cultural expert).

In the wake of the Chief Judge's order, no further services were provided by the prison culture expert or the Mexican cultural expert and no neurological assessment was conducted.

On March 29, 2010 defense counsel moved in three separate applications for additional funding for Dr. Brams, mitigation specialist Mary Burdette, and investigator J.J. Gradoni totaling $37,125. On April 1, 2010 the district court denied the requests upon learning that the Chief Judge would not approve any additional funds in this case. App. E. The nature of the order and its express language make clear that the budget was based in an arbitrary cap imposed under the authority of the Chief Judge, not the statutory standard of reasonable necessity.

C. On direct appeal the Fifth Circuit held that the funding decisions were unreviewable decisions and that review was confined to whether the trial had been rendered fundamentally unfair

On direct appeal, Mr. Garcia raised the denial of adequate funding based upon the erroneous reversal by the Chief Judge of the district court's funding orders, which resulted in a denial of due process. Original Brief, Claim XIX. Mr. Garcia argued: an abuse of discretion under the statutory standard; that the Chief Judge's rejection of the funding approved by the district court was error and denied Mr. Garcia a fair trial, and that it was error to deny funds that were necessary to the defense. Original Brief at 215, 232; Reply Brief at 55-57. The government argued in its brief that the Chief Judge's decision was unreviewable. Brief in Opposition at 167-68.

While Mr. Garcia's appeal was pending, the Fifth Circuit announced its decision in *In re Marcum L.L.P.*, 670 F.3d 636, holding that the Chief Judge's orders under 18 U.S.C. § 3006A(e)(3) were unreviewable.[4]

At oral argument, the court's jurisdiction to consider the funding claim was extensively debated, the government urging that *Marcum* foreclosed any relief.[5] Addressing the merits, the government conceded that if it had been involved in the funding process, it would not have opposed Mr. Garcia's applications for funding.[6]

Believing itself without jurisdiction to consider Mr. Garcia's claim that the Chief Judge abused her discretion under the statute, the Fifth Circuit held that it could nevertheless consider whether Mr. Garcia had been tried in violation of due process and grant relief if he established "a reasonable probability that the requested experts would have been of assistance and that their absence resulted in a fundamentally unfair trial." *Snarr*, 704 F.3d at 404, 406; App. B. at 37, 38.

The court denied relief, holding that there had been no abuse of discretion in the funding orders. *Snarr*, 704 F.3d at 406; App. B at 38; *see also* App. A at 2. The court held that Mr. Garcia was not denied the right to present testimony from any particular expert, as the "court ultimately authorized Garcia $85,000 for experts and investigators, and largely permitted Garcia to distribute those funds as he saw fit."

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[4] In *Marcum*, the expert firm itself directly appealed the Chief Judge's order drastically limiting payment and the Fifth Circuit held that the order, issued under § 3006A(e)(3), was unreviewable, *inter alia*, citing cases holding that the Chief Judge's decision is an administrative one. *See also Marcum LLP v. United States*, 753 F.3d 1380 (Fed Cir. 2014) (describing procedural history in more detail).

[5] Oral Argument at about time stamp 28:20, *available at* http://www.ca5.uscourts.gov/oral-argument-information/oral-argument-recordings.

[6] *Id.* at about time stamp 36:30, *available at* http://www.ca5.uscourts.gov/oral-argument-information/oral-argument-recordings.

Snarr, 704 F.3d at 405; App. B at 37. As to the cultural expert, prohibited by the order of the Chief Judge, the court held that this order did not prohibit Mr. Garcia from presenting mitigation evidence on related topics through other witnesses. *Snarr*, 704 F.3d at 405; App. B at 37.

The court went on to conclude that Mr. Garcia had "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*, 704 F.3d at 406; App. B at 38. Of course, in a direct appellate posture, no evidence was before the court of what could have been presented to the jury if the reasonably necessary funding had been made available.

D. Following this Court's decision in Ayestas*, the Fifth Circuit has affirmed that its decision in Mr. Garcia's case was correct and that the funding orders setting arbitrary budget caps were not an abuse of discretion*

Following *Ayestas*, Mr. Garcia moved for the Fifth Circuit to recall the mandate and reconsider his appellate claim regarding the denial of reasonably necessary funding for investigative and expert services – in particular, "investigators, a mitigation specialist, a pathologist, mental health experts, a prison expert and a criminologist." *Motion to Recall the Mandate* at 2.

Separately, Mr. Garcia's co-defendant, Mr. Snarr, also moved to recall the mandate based on *Ayestas*, but on a far more limited basis, focusing on the denial of funding to Mr. Garcia of a psychologist with expertise in prison adaptation and the psychological effects of the prison environment. Mr. Snarr argued, as he had on

appeal, that he also would have benefited before the jury from Mr. Garcia presenting such testimony.

The Fifth Circuit considered both motions jointly, conflating them, and in its *per curiam*, clearly erred in understanding Mr. Garcia's motion as limited to the funding of the prison expert. App. A at 2 ("Moreover, they now focus their argument solely on the alleged denial of funding for a prison expert.").

On November 9, 2017, the motion to recall the mandate was denied, with the court affirming its prior holding that there had been no abuse of discretion in the funding orders in Mr. Garcia's case and again holding that Mr. Garcia was not denied the opportunity to present a prison expert because he could have chosen to spend some of the available funds on that expert rather than the other services that had also been found to be reasonably necessary. *Id.*

REASONS FOR GRANTING THE PETITION

I. This Court should decide whether, pursuant to 18 U.S.C. § 3599(f) and (g)(2), 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

A. Congress has established a funding scheme for indigent capital defendants that aims to ensure that they receive funding for investigative, expert, or other services where those services are found to be reasonably necessary

The current legislative provision for funding ancillary services in capital cases was enacted in 1988 and created a distinct legislative scheme for funding in capital cases as opposed to other Criminal Justice Act cases. *Martel v. Clair*, 565 U.S. 648, 659 (2012).

The statute "grants federal capital defendants . . . enhanced rights of representation" in light of "the seriousness of the possible penalty" and "the unique and complex nature of the litigation." *Id.* One aspect of this is that § "3599 provides more money for investigative and expert services." *Id.*

In providing statutory rights to counsel and to necessary services, Congress declined to track the Fifth or Sixth Amendment; accordingly, the scope of those Amendments cannot answer the question of entitlement to funding under the statute. *See id.* at 662 ("In providing statutory rights to counsel, Congress declined to track the Sixth Amendment; accordingly, the scope of that Amendment cannot answer the statutory question presented here.").

By the terms of the statute, an indigent capital defendant is "entitled to . . . the furnishing of [investigative, expert, or other reasonably necessary services] in accordance with [§ 3599] (b) and (f)." 18 U.S.C. § 3599(a)(1)(B).

Under § 3599(f), a defendant in a federal capital trial proceeding may apply to the district judge for investigative, expert, or other services for use in connection with issues relating to guilt or the sentence. If, in the exercise of its "broad"[7] discretion, the district court determines that each requested service is "'reasonably necessary' for effective representation" then the court "shall order the payment of fees and

[7] In *Ayestas*, this Court noted that the substitution of the word "may" into § 3599(f) in 1996 served to make clear "that determining whether funding is 'reasonably necessary' is a decision as to which district courts enjoy broad discretion." *Ayestas*, 138 S. Ct. at 1094. While the Court accepted that the use of the word "may" could possibly, in narrow circumstances, authorize denial of funds found to be reasonably necessary (e.g., gamesmanship in the timing of the application, where the State has provided funding for the same services), none of those circumstances apply here and the Court necessarily rejected the idea that the word "may" granted plenary authority to reject funding for services otherwise found to be reasonably necessary. *Id.* at 1094, 1101.

expenses thereof." 18 U.S.C. § 3599(f); *Ayestas*, 138 S. Ct. at 1090, 1094. The determination whether services are reasonably necessary is made having regard to "whether a reasonable attorney would regard the services as sufficiently important." *Ayestas*, 138 S. Ct. at 1093. That decision is to be guided by considerations such as the potential merit of the theory that the defendant 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.

Pursuant to § 3599(g)(2), where the fees and expenses for investigative, expert, and other reasonably necessary services authorized under subsection (f) exceed $7500, two additional steps are required for payment:

- the payment in excess of $7500 must be certified by the district court as necessary to provide fair compensation for services of an unusual character or duration; and
- the *amount* of the *payment* in excess of $7500 must be approved by the chief judge of the circuit or the delegate of the chief judge.

Congress did not provide for the imposition of arbitrary spending caps in amounts below that found to be reasonably necessary under the statute. With the intent and text of the statute pointing in the direction of increased access to reasonably necessary services, it cannot be credibly suggested that Congress silently prescribed a funding method that would head the opposite direction. *See Martel v. Clair*, 565 U.S. at 659-60.

It is apparent then that the Congress of the most wealthy and powerful nation in the world has established a system of criminal justice wherein indigent capital defendants whom the government is seeking to execute will be provided with funding for investigative, expert, or other services where those services are found to be reasonably necessary to an effective defense. § 3599(a), (f), (g)(2); *Ayestas*, 138 S. Ct. at 1090, 1093.

This must be particularly true in the pretrial period, "perhaps the most critical period of the proceedings," during which "thoroughgoing investigation and preparation [are] vitally important." *Powell v. Alabama*, 287 U.S. 45, 57 (1932); *see also McFarland v. Scott*, 512 U.S. 849, 859 (1994) (a criminal trial "is the 'main event' at which a defendant's rights are to be determined.")

B. *Despite* Ayestas*, the Fifth Circuit has affirmed the use of funding caps under § 3599 in amounts far below those found to be reasonably necessary for an effective defense*

The funding orders entered in Mr. Garcia's case clearly set funding caps in amounts below those found to be reasonably necessary for each individual investigator and expert.

Whatever may be said about the jointly signed order of September 11, 2009, App. C, the Chief Judge's order of December 18, 2009, App. D, unequivocally set an arbitrary funding cap and unapologetically approached the exercise as one involving the setting of a maximum budget for investigative and expert services. Following that order, the district court refused to even consider the merits of applications for

additional funding, having become aware that the Chief Judge would not approve any additional funds in the case. App. E.

The Chief Judge did not expressly or impliedly disturb the finding that each of the services for which the district court authorized funding was reasonably necessary, with the exception of the cultural expert. However, when she arbitrarily capped the total combined expenditure, the Chief Judge made it impossible for Mr. Garcia to obtain all of those services.

Not only did the Chief Judge not impliedly disturb the finding of reasonable necessity as to each service provider,[8] the Chief Judge authorized expenditures up to the amounts certified by the district court as reasonably necessary and beyond. That is, the chief judge's order allowed defense counsel to use the additional $20,000 in the budget to fund services from already approved investigators or experts in excess of the amounts previously approved by the district court. However, total expenditure was arbitrarily capped so that all of the reasonably necessary services could not be afforded.

On appellate review, now affirmed in the reasons for denial of the motion to recall the mandate, the Fifth Circuit has held that an order of this sort, capping funding below the amount found reasonably necessary, is not an abuse of discretion.

Furthermore, the Fifth Circuit has reasoned that because the defendant was not barred from spending the limited funds on any particular necessary expert but

[8] With the exception of the cultural expert.

could choose which to fund and which to forego, he was not denied the right or opportunity to present any particular expert. *Snarr*, 704 F.3d at 405; App. B at 2.

The funding orders and appellate reasoning operate on a similar theory to the provision of lifeboats on the RMS Titanic. There were 2208 passengers and crew on the Titanic. The Titanic was provided with lifeboat space for only 1178 people. No rule was announced that any particular person could not get a seat in a lifeboat and the passengers and crew were at liberty to distribute the lifeboat seats as they saw fit. While technically it is true that no particular individual was denied a lifeboat seat as a result of the under-provision of lifeboats, the fact remains that there were fewer lifeboat seats than were reasonably necessary and more than 1500 of the passengers and crew died.

The statute is plain that Congress did not intend to create funding caps below the amount found to be reasonable necessary but, to the contrary, intended that indigent capital defendants be provided with the resources reasonably necessary to an effective defense.

C. *The Fifth Circuit's decision is contrary to the language of the statute and to this Court's decision in* Ayestas

This Court in *Ayestas* made clear that a funding decision under § 3599(f) and (g) "does not remotely resemble" an administrative decision but is clearly a judicial decision upon a motion filed in a judicial proceeding that "requires the application of a legal standard—whether the funding is "reasonably necessary" for effective representation." *Ayestas*, 138 S. Ct. at 1090.

Prior to *Ayestas*, the Fifth Circuit viewed § 3599 funding decisions as unreviewable and adopted a bureaucratic, rather than judicial approach to funding decisions. Instead of a judicial resolution of an individual's entitlement to funding for each particular service requested under the statutory test, the Fifth Circuit engaged in budget management, arbitrarily capping the costs of capital cases even where the reasonable necessity of the services was established. The recent decision in Mr. Garcia's case indicates that the circuit court continues to apply this rule despite this Court's guidance in *Ayestas*.[9]

The Fifth Circuit's rule is wholly inconsistent with the terms of the statute and this Court's holding in *Ayestas*. The Fifth Circuit rule is based on total budgeting for a case, rather than a judicial determination under the statutory test of entitlement *vel non* to funding for each of the services for which an application is made. This is contrary to the statutory scheme, which requires a judicial determination of eligibility for funding based upon the statutory test. 18 U.S.C. § 3599(f); *Ayestas*, 138 S. Ct. at 1090. The Fifth Circuit rule provides for funding in an amount that is known to be less than that required to meet the costs of the reasonably necessary services and forces a defendant to choose between necessary services, when he is entitled to each. This is contrary to the statute, which provides that a defendant is "entitled" to funding of services found to be reasonably necessary under § 3599(f). 18 U.S.C. § 3599(a)(1)(B); § 3599(f). The Fifth Circuit rule arbitrarily assigns a cap on funding

[9] In *Ayestas*, referring to the Fifth Circuit's caselaw permitting the use of spending caps, this Court stated: "The Fifth Circuit adopted this rule before our decision in *Trevino*, but after *Trevino*, the rule is too restrictive." 138 S. Ct. at 1093.

based not on the statutory standard of what is reasonably necessary but upon unstated and arbitrary budgetary considerations. This is contrary to the statute, which requires that funding eligibility be based upon the showing of reasonable necessity and not arbitrary spending caps. *Id.*; *Ayestas*, 138 S. Ct. at 1093.

As this Court stated in *Ayestas*, "What the statutory phrase calls for, we conclude, 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, guided by the considerations we set out more fully below." 138 S. Ct. at 1093.

Mr. Garcia articulated specific reasons why the services were warranted, amply demonstrating that the services related to plausible defense theories as to guilt or penalty and were well founded in existing investigation and thus not fishing expeditions. *Cf. id.* at 1094. The district court made explicit and detailed findings that Mr. Garcia's showing met the statutory standard and that funding should be authorized.

Mr. Garcia was entitled to the funding and the Fifth Circuit's rule capping that funding below the level that was reasonably necessary is clearly wrong.

D. *In affirming the use of arbitrary funding caps in capital cases, the Fifth Circuit has decided an important question of federal law that should be settled by this Court and has done so in a way that conflicts with this Court's decision in* Ayestas

The proper application of the federal statute providing for funding for indigent defendants facing the death penalty is self-evidently an important federal question. It gains increased importance in light of the constitutional requirement for heightened reliability in the determination that death is the appropriate punishment

in a specific case and the especially vigilant concern for procedural fairness in such cases.[10]

The importance of the federal question could not be made plainer than through Judge Learned Hand's oft-quoted declaration: "If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice." *Hardy v. United States*, 375 U.S. 277, 293-94 (1964) (Goldberg, J., concurring) (quoting Address before Legal Aid Society of New York, Feb. 16, 1951). The Fifth Circuit rule directly embraces the rationing of justice and does so without statutory direction or authority.

This important question should be settled by this Court. It is clear that the lack of guidance from this Court on the proper application of the statute has led to arbitrary and wildly fluctuating access to adequate funds for the representation of criminal defendants across the country. In 2015 this Court's Chief Justice established an ad hoc committee to evaluate the implementation of the Criminal Justice Act of 1964. The Committee has exhaustively studied the application of the Act across the country and published a 2017 report.[11] *2017 Report of the Ad Hoc*

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[10] *Monge v. California*, 524 U.S. 721, 732 (1998) (the Court has "recognized an acute need for reliability in capital sentencing proceedings"); *id.* (capital proceedings must be policed at all stages by an "especially vigilant concern for procedural fairness and for the accuracy of factfinding") (quoting *Strickland v. Washington*, 466 U.S. 668, 704 (1984) (Brennan, J., concurring in part and dissenting in part)); *Caldwell v. Mississippi*, 472 U.S. 320, 323, 341 (1985) ("the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case') (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion)).

[11] The Committee: conducted seven public hearings across the country; heard nearly 100 hours of testimony from 229 witnesses; received 224 written submissions totaling over 2300 pages; conducted additional closed door hearings; met with leaders of the Administrative Office, members of Judicial Conference Committees, and other relevant agencies; received written comments from district, circuit, and magistrate judges, the American Bar Association, the Federal Bar Association, the Association of American Law Schools, the National Legal Aid and Defender Association, and the National Conference of Women's Bar Associations; and reviewed hundreds of pages of relevant reports and studies. *Committee Report* at 2-3.

Committee to Review the Criminal Justice Act, https://cjastudy.fd.org/sites/default/files/public-resources/Ad%20Hoc%20Report%20June%202018.pdf ("Committee Report"). The Committee found disparate use of funding caps in capital cases across the country, most prevalently in the Fifth Circuit, and concluded:

> Caps in some circuits but not others ensure that defendants within a national federal system receive varying levels of resources and representation. This is anathema to any criminal justice system based on due process and equal protection under the law, especially since defendants' lives are at stake.

Id. at 198. The Committee went on to recommend the elimination of any formal or informal budgeting caps:

> Eliminate any formal or informal non-statutory budgetary caps on capital cases, whether in a death, direct appeal, or collateral appeal matter. All capital cases should be budgeted with the assistance of Case Budgeting Attorneys (CBAs) and/or resource counsel where appropriate.

Id., Interim Recommendation 26, at xxxiv.[12]

The 2010 Report to the Committee on Defender Services on the cost and quality of defense representation in federal death penalty cases identified massive disparities in funding of death cases in the 1998-2004 period depending upon geography. Jon Gould & Lisa Greenman, *Report to the Committee on Defender Services Judicial Conference of the United States Update on the Cost and Quality of Defense*

[12] The use of funding caps in capital cases has long been decried by the American Bar Association. "Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases." ABA Guidelines, Guideline 9.1(B)(1). The Guidelines go on to state that non-attorney members of the defense team should be "fully compensated" at a rate commensurate with the specialized nature of the work and the high standards required and, further, that they should be fully compensated for actual time and service at an appropriate hourly rate. Guidelines 9.1(C).

Representation in Federal Death Penalty Cases (Sept. 2010) http://www.uscourts.gov/sites/default/files/fdpc2010.pdf ("2010 Report"). Federal capital trials in Texas were the second lowest funded in the country and federal capital trials in the Fifth Circuit were easily the lowest funded in any circuit in the country. *Id.* at 50-53. In the 1998-2004 period, the mean funding for experts in federal capital cases in which death was authorized was $128,129 and was $158,895 for those that actually went to trial. *Id.* at 32. Funding for Mr. Garcia's 2010 trial was arbitrarily capped at about half (53%) of the average actual cost for investigation and experts in capital trial cases across the country in 1998-2004.[13]

In considering the importance of considering the funding rule applied by the Fifth Circuit, it is not simply a matter of ensuring consistency across the country. Federal death sentences from the Fifth Circuit account for one quarter of those on federal death row and so the circuit's rule for applying § 3599 has a significant impact in the real world.[14]

In short, the proper interpretation of § 3599 and the legitimacy of arbitrary funding caps in capital cases represents a critically important federal question that should be settled by this Court and as to which the Fifth Circuit has established a rule that conflicts with relevant decisions of this Court.

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[13] As the figures in the 2010 Report show, the costs of capital litigation have increased and so there is every reason to believe that the average cost was even higher by 2010.

[14] 15 of 62 prisoners on federal death row (24%) were sentenced to death in the Fifth Circuit. *See* Death Penalty Information Center, *List of Federal Death-Row Prisoners*, https://deathpenaltyinfo.org/federal-death-penalty#PrisonerList (last visited Dec. 21, 2018).

E. Mr. Garcia's case is a good vehicle for this Court to consider the question

Mr. Garcia's case presents a good vehicle for this Court to take up and address this important question.

A review of the precise language of the funding orders makes it clear that this case involves an unambiguous application of funding caps in levels below those found to be reasonably necessary under the statute. The Fifth Circuit has had an opportunity to address this question both before and after this Court's opinion in *Ayestas* and has concluded that the imposition of such funding caps are a legitimate and proper exercise of the court's authority under § 3599. The question is squarely presented.

Counsel is mindful of the fact that this case comes before the Court on review of a motion to recall the mandate. However, it is clear from the order denying that motion that the Fifth Circuit denied relief based upon an erroneous construction of § 3599, endorsing the use of funding caps. If this Court were to consider the question and conclude that § 3599 does not permit the capping of funds below the level reasonably necessary for an effective defense then the Fifth Circuit would have an opportunity to consider the motion to recall the mandate and exercise its discretion in light of the correct legal rule.

Importantly, Mr. Garcia's case is not a throwback to a bygone era, calling for correction of an error that will never be repeated in light of *Ayestas*. In Mr. Garcia's case, the Fifth Circuit has affirmed its holding subsequent to *Ayestas* and done so through a panel including the current Chief Judge of the circuit and the jurist next

in line to be Chief Judge of the circuit: the very judicial officers empowered to apply § 3599(g)(2) for the foreseeable future.

Finally, while this Court would not need to weigh this question were certiorari granted, Mr. Garcia was severely prejudiced by the funding rulings and will continue to suffer the potentially lethal effects of that prejudice. It is true that the Fifth Circuit held on direct appeal that Mr. Garcia had not established sufficient prejudice to require reversal under the constitutional standard, however, that finding was made without an opportunity for Mr. Garcia to present the evidence that could have been offered had funding not been arbitrarily circumscribed.

Since direct appeal, Mr. Garcia has finally obtained the neurological assessment that had been repeatedly sought prior to trial. The results reveal that Mr. Garcia suffers from significant impairment as a result of brain damage that is developmental in origin, most likely as a result of pre-natal or childhood lead poisoning. The jury that sentenced Mr. Garcia to death was wholly unaware of this. Further, an assessment by a mental health expert with expertise in the prison environment has revealed that Mr. Garcia's mental functioning and decision making at the time of the assault on Mr. Rhones were significantly impaired and substantially affected by the psychologically aversive environment in which he was placed, his brain damage, his personal trauma history, and his institutional trauma history. The evidence developed by this expert assessment bears no meaningful comparison to the brief comments by Dr. Brams at trial, comments that touched on an area as to which Dr. Brams herself testified she was not qualified to opine.

The Fifth Circuit's standard of review requires a defendant to prove prejudice to a high standard in a posture in which new evidence is not admissible: a virtually impossible task. Nor can Mr. Garcia be guaranteed relief through habeas proceedings under 28 U.S.C. § 2254. In such proceedings, the Government will no doubt argue that the Fifth Circuit has already disposed of Mr. Garcia's Due Process claim and further, that it was trial counsel's legitimate decisions about where best to allocate limited resources, not the rulings of the court, that resulted in the evidence not being available at trial. The Government will also no doubt argue that *Ayestas* does not operate retroactively and cannot avail Mr. Garcia in habeas proceedings.

Counsel is mindful of the government's interest in finality. However, this is not a case involving successor litigation and the government is yet to file its Answer in the habeas proceedings. In this case, the government's interest in executing a death sentence obtained in violation of § 3599 and in defiance of the heightened need for reliability in fact-finding in capital cases is weak.

CONCLUSION

It is respectfully submitted that this Court should grant certiorari to consider whether 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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