CAPITAL CASE No. 18-8845

IN THE

Supreme Court of the United States

ABEL REVILL OCHOA,
Petitioner
v.
LORIE DAVIS,
DIRECTOR, TEXAS DEPARTMENT OF
CRIMINAL JUSTICE
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JASON D. HAWKINS
Federal Public Defender
Jeremy Schepers (#304861)*
Supervisor, Capital Habeas Unit
*Counsel of Record
Nadia Wood (#291584)
Derek VerHagen (#308525)
Assistant Federal Public Defenders
Office of Federal Public Defender
Northern District of Texas
525 S. Griffin Street, Suite 629
Dallas, TX 75202
214-767-2746 • 214-767-2886 (fax)
Jeremy_Schepers@fd.org

PAUL MANSUR (TX 00796078)
Attorney at Law
P.O. Box 1300
Denver City, TX 79323
806-592-2797
806-592-9136 (fax)
Paul@PaulMansurLaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

REPLY IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

Mechanical recitation of a correct legal standard does not insulate the Fifth Circuit from review when the opinion shows that the Circuit disregarded the correct standard and applied the standard struck down by this Court yet again. This is especially true when the correct standard is recited for the first time on appeal because the appellate court, instead of remanding for full consideration of the issues by the district court, dives into the merits analysis on the appeal of denial of funding.

The *Ayestas* Court stressed that the applicant must not be required to *prove* that he will win relief on his claims before receiving funding. *Ayestas v. Davis*, 138 S. Ct. 1080, 1094 (2018). This Court went on to explain that, to meet this lower funding standard, an applicant must establish merely a "plausible" underlying claim and a "credible chance" that the funding will help the applicant overcome procedural default, if any—both notably lower standards than that required to win relief on an unexhausted ineffective assistance of counsel claim. *See id.*

Nevertheless, the State in its Brief in Opposition argues that Mr. Ochoa's uninvestigated *Wiggins* claim fails to meet the proof standards of *Strickland* and *Martinez*. The State characterizes evidence that was never introduced—because Mr. Ochoa never received funding to discover it—as "duplicative" and compares this hypothetical evidence to the mitigating evidence that was found to be prejudicial. This analysis, conducted without any evidence in the actual record due to absence of funding, only makes sense if the Court embraces the underlying premise of the State's argument: that Mr. Ochoa's crime "rendered his sentence predetermined." BIO at 20. In other words, the State argues that it is pointless to fund a mitigation investigation

that may uncover relevant evidence that might have caused the jury to decline to impose the death sentence. In the State's and the Fifth Circuit's eyes, Mr. Ochoa is someone less than a "uniquely individual human being," *Woodson v. North Carolina*, 428 U.S. 280 (1976), and therefore, the funding is not necessary under any standard.

When the Fifth Circuit opinion is examined closely, it shows that contrary to the State's position, the Fifth Circuit did not apply the correct funding standard post-*Ayestas* because the court did not cite, much less conduct, a "plausibility" analysis of the underlying claim. Instead, the Fifth Circuit engaged a full merits analysis at the funding stage. It further raised the burden by miscasting the *Wiggins* standard as a "failure to present" evidence.

Mr. Ochoa's case presents a question worthy of this Court's review as it implicates whether funding applicants in the Fifth Circuit still remain subject to a higher burden than others across the country. To the extent this Court believes it has adequately addressed the funding standard in *Ayestas*, Mr. Ochoa requests that the Court grant his petition, vacate the judgment, and remand to the Fifth Circuit with instructions to apply the correct legal standard, rather than merely reciting it, to Mr. Ochoa's funding motion.

ARGUMENT

I. The Fifth Circuit did not consider whether Mr. Ochoa's claim was "plausible" as required after *Ayestas* and instead considered whether the claim would merit relief.

The purpose of the § 3599 inquiry emanates from a "bedrock principle in our justice system"—the right to effective assistance of counsel. *Ayestas*, 138 S. Ct. at 1096 (Sotomayor, J., concurring) (quoting *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012)). In capital defense, when a lawyer fails to do his or her "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary," the rights of the person charged are violated and corrective measures must be taken. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). The *Ayestas* Court built on these foundational ideas when it stated that the purpose of § 3599 is to enable indigent petitioners to have funding to undertake an effective investigation that could allow them to overcome procedural default or a merits challenge. 138 S. Ct. at 1092. Thus, a funding applicant "must not be expected to *prove* that he will be able to win relief if given the services he seeks." *Id.* at 1094. To warrant funding, the applicant must show a "plausible" underlying claim where the applicant "articulate[s] specific reasons why the services are warranted," and their "likely utility." *Id.* This lowered standard for a § 3599 funding request gives proper deference to the fact that the "stakes are [high] . . . [a]nd any given filing . . . could be the petitioner's last, best shot at relief from an unconstitutionally imposed sentence." *McGee v. McFadden*, ____ S. Ct. ____, 2019 WL 2649823, at *3 (Mem.) (2019) (Sotomayor, J., dissenting from denial of certiorari).

In *Ochoa*, the Fifth Circuit failed to address the central inquiry of *Ayestas*—whether "a reasonable attorney would regard the services as sufficiently important." *See Ayestas*, 138 S. Ct. at 1093. Moreover, it failed to mention the touchstone of the opinion lowering the funding standard—whether "the underlying claim is at least plausible" and the funding "stands a credible chance of enabling a habeas petitioner to overcome the obstacle of procedural default." *Id.* at 1093–94. The Fifth Circuit's mere citation to the "reasonably necessary" standard simply is not enough to satisfy *Ayestas* when the court conspicuously avoids any of the analysis from that opinion that lowered the Fifth Circuit's overly burdensome pre-*Ayestas* standard. Thus, contrary to the State's argument, BIO at 3, 11, this case presents not misapplication of a correct standard, but application of the wrong one.

That the Fifth Circuit continues to apply a wrong and heightened standard is obvious by looking at the Fifth Circuit's decision that this Court vacated in *Ayestas*. The Fifth Circuit's "substantial need" test inverted the § 3599 application process by analyzing the merits of the applicant's underlying claim *before* giving funding that would enable an applicant to investigate and support the claim. *Ayestas v. Davis*, 817 F.3d 888, 896 (5th Cir. 2016) (stating that "[t]he district court properly considered the procedural default prior to approving Section 3599(f) funding" and determined "that any evidence of ineffectiveness, even if found, would not support relief."). Mr. Ayestas argued that the Fifth Circuit's inverted and overly burdensome analysis "required an impossibility" of a § 3599 applicant—that he preemptively prove

ineffective assistance of counsel in order to be given resources to discover the evidence of ineffective assistance. *Ayestas*, 817 F.3d at 896.

To counteract this catch-22, this Court stated that the Fifth Circuit's "rule was too restrictive" because the § 3599 standard is not and should not be a proof standard. 138 S. Ct. at 1093. In *Ayestas*, this Court distinguished between a merits analysis and a proper § 3599 funding analysis. *Id.* at 1094. After *Ayestas*, the courts should focus not on "whether [the applicant] can prove that his trial counsel is ineffective under *Strickland* or whether he will succeed in overcoming the procedural default under *Martinez* and *Trevino*. Rather, at this § 3599(f) request stage, the focus is on the *potential* merit of these claims." *Id.* at 1096–97 (Sotomayor, J., concurring) (emphasis added).

Yet, in *Ochoa*, the Fifth Circuit continued to invert the § 3599 review, upholding the denial of funding because "[n]ot only is this [ineffective assistance of counsel] allegation insufficient to warrant habeas relief, it would be insufficient to grant investigative funding." *Ochoa v. Davis*, 750 F. App'x 365, 373 (5th Cir. 2018) (quoting *Ochoa v. Davis*, No. 3:09-CV-2277-K, 2017 WL 2666150, at *4 (N.D. Tex. June 20, 2017)); *see also* BIO at 17. This statement shows that the Fifth Circuit continues to insist that analysis of § 3599 request for funding requires a full merits analysis of the underlying claim, despite the fact that this Court overruled this same procedure in *Ayestas*. 138 S. Ct. at 1095.

The test applied to *Ochoa*'s request for funding is, at its essence, the same "substantial need" test because it requires a showing that the petitioner will obtain

relief by prevailing on the merits of the underlying claim, including overcoming the procedural default. Prior to being vacated by this Court, the Fifth Circuit held in *Ayestas* that:

> The district court properly considered the procedural default prior to approving § 3599(f) funding for this federal habeas claim. . . [because] [t]here must be a viable constitutional claim, not a meritless one, and not simply a search for evidence that is supplemental to the evidence already presented.

Ayestas, 817 F.3d at 896. Similarly, in the Fifth Circuit's post-*Ayestas* opinion affirming the denial of § 3599 funding to Mr. Ochoa, the court stated:

> [N]ot only is this [ineffective assistance of counsel] allegation insufficient to warrant habeas relief, it would be insufficient to grant investigative funding. . . . The requested funds cannot help [Mr.] Ochoa win relief on his unexhausted, procedurally defaulted, and meritless *Wiggins* claim [because] . . . he has not shown a lack of diligence by his original state habeas counsel in those proceedings, but even if he had, such counsel could not be found ineffective for the purpose of the *Martinez* exception for failing to present a meritless claim.

Ochoa, 750 F. App'x at 372–73; BIO at 1.

Thus, the Fifth Circuit persists in conducting a full merits analysis *before* granting funding despite *Ayestas*' holding that "this is not a permissible reading of [§ 3599]." *Ayestas*, 138 S. Ct. at 1095. In fact, the State concedes "the Fifth Circuit's decision largely focuses on the merits" of Mr. Ochoa's *Wiggins* claim, BIO at 14, and proceeds to spend approximately sixteen of the thirty-one-pages in its Brief in Opposition addressing that same merits analysis. BIO at 5–10, 14–25.

This inverted analysis is not without consequence to funding applicants, as it prevents the full development of claims in federal habeas. In the context of Certificates of Appealability—which also require courts to conduct a threshold plausibility-type analysis before reaching the merits of an appeal—this Court has stated:

> [W]hen a reviewing court (like the Fifth Circuit here) inverts the statutory order of operations and "first decid[es] the merits of an appeal . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits," it has placed too heavy a burden on the prisoner at the COA stage.

Buck v. Davis, 137 S. Ct. 759, 774 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003)). The "ultimate merits determinations . . . should not have [been] reached" at the COA stage; instead, there must only be a "preliminary showing that his claim was debatable." *Buck*, 137 S. Ct. at 774. This "threshold inquiry is more limited and forgiving than 'adjudication of actual merits'" because "the COA procedure should facilitate, not frustrate, fulsome review of potentially meritorious claims." *McGee*, 2019 WL 2649823 at *2 (Sotomayor, J., dissenting from denial of certiorari) (citation omitted). In much the same way, the § 3599 funding analysis is intended to facilitate, not frustrate, the development and presentation of potentially meritorious claims. *See Ayestas*, 138 S. Ct. at 1098-99 (Sotomayor, J., concurring) ("It was error, therefore, for the Fifth Circuit to evaluate the merit of the ineffective-assistance-of-trial-counsel claim and to deny § 3599(f) funding based solely on an evaluation of the evidence in the record at the time of the request, without evaluating the potential evidence that Ayestas sought.").

Ultimately, the State proposes that federal courts should act in direct contravention to the *Ayestas* standard by conducting a merits analysis to determine whether funding is warranted. Both the Fifth Circuit and the State focus on a full merits analysis of Mr. Ochoa's underlying *Wiggins* claim as it was plead to form the nucleus of their argument to deny Mr. Ochoa's § 3599 funding request. This Court's intervention is required to correct the Fifth Circuit's improper application of § 3599 post-*Ayestas*.

II. The Fifth Circuit further increases the funding burden by miscasting the *Wiggins* standard as a "failure to present" rather than a failure to investigate.

In assessing the merits of Mr. Ochoa's *Wiggins* claim, the lower courts incorrectly cast it as a failure to *present* mitigating evidence, rather than a failure to *investigate*. *Compare Ochoa,* 750 F. App'x at 373 (assessing the merits of Mr. Ochoa's ineffective assistance of counsel claim through the lens of the evidence that was actually presented at trial), *with Wiggins*, 539 U.S. at 523–24 (assessing trial counsel's failure to take reasonable investigative steps rather than failure to present evidence). By doing so, the courts bypass the deficient performance inquiry into counsel's investigation (or lack thereof), and jump straight to a prejudice inquiry of whether there is a reasonable probability that an adequate investigation would have uncovered evidence that would have resulted in a different outcome at trial. This is particularly problematic at the funding stage because often the only evidence a petitioner has access to pre-funding is the trial record and trial counsel's files, which typically support the deficient performance prong of a *Wiggins* claim. To uncover the

prejudice for a failure to investigate claim, one must investigate. To investigate, one must have funding. This is the very impossibility that this Court ostensibly remedied in *Ayestas*.

In this case, Mr. Ochoa's federal habeas counsel was denied funding to investigate the mitigation evidence that was never properly investigated by trial or state habeas counsel. It is undisputed that trial counsel did not take any substantial steps toward investigating evidence that may spare Mr. Ochoa's life until after jury selection began when counsel finally hired their mitigation specialist. Pet. at 7. That same mitigation specialist repeatedly told counsel that the length of jury selection was not a sufficient amount of time to put together a case to save their client's life, particularly when she was unable to meet with Mr. Ochoa for several hours a day while he was in court for individual *voir dire*. *Id.* at 7. And she did not speak Spanish and was therefore unable to communicate with key witnesses. *Id.* Likewise, Ochoa established that his state habeas counsel "did not seek funding from the state habeas court, did not retain an investigator or mitigation specialist, and did not hire a single expert." Pet. at 9. In total, state habeas counsel billed only 12.5 hours of outside-the-record investigation, and raised two extra-record claims—none of which pertained to trial counsel's failure to investigate. *Id.* The State's arguments that trial counsel "presented significant mitigation evidence" and ultimately put together "a robust mitigation case," BIO at 15, are therefore irrelevant to the question of whether trial and state habeas counsel conducted adequate investigation.

The Fifth Circuit never addressed Mr. Ochoa's argument that he needed funding to conduct mitigation investigation to show prejudice resulting from deficient performance for failure to investigate mitigating evidence. Instead, it denied the funding request on the basis that trial counsel had presented sufficient evidence at the time of trial. *Ochoa*, 750 F. App'x at 372–73. The State now urges the Court to let this decision stand.

The State's argument that the denial of funding was proper is premised on the underlying assumption that Mr. Ochoa's *Wiggins* claim is meritless because the "heinous facts" of Mr. Ochoa's "appalling" crime "rendered his sentence predetermined." BIO at 20. In essence, the State invites this Court to treat Mr. Ochoa not as a "uniquely individual human being," but as a member "of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). Without funding, Mr. Ochoa will never be able to show what "diverse frailties of humankind," *id.*, may have been presented to the jury at trial that could have served as a basis for a sentence less than death. The State's rationale for denial of funding undermines the entire death penalty sentencing scheme.

Justice Sotomayor addressed this issue in her concurrence to *Ayestas*: the "'brutality of the crime' rationale is simply contrary to our directive in case after case that, in assessing prejudice, a court must 'consider the totality of the available mitigation evidence . . . and reweigh it against the evidence in aggravation.'" *Ayestas*, 138 S. Ct. at 1100 (Sotomayor, J., concurring). Because of former counsels' failure to

investigate, one cannot know what the "totality" of mitigating evidence is without funding. *Id.* at n.7 ("Notably, application of this 'brutality of the crime' rule is particularly irrational in the § 3599(f) context, where the court is unaware of what the undiscovered evidence of mitigation looks like."). The State and the Fifth Circuit are relying on a legal standard contrary to *Wiggins* and *Ayestas*.

To rectify Fifth Circuit's indifference to the Court's holding in *Ayestas*, Mr. Ochoa respectfully requests that if the Court does not grant certiorari for full hearing on the merits in this case, the Court summarily grant certiorari, vacate the decision below, and remand the case for further consideration by the lower court.

III. Section 2254(e)(2) does not bar evidence on a procedurally defaulted claim for which cause has been established.

The State also argues that the funding was unnecessary because 28 U.S.C. § 2254(e)(2) would have barred Mr. Ochoa from presenting any evidence. BIO at 25–27. Section 2254(e)(2) does not bar evidence on a procedurally defaulted claim for which cause has been established. That provision provides, "If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless" certain circumstances are present. *Id.* Because *Martinez* and *Trevino* recognize that a prisoner like Mr. Ochoa, who has never had adequate state representation, is not "at fault" for a forfeited IATC claim. Since § 2254(e)(2) is a fault-based restriction, it does not preclude the use of facts developed in a federal habeas proceeding to support a faultless prisoner's constitutional claims. *See Williams v. Taylor*, 529 U.S. 420, 432 (2000); *Martinez v. Ryan*, 566 U.S. 1, 12 (2012). The State's interpretation of this statute cannot be

reconciled with *Martinez*, *Trevino*, or the unbroken line of authority confirming that a prisoner whose lack of fault excuses a procedural default also lacks fault for "fail[ing] to develop" a claim within the meaning of § 2254(e)(2).

CONCLUSION

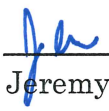
As the decision in *Ochoa* shows, no material difference exists between the burden the Fifth Circuit currently places on petitioners for funding under § 3599 and the "substantial need" test that this Court struck down in *Ayestas*. Both effectively require petitioners to prove up their underlying habeas claims before they can receive funding. In addition, the Fifth Circuit continues to misstate and misapply the *Wiggins* standard when it conducts its improper merits analysis, again disregarding precedent. This Court squarely rejected this type of test in *Ayestas*, and it should do so again here.

DATED: July 12, 2019

Respectfully submitted,

JASON D. HAWKINS
Federal Public Defender

by



Jeremy Schepers (#304861)*
Supervisor, Capital Habeas Unit
**Counsel of Record*

Paul Mansur (TX 00796078)
Attorney at Law
P.O. Box 1300
Denver City, TX 79323
806-592-2797
806-592-9136 (fax)
Paul@paulmansurlaw.com

Nadia Wood (#291584)
Derek VerHagen (#308525)
Assistant Federal Public Defenders
Office of Federal Public Defender
Northern District of Texas
525 S. Griffin St., Ste. 629
Dallas, TX 75202
214-767-2746 • 214-767-2886 (fax)
Jeremy_Schepers@fd.org
Counsel for Abel Revill Ochoa