CAPITAL CASE No. _____

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE: QUESTIONS PRESENTED FOR REVIEW

This Court has unanimously ruled, in multiple cases, that Congress's intent in enacting 18 U.S.C. § 3599 was to provide quality representation to qualifying prisoners sentenced to death in federal habeas corpus proceedings, above even that afforded to the accused in non-capital trials. *Ayestas v. Davis*, 138 S. Ct. 1080 (2018); *Martel v. Clair*, 565 U.S. 648 (2012). By denying Mr. Ochoa any requested representation services under § 3599(f), the courts below failed to heed these rulings. Absent this Court's intervention, Mr. Ochoa will be executed without having received meaningful representation informed by investigation to prepare his habeas corpus application. The district court repeatedly denied multiple requests for funding, faulting Mr. Ochoa for failing to demonstrate "a substantial need" for requested assistance—the standard that this Court struck down while Mr. Ochoa's case was pending on appeal. Instead of remanding the case back to the district court so it could make findings under the proper standard, the Fifth Circuit affirmed because it believed that Mr. Ochoa was "simply seeking to 'turn over every stone."

No stones, in fact, have been turned over, because of the lack of funds. Far from quality representation, Mr. Ochoa has only had counsel deprived of any means to effectuate his representation. The Court's intervention is necessary to preserve Mr. Ochoa's access to the writ of habeas corpus in this case. Accordingly, Mr. Ochoa presents the following question to the Court:

(1) Whether, in light of *Ayestas v. Davis*, 138 S. Ct. 1080 (2018), a court applies an overly burdensome standard for funding under 18 U.S.C. § 3599(f) when it requires a petitioner prove that he is likely to clear any procedural hurdles and win relief on the underlying habeas claim to receive any resources.

Mr. Ochoa respectfully requests that if the Court does not grant certiorari for full hearing on the merits in this case, that the Court summarily grants certiorari, vacates the decision below without finding error, and remands the case for further consideration by the lower court.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion below.

OPINIONS BELOW

On October 18, 2018, the United States Court of Appeals for the Fifth Circuit entered judgment and issued an opinion affirming the district court's denial of representation services under 18 U.S.C. § 3599(f). This opinion is unpublished and unofficially reported as *Ochoa v. Davis*, 2018 WL 5099615 (5th Cir. 2018). It is reproduced in **Appendix A.** The judgment issued by the United States District Court for the Northern District of Texas denying habeas relief on Mr. Ochoa's petition for writ of habeas corpus on September 21, 2016 is reproduced in the **Appendix B.** The district court's memorandum opinion and order, issued on the same day, is unofficially reported as *Ochoa v. Davis*, No. 3:09-CV-2277-K, 2016 WL 5122107 (N.D. Tex. Sept. 21, 2016) and is reproduced in the **Appendix C.** The Fifth Circuit's denial of Petition for Rehearing En Banc issued on November 30, 2018 is reproduced in the **Appendix D.**

JURISDICTION

The district court entered its judgment on September 21, 2016. App.14. Within 28 days from the entry of judgment, on October 19, 2016, Mr. Ochoa timely filed a motion under Fed. R. Civ. P. 59 to amend judgment. ECF No. 61. The district court denied that motion on June 20, 2017. App I. Consistent with Federal Rules of Appellate Procedure 4(a)(4)(A) and 4(a)(1)(A), which allow for the notice of appeal to be filed within 30 days from the denial of motion under Rule 59, Mr. Ochoa timely filed a Notice of Appeal and Request for COA on July 19, 2017. ECF No. 64.

The Fifth Circuit entered its judgment and opinion on October 18, 2018 and denied petition for rehearing on November 30, 2018. App.1–13,82. Mr. Ochoa's petition for writ of certiorari was originally due on February 28, 2019, within 90 days of the denial of the rehearing. Sup. Ct. Rule 13.3. On February 19, 2019, this Court granted Mr. Ochoa an extension of 46 days, making the new deadline April 15, 2019. *See* Order Granting Application for Extension to File until April 15, 2019, *Ochoa v. Davis*, No. 18A839.

The district court had jurisdiction over this capital habeas case pursuant to 28 U.S.C. §§ 2241, 2254. Under 28 U.S.C. § 1291, the United States Court of Appeals for the Fifth Circuit had jurisdiction over the funding issues arising under the Criminal Justice Act, codified at 18 U.S.C. § 3599. Pursuant to 28 U.S.C. § 2253, the Fifth Circuit also had jurisdiction over the uncertified issues raised in the Application for Certificate of Appealability.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND OTHER AUTHORITIES INVOLVED

This case involves a state criminal defendant's constitutional rights under the Sixth and Fourteenth Amendments. The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defence.

The Fourteenth Amendment provides in relevant part:

> [N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

This case further involves the application of 18 U.S.C. § 3599(f), which states:

> (a)(2) In any post conviction proceeding . . . seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain . . . investigative, expert, or other reasonably necessary services 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 . . . .

STATEMENT OF THE CASE

A. Introduction

This case is about whether Mr. Ochoa, who is sentenced to death, has been afforded the meaningful representation in his federal habeas corpus proceeding that was contemplated by Congress when it enacted 18 U.S.C. § 3599 and by this Court in *McFarland v. Scott*, 512 U.S. 849 (1994). Mr. Ochoa's counsel filed a petition for writ of habeas corpus in 2010. That petition included some claims that Mr. Ochoa conceded were unexhausted, primarily due to the delayed, incomplete, and objectively unreasonable investigation that both his trial and state post-conviction counsel conducted. Three years later, this Court decided *Trevino v. Thaler*, which provided a basis for excusing procedural default for these claims for Texas inmates. 569 U.S. 413, 428 (2013). In the ensuing months, Mr. Ochoa filed multiple requests for funding to develop the merits of those claims, including a *Wiggins* claim, which were denied for failure to show "a substantial need." *See* App. G, H & I.

Despite the intervening decision in *Ayestas v. Davis*, 138 S. Ct. 1080 (2018), which rejected the Fifth Circuit's "substantial need" test for § 3599(f) representation services, the Fifth Circuit affirmed the totality of the district court's actions. Purporting to rely on *Ayestas*, the Fifth Circuit nonetheless asked whether Mr. Ochoa was "unlikely" to overcome procedural default and prevail on his underlying *Wiggins* claim. It answered in the affirmative and upheld the denial of funding, scrapping Mr. Ochoa's last opportunity to develop the merits of the procedurally defaulted claims and receive meaningful representation.

B. State court proceedings

Mr. Ochoa's guilt was never a point of serious contention. Mr. Ochoa killed five members of his family, including his wife and two children, on August 4, 2002. He could not believe what he had done under the influence of drugs but he was cooperative with the police mere minutes later and gave a voluntary statement the same day. App.147–150.[1] The trial court in Dallas County, Texas, appointed defense counsel four days later, on August 8, 2002. 1 CR 14.

Three months later, in November 2002, trial counsel contacted a mitigation specialist, Tena Francis. App.84. At that time, no investigation had been conducted in preparation for Mr. Ochoa's capital murder trial. *Id.* Another month went by until Francis received any information related to the case. *Id.* Even then, the information she received was rudimentary: Indictment, Affidavit of Probable Cause, Mr. Ochoa's statement, the offense report, and a transcript of the examining trial. *Id.*

It would be another two months until trial counsel met with Francis for the very first time on January 28, 2003, just ten days before the start of jury selection on February 7, 2003. App.85; 3 RR 1. At the meeting, counsel allowed Francis to review their file. In addition to the rudimentary materials counsel sent to Francis months ago, the only things in the counsel's file were crime-scene photographs and hand-

[1] In this petition, "App." refers to Petitioner's Appendix. "RR," followed by a page number, refers to the official trial transcript. The clerk's record is referred to as "CR" followed by the page number. For both the trial transcript and the clerk's record, the volume number precedes the references. The state habeas record is referred to as "SHR", followed by the page number. Filings in the district court case below, *Ochoa v. Thaler*, 3:09-cv-02277 (N.D. Tex) are referred to by "ECF No." Filings in the Fifth Circuit case below, *Ochoa v. Davis*, No. 17-70016 (5th Cir.), are referred to by title.

written notes of a single meeting with Mr. Ochoa. App.85. There were no investigation reports, no witness interviews, and no other evidence that Mr. Ochoa's defense team had begun working on the case. *Id.*

At that time, trial counsel informed Francis that they had also hired a fact investigator but that counsel wanted to limit the investigator's work on the case because he was not trustworthy. *Id.* Even at this late hour with the trial imminent, Francis still was not appointed to the case and was, therefore, unable to incur costs to conduct a mitigation investigation. Finally, on February 12, 2003, in the middle of jury selection, the trial court appointed Francis to the case and she began her investigation. App.83; 1 CR 138, 213; 3 RR 1; 4 RR 1.

Due to the tremendous time constraints, Francis was unable to collect "even the most minimal records" by the start of trial. App.87, 91–92. She struggled to find time to interview Mr. Ochoa because he was in court every day for individual *voir dire*. *Id.* Ultimately, Francis had to resort to conducting her mitigation interviews with Mr. Ochoa during breaks at the courthouse. *Id.* Likewise, she had difficulty meeting with trial counsel because they were consumed by jury selection. Francis was further hindered in her ability to conduct witness interviews because many of the witnesses spoke only Spanish (a language she did not speak).

Throughout the process, Francis urged trial counsel to seek a continuance but they refused. Finally, just one week before the start of trial and well after the completion of jury selection, counsel filed a motion for continuance. App.96–108. They attached an affidavit from Francis explaining that she had conducted almost no

investigation to that point and needed additional time to complete the most basic tasks one would expect in a death penalty case. App.102–108. Among other things, no investigation or record collection from Mexico, where Mr. Ochoa was born, had occurred. *See* Commentary, Guideline 10.7, ABA Guidelines ("At least in the case of the client, [investigation into personal history] begins with the moment of conception."). During the argument on the motion, counsel never even mentioned that the continuance was needed to conduct mitigation investigation. 31 RR 2–5. The trial court denied the continuance. *Id.* Trial began a week later on April 15, 2003, and the jury returned a guilty verdict the following day. 33 RR at 1; 34 RR at 95.

Punishment phase followed, during which the defense invited Mr. Ochoa's father to minimize the violence he inflicted on family members: "One time I would hit them. Sometimes I would offend them verbally. That's it." App.163. The father admitted that he beat his children and Mr. Ochoa, with a belt and sticks and branches, but "[n]ot a lot." *Id.* Perpetuating racist stereotypes, the defense also offered the father an opportunity to characterize violence directed at his wife and children "as part of Hispanic culture." App.162. Thus, even when stumbling into potentially helpful mitigation evidence, the defense counsel turned this evidence against Mr. Ochoa, who is Hispanic and who was on trial for the murders of his wife and children. The defense counsel suggested to the jury that such violence is simply part of Mr. Ochoa's culture, practically guaranteeing a finding of future dangerousness. Indeed, just two months after his mitigation investigation began, on April 23, 2003, Mr. Ochoa was sentenced to death. 39 RR 108–09.

On direct appeal, the Texas Court of Criminal Appeals (CCA) affirmed Mr. Ochoa's conviction and sentence. *Ochoa v. State*, No. AP-74,663 (Tex. Crim. App. Jan. 26, 2005).

Wayne Huff was later appointed to represent Mr. Ochoa in his state habeas corpus proceedings. Huff did not seek funding from the state habeas court, did not retain an investigator or mitigation specialist, and did not hire a single expert. His billing records indicate only 12.5 hours of outside-the-record investigation. ECF No. 19-3. On February 11, 2005, Huff filed Mr. Ochoa's initial application. It was 53 pages long and contained only two non-record-based claims, neither of which required Huff to conduct any witness interviews or collect life history records.[2] SHR 2–55. The CCA denied relief on August 19, 2009. *Ex parte Ochoa*, WR-67,495-01 & WR-67-495-02 (Tex. Crim. App. Aug. 19, 2009).

C. Federal habeas corpus proceedings

In his federal habeas petition Mr. Ochoa raised 21 claims for relief, most of which were not presented in his state habeas application. ECF No. 8 (N.D. Tex Aug. 19, 2010). Among these claims, Mr. Ochoa argued that his trial counsel were ineffective by failing to conduct a constitutionally-adequate investigation for the punishment phase of trial under *Wiggins v. Smith*, 539 U.S. 510 (2003). Mr. Ochoa supported the claim with a handful of short affidavits he obtained through a

[2] The two non-record-based claims were (1) ineffective assistance of trial counsel for failing to prepare Mr. Ochoa for cross-examination and (2) a claim that Hispanics and individuals under the age of 34 were systematically excluded from Dallas County jury pools.

preliminary investigation that a Spanish-speaking mitigation specialist conducted pro bono. *See* Exhibits to ECF No. 8; App.123.

While Mr. Ochoa's petition was pending in the district court, this Court decided *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), which held that ineffective assistance by state habeas counsel can serve as "cause" to excuse procedural default of an ineffective assistance of trial counsel claim. *Trevino* had opened a door that previously had been closed during the entire course of Mr. Ochoa's federal habeas proceedings up until that point. Mr. Ochoa then filed a funding request with the district court under 18 U.S.C. § 3599, requesting funding to retain a mitigation specialist to conduct punishment phase investigation that trial counsel and state habeas counsel failed to conduct into punishment phase issues as alleged in the petition.[3] App.109–129. In the funding motion, Mr. Ochoa detailed trial

[3] Mr. Ochoa filed several motions related to funding and leave to proceed ex parte. The district court laid out the history of filings in its order denying funding, ECF No. 58, App. H: "Petitioner filed a motion for leave to proceed ex parte on an application to fund a mitigation investigator on October 7, 2013 (Doc. No. 48), that was denied on December 17, 2013 (Doc. No. 51) after a response in opposition (Doc. No. 50) was filed, and Ochoa was permitted to either withdraw his funding motion tendered ex parte (Doc. No. 49), or proceed with a motion served on Respondent. Ochoa filed a motion to reconsider on January 29, 2014 (Doc. No. 52), accompanied by an amended motion for funding tendered ex parte (Doc. No. 53). That motion (Doc. No. 52) was denied after opposition on April 1, 2014 (Doc. No. 55), and Ochoa was allowed one final opportunity to either withdraw his amended motion tendered ex parte (Doc. No. 53) or serve it on Respondent." The district then ruled that Mr. Ochoa's Second Amended Motion for Funding for funding filed on May 16, 2014 (Doc. No. 56), App. G, appears to have to replaced Mr. Ochoa's amended motion previously tendered ex parte (Doc. No. 53). The district court then denied as moot Mr. Ochoa's amended motion previously tendered ex parte (Doc. No. 49) and then also denied Second Amended Motion for Funding (Doc. No. 56).

counsel's failure to investigate punishment phase issues, including the affidavit from the trial mitigation specialist, Tena Francis, stating that the gross delay by trial counsel, compressed timeframe in which to conduct the investigation, and utter lack of support from the trial team curtailed her ability to conduct a constitutionally adequate investigation. App.121–124. The motion also detailed state habeas counsel's failure to conduct an investigation into matters outside the trial record. App.123. Finally, Mr. Ochoa pointed to the information that the pro bono mitigation specialist uncovered during her preliminary investigation as an indication that further investigation was warranted. *Id.* The district court denied the funding request under the Fifth Circuit's "substantial need" test that was in place at the time. App.134. The court further found that Mr. Ochoa had failed to demonstrate "how further investigation of these matters will *substantially improve* his chances of success." *Id.* (emphasis added).

Subsequent to denying the funding that would allow Mr. Ochoa to develop the record to potentially excuse procedural default, the district court then denied Mr. Ochoa's federal petition. App.15–81. The district court found that Mr. Ochoa failed to present sufficient evidence to support his claim that trial counsel were ineffective by failing to conduct proper mitigation investigation and further failed to show ineffective assistance by state habeas counsel to meet the *Martinez*/*Trevino* exception to procedural default. App.39–43.

Mr. Ochoa then filed a motion to alter judgment, ECF No. 61. In denying that motion, the district court held that allegations in Mr. Ochoa's petition regarding trial

counsel's ineffectiveness during punishment phase are insufficient to warrant habeas relief and "would be insufficient to grant investigative funding." App.144. The district court believed it should only "only allow further evidentiary development or an evidentiary hearing if it finds that Ochoa has made specific factual allegations that, if true, would entitle him to federal habeas relief." App.146. In other words, unless Mr. Ochoa could show—without investigative funds—what a thorough, competent mitigation investigation would uncover, he would never get the funds. Funds, of course, are necessary to show what a thorough, competent mitigation would uncover. These funds, are at least in theory, were promised to be made available to Mr. Ochoa under 18 U.S.C. § 3599.

Mr. Ochoa then filed a notice of appeal and request for COA. App.166–67.

D. Fifth Circuit Opinion Affirming Denial of Funding

Mr. Ochoa filed an application for certificate of appealability (COA) in the Fifth Circuit, as well as an appeal of the district court's denial of § 3599 funding under the "substantial need" test on December 14, 2017. The Director responded on February 23, 2018. The Fifth Circuit then appointed Federal Public Defender as co-counsel to represent Mr. Ochoa in his federal habeas proceedings. A few weeks later, this Court issued *Ayestas v. Davis*, 138 S. Ct. 1080 (2018), striking down the Fifth Circuit's "substantial need" test as overly burdensome.

Mr. Ochoa filed a reply brief on April 5, 2018, asking the Fifth Circuit to remand his case to the district court for a determination, in the first instance, of the

impact of *Ayestas*.[4] The Fifth Circuit held oral argument on the COA and appeal from the denial of funding on August 31, 2018, during which Mr. Ochoa again requested that the Fifth Circuit remand his case to allow the district court to consider his funding motion under the correct standard.

But the Fifth Circuit declined to remand to allow the district court to rule on the funding motion in light of *Ayestas*. Instead, it held that the district court did not abuse its discretion because the reasons it gave for denying funding would stand even under *Ayestas*. App.11. In its analysis, the Fifth Circuit discussed the considerations laid out in the *Ayestas* opinion and noted that the "touchstone" of the inquiry was the "likely utility" of the services sought. *Id.* The court concluded that Mr. Ochoa "cannot overcome the procedural default 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." App.12. The Circuit then quoted the district court's merits analysis of the uninvestigated *Wiggins* claim, wherein it (1) characterized the claim as a failure to present evidence rather than a failure to investigate; (2) concluded that trial counsel could not be ineffective by failing to investigate Mr. Ochoa's social history because they presented an addiction expert; and (3) faulted Mr. Ochoa for not "identify[ing] an area or subject that was not generally covered by the evidence trial

[4] By then, the Fifth Circuit had already issued a remand to the district court on an *Ayestas* issue in another case, and Mr. Ochoa sought a similar disposition. *See Sorto v. Davis*, No. 16-70005, 716 F. App'x 366 (5th Cir. Mar. 28, 2018) (vacating denials of funding and remanding to the district court for consideration of the impact of *Ayestas*).

counsel presented to the jury." App.12–13. Purporting to rely on *Ayestas*, the Fifth Circuit then asked whether Mr. Ochoa was "unlikely" to overcome procedural default and prevail on his underlying *Wiggins* claim. *Id.* It answered in the affirmative and upheld the denial of funding.

Mr. Ochoa filed a Petition for Rehearing En Banc, which was denied on November 30, 2018. This petition for writ of certiorari follows.

REASONS FOR GRANTING WRIT

I. This Court Should Grant Certiorari to Address the Fifth Circuit's Improper Application of the "Reasonably Necessary" Standard in light of *Ayestas*.

In certain situations—as with the *Wiggins* prejudice prong requiring petitioners to show the results of their investigation—a habeas petitioner cannot plead a factually developed claim without a court award of resources necessary to develop it. Under 18 U.S.C. § 3599(f), federal courts are authorized to provide funding to capital habeas petitioners for investigative, expert, or other services that are "reasonably necessary for the representation of the defendant[.]" For years, the Fifth Circuit interpreted § 3599(f)'s reference to "reasonably necessary" services to require a showing of "substantial need" and to establish that the funding was sought to present a "viable constitutional claim that are not procedurally barred." *See Ayestas v. Davis*, 138 S. Ct. 1080, 1092–93 (2018); *Riley v. Dretke*, 362 F.3d 302, 307 (5th Cir. 2004). In applying its substantial-need rule to petitioners like Mr. Ochoa—who have had no resources to develop *Wiggins* prejudice—the Fifth Circuit used a § 3599(f) rule that starved meritorious IAC claims of resources.

Last year, in *Ayestas*, this Court struck down the Fifth Circuit's "substantial need" test as overly burdensome, and held that while lower courts may consider a number of factors when assessing funding requests, they may not require petitioners to *prove* that they will win relief if granted the funding requested. Instead, a funding applicant need only show that his underlying claim is "plausible" and that the requested funding stands a "credible chance" of enabling him to overcome the obstacle of procedural default, if any. *See generally id.*

Nevertheless, the Fifth Circuit continues to require funding applicants to establish that they are likely to win relief if granted the funding they have requested. This is based in large part on the court's overemphasis on *Ayestas*' language that the "reasonably necessary" test requires an assessment of the "likely utility" of the services sought and that § 3599(f) does not guarantee that a funding applicant will "have enough money to turn over every stone." *See Ayestas*, 138 S. Ct. at 1094. The Fifth Circuit has all but ignored *Ayestas*' "plausibility" standard for the underlying claim and the language indicating that an applicant need only show the funding stands a "credible chance" of enabling him to overcome procedural default, and instead jumped straight to the merits of the uninvestigated claim.

Moreover, the Fifth Circuit requires funding applicants to identify the specific facts that make it likely that they will win relief, rejecting funding requests to support claims that are based on "speculation" or "conjecture." This, too, creates an undue burden on petitioners who seek funding to investigate procedurally defaulted ineffective assistance of counsel claims. Because these claims by their very nature

have never been investigated, such petitioners are unable to provide sufficient detail to satisfy the Fifth Circuit's specificity requirement without speculating about what the investigation might uncover. As a result, petitioners are placed in the "Catch-22" scenario that was often criticized pre-*Ayestas*, where they cannot show cause to excuse procedural default without funding for an investigation, but they cannot get funding for an investigation without establishing how they will show cause to excuse the default.

The result of these problems is that there is no material difference between the Fifth Circuit's current standard and the one that the Supreme Court struck down in *Ayestas*.

A. In *Ayestas*, this Court held that a funding applicant must not be expected to prove that he will be able to win relief if given the services he seeks.

Ayestas established that the funding standard under § 3599 is well below that required to prevail on a habeas claim, and courts should allow petitioners to use § 3599 funding to investigate and prove up procedurally defaulted claims.

In reaching its conclusion, this Court conducted a side-by-side comparison of the statutory language and that of the Fifth Circuit's "substantial need" test. It found that although the term "necessary" is sometimes used to mean "essential," § 3599's use of the modifier "reasonably" implies that the term more closely tracks the colloquial use to mean "merely important." *Ayestas*, 138 S. Ct. at 1093 (citing *McCulloch v. Maryland*, 4 Wheat. 316, 414-15 (1819); Internal Revenue Code, 26 U.S.C. § 162(a) (describing a "necessary" expense as something that is "merely helpful

and appropriate"); Black's Law Dictionary 928 (5th ed. 1979) (explaining that "necessary" can mean "that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought.")). At the very least, § 3599's use of the term "necessary" must mean "something less than essential." *Id.*

The Fifth Circuit's use of the modifier "substantial," on the other hand, suggested a heavier burden than the statutory language. *Ayestas*, 138 S. Ct. at 1093 (citing Oxford English Dictionary 291 (2d ed. 1989) (defining "reasonably" as "sufficiently, suitably, fairly"); *id.* at 66–67 (defining "substantial" as "firmly or solidly established")). While the difference between the correct standard and the "substantial need" test may appear small, the problem was exacerbated by the Fifth Circuit's prohibition against funding to support procedurally defaulted claims. *Id.* Given that petitioners may now excuse the procedural default of an ineffective assistance of counsel claim by establishing ineffective assistance by state habeas counsel under *Trevino*, the Fifth Circuit's prohibition against such funding was "too restrictive." *Id.*

Ultimately, the question for lower courts is whether a reasonable attorney would view the requested funding as "sufficiently important," guided by three considerations set out in the opinion. *Ayestas*, 138 S. Ct. at 1093. First, the court should consider the "potential merit of the claims that the applicant wants to pursue." *Id.* at 1094. Specifically, the applicant must "demonstrate[e] that the underlying claim is at least plausible." *Id.* Second, the court should consider the likelihood that the types of services requested by the applicant will generate useful and admissible evidence to support the claims. *Id.* This Court did not expand on whether the

applicant must meet a specific threshold of "likelihood." Finally, the court should consider "the prospect that the applicant will be able to clear any procedural hurdles standing in the way." The applicant need only show that the funding stands a "credible chance" of enabling the applicant to overcome the default. *Id.*

The essential takeaway from *Ayestas* is that lower courts may not require funding applicants to prove that they would win relief on their claim(s) if granted the requested funding. The Court explained that while the "likelihood that the contemplated services will help the applicant win relief" may be a "natural consideration," a petitioner "must not be expected to *prove* that he will be able to win relief if given the services he seeks." *Ayestas*, 138 S. Ct. at 1094.

B. The Fifth Circuit continues to require funding applicants to prove that they are likely to win relief if granted the requested funding.

Over the course of three post-*Ayestas* cases, culminating in *Ochoa*, the Fifth Circuit has established that (1) a funding applicant must prove that he is likely to win relief if granted the funding requested, and (2) the applicant must provide "sufficient detail" about how he will win his claim, without relying on "speculation" or "conjecture." This is an overly burdensome standard under § 3599.

First, in *Mamou v. Davis*, 742 F. App'x 820 (5th Cir. 2018), the court held that a funding applicant must provide specific detail—rooted in some type of factual showing—establishing how he will win relief if granted the funding requested. Mamou sought funding for experts and an investigator to investigate multiple procedurally defaulted ineffective assistance of counsel claims. *Id.* at 824–25. The district court denied funding under the "substantial need" test. Mamou appealed,

and *Ayestas* was released while the appeal was pending. The Fifth Circuit affirmed,[5] citing *Ayestas*' language that funding is not appropriate when it "stands little chance of helping [a petitioner] win relief." *Id.* at 824. To meet the "reasonably necessary" standard, the court held, an applicant must establish that the funding will help him win relief, and he must do so without relying upon "conjecture" or "speculation." *See id.* at 824 ("Mamou was only 'speculating' that the 'State hid agreements with witnesses to manufacture testimony."). Mamou argued that such an approach placed him in a "Catch-22" where he cannot prove that he is entitled to relief without funding, yet he cannot get funding without first proving that he is entitled to relief. *Id.* at 825. In response, the court resorted to an outcome-driven analysis: "[Mamou's argument] ignores the court's ruling that Mamou has failed to show how expert assistance would help him accomplish either goal, including establishing the ineffective assistance of habeas counsel claim that could serve as *Martinez*/*Trevino* cause." *Id.*

Second, the Fifth Circuit returned to the issue in *Crutsinger v. Davis*, 898 F.3d 584 (5th 2018). Crutsinger sought $500 in funding for a "preliminary review of DNA evidence" after the State informed him that his case might have been impacted by the change in DNA-mixture interpretation protocol and the FBI's recent amendment

[5] The Fifth Circuit has declined to automatically remand pending appeals where the petitioners were denied funding under the "substantial need" test. Instead, it retrospectively determines whether the funding denial would have been warranted under *Ayestas*. *Mamou*, 742 F. App'x at 824 ("Because the reasons the district court gave for its ruling remain sound after *Ayestas*, we find no abuse of discretion."); *see also id.* at n.1 ("As discussed, none of the district court's reasons depend on the heightened standard that *Ayestas* rejected.").

of its population database. *Id.* at 585. The district court denied the request under the "substantial need" test and Crutsinger appealed. *Id.* at 585–86. While the appeal was pending, this Court released *Ayestas*. The Fifth Circuit declined to remand on the funding issue, and instead applied *Ayestas* retrospectively. Similar to *Mamou*, the court faulted Crutsinger for providing insufficient detail about what evidence the funding would uncover and how the funding would allow him to win habeas relief. However, this time the court went a step further and identified what it believed to be the "touchstone" of the *Ayestas* decision:

> Though the [Supreme] Court was careful to add that "a funding applicant must not be expected to prove that he will be able to win relief," it emphasized that the touchstone of the inquiry is "the likely utility of the services requested" and that "§ 3599 cannot be read to guarantee that an applicant will have enough money to turn over every stone."

Id. at 586. Throughout the opinion, the Fifth Circuit repeatedly claimed that this Court placed an "emphasis" on the "utility" of the services in *Ayestas*. *Id.* at 586, 587. *Crutsinger* signaled that the Fifth Circuit's focus would be on the viability of the habeas claims for which petitioners seek funding.

Third, it was in *Ochoa* that the court revealed that its "likely utility" test actually requires funding applicants to establish that they are likely to win relief on the merits if granted the funding requested. In *Ochoa*, the court correctly recited the three considerations laid out in the *Ayestas* opinion—potential merit of the underlying claim, likelihood that the services will produce useful and admissible evidence, and prospect of overcoming procedural default—but again concluded that the "touchstone" of the inquiry is the "likely utility" of the services sought. App.11.

From there, the court boiled the funding inquiry down to a simple question: whether it is "unlikely" that the petitioner would overcome procedural default and win relief on the underlying claim if granted the requested funding. App.12 ("It is unlikely that Ochoa will clear these procedural hurdles."); App.13 ("[I]t is unlikely that the contemplated services will help Ochoa win relief on the *Wiggins* claim.").

As can be seen in the Fifth Circuit's recent caselaw, the court's post-*Ayestas* standard focuses on whether the petitioner is *likely* to overcome procedural default and win relief on his claim if granted funding and it bases that determination on its assessment of the claim as it currently stands, uninvestigated. This inquiry is indistinguishable from the "substantial need" test struck down in *Ayestas*.

C. The Fifth Circuit improperly held Mr. Ochoa to a proof standard on his funding motion.

While the Fifth Circuit's approach in *Mamou*, *Crutsinger*, and now *Ochoa* correctly quotes certain portions of the *Ayestas* opinion, it improperly focuses on whether the funding applicant is likely to prevail on his claims and fails to lower the burden for funding as this Court ordered. The *Ochoa* opinion is a good example of how this works in practice.

In *Ochoa*, the court did not engage with the question of whether the underlying *Wiggins* claim is "plausible." Nor did it ask whether the requested funding stands a "credible chance" of enabling Mr. Ochoa to overcome the procedural default of the claim. Instead, it simply concluded that the claim is meritless. App.12 (describing the underlying *Wiggins* claim as "meritless"); *see also id.* (quoting the district court's merits analysis of the underlying claim without the benefit of investigative services).

To the extent the court may have reasoned that if a claim is meritless then it cannot meet the plausibility standard under *Ayestas*, that inverse logic misses the point. A funding applicant need not show that his claim is meritorious. He must only show that it is "plausible," which is a notably lower burden. If anything, that is the "touchstone" of *Ayestas*.

Similarly, the court found that "it is unlikely Ochoa will clear the[] procedural hurdles" impeding the underlying *Wiggins* claim because he "has not shown a lack of diligence by his original state habeas counsel" and "such counsel could not be found ineffective . . . for failing to present a meritless claim." App.12. Whereas the proper inquiry focuses on whether there is a "credible chance" that the funding would enable Mr. Ochoa to excuse the procedural default via *Martinez*/*Trevino*, the Fifth Circuit's approach jumps the gun to ask whether the claim as currently pleaded—i.e., uninvestigated—meets the requirements of *Martinez*/*Trevino*. But it is entirely possible that funding could stand a "credible chance" of enabling a petitioner to meet the *Trevino* standard, even if the claim as it exists pre-investigation does not yet meet that standard. Indeed, that is purpose of the funding. *See Ayestas*, 138 S. Ct. at 1094 ("*Trevino* permits a Texas prisoner to overcome the failure to raise a substantial ineffective-assistance claim in state court by showing that state habeas counsel was ineffective, and it is possible that investigation might enable a petitioner to carry that burden."). Equally important, funding may stand a "credible chance" of enabling the petitioner to excuse procedural default, yet it still be "unlikely" that the petitioner will succeed in doing so.

It is the space between "credible chance" (or "plausibility") and "unlikely to win" where the Fifth Circuit errs. This is not a purely philosophical distinction. There are good reasons for having a lower burden for funding than the ultimate burden of whether the claim is meritorious—not the least of which is that it is difficult to know what an investigation will uncover until one undertakes that investigation. *Ayestas*, 138 S. Ct. at 1100 n.7 (Sotomayor, Ginsburg, J.J. concurring); *see also Wiggins*, 539 U.S. at 525 (finding trial counsel ineffective for failing to follow up on red flags in the investigation that may have led them to discover evidence of sexual abuse).

This Court has repeatedly admonished the Fifth Circuit for a similarly faulty approach in the context of applications for COA, where a petitioner must establish that his claim is "debatable" in order to earn the right to appeal. In *Buck v. Davis*, 137 S. Ct. 739 (2017), this Court rejected the Fifth Circuit's reasoning that because Buck's claim was "meritless" he failed to meet the debatability standard for COA:

> Of course when a court of appeals properly applies the COA standard and determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. That a prisoner fails to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim is debatable.

Id. at 774 (citing *Miller-El v. Cockrell*, 537 U.S. 322, 336–37 (2003)). Whether it be an application for COA or a funding motion, it is critical that the court analyze the threshold question under the correct standard, rather than jump ahead to rule on the merits of a claim or issue that has not yet been fully developed.

D. The Fifth Circuit's specificity requirement is overly burdensome.

The Fifth Circuit's requirement that a funding applicant specifically identify, without conjecture or speculation, what evidence he will uncover in his mitigation investigation before he receives funding is a fool's errand. Justices Sotomayor and Ginsburg touched on this very problem in their concurrence to *Ayestas* when they observed that, due to the open-ended nature of a mitigation investigation, it is difficult to know what such an investigation will uncover ahead of time. *Ayestas*, 138 S. Ct. at 1100 n.7 (Sotomayor, Ginsburg, J.J. concurring).

That is not to say that a court *must* grant funding to investigate an unexhausted *Wiggins* claim. But a court's funding standard must allow for the practical limitations on a petitioner's ability to provide specific detail to support the viability of his unexhausted claim that, by its very nature, has never been investigated. A funding applicant should be able to meet the "reasonably necessary" standard based on the information that is available to them without funding. Typically, that is evidence of deficient performance. The *Ayestas* concurrence concluded that funding for the unexhausted IAC *Wiggins* claim was "reasonably necessary" in large part based on trial counsel and state habeas counsel's failure to investigate, rather than what evidence of prejudice that Ayestas guessed he might uncover if provided funding to investigate for the first time. *Id.* at 1101 ("[T]he troubling failures of counsel at both the trial and state postconviction stages of Ayestas' case are exactly the types of facts that should prompt courts to afford investigatory services.").

As do other post-*Martinez* claimants seeking to excuse forfeiture committed by state habeas counsel, Mr. Ochoa pleaded and briefed his *Wiggins* claim without having factually developed all aspects of it—most importantly, the prejudice prong. But in pursuing funding under § 3599(f), Mr. Ochoa went to great lengths to explain the deficiencies of trial and state habeas counsel and identify what evidence he might uncover if granted funding to investigate his unexhausted claim. Through records and affidavits, Mr. Ochoa established that trial counsel did not hire a mitigation specialist until the middle of jury selection, leaving many of the most basic tasks incomplete by the time the trial started. *See, e.g.*, App.83–95;102–108. But the shortcomings in investigation and preparation are obvious even from a cursory review of the punishment phase transcript, which shows that counsel elicited the most basic, rudimentary information from witnesses like Mr. Ochoa's father and failed to explore underlying issues to any depths or present a coherent narrative. The father testified that while he would describe his family as "poor," the family's living conditions were "fine," that they did not have a shortage of food or water, and that he had enough money to support his family. App.153,156,157. And yet, two of his children, Mr. Ochoa's siblings, died either during childbirth or shortly thereafter. App.154. Mr. Ochoa's surviving siblings did not finish high school. App.161. Because of lack of investigation and preparation, counsel never explored these apparent contradictions in the testimony or asked questions that would have revealed a far more compelling narrative than the one-word answers elicited by trial counsel. Likewise, Mr. Ochoa's state habeas counsel conducted virtually no extra-record investigation. SHR 2–55.

Prior to filing his federal habeas petition, Mr. Ochoa brought on a pro bono mitigation specialist to conduct a brief, preliminary investigation and collect short affidavits from potential witnesses to signal to the court how the funding would be useful moving forward.[6] This information establishes at the very least a "plausible" claim and a "credible chance" of overcoming procedural default. Unfortunately, the Fifth Circuit's funding standard currently requires a much greater showing. *But see Ayestas*, 138 S. Ct. at 1094.

E. The Fifth Circuit further raised the funding burden by misapplying *Strickland* and its progeny.

The Fifth Circuit affirmed the denial of funding in part on the basis that Mr. Ochoa did not "identify an area or subject [of mitigating evidence] that was not generally covered by the evidence trial counsel presented to the jury." App.12. As an initial matter, that is not the correct inquiry for a *Wiggins* claim. The court should ask whether counsel conducted a reasonable investigation—not whether counsel presented the right kind of evidence. *See Wiggins*, 539 U.S. at 522–23 ("[O]ur principal concern . . . is not whether counsel should have presented a mitigation case . . . [but] whether the investigation supporting counsel's decision not to introduce mitigating evidence . . . was itself reasonable").

[6] *See, e.g.*, ECF No. 8-3, PageID 206; No.8-4, PageID 211; ECF No. 8-5, PageID 217; ECF No. 8-6, PageID 220; ECF No. 8-7, PageID 225; ECF No. 8-8, PageID 227; ECF No. 8-9, PageID 230; ECF No. 8-9, PageID 232; App.123.

The court also found that Mr. Ochoa's IAC claim was "meritless" because trial counsel chose to present an addiction expert at the punishment phase of trial. App.12 ("Trial counsel chose to focus on the power of Ochoa's cocaine addiction to explain this sudden anomaly"). But, again, this is the wrong inquiry under *Wiggins*. "[T]hat a theory might be reasonable, in the abstract, does not obviate the need to analyze whether counsel's failure to conduct an adequate mitigation investigation before arriving at this particular theory prejudiced [the defendant]." *Sears v. Upton*, 561 U.S. 945, 953 (2010). Instead, trial counsel's purported strategy or theory is reasonable only to the extent that it is informed by a reasonable investigation. *See Strickland v. Washington*, 466 U.S. 668, 690-91 (1984) ("[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.").

Moreover, when assessing prejudice, the fact that trial counsel presented some semblance of a mitigation case does not defeat a claim that they conducted an unreasonable investigation under *Wiggins*. *See Sears v. Upton*, 561 U.S. 945, 955 (2010) ("We certainly have never held that counsel's effort to present some mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant.") (emphasis in original). In short, not only did the Fifth Circuit improperly require Mr. Ochoa to establish that his claim was meritorious instead of "plausible," but it exacerbated the problem by raising the merits burden.

II. Alternatively, This Court Should Summarily Grant Certiorari and Reverse the Court Below.

Mr. Ochoa respectfully requests that if the Court does not grant certiorari for full hearing on the merits in this case, that the Court summarily grants certiorari, vacates the decision below without finding error, and remands the case for further consideration by the lower court.

CONCLUSION

There is no material difference between Fifth Circuit's new test and the "substantial need" test that this Court struck down in *Ayestas*. Both effectively require funding applicants to prove up their underlying habeas claims before they can receive funding. This Court squarely rejected this type of test in *Ayestas*, and it should do so again here. In the alternative, this Court should clarify the "plausibility" and "credible chance" standards so that the Fifth Circuit may distinguish them from the "substantial need" test.

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Respectfully submitted,

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