No. _____ (CAPITAL CASE)

In the Supreme Court of the United States

MARK ROBERTSON,
Petitioner,
vs.

LORIE DAVIS, Director, Texas Department of Criminal Justice,
Correctional Institutions Division
Respondent.

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

REDACTED PETITION FOR A WRIT OF CERTIORARI

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*** CAPITAL CASE ***

QUESTIONS PRESENTED

This Court has unanimously ruled, in multiple cases, that Congress's intent in enacting 18 U.S.C. § 3599 was to provide high 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. Robertson any requested representation services under § 3599(f), the court below ignored these rulings (albeit while paying lip service to them), along with many of the Court's other rulings, including: the duty of a habeas applicant to investigate all grounds for relief that may be raised in a *first* habeas corpus application on penalty of forfeiture, *McCleskey v. Zant*, 499 U.S. 467 (1991); the duty of federal courts to provide meaningful representation for the preparation of a habeas corpus application, *McFarland v. Scott*, 512 U.S. 849 (1994); the duty of federal courts to provide meaningful representation in federal habeas corpus proceedings before permitting a prisoner to be executed, *id.*; the duty of federal courts to ensure one meaningful round of federal habeas corpus review for a non-dilatory prisoner before permitting his execution to occur, *Lonchar v. Thomas*, 517 U.S. 314 (1996); and the importance of meaningful review of Sixth Amendment claims by at least one tribunal, *Martinez v. Ryan*, 566 U.S. 1 (2012).

Absent the Court's intervention, Mr. Robertson will be executed without having received any meaningful representation informed by investigation to prepare a *first* federal habeas corpus application and without having received any judicial review of a plausible Sixth Amendment claim he identified but was unable to meaningfully plead. Far from high quality representation, Mr. Robertson has only had counsel deprived of any means to effectuate her representation. The Court's intervention is necessary to preserve Mr. Robertson's access to the writ of habeas corpus in this case.

(1) Did the district court deny Mr. Robertson the meaningful representation informed by investigation to prepare a habeas corpus application to which he is entitled under 18 U.S.C. § 3599?

(2) Would a reasonable lawyer representing a death-sentenced prisoner pursue an investigation of a "bedrock" Sixth Amendment claim under the totality of the circumstances of this case?

(3) Was the Sixth Amendment claim identified by counsel representing the petitioner a "plausible" one within the meaning of *Ayestas v. Davis*, 138 S. Ct. 1080 (2018)?

(4) Does an attempt to amend a habeas corpus application following an appellate court's reversal and remand for further proceedings related to the provision of representation by the district court on the initial application constitute a second or successive habeas corpus application under 28 U.S.C. § 2244(b)?

PARTIES TO THE PROCEEDINGS BELOW

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PETITION FOR A WRIT OF CERTIORARI

Mark Robertson petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit affirming the district court's denial of Mr. Robertson's request for auxiliary representation services and to amend his habeas corpus application is attached as Appendix A. The unpublished order of the district court denying leave to amend the habeas corpus application is attached as Appendix B. The unpublished memorandum opinion of the district court denying representation services and a stay of execution on remand, which was sealed *sua sponte* by the court, is attached as Appendix C. The unpublished opinion of the Fifth Circuit reversing the district court and remanding it for further proceedings related to representation on his Sixth Amendment claim is attached as Appendix D.

JURISDICTION

The district court had jurisdiction over the habeas cause under 28 U.S.C. § 2241. The Fifth Circuit possessed jurisdiction pursuant to 28 U.S.C. §§ 1291 & 2253. The Fifth Circuit's affirmance and/or denial of a certificate of appealability on all issues occurred on April 3, 2019. This Court has jurisdiction to review the opinion pursuant to its authority to issue writs of certiorari. 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are attached as Appendix E.

STATEMENT OF THE CASE

This case fundamentally reduces to whether Mr. Robertson, a capitally sentenced prisoner, has been afforded the meaningful representation in his federal habeas corpus proceeding contemplated by Congress when it enacted 18 U.S.C. § 3599 and by this Court in *McFarland v. Scott*, 512 U.S. 849 (1994). Shortly after the district court appointed Mr. Robertson counsel pursuant to § 3599, that counsel—a solo practitioner in private practice without any staff—diligently inquired into what investigation might bear fruit with respect to the question of the legality of Mr. Robertson's confinement under federal law. *See* 28 U.S.C. § 2241(c)(3). It was her duty to do so. *See McCleskey v. Zant*, 499 U.S. 467, 498 (1991) (a federal habeas applicant "must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition").

Within a couple months of appointment, counsel had obtained and reviewed trial counsel's files; obtained and reviewed state habeas counsel's files; spoken to the mitigation specialist retained by state habeas counsel; and consulted with an independent mitigation specialist to understand the scope and quality of prior legal teams' investigation into Mr. Robertson's background. Based on that inquiry, counsel formed the opinion that a possible Sixth Amendment violation occurred relating to trial counsel's failure to conduct the thorough background investigation this Court has recognized that trial counsel have the duty to conduct in capital cases ("*Strickland* claim"). *See Porter v. McCollum*, 558 U.S. 30, 39 (2009) (trial counsel in a capital case have an 'obligation to conduct a thorough investigation of the defendant's background'") (quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000)). Since 2013, Mr. Robertson has sought the means to conduct an investigation that might support that possible claim, but has never received them. His counsel was forced to file a habeas application uninformed by any meaningful investigation. The application alleged the *Strickland* claim as well as it could be done absent

resources for investigation. Many allegations were necessarily speculative. Many, it is believed, remain undiscovered that would support the claim.

Mr. Robertson's case was in the Fifth Circuit when this Court decided *Ayestas v. Davis*, 138 S. Ct. 1080 (2018), rejecting that court's "substantial need" test for § 3599(f) representation services. In response, the Fifth Circuit reversed the district court and remanded it for further proceedings on representation related to the *Strickland* claim in light of *Ayestas*. On remand, the district court again refused to provide investigative services under § 3599, but on that same date the district court appointed the Capital Habeas Unit of the Federal Public Defender for the Northern District of Texas ("FPD") as co-counsel to represent Mr. Robertson. Unlike previously appointed counsel, the FPD has the means and staff to conduct the investigation Mr. Robertson long pursued in federal court. The federal court's appointment of the FPD therefore gave to Mr. Robertson with one hand what it had deprived him with the other. But the district court refused thereafter to afford Mr. Robertson any opportunity to utilize those resources and obtain the benefit of representation informed by investigation. The Fifth Circuit affirmed the totality of the district court's actions, leaving Mr. Robertson without any meaningful representation to prepare a federal habeas application and, as a consequence, without any meaningful review of his possible Sixth Amendment claim.

* * * * *

Mr. Robertson was originally convicted of capital murder and sentenced to death in 1991 by the Criminal District Court, Number Five, Dallas County. He received sentencing relief from the Court of Criminal Appeals of Texas. Following a resentencing trial in 2009, he was again sentenced to death.

A. Section 3599 Counsel Diligently Reviewed Records to Ascertain Mr. Robertson's Representation Needs in Federal Habeas Corpus Proceedings

On March 18, 2013, the U.S. District Court for the Northern District of Texas appointed attorney Lydia Brandt to represent Mr. Robertson in proceedings within the scope of 18 U.S.C. § 3599. Counsel diligently obtained and reviewed prior defense team files as well as the trial, resentencing, and state habeas records. Review of those files, in conjunction with interviews with members of Mr. Robertson's prior defense teams and a consultation with a mitigation specialist, caused § 3599 counsel to form the opinion that a possible *Strickland* claim existed because his trial counsel did not meet their duty to conduct a thorough background investigation of their client.

Review of the clerk's record from the trial reflected that the state court appointed Mr. Robertson's trial counsel for his resentencing proceeding at least by June 30, 2008. It reflected that on July 1, 2008, trial counsel filed a motion requesting authorization to retain "forensic psychologist" Kelly Goodness, Ph.D., who was to "review the facts of this case, review reports, interview and evaluate the Defendant, and examine the Defendant's background and character in order to shed light on potentially mitigating factors and to prepare and present mitigation evidence." 1 CR 130. The record did not reflect that trial counsel ever sought authorization to retain a person specifically trained to investigate mitigation. The trial record additionally reflected that, on or about April 16, 2009, trial counsel requested and the trial court authorized retention of a second psychologist Kristi Compton, for no identifiably strategic purpose. The retention of Dr. Compton raised a red flag about the thoroughness of trial counsel's investigation into Mr. Robertson's background, because it occurred over a month after the resentencing trial began on March 13, 2009.

Review of the reporter's record from the trial reflected that Mr. Robertson's counsel presented testimony from two family members, Mr. Robertson's mother Mary Lou Runnels and

sister Denise Breedlove. Breedlove's testimony focused mostly on the dysfunctional family dynamics in Mr. Robertson's early childhood home in California, including their alcoholic, violent, and incredibly abusive father Donald Robertson. Most of the narrative about Mr. Robertson's life through adolescence and into adulthood, however, was supplied by his mother.[1] Trial counsel also presented testimony from Mark Dittrich, one of Mr. Robertson's friends from adolescence.[2] The testimony from just three witnesses about Mr. Robertson's social history raised a red flag about the thoroughness of trial counsel's background investigation.

Trial counsel also presented testimony from two mental health experts, addiction expert Dr. Ari Kalechstein and psychologist Dr. Kristi Compton. Dr. Kalechstein testified about the underlying causes of addictive behavior to the jury and opined based on records he reviewed that Mr. Robertson was exposed to several risk factors that increased the likelihood he would suffer substance abuse. 40 RR 44-46. Dr. Compton evaluated Mr. Robertson and testified that in her opinion Mr. Robertson was a psychopath. 41 RR 147. He was impulsive, lacked remorse for his actions, and exhibited deceitfulness, irritability, aggressiveness, irresponsibility and reckless disregard for the safety of self and others. *Id.* at 69-70. She opined there was likely a genetic link to his father who was a psychopath. *Id.* at 72.

Dr. Compton's testimony raised a red flag about the thoroughness of trial counsel's investigation into Mr. Robertson's background. First, Dr. Compton's testimony was extremely

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[1] Mr. Robertson's father physically beat the children to the point they needed medical attention. 39 RR 156; 41 RR 10-11, 23. Mr. Robertson's mother did not intervene to protect them and did not help them obtain medical care when needed. 41 RR 11, 23. Mr. Robertson's father's behavior also subjected the family to violence from outsiders. 39 RR 166; 41 RR 18-19. When Mr. Robertson was eight, their mother abandoned them and moved to Texas. 39 RR 173, 176-77. Three months later, Mr. Robertson's father showed up in Texas to abandon the children back to her, although not without violence. *Id.* at 178-79. Neither she nor the children ever saw Donald Robertson again.

[2] Mr. Dittrich had known Mr. Robertson as a teenager; he testified that despite the murders, he still considered Mr. Robertson a friend because there was still good in him. 40 RR 63-64. He described generally how Mr. Robertson had changed for the better since his incarceration. *Id.* at 67. He did not think Mr. Robertson's mother and step-father had good parenting skills and. *Id.* at 56-57.

damaging, and may as well have been presented by the State. Second, the clerk's record reflected that Dr. Compton had been retained after trial began, suggesting a rushed preparation. Third, and corroborating the second, Dr. Compton's testimony reflected she operated under an immensely significant misimpression that Mr. Robertson was not abused as a child. 41 RR 73 ("To my knowledge, Mark was not abused."). The testimony conflicted with Mr. Robertson's sister, who testified he was abused *Id.* at 14-15 (testimony that Mr. Robertson was made to stand at the foot of the bed in the middle of the night with the rest of the children under threat of beating and was physically abused by the father). Dr. Compton's opinions were heavily based on Mr. Robertson's having witnessed abuse inflicted on his family while being the "favorite" child spared it, facts bearing no relation to reality.[3] Fourth, although Dr. Compton's opinion was based on Mr. Robertson's *father's* psychology, the defense team had not collected any information from him or from any paternal relatives on which that assessment could be based.

Review of the trial defense team's files reflected that, although trial counsel had obtained authorization to retain Dr. Goodness to assist with mitigation on July 1, 2008, no witness interviews occurred until March 16, 2009, after the resentencing trial had begun. The records reflected Dr. Goodness had compiled a "Collateral Contacts List," identifying 30 individuals who could be interviewed. All the "collateral contacts" except four were family members.

The records also reflected that Dr. Goodness compiled a "Collateral Interview List," documenting interviews completed and those designated to be done. The list contained 20

[3] Mr. Robertson was hardly exempt from abuse dished out by his father. Evidence elicited during his first trial leaves no doubt Mr. Robertson was abused. While Mr. Robertson may not have received as much physical abuse as siblings because of his younger age, he was both physically and verbally abused, and allowed to be so by his mother before she abandoned the children. Mr. Robertson's sister Denise Breedlove (then McLane) testified at the first trial that Mr. Robertson "didn't get a beating when he was a baby," but "the older he got the more he got." She had seen Mr. Robertson's father "strike him when he was a toddler more than a toddler should be struck." And "[t]he older he got you know the more he got it. He was just around it so much and there was a lot of verbal abuse toward him as well as us." 63 RR 11.

witnesses to interview from the "Collateral Contacts List," all family members. The "Collateral Interview List" was divided in three categories: (1) "Collateral Interviews Completed;" (2) "Collaterals [sic] Interviews Attempted;" and (3) "Collaterals Still Needed – PRIVATE INVESTIGATOR to find." The Collateral Interviews Completed category reflected the interviews completed were confined to the maternal side of the family. By April 3, 2009, she had interviewed just nine individuals, five of whom had testified during Mr. Robertson's first trial and hence were individuals from whom the team already had information. Dr. Goodness interviewed just four individuals that could have provided any additional information, all siblings of Mr. Robertson's mother.

The records reflected Dr. Goodness only conducted brief interviews with a handful of individuals over just a handful of days in her office. On March 16, 2009, she briefly interviewed five individuals: mother Mary Lou Runnels, step-father Gary Runnels, sister Denise Breedlove, sister Carol Carpenter, and half-brother Jimmy Raines. On April 2, 2009, she interviewed three maternal aunts and uncles. On April 3, 2009, she interviewed another maternal uncle. Having interviewed less than half the "collaterals" identified, execution of the "Collateral Interview List" appeared to terminate, less than half finished.[4]

Defense counsel's files raised several red flags related to the thoroughness of the team's background investigation. *First*, there was no indication trial counsel exercised any oversight over the background investigation. It appeared the task was delegated to the retained psychologist.

Second, although Dr. Goodness had been retained relatively early in the process, no "collateral" interviews occurred until very late, after the resentencing trial had already begun and

[4] Dr. Goodness interviewed Mark Dittrich on April 17, 2009, but he was not on the "Collateral Interview List," suggesting it may have been fortuitous. Dr. Goodness's invoice reflected another entry for a short (0.3 hours) "collateral interview" occurring on May 6, 2009.

just one month before individual voir dire began. *See* Commentary, Guideline 10.7, American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases [hereinafter "ABA Guidelines"] ("The mitigation investigation should begin as quickly as possible, because it may affect . . . decisions about the need for expert evaluations (including competency, mental retardation, or insanity), motion practice, and plea negotiations."). The background investigation was therefore exceedingly dilatory.

Third, it appeared no investigation into Mr. Robertson's childhood in California (beyond the dysfunctional family dynamics) occurred. There was a dearth of information in the files relating to Mr. Robertson before age eight. *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.").

Fourth, the investigation that was contemplated by Dr. Goodness's "Collateral Interview List" relied on a narrow set of sources, all family members. Of the family members interviewed, all were from the maternal side of the family. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *see also* Commentary, Guideline 10.7, ABA Guidelines ("It is necessary to locate and interview the client's family members (who may suffer from some of the same impairments as the client), and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation, or parole officers, and others."); *id.* ("The collection of corroborating information from multiple sources—a time-consuming task—is important wherever possible to ensure the reliability and thus the persuasiveness of the evidence."). A thorough background investigation plan would have identified dozens of more people to interview beyond family members and would have encompassed Mr. Robertson's paternal family. The information that the defense team learned came almost exclusively from Mr. Robertson's mother's perspective,

i.e., from her or from her immediate family members. This was problematic because the defense team learned information that Mr. Robertson's mother contributed to dysfunction and was not necessarily an objective, reliable historian.[5]

Fifth, Dr. Goodness's records reflected that historical records related to Mr. Robertson were reviewed, but records related to any other family members were not obtained or reviewed, including Mr. Robertson's principal caregivers after age eight (his mother and step-father). *See id.* ("Records should be requested concerning not only the client, but also his parents, grandparents, siblings, cousins, and children."). A thorough background investigation would have included such investigation.

Sixth, as Dr. Goodness was a psychologist, and not a mitigation investigator, these interviews that were labeled "collateral interviews," occurred only once in an office, and took the form of structured collateral interviews that psychologists would conduct. This is not the prevailing professional norm for mitigation investigation; it could not be expected to develop the breadth and thoroughness of information typically generated by a mitigation specialist conducting field investigation work. *See* Guideline 4.1(A)(1), ABA Guidelines ("The defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1, an investigator, and a mitigation specialist."); Commentary, Guideline 10.7, ABA Guidelines (explaining that investigation requires significant time to develop, particularly in light of the sensitive nature of information sought).

Seventh, the defense did not complete more than half its investigation plan, as narrow and limited as it was to start. Out of twenty witnesses on the list, Dr. Goodness spoke to just nine. Even

[5] The role she played in Mr. Robertson's life did not appear to have been critically investigated. Mr. Robertson's sister Denise Breedlove told Dr. Goodness that much of Donald Robertson's violence happened while Ms. Runnels was away at work. *See* Doc. 92 at 9-10. And when she was there, she would not intervene to protect the children or provide them medical care afterwards. *Id.*

if the defense team's investigation plan had been thorough as designed, they did not complete it, which strongly indicated dilatoriness and lack of adequate preparation. Section 3599 counsel recognizes that "reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste," *Rompilla v. Beard*, 545 U.S. 374, 383 (2005), but it appeared that the lines drawn by the trial team here were dictated to them by the impending trial because they were dilatory in beginning investigation.

Eighth, the rushed, inadequate background investigation resulted in a deficient and incomplete psychosocial history of the client, critical for identifying coherent mitigating themes to present at sentencing; identifying mental health issues and experts with relevant expertise to investigate further; and supplying thorough, relevant, and accurate social history information to experts to ensure the reliability and credibility of the opinions they form. *See* Commentary, Guideline 4.1, ABA Guidelines ("The mitigation specialist compiles a comprehensive and well-documented psycho-social history of the client based on an exhaustive investigation . . .").

From this record review, § 3599 counsel formed an opinion that a possible claim existed that trial counsel's failure to conduct a thorough background investigation deprived him of effective representation for the capital resentencing. *See supra* p. 2 (citing *Porter*, 558 U.S. at 39). This opinion was reinforced by reviewing the state habeas record and speaking with Mr. Robertson's state habeas legal team. Review of the state habeas record reflected that Mr. Robertson's state habeas application raised a claim that Mr. Robertson was deprived of effective representation at the resentencing trial, but the allegations centered around challenging their strategic decisions about what information to present as evidence. Included as an attachment to the state habeas application, however, was a "Mitigation Assessment" created by mitigation specialist Toni Knox, who had been retained by state habeas counsel. The document reflected conclusions

by her that "a thoroughly documented psychosocial history was not completed" by the trial defense team and that "a complete and thorough investigation was not completed." 1 S.H.Tr. 43, 45.

Section 3599 counsel's interview with Ms. Knox reflected that, after being retained by state habeas counsel, she reviewed the court and trial team records, from which she formed the opinion that the trial investigation into Mr. Robertson's background was incomplete. Two glaring omissions she identified were that the trial defense team did not interview a single person from Mr. Robertson's paternal side of the family and "there was a dearth of information in the files . . . about [Mr. Robertson's] life from birth to age eight." Doc. 47 at 46. She created an investigation plan compiling "a large interview list," which included interviewing witnesses beyond maternal relatives to learn about Mr. Robertson's childhood and objective information about his mother and step-father. Doc. 47 at 42-44.

Ms. Knox conveyed that Mr. Robertson's state habeas counsel did not permit her to conduct the recommended investigation. Ms. Knox had expended most of her initial funding reviewing the trial records and trial defense team's files, and the investigation would have required expenditure of additional funds. State habeas counsel, however, believed the state trial judge would not approve additional funding, and decided to redirect Ms. Knox's efforts to second-guessing trial counsel's strategic presentation decisions based on the information they had.

Section 3599 counsel also consulted independent mitigation investigator Mary Burdette, asking her to review records and give her opinion about the adequacy of investigations into Mr. Robertson's background. Via letter to § 3599 counsel, Burdette expressed her opinion that investigation into Mr. Robertson's background by prior legal teams was "a patchwork and lacks comprehensiveness, [containing] significant gaps in information." Doc. 53, Exhibit A. She opined, "[A] glaring omission is the all-important investigation into Mr. Robertson's biological father and

extended paternal family," noting it "appear[ed] clear" Mr. Robertson's father had mental health issues. *Id.* She also observed that "[s]everal other areas of investigation were hinted at, but not adequately investigated, such as possible bi-polar diagnosis and traumatic head injury." *Id.*

B. Section 3599 Counsel's Attempts to Obtain Investigative Services to Effectuate Meaningful Representation in the Preparation of an Initial Federal Habeas Corpus Application

Because investigation takes substantial time to conduct, and there exists a one-year limitations period in federal habeas corpus proceedings, § 3599 counsel must move quickly to obtain and review voluminous court records and legal files to ascertain what the representation needs for the preparation of a federal habeas corpus application are. It can take significant time just to acquire all these records. In this case, Mr. Robertson's § 3599 counsel diligently conducted this review and moved for leave to make a representation request for investigative services ex parte on May 13, 2013, less than two months after appointment. Specifically, Mr. Robertson requested authorization to retain auxiliary services to assist his counsel's investigation of Mr. Robertson's background. Doc. 8 (withdrawn by court order).

Following extensive litigation over Mr. Robertson's right to proceed ex parte, the district court on September 30, 2013, denied authorization for any services. Doc. 25. The court reasoned investigative services were not reasonably necessary to Mr. Robertson's representation because a "*Wiggins* claim" had been raised and adjudicated on the merits in state court and thus would be subject to 28 U.S.C. § 2254(d)'s relitigation bar. *Id.* at 4-6.

On October 14, 2013, Mr. Robertson sought reconsideration. Sealed Doc. 31. [redacted]

[redacted]

On October 31, 2013, the court denied reconsideration. Doc. 33. Notwithstanding Mr. Robertson's assertions about how § 3599 counsel intended to represent him in the federal forum, the court re-adopted its prior ruling that he was seeking services to investigate a failure-to-present claim that had been adjudicated in state court and thus would be subject to 28 U.S.C. § 2254(d). The Court also held that, even if Mr. Robertson could identify a *Strickland* claim different from the one presented in state court, the court would refuse to afford him the representation to investigate its factual basis, on the ground that a federal habeas applicant should not be permitted to explore the existence of claims that are different from what was presented in state court.

On January 7, 2014, because the statute of limitations required it, Mr. Robertson filed a habeas corpus application without meaningful representation informed by investigation. Doc. 34. The application alleged, to the best of his counsel's ability under the constraints imposed, that his confinement violated federal law for two reasons: (1) Mr. Robertson was deprived of effective representation during his capital trial because trial counsel failed to conduct a thorough background investigation ("*Strickland* claim"); and (2) Mr. Robertson was deprived of due process by the introduction of materially false testimony during the sentencing phase ("false testimony claim").

A week later, Mr. Robertson filed a renewed motion for investigative services ex parte. Sealed Doc. 36 (withdrawn). [redacted]

[redacted]

On May 15, 2014, Mr. Robertson filed an amended application raising the same allegations as in the original application, together with an argument that state habeas counsel had been ineffective for failing to investigate and raise a claim related to trial counsel's background investigation in anticipation the Director would assert the claim to be procedurally defaulted. Doc. 47. Mr. Robertson proffered affidavits from state habeas mitigation investigator Toni Knox, Doc. 47-12, and state habeas counsel Franklyn (Mick) Mickelsen, Doc. 47-15. The affidavits reflected that Knox had recommended to Mickelsen that background investigation be conducted due to the incomplete investigation and deficient social history compiled by the trial team. Mickelsen rejected the recommendation, but not because he rejected Knox's conclusions about deficiencies in the background investigation. Mickelsen believed the trial judge was "hostile" to funding and would not have been receptive to a request to authorize investigative services. Because of this perception, Mickelsen never asked for authorization. Instead, Mickelsen redirected Knox's efforts to other tasks to support a claim challenging trial counsel's strategic presentation decisions.

On July 8, 2014, the Director filed her answer. Doc. 50. It argued (1) the *Strickland* claim was procedurally defaulted because it had not been presented to the state court, Doc. 50 at 51-52; (2) Mr. Robertson could not establish *Martinez* cause because the *Strickland* claim as pleaded was insubstantial, Doc. 50 at 53, 59-60; and (3) the *Strickland* claim lacked merit because the allegations did not demonstrate prejudice, Doc. 50 at 53.

[6] Mr. Robertson had assumed that he could proceed ex parte to renew the request the court had previously granted him leave to proceed ex parte. The district court made seemingly arbitrary rulings in response to Mr. Robertson's representation requests throughout the proceeding.

On August 6, 2014, Mr. Robertson filed a reply, asserting that whether he pleaded a substantial *Strickland* claim and whether he was prejudicially deprived of effective state habeas counsel had to be deferred until Mr. Robertson was afforded the representation services necessary to plead all reasonably obtainable allegations in support of the claim and argument. Doc. 51. Mr. Robertson's indigency had rendered him unable to pay for the assistance necessary to meaningfully investigate and discover all material allegations to support the claim.

Contemporaneous with his reply, Mr. Robertson again renewed his representation request, Doc. 53, seeking investigative services to conduct a background investigation that prior legal teams had not. Mr. Robertson pointed out that the parties agreed the *Strickland* claim was procedurally defaulted. Because the parties agreed that the *Strickland* claim had not been adjudicated by the state court, the court's prior ruling that investigative services were not reasonably necessary because § 2254(d) could preclude relief based on the state court record alone was no longer sound.

On March 25, 2015, the court again denied the requested representation services. Doc. 69. Applying the "substantial need" test for provision of representation services under § 3599(f), the court held Mr. Robertson was not entitled to the services, either because he was seeking the services with respect to "an exhausted claim to develop additional evidence that could not be considered under *Pinholster*," or "for a fishing expedition to find new evidence to support an unexhausted claim that would appear to be procedurally barred." *Id.*

On March 30, 2017, the district court denied the habeas application. Doc. 72. Reversing its prior holding in the orders denying investigative services, it agreed that the *Strickland* claim was procedurally defaulted. *Id.* at 31. Notwithstanding Mr. Robertson's request that the court not address the merits of his *Strickland* claim until he was able to plead it with meaningful

representation informed by investigation, the court nevertheless addressed the merits. It held the claim as pleaded lacked merit under 28 U.S.C. § 2254(b)(2) and denied it for that reason. *Id.* at 28.

Mr. Robertson appealed the court's denial of representation services as it related to thwarting his ability to plead material factual allegations in support of his *Strickland* claim. On March 21, 2018, while Mr. Robertson's appeal was pending, this Court decided *Ayestas v. Davis*, 138 S. Ct. 1080 (2018). *Ayestas* rejected the Fifth Circuit's overly restrictive "substantial need" test for determining whether auxiliary services are reasonably necessary to representation under § 3599(f). On July 5, 2018, the Fifth Circuit reversed and remanded Mr. Robertson's case back to the district court for reconsideration of his need for representation services as it related to the *Strickland* claim in light of *Ayestas*. *Robertson v. Davis*, 729 F. App'x. 361, 362 (5th Cir. 2018).

Notwithstanding that the Fifth Circuit remanded Mr. Robertson's initial habeas application back to the district court for further proceedings, on October 26, 2018, the Dallas County District Attorney filed a motion in the state trial court over Mr. Robertson's objection asking the court to set an execution date. The motion falsely stated that Mr. Robertson's "substantive claims have been rejected by the federal courts." It did, however, inform the state court that the Fifth Circuit had remanded the case to the district court on July 5, 2018, and that "the remand . . . to the federal district court is currently pending." Notwithstanding the pendency of Mr. Robertson's federal action, the state court on November 9, 2018, set an execution date of April 11, 2019. Doc. 87.

On November 15, 2018, the Director filed in the federal district court a motion for a post-remand scheduling order, which Mr. Robertson opposed because it did not include a request to stay the execution the State had just a week earlier set despite knowing the initial habeas application remained pending. Docs. 88 & 90. The district court set a briefing schedule and the parties submitted post-remand briefs. Docs. 92 & 94. Mr. Robertson also asked the district court

to stay his execution. On February 7, 2019, appointed § 3599 counsel, a solo practitioner, filed a motion to have the Capital Habeas Unit of the Federal Public Defender for the Northern District of Texas ("FPD") appointed as co-counsel in his case. Doc. 97.

On February 19, 2019, the district court issued a 57-page opinion order denying investigative services under § 3599(f). Sealed Doc. 98. [redacted] Although no party requested it, the court sealed its order from the public. [redacted] The district court did not issue a separate judgment.

On March 4, 2019, Mr. Robertson filed a motion for leave to file an amended application within 120 days. Doc. 102. He reasoned that, because the district court had appointed the FPD, which has investigative services on staff, Mr. Robertson could now conduct the investigation he had been seeking assistance from the court to conduct since 2013. The FPD had conducted a preliminary review and agreed that the investigation was reasonably necessary; that the investigation ought to be pursued; and that it would use its own resources to pursue it. *Id.* Mr.

[7] The order did not reflect any consideration of and did not address or reference the briefs the court ordered the parties to prepare and file.

Robertson needed time to conduct that investigation, however, and, in view of the April 11 execution date, he also needed a stay of execution for this representation to be meaningful.

The next day, the district court denied leave to file an amended application and a stay of execution. Doc. 103. The court believed there was "nothing" before it other than the issue of Mr. Robertson's representation, and that it therefore "lack[ed] the authority to . . . grant petitioner permission to file what amounts to a successive federal habeas corpus petition." *Id.* at 4. Although the district court did not enter a separate judgment, Mr. Robertson filed a notice of appeal.[8]

Before the Fifth Circuit, Mr. Robertson argued, inter alia, that the district court erred in several respects: (1) by holding that it lacked power on remand to consider Mr. Robertson's request for leave to file an amended habeas application after the FPD was appointed because it would be a successive habeas application; (2) by concluding that the possible *Strickland* claim was "inane" to deny investigative services; (3) by depriving Mr. Robertson of meaningful representation informed by investigation to prepare a habeas corpus application; and (4) by denying a stay of execution before Mr. Robertson had been afforded meaningful representation to prepare an initial habeas corpus application in federal court and before he had received one meaningful round of habeas corpus review. Because Texas set an execution date, the appellate proceeding—from opening brief to decision—occurred over the course of eleven days.

On April 3, 2019, a different panel of the Fifth Circuit from the one that had remanded the case issued a five-page opinion. It affirmed the district court's denial of representation services,

[8] The district court's order denying leave to file an amended application is a final, appealable order, because it disposes of all possible issues in the district court on remand. Mr. Robertson filed his notice of appeal notwithstanding the district court's failure to enter a separate judgment. *See* Fed. R. Civ. P. 58(a); *Moreno v. LG Elecs., USA Inc.*, 800 F.3d 692, 696-97 (5th Cir. 2015).

agreeing that § 3599 counsel and the FPD sought to pursue an "inane" claim.[9] App. A at 4. The Court also denied a COA to appeal the district court's denial of Mr. Robertson's motion for leave to amend a habeas corpus application.[10] It held that its remand "was limited—to determine whether Robertson was entitled to funding under *Ayestas*," and it "did not vacate the district court's judgment denying Robertson federal habeas relief." *Id.* It, therefore, held that "no jurist of reason would disagree with the district court's conclusion that Robertson's amended petition represents a successive filing." In short, it held it previously remanded the case to the district court to issue an advisory opinion about Mr. Robertson's representation as to a facially "inane" claim from which he could obtain no benefit, regardless of the ruling.[11]

REASONS FOR GRANTING THE WRIT

The Court's intervention is necessary to provide Mr. Robertson access to the writ of habeas corpus in a capital case. As this Court recognized in *McFarland*, access to meaningful representation is necessary to ensure meaningful federal review. Mr. Robertson has had neither.

I. THE COURT SHOULD GRANT CERTIORARI TO DECIDE AN IMPORTANT FEDERAL QUESTION ABOUT WHEN A QUALIFYING PRISONER HAS BEEN DENIED MEANINGFUL REPRESENTATION INFORMED BY INVESTIGATION TO PREPARE A FEDERAL HABEAS CORPUS APPLICATION

The Court should grant certiorari in this case to answer the important question of when the judiciary has deprived a qualifying defendant or habeas applicant of the meaningful representation

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[9] Under Fifth Circuit case law, a COA is not required to appeal the denial of representation under § 3599. *Smith v. Dretke*, 422 F.3d 269, 288 (5th Cir. 2005). Thus, it "affirmed" the district court's deprivation of representation services.

[10] It is not clear that an appeal of this order required a COA, because it did not dispose of the merits of Mr. Robertson's habeas corpus application. *See Harbison v. Bell*, 556 U.S. 180, 183 (2009) (Section 2253(c) "governs final orders that dispose of the merits of a habeas corpus proceeding—a proceeding challenging the lawfulness of the petitioner's detention.").

[11] The Texas Court of Criminal Appeals stayed Mr. Robertson's execution on April 8, 2019, on an unrelated issue.

to which Congress entitled him. The question presented in this case is timely in light of the recent release of a report by the Ad Hoc Committee to Review the Criminal Justice Act. The report, discussed *infra*, identified wide disparities in the quality and scope of representation afforded to qualifying defendants and prisoners under the Criminal Justice Act ("CJA") and related provisions. As well, notwithstanding the Court's recent decision in *Ayestas*, the lower courts, especially the Fifth Circuit and district courts within it, remain in substantial need of guidance so as to ensure that qualifying prisoners are not denied meaningful, high quality representation in capital cases.

Section 3599 of Title 18 grants indigent capital defendants a right to legal representation in federal post-conviction proceedings. The statute reflects a Congressional determination "that quality legal representation is necessary in capital habeas corpus proceedings in light of 'the seriousness of the possible penalty and . . . the unique and complex nature of the litigation.'" *McFarland*, 512 U.S. at 855 (quoting 21 U.S.C. § 848(q)(7) (current version at 18 U.S.C. § 3599)). The purpose of § 3599 is to "improve the quality of representation afforded to capital [habeas] petitioners and defendants alike." *Martel v. Clair*, 565 U.S. 648, 659 (2012). The statute accomplishes this aim by requiring lawyers in capital cases to have more legal experience than the Criminal Justice Act (18 U.S.C. § 3006A) demands in the non-capital context. *Id.* Additionally, the statute authorizes higher rates of compensation to attract better counsel. *Id.* And § 3599 provides more money for investigative and expert services than are available under § 3006A. These measures "'reflec[t] a determination that quality legal representation is necessary' to foster 'fundamental fairness in the imposition of the death penalty.'" *Id.* (quoting *McFarland*, 512 U.S. at 855, 859). In short, the clear intent of § 3599 was to grant federal capital defendants and capital habeas applicants "enhanced rights of representation" beyond those granted to non-capital applicants in 18 U.S.C. § 3006A.

In *McFarland*, the Court held that failure to appoint counsel to a qualifying prisoner before the filing of a habeas application created a substantial risk the prisoner's habeas claims would never be heard on the merits, and therefore violated the right to quality legal representation afforded by 18 U.S.C. § 3599. 512 U.S. at 856. The Court concluded that pre-application representation was essential for two reasons: (1) the complexity of habeas corpus jurisprudence; and (2) the need to investigate and identify the factual bases of possible claims. *Id.* at 855-56. The Court also held that a stay of execution was required in the case because, absent one, the representation could not be made meaningful. *Id.* at 858. Thus, *McFarland* stands for the proposition that the failure to afford a qualifying prisoner meaningful and quality legal representation to prepare a habeas corpus application violates the representation right that § 3599 affords him. Additionally, a federal court must "ensure that the defendant's statutory right to counsel [i]s satisfied throughout the litigation." *Martel*, 565 U.S. at 661.

Specifically with respect to representation informed by investigation, *McFarland* recognized that "[t]he services of investigators and other experts may be critical in the preapplication phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified." 512 U.S. at 855. Congress authorized the provision of investigative services to prisoners in 18 U.S.C. § 3599(f) where those "services are reasonably necessary for the representation of the defendant." In *Ayestas*, the Court held this standard is the same as the parallel "reasonable attorney" standard for expert and investigative services under the Criminal Justice Act (CJA), which applies in noncapital cases: The district court should determine "whether a reasonable attorney would regard the services as sufficiently important." *Ayestas*, 138 S. Ct. at 1093. Where a request is made in relationship to a possible claim, the applicant should show that the claim is "plausible" by "articulat[ing] specific reasons why the services are warranted." *Id.* at

1094. Where procedural obstacles may prevent relief, a court should nevertheless grant requests when a "credible chance" of overcoming them can be articulated. *Id.*

In keeping with the principle that the standard should work the same way in capital and noncapital cases, *Ayestas* emphasized that the reasonable attorney standard should be interpreted by reference to the "way in which § 3599's predecessors were read by the lower courts." *Id.* (citations omitted). Under this precedent, a court should authorize investigative services "in circumstances in which a reasonable attorney would engage such services for a client having the independent financial means to pay for them." *United States v. Alden*, 767 F.2d 314, 318-19 (7th Cir. 1984) (cited by *Ayestas*, 138 S. Ct. at 1094) (quotation and citations omitted). The approach, unanimously adopted in *Ayestas*, comports with an unbroken line of cases resolving requests for services by asking whether a private attorney representing a paying client would use them. *See, e.g.*, *United States v. Burroughs*, 613 F.3d 233, 239 (D.C. Cir. 2010) ("Necessity is made out where ... a reasonable attorney would engage such services for a client having the independent means to pay for them." (ellipses in original) (citation omitted)); *Brinkley v. United States*, 498 F.2d 505, 510 (8th Cir. 1974); *United States v. Theriault*, 440 F.2d 713, 717 (5th Cir. 1971) (Wisdom, J., concurring). Simply put, reasonable attorneys pursue services in support of "plausible" claims that stand a "credible" chance of overcoming any procedural obstacles that might exist. *Ayestas*, 138 S. Ct. at 1094; *see also id.* (an "applicant must not be expected to prove that he will be able to win relief if given the services he seeks") (emphasis omitted).

A. The *2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act* Identified "Drastic Disparities" in the Federal Judiciary's Provision of Guaranteed Representation Between and Even Within Regions

In 2015, Chief Justice Roberts appointed federal judges to a CJA Review Committee to conduct a comprehensive and impartial review of the CJA program. Chaired by Judge Kathleen

Cardone, a Western District of Texas judge, the Committee heard nearly 100 hours of testimony from 229 witnesses at seven public hearings. It issued its final revised report detailing its findings in April 2018.[12] The Committee "found troubling signs that many panel attorneys in particular are . . . ill-equipped and insufficiently compensated; often without the resources or knowledge to hire experienced investigators, expert witnesses, and interpreters when a case requires such services." 2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act at xvii. One "structural problem" the committee identified was "letting judges decide what, if any, resources attorneys may or may not use in defending their clients." *Id.* at xvii-xviii. The Committee observed,

> The phenomenon of cost-cutting . . . encompasses refusal by judges to approve expenditures for non-legal services. These can be essential to mounting an effective defense, especially when counsel is a solo practitioner, as are many panel attorneys. These services include the assistance of a skilled investigator, expert witnesses, and interpreter.

Id. at xix.

The Committee paid special attention to capital habeas corpus cases like this one where the "potential consequence of inadequate representation is plainly dire." *Id.* at xxi. It described what it found to be "especially troubling." *Id.* First, it found the threshold statutory cap of $7,500 for investigative and expert services, established in 1996, "unrealistically low." *Id.* Second, it concluded that "many of the federal judges presiding over these cases are not familiar with the nature of capital habeas representation, which can inadvertently hamper the quality of defense. For example, if a judge doesn't recognize the need for in-depth investigation to mount an effective challenge, that judge may not approve necessary expert expenses." *Id.* The Committee observed this was "a particular problem in Texas." *Id.* at 209.

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[12] The report is available online at https://cjastudy.fd.org/sites/default/files/public-resources/Ad%20Hoc%20Report%20June%202018.pdf.

One section of the report examined a "major source of disparity" in the system generated by the provision of representation that is split between federal defender offices and private panel attorneys, who are often solo practitioners. *Id.* at 146. As the report explained, "FPDOs [Federal Public Defender Offices] and CDOs [Community Defender Offices] typically have investigators on staff and rely upon their services in most of their cases. In fact, in many federal defender offices, 'every case is staffed with a staff investigator.' Similarly, these offices usually have the funds necessary to secure other expert assistance when needed." *Id.* at 151. It quoted one federal defender's testimony to the panel: "There is simply no comparison really in the resources available to our office versus the CJA panel attorneys." *Id.* at 146-47. The report found "significant disparities [to] exist in some districts between the number of cases in which service providers and experts are used by panel attorneys, as compared to the number of cases in which such services are employed by FDOs and CDOs." *Id.* at 151. It identified the Northern District of Texas, the district in which this case arises, as one of those districts.[13] *Id.*

Looking at capital cases specifically, the Committee found "significant disparities in capital cases across districts and circuits" in the provision of effective representation. The Committee called out the Fifth Circuit, in particular, for failing to ensure quality representation in federal cases. *Id.* at 197-98. It observed that the equitable exception to procedural default created in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), "is hollow if the lawyers bringing those [*Strickland*] claims in federal court don't have the resources to mount an effective defense." *Id.* at 198.

Generally, the Committee concluded the current arrangement was structurally flawed, resulting in "disparities in the quality of representation that have serious consequences for some

[13] While federal defenders told the committee they used auxiliary services in every case, the Committee observed that empirical data reflected that CJA panel attorneys across all districts used service providers in only 14 to 15 percent of their cases on average. *Id.* at 151-52.

defendants," and recommended creating an entity independent from the judiciary to administer the CJA.[14] *Id.* at xv, xxvi. It found "particularly troubling" the judicial branch's role in implementing the CJA where its doing so "compromise[s] an advocate's independent professional judgment." *Id.* at xxvi. This case encapsulates all the committee's concerns about the current implementation of § 3599. While a less structurally flawed implementation of the CJA may one day come to fruition, so long as the judiciary remains responsible for administering it, the Court should place a high priority on ensuring that effective representation is consistently and uniformly provided by the lower courts. Cases like this one, a capital habeas case in which no resources at all were provided to assist a solo practitioner in her representation, require the Court's intervention to ensure that the judiciary's implementation of representation rights does not fall drastically short of Congress's goals.

B. Lower Courts Need Guidance About How to Properly Apply *Ayestas*

In *Ayestas*, the Court corrected a "too restrictive" application of 18 U.S.C. § 3599(f) by the Fifth Circuit. Since *Ayestas*, the Fifth Circuit has yet to find any district court to have abused its discretion by denying § 3599(f) services, even when the decisions were made before *Ayestas*. *See Jones v. Davis*, 890 F.3d 559, 574 (5th Cir. 2018) (affirming pre-*Ayestas* denial of any investigative services because "we determine he is not entitled to relief even under the most favorable view of the facts"); *Mamou v. Davis*, 742 F. App'x 820, 824 (5th Cir. 2018) (affirming denial of any investigative services); *Ochoa v. Davis*, 750 F. App'x 365, 372 (5th Cir. 2018) (affirming denial of any investigative services to pursue "meritless *Wiggins* claim"). Most recently, the Fifth Circuit in a published opinion again affirmed the district court's denial of *any* investigative assistance to

[14] The Committee called out the Fifth Circuit for being responsible for "drastic disparities" in indigent defense. *Id.* at 141. In reference to federal defender office staffing, the Committee observed that "the Fifth Circuit has been unreceptive to approving additional attorneys for FPD offices, even when those attorneys were needed to meet the offices' growing caseloads." *Id.*

counsel to investigate the factual basis of a Sixth Amendment violation. *Jones v. Davis*, __ F.3d __, 2019 WL 2509243 at *5-6 (5th Cir. 2019). Mr. Robertson is unaware of any case in which a prisoner has, post-*Ayestas*, been afforded *any* auxiliary representation services under § 3599 by any federal court in Texas. *See* Mem. Op. and Order Transferring Successive Habeas Pet., *Segundo v. Davis*, No. 4:10-CV-970-Y, 2018 WL 4623106, at *9 (N.D. Tex. Sept. 26, 2018) (applying *Ayestas* to conclude applicant not entitled to expert services); Order Overruling Objs. and Accepting Findings, Conclusions, and Recommendation of the United States Magistrate Judge, *Green v. Davis*, No. 3:15-CV-02197-M, 2018 WL 1477241, at *3 (N.D. Tex. Mar. 27, 2018) (same).

Instead of holding that representation services are unavailable because the claim is procedurally defaulted, which *Ayestas* rejected, federal courts within the Fifth Circuit now resort to denying all representation services by dismissing the merits of the possible claims for which the services are sought (in this case, by calling the possible claims identified [redacted] notwithstanding that appointed counsel reasonably identified it and the FPD averred it would expend its own resources to pursue it). The lower courts are not appropriately applying the *Ayestas* standard, however, using it to dismiss facially reasonable claims—including Sixth Amendment claims—as frivolous. The result is that death-sentenced habeas applicants appointed counsel continue being deprived of any resources to investigate their case, even to pursue claims like the effectiveness of their trial counsel's representation which any reasonable habeas counsel clearly would pursue.

The court below ruled that Mr. Robertson was not deprived of meaningful representation informed by investigation because the *Strickland* claim his counsel sought to pursue was, in its judgment, "inane." In doing so, it fully endorsed the district court's reasoning [redacted] The courts below imposed far too high a burden on an applicant, one

which disregarded the reasonable attorney standard this Court held should guide the analysis and which substituted in its stead the court's own views of the ultimate merits of the claim. The district court's approach to the representation request in this case—[redacted]—not only misapplies the spirit of *Ayestas*, but is an unworkable approach for implementing it and deciding representation requests. *Ayestas's* utility considerations were not intended to be wielded as a sword by federal courts to slay possible claims before they are ever filed. Rather, they are intended to guide courts in their provision of representation with reasonable efficiently.

C. A Reasonable Lawyer Would Pursue the Possible *Strickland* Claim Identified by § 3599 Counsel

1. Section 3599 counsel's professionally formed opinion that a plausible *Strickland* claim existed was one a reasonable attorney would form

A reasonable attorney representing a prisoner in a federal habeas corpus proceeding understands she has a duty to "conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition." *McCleskey v. Zant*, 499 U.S. 467, 498 (1991). The reasonable attorney also understands that failure to do so causes forfeiture of claims that go undiscovered and unraised. *See id.* ("Omission of the claim will not be excused merely because evidence discovered later might also have supported or strengthened the claim."); 28 U.S.C. § 2244(b)(1) ("A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed."). The reasonable habeas lawyer also understands that "[t]he right to the effective assistance of counsel at trial is a bedrock principle in our justice system" and "the foundation for our adversary system." *Martinez v. Ryan*, 566 U.S. 1, 12 (2012). In capital cases, trial counsel have an "unquestioned . . . 'obligation to conduct a thorough investigation of the defendant's background.'" *Porter*, 558 U.S.

at 39 (quoting *Williams*, 529 U.S. at 396). Further, the reasonable attorney understands that "a defendant is prejudiced by his counsel's deficient performance if 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* at 40 (citation omitted). Thus, generally speaking, a reasonable attorney would inquire into whether trial counsel provided effective representation in a capital case by conducting a thorough background investigation of the client and, if not, learn information about what would have been discoverable by them if they had done so in order to ascertain whether a claim exists that the deficiency prejudiced the client. Mr. Robertson's § 3599 counsel tried to do that.

The representation request for investigative services made by Mr. Robertson was not made as part of a rote routine or in a vacuum. It was made based on § 3599 counsel's professionally formed opinion about this case, forged through reviewing court records; reviewing prior legal teams' files; speaking to witnesses such as Mr. Robertson's former legal team members; and consulting relevant experts. That review reflected that trial counsel did not complete their own background investigation plan, or even most of it, and yielded an incomplete social history of the client. It further reflected that a mitigation specialist retained by state post-conviction counsel and who reviewed trial counsel's sentencing investigation concluded that a thorough background investigation was not completed by the trial team and that further investigation was warranted.

Mr. Robertson's § 3599 counsel thereafter separately consulted a different mitigation specialist, who arrived at the same conclusion that a thorough background investigation was not conducted at trial. The sparse (and contradictory) trial testimony, in addition to the unreliable and damaging mental health opinion testimony presented by the defense at trial, caused § 3599 counsel to form the opinion that the failure to conduct a thorough background investigation may have been

prejudicial. Thus, she formed the opinion that a plausible *Strickland* claim existed. When the FPD was appointed, its lawyers formed the same opinion based on its review.

Mr. Robertson's counsel understood she was appointed to represent Mr. Robertson following a resentencing trial, and that federal habeas review of his conviction occurred prior to resentencing. This limited the viable issues that could be pursued to sentencing issues. Mr. Robertson's counsel considered possible claims in this context and prioritized just two theories of unlawful confinement: a false testimony claim and the *Strickland* claim. The former did not require investigative assistance to pursue, but the latter did. Thus, counsel sought investigative services to pursue one of the two potentially viable claims she identified. It was reasonable for her to do so.

2. Section 3599 counsel's professionally formed opinion that credible arguments for overcoming procedural obstacles to review of any *Strickland* claim existed was reasonable

A reasonable attorney representing a prisoner in a federal habeas corpus proceeding understands that a procedurally defaulted *Strickland* claim may be excused where state-postconviction counsel's deficient representation caused the default. *Trevino v. Thaler*, 569 U.S. 413 (2013); *Martinez*, 566 U.S. 1 (2012). In this case, § 3599 counsel's review reflected that state post-conviction counsel presented a Sixth Amendment claim focusing narrowly on trial counsel's strategic decisions about what evidence to present based on information known to them. Because her review suggested a possible claim existed that trial counsel failed to conduct a thorough background investigation, § 3599 counsel formed the opinion the claim she identified could be procedurally defaulted because it was not the same claim that state post-conviction counsel raised. *Anderson v. Harless*, 459 U.S. 4, 5 (1982) ("It is not enough that all the facts necessary to support the federal claim were before the state courts or that a somewhat similar state-law claim was

made.") (internal citation omitted). Mr. Robertson's counsel nevertheless formed the opinion that credible arguments existed to overcome any procedural default of such a claim.

Section 3599 counsel's review of records relating to the state post-conviction proceeding and her discussion with the legal team on it reflected that state habeas counsel's decision not to conduct the investigation proposed by the mitigation specialist he retained may have been unreasonable. State habeas counsel made the decision not to conduct the investigation based on a belief that the state court judge would deny the investigative assistance necessary to pursue it; however, state post-conviction counsel never actually tested this belief by filing a motion. Texas law *requires* that the state pay all reasonable expenses incurred by appointed state post-conviction counsel as long as the request is timely made. Tex. Code Crim. Proc. art. 11.071 § 3(c). It was incumbent upon state habeas counsel to at least make a request that the state court authorize the investigative services rather than rest on speculation about how the court would rule. Section 3599 counsel therefore formed the opinion that state post-conviction counsel may have provided deficient representation by abandoning inquiry into the thoroughness of trial counsel's background investigation without even asking the court to authorize the representation necessary to pursue it. *See Hinton v. Alabama*, 571 U.S. 263, 274 (2014) ("The trial attorney's failure to request additional funding in order to replace an expert he knew to be inadequate because he mistakenly believed that he had received all he could get under Alabama law constituted deficient performance.").

In sum, Mr. Robertson's § 3599 counsel formed reasonable opinions that a "plausible" *Strickland* claim existed and for which "credible" arguments to overcome any procedural default existed. A reasonable attorney, provided with independent opinions from two mitigation specialists that a thorough background investigation was not completed and that additional background

investigation was warranted would pursue that investigation for a client in a federal habeas corpus proceeding, all the more so in a context in which few other viable theories of relief existed.

D. The Approach Taken By the District Court Is Incompatible with *Ayestas* and Is Unworkable in Practice

The district court's analysis in this case is the antithesis of the approach a court informed by *Ayestas* should take and is thoroughly unworkable in practice. Requests for investigative services are representation matters, which a court will frequently receive at the very earliest stage of a federal habeas corpus case at a time when newly appointed lawyers are reviewing records and familiarizing themselves with a case. At this stage, lawyers will be unable to marshal every fact in support of a claim or mount a vigorous "case" for deficient performance or prejudice of a possible *Strickland* claim, and courts should not condition representation services on them doing so.

First, the approach taken by the district court consumes far too many judicial resources to respond to a mere request for representation in a case, which should be a relatively simple collateral matter requiring only review of the motion making the request. [redacted] The district court only possessed these records because of the case's posture on remand; generally, at least in Texas, the state court record is not available to a federal district court before an application has been filed, when it will typically be reviewing these kinds of representation requests. (The state court record was not before the court when it denied Mr. Robertson's first representation request, which helps explain its erroneous procedural ruling that the possible claim would be precluded by § 2254(d).) It took the district court almost eight months from the date of remand to produce [redacted] Had the district court taken this approach upon receiving Mr. Robertson's initial representation request, the limitations period would have expired before the court decided it. [redacted]

[redacted] reflects it was conducting something far more intensive than a mere screening for "plausibility" of a possible claim for the purpose of providing representation to an indigent party.

Second, the district court's approach adjudicated legal issues in the case, including the merit of claims, *before* a habeas application has even been filed. It is neither necessary nor appropriate for a district court to adjudicate a possible claim that has been identified as in need of further investigation or its procedural status in response to a request for representation. In this case, the court made pre-application rulings (later retracted) that the identified claim was subject to the relitigation bar of 28 U.S.C. § 2254(d) before the claim was ever filed in an application and before it had the state court record. The district court's post-remand denial—intended to reassess its *pre-*application denial—[redacted] and in response only to a representation request at a time when appointed counsel will have been unprepared to marshal all the allegations in support of it.

Third, the district court's approach is incompatible with *Ayestas*. [redacted]

[redacted]

Because resources are limited and the statute only affords auxiliary services which are reasonably necessary to effectuate quality representation, a court must take some notion of the prospects of success in mind. *Ayestas* ,138 S. Ct. at 1094 (the "'reasonably necessary' test requires an assessment of the likely utility of the services requested"). But *Ayestas* should not be interpreted as a license to turn representation requests into an opportunity to adjudicate the substantive rights of the parties before habeas applications are even filed. A court must grant some measure of deference to the competent lawyers it has presumably appointed, *see Christeson v. Roper*, 135 S. Ct. 891, 894 (2015) ("the statute leaves it to the court to select a properly qualified attorney"), and evaluate the request from the perspective of an attorney advocate trying to perform her job.

Lawyers are officers of the court, owing a duty of candor to them. *Hollingsworth v. Perry*, 570 U.S. 693, 722 (2013) (Kennedy, J., dissenting). A lawyer a court appoints to provide the quality representation guaranteed by § 3599 in a capital case should be presumed to be acting reasonably. *Ayestas* implements this deference by adopting the reasonable lawyer standard, a standard that incorporates the perspective of the attorney *as advocate*. *Ayestas* accommodates the uncertainty inherent to the investigatory stage of proceedings in which such services are most frequently sought by disclaiming the existence of any duty by the party to demonstrate they will be *entitled* to relief, *Ayestas*, 138 S. Ct. at 1094 (an "applicant must not be expected to prove that

he will be able to win relief if given the services he seeks"), instead imposing only a requirement to show that what they have identified is "plausible" and that there exists a "credible chance"—*i.e.*, a not unbelievable possibility—that procedural obstacles could be overcome. When that burden is met, the court should provide the representation.[15] Although not a license to investigate frivolous matters, the burden should not be onerous, all the less onerous to conduct *any* meaningful investigation of the case at all to fulfill the basic representation duty imposed by *McCleskey*.[16]

Whenever decisions about the provision of representation to indigents is made to depend upon assessments of a likelihood of success, there is a risk that meaningful representation will be given only to those whose defenses or claims are deemed meritorious by the court providing the representation. Beyond the cart and horse ordering problem created by judging merit before representation, Congress did not limit the right to representation in § 3599 only to those with obviously meritorious claims. *Ayestas* strikes a balance by requiring the reviewing court to take the perspective of the reasonable lawyer *advocate* into account. The lower courts' approach falls on the wrong side of that balance, overly restricting the provision of representation only to those whose can state claims it believes will ultimately succeed. While "§ 3599(f) cannot be read to guarantee that an applicant will have enough money to turn over every stone," Mr. Robertson has

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[15] A denial of a representation request under the reasonable attorney standard is effectively a conclusion that the appointed lawyer is acting unreasonably. It should not be arrived at lightly. [redacted] Nevertheless, any deference given to counsel making representation requests clearly has limits, *Ayestas*, 138 S. Ct. at 1094 ("§ 3599(f) cannot be read to guarantee that an applicant will have enough money to turn over every stone"), [redacted]

[16] Once early investigative priorities have been met, a court could exercise more scrutiny and afford less deference to requests for services as the case and representation progress. Successive requests after early priorities are met are more likely to involve lower priorities and have less utility. In short, they are more likely to be unnecessary to the representation. But denying *any* services at all is tantamount to declaring that no reasonable lawyer would conduct any investigation in the case, which is in significant tension with *McKleskey* and with what *every* lawyer understands about his or her basic ethical obligations towards their clients in habeas corpus, which by its nature involves investigating the fairness of a trial based on factors occurring *outside* the trial record.

been denied the ability to turn over even one stone. This approach clearly thwarts Congress's intent that federal habeas corpus play "a particularly important role [] in promoting fundamental fairness in the imposition of the death penalty." *Christeson v. Roper*, 135 S. Ct. 891, 893 (2015) (quoting *McFarland*, 512 U.S. at 859). The Fifth Circuit endorsed the district court's approach wholesale.

This Court should grant certiorari to hold that Mr. Robertson's counsel identified a "plausible" claim by any reasonable lawyer measure, that he was denied meaningful representation informed by investigation to prepare a federal habeas corpus application, and that he was therefore denied what Congress entitled to him in 18 U.S.C. § 3599. In doing so, the Court can provide sorely needed guidance to the lower courts about how they should apply *Ayestas*.

II. THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER THE AMENDMENT OF A HABEAS CORPUS APPLICATION FOLLOWING A REVERSAL AND REMAND FROM AN APPELLATE COURT CONSTITUTES A SECOND OR SUCCESSIVE HABEAS CORPUS APPLICATION

When the district court appointed the FPD, it provided Mr. Robertson counsel with access to investigative services that it could marshal to inform its representation. When Mr. Robertson asked to put that representation to use and for leave to file an amended habeas application, the court held it lacked the power to consider any amended application, because it would constitute an unauthorized successive application. The court based this conclusion, at least in part, on its belief there was "nothing" before the court "[e]xcept for the narrow issue of petitioner's funding requests." Doc. 103 at 4. It thought that by reversing its prior denials of representation—all of which related to investigating the factual bases of the possible *Strickland* claim—and remanding for redetermination in light of *Ayestas*, the Fifth Circuit had not disturbed its prior judgment, notwithstanding that it closed the appeal and issued a mandate. *Id.* at 3. Citing no case law, the court reasoned that an amended application in this context would be "no different from" a successive application. In short, it believed the Fifth Circuit had remanded the case to it for no

reason, because regardless of the outcome of the district court's reassessment of his entitlement to representation services, Mr. Robertson would remain the losing party entitled to no relief.

The Fifth Circuit, surprisingly, agreed with the district court. It held it "did not vacate the district court's judgment denying Robertson federal habeas relief" when it reversed the district court's denials of representation and remanded for further proceedings. App. A. It "decline[d] . . . to consider what avenues for relief might have been available had his request for funding succeeded," concluding that "no jurist of reason would disagree with the district court's conclusion that Robertson's amended petition represents a successive filing." *Id.* The Court should grant certiorari to decide whether amendment of the habeas application in these circumstances was within the power of the district court to consider and to grant. At the least, it should summarily grant and reverse the Fifth Circuit panel's conclusion that only unreasonable jurists could debate the matter. *See Buck v. Davis*, 137 S. Ct. 759 (2017).

A. When the Fifth Circuit Reversed the District Court, Remanded the Case, Issued Its Mandate, and Closed the Appeal, It Also Vacated the District Court's Judgment By Necessary Implication

In its 2018 opinion reversing the district court's orders denying representation services and remanding for further proceedings, the Fifth Circuit did not expressly state that it was vacating the district court's judgment. Nevertheless, it must have done so; else, the reversal and remand were entirely futile and Mr. Robertson's fate was sealed: clearly, if the district court's judgment that Mr. Robertson loses remained intact even after the remand, then investigative services could never have been reasonably necessary to his representation.

"This Court, like all federal appellate courts, does not review lower courts' opinions, but their judgments." *Jennings v. Stephens*, 135 S. Ct. 793, 799 (2015) (emphasis omitted) (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)). After

the district court prematurely adjudicated the merits of Mr. Robertson habeas corpus claims over his objection and entered its judgment against Mr. Robertson in 2017, Mr. Robertson appealed it to the Fifth Circuit, seeking reversal of that judgment. Specifically, he appealed antecedent procedural rulings—the representation rulings—that materially affected the record on which the district court made what he contended was a premature merits ruling on the possible *Strickland* claim.[17] He won that appeal. The Fifth Circuit issued a dispositive opinion that "VACATE[D] the district court's denial of funding and REMAND[ED] for reconsideration in light of *Ayestas*." Thereafter, the Fifth Circuit issued its mandate and closed the appeal. The necessary implication of these acts was to vacate the district court's judgment, even if it did not say so expressly. If the district court's judgment was not vacated, then the remand could not have redounded to Mr. Robertson's benefit—he could not have changed the judgment—and was entirely futile. It effectively turned the subsequent district court action into an advisory ruling it had no power to make.[18] *See Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 241 (1937) ("It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.") (citation omitted)).

If the Fifth Circuit did not vacate the district court's judgment, then if the district court determined that Mr. Robertson was entitled to representation services to investigate the factual basis of his possible *Strickland* claim, Mr. Robertson would not have been able to obtain any

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[17] Under Fifth Circuit case law, a COA was not required for the appellate court to acquire jurisdiction over such an appeal. *Smith v. Dretke*, 422 F.3d 269, 288 (5th Cir. 2005).

[18] The Fifth Circuit remanded a similarly postured case after *Ayestas* using language similar to that in *Robertson*. *See Sorto v. Davis*, 716 F. App'x 366 (5th Cir. 2018). The case is currently still pending in the district court, awaiting a ruling on the applicant's entitlement to representation. It is likely that applicant is currently unaware that nothing occurring in the remand proceeding can redound to his benefit, because that district court's judgment against him is still intact according to the appellate court.

"specific relief through a decree of a conclusive character." He could not use the representation to amend his application, because the district court's judgment would still be in place. And he could not appeal the district court's order granting him the representation services, because he would have won the representation he sought. His only recourse would have been to (1) file a motion for relief from the judgment under Federal Rule of Civil Procedure 60; or (2) ask the Fifth Circuit to withdraw its mandate, vacate the district court's judgment, and remand the case for further proceedings. But Mr. Robertson *won his appeal* of the district court's judgment, securing vacation of antecedent orders on procedural matters that could affect the district court's judgment in the case. It cannot be the case that all he won was the right to file post-judgment motions requiring a showing of extraordinary circumstances to prevail, motions which he already had a right to file.

Finally, if the outcome of the district court adjudication—Mr. Robertson loses—was always foreordained as the Fifth Circuit held, it suggests that the district court's re-consideration of Mr. Robertson's entitlement to pre-application investigative services the appeals court ordered was a sham, an artifice intended to convey the appearance—but not provision—of meaningful federal review and process. The appellate proceedings below would have been no different. The Court should not countenance such immense wastes of judicial resources for show, especially in a capital case, as it can only serve to undermine the public's confidence in the judiciary.

B. If the District Court's Judgment Was Vacated, It Should Have Been Empowered to Consider Mr. Robertson's Motion for Leave to Amend His Application Once He Obtained Appointment of Counsel with Access to Investigative Assistance

The ruling that Mr. Robertson's request for leave to amend his habeas application amounted to a request to file a second or successive habeas application follows from the ruling that the district court's judgment was not disturbed when the appeals court vacated its representation rulings relating to representation on the *Strickland* claim. If the court was incorrect

about whether the district court's judgment was vacated, then it was also incorrect to label an attempt to file an amended application a successive application.

Generally, amendment of an initial habeas application is not a successive habeas corpus application. The statute permits amendment. *See* 28 U.S.C. § 2242 (a habeas corpus application "may be amended or supplemented as provided in the rules of procedure applicable to civil actions."). This Court recognizes that amendment is permitted without running afoul of the successive application bar. *Mayle v. Felix*, 545 U.S. 644, 655 (2005). If the district court was wrong that this Court's mandate prohibited it from ruling on the motion, then Mr. Robertson's request for leave to amend should have received substantive consideration.

Federal Rule of Civil Procedure 15(a)(2) provides that, when not as of right, a party may amend its pleading with the opposing party's consent or the court's leave. "The court should freely give leave when justice so requires." *Id.* "[T]his mandate is to be heeded." *Foman v. Davis*, 371 U.S. 178, 182 (1962). "In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should . . . be 'freely given.'" *Id.* This is because, "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Id.*

Mr. Robertson's request for leave to amend was timely made. He made the request just days after acquiring the representation services he had consistently sought since before filing his application in 2013. The appointment of the FPD marked the first time Mr. Robertson could conduct the thorough investigation into his background no previous legal team completed. Mr. Robertson's request for leave included an allowance of 120 days to file the amendment, but that is

because an investigation into a person's background necessarily takes some time. Moreover, no *undue* prejudice to the Director would occur, because Texas inexplicably set his execution date while his initial federal habeas proceeding was ongoing *in the district court*. Indeed, it was set *after* the Fifth Circuit's mandate remanded the case for further proceedings and before the district court could carry out that mandate, in disregard for the orderly adjudicative processes of the federal judiciary.

This Court has repeatedly instructed that federal courts are not to permit executions to occur that would thwart the federal courts from affording one complete federal habeas review of capital judgments or that would thwart their provision of meaningful representation during such review. *See McFarland v. Scott*, 512 U.S. 849, 858 (1994) (stay required to be issued where opportunity for appointed counsel to meaningfully research and present a defendant's habeas claims has not been afforded); *Lonchar v. Thomas*, 517 U.S. 314, 320-21 (1996) (district court is obligated to stay execution scheduled while habeas corpus case is pending before it whenever necessary to adjudicate the application in due course and avoid mootness); *Barefoot v. Estelle*, 463 U.S. 880, 893-94 (1983) (court of appeals is obligated to stay execution where necessary to decide the merits of any appeal in a habeas corpus case over which it is exercising jurisdiction before a prisoner may be executed). The Court should grant certiorari to decide whether the district court was empowered to consider Mr. Robertson's request for leave to amend his application. Alternatively, it should summarily reverse the court below, hold that Mr. Robertson was entitled to amend the application, and remand the case for further proceedings.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. If appropriate, the Court should summarily reverse.

Respectfully submitted on this 28th day of June, 2019,

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