No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____

QUINTIN PHILLIPPE JONES
Petitioner,
v.
Lorie Davis, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division, Respondent.

_____

On Petition for a Writ of Certiorari to
the Fifth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

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QUESTION PRESENTED

This Court has unanimously ruled that Congress' 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. Jones any requested representation services under § 3599(f), the federal courts below ignored these rulings, along with many of this 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. Jones 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. Jones has only had counsel deprived of any means to effectuate meaningful representation. The Court's intervention is necessary to preserve Mr. Jones' access to the writ of habeas corpus in this case.

I. THIS COURT SHOULD GRANT CERTIORARI TO ANSWER THE FEDERAL QUESTION: WHEN HAS A QUALIFYING PRISONER BEEN DENIED MEANINGFUL REPRESENTATION INFORMED BY INVESTIGATION TO PREPARE A FEDERAL HABEAS CORPUS APPLICATION

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

B. 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?

C. 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)?

PARTIES TO THE PROCEEDING

QUINTIN PHILLIPPE JONES, Petitioner

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

RELATED CASES

- *Jones v. Davis*, 927 F.3d 365 (5th Cir. 2019) (Jones is not entitled to relief on his Fifth Amendment claim, no abuse of discretion in denying investigative funding)
- *Jones v. Davis*, 922 F.3d 271 (5th Cir. 2019) (Opinion Withdrawn and Superseded on Rehearing)
- *Jones v. Stephens*, 157 F. Supp.3d 623 (N.D. Tex. 2016) (habeas relief denied; COA granted in part; denied in part)
- *Jones v. Stephens*, 2014 WL 2807333 (N.D. Tex. June 20, 2014) (Order denies Opposed First Motion for Funding [Doc 127])
- *Jones v. Stephens*, 2014 WL 2446116 (N.D. Tex. May 30, 2014) (denied Motion to Seal § 3599 Funding Application)
- *Jones v. Stephens*, 998 F. Supp.2d 529 (N.D. Tex. 2014) (equitable tolling granted)
- *Jones v. Stephens*, 2013 WL 4223968 (N.D. Tex. 2013) (3rd time, petition dismissed as time-barred under 28 U.S.C. § 2244(d))
- *Jones v. Thaler*, 383 Fed. Appx. 380 (5th Cir. 2010) (vacate and remand for equitable tolling in light of Holland v. Florida, 560 U.S. 631 (2010)
- *Jones v. Quarterman*, 2009 WL 559959 (N.D. Tex. 2009) (2nd time, petition dismissed as time-barred under 28 U.S.C. § 2244(d)
- *Jones v. Quarterman*, 2008 WL 4166850 (N.D. Tex. 2008) (Vacating judgment dismissing Jones' habeas petition)
- *Jones v. Quarterman*, 2007 WL 2756755 (N.D. Tex. 2007) (Dismisses Jones' petition for writ of habeas corpus as time-barred under 28 U.S.C. § 2244(d))

- *Ex parte Jones*, Writ No. 57, 299-01, 2005 WL 2220030 (Tex. Crim. App. 2005) (denied habeas relief)

- *Jones v. Texas*, 542 U.S. 905 (2004)

- *Jones v. State*, 119 S.W.3d 766 (Tex. Crim. App. 2003) (Direct Appeal, affirmed conviction and death sentence)

- *State v. Jones*, No. C-1-007071-0744493-A (Criminal District Court No. 1, Tarrant County, TX, Sept. 20, 2000) (Judgment, Jury Verdict, Death Sentence)

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PETITION FOR WRIT OF CERTIORARI

QUINTIN PHILLIPPE JONES petitions for a writ of certiorari to review the Fifth Circuit's opinion denying a petition for writ of certiorari: *Jones v. Davis*, 927 F.3d 365 (5th Cir. 2019).

OPINIONS BELOW

Jones v. Davis, 927 F.3d 365 (5th Cir. 2019) (affirmed funding denial)
Jones v. Stephens, 157 F. Supp.3d 623 (N.D. Tex. 2016) (habeas relief denied)
Jones v. Stephens, 998 F. Supp.2d 529 (N.D. Tex. 2014) (equitable tolling granted)

JURISDICTION

The Fifth Circuit Court of Appeals opinion sought to be reviewed was entered on August 26, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). Originally, the Fifth Circuit had issued its opinion, *Jones v. Davis*, 922 F.3d 271 (5th Cir. 2019). This Opinion was Withdrawn and Superseded on Rehearing in *Jones v. Davis*, 927 F.3d 365. No further rehearing petitions were filed by either of the parties to the litigation. The petition was due September 16, 2019. Mr. Jones' application for an extension of time (19A285) was granted by Justice Alito extending the time to file until October 31, 2019.

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

6th Amendment ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed ..".; 14th Amendment: "No state shall ... deprive any person of life, liberty, or property, without due process of law...." U.S. CONST. Amend. VI; U.S. CONST. AMEND. XIV.

Title 18 USCA § 3599 (f) provides:

> (f) Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under subsection (g).

STATEMENT OF THE CASE WITH FACTS RELEVANT TO THE ISSUE

I. State Trial, Direct Appeal, and State Habeas Proceeding

A. Trial and Direct Appeal

> Jones beat his eighty-three-year-old great aunt, Berthena Bryant, to death with a baseball bat after she refused to continue lending him money. Fort Worth police arrested him the next day for outstanding traffic warrants and possession of a controlled substance. They interviewed him twice about Bryant's murder. The first time, Jones denied involvement. The second time, he waived his Miranda rights and confessed to the murder—explaining that he had an alter ego named James who lived in his head and who was responsible for killing Bryant.
>
> Based on a lead from Jones's sister, the police also investigated Jones's involvement in the murders of Marc Sanders and Clark Peoples. Nine days after Jones confessed to killing Bryant, a Texas Ranger and sheriff's deputy interrogated Jones about the Sanders and Peoples murders. Jones told them that he murdered Sanders and Peoples with his close friend Ricky "Red" Roosa. He described how Roosa was the primary decision-maker and directed Jones to take steps like restraining the victims and disposing of their bodies. Authorities only informed Jones of his Miranda rights after this statement was written down and he was about to sign; he proceeded to sign it.8 While Jones was only tried for Bryant's murder and this written statement was not introduced at the guilt phase of his trial, it was introduced in the punishment phase.
>
> A Texas jury convicted Jones of capital murder. At the punishment phase of his trial, the jury was asked to answer Texas's two special issues: "1) would appellant probably commit future criminal acts of violence that would constitute a continuing threat to society; and 2) whether, taking into consideration all of the evidence, there are sufficient mitigating circumstances to warrant a life sentence rather than a death sentence."

Jones v. Davis, 927 F.3d 365, 367–68 (C.A.5 (Tex.), 2019)

On March 5, 2001, after the jury answered the special issues under TEX. CODE CRIM. PROC. Art. Article 37.071 §§ 2(b) and 2(e), Jones was sentenced to death. (CR 408-410).

During the punishment-phase, trial counsel called just four witnesses at sentencing. Paula Freeman, who lived with Jones, testified that she and her children loved Jones, who she considered a good person. She also testified that the violence she ever saw Jones commit was against himself; when Jones self-harmed, it was as though another personality had taken over. (RR 35:20-23).

Jones' sister testified that she and her three siblings (including Jones) hardly ever stayed with their mother because she was addicted to crack cocaine and Jones' father treated Jones as though he was not his child. *Id*. at 51-54. When Jones was seven or eight and his sister ten or eleven, Jones' stepbrothers would lock Jones and his sister in a room and force them to have sex while they watched. *Id*. at 68-69. Jones began using drugs when he was thirteen. *Id.* at 70-71. She had also seen Jones talk to himself and physically hurt himself by hitting, burning, and shooting himself. *Id.* She also noticed that Jones' self-harm occurred when he appeared to be a different personality named "James." *Id*. at 74.

Magistrate Judge Allan Butcher testified that Jones appeared before him about the Bryant capital murder charge and was remorseful. (RR 35:38-41). Psychologist Raymond Finn testified that some dissociative process was occurring that manifested itself as alter-ego "James." *Id*. at 148-151. Dr. Finn opined that this alter-ego was responsible for Bryant's murder and that Jones had little or no ability to control the personality. *Id*. at 157. Dr. Finn believed Jones had only a moderate to low risk for future violence, because he was remorseful and could benefit from psychotherapy and drug abstinence. *Id.* at 161-63.

On November 5, 2003, the judgment was affirmed by the Texas Court of Criminal Appeals. *Jones v. State*, 119 S.W.3d 766 (Tex. Crim. App. 2003). On June 14, 2004, the Supreme Court denied certiorari. *Jones v. Texas*, 542 U.S. 905 (2004).

B. The State Habeas Proceedings

1. The State Habeas Application

On May 17, 2002, the state court appointed Wes Ball to represent Mr. Jones. (ROA.812). *Ex parte Jones*, No. 57,299-01 (Tex. Crim. App. Dec. 3, 2003 Order). Mr. Ball failed to file a timely state habeas application. On December 3, 2003, Mr. Ball was removed and Jack V. Strickland was appointed in his place.

The state court gave Mr. Strickland 270 days to file the state habeas application. Nearly 30 days after the filing deadline, Mr. Strickland filed the state habeas application on September 27, 2004. (ROA.822); *see* State Hab. App., 9-27-2004. In the interim, the federal statute of limitations began to run.

2. The FFCL ruled that the state habeas claims were record-based, direct appeal claims, and/or claims that could have been raised on direct appeal, and/or claims that lacked evidentiary support

Jack Strickland filed a thirty-three (33) page State Habeas Application. The application purported to raise eight claims for relief. The claims were alleged deprivations of rights by the trial court, and due process violations. *See* State Hab. App.

The State Proposed Findings of Fact and Conclusions of Law (FFCL) signed July 6, 2005 by the state district judge ruled that six of the claims (those alleging deprivations of rights caused by the trial court) were noncognizable and/or procedurally defaulted because they were raised and decided on direct appeal or could have been but were not raised on direct appeal. *See* State Proposed FFCL, Claims A & B 3; Claims C, D, E, F p.7, June 23, 2005, signed July 6, 2005. The FFCL ruled the remaining two claims (Claim G - State's testifying forensic scientist not credible; Claim H - due process requires Applicant be given reasonable opportunity to avail himself of recent scientific research on the effects of low levels of serotonin of behavior) lacked evidentiary support. *Id*. at

Claim G at 8-10 & Claim H at 11-12.

3. The State Habeas Application did not raise any IATC Claims despite Jones request to Jack Strickland to investigate Jones' psycho-social history. Jack Strickland perceived IATC Claims as "slander," and "blaming" former defense counsel

Seven months after Jack Strickland was appointed in state habeas, and only six weeks before the state habeas application was due, Jack Strickland met with Quintin Jones for the first and only time. Jones asked Strickland to investigate Jones' psycho-social history, and whether trial counsel provided effective assistance. [Doc 35 at 4]. Strickland did not investigate or raise any ineffective assistance of trial or appellate counsel ("IATC") claims in the State Habeas Application, despite the request by Mr. Jones at their July 12, 2004 meeting to consider doing so.

As more fully discussed below, Jack Strickland perceived IATC claims as "slander" and "impugning the integrity" of former defense counsel, and that Jones was "blaming everyone who has tried to assist you while seemingly ignoring your own behavior, "particularly because "[t]he facts presented in the prosecution of your case were unusually horrific." *See* January 12, 2006 letter from Strickland to Jones. (ROA.80); *II. Federal Habeas Proceedings, A. The federal appointment....*

Mr. Strickland admitted in correspondence that he relied on the investigation done by trial counsel in making the decision to forego investigation into Mr. Jones' life history. *See infra id.*

4. The Due Diligence Inquiry (DDI) conducted in federal habeas by Brandt raised Red Flags that evidence known to trial counsel, would have lead a reasonable trial attorney to investigate further

A "***Due-Diligence Inquiry***" (DDI) consists of engaging in such tasks as reviewing the official record (clerk's record containing the pleadings, and reporter's record of in-court proceedings) and former-counsel files, conducting an analysis and assessment of content in various documents, and seeking preliminary information about what phenomena are typically associated with "Red Flags."

"***Red Flags***" signal that there were people and information former counsel overlooked, and

underpin a funding request for extra-record, investigative and expert services. When a court denies funding, the claims in a habeas petition, necessarily are at best "***Early-Stage Claims***," which are confined to pleading the Red Flags arising from a Due Diligence Inquiry, and speculating about what would have been discovered.

In contrast, with funding, counsel can conduct an "Investigation," which entails hiring a trained mitigation specialist, whose extra-record efforts, include among other things preparing an extensive psycho-social history report based on: interviewing family, friends, teachers, etc; obtaining documents not previously gathered by former counsel; developing a comprehensive, multi-generational psycho-social history; suggesting mitigation themes for presentation; and identifying the types of experts needed. With that foundation, counsel can hire one or more experts to conduct mental health evaluations and prepare reports of their professional opinions, based on both what was known and the additional facts developed. When a court provides both adequate time and adequate funding, a habeas petition pleads "***Factually-Developed Claims***," supported by the extra-record evidence developed in the Investigation that details what had been foreclosed.

a. The Red Flags reflected the investigation by former counsel into Jones' psycho-social history was performed on the eve of trial & was significantly underfunded. Based on known evidence, a reasonable attorney would have further investigated and developed evidence of Jones' mental health, intellectual functioning, and life history

When undersigned counsel Brandt was appointed in 2008 to replace Jack Strickland in federal habeas, she began a Due Diligence Inquiry (DDI), which was continued by her and co-counsel Mowla after the court granted equitable tolling in 2014. As part of her DDI, Brandt reviewed the officials court record, and records from the former defense team. The DDI suggested that trial counsel and their mental health professionals did not have the benefit of a timely, and adequate mitigation investigation into Mr. Jones' psycho-social history. It suggested a plausible

Strickland/Wiggins claim, as well as several plausible mental heath claims, defenses and legal theories (plead as *Early-Stage Claims* in both the 2009 Proposed amended habeas petition, and in the 2014 amended habeas petition because of the court's denial of funding).

Counsel's professional opinion that a reasonable attorney would pursue a plausible *Strickland/Wiggins* claim, among others, came from a review of the state record, from which Brandt constructed a time line. *See* Appendix 5: Opposed First Motion for Funding at 10-11. The time line reflected that trial-investigator Loven had been appointed on November 10, 1999, but was replaced by Brownlee on August 21, 2000 because Loven had done no investigation into the case. Brownlee did not begin her interviews until January 17, 2001. Guilt-innocence began on February 15, 2001; the punishment phase began on February 22, 2001. *See* Time line Appx 5: Funding Motion at 10-11.

The time line reflected also that defense forensic expert, Dr Ray Finn, was appointed on October 11, 2000, three (3) months before voir dire began on January 11, 2001 and four months before guilt/innocence began on February 15, 2001, and the punishment phase began on February 22, 2001. Dr. Carol Wadsworth was appointed as the other defense forensic expert on February 20, 2001, two days before the punishment phase began (2/22/2001). *See* Time line Appx 5: Funding Motion at 10-11.

Further, counsel's opinion of a plausible *Strickland/Wiggins* claim was supported by an analysis of the billing records of the trial team, which reflected that the state court approved only $2,500 for investigation. The private investigator, Janie Brownlee, billed for 84 hours, 64% of which was travel time; she spent about 25 hours interviewing witnesses.

An analysis of the billing records of trial counsel (Barnett and Moore) did not provide evidence that an adequate mitigation investigation had been conducted. Appx 5: Funding Motion at 11-12.

Dr. Wadsworth had submitted a three (3) page Report and a $500 bill for "diagnostic interview, review of records, and consultation." The Red Flags signaled that Dr. Wadsworth's report placed the defense counsel on notice that a review of school records contained multiple indications of emotional and academic problems, (ADD; emotional disturbance evaluation) that needed further investigation. The DDI reflected the defense did not attempted to locate and interview former teachers or administrators about Mr. Jones' placement in special education, an evaluation of his emotional disturbance in 4th grade, or his academic limitations in school.

Dr. Wadsworth's report captures a possible correlation between the sexual molestation of Jones and of his drug use (both beginning at or before age 11), which the Red Signals signaled needed further exploration, but the records suggested had not been adequately investigated either. Dr. Wadsworth's report further suggested a genetic propensity for drug and alcohol addiction and put counsel on notice that Jones did well in a structured environment. Former counsel did not follow-up to investigate and present testimony that the Texas Department of Criminal Justice would have provided an adequate structured environment if the jury were to give Petitioner a life sentence. *See* Appx 5: Funding Motion at 26-27; *see also* 2014 Amended Hab. Pet [Doc 129 at 62-66].

The Red Flags signaled that Mr. Jones had been treated for several incidences of self-inflicted gunshot wounds to his body, but there was no record that the defense attempted to locate and interview treating physicians, or personnel from agencies to whom Mr. Jones was thereafter referred for mental health treatment. Although the trial record appears to raise the likelihood that Mr. Jones was addicted to drugs and alcohol at a very early age, there does not appear to have been sufficient investigation and development so that counsel could have made an informed decision about an involuntary intoxication defense. Further, the trial testimony raised questions about Petitioner's intellectual functioning that did not appear to be adequately investigated and addressed. *See* Appx

5: Funding Motion at 13-14.

Because the court refused to provide adequate time, as part of the 2014 DDI Brandt and Mowla made unsuccessful attempts at interviews. The records they had requested and received needed to be reviewed and assessed by a mitigation specialist. *Id.* at 24-25. They did learn that by the age of 24 (since the age of 13), Mr. Jones had engaged in nearly 11 years of heavy, constant drug and alcohol abuse and that at no time did prior habeas counsel (Strickland) ask Mr. Jones about his drug and alcohol abuse, notwithstanding that there was some evidence of his drug use in the record on appeal. Brandt and Mowla learned Jones began using marijuana at the age of 12 and began to drink large amounts of alcohol. By age 15, Jones was snorting cocaine, snorting heroin, using cocaine, crank, and heroin intravenously, and began to also smoke crack cocaine. *See* Appx 5: Funding Motion at 19.

Thus, it appeared from the DDI, that trial counsel unreasonably narrowed the scope of their sentencing investigation. The Red Flags from the DDI suggested that the evidence known by trial counsel would have lead a reasonable trial attorney to investigate further into whether Mr. Jones suffered from:

(1) severe, long-standing, involuntary alcohol addiction;

(2) traumatic, physical/sexual childhood abuse;

(3) severe, long-standing, involuntary addiction to polysubstances, beginning as early as age 12; and

(4) dissociative disorder as a result of traumatic, physical and sexual childhood abuse.

See Wiggins v. Smith, 539 U.S. 510, 527-28 (2003) ("In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further").

The Red Flags from the DDI also suggested that because of an inadequate and untimely investigation, trial counsel was unable to develop a consistent theory of the case presented in all phases of the trial (including jury selection), which made use of the undisputed facts of the offense, while leading to the conclusion that Jones was not deserving of death, if the jury came back with a verdict of guilty.[1] *See* [Doc 57] Motion for Leave to File Amended Habeas Petition, Exhibit 1 - 2009 Proposed Amended Petition at p. 45, Claim V, B. 2.a.(2) defense counsel did not have an effective theory of the case.

b. The Red Flags suggested several plausible claims, including a Sixth Amendment *Strickland/Wiggins* claim, as well as several mental-state claims and defenses to capital murder

One plausible claim raised by the Red Flags were a Sixth Amendment *Strickland/Wiggins* claim. *Strickland v. Washington*, 466 U.S. 668 (1984); *Wiggins v. Smith*, 539 U.S. 510, 521(2003); U.S. Const. amend. VI; U.S. Const. amend. XIV. Appx 5: Funding Motion at 7, 17, 21.

The Red Flags also suggested the likelihood that further investigation would generate evidence of Mr. Jones' mental impairments that could support other plausible claims based on the facts of traumatic childhood abuse which adversely affects neurobiological development, polysubstance abuse and dissociative disorder). Appx 5: Funding Motion at 14.

For example, such evidence could be both logically relevant and admissible under the Texas Rules of Evidence to negate the *mens rea* for capital murder. Appx 5: Funding Motion at 19.

TEX. CODE CRIM. PROC. Art. 38.36(a) provides:

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[1] Steven Lubet, Modern Trial Advocacy: Analysis & Practice (NITA 2nd ed. 1999). Stephen C. Rench, Building the Powerfully Persuasive Criminal Defense, 42 Mercer L. Rev. 569 (1991) ("The story allows the jury to understand and organize the myriad of facts and to judge plausibility. Studies show that in order to be plausible, a story or case must be: 1) consistent; 2) complete; 3) in context; 4) organized; 5) believable; and 6) positive and persuasive.").

> (a) In all prosecutions for murder, the state or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense.

(Emphasis supplied).

The absence of such evidence to negate the *mens rea* element makes the prosecution's evidence with respect to the *mens rea* element of capital murder uncontestable as a matter of law, *In re Winship*, 397 U.S. 358 (1970), and results in a deprivation of Mr. Jones Sixth and Fourteenth Amendment right to proof beyond a reasonable doubt and federal due process right to a fair defense. *Montana v. Egelhoff*, 518 U.S. 37, 71 (1996) (O'Connor, dissenting). *See* 2014 Amend. Fed. Hab. Pet at 87 [Doc 129].

5. The late-filed State Habeas Application by Jack Strickland culminated in the dismissal of the federal habeas petition filed by Jack Strickland because the federal statute of limitations had run

In the interim before Jack Strickland filed the state habeas application on September 27, 2004, the U.S. Supreme Court denied certiorari from the *Jones* direct appeal, The federal statute of limitations period began to run, unbeknownst to Mr. Strickland. *See* 28 U.S.C. § 2244(d). By the time Mr. Strickland filed the state habeas application, which tolled the federal limitations period, one hundred forty nine (149) days had elapsed. This is the exact number of days late that Mr. Strickland filed the federal petition after the federal limitations period had run. Appx 4: *Jones v. Stephens*, 998 F. Supp.2d 529, 532, n. 5 (N.D. Tex 2014).

On September 28, 2004, Strickland forwarded a copy of the state application to Jones without informing him that it was untimely filed or explaining why the issues Mr. Jones had previously raised with him were omitted from the application. (ROA.817).

Throughout the state habeas litigation, the attorney-client relationship between Mr. Strickland

and Mr. Jones continued to deteriorate as a result of Mr. Strickland's refusal to communicate with Mr. Jones and adequately protect Mr. Jones' rights. Mr. Jones sought help from the state court judge to no avail.

In early October 2005, Jones received copy of a notice from Kelli Weaver, Assistant Attorney General, to Mr. Strickland, informing Mr. Strickland that the state habeas application had been denied and that state habeas counsel had the responsibility for filing a motion for appointment of counsel in federal court. (ROA.834). Jones promptly wrote to Strickland and informed him that he did not want him "to file anything in [his] behalf" in federal court because he wanted new counsel for his federal habeas proceeding. *Id.*

II. Federal Habeas Proceedings

A. The federal court appointed Jack Strickland, despite knowing of the deteriorated attorney-client relationship and the late-filed state habeas application

On October 16, 2005, Jones wrote to the federal district court and asked for the appointment of someone other than Strickland because of all the problems Jones had experienced with Strickland in state court. (ROA.33).

Mr. Strickland, too, informed the federal court that he did not wish to be appointed and that it would be "in the best interest of everyone to have new counsel appointed." Notwithstanding the positions of both Jones and Strickland, on November 3, 2006, the district court appointed Strickland because of Strickland's alleged familiarity with the case. (ROA.39).

The appointment order contains two very specific orders:

> It is ordered that Jack V. Strickland, an attorney admitted to practice in this court, is hereby appointed as attorney for the Petitioner Quintin Phillippe Jones for the purpose of preparing, filing and litigating a petition for writ of habeas corpus on behalf of Petitioner. The hourly rate for attorney compensation will be $160.00 per hour, pursuant to 21 U.S.C.A. § 848(q)(10). Interim payments are authorized in accordance with the Guide to Judiciary Policies and Procedures.

> It is further ordered that Petitioner shall timely file his federal petition for writ of habeas corpus. The petition shall demonstrate that it is timely filed under 28 U.S.C. § 2244(d)(1). Moreover, this case has been designated for ECF (electronic case filing) by order of October 18, 2005 to which attorney Strickland is referred. [Doc 7]

Appendix 3: Order, Federal Appointment of Jack V. Strickland [Doc 7]

On December 22, 2005, despite his objections to the appointment and his frustrations with Strickland, Jones wrote Strickland stating that "nothing [would] change the past" and suggested that they not "waste time and words" on it during this proceeding. He asked Strickland to answer two specific questions, either in person or in writing:

> "1. Are we going to work together doing [sic] my fedreal [sic] appeal?"
> "2. Or are you going to not answer my letters and just do what you want without my input?" (ROA.835).

On December 27, 2005, Jones also renewed his request for the appointment of different counsel with the court, (ROA.42) [Doc 9], complaining about Strickland's "uncaring and incompetent" representation, and failure to conduct any investigation into Jones' background. Jones stated that he had filed a grievance against Strickland with the State Bar of Texas. (ROA.44).

On January 12, 2006, Strickland wrote to Jones, telling him that he would not:

> . . . casually impugn the integrity or competence of your prior attorneys. The facts presented in the prosecution of your case were unusually horrific. It is my opinion that all of your lawyers have done the best for you in spite of that. ***I do not understand why you seem intent on blaming everyone who has tried to assist you while seemingly ignoring your own behavior***. (ROA.80).

On February 1, 2006, the district court ordered Strickland to file a response to Jones' request. In his response, Strickland explained why he did not investigate the issues identified by Jones. Strickland did not, however, explain why he had repeatedly ignored Jones' requests for this information. Furthermore, Strickland's adversarial relationship with his client was evident:

> Petitioner has been convicted of an unusually heinous crime and sentenced to death. Rather than assume any measure of responsibility for beating his elderly aunt to death

> with a baseball bat, petitioner continues to seek to blame others for his situation in which he now finds himself. ***Perhaps it is understandable that he would resort to such measures in a last ditch effort to save himself. However he should not be permitted to slander the character or impugn the integrity of the many trial, appellate, and writ lawyers who have worked on his behalf since 1999***.

(ROA.74).

Responding to Jones' complaint that Strickland would not investigate the reasonableness of trial counsel's sentencing investigation, Strickland told the court:

> What petitioner fails to tell the Court is that such investigation was done by trial counsel Larry Moore prior to petitioner's trial. Following petitioner's conviction and death sentence, and during the investigation and preparation of writ claims, that information was shared with Strickland. Lengthy discussions were conducted between Strickland and Mr. Moore. . . . Petitioner took his best shot at mitigation at his trial. His lawyers uncovered much and presented it all to the jury. (ROA.75,76).

He later described Jones' trial counsel as "unusually gifted and conscientious lawyers." (ROA.78).

On March 6, 2006, Jones then filed a pro-se motion to remove Strickland and appoint different counsel. [Doc 17]. It alleged Strickland's failure (1) to timely file the state writ application and (2) to investigate and present certain mitigation-related claims, showed that Strickland "will not represent Petitioner in a competent much less professional manner." Applicant's Pro Se Motion for the Appointment of Different Counsel at 2 [Doc. 9] ("Motion to Substitute Counsel"). Jones also wrote to Strickland, asking him to step down as counsel. Ex. U. *Jones v. Stephens*, 998 F.Supp.2d 529, 531-32 (N.D. Tex. 2014).

On March 9, 2006, the Court denied both of the pro-se requests. Order Denying Pro Se Motion for Appointment of Counsel [Doc. 17] (ROA.82). *See Jones v. Stephens*, 998 F.Supp.2d 529, 531-32 (N.D. Tex. 2014).

The last day to timely file a federal habeas application, April 18, 2006, came and went without Strickland having filed a federal habeas petition.

B. The Out-of-Time federal habeas petition filed by Jack Strickland

On September 14, 2006, approximately five months after the limitations period expired, Strickland filed a thirty (30) page, federal habeas petition without communicating with Jones, notwithstanding his representation that he would confer further with Jones "by letter and in person." Petition [Doc. 19]. Never having conducted an adequate investigation in state or federal habeas, the federal habeas petition filed by Mr. Strickland raised just two record-based claims: (1) the admission of Jones' statement at sentencing violated his Fifth Amendment right against self-incrimination; and (2) the state court's failure to timely appoint counsel violated Jones' Sixth Amendment right to counsel. (ROA.84).

The petition did not comply with the appointment order. [Doc 7]. It was not timely filed and nothing within the petition "demonstrate[d] that it [was] timely filed under 28 U.S.C. § 2244(d)(1)."

On November 17, 2006, the Director filed a motion to dismiss. (ROA.708, 751). Thereafter, without any explanation to Jones or the court, Strickland abandoned Mr. Jones and walked off the job. He filed no response to the State's motion to dismiss, and took ***no*** further action in the case.

On September 21, 2007, without addressing the merits of the claims, the district court granted the Director's unopposed motion to dismiss Jones' habeas petition as untimely. (ROA.763). The district court held that equitable tolling was ***not*** available, explaining that "because no response was filed by Jones to the State's motion to dismiss, no reason has been given to the district court for the delay in filing the federal petition." (ROA.768). The district court issued its judgment the same day. Strickland did not file any notice of appeal, nor did he inform Jones that he would not do so.

In mid- to late-January, 2008, in response to repeated letters from Jones, attorney Jim Marcus with the Texas Defender Services met with Jones. It was during this meeting that Jones first learned that because no notice of appeal had been filed, his case was ***not*** being appealed to the Fifth

Circuit as promised by Strickland. Upon learning of his predicament, in February 2008, Jones wrote to the district court, expressing his desire to appeal. On March 21, 2008, the district court removed Strickland as counsel of record and appointed undersigned Lydia Brandt. (ROA.772).

C. The 2008/2009 Initial Due Diligence Inquiry Was Not an Investigation

On May 29, 2008, Brandt filed a motion for relief from judgment because Jones had been deprived of his representation rights under 18 U.S.C. § 3599. (ROA.780) [Doc 35]. On September 10, 2008, the district court granted relief from the judgment and permitted Jones to respond to the Director's motion to dismiss the habeas application as time-barred. (ROA.891) [Doc 43].

Brandt began an initial 2008/2009 Due-Diligence Inquiry. The Due-Diligence Inquiry was not an Investigation, *see supra I.B. The State Habeas Proceedings, ... 3. The State Habeas Application.* It was confined to review of official record (clerk's record and reporter's record of the litigation) and record created by and received from former counsel and their defense team.

As more fully discussed *supra*, the Red Flags suggested that trial counsel's performance was deficient because trial counsel unreasonably narrowed the scope of their sentencing, and it suggested several plausible claims including a Sixth Amendment *Strickland/Wiggins* claim. *See supra*.

D. The Federal Order denied Jones' Feb. 4, 2009 Motions: Motion for Stay, which was filed in an attempt to overcome procedural default & obtain funding from state court; and the Motion for Leave to file the Feb. 4, 2009 *Proposed* First Amended Petition with Early-Stage Claims

On February 4, 2009, pursuant to the September 10, 2008 court order, Mr. Jones filed his Reply to the Respondent's Answer to the out-of-time federal habeas petition filed by Mr. Strickland. [Doc 50].

Mr. Jones also filed a Motion for Leave to File Amended Habeas Petition, attaching a *proposed* Amended Habeas Petition as an exhibit, and a Motion to Stay the proceedings in federal court to allow him to return to state court to present potentially unexhausted claims within the

Amended Habeas Petition. [Docs 53, 57]. The 2009 Proposed Amended Habeas Petition was the result of the initial 2008/2009 DDI, *see supra*. Brandt also anticipated that, if she were able to return to state court, she could possibly obtain investigative and other services from the state court pursuant to TEX. CODE CRIM. PROC. Art 11.071 §3.

On March 4, 2009, the district court again dismissed the initial federal habeas petition filed by Jack Strickland concluding that equitable tolling was ***not*** warranted. (ROA.1223,1235, 1236). [Doc 59]. Two other court orders, dated the same date, March 4, 2009, denied the Motion to Stay and Abate the federal proceedings [Doc 62], and denied the Motion for Leave to File an Amended Habeas Petition [Doc 60]. The basis for the denial was that "This Court has dismissed petitioner's federal habeas petition as time-barred. Accordingly, petitioner's motion [to Stay and Abate, and Motion to File an Amended Petition] is DENIED." [Doc 60, 62].

E. The district court granted Equitable Tolling in 2014, but rejected the requests that Jones' § 3599 counsel (Brandt and Mowla) be granted adequate time, and funding to Investigate the factual basis of the *Strickland/Wiggins* IATC Claim

On February 6, 2014, after several more years of litigation over the limitations period, the district court vacated the dismissal order. Appendix 4: *Jones v. Stephens*, 998 F. Supp.2d 529 (N.D. Tex. 2014) [Doc 113]. Observing that "it is difficult to overlook the fact that Jones's concerns about Strickland's ability to provide 'competent' and 'professional' representation proved in retrospect to be justified," the district court concluded that, "[i]n the unusual circumstances of this case, where petitioner anticipated he would receive 'incompetent' representation and his timely requests to avoid it were denied in an order that attempts to address his concerns about competence and timeliness, . . . that is enough [to warrant tolling]." (ROA.1679). The court reopened the case and ordered Jones to file an amended petition not more than 90 days from the date of the order.

On February 10, 2014, Brandt requested appointment of co-counsel Michael Mowla, which

was granted on February 13, 2014. [Doc 114, 116]. On March 23, 2014, Jones requested an extension of time, asking that the court give his counsel an opportunity to investigate the case before filing an amended petition. (ROA.1694). The motion pointed out that this Court had recently decided cases which permitted a federal habeas applicant to obtain review of defaulted IATC claims attributable to ineffective state-habeas representation and alleged that prior representation in state habeas by Strickland had been deficient. *See Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 133 S.Ct. 1911 (2013).

Further because of equitable tolling, Jones asked to be to restored to the position he would have been in had he been originally appointed competent counsel. On April 1, 2014, the district court granted in part Jones' motion for an extension of time, but gave him only an additional 47 days. (ROA.1713). The district court denied the Second Motion for Continuance [Doc 126, 128], and denied the Opposed First Motion for Funding, *infra*. Appx 6: Order denies funding.

F. In 2013, the Northern District had created the *Robertson* Procedure, effectively eliminating *ex parte* requests for funding and making them the subject of adversarial opposition by the Respondent

On May 23, 2014, Jones filed a Motion for Leave to Proceed ex parte on his Opposed First Application for Funding. For many years, the request to seal the funding application had been governed by the *Patrick* procedure and requests to seal were routinely granted. Appendix 9: *Patrick v. Johnson*, 37 F. Supp. 2d 815, 816 (N.D. Tex. 1999) (*quoting Dowthitt v. Johnson*, No. H-98-3282, 1998 WL 1986954 (S.D. Tex. Dec. 2, 1998). The *Patrick* procedure held a statement of need for confidentiality "merely must identify generically the type of services needed and the broad issue or topic (e.g., innocence) for which the services are necessary." *Patrick*, 37 F. Supp. 2d at 816.

The *Patrick* Procedure was "revised" in 2013 by the *Robertson* procedure, which effectively eliminated any *ex parte* filing. Appx 8: *Robertson*, 2013 WL 2658441 at 2. *See* CJA Report at 209

("some courts have read [§ 3599] as a near categorical proscription of ex parte requests for expert and other services. As a result, habeas counsel in some districts and circuits are forced to litigate for the funding for any third-party services while the one-year statute of limitations is running.").

Accordingly, the *Jones* May 30, 2014 Order denied leave to Jones to proceed *ex parte* on the funding application, and ordered the motion be "unfiled" by the clerk of court. The Order stated: "How, exactly, a petitioner can explain the need to proceed *ex parte* without disclosing the very information he claims a need to keep secret may be unclear, but it is not impossible." Appendix 7: *Jones*, 2014 WL 2446116.

Under the *Robertson* Procedure, the court made funding the subject of adversarial opposition by the Respondent[2] reasoning that when the request is not filed publicly, Respondent is "deprived of a meaningful opportunity to provide information necessary for this court to make a proper determination of this important funding matter. .... As observed by respondent, a 'federal habeas corpus proceeding is no place for sandbagging.'" Appx 8: *Robertson*, 2013 WL 2658441, at *4.

Robertson required that "Petitioner must provide factual support for the funding request, including any pertinent state court records and prior funding records," and "[make] these disclosures in the motions served on the respondent." *Id*. Thereafter, "Respondent should provide all pertinent state court records not already filed or produced by any party prior to that time, including any available records of payments for prior investigations, attorney, or expert services." *Id*.

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[2] According to *Robertson*, "the court must balance a petitioner's need for a confidentiality in preparing her case with other factors such as: (1) the State's interest in evidentiary development in federal habeas proceedings; (2) the public's interest in fiscal transparency; and (3) the court's need for reliable information in deciding whether the requested assistance is really necessary." Appx 8: *Robertson* 2013 WL 2658441 at *2. *See* CJA Report at 209 ("While requests for resources are necessary in all cases, those requests in Texas have, become the subject of adversarial opposition by the Respondent in Texas cases.").

*Robertso*n explained: "In determining whether and to what extent further mitigation investigation is now required, it is important to ascertain what mitigation information is already available to the petitioner. Duplicating prior mitigation investigations would unnecessarily waste judicial resources." Appx 8: *Robertson*, 2013 WL 2658441 at *4.

G. On June 3, 2014, Brandt and Mowla filed in the public record a twenty-nine (29) page Opposed First Funding Motion based on the Due Diligence Inquiry, that included a detailed Proposed Investigative Plan

On June 3, 2014, Jones filed a twenty-nine (29) page Opposed First Motion for Funding in the public record. Appx 5: Opposed First Motion for Funding [Doc 124] and Burdette Estimate as exhibit. It was based on a continuation by Brandt and Mowla of the Due Diligence Inquiry begun by Brandt in the 2008/2009 time frame, *see supra*. The funding motion included a detailed Proposed Investigation Plan [*id*. at 25-26] and an estimate of time/cost from Mary Burdette, a mitigation specialist, pursuant to 18 U.S.C. § 3599(f).

Petitioner requested initial authorization of the first $7,500.00 (an amount within the authority of the district court to grant) to allow the mitigation investigator to begin work, while also seeking authorization for a total amount of $30,000 (400 hours x $75/hour) for mitigation investigative services to be submitted to the Fifth Circuit for its approval. *See* Appx 5: Funding Motion at 5.

1. The Motion identified a plausible Sixth Amendment *Strickland/Wiggins* claim

Based on counsel's Due Diligence Inquiry, the funding motion identified a plausible Sixth Amendment *Strickland/Wiggins* IATC "claim based on an absence of a reasonable and adequate pretrial investigation, development and presentation of facts about Mr. Jones' psychosocial history." Appx 5: Funding Motion at 24.

2. The Motion demonstrated the likelihood that the services would generate useful and admissible evidence

The Motion laid out the Red Flags from the analysis of the record from former counsel and the state court, including an analysis of available billing records for former counsel and their investigators and experts, and the file contents identifying several areas of Jones' background that were not adequately explored by trial counsel. Appx 5: Funding Motion at 8-14. *See supra I. B. State Habeas Proceedings, 4. The Due Diligence Inquiry....* The motion alleged trial counsel had unreasonably narrowed the scope of their sentencing investigation. The proposed Investigation had *not* been conducted by Brandt or Mowla.

3. The Motion demonstrated that with the *Martinez/Trevino* decisions, there was a credible possibility Jones could clear the procedural hurdles standing in the way

With the release of *Martinez/Trevino*, and state habeas counsel's hostility to raising IATC claims, *see supra*, the funding motion asserted a credible possibility that Mr. Jones could clear the procedural hurdles standing in the way of merits review. Appx 5: Funding Motion at 23-24.

H. Every objection of the Respondent became the court's reason to deny funding. The June 20, 2014 Order also denied funding because the motion "does not identify what was, in fact, foreclosed ...." and because the motion "fails to acknowledge the full scope of the investigation that was done by the trial team"

The Respondent objected to the funding motion. [Doc 125]. The court converted every argument made by Respondent [Doc 125], into the court's reasons for denying funding, including making a premature merits determination that Jones could not overcome procedural default because the claim was not substantial – even though the 2014 amended federal habeas petition was not yet filed. *See supra II. A. The federal court appointed Jack Strickland* at pp13-14. [*Compare* Doc 125 at 7 *with* Appx. 6 Order at *6, *7]. *See also I.B.4. The June 20, 2014 Order denying funding,*

prematurely adjudicated.... [3]

The June 20, 2014 Order (Appx 6: Jones, 2014 WL 2807333, at *2, *4, *6,) also makes clear the court had reviewed the state-court record; it detailed the content in the order ("Given the other evidence in the record, discussed below...." *id.* at *4, *5); *see also* Appx 2 at 649: 2016 Mem. Op, and Order denying habeas relief ("The Court will nevertheless examine the whole record to determine whether the red flags support Jones's conclusion that counsel unreasonably limited their investigation"). Based on the record review, the order denied funding because:

> "***The [2014] motion does not identify the existence of a lead that trial counsel failed to follow or demonstrate what Jones expects to find with a new investigation***," *id*. at *4;
>
> "[The 2014 Motion] ***does not identify what was, in fact, foreclosed or what present counsel hopes to find***. Motion at 6. ***The motion fails to acknowledge the full scope of the investigation that was done by the trial team*** and the evidence presented to the jury, and rests on the assumption that every habeas petitioner is entitled to re-do the mitigation investigation under current ABA guidelines to see what may have been missed." at *6.

I. The 2016 Mem. Opinion and Order denied habeas relief with respect to the IATC Claims, and affirmed its 2014 denial of funding order because "Jones fails, for the most part, to specify the people and information counsel overlooked, much less provide evidence of them"

On January 13, 2016, the district court denied habeas relief and entered judgment against Jones. Appx 2: Mem. Op. and Judgment denies habeas relief [Doc 152; 153]. Because Jones was denied funding, all of the substantive claims in the Amended Federal Habeas Petition were reduced to *Early-Stage*, and not *Factually-Developed* Claims. Thus, without evidence to support the

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[3] *Compare also* Doc 125 at 14 ("counsel has already been given over $48,000 to represent Jones ... includ[ing] ... a proposed amended petition") *with* Appx. 6 Order at *5 ("there is no question that counsel previously investigated, prepared, and was compensated for an [2009] amended petition containing substantially the same issues for which she now seeks funding"). *Compare* Doc 125 at 11 *with* Appx. 6 Order at * (new claims would be time-barred).

allegations, it is unremarkable that as to the IATC Claims 2, 3, and 4,[4] the district court ruled:

> ***Jones fails, for the most part, to specify the people and information counsel overlooked, much less provide evidence of them. This alone is a basis to deny the claim.*** Koch, 907 F.2d at 530 (holding that conclusory allegations are not sufficient to raise a constitutional issue). Appx 2: *Jones*, 157 F. Supp.3d at 649.

The 2016 Memorandum Opinion and Order affirmed its 2014 Order that denied funding reciting in pertinent part:

> ***Jones's funding motion simply identified so-called red flags in the record involving matters that were clearly investigated by trial counsel and presented at trial. Jones did not provide any information that exceeded what was known to counsel*** and did not demonstrate a reasonable necessity for the investigation that he requested. He simply sought to re-investigate any and all aspects of trial counsel's 2001 performance under 2008 guidelines. He also failed to demonstrate that funds in excess of the statutory maximum were "necessary to provide fair compensation for services of an unusual character or duration." *See* 18 U.S.C. § 3599(g)(2).

App 2: *Jones*, 157 F. Supp. 3d at 665-666.

J. The Fifth Circuit's 2019 *Jones* opinion affirmed the denial of funding

Although the district court in *Jones* denied funding four (4) years before this Court decided *Ayestas*, the Fifth Circuit's opinion post-*Ayestas* opinion endorsed the district court's order, without remanding for a re-determination in light of *Ayestas*. It held:

> "Although the district court denied funding before the Supreme Court's decision in *Ayestas*, the denial did not hinge on our now-rejected requirement that Jones show "substantial need" for the funding. Instead, it viewed Jones's request for additional funding as effectively seeking a full retrial of the issues already litigated in the state court. *Ayestas* did not disturb the long-settled principle that district courts have discretion to separate "fishing expedition[s]" from requests for funding to support

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[4] Claim 2 (IATC & *Wiggins* – Failure to Adequately Investigate & Develop Mitigating Evidence); Claim 3 (IATC & Denial of Rights to a Fair Defense, Presumption of Innocence, and Right to Reasonable Doubt – Failure to Adequately Investigate & Develop Condition-of-the-Mind Evidence), and Claim 4 - IATC Claim, attorney failed to seek timely and relevant evaluations of his: mental condition regarding: a. the reliability and voluntariness of his confession; his competency to stand trial; c. his criminal responsibility for the death of Ms. Bryant; and d. his moral culpability and the appropriate punishment.

> plausible defenses. Because "the reasons the district court gave for its ruling remain sound after Ayestas," we conclude that remand is unnecessary and affirm the denial of funding.

Appx 1: *Jones v. Davis*, 927 F.3d 365, 373-374 (5th Cir. 2019). The opinion affirmed the district court's reasons, *supra*.

This petition for writ of certiorari in the Supreme Court follows.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO ANSWER THE FEDERAL QUESTION: WHEN HAS A QUALIFYING PRISONER BEEN DENIED MEANINGFUL REPRESENTATION INFORMED BY INVESTIGATION TO PREPARE A FEDERAL HABEAS CORPUS APPLICATION

The district court in *Jones* denied funding before this Court decided *Ayestas*. Nonetheless, in the post-*Ayestas* landscape, the Fifth Circuit's opinion endorsed the district court's unworkable approach wholesale. *Jones v. Davis*, 927 F.3d 365, 373-374 (5th Cir. 2019) "Although the district court denied funding before the Supreme Court's decision in *Ayestas*, ... *Ayestas* did not disturb the long-settled principle that district courts have discretion to separate "fishing expedition[s]" from requests for funding to support plausible defenses. Because 'the reasons the district court gave for its ruling remain sound after *Ayestas*,' we conclude that remand is unnecessary and affirm the denial of funding."

Post-*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 Shelton Denoria Jones v. Davis*, 890 F.3d 559, 574 (5th Cir. 2018) (unrelated to *Quinton Jones* case; 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"). And now in the case at bar, the Fifth Circuit again affirmed the district court's denial of any investigative assistance to counsel to investigate the factual basis of a Sixth Amendment violation. *Jones v. Davis*, 922 F.3d 271, 283-85 (5th Cir. 2019).

Mr. Jones 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).

A. A Reasonable Lawyer Would Pursue the Plausible *Strickland/Wiggins* Claim Identified by § 3599 Counsel

The federal question in *Jones* reduces to whether Mr. Jones, 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).

1. Section 3599 counsel's opinion that a plausible *Strickland/Wiggins* claim existed and that the known evidence would lead a reasonable attorney to investigate further, was a professionally formed opinion that 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," or forfeit claims that go undiscovered and unraised. *McCleskey v. Zant*, 499 U.S. 467, 498 (1991) ("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).

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). As part of that right, 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). 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. Jones' § 3599 counsel tried to do that. As part of that inquiry, the reasonable attorney also understands that it necessary to show the prospect that he will be able to clear any procedural hurdles standing in the way. *Ayestas v. Davis*, 138 S.Ct. 1080, 1094 (2018). Mr. Jones shoulder that burden as well.

In the 2008/2008 time frame, shortly after the district court appointed Brandt, a solo practitioner, as Mr. Jones federal habeas counsel pursuant to § 3599, Brandt diligently inquired into what investigation might bear fruit with respect to the question of the legality of Mr. Jones' confinement under federal law. In 2014, she and co-counsel Mowla continued the Due Diligence Inquiry after equitable tolling was granted in an effort to obtain funding to conduct an Investigation. *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").

The Red Flags from the Due Diligence Inquiry signaled that trial counsel unreasonably narrowed the scope of their sentencing investigation, given the quantum of evidence known to them. *See supra, I.B.4. The Due Diligence Inquiry....* It was § 3599 counsel's professional opinion that based on the known evidence, a reasonable attorney would have further investigated and developed evidence of Jones' mental health, intellectual functioning, and life history, specifically whether Mr. Jones suffered from:

(1) severe, long-standing, involuntary alcohol addiction;

(2) traumatic, physical/sexual childhood abuse;

(3) severe, long-standing, involuntary addiction to polysubstances, beginning as early as age 12; and

(4) dissociative disorder as a result of traumatic, physical and sexual childhood abuse.

Yet both the 2014 denial of funding Order and the 2016 Mem. Opinion and Order denying funding and habeas relief persisted in ruling that "[t]he asserted red flags are issues that were obviously investigated or known to counsel, ..." Appx 2 at 649. For funding purposes, the issue is not whether the state record reflects former counsel did an investigation or had some knowledge of the issues. The issue to be addressed in making the funding determination is whether Section 3599 counsel's opinion – "the known evidence would have lead a reasonable attorney to investigate further" into a Sixth Amendment IATC Claim – was a professionally formed opinion that a reasonable attorney would form. Unlike a *Wiggins* determination of a *Factually-Developed* Claim plead in a habeas petition, the pre-petition funding determination does not require proof of what was in fact foreclosed. *See generally Wiggins v. Smith*, 539 U.S. 510, 527-28 (2003).

Further, the emphatic ruling of the district court – "there is no question that counsel [Brandt] previously investigated, prepared, and was compensated for an amended petition [referring to the 2009 *Proposed* First Amended Habeas Petition] containing substantially the same issues for which she now seeks funding" – is simply wrong. [Appx 6, Order denies funding, Doc 127 at 11]. The court's own rulings confirm counsel's efforts were a Due Diligence Inquiry confined to a state court, record-bound review, and not an extra-record Investigation:

- "***In truth, all of this information 'learned' by present counsel appears in Dr. Wadsworth's 2001 report*** [doc. 57-2]. It is also, to some extent, present in the trial record. (35 RR 10, 33, 35, 69, 73-74.).... To the extent the motion implies that any of this information has been newly discovered by recent efforts of present counsel, it contradicts the record." App 6: Jones, 2014 WL 2807333 at *5

- "Jones simply alleges in the abstract [in] that counsel could have done more or takes issue with counsel's strategic choices. ***His "red flags" provide***

> ***nothing more than what is already in the trial record***." Appx 2: Jones, 157 F. Supp.3d at 656.

Without funding to conduct an Investigative assistance, § 3599 counsel could not identify "what was, in fact, foreclosed or what present counsel hopes to find." Appx 6: Order denies Funding Motion at *4. And because § 3599 counsel are not trained in mental health, without funding for expert assistance, § 3599 counsel is unable to assess "the testimony provided by the defense's mental health experts at trial…," as the district court, and circuit court demanded in a cart before the horse approach. Appx 1: *Jones v. Davis*, 927 F.3d at 373.

The Order demonstrates the lack of familiarity by the district judge with the nature of capital habeas representation, which hampers the quality of defense. *See* 2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act (revised April 2028) (CJA Report).[5] ("Some district judges don't understand what is involved or necessary in habeas proceedings, and so will deny requests for services to develop evidence outside the record."). *Id*. at 208.

2. Section 3599 counsel's opinion that credible arguments for overcoming procedural obstacles of an IATC *Strickland/Wiggins* Claims existed, was a professionally formed opinion that a reasonable attorney would form

Jones tried twice to overcome procedural default, once in 2008/2009 and again in 2014. In the 2008/2009 time frame, *Ayestas* had not yet been decided, nor *Martinez/Trevino*. Because of *Coleman*, § 3599 counsel was cognizant that merits review was foreclosed in federal court and that the burden for *Jones* was onerous because of the procedural posture of his case. *Coleman v. Thompson*, 501 U.S. 722, 754 (1991) (petitioners vicariously faulted, via agency principles, for any deficiency of state post-conviction counsel).

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[5] https://cjastudy.fd.org/sites/default/files/public-resources/Ad%20Hoc%20Report%20June%202018.pdf

In 2008/2009, Jones filed a motion to vacate the order and judgment dismissing the case because of the time-bar [Docs 28, 29, 35]. Jones also filed a motion for leave to file the proposed 2009 First Amended Habeas Petition with Early-Stage claims in federal court [Doc 57], and a motion to stay the federal proceedings and return to state court [Doc 53]. *Jones*' strategy was to return to state court to exhaust the Sixth Amendment IATC claims (thereby overcoming procedural default), and possibly obtain funding to investigate, pursuant to TEX. CODE CRIM. PROC. Art. 11.071 § 3. The district court denied the motions; the proposed 2009 Amended Habeas Petition was never filed. The court ruled: "This Court has dismissed petitioner's federal habeas petition as time-barred. Accordingly, petitioner's motion [to Stay and Abate, and Motion to File an Amended Petition] is DENIED." [Doc 60, 62].

Thus, during the seven years from the time Jack Strickland filed the out-of-time federal habeas petition on September 14, 2006, until equitable tolling was granted on February 6, 2014, there were no substantive merits claims to investigate or to seek funding to investigate because the only issue before the court was a procedural issue: whether equitable tolling should be granted as reflected by the early 2008/2009 pleadings and orders. Because of the procedural posture of the case at that time, Mr. Jones could not show reasonable necessity as required by federal statute.[6]

In his 2014 funding motion, Jones tried again to overcome procedural default after the federal court granted equitable tolling on February 6, 2014, Appx 4: Order grants equitable tolling [Doc 113]. Counsel continued the Due Diligence Inquiry begun in 2008/2009, consulted with an independent mitigation specialist, and filed in the public record an Opposed First Motion for Funding Appx 5 [Doc 124], which was denied. Appx 6 [Doc 127]. The funding motion sought to overcome

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[6] In denying Jones' 2014 funding motion and his motions for adequate time, the court unreasonably held that Jones was not diligent: "This investigation is requested eight years after the original petition was filed and six years after the appointment of substitute counsel." Appx 6: *Jones*, 2014 WL 2807333, at *7.

procedural default relying on *Martinez/Trevino*, which abrogated *Coleman*'s vicarious-fault rule when the petitioner demonstrates that state post-conviction counsel ineffectively litigated, or failed to litigate, a substantial *Strickland* claim. The Due Diligence Inquiry supported the opinion of Brandt and Mowla that there was a plausible and substantial *Strickland/Wiggins* claim, and also supported that Strickland was hostile to such claims, so he did not investigate, develop, and raised it. *See I.B. State Habeas Proceeding, supra.*

However, the court adopted the Respondent's arguments, including making a premature merits adjudication that the IATC Claim was *not* substantial (*before* the 2014 amended habeas application had even been filed). *Compare* Appx 6: *Jones*, 2014 WL 2807333 at *3, *6. *with* Respondent's Opposition to funding [Doc 125 at 7] ("in response to Jones's request for the appointment of new federal habeas counsel, Mr. Strickland explained to this Court why he did not further investigate or present the IATC claim that Jones had requested.... This Court has already determined that such accusations against state habeas counsel have no support in the record.").

Thus, twice (in 2009, and again in 2014). Jones sought to overcome procedural default. And twice, because of Respondent's Opposition and federal district court orders, he was thwarted.

The Fifth Circuit affirmed the district court's nonsensical pronouncements (*e.g.*, "there is no question counsel [Brandt] investigated;") and held there was no abuse of discretion in the denial of §3599 representation services, [Appx 6, Doc 127 at 5]; Appx 1: *Jones v. Davis*, 927 F.3d at 373-374, notwithstanding that a federal court must "ensure that the defendant's statutory right to counsel [i]s satisfied throughout the litigation." *Martel v. Clair*, 565 U.S. 648, 661 (2012).

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

The funding determination should be a relatively simple collateral matter requiring only review of the motion making the request. But in *Jones* (and in *Crutsinger*, and *Robertson*) the courts transformed a proceeding that "should *not* impose a great burden on counsel," into "a near categorical proscription of *ex parte* requests for expert and other services," and made it "the subject of adversarial opposition by the Respondent in Texas cases," CJA Report at 209.

1. The *Robertson* Procedure requires, before the petition is filed, that the parties "provide all pertinent state court records not already filed or produced by any party prior to that time, including any available records of payments for prior investigations, attorney, or expert services."

Under the *Robertson* Procedure, the district courts evaluate federal habeas funding requests against what investigation had been done by the trial attorneys in state court, after a review of "all pertinent state court records ..., including any available records of payments for prior investigations, attorney, or expert services." Appx 8: *Robertson*, 2013 WL 2658441 at *4.

The *Robertson* Procedure asserted:

> In determining whether and to what extent further mitigation investigation is now required, ***it is important to ascertain what mitigation information is already available to the petitioner***. ***Duplicating prior mitigation investigations would unnecessarily waste judicial resources***.

Id. at *4. A "federal habeas corpus proceeding is no place for sandbagging." *Id*.

2. The district court in *Jones* did an extensive review of the state record, ruled that trial counsel conducted an investigation, and denied funding to develop evidence outside the state court record

Jones: The *Jones* court reviewed the state court record, and in its 2014 order denying the funding motion, chides counsel for failure to acknowledge the investigation by trial counsel:

- "Except to acknowledge how much they were paid and that the files of Dr. Finn are no longer available, the motion fails to attribute the work of these

two defense-team members that is apparent in the record." Appx 6: *Jones*, 2014 WL 2807333, at *5 [Doc 127 at 13];

- "The motion fails to acknowledge the full scope of the investigation that was done by the trial team and the evidence presented to the jury;" *id.* at *6

The district courts have made similarly erroneous rulings in denying funding in other cases in the Northern District based on a state-court, record-bound review and conclusion an investigation had been conducted by trial counsel.

Crutsinger: The same district court who presided in *Jones*, also presided in the *Crutsinger* habeas litigation. In *Crutsinger*, the district recited its extensive state-court record review:

- "Next, this Court assessed trial counsel's investigative efforts from the contents of the reporter's record," *Crutsinger v. Davis*, 2019 WL 3749530, at *4 (N. D. Tex. 2019);

- "the trial court clerk's record includes orders demonstrating that trial counsel had procured a fact investigator, a psychiatrist (Barry Mills), a DNA expert (Identagene, Inc.), a forensic psychologist and mitigation investigator (Kelly Goodness), and a prison classification expert (Walter Quijano).(1/8 CR 35, 50, 63, 67; 7/8 CR 1309)," *Id*. at *4; ;

- "The clerk's record also reveals a rigorous pretrial motions practice," *Id*. at *4;).

The district court in *Crutsinger* (as in *Jones*), castigated counsel because she and her proposed mitigation investigator did not acknowledge the work done at trial:

- Crutsinger's proposed mitigation investigator "did not acknowledge the investigative work that was done at trial;" ROA.1388, [Mem. Op. Doc 120 at 17];

- "The application does not acknowledge the investigation and mental-health evaluations that were performed for his trial," ROA.1388, [Mem. Op. Doc 120 at 20];

- "Crutsinger gives short shrift to the defense evidence at punishment and suggests that reasonable counsel would have presented a mental-health defense." ROA.1388, [Mem. Op. Doc 120 at 21].

With escalating hostility to the § 3599 funding request, the *Crutsinger* court characterized the

opposed funding request as "border[ing] on frivolous," "completely false;" and "leaving a false impression." *Crutsinger v. Davis*, 2019 WL 3749530 at *3, *7, *9 (N.D. Tex. 2019). *See also Crutsinger v. Davis*, SCOTUS No. Cert. Pet. 19-5755 at 20.

The Fifth Circuit approved the approach in *Crutsinger*. It recognized that the district court "engaged in an extensive review of the [*Crutsinger*] record...." *Crutsinger v. Davis*, 936 F.3d 265, 270 (5th Cir. 2019). It held the district court "rightly emphasized [that] Crutsinger's 'assertions that the denial of funding precluded a true merits review and that trial counsel's representation was egregious, border on frivolous.'" *Id.*

Robertson: Similarly in *Robertson*, the district court conducted an extensive record review and characterized the proposed *Wiggins* claim as "inane." *Robertson v. Davis*, 763 Fed. Appx. 378, 380 (5th Cir. 2019) ("we agree with the district court that the *Wiggins* claims Robertson proposes to investigate "are not merely implausible, they are inane."). *See Robertson v. Davis*, SCOTUS No. 19-6181.

The district courts' approach consume far too many judicial resources to respond to a mere request for § 3599 representation services in a case. It is an inflexible, concrete all-or-nothing approach (*i.e.,* if the state court record suggests that trial counsel conducted any investigation, funding requests by private[7] § 3599 counsel are denied).

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[7] Richard Burr, Texas Regional Habeas and Assistance Project, testifying before the Ad Hoc Committee, explained:

> "In more than half of the capital federal habeas petitions filed in Texas, counsel raise only record-based issues. Only on rare occasions can record-based issues lead to relief in federal court. The reason is obvious: Numerous other courts have reviewed the same issues and found them wanting. The rate of success is exponentially higher if the petition includes well-investigated-and-developed, non-record-based issues such as ineffective assistance of counsel for failing to investigate material facts, the concealment of facts by the prosecution that would have been helpful to the defense, and the demonstrable unreliability of scientific evidence presented by the prosecution. These are the kinds of issues that change the equities in a case . . ."

3. The June 20, 2014 Order required Petitioner to "identify what was, in fact, foreclosed" by prior counsel's investigation, as a prerequisite for §3599 funding to investigate, develop and present evidence of what was in fact foreclosed

The June 20, 2014 Order (Appx 6) in *Jones* denying funding, demanded that a petitioner *prove* the claims and defenses against all procedural bars, *before* the court would grant Jones the resources to investigate, develop, and prove the claims and defenses against all procedural bars. The June 20, 2014 Order ruled:

- "the amended petition did not actually identify any overlooked mitigating evidence; rather it focused on the timing of the investigation," Appx 6: *Jones,* 2014 WL 2807333 at *2;
- "the motion does not identify the existence of a lead that trial counsel failed to follow or demonstrate what Jones expects to find with a new investigation;" Appx 6: *Jones*, 2014 WL 2807333 at *4;
- "The motion ... does not identify what was, in fact, foreclosed or what present counsel hopes to find." Appx 6: *Jones*, 2014 WL 2807333 at *6; and
- "The present motion does not demonstrate a reasonable expectation that further investigation into this matter will produce anything substantially different or more helpful to Jones." Appx 6: *Jones*, 2014 WL 2807333 at *6.

The reasoning in *Jones* is circular. It was circular in *Crutsinger* as well. Judge Graves in *Crutsinger v. Davis*, 929 F.3d 259, 267 (5th Cir. 2019) (Graves, J. dissenting) wrote "[s]uch a circular application [by the district court] is illogical. It heightens the standard required under 18 U.S.C. § 3599(f) and essentially makes it impossible for a defendant to ever obtain funding on such a claim. A defendant who has already proven his claim of ineffective assistance of counsel would have no need for additional investigative, expert, or other services."

Further, petitioners such as *Jones*, *Crutsinger*, and *Robertson*, are foreclosed from all access

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CJA Report at 207, n.974, Richard Burr, Texas Regional Habeas and Assistance Project, Public Hearing — Birmingham, Ala., Panel 3, Writ. Test., at 2.

to courts on plausible meritorious claims – in both the state *and* federal courts. A petitioner represented by incompetent/ineffective state habeas counsel[8] defaults plausible federal constitutional claims in Texas state court by not raising them. The true merits of those claims are never considered by the federal habeas court when § 3599 counsel is denied § 3599 representation services to investigate, develop and present the factual basis for them in federal court – even though *Martinez/Trevino* could provide cause to excuse the procedural default.

While it is true that there is no constitutional right to habeas, once a governmental body establishes a statutory right to habeas, it cannot deny access to the courts based on an unworkable approach that denies the petitioner the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights. U.S. CONST. amend XIV; *Johnson v. Avery*, 393 U.S. 483 (1969) (" the initial burden of presenting a claim to post-conviction relief usually rests upon the indigent prisoner himself.... In the case of all except those who are able to help themselves ... the prisoner is, in effect, denied access to the courts unless ... help is available); *Wolff v. McDonnell*, 418 U.S. 539 (1974) ("The right of access to the courts ... is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights.").

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[8] In *Jones*, Jack Strickland rejected raising ineffective assistance of trial counsel claims because petitioner would be "slandering" or "blaming" former defense counsel in "a last-ditch effort to save himself," *see* Statement of the Case, *supra*. In *Robertson*, former state habeas counsel, Mickelsen, attests the claim he raised in state habeas was an IATC failure-to-present claim, not an IATC Wiggins claim. [USDC No. 3-13cv728, Doc 47 at 39]. In *Crutsinger*, Mr. Crutsinger had a word processor for counsel, who cut-and-pasted record-bound claims from the writ of one client into the writ of the next client, and the next, and the next. *See Crutsinger v. Texas*, SCOTUS No. 19-5715.

4. The June 20, 2014 Order denying funding, prematurely adjudicated the merits before the 2014 amended habeas petition had been filed

The June 20, 2014 Order denying funding, also prematurely adjudicated the merits of the IATC Claims, *before* the 2014 amended habeas application had even been filed:

> • To the extent Jones argues that *Martinez* justifies an investigation into the representation of state habeas counsel Strickland, the Court observes that years of prior litigation on equitable tolling in this case were focused on allegations of ineffective assistance against Strickland for multiple reasons, including his alleged failure to investigate mitigation issues. .... ***While the Court concluded Strickland negligently miscalculated a filing deadline, it rejected Jones's contention that Strickland failed to investigate mitigation issues due to his personal relationship with trial counsel***. .... The present motion does not demonstrate a reasonable expectation that further investigation into this matter will produce anything substantially different or more helpful to Jones.
>
> • Respondent also contends that the new claim Jones seeks to fund would be time-barred.... ***although the time for Jones to file a reply addressing this argument will not expire until after Jones's amended petition is due***, the time-bar issue is not a surprise to Jones. Yet ***counsel did not make an anticipatory argument in his motion regarding the time bar*** (as he did with the procedural bar),.... Jones has not shown how any new claims produced by the additional funding would not be time barred.

Appx 6: *Jones*, 2014 WL 2807333 at *6, *7.

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.

C. The lower courts need guidance on how to properly apply *Ayestas*

A court must grant some measure of deference to the competent lawyers it has 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.

A lawyer who the court appoints to provide the quality representation guaranteed by § 3599 in a capital case should be presumed to be acting reasonably. The recent 2018 *Ayestas* decision from this Court 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. Although not a license to investigate frivolous matters, the burden should not be onerous, or appointed counsel cannot conduct any meaningful investigation of the case at all, as is her obligation to fulfill the basic representation duty imposed by *McCleskey*.

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. This approach thwarts Congress' 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).

This Court should grant certiorari to hold that Mr. Jones' 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*.

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 day, October 28, 2019,

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APPENDIX

Appendix 1: *Jones v. Davis*, 927 F.3d 365 (5th Cir. 2019) (affmd funding denial)

Appendix 2: *Jones v. Stephens*, 157 F. Supp.3d 623 (N.D. Tex. 2016) (Mem. Op. and Order); Judgment [Doc 152; 153]

Appendix 3: Federal Appointment Order of Jack V. Strickland [Doc 7]

Appendix 4: *Jones v. Stephens*, 998 F. Supp.2d 529 (N.D. Tex. 2014) (Dist Ct. Order Granting equitable Tolling [Doc 113])

Appendix 5: Opposed First Motion for Funding [Doc 124] and Burdette Estimate as exhibit

Appendix 6: *Jones v. Stephens*, 2014 WL 2807333 (N.D. Tex. June 20, 2014) (Order denies Opposed First Motion for Funding [Doc 127]

Appendix 7: *Jones v. Stephens*, 2014 WL 2446116 (N.D. Tex. May 30, 2014) (Order denies Motion to Seal Opposed Motion for Funding [Doc 123]

Appendix 8: *Robertson v. Stephens*, 2013 WL 2658441 (N.D. Tex. 2013) ("revises" *Patrick* procedure)

Appendix 9: *Patrick v. Johnson*, 37 F. Supp. 2d 815, 816 (N.D. Tex. 1999)