No. 19-6465

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

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Petitioner Jones replies to the Respondent Davis' Brief in Opposition (BIO) to his petition for writ of certiorari.

I. (Reply to BIO secs. I-III): In her sections I-III, Director Davis mistakenly asserts Jones' request for review is a request "merely to correct errors in the application of properly stated legal rules." To the contrary, THE FIFTH CIRCUIT DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT by incorrectly affirming that as a prerequisite to funding, a petitioner must produce extra-record evidence and prove the merits of his claims and defenses against all procedural bars

A. THE LOWER COURTS INCORRECTLY REQUIRED EXTRA-RECORD EVIDENCE OF IAC AS A PREREQUISITE TO FUNDING: *Ayestas* held "the inquiry is *not* whether [the petitioner] can prove that his trial counsel was ineffective ...." Nevertheless, the Fifth Circuit affirmed the June 10, 2014 Order, which denied Mr. Jones' request for funding, because Jones failed to produce evidence of deficient performance – "The motion ... does not identify what was, in fact, foreclosed"

In her Introduction, and again in her sections I-III, Director Davis mistakenly asserts that Mr. Jones requests "review merely to correct errors in the application of properly stated legal rules," BIO at 2, and that "the Fifth Circuit agreed with the district court that Petitioner had failed, in his request for funding, to demonstrate the potential merit of his ineffective-assistance claim." BIO at 13.

The Fifth Circuit's affirmance is not about a ruling on a plausible claim. Rather the circuit opinion incorrectly affirmed the district court's June 10, 2014 Order, which ruled that as a prerequisite to funding, a petitioner (specifically Jones) must produce extra-record evidence and prove the merits of the Sixth Amendment IAC claim, and the success of his defenses to the procedural bars – a burden of proof contrary to *Ayestas* and Court precedent.

The standard articulated by this Court in *Ayestas* "requires courts to consider the potential

merit of the claims that the applicant wants to pursue, the likelihood that the services will generate useful and admissible evidence, and the prospect that the applicant will be able to clear any procedural hurdles standing in the way. To be clear, a funding applicant must not be expected to prove that he will be able to win relief if given the services he seeks." *Ayestas v. Davis*, 138 S.Ct. 1080, 1094 (2018) (emphasis supplied). This Court pointedly held: "the inquiry is <u>*not*</u> whether Ayestas can prove that his trial counsel was ineffective under *Strickland* or whether he will succeed in overcoming the procedural default under *Martinez* and *Trevino*." (Emphasis supplied) *Ayestas*, 138 S.Ct. at 1097.

In direct conflict with *Ayestas*, the June 10, 2014 Order (in its illogical and circular reasoning) denied funding because:

- "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; and

See Cert. Pet. at 23, 35-36.

B. THE LOWER COURTS INCORRECTLY REQUIRED PROOF THAT JONES WOULD SUCCEED IN OVERCOMING PROCEDURAL DEFAULT: *Ayestas* held "the inquiry is <u>*not*</u> whether [the petitioner] will succeed in overcoming the procedural default under *Martinez* and *Trevino*." Nevertheless, the Fifth Circuit affirmed the June 10, 2014 Order, which denied funding on the basis that Jones had not proven the *Martinez/Trevino* prong

Ayestas held: "the inquiry is not whether [the petitioner] will succeed in overcoming the

procedural default under *Martinez* and *Trevino*." *Ayestas*, 138 S.Ct. at 1097.[1]

Contrary to *Ayestas*, the June 10, 2014 denial-of-funding Order (affirmed by the Fifth Circuit) held that Jones' 2014 funding motion failed to prove he could overcome procedural default because Jones did not prove during the equitable tolling litigation between 2008 and 2013 that former state/federal habeas counsel (Jack Strickland) was ineffective – a time when the habeas petition filed by state/federal habeas counsel Jack Strickland had been dismissed and judgment had been entered against Mr. Jones.

As the June 10, 2014 denial-of-funding order reflects, it was premised on pre-2014 denial-of-equitable tolling Orders:

> 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. *See* Post–Holland Brief of Jones at 27 [doc. 86]; Reply to Respondent's Motion to Dismiss Jones's Petition as Time–Barred at 4–6 [doc. 55]; Motion for Relief from Judgment at 3–11 [doc. 35]. 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

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[1] Contrary to the Bio at 28 (IV.C.), Petitioner Jones twice (in 2009 and again in 2014) sought investigative services <u>not</u> to present evidence at an evidentiary hearing – this case has never moved past the pleading stage and no court has ever ordered a hearing to adjudicate facts – but to learn facts that he may plead in a habeas corpus application. *See* Cert. Pet. at 16-17, 21.

A habeas corpus application is a pleading that alleges facts and claims of unlawful custody; it is not a vehicle for hearing evidence. The distinction is important. A federal court (in any context) need hold an evidentiary hearing only if necessary to adjudicate disputed factual allegations. *See, e.g., Tijerina v. Estelle*, 692 F.2d 3, 5 (5th Cir. 1982) (evidentiary hearing is unnecessary when the habeas corpus applicant raises only questions of law or questions concerning the legal implications to be drawn from undisputed facts); *Janecka v. Cockrell*, 301 F.3d 316, 322 (5th Cir. 2002) (evidentiary hearing on habeas corpus application no allegations are not materially disputed by the Director, then there is no need for the court to hold a hearing. Mr. Jones may in that event be granted relief based on his undisputed allegations alone, i.e., without an evidentiary hearing.

> relationship with trial counsel. Opinion and Order on Remand at 20–21 [doc. 101]. 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 v. Stephens*, 2014 WL 2807333, at *6 (N.D. Tex. 2014).

This June 10, 2014 denial-of-funding Order was premature. It adversely decided the merits of the *Martinez/Trevino* prong before the 2014 amended habeas petition had even been filed.

C. JONES DID ALL HE WAS REQUIRED BY LAW TO DO. He conducted and presented a detailed analysis of the record and a time line which showed the mitigation investigation began on the eve of trial; identified the Red Flags that signaled the evidence known to former trial and state habeas counsel would have lead a reasonable attorney to investigate further into Jones' mental health, intellectual functioning and life history; set out a proposed investigation plan; and identified several plausible claims

The Director asserts that "the district court faulted Petitioner's funding motion for ignoring the mitigation case made by the trial counsel," and that "[t]he Fifth Circuit found the same fault." BIO at 15. The Director then concludes "Petitioner was not entitled to funds because he made no effort to show the merits of the claim ...." and "Petitioner offers no plausible explanation for why trial counsel's investigation of the very same areas Petitioner now wants his federal-habeas counsel to investigate was 'unreasonably narrow.'" BIO at 16.

These allegations are simply not true. Jones made a plausible Sixth Amendment claim. Jones' funding motion provided an extensive analysis of the state court record that showed the evidence known to former trial and state habeas counsel would have lead a reasonable attorney to investigate further. *Wiggins v. Smith*, 539 U.S. 510, 527-28 (2003).

The funding motion contained an extensive analysis of the billing records and a time line that

demonstrated a mitigation investigation begun on the eve of trial; identified the Red Flags that signaled the evidence known to former trial and state habeas counsel would have lead a reasonable attorney to investigate further into Jones' mental health, intellectual functioning and life history; set out a proposed investigation plan; and identified several claims including a Sixth Amendment *Strickland/Wiggins* claim, as well as several mental-state claims and defenses to capital murder – all of which were left unexplored by former counsel. Jones did all that he was required to do. *See* Cert. Pet. at 6-11; *see also* Opposed Motion for Funding, Appendix 5.

Contrary to the Director's assertion, *Jones* *is* like *Wiggins* in which "[c]ounsel did not even put together a social history." BIO at 27. In his Opposed Motion for Funding filed by Jones, Jones put the district court on notice that:

> Attorneys for Petitioner located two sheets of paper in the file that contain what appears to be a witness list typed during the investigation of the case back in 2001, and is presumably the work product of Ms. Brownlee. ....
>
> ***There were no memos of the interviews*** in the files provided by trial and state habeas counsel of the work product from the Janie Brownlee investigation. Attempts to locate these records, if any were created, have not been successful. ***There was no social history of the client, no genogram to show family lineage to aid in identifying themes, such as genetic predispositions to mental or physical health issues***. ***There was no timeline that could show correlations between significant events in the client's life and concomitant behaviors***.

Appx. 5: Opposed First Motion for Funding [Doc 124 at 12] and Burdette Estimate as exhibit.

Further, Jones' funding motion contradicts the Director's assertion that a punishment phase IAC claim was not worth pursuing, BIO at 26. The funding motion's analysis of the state court record demonstrated:

> "There is no record that the defense attempted to locate and interview former teachers or administrators about Mr. Jones's placement in special education, an evaluation of emotional disturbance in 4th grade, or his academic limitations in school. Despite

> Mr. Jones having been treated for several incidences of self-inflicted gunshot wounds to his body, there is 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. ...."

See Cert. Pet. at 7-9, and document analysis Appx. 5: Opposed First Motion for Funding [Doc 124 at 12-13]. Former state/federal habeas counsel Jack Strickland did no such analysis, instead admitting 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* Cert. Pet. at 5, 13-14.

Despite the district court's obtuse perception of the significance of the Red Flags, Jones did inform the court:

> "These red flags should have placed trial counsel on notice that further investigation into Mr. Jones's life history had to be explored before they could make any reasonable strategic decisions about voir dire and the presentation of legal theories and defenses at the merits and sentencing phases of trial."

Appx. 5: Opposed First Motion for Funding [Doc 124 at 13].

The Fifth Circuit affirmed the June 10, 2014 denial of funding order that illogically and erroneously required – in a cart before the horse approach[2] – that Jones produce evidence of deficient performance before the court would grant funding to investigate, develop and present that evidence in Factually-Developed Claims raised in a habeas petition. Appx. 1: *Jones v. Davis*, 927 F.3d at 373; Appx. 2: Jones, 157 F. Supp. 3d at 665-666. The rulings of the lower courts guarantee no funding motion will ever be granted.

Without funding, a federal habeas Petitioner lacks the resources to conduct an extra-record investigation to "identify what was, in fact, foreclosed," and to "provide ... information that exceeded

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[2] Appx. 2: *Jones v. Stephens*, 157 F. Supp.3d 623, 665-666 (N.D. Tex. 2016) ("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.").

what was known to counsel." And without expert assistance, § 3599 counsel does not have the credentials and expertise to engage in a forensic assessment of "the testimony provided by the defense's mental health experts at trial…" *Id.*; Appx 6: Jones, 2014 WL 2807333 at *6.

Likewise, a petitioner who has extra-record evidence to prove his IAC claim *before* funding is granted, has no need for funding. *See Crutsinger v. Davis*, 929 F.3d 259, 267 (5th Cir. 2019) (Graves, J. dissenting) ("Such 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.").

D. THE FIFTH CIRCUIT DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT. The statutory excess argument is irrelevant. The issue is *not* the amount of funding because the district court denied even the first penny of the $7,500 within its discretion to grant. At issue is the Fifth Circuit decision that counsel must produce extra-record evidence to prove that his trial counsel was ineffective, before a court will grant *any* funding to investigate, develop and present that evidence

The district court's scattershot reasons[3] for denying funding, included a "statutory maximum

[3] *Jones v. Davis*, 927 F.3d at 373, 374 (5th Cir. 2019) ("The district court, writing before the Supreme Court decided *Ayestas*, offered several reasons for denying Jones § 3599 funding.... [374] Even though Jones identified 'red flags' involving alcohol and substance addiction and childhood physical and sexual abuse, the district court concluded that he had not shown that he was likely to uncover anything beyond what his experts had already addressed: '[t]he funding statute is not designed to provide petitioner with unlimited resources to investigate speculative claims.' This was especially so where Jones sought services in excess of $ 7,500 and therefore needed to show that excess funding was 'necessary to provide fair compensation for services of an unusual character or duration,' but wholly failed to address this requirement.").

argument" – that Jones "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)." BIO at 2, 17-18. The ruling was adopted by the Fifth Circuit and argued now erroneously by the Director as a procedural bar.

The lower courts' rulings are yet another example of illogical thinking and pure smoke and mirrors. BIO at 18; *See also* Appx. 2: *Jones*, 157 F. Supp. 3d at 665-666; BIO at 18. The district court refused to grant even the first penny of the $7,500 amount, which was well within the court's discretion to provide, as recited in the statute:

> (2) ***Fees and expenses paid for investigative, expert, and other reasonably necessary services authorized under subsection (f) shall not exceed $7,500*** in any case, unless payment in excess of that limit is certified by the court,

18 U.S.C. § 3599(g)(2).

At issue is ***not*** the amount of funding, but the lower courts' rulings that counsel must first produce extra-record evidence to prove trial counsel was ineffective and prove his success in overcoming the procedural bars, before the court would provide ***any*** funding to investigate, develop and present that evidence. This ruling of the Fifth Circuit decided an important federal question in a way that conflicts with relevant decisions of this Court. *See* Sup. Ct. R. 10. *See also* Questions Presented at ii, citing *Ayestas v. Davis*, 138 S. Ct. 1080 (2018); *Martel v. Clair*, 565 U.S. 648 (2012), *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).

Thus, the statutory excess argument is irrelevant. Contrary to the BIO, there is no independent and adequate basis to prevent review by this Court, as the Director erroneously argues. BIO at 18. Contrary to the erroneous assertions of Director Davis, review will *not* result in an advisory opinion. Review by this Court would alter the Fifth Circuit's judgment (*Compare* BIO at 2 "granting his petition would offer nothing but the opportunity for an advisory opinion"; BIO at 18 "adopting Petitioner's arguments will not alter the Fifth Circuit's judgment").

II. (Reply to BIO secs. IV): This Court should decline to decide in the first instance the Director's arguments in Section IV. She failed to raise any of them in her Amended Answer. Neither the district court, nor the Fifth Circuit ruled on them

A. Director Davis waived all grounds that she now raises in Sec. IV (time-bar, procedural default, or § 2254 (e)(2)) because she failed to raise any of them in her Amended Answer in the district court

The district court granted equitable tolling on February 6, 2014, vacated the judgment, and reopened the case. Appx. 4: *Jones v. Stephens*, 998 F. Supp.2d 529 (N.D. Tex. 2014) [Doc 113]). On June 22, 2014 after the case was reopened, Jones raised his Sixth Amendment *Strickland* claim as Claim 1a in his Amended Habeas Petition. [Doc#129].

The Director failed to respond to the *Strickland* Claim 1a at all – as the district court ruled in its Memorandum Opinion and Order:

> In a related, unnumbered claim ("claim 1a") [the Sixth Amendment, *Strickland* IAC claim under discussion], Jones contends that trial counsel rendered ineffective assistance by failing to assert this Sixth Amendment violation at trial. (Doc. 129, p. 50.) ***Respondent does not address this new claim in his answer***.

Appx. 2A [Doc 152 at 28]; *Jones v. Stephens*, 157 F. Supp.3d 623, 638 (N.D. Tex. 2016).

Thus, at least six (6) years ago the Director waived all limitations defenses and procedural bars in district court that she is now raising against the *Strickland* claim asking this Supreme Court to be the first court to address the merits of her grounds. *See* BIO at IV, pp. 18-31.[4]

B. The district court did not rule on the grounds the Director now presents to this Court in section IV, but instead proceeded directly to a merits-determination of the Sixth Amendment claim

Further, the district judge did not rule on any limitations defense or procedural bar. The district court instead decided the Sixth Amendment, *Strickland* Claim 1a on the merits based on the trial record. [Because the court had denied all funding, Jones could not investigate, develop, and present extra-record evidence of his claim. The claims in the Amended Habeas Petition were Early-Stage claims limited to the Red Flags raised from a record-bound review, *see* Cert. Pet. at 23]. The district court reasoned that where there is a merits denial, it need not – and did not – address limitations and procedural bars.[5] Thus, there is no district court ruling at all on any of the Director's

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[4] The limitation defenses and procedural bars that the Director did raise in her Amended Answer were asserted only as to claims 2-4. EROA.2236; 2241 [Doc #146 at at 18, and at 23]. Further, nowhere in her Answer did the Director brief a § 2254 (e)(2) argument as to any claim. This argument is irrelevant. Contrary to the Bio at 28 (IV.C.), Petitioner Jones sought investigative services to learn facts that he may plead in a habeas corpus application. This case has never moved past the pleading stage and no court has ever ordered a hearing to adjudicate facts. *See supra* at Reply I.B.

[5] *See* Appx. 2A: *Jones*, 157 F. Supp. 3d at 639 (" ... the record is sufficient to review and deny this claim on the merits," *citing* "*See Busby*, 359 F.3d at 720 (noting that habeas court may look past any procedural default if the claim may be resolved more easily on the merits); *Barksdale v. Quarterman*, No. 3:08–CV–736, 2009 WL 81124, at *3, n. 4 (N.D.Tex. Jan. 9, 2009) (Kinkeade, J.) (noting that Court need not address alleged limitations bar because claims lack merit); *Russell v. Cockrell*, No. 3:01–CV–1425, 2003 WL 21750862, at *3, n. 3 (N.D.Tex. July 25, 2003) (Fitzwater, J.) (holding that court need not address potential limitations

grounds in section IV.

C. The Fifth Circuit did not rule on any of the grounds the Director now presents to this Court in section IV

In the April 15, 2019 Fifth Circuit opinion (subsequently withdrawn), the Fifth Circuit wrote that "[t]he Director argue[d] that Jones's entire petition is time-barred and that the district court improperly applied equitable tolling." The April 15,2019 opinion concluded that the Director did not waived her limitations defense. However, the Director's victory was a Pyrrhic victory. Thereafter, the April 15, 2019 opinion held: "This said, we will affirm the district court's decision to treat Jones's application as timely." Appx. 10: *Jones v. Davis*, 922 F.3d 271, 278 (5th Cir. [Apr. 15,] 2019), *withdrawn and replaced with Jones v. Davis*, 927 F.3d 365 (5th Cir. [June 18,] 2019).

The Director filed a Petition for Rehearing *En Banc*. In the June 18, 2019 opinion at issue before this Court, the panel treated the Director's petition for rehearing *en banc* as a petition for panel rehearing, granted it, withdrew the April 15, 2019 prior opinion (Appx. 10), and substituted the June 18, 2019 opinion in its place, Appx. 1: Jones v. Davis, 927 F.3d 365 (5th Cir. 2019).

Nowhere in the June 18, 2019 opinion does the panel address any of the Section IV grounds raised in the BIO. For a second time, no lower court ruled on these matters.

D. Like *Ayestas*, this Court should decline to decide in the first instance the Director's arguments in Section IV because neither the district court, nor the Fifth Circuit decided any of them

In *Ayestas*, the Director raised the § 2254 (e)(2) argument, but this Court declined to decide

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bar where claim has no merit)."

it in the first instance because the argument "was neither presented nor passed on below." *Ayestas v. Davis*, 138 S.Ct. 1080, 1095 (2018). Given this precedent, the Court should decline to decide in the first instance any and all of the arguments in Section IV the BIO for the same reasons, *see supra*. Neither the district court, nor the Fifth Circuit decided any of them.

CONCLUSION

In summary, there is no procedural obstacle to review by this Court. 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 him to, in 18 U.S.C. § 3599. In doing so, the Court can resolve the Fifth Circuit conflict with this Court's several precedents, and provide sorely needed guidance to the lower courts about how they should apply *Ayestas*. 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, February 3, 2020.

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APPENDIX

Appendix 10: *Jones v. Davis*, 922 F.3d 271, 278 (5th Cir. 2019) (opinion affirming equitable tolling, *withdrawn and superceded by Jones v. Davis*, 927 F.3d 365 (5th Cir. 2019) (affmd funding denial))