No._____

In the
Supreme Court of the United States

CHARLES MAMOU, JR.,
Petitioner,

v.

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

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

PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

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CAPITAL CASE

QUESTION PRESENTED

This Court in *Ayestas v. Davis*, 138 S. Ct. 1080 (2018) held that the Fifth Circuit's requirement that individuals seeking funding under 18 U.S.C. § 3599(f) must show a "substantial need" for the services was an impermissible reading of the statute. Yet here both the district court's order denying funding and the Fifth Circuit's affirmance of that order were contrary to virtually all the holdings of that case. The impermissible "substantial need test" was twice used by the district court in denying funding; it held that funding was not available for procedurally defaulted claims; Mamou was required to show a likelihood of success on his claims; and his extensive showing that a reasonable attorney would request the services was ignored. On appeal, the Fifth Circuit's post-*Ayestas* opinion approved the district court's denial of funding based on the same impermissible pre-*Ayestas* standards it had previously used. Left uncorrected, the Fifth Circuit's decision would place that Court's rejection of *Ayestas* beyond review. This case is a straightforward application of *Ayestas*. Summary reversal is the most appropriate relief when the legitimacy of this Court's judgments and the rule of law are threatened in this manner.

It therefore presents the following question:

Whether the Fifth Circuit erred in how it applied *Ayestas v. Davis*?

LIST OF PARTIES

Pursuant to Sup. Ct. R. 14.1(b), the following list identifies all of the parties before the United States District Court for the Southern District of Texas and the Fifth Circuit Court of Appeals:

Petitioner is Charles Mamou, Jr., an inmate confined pursuant to a conviction of capital murder and sentence of death in the custody of the Texas Department of Criminal Justice.

Respondent is Lorie Davis, the Director of the Texas Department of Criminal Justice, Correctional Institutions Division. Her predecessor in that position, William Stephens, was also a party in prior proceedings in federal district court and the Fifth Circuit.

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

TABLE OF CONTENTS

APPENDICES TO PETITION:

Appendix A: *Mamou v. Davis*, 2018 WL 3492821 (5th Cir. 2018).

Appendix B: *Mamou v. Davis*, No. 17-70001 (5th Cir. Sept. 14, 2017) (*per curiam*) (not reported) (opinion granting COA on two issues).

Appendix C: *Mamou v. Davis*, No. H–14-403 (S.D. Tex. Dec. 8, 2016) (not reported).

Appendix D: *Mamou v. Stephens*, No. H-14-403, 2014 WL 4274088 (S.D. Tex. Aug. 28, 2014) (district court order denying motion for funding).

Appendix E: *Mamou v. Stephens*, No. H-14-403 (S.D. Tex. Jan. 9, 2015) (district court order denying the motion for reconsideration of the denial of funding).

Appendix F: . *Ex Parte Charles Mamou, Jr.* Nos. WR-78,122-01, WR-78,122-02, and WR-78,122-03 (Tex. Crim. App. February 5, 2014) (not designated for publication) (state post-conviction opinion).

Appendix G: *Mamou v. Davis*, 18A306 (application of petitioner for an extension of time to file this petition for certiorari, granted by Justice Alito on September 21, 2018).

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

STATE STATUTES

No._____

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-v-
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PETITION FOR WRIT OF CERTIORARI

Earlier this year, in *Ayestas v. Davis*, ___U.S.___, 138 S. Ct. 1080 (2018) this Court unanimously held that the Fifth Circuit applied the wrong standard in affirming the district court's denial of the petitioner's request, under 18 U.S.C. § 3599(f), for investigative funding needed to prove his entitlement to federal habeas relief. *Ayestas* held that the district courts should determine whether "a reasonable attorney would regard the services as sufficiently important" to the case in order to meet the "reasonably necessary" requirement of the statute. *Ayestas* at 1093. The Fifth Circuit's interpretation of the "reasonably necessary" standard as meaning a "substantial need" was more stringent and therefore "not a permissible reading of the statute." *Id.* at 1095.

This Court also held that the Fifth Circuit erred in requiring Ayestas to present "a viable constitutional claim that [was] not procedurally barred," as this rule was too restrictive in light of *Trevino v. Thaler*, 569 U.S. 413 (2013). *Ayestas* at 1093-1094. Lower courts could potentially err

in denying funding requests in cases where such funding could allow a petitioner to overcome a procedural default, as with Mr. Mamou's case. While a petitioner need not prove that they have a meritorious claim or will win their case as a result of the funding services, the courts must evaluate the likelihood of success as part of the "reasonably necessary" test.

Here, the district court's pre-*Ayestas* order denying funding was contrary to virtually all the holdings of that case. It applied the impermissible "substantial need test" in denying funding, and re-applied it again to deny a motion for reconsideration of the denial. It held that funding was not available for procedurally defaulted claims, required Mamou to show a likelihood of success on the claims, and ignored his extensive showing that a reasonable attorney would request the services. On appeal, the Fifth Circuit's post-*Ayestas* opinion approved the district court's denial of funding based on the same impermissible pre-*Ayestas* standards it had previously used. It was also wrong on the merits of the underlying claims. Left uncorrected, the Fifth Circuit's decision would place that Court's rejection of *Ayestas* beyond review. Even worse, the Fifth Circuit's subversion of *Ayestas* would give license to lower courts, both state and federal, to ignore this Court's judgments when they disagree with them.

Charles Mamou Jr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit decision sought to be reviewed is reported as *Mamou v. Davis*, 2018 WL 3492821 (5th Cir. 2018), and is attached as Appendix A. Rehearing was not sought. The opinion of the Fifth Circuit granting a certificate of appealability ("COA") on two issues, *Mamou v. Davis*, No. 17-70001 (5th Cir. Sept. 14, 2017) (*per curiam*) (not reported), is attached as Appendix B. The district court memorandum and order from which Mr. Mamou's appeal was taken, *Mamou v. Davis*,

No. H–14-403 (S.D. Tex. Dec. 8, 2016) (not reported), is attached as Appendix C. The district court order denying funding, *Mamou v. Stephens*, No. H-14-403, 2014 WL 4274088 (S.D. Tex. Aug. 28, 2014) is attached as Appendix D. The district court order denying the motion for reconsideration of the denial of funding, *Mamou v. Stephens*, No. H-14-403 (S.D. Tex. Jan. 9, 2015) is attached as Appendix E. The order of the Texas Court of Criminal Appeals denying Mr. Mamou's original and supplemental state post-conviction applications, *Ex Parte Charles Mamou, Jr.* Nos. WR-78,122-01, WR-78,122-02, and WR-78,122-03 (Tex. Crim. App. February 5, 2014) (not designated for publication) is attached as Appendix F. The application of petitioner for an extension of time to file this petition for certiorari was granted by Justice Alito on September 21, 2018, and the letter reflecting that order, *Mamou v. Davis*, 18A306, is attached as Appendix G.

STATEMENT OF JURISDICTION

This case was initiated in the United States District Court for the Southern District of Texas pursuant to 28 U.S.C. §§ 2241 and 2254. The United States Court of Appeals for the Fifth Circuit exercised appellate jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253(c). A panel of the Fifth Circuit issued its decision denying habeas relief on July 19, 2018. Justice Alito granted an extension of time, to and including November 16, 2018, to file a petition for writ of certiorari. The jurisdiction of this Court is invoked under the United States Constitution Article III, Section 2 and 28 U.S.C. § 1254(1); this Court has jurisdiction over the issues presented to the Fifth Circuit under 28 U.S.C. §§ 1291 and 2253, petitioner having asserted below and asserting herein deprivation of rights guaranteed by the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The question presented implicates the Fifth Amendment to the United States Constitution, which provides in pertinent part that "[n]o person...shall be deprived of life, liberty or property, without due process of law."

The questions also implicate the Sixth Amendment right to counsel: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U. S. CONST. amend. VI.

The case also involves the Fourteenth Amendment to the United States Constitution which applies the Fifth Amendment to the states and which provides, in pertinent part that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The case also involves 18 U.S.C. § 3599 (f) which provides in relevant part as follows: "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."

STATEMENT OF THE CASE[1]

A. Prior Proceedings.

Mr. Mamou is currently incarcerated on death row at the Polunsky Unit of the Texas Department of Criminal Justice at Livingston, Texas, in the custody of Respondent ("the Director").

On December 10,1998, Mamou was indicted in the 179th Judicial District Court of Harris County, Texas. [ROA.4386-4389, Complaint and Indictment (CR 2-5)] for the December 7, 1998 murder of Mary Carmouche in Houston. However, Mamou was not extradited from Louisiana until June of 1999, less than three months prior to the beginning of his trial. Jury selection began on September 8, 1999. [ROA.1899, 3 RR 3 *et. seq.*] Mamou was found guilty of capital murder on October 12, 1999 [ROA.4474], and three days later, in accordance with the jury's answer to the special issues submitted pursuant to TEX. CODE CRIM. PROC. Art. 37.071, the trial court set punishment at death. [ROA.4479-4484] (charge of the jury at punishment phase); [ROA.4485-4487] (judgment); and [ROA.4489-4491] (sentence).

Mamou appealed his conviction and sentence. His appellant's brief was filed in the Texas Court of Criminal Appeals ("CCA") on September 1, 2000. [ROA.1753-1803]. That Court affirmed his conviction and sentence of death. *Mamou v. State,* No. 73,708 (Tex. Crim. App. November 7, 2001) (not designated for publication). [ROA.593-611].

Mamou also sought state post-conviction relief. He filed his initial application, Cause No. 800112-A, in the trial court on April 18, 2001. [ROA.4597-4650]. A supplemental *pro se*

[1] As used in this petition, "RR" refers to the Reporter's Record (the trial transcript) in *State v. Mamou,* 179th Judicial District Court of Harris County, Texas in Cause No. 800112, as assembled by the United States District Court for the Southern District of Texas and transmitted to the Fifth Circuit, with the volume number preceding the page number. "CR" refers to the Clerk's Record of these proceedings. "ROA" refers to the federal record on appeal in *Mamou v. Davis*, 2018 WL 3492821 (5th Cir. July 19, 2018) (App. A).

application, Cause No. 800112-B, was filed on July 31, 2013. [ROA.5023-5046]. Additionally, Mamou, now represented by new state habeas counsel, filed a supplemental application on October 29, 2013. [ROA.4792-4835]. None of these applications evidenced the results of any extra-record investigation. On November 6, 2013 the prosecutor filed the "State's Proposed Findings of Fact, Conclusions of Law and Order." [ROA.4837-4853]. One week later, these proposed findings were adopted verbatim by Judge Kristin M. Guiney, without changing a comma. [ROA.4846]. Although Judge Guiney was not the trial judge, findings and conclusions on disputed and controverted factual issues were made without holding an evidentiary hearing. On February 5, 2014, the CCA denied the original and supplemental post-conviction applications. *Ex Parte Charles Mamou, Jr.* Nos. WR-78,122-01, WR-78,122-02, and WR-78,122-03 (Tex. Crim. App. February 5, 2014) (not designated for publication). [ROA.5051-5052] (App. F). The CCA adopted the trial court's findings and conclusions. [ROA.4846].

In federal district court, Mamou twice applied for investigative and expert assistance but was ultimately denied all such funding. (*See* App. D, district court's denial of funding on August 28, 2014; App. E, district court's denial of motion for reconsideration of denial of funding on January 9, 2015). After litigation regarding page limits,[2] a skeletal petition and exhibits were timely filed on Feb. 4, 2015, to comply with the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") statute of limitations. [ROA.347-907]. An amended petition and exhibits were filed on June 4, 2015. [ROA.937-1354].

On December 8, 2016, the district court granted the Director's motion for summary judgment and denied relief on all claims [ROA.1598-1654] (App. C) and declined to issue a COA [ROA.1716] (App. C 55-56) without affording Mamou an opportunity to apply for it. *Mamou v.*

[2] *See* ROA.27; ROA.344; ROA.908-922.

Davis, No. H–14-403 (S.D. Tex. Dec. 8, 2016) (not reported). (App. C).

Mamou appealed and applied for a COA on three issues in the Fifth Circuit Court of Appeals. On September 14, 2017, that Court issued a *per curiam* opinion granting a COA on Issues Two and Three of his application, relating to the failure of the trial attorneys to object to inadmissible victim impact testimony and their failure to challenge ballistics evidence concerning "magazine marks" testimony by a state's witness. The issue regarding funding did not require a COA. *Mamou v. Davis*, No. 17-70001 (5th Cir. Sept. 14, 2017) (*per curiam*) (App. B). On July 19, 2018, the Fifth Circuit denied Mr. Mamou's petition. *Mamou v. Davis*, 2018 WL 3492821 (5th Cir. 2018). (App. A).

On September 21, 2018, Justice Alito granted Mamou's application for an extension of time to file this petition, to and including November 16, 2018. (App. G).

B. Statement of Facts and Summary of the Trial.

The State's case relied on testimony from admitted participants in a scheme to rob and shoot Mamou in an abortive drug deal gone bad in Houston on December 6, 1998. The purported sellers never possessed any drugs and the purported buyers, Mr. Mamou and an associate, never had the funds to purchase the non-existent drugs. It ended in a fatal shooting of an armed participant who was about to shoot Mamou, for which Mamou was not charged. He was charged with the kidnaping and murder of Mary Carmouche, who, unbeknownst to Mamou, was hiding in the back seat of the drug-sellers' car in which he fled in order to avoid being shot. Carmouche was found dead of a gunshot wound at an abandoned house in Houston two days later.

There was no time for an adequate investigation, as defense counsel Wayne Hill was appointed on May 28, 1999 [ROA.4389], only three and a half months prior to trial, and second-chair counsel Kurt Wentz was appointed on July 26, 1999 [ROA.4394], only one-and-a-half months

prior. Yet defense counsel failed to request a continuance to investigate the merits of the case or the State's witnesses.

The State built its case through witnesses involved in the abortive drug deal. All gave self-serving testimony that implicated Mamou. However, only one purported to show that Mamou was involved in the Carmouche murder, via an alleged confession to him, which Mamou has consistently denied. There was no corroborating testimony from the other State's witnesses regarding this "confession."[3] Unreliable "magazine marks" testimony by a State's witness purported to link Mamou to the shooting death of the victim.

Mamou's discussion of additional pertinent facts of the trial is presented *infra* in the discussion of the individual claims.

C. How The Issue Was Previously Raised.

This issue was first raised in the Fifth Circuit, as it involved the denial of funding by the district court. Thus, there is no procedural bar for failure to raise it earlier.

[3] State's witnesses linked Mamou to the drug shooting, which he admitted at trial. However, after he drove off, other individuals had access to the car and came in contact with Carmouche.

REASONS FOR GRANTING CERTIORARI

This case is a straightforward application of this Court's recent holding in *Ayestas v. Davis*, ___U.S.___, 138 S. Ct. 1080 (2018). Once again, this Court is asked to correct the United States Court of Appeals for the Fifth Circuit's mis-application of this Court's clear guidelines, where here unduly restrictive standards have been used in determining when a petitioner is entitled to funding.[4] The district court twice denied funding for services using the same standard explicitly held to be "not a permissible reading of the statute" [18 U.S.C. § 3599(f)] by this Court. *Ayestas* at 1095. The Fifth Circuit then upheld the funding denial for reasons that both contravene *Ayestas* and are contrary to the plain meaning of the statute, the district court's order, and the facts of the funding claim. Left uncorrected, the Fifth Circuit will continue to ignore *Ayestas* and apply the statute in a manner that deprives capital litigants of their first and only chance to present their meritorious claims when their state habeas counsel has performed deficiently. This Court specifically remedied that situation in *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013), which held that a petitioner may show cause to excuse the procedural default of ineffective assistance of trial counsel claims if he received ineffective assistance from his state habeas counsel. But those rulings would be nullified if, as here, a petitioner is disallowed any funding to develop those claims after a substantial showing that the funds are reasonably necessary and the claims have a reasonable chance of success. *Ayestas* too would be nullified if courts are permitted to deny funding based on the impermissible "substantial needs" test, as happened here.

Indeed, the district court here violated virtually every holding of *Ayestas*. It held that funding

[4] For instance, this Court has had to correct the Fifth Circuit's unique and idiosyncratic method of determining when a state prisoner may appeal the denial or dismissal of his petition for writ of habeas corpus in *Miller-El v. Cockrell*, 537 U.S. 322, 326 (2003) and again in *Buck v. Davis,* 137 S. Ct. 759 (2017).

was not available for procedurally defaulted claims; twice held that Mamou had to show a "substantial need" for the services; and held incorrectly that Mamou had not provided sufficient detail of the need for the services and that he had not shown how state habeas counsel was ineffective. The Fifth Circuit then affirmed these contrary-to-law-and-fact holdings on the same bases and left uncorrected, this practice will undoubtedly continue. That Court's reassertion of its rejected high standard for obtaining funding violates the Sixth and Eighth Amendments and the plain language of § 3599(f). It would also impermissibly allow the execution of an individual who, through no fault of his own, has never had the opportunity to present his meritorious claims.

I. The Fifth Circuit Misapplied *Ayestas* In Approving The District Court's Denial of All Funding for Investigation and Experts Under 18 U.S.C. §3599(f).

A. Factual Background.

i. State court proceedings.

Mr. Mamou's state habeas counsel was obligated to conduct an extra-record investigation into potential collateral claims, including ineffective assistance of trial counsel. TEX. CODE CRIM. PROC. art. 11.071 § 3(a) (requiring "expeditious[]" investigation, "before and after the appellate record is filed," of the factual and legal basis for potential claims); *see also* State Bar of Texas, *Guidelines and Standards for Texas Capital Counsel*, 69 Tex. Bar J. 966, 976 (2006). However, state habeas counsel Roland Moore, appointed on May 8, 2000 [ROA.4659], did no such thing. Although Moore apparently secured funding for a mitigation specialist and a ballistics expert, those roles were either not filled or not performed. Mamou's state habeas petition reflected absolutely no extra-record investigation, and the ineffective-assistance issues raised were entirely record-based. [ROA.4597-4650]. Mamou's supplemental application, filed on October 29, 2013 through new habeas counsel, also evidenced no extra-record investigation. [ROA.4791-4835].

ii. Federal proceedings.

After Mr. Mamou was denied permission to proceed *ex parte* in his funding requests under 18 U.S.C. § 3599(f) [ROA.40-56; 93-105; 106-112] he filed, on a non-confidential basis, a detailed and comprehensive investigative plan and request for funds to investigate, among other claims, his ineffective assistance of counsel claims, his ballistics claim and his claim of actual innocence. [ROA.113-156; reply to the Director's Opposition at ROA.172-185]. This detailed motion discussed:

- how the funding was authorized under 21 U.S.C. §848(q)(9) and 3599(f) [ROA.115-120];
- how the non-exhaustion of any claims was not a bar to funding because of the exceptions to procedural default established in *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013) [ROA.118-121, 124];
- which claims were exhausted [ROA.122-124]; and
- a detailed request for funding to investigate claims of actual innocence [ROA.125-127]; ineffective assistance of counsel claims, both exhausted and unexhausted [ROA.127-128]; records and documents that needed to be located; needed interviews of family and law enforcement witnesses, and the need for an investigator, a firearms and ballistics expert, and a future dangerousness expert. [ROA.128-132]. Also included were the resumes of the four proposed experts. [ROA.137-157].

The claims underlying the funding request were potentially meritorious. Mamou made clear references to the trial witnesses he needed to interview, in particular Terrence Dodson, to whom Mamou purportedly confessed via telephone. Investigation was needed regarding trial counsel's failure to challenge clearly impermissible victim impact evidence regarding non-victims. A ballistics expert was needed to show ineffective assistance of counsel for failing to challenge the

flawed and recently-discredited "magazine marks" testimony given at trial, which purported to link Mamou to the killing of the victim.[5] Additionally, there was no psychological evaluation of Mamou and the two defense experts who testified at the punishment phase, Dr. Walter Quijano and Dorothy Morgan, testified only in general terms as to prison conditions and parole. 22 RR 158-187; 23 RR 4-19. Investigation was needed regarding Morgan and her testimony, which was actually harmful. No social history was prepared and the proposed investigator's declaration showed many areas of mitigation that were in need of investigation and pointed to various people who needed to be interviewed.

The Director opposed the funding request. [ROA.157-171]. This opposition was based virtually entirely on the now-impermissible "substantial needs" test. Section I(a) of the Director's opposition was entitled "Mamou cannot show a substantial need for funding overall" [ROA.160-164] and Section I(b) was entitled "Mamou cannot show a substantial need for funding on his specific requests." [ROA.164-169]. The Director also argued that procedurally defaulted claims are not entitled to funding. [ROA.160-163].

The district court denied funding, echoing the Director's arguments and citing the Fifth Circuit's then-prevailing rule that "a petitioner must show 'that he ha[s] a substantial need' for investigative or expert assistance. *Clark v. Johnson*, 202 F.3d 760, 768 (5th Cir. 2000); *see also Riley v. Dretke*, 362 F.3d 302, 307 (5th Cir. 2004)." *Mamou v. Stephens*, 2014 WL 4274088 at *1 (App. D 1).[6] The district court also held that "funds are not reasonably necessary to develop claims for

[5] The same State's ballistics expert that gave this crucial testimony in Mamou's trial, Robert Baldwin, gave false testimony in the capital case of Nanon Williams, which was reversed as a result. *Williams v. Quarterman*, 551 F.3d 352 (5th Cir. 2008). This shows the need for the ballistics expert funding, even under the flawed "substantial need" standard.

[6] *Riley* was one of the cases cited by this Court in *Ayestas* to show that the Fifth Circuit was incorrectly interpreting § 3599 to require a "substantial need." *Ayestas,* 138 S. Ct. at 1093.

which federal habeas review is unavailable. This includes claims that are not exhausted." (*Id.*; App. D 1). The district court held that no funding could be provided for exhausted claims because "additional factual development is irrelevant (sic) the adjudication of exhausted claims." (App. D 2). And it held that no funding could be provided for unexhausted claims, as they will be procedurally defaulted and "[f]ederal law does not authorize funds to develop a procedurally deficient claim." (App. D 4). Thus, the district court's holding was contrary to the plain meaning and intent of § 3599 as *it denied funding for all possible claims, whether exhausted or unexhausted*. Under that rationale, no potential claims could ever qualify for § 3599 funding. That Court also held that sufficient details had not been provided as to what the former attorneys had or had not done, although there was abundant and specific discussion of the inadequacies of the trial and state post-conviction counsel in the motion. (*Id.*)[7]

A 29-page motion for reconsideration of that order was filed in the district court on September 5, 2014, providing more details of the purpose of the requested funding [ROA.197-226] along with a 35-page appendix. [ROA.227-262]. In that motion, Mr. Mamou:

- provided additional and detailed information about the proposed unexhausted claims [ROA.208-211, section ii of the motion];

[7] The district court, in denying funding, also made many factual errors. With regard to the request for an investigator, it held that "[w]itnesses said they later helped Mamou search the stolen car for drugs and wipe it down to remove fingerprints" and "the strongest trial testimony came from those involved ...in helping Mamou wipe down the car." (App. D 2). There was no testimony about Mamou wiping down the car. The district court also held that "Mamou told those witnesses that he had sexually assaulted Carmouche and then killed her." *(Id.*) Again, there was no such testimony, only the uncorroborated testimony of Terrence Dodson. That court also held that the ballistics claim had been held to be forfeited by the CCA "by raising it in a successive habeas application" (D 4), whereas the failure was actually that it was not raised in the initial state habeas application. This is erroneous, because a failure to bring it in the initial state habeas application could qualify as an exception to default under *Martinez.* The motion for reconsideration pointed out that the initial denial was based on these factual errors and provided additional factual support for the proposed funding. [ROA.208-225].

- explained at length how state habeas counsel's representation fell below expected standards and how it would meet the *Martinez* exception, as all claims in state habeas were record-based, little time was spent in investigation, and virtually no investigative work-product was visible in the state petitions [ROA.211-218, section iii of the motion];

- explained how funding can be available for procedurally defaulted claims [ROA.218-219, section iv of the motion];

- explained that §3599(f) does not bar the funding of defaulted claims as the district court had previously held [ROA.219-220, section v of the motion]; and

- provided a detailed factual discussion of the proposed investigation and funding, explained that several factual assumptions the district court used to deny funding were inaccurate, and presented the additional details the district court had previously found lacking. [ROA.220-226].[8]

The Director's opposition to the motion to reconsider the denial of funding was again entirely based on the impermissible "substantial need" test, arguing that:

- the "requisite threshold showing of § 3599 was the 'substantial need' test and that "the Fifth Circuit has interpreted 'reasonably necessary' to mean that a petitioner must demonstrate 'a substantial need' for the required assistance," citing *Riley v. Dretke*, 362 F.3d 302, 307 (5th Cir. 2004) (quoting *Clark v. Johnson*, 202 F.3d 760, 768 (5th Cir. 2000), and *Fuller v. Johnson*, 114 F.3d 491, 502 (5th Cir. 1997) [ROA.269];

- that "Mamou cannot show a substantial need for funding on claims that were adjudicated

[8] In the reply to the Director's opposition to reconsideration of the funding denial, Mamou presented in depth the reasons why the "substantial need" test was inappropriate. [ROA.298-301]. This argument in 2014 anticipated much of the basis for the grant of *certiorari* in 2017 and this Court's ultimate holding in *Ayestas v. Davis*. Indeed, Mamou's denial of funding by the district court was specifically mentioned in the *Ayestas* cert petition. *See* http://www.scotusblog.com/wp-content/uploads/2016/11/16-6795-petition.pdf at 33 (last accessed November 12, 2018).

on the merits in state court" [ROA271-273];

- that "Mamou cannot show a substantial need for funding on claims that are procedurally defaulted" [ROA.273-274];

- that "Mamou cannot show a substantial need for funding for his claim of actual innocence" [ROA.274-279];

- that "Mamou cannot show a substantial need for funding for investigative services on his proposed ...IATC claims" [ROA.279-288];"

- that "Mamou cannot show a substantial need for funding for a ballistics and firearms expert" [ROA.288-290];

- that "Mamou cannot show a substantial need for funding for a mitigation investigator/expert" [ROA.290-292];

- and that "Mamou cannot show a substantial need for funding for a future dangerousness expert" [ROA.292-294].

Even though the Director apparently did not oppose *all* funding,[9] the motion for reconsideration was denied on January 9, 2015, over six months after Mamou's initial funding application and less than one month prior to the due date for filing his petition. The district court, without discussing any of Mamou's specific, extensive and detailed showings of the need for funding, again summarily found that "Mamou had not shown a substantial need for the requested funds." [ROA.327] (App. F 1). In a one-page order, the district court held that funding was originally denied because Mamou "1) provided speculative or cursory statements about the reason for any proposed investigation; 2) he proposed investigating some procedurally deficient claim and

[9] The Director argued " ...or in the alternative provide funding in an appropriately reduced amount" in her "Opposition to Motion for Reconsideration of Denial of Funding." [ROA.264].

3) he wanted to expand the record beyond the limits of federal habeas practice." (*Id.*) The Court recognized that Mamou had provided "some greater detail about the claims he intends to raise," alleviating the first concern, but ultimately the funding was denied because of the "same procedural and substantive defects" the Court found in its original denial. [ROA.327-328]. This denial was once again based on the erroneous view that Mamou provided only "speculative or cursory" statements; the improper "substantial need" test, echoing the Director's opposition; and the improper holding that potential claims that may be procedurally barred are categorically ineligible for funding. Consequently, no funding for experts and investigation was ever authorized by the district court.[10]

On appeal in the Fifth Circuit, that Court held that a "COA is not necessary to appeal the denial of funds for expert assistance," citing *Smith v. Dretke*, 422 F.3d 269, 288 (5th Cir. 2005). *Mamou v. Davis*, No. 17-70001 at *1. (App. B). Unlike several post-*Ayestas* funding denials by the Fifth Circuit, *e.g. Crutsinger v. Davis*, 898 F.3d 584 (5th Cir. 2018) and *Ochoa v. Davis*, 2018 WL 5099615 (5th Cir. Oct. 18, 2018), where the underlying claims were found to be non-meritorious or not potentially viable, the Fifth Circuit granted a COA on both of the underlying ineffective assistance of counsel claims, for failure of trial counsel to challenge the inadmissible victim impact evidence and the "magazine marks" testimony of the State's ballistics expert. *Mamou v. Davis*, No. 17-70001 (5th Cir. Sept. 14, 2017) (*per curiam*) (granting COA)(App. B). Thus, these claims were "substantial," as the standard for granting a COA and *Martinez*-substantiality are similar. *Miller-El v. Cockrell,* 537 U.S. 322 (2003); *Trevino v. Davis,* 861 F.3d 545, 548-549 (5th Cir. 2017).

[10] Mamou filed multiple detailed funding requests in the district court. [ROA.113-156 (initial request for funding); ROA.172-185 (reply to respondent's opposition); ROA.197-226, and appendix at ROA.227-262 (motion for reconsideration of denial of funding); ROA.296-308 (reply to respondent's opposition to reconsideration); ROA.314-319 (reply to respondent's supplemental response to reconsideration)]. These detailed funding requests ran to over 125 pages and belie the district court's holdings that Mamou supplied insufficient or "speculative or cursory" detail for the requests.

After further briefing, the Fifth Circuit denied the claim, holding that "the district court did not abuse its discretion in denying funding." *Mamou v. Davis*, 2018 WL 3492821 at *5 (5th Cir. 2018). (App. A 4).

B. This Court's Holding in *Ayestas v. Davis*.

Ayestas unanimously rejected the Fifth Circuit's standard for determining whether investigative funds pursuant to 18 U.S.C. § 3599(f) are 'reasonably necessary.' In *Ayestas*, this Court first determined a jurisdictional issue, that a denial of funding was a judicial and not merely an administrative decision. *Ayestas*, 138 S. Ct. at 1088-1092. This Court then looked at section 3599's language providing funding for death-sentenced individuals "financially unable to obtain adequate... investigative, expert, or other reasonably necessary services." *Id.* at 1092, citing section 3599(a). The statute holds that services must be "reasonably necessary for the representation of the [applicant] in order to be eligible for the funding." *Id.,* citing 3599(f).

This Court observed that "Section 3599 appears to use the term 'necessary' to mean something less than essential." *Id*. at 1093. The statute was interpreted to call for "a determination by the district court, in the exercise of its discretion, as to whether a reasonable attorney would regard the services as sufficiently important..." to demonstrate potential merit. *Id.* This Court also held that the Fifth Circuit's "substantial need" test was "arguably more demanding" and "suggests a heavier burden than the statutory term 'reasonably.'" *Id*. This "heavier burden" was exacerbated by the Fifth Circuit's requirement that "a habeas petitioner seeking funding must present a 'viable constitutional claim that is not procedurally barred." *Id.*, citing *Riley v. Dretke*, 362 F.3d 302, 307 (5th Cir. 2004) and *Allen v. Stephens*, 805 F.3d 617, 626 (5th Cir. 2015). The *Ayestas* court rejected the district court's and the Fifth Circuit's holding that barred funding for claims that are procedurally

barred, holding that

> [t]he Fifth Circuit adopted this rule before our decision in *Trevino* [*v. Thaler*, 569 U.S. 413 (2013)], but after *Trevino*, the rule is too restrictive. *Trevino* permits a Texas prisoner to overcome the failure to raise a substantial ineffective-assistance claim in state court by showing that state habeas counsel was ineffective...and it is possible that investigation might enable a petitioner to carry that burden. In those cases in which funding stands a credible chance of enabling a habeas petitioner to overcome the obstacle of procedural default, it may be error for a district court to refuse funding.
> *Ayestas* at 1093-1094.

This Court added that "[a] natural consideration informing that discretion [to grant funding] is the likelihood that the contemplated services will help the applicant win relief" and "applicant must not be expected to prove that he will be able to win relief if given the services he seeks." *Id.* at 1094. A petitioner must "'articulate specific reasons why the services are warranted'—which includes demonstrating that the underlying claim is at least 'plausible.'" *Id*.[11] *Ayestas* held that 3599(f) should be applied in a manner "similar to how its predecessors were read by the lower courts," for instance, that it was "not proper to use the funding statute to fund a 'fishing expedition.'" *Id.* This Court concluded that "the Fifth Circuit's interpretation of § 3599(f) is not a permissible reading of the statute." *Id.* at 1095.

C. The district court's holding and the Fifth Circuit's opinion contravene virtually every aspect of *Ayestas*.

The Fifth Circuit denied Mr. Mamou's funding claim and upheld the district court for reasons that do not withstand scrutiny and are contrary to the holding of *Ayestas* in virtually *all* respects.

[11] This Court declined to address Respondent's argument, in *Ayestas* and also made herein, that funding is never reasonably necessary because, under 28 U.S.C. § 2254(e)(2) "the fruits of any such investigation would be inadmissible in a federal habeas court." *Id.* at 1095.

i. The district court and the Fifth Circuit relied on the impermissible "substantial need" test.

Initially, the Fifth Circuit brushed aside this Court's holding that the "substantial need" test previously used by that Circuit was "not a permissible reading of the statute," *Ayestas* at 1095, by holding that

> [t]he district court understandably recited the then-governing 'substantial need' test standard in the section of its order discussing 'applicable legal standard.' But it never mentioned that heightened standard again, instead using the statutory 'reasonably necessary' language when declining Mamou's specific requests. Because the reasons the district court gave for its ruling remain sound after *Ayestas*, we find no abuse of discretion.
> *Mamou v. Davis,* 2018 WL 3492821 (5th Cir. July 19, 2018) at *3 (App. A 3).

That holding is flat wrong. In the first order the Fifth Circuit referenced , as discussed *supra*, the district court held that "a petitioner must show 'that he ha[s] a substantial need' for investigative or expert assistance. *Clark v. Johnson*, 202 F.3d 760, 768 (5th Cir. 2000); *see also Riley v. Dretke*, 362 F.3d 302, 307 (5th Cir. 2004)." *Mamou v. Stephens*, 2014 WL 4274088 at *1 (App. D 1). Mamou submitted a lengthy augmented motion for funding on September 5, 2014, providing more details. [ROA.197-262]. That motion for reconsideration was denied on January 9, 2015 using the same "substantial need" standard: "On August 28, 2014, the court found that Mamou had not shown a substantial need for the requested funds." (App. E 1). The Fifth Circuit's holding that the district court "never mentioned that heightened standard again" (App. A 3) is incorrect. The district court's subsequent order confirmed that it had used the "substantial need" test in both the initial and the subsequent order, contrary to the Fifth Circuit's analysis.

Although the district court did mention the 3599(f) "reasonably necessary" language in the second denial, that short order of January 9, 2015 summarily upheld the prior denial and confirmed that the district court was using the inapplicable "substantial need" test, in both the initial and

subsequent denials of funding. The one-page second denial basically rubber-stamped the holding of the first denial (App. D) based on "the same procedural and substantive defects that this discussed extensively in denying his original funding request." (App. E 1-2). Thus, the basis of the Fifth Circuit's holding, that the "substantial need" test was used only once and "never mentioned...again" (App. A 3) is incorrect.

Additionally, the Fifth Circuit's holding, hanging on the district court purportedly "using the statutory 'reasonably necessary' language when declining Mamou's specific requests" (App. A 3) makes little sense when the district court defined and applied "reasonably necessary" as meaning "a substantial need." In the initial denial of funding, the district court held that "[a] petitioner must show 'that he ha[s] a substantial need' for investigative or expert assistance" (App. D 1), adopting the Director's argument in opposition that "the Fifth Circuit has construed 'reasonably necessary' to mean that a petitioner 'must demonstrate 'a substantial need' for the requested assistance," with the exact same cites to *Riley* and *Clark*. [ROA.158]. The district court adopted and applied the Director's extensive arguments that "reasonably necessary" meant "a substantial need," as shown *supra*. The district court's initial order denying funding shows that the "reasonably necessary" standard was recited only to repeat the language of the statute, which it interpreted and applied to mean "a substantial necessity." (App. D 1-5).

First, regarding Mamou's claim of actual innocence, the district court explicitly required Mamou to "demonstrate 'a substantial need' for investigative or expert assistance." [ROA.187, citing *Riley v. Dretke*, 362 F.3d 302 at 307 (5th Cir. 2004)]. (App. D 1). The denial of investigative services was also based on factual errors, that "[w]itnesses said that they later helped Mamou search the stolen car for drugs" and that he "told those witnesses that he had sexually assaulted Carmouche and then killed her" and "the strongest trial testimony came from those involved in the narcotics

transaction and in helping Mamou wipe down the car." (App. D 2). No such testimony about Mamou searching or wiping the car ever occurred. The district also held that "Mamou can be innocent only if witnesses lied about him kidnaping Carmouche and the incriminating statements he made later" (App. D 3), but there was only one uncorroborated statement from Terrence Dodson that Mamou allegedly confessed.

Second, the "specific requests" were denied applying the "substantial needs" test—or, in some cases, using an even more stringent and impermissible test that would preclude any funding whatsoever. The district court framed the actual innocence issue as requiring evidence of deals made between the prosecution and their witnesses, ignoring the other bases of the claim, such as an investigation of the sole witness who testified that Mamou confessed, Terrence Dodson. (App. D 3). That court then denied investigative funds on the basis that *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011) "[p]revents federal courts from considering facts outside the state court record" (App. D 3). Regarding claims in the state court record, "for the claims he advanced in his initial state habeas application, additional factual development is not reasonably necessary." (App. D 3-4). While this denial used the "reasonably necessary" language, the standard actually applied, that no claims would ever merit funding, was even more stringent than the "substantially necessary" standard held impermissible in *Ayestas*.

As for the ballistics expert, funding was denied on the basis that "[f]ederal law does not authorize funds to develop a procedurally deficient habeas claim." (App. D 4). Funds for a mitigation expert were denied on the basis that Mamou has "offered little to no evidence that the investigative avenues [habeas] counsel propose[s] to take hold any significant chance of success," quoting *Wilkins v. Stephens*, 560 F. App'x 299, 315 (5th Cir. 2014). (App. D 4-5). A proposed expert on the future dangerousness special issue was denied on the erroneous basis that this would

be a re-urged claim of insufficiency of the evidence presented on direct appeal.[12] And the district court held that *Jackson v. Virginia*, 443 U.S. 307 (1979) "precludes consideration of new factual evidence in adjudicating a claim of insufficiency of the evidence, and Mamou has not reasonably shown that expert assistance is necessary, the requested funds to retain a future-dangerousness expert are not reasonably necessary." (App. D 5). Mamou provided significant additional details of his proposed investigation in his motion for reconsideration of the denial, but those details were completely ignored in the second denial.

The cases relied upon by the district court--- *Riley* and an earlier version of *Crutsinger, v. Stephens*, 576 F. App'x 422 (5th Cir. 2014)---setting out the "substantially necessary" test were specifically abrogated in *Ayestas*. 138 S. Ct. at 1093. This Court explained that "[t]he Fifth Circuit adopted this rule before our decision in *Trevino*, but after *Trevino*, this rule is too restrictive." *Id.* This was because "*Trevino* permits a Texas prisoner to overcome the failure to raise a substantial ineffective-assistance claim in state court by showing that state habeas counsel was ineffective." *Ayestas* at 1093-1094. The district court used the plain language of the statute, the "reasonably necessary" standard, in quoting the statute itself, but in applying it, required a "substantial need."

ii. The district court and the Fifth Circuit relied on the ban on funding for procedurally defaulted claims which *Ayestas* also abrogated.

This Court in *Ayestas* held that, after *Martinez* and *Trevino*, the Fifth Circuit's rule forbidding funding of claims that were procedurally defaulted was "too restrictive." *Ayestas* at 1093. This was because "it is possible that investigation might enable a petitioner to carry that burden. In those cases in which funding stands a credible chance of enabling a habeas petitioner to overcome

[12] The proposed claim had little to do with "insufficiency of the evidence." Mamou requested access to an expert on future dangerousness who could refute and show the limitations of the State's case for future dangerousness.

the obstacle of procedural default, it may be error for a district court to refuse funding." *Ayestas* at 1094. The concurring opinion in Ayestas further explained that "a request under § 3599(f) for investigative services [] requires a showing only that 'a reasonable attorney would regard the services as sufficiently important.'" (*Ayestas* at 1096, citing *Id*. at 1094) (Sotomayor, J, concurring).

The district court held that "funds are not reasonably necessary to develop claims for which federal habeas review is unavailable. This includes claims that are not exhausted." *Mamou v. Stephens*, 2014 WL 4274088 (S.D. Tex. Aug. 28, 2014) at *1 (App. D 1). That court relied on *Riley*, 362 F.3d at 307 and other Fifth Circuit cases for the proposition that "[t]he Fifth Circuit has affirmed the denial of funding when a petitioner has 'failed to supplement his funding request with a viable constitutional claim that is not procedurally barred'" (*Id*.). The district court denied funding for the ballistics claim on the basis that "[f]ederal law does not authorize funds to develop a procedurally deficient habeas claim." (App. D 4). This rationale was repeated in denying the motion for reconsideration, holding that the funding was denied because Mamou "proposed investigating some procedurally deficient claim" and "wanted to expand the record beyond the limits of federal habeas practice." (App. E 1). That standard was explicitly abrogated in *Ayestas*.

This error was repeated by the district court in the second denial of funding, when that court again held that Mamou's "motion for reconsideration, however, still suffers from the same procedural and substantive defects that this court discussed extensively in denying his original funding request." (App. E 1-2). The "procedural defect" was the ban on funding for procedurally defaulted claims.

On appeal in the Fifth Circuit, that Court affirmed the denial based on two factual errors, that "the magazine mark testimony...was cumulative of other ballistics evidence, which itself only corroborated eyewitness testimony and a confession strongly implicating Mamou." (App. A 4). The

evidence was not cumulative and there were no eyewitnesses to Carmouche's murder.

iii. The district court and the Fifth Circuit contravened *Ayestas* in requiring Mamou to show that he will be able to win relief if the services were granted.

This Court, in striking down the Fifth Circuit's "substantial need" requirement, clarified that "a funding applicant must not be expected to *prove* that he will be able to win relief if given the services he seeks." *Ayestas*, 138 S. Ct. at 1094, 1096 (emphasis in original). At this funding stage, all the courts must consider are "the potential merits 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." *Id.* at 1094. Yet the Fifth Circuit held that

> And for the claim Mamou pushes the most in his funding appeal and on the merits—the ineffective assistance claim related to trial counsel not challenging the magazine mark testimony—funding would not be helpful because additional information discrediting that forensic testimony would not have created a 'reasonable probability' of a different result.
> *Mamou v. Davis*, 2018 WL 3492821 at *4 (App. A 4).

The district court also held that a petitioner is required to show a meritorious claim in order to merit funding, holding that "Mamou has not provided sufficient detail to enable the court to decide that investigative assistance is reasonably necessary to support a viable and potentially meritorious claim." (App. D 4). Funds for a mitigation expert were denied at least in part because Mamou had not provided details about "what additional evidence is likely to affect the outcome." (App. D 4).

Both the district court and the Fifth Circuit focused on requiring Mamou to show that he would prevail on the proposed claims, whereas "a request for funding under § 3599(f)...requires a showing only that "a reasonable attorney would regard the services as sufficiently important." *Ayeastas* at 1093, 1096.

iv. Mamou has shown that "a reasonable attorney would regard the services as sufficiently important" to merit funding and that his claims are "plausible."

There can be little doubt that Mamou made the requisite showing that "a reasonable attorney would regard the services as sufficiently important," *Ayestas* at 1093, to merit funding. As discussed *supra*, Mamou, in well over 125 pages of detailed briefing and appendices, "articulat[ed] specific reasons why the services were warranted—which includ[ed] demonstrating that the underlying claim is at least plausible." *Id.* at 1094. Both the victim impact claim and the ballistics claim reasonably required the requested services. Indeed, the state habeas petition evidenced no extra-record evidence or claims, the state courts denied Mamou's victim impact claim largely on the basis of trial counsel's affidavit to which state habeas counsel had no opportunity to respond or investigate, and the ballistics claim was denied by the district court on the basis of the insufficiency of the evidence of the inaccuracy and unscientific nature of "magazine marks" evidence at the time of Mamou's trial. Mamou showed the district court and the Fifth Circuit that "an assessment of the likely utility of the services requested" would lead a reasonable attorney to "regard the services as sufficiently important." *Id.* at 1093.

Mamou's claims were at the very least "plausible" and "substantial" as the Fifth Circuit granted a certificate of appealability ("COA") on both underlying claims regarding victim impact testimony and the ballistics claim, and the standards for a COA and *Martinez*-substantiality are similar. *Mamou v. Davis*, No. 17-70001 (5th Cir. Sept. 14, 2017) (*per curiam*) (granting COA); *Miller-El v. Cockrell,* 537 U.S. 322 (2003); *Trevino v. Davis,* 861 F.3d 545, 548-549 (5th Cir. 2017).

v. This case is in a more favorable posture than *Ayestas*.

In addition, Mamou's case is even more favorable than *Ayestas*:

1) Unlike *Ayestas*, Mamou's funding request were not made *ex parte*, as the district court

denied him permission to do that. [ROA.40-56; 93-105; 106-112]. In *Ayestas*, this Court rejected the State's argument that funding requests were non-adversarial "because the request was made *ex parte*," holding that this factor *could be considered* but it "is hardly dispositive." *Ayestas* at 1090-1091.

2) Unlike *Ayestas*, there is no jurisdictional dispute here. In *Ayestas*, no certificate of appealability ("COA") had issued, *Ayestas* at 1089 n. 1, but here the funding issue itself did not require a COA.

3) Ayestas' underlying issue for his funding request was based on ineffective assistance of counsel for failing to present mitigation evidence, but he prohibited his counsel from contacting family members in Honduras until the eve of trial. *Ayestas*, at 1088. Here, Mamou imposed no such limitations and the underlying issues, ineffective assistance of counsel for failing to investigate and challenge the State's ballistics and "magazine mark" testimony and the failure to challenge inadmissible victim impact evidence from the family of non-victims, were both granted COAs and were thus "substantial" as noted in the previous section.

vi. Mamou showed how state habeas counsel's representation fell below expected standards, contrary to the district court's holding.

The district court denied funding for non-exhausted claims on the basis that "Mamou does not explain how state habeas counsel's representation fell below expected standards." The first requirement for the exception to procedural default under *Martinez/Trevino* is that the claim or claims are substantial, which has been shown. The second relevant requirement under *Martinez/Trevino* is a showing that the state habeas counsel was ineffective (IAHC). *Trevino,* 133 S. Ct. at 1918 (citing *Martinez,* 132 S. Ct. at 1320).

Mr. Mamou's initial appointed state habeas attorney, Mr. Roland Moore, filed a state habeas

corpus petition that was undeniably deficient and which raised only record-based issues. It consisted of a 46-page petition [ROA.4593-4643], with big type and large margins. Although it purported to raise nine "grounds of error" (sic) it really raised only three claims: the wrongful admission of extraneous victim impact testimony (in seven claims) [ROA.4604-4628]; the improper questioning of a defense witness, Ms. Morgan, on parole eligibility [ROA.4628-4632]; and an oft-raised and oft-rejected challenge to the constitutionality and burden of proof of the Texas mitigation special issue, which comprised twelve pages. [ROA.4632-4647]. Record-based claims of ineffective assistance of counsel related to the first issue. Even this sparse presentation was padded out with an 11-page double-spaced verbatim download of the trial testimony of the family of the non-victims. [ROA.4608-4618].

Several exhibits were appended to the petition which also did not show much if any investigation of non-record-based issues. The investigator Cynthia Patterson's affidavit states simply that the testimony of Ms. Morgan raised a juror's concern about parole eligibility, yet there was no IATC claim for calling this witness nor any affidavit from the juror. [ROA.4649]. An affidavit of attorney Jim Leitner related simply to the record-based claim of improper victim impact evidence and gave his bare-bones opinion that failure to object was ineffective assistance. [ROA.4648]. Another affidavit from attorney Tom Moran related to the same claim, but was hardly helpful as it concluded with the statement that "[w]ithout knowing more of the facts of the case, I cannot say definitively whether the error meets the prejudice prong of *Strickland."* [ROA.4663-4666].

State court billing records also reveal that little investigation was carried out by Mr. Moore. Of the total of 142.5 hours he billed the court,[13] 38 hours were billed as "review of transcript" and

[13] Apparently in two vouchers, the first for 50 hours and the second for 92.5 hours. [ROA.4694].

over 61 hours were devoted to researching, drafting and filing the writ. [ROA.4694-4695]. Other than procuring a jury list, sending out "jury letters" and two meetings with the investigator, there is little evidence of investigation, as the total time spent on these tasks is under 10 hours. *Id.* A total of 2.5 hours seems to have been spent with the investigator. *Id.* Sixty-four of the hours billed were for the three week prior to the filing of the writ. *Id.*

Investigator Cynthia Patterson's billing also shows IAHC. She billed a total of only 33 hours. [ROA.4688-4689]. Only about 15 of these hours were actual interviews or attempts to interview potential witnesses or potential affiants. *Id.* However, none of this showed up as work product, save for the one-page hearsay affidavit as to what one juror allegedly told Ms. Patterson. [ROA.4649]. No affidavits or declarations were forthcoming from the persons she allegedly interviewed. The state court adopted the district attorney's findings that Ms. Patterson's affidavit should be disregarded on the basis that it was hearsay. [ROA.4843].

Thus, initial state habeas counsel, Mr. Roland Moore, incontestably failed to perform the basic tasks necessary to identifying the factual bases for a habeas corpus application, much less the investigation necessary to plead and prove any habeas claims.

The trial court adopted verbatim the prosecutor's proposed findings and conclusions [ROA.4846] which in turn were adopted by the Texas Court of Criminal Appeals.[14]

The initial state writ application itself and these findings and conclusions clearly show the lack of any meaningful efforts by initial habeas counsel to go beyond the record and perform any investigation into extra-record claims. As such, state habeas counsel was ineffective.

[14] Among these findings and conclusions were: without holding a hearing, that the self-serving affidavits of trial counsel were believable and those of Mr. Leitner and Mr. Moore were not [ROA.4837-4838]; that the court "need not consider" the investigator's affidavit [ROA.4843]; that the error in not objecting to the victim impact testimony was harmless [ROA.4844-4845]; and the issue as to the burden of proof on mitigation had been often rejected. [ROA.4845].

vii. The district court's holding and the Fifth Circuit's opinion are also contrary to *Martinez*.

Mamou argued in his funding motions that an appropriate investigation would likely demonstrate not only the merits of the underlying claims, but also cause for the procedural default under *Martinez* v. *Ryan*, 566 U.S. 1 (2012). [*e.g.,* ROA.118-121, 211-220]. The district court held that "Mamou had not yet shown that expert assistance is reasonably necessary for development of his claims" [ROA.193 n.2] and, when that showing was made [ROA.197-226], again denied funding and dismissed the claims prematurely when Mamou had no opportunity to develop his ineffective-assistance claims. This defeats the purpose of *Martinez*.

Martinez held that inadequate representation at an "initial review collateral proceeding"—such as a Texas habeas proceeding—can establish cause to excuse the default of a substantial claim of ineffective assistance of trial counsel. *Id*. at 1315-1320; *see also Trevino* v. *Thaler*, 133 S. Ct. 1911 (2013) (applying *Martinez* to Texas cases). As this Court explained in *Trevino*, "significant unfairness" would result from "depriv[ing] the defendant of any opportunity at all for review of an ineffective-assistance-of-trial-counsel claim." 133 S. Ct. at 1919, 1921.

The district court's denial put Mamou in a "Catch 22" situation by denying his request for funds in light of the procedural default and then holding that he could not establish cause for the default or obtain relief on the merits because he had not produced sufficient evidence to substantiate his ineffective-assistance claims—*i.e.*, the very evidence he needed the funds to obtain. [ROA.192-193].[15] Under this circular analysis, a capital habeas petitioner cannot secure resources to develop an ineffective-assistance claim unless the petitioner can *already* demonstrate the claim's merit. That

[15] Even when Mamou provided the additional details regarding how his "proposed investigation will meaningfully augment his proposed claims" [ROA.193] and how state habeas counsel performed deficiently [ROA.208-218], the district court still denied the funding.[ROA.327-328].

reasoning finds no support in the text of 18 U.S.C. § 3599(f). It also makes little sense in those cases where *Martinez* might apply because state habeas counsel never conducted a reasonable investigation of the ineffective-assistance claims, as here.

In contrast to the district court's holding, other courts have given meaning to *Martinez* by providing habeas petitioners some opportunity to prove cause and prejudice and develop their defaulted ineffective-assistance claims before rejecting them on their merits. *See, e.g, Sasser* v. *Hobbs*, 735 F.3d 833, 851-854 (8th Cir. 2013) (in light of *Trevino*, Sasser was entitled to an evidentiary hearing and "an opportunity to present evidence related to [the defaulted] claims"); *Dickens* v. *Ryan*, 740 F.3d 1302, 1321 (9th Cir. 2014) (en banc) (petitioner was entitled on remand in light of *Martinez* "to present evidence" of cause, prejudice, and the substantiality of his claim).

Section 3599(f) provides that:

> [u]pon 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.* (Emphasis added).

See also 18 U.S.C. § 3599(a)(2) (indigent capital habeas petitioner "shall be entitled to" the furnishing of "investigative, expert, or other reasonably necessary services"). The district court (Apps. D &E) and the Fifth Circuit have construed the statute's "reasonably necessary" standard to require petitioners to "demonstrate 'a substantial need' for the requested assistance." *Riley*, 362 F.3d at 307 (quoting *Clark* v. *Johnson*, 202 F.3d 760, 768-769 (5th Cir. 2000) (affirming denial of funds where petitioner did not show the requested assistance was "substantially necessary"); *Fuller v. Johnson*, 114 F.3d 491, 502 (5th Cir. 1997)); *Allen v. Stephens*, 805 F.3d 617, 626, 638-39 (5th Cir. 2015); *cf. Woodward* v. *Epps*, 580 F.3d 318, 334 (5th Cir. 2009) (affirming denial of funds "in light of" holding that petitioner was not entitled to habeas relief). And, as the district court held

(App. D 1)], "[a] petitioner cannot show a substantial need when his claim is procedurally barred from review," citing *Riley*, 362 F.3d at 307—at least where the petitioner has not already demonstrated the merits of his claim.

Nothing in the text of § 3599 supports these limitations. Subject to the district court's sound discretion, that statute "entitles capital defendants to a variety of expert and investigative services" simply "upon a showing of necessity." *McFarland v. Scott*, 512 U.S. 849, 855 (1994). It does not categorically preclude funding for investigation of procedurally defaulted claims, and it does not require that a petitioner demonstrate the merits of his claim before obtaining funding.

To the contrary, in *McFarland*, this Court emphasized that the purpose of funding is to assist the prisoner in "research[ing] and identif[ying]" his "*possible* claims and their factual bases." *Id*. at 855 (emphasis added). Requiring an indigent capital prisoner to proceed without such assistance until after he had filed his habeas petition, the Court reasoned, would expose the petitioner to a "substantial risk that his habeas claims never would be heard on the merits." *Id.* at 856. This was reaffirmed recently in *Ayestas*. 138 S. Ct. at 1093-1094. Here, the district court's holding precluding funding for defaulted claims when the petitioner cannot already establish their likely merit poses precisely the same risk.

AEDPA identifies circumstances in which a petitioner may assert unexhausted claims, 28 U.S.C. § 2254(b)(1)(B), or in which a court may decide a defaulted claim on the merits if the State waives objection, *see id.* § 2254(b)(3). This Court has likewise recognized exceptions allowing a petitioner to raise defaulted claims. *E.g.*, *Martinez*, 132 S. Ct. at 1316. And it has recognized that federally funded counsel appointed under § 3599 may assist a petitioner in litigating such claims. *Harbison* v. *Bell*, 556 U.S. 180, 190 n.7 (2009). Given that petitioners may pursue and courts may consider defaulted claims on their merits in some circumstances, the statutory scheme cannot

sensibly be understood to categorically preclude funding to develop such claims.

This Court's decisions in *Martinez* and *Trevino* contemplate that a death-sentenced prisoner with a potentially meritorious ineffective assistance of trial counsel ("IATC") claim should have a meaningful opportunity to develop and present that claim and receive consideration on the merits. *Trevino*, 133 S. Ct. at 1918-1921; *Martinez*, 132 S. Ct. at 1315-1318. And they recognize an exception to the procedural-default rule that applies in many cases precisely because the IATC claims were never previously investigated due to state habeas counsel's own ineffectiveness. If, as the district court held, investigative funds are unavailable for procedurally defaulted claims, then few indigent prisoners in such circumstances could ever obtain the funds necessary to establish cause under *Martinez* unless they have some other source of funding or support. That result cannot be what this Court intended in *Martinez* and *Trevino*, as well as *Ayestas*.

But the funds' "necess[ity]" was made evident by the district court's opinion rejecting Mamou's claims on the merits, which cited the absence of the very proof Mamou was attempting to obtain with the requested funding. [*See, e.g.,* App. C 38 [ROA.1699] (Mamou criticized for citing no "scientific evidence...new physical evidence, or new reliable testimony" of innocence, for which Mamou had requested funding); App. C 45 [ROA.1706] ("Mamou has not identified anything contemporaneous to trial or habeas review generally condemning Baldwin's expertise or conclusions," and citing reliance on "academic literature," regarding another area where the district court denied requested funding)]. The district court's analysis and the Fifth Circuit's opinion frustrates the purpose and contravenes the precedents of *Martinez* and *Trevino*.

II. The Fifth Circuit's Rejection Of *Ayestas* Raises Serious Rule of Law Concerns That Can Only Be Remedied By This Court.

Because the Fifth Circuit's post-*Ayestas* opinion is directly contrary to the holdings of that

case, this Court should grant the petition for a writ of certiorari and summarily reverse to preserve the legitimacy and integrity of its judgments and to underscore the importance of the rule of law. *Ayestas* provided clear instructions that the "substantial need" test was impermissible, that procedurally-defaulted claims were not barred from funding, and that the proper standard for such funding was what "a reasonable attorney would regard the services as reasonably important." Ayestas, 138 S. Ct. at 1093. The Fifth Circuit ignored those instructions and once again applied precisely the same impermissible standards it used prior to *Ayestas*.

It is axiomatic that this Court's decisions are binding on lower courts and it is not their province to ignore or overrule those decisions. *See Agostini v. Felton*, 521 U.S. 203. 237 (1997) ("[C]ourts of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." (Citation and internal quotation marks omitted)); *United States v. Martinez-Cruz*, 736 F.3d 999, 1006 (D.C. Cir. 2013) (Kavanaugh, J., dissenting) ("As a lower court in a system of absolute vertical stare decisis headed by one Supreme Court, it is essential that we follow both the words and the music of Supreme Court opinions."). From "its earliest days this Court [has] consistently held that an inferior court has no power or authority to deviate from the mandate issued by an appellate court." *Briggs v. Pa. R.R. Co.*, 334 U.S. 304, 306 (1948) (citing cases). This Court's decisions accordingly "remain binding precedent until [it] see[s] fit to reconsider them." *Hohn v. United States*, 524 U.S. 236, 252-253 (1998).

The Fifth Circuit's decision disregards that core rule of law principle. Summary reversal is accordingly the necessary and appropriate relief. This Court has not shied away from summarily deciding fact-intensive cases where, as here, lower courts have egregiously misapplied settled law. *See, e.g., Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) (*per curiam*) (citing cases); *Mullenix v. Luna*, 136 S. Ct. 305, 311 (2015) (*per curiam*); *Stanton v. Sims,* 134 S. Ct. 3 (2013) (*per curiam*);

Parker v. Matthews, 132 S. Ct. 2148 (2012) (*per curiam*); *Coleman v. Johnson,* 132 S. Ct. 2060 (2012) (*per curiam*); *Wetzel v. Lambert,* 132 S. Ct. 1195 (2012) (*per curiam*); *Ryburn v. Huff,* 132 S .Ct. 987 (2012) (*per curiam*); *Sears v. Upton,* 561 U.S. 945 (2010) (*per curiam*); *Porter v. McCollum*, 558 U.S. 30 (2009).

If this Court permits the Fifth Circuit's decision to stand, it would place that Court's rejection of this Court's decision in *Ayestas* beyond review. Even worse, the Fifth Circuit's subversion of *Ayestas* would give license to lower courts both state and federal to ignore this Court's judgments when they disagree with them. Summary reversal is the most appropriate relief when the legitimacy of this Court's judgments and the rule of law are threatened in this manner.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari, summarily reverse, and remand in light of *Ayestas*. Alternatively, the Court should grant the petition and conduct plenary review.

Respectfully Submitted,

s/ A. Richard Ellis

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November 15, 2018.