No. 18-6741

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

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REPLY BRIEF OF PETITIONER

CAPITAL CASE

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Respondent ("the Director")'s Brief In Opposition ("BIO") is based on assertions regarding the record, Mr. Mamou's arguments, and the law that do not withstand scrutiny. Perhaps mindful of the maxim that "the United States Supreme Court is not a court of error correction,"[1] the first part of the BIO, the Director's "statement" (BIO at 2-12) contains numerous factual errors, omissions, and misrepresentations, seemingly aimed at having this matter categorized as a mere "error correction" dispute. Then, in the argument section (BIO at 13-21), the Director diverts attention from what was actually done in the district court, the denial

[1] Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, 8 J. APP. PRAC. & PROCESS 91, 92 (2006); *see also* William Howard Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925*, 35 YALE L.J. 1, 2 (1925).

of funding, to what the Fifth Circuit said was done. The Court is respectfully urged to closely examine the record before accepting the Director's arguments and factual assertions at face value, and grant Mr. Mamou's well-founded request for a grant of *certiorari,* vacate the opinion of the Fifth Circuit, and remand to the court below. This case is a straightforward application of this Court's unanimous holding in *Ayestas v. Davis*, 138 S. Ct. 1080 (2018). The Director's attempts to show otherwise are unavailing and are contradicted by the law and/or the record, as shown in Mr. Mamou's petition and herein.

I. Introduction.

The underlying issue is whether the district court and the Fifth Circuit Court of Appeals contravened *Ayestas v. Davis*, 138 S. Ct. 1080 (2018) which unanimously struck down the Fifth Circuit's requirement that individuals seeking funding under 18 U.S.C. § 3599(f) must show a "substantial need" for the services. Here, the district court's denial of funding was contrary to virtually all the holdings of *Ayestas.* The impermissible "substantial need test" was repeatedly argued by the Director and twice accepted by the district court in denying funding; contrary to *Ayestas*, the district court held that funding was not available for procedurally defaulted claims; the district court required Mamou to show a likelihood of success on his claims, also contrary to *Ayestas*; and his extensive showing that a reasonable attorney would request the services was ignored in that court.[2] (*See* Apps. D and E).

[2] Ignored by both the Fifth Circuit and the Director is the fact that the district court imposed an even more restrictive standard for funding than the now-impermissible "substantial needs" test. That court held that *all claims*, both exhausted, *Mamou v. Stephens*, 2014 WL 4274088 at *1 (App. D at 1), and unexhausted, (*Id*. at 2, 4),would not qualify for funding. The district court's funding denial here was thus even more inconsistent with the funding statute than the pre-*Ayestas* "substantial need" test.

Although the funding denial occurred in the district court, the Director's arguments (BIO at 13-21) *simply ignore those holdings and are directed solely to the Fifth Circuit's gloss on the district court's holdings.* The Director's diversionary tactics are clear from the headings of her arguments. Section I is entitled "review is unwarranted because the Fifth Circuit explicitly and unambiguously applied the correct legal standard" (BIO at 13-16), and Section II is entitled "the Fifth Circuit did not err in applying the 'reasonably necessary" test to the facts of this case." (BIO at 16-22). The Director argues that, because the Fifth Circuit's opinion, issued post-*Ayestas*,[3] not surprisingly did not use the *Ayestas*-disapproved "substantial need" test, all is well. The Director's disingenuous argument plainly fails because Mamou has shown that the errors that occurred in the district court plainly contravened *Ayestas*, and the BIO utterly fails to address Mamou's showing of their fatal defects. Instead, the BIO merely repeats Fifth Circuit's erroneous summary of the district court's holdings.[4]

As the district court's holdings are untenable, the Director attempts to shift attention away from them. The Director misrepresents the record in attempting to show that the Fifth Circuit applied the correct standard (BIO at 13-16), and then again misrepresents the record attempting to show that the funding was not "reasonably necessary" (BIO at 16-21), when Mamou, in over 125 pages of funding requests, overwhelmingly showed that it was.[5]

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[3] "And we held off on deciding the funding decision in this case until *Ayestas* was issued." *Mamou v. Davis*, 2018 WL 3492821 at *3 n.1 (App. A. 3).

[4] "Because the reasons the district court gave for its ruling remain sound after *Ayestas*, we find no abuse of discretion;" "none of the district court's reasons depend on the heightened standard that *Ayestas* rejected." (App. A 3).

[5] *See* ROA.63-68, 76-77, 97 (motion to proceed *ex parte* on funding); ROA.113-156, 172-184 (initial request for funding); ROA.197-262, 296-308, 314-318 (revised request for funding). This was a case where the petition itself was limited to only 100 pages.

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* and 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.

II. The Director's Misrepresentations of the Record. (BIO at 2-13).

In her "statement" (BIO at 2-12), the Director's briefing tactic attempts to portray the case as a mere factual dispute and thus a not-cert-worthy error-correction matter. Mamou will address certain egregious factual errors, omissions and distortions, mainly designed to give the false impression that any funding would have been a useless enterprise doomed to failure.

(1) The Director terms the two detailed funding requests "scattershot," "justified...with speculation, [and] reasoning that contradicted established precedent" (BIO at 1) and the motion for reconsideration merely "largely rehashed" the first request. (BIO at 9). This is utterly false. The initial request for funding identified evidence 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; required 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 29-page motion for reconsideration provided many more details of the purpose of the requested funding [ROA.197-226] including additional and detailed information about the proposed unexhausted claims [ROA.208-211]; explained at length how state habeas counsel's representation fell below expected standards and how it would meet the *Martinez v. Ryan*, 566 U.S. 1 (2012) 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]. As for the Director's claim that the requests were based on "reasoning that contradicted established precedent" (BIO at 1), using the words of the district court one-page denial of the motion for reconsideration (App. E 1-2), the "established precedent" was both the now-rejected "substantial need" test and the denial of funding for non-exhausted claims, as shown by the district court's holdings. (Apps. D and E).

(2) The Director alleges that the "Fifth Circuit affirmed in an opinion that expressly applied the 'reasonably necessary' standard that this Court articulated in *Ayestas v. Davis*, 138 S. Ct. 1080 (2018)" and that holding "in no way" depended on the "since-rejected 'substantial need' test." (BIO at 1-2). This too is false and misleading because the standard was actually "applied" in the district court. The Fifth Circuit did not deny the funding, the district court did, which is where the "substantial need" test was repeatedly applied.[6] The Fifth Circuit opinion

[6] The Director's argument repeatedly seeks to divert attention from the district court's error-ridden denials (Apps. D and E) in order to focus attention solely on the Fifth Circuit opinion affirming those denials. Indeed, the Director repeatedly misleads this Court to give the false impression that the Fifth Circuit denied the funding, not the district court. *See, e.g*, BIO at 13 (arguing that the Fifth Circuit applied the "reasonably necessary" test, ignoring the district court's application of the "substantial need" test; BIO at 14 ("the Fifth Circuit did not categorically bar funding for procedurally defaulted ineffective-assistance-of-trial-counsel claims," whereas the district court did); *Id.* ("the Fifth Circuit...denied funding" whereas the district court denied it); BIO at 15 ("the Fifth Circuit denied his funding request," again false); BIO at 16 ("the Fifth Circuit...denied funding because petitioner's requests do not meet that threshold"); BIO at 19 ("the Fifth Circuit [was required] to deny petitioner's request for funds"). The Director even credits the Fifth Circuit for not

was issued after *Ayestas* was handed down, so it is meaningless to point to the absence of the "substantial need" test in that opinion, when that test had already been rejected by this Court.

(3) The Director's "factual" summary is replete with misrepresentations, omissions, and errors. The Director asserts that "Petitioner shot and killed Gibson" (BIO at 3), but omits the fact that this was only after the armed Gibson showed Mamou that he (Gibson) had a gun and Mamou shot him in order to avoid being shot himself and then ran away. [ROA.3183-3184]. Respondent emphasizes Mamou's alleged "confession" to Dodson (BIO at 4), but omits the fact that Dodson himself was an accomplice who had set up the botched drug deal [ROA.3394, 3395, 3396-3401], that Dodson's admitted role in the deal was to rob the drug sellers with his gun [ROA.3399], and Dodson himself thought he was going to be indicted for capital murder for his role an accomplice [ROA.3402-3403]. Hence, he had ample motive to lie.

(4) The "victim-impact testimony" to which the Director refers (BIO at 6) was actually inadmissible testimony from non-victims Yolanda Williams and Patricia Gibson, as Mamou was never charged with those murders. The Director repeats Mamou's trial attorney's self-serving explanation that he did not object because he "used these witnesses to emphasize that his victims were themselves involved in the drug trade" (BIO at 6) where in actuality this did not occur as Yolanda Williams explicitly denied her brother was involved in the drug trade. ("No drug dealing that we knew of." [ROA.3570]). Nor did trial counsel ever explain his failure to object to Gibson's testimony.

(5) The Director also misleads in attempting to show that state habeas counsel was effective. (BIO at 7). Alleging a sufficient investigation, the Director cites "over 140 hours

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using the "substantial need" language (BIO at 13) in an opinion issued post-*Ayestas* which had already struck down that test, which again ignores its substantial use, and more importantly, its *application* in the district court.

developing Mamou's claims" (BIO at 7), while omitting the fact that the total time spent on investigation was under 10 hours. [ROA.4694-4695]. The Director claims counsel "hired an investigative agency" (BIO at 7) while omitting the fact that these investigative meetings were only 2.5 hours [ROA.4694-4695] and no extra-record claims or any results of the investigation were included in the petition. The Director claims counsel "raised nine points of error" (BIO at 7), and the district court held he raised eight issues [ROA.1704], but in reality state habeas counsel raised only three: the wrongful admission of extraneous victim impact testimony [ROA.4604-4628]; the improper questioning of a defense witness 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 eleven pages. [ROA.4632-4642]. Both ineffective-assistance-of-counsel claims were record-based.[7]

(6) The Director falsely claims that "eye-witness testimony" was presented through Dodson and Anthony Trail (BIO at 4), yet there were no eye-witnesses to Carmouche's murder, just the uncorroborated testimony of Dodson regarding Mamou's alleged "confession." The Director asserts that this "eye-witness" testimony was corroborated by "ballistics testimony from Robert Baldwin" (BIO at 4), but omits the fact that Baldwin was utterly discredited in another capital case with similar ballistics testimony in which the Fifth Circuit held that Baldwin's trial testimony *"at best demonstrates extreme carelessness on his part and at worst calls into*

[7] The district court went to extreme lengths to find that state habeas counsel Mr. Moore did not render deficient performance. That Court credited him with filing a boiler-plate Freedom of Information request [ROA.1704]; credited him for statements where he claimed to be investigating the extraneous murder and had hired a mental-health expert, even though neither alleged activity was evident in the petition [*Id.*]; held that he "raised 8 claims in 55 pages" even though they were all record-based [*Id.*]; and even credited him for asking for an extension of time to file the brief. [*Id.*] The district court then attempted to ameliorate Moore's entirely record-based petition, apparently recognizing its defects, by holding that "the initial habeas application does not fully reflect his efforts..." [ROA.1705].

question his expertise." Williams v. Quarterman, 551 F.3d 352, 355-356 (5th Cir. 2008) (emphasis added).[8] Far from "corroboration," Baldwin's "magazine marks" testimony was another reason why the funding denial deprived Mamou of due process, as Mamou was unable to present evidence of its unreliability, save through a *pro bono* declaration.

III. The Director Misrepresents the Record in Attempting to Show That "the Fifth Circuit Explicitly and Unambiguously Applied the Correct Legal Standard." (BIO at 13-16).

The Director's record misrepresentations described *supra* are designed to draw attention away from the central flaw in this matter: the Fifth Circuit didn't "apply" the standard, that was done in the district court, when that court denied funding, echoing the Director's arguments and the Fifth Circuit's then-prevailing rule that "a petitioner must show 'that he ha[s] a substantial need' for investigative or expert assistance.' *Mamou v. Stephens*, 2014 WL 4274088 at *1 (App. D 1).[9] The district court also held that "funds are not reasonably necessary to develop claims for which federal habeas review is unavailable. This includes claims that are not exhausted." (*Id.*). Both contravene *Ayestas.*

A major defect in the Director's argument is inadvertently revealed in their "Questions presented." (BIO at i). The first question is framed as "did the Fifth Circuit apply the wrong legal standard when it *quoted* the standard this Court announced last Term in *Ayestas*?" *(Id.*) (emphasis added). That is exactly the problem: quoting a standard is not the same thing as applying it. Mamou's *Ayestas* argument is based on his showing that the standard "quoted" in the Fifth Circuit's post-*Ayestas* opinion was not the one actually "applied" in the district court.

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[8] The very same unreliability and carelessness that Baldwin evidenced in the *Williams* case was one of the main areas of investigation for which Mamou sought expert funding and investigation here.

[9] Citing *Riley v. Dretke,* 362 F.3d 302 (5th Cir. 2004), which 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.

The Director shifts her argument to "applied" in the Arguments sections (BIO at 13-21) but even then never addresses the central point of Mamou's showing: that the district court, pre-*Ayestas*, applied the now-rejected "substantial need" test. The focus of her argument is on what the Fifth Circuit did or did not hold, diverting attention from the district court's *Ayestas*-violative holdings. And the Director's argument assumes that by not reciting or "quoting" the "substantial need" test, after that test was struck down, the Fifth Circuit "applied" the correct standard. *(E.g.*, BIO at 13). The "application" of the test occurred in the district court, when funding was denied, not after-the-fact in the Fifth Circuit. The Director's argument completely fails to address Mamou's showing that the district court relied on and applied the "substantial need" test.

In actuality, the district court imposed a standard even more restrictive than the "substantial need" test struck down in *Ayestas*. 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 also 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 both *Ayestas* and § 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. On the motion for reconsideration of that denial, the district court, in a one-page order, adopted the Director's opposition to the motion to reconsider the denial of funding, which was again entirely based on the impermissible "substantial need" test. (App. E).

The Director also fails to mention that in the district court she argued 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"[ROA.269] (emphasis added). The district court in denying funding agreed with the Director's arguments that "Mamou cannot show a *substantial need* for funding on claims that were adjudicated 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]. (emphasis added).

The Director cannot explain away the district court's clear and unambiguous holding in denying the motion for reconsideration: "Mamou had not shown a *substantial need* for the requested funds." [ROA.327] (App. E 1) (emphasis added). 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 3) he wanted to expand the record beyond the limits of federal habeas practice." (*Id.*) All three rationales were false.

In yet another misrepresentation, the Director asserts that the Fifth Circuit "denied funding because petitioner made no showing whatsoever that the funding would give him a credible chance to overcome his default" by failing to provide "sufficient detail" of the basis of the claims and by failing to "explain how state habeas counsel's representation fell below

expected standards" (BIO at 14-15), the two elements for excusing the default under *Martinez v. Ryan*, 566 U.S. 1 (2012). Although ignored by the Fifth Circuit, Mamou extensively discussed both elements in the district court [ROA.115-157; 197-262; 298-301], as well as in the Fifth Circuit (brief at 11-15) and in his petition in this Court (11-17, 26-29).

IV. The Director Also Misrepresents In Alleging That the "Fifth Circuit Did Not Err In Applying The "Reasonably Necessary" Test To The Facts Of This Case. (BIO at 16-21).

In Section II, the Director avers that "[t]he Fifth Circuit correctly affirmed the denial of each of petitioner's funding requests because it recognized that those requests cannot possibly 'help [him] win relief.'" (BIO at 16, quoting *Ayestas*, 123 S. Ct. at 1094.) This too is based on misrepresentations designed to show there was no prejudice in the denial of funding.

The Director begins this section badly, asserting, regarding the alleged confession to Dodson, that "[t]he Fifth Circuit correctly affirmed the denial of petitioner's request for funding to develop a claim of actual innocence by interviewing trial witnesses," and then contradicts herself on the same page by arguing that Mamou "failed to raise or brief this argument to the Fifth Circuit." (BIO at 17). The Director cannot have it both ways. The Director admits that Mamou alleges "that a specific witness–Dodson, to whom petitioner confessed---fabricated his testimony," but then argues Mamou "offered no details about what testimony...[was] fabricated." The answer is obvious from the Director's own words: the alleged confession to Dodson. The Director's argument that Mamou "failed to raise or brief this argument to the Fifth Circuit (BIO at 17) is incorrect, as in the Fifth Circuit Mamou argued that the funding request was, in part, to show actual innocence. (Brief at 14, 24). Even if he had not, the issue raised in the Fifth Circuit was not a "freestanding actual innocence claim," as the Director avers. (BIO at 17). The claim in the Fifth Circuit, as it is here, was the failure of the courts below to grant funding, some of

which was clearly for the purposes of showing that Dodson lied about the alleged confession, not simply to show "actual innocence."

As for expert funding, here again the Director misrepresents. She complains that in his petition for *certiorari*, Mamou "does not explain how his habeas counsel's performance was defective and even fails to identify specific claims that, if investigated now, could help him overcome his default and obtain relief," and this "is why the Fifth Circuit correctly affirmed the denial of funding as not 'reasonably necessary.'" (BIO at 18). Of course, the petition for *certiorari* did not exist when the Fifth Circuit ruled, so the argument is absurd. If the Director's argument is taken to complain generally about the lack of detail in the court where the funding was actually denied, the district court, the argument also fails. Mamou provided almost 125 pages of detailed areas of investigation, proposed claims, expert qualifications, deficiencies of the state habeas petition, and areas of needed funding,[10] but the Director seems to assume that this detailed showing must be replicated in Mamou's petition which is limited to 40 pages.[11]

The Director repeats two errors of the Fifth Circuit, that "the magazine mark testimony...was cumulative of other ballistics evidence, which itself only corroborated eyewitness testimony and a confession strongly implicating Mamou." (BIO at 19, quoting App.

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[10] *See* Note 5 supra.

[11] In yet another misrepresentation, the Director states that in his petition, Mamou "does not explain how his habeas counsel's performance was defective" and "all he does is complain generally about the number of hours his habeas counsel spent investigating." (BIO at 18). That is utterly false. Mamou devoted over two pages to a detailed explanation of state habeas counsel's failings (Pet. at 26-28), including that the petition was limited to only record-based issues; raised only three claims, including an oft-raised and oft-rejected challenge to the constitutionality and burden of proof of the Texas mitigation special issue; deficiencies in the affidavits which included an opinion that the affiant did not know whether the error was prejudicial; the billing records which showed little investigation; the ineffective assistance of the investigator, none of whose work showed up in the petition and without any affidavits or declarations from the persons she allegedly interviewed; and the disregarding of her affidavit as hearsay. (Pet. at 26-28).

A 4). The ballistics evidence was not cumulative of "other ballistics evidence" because there was no other ballistics evidence; and there were no eyewitnesses to Carmouche's murder. The Director attempts to avoid this by claiming that Mamou "has not properly presented the issue to this Court" because he only "devotes one sentence" to it (BIO at 19 n.8). This assumes that there is a better way to show that something was not presented other than stating that it was not presented. Notably, the Director, who has controverted the assertion, does not show any actual testimony where other ballistics evidence *was* presented or any eye-witnesses to Carmouche's murder.[12]

The Director misrepresents in stating that "Petitioner argues that the Fifth Circuit affirmed 'on the erroneous basis that this would be a re-urged claim of insufficiency of the evidence presented on direct appeal.' Pet. 21-22. But he never explains why the denial was erroneous." (BIO at 20). However, Mamou did just that: "[t]he 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." (Pet at 22 n. 12). Nowhere in the motion for reconsideration of the funding denial is "insufficiency of the evidence" even mentioned; the proposed claim is "IATC (ineffective assistance of trial counsel) for failure to coherently address the future dangerousness special issue." (Motion at 8) The Director acknowledges this footnote (BIO at 2) but then continues to mislead by arguing that "refuting and showing the limitations of the State's evidence *is* a challenge to the sufficiency of the State's evidence." (*Id.*) (emphasis in original).

[12] The Director (BIO at 19 n. 8) points to eye-witness testimony only of the alleged kidnaping (although Mamou was unaware at the time that Carmouche was in the back seat), and Baldwin and Dobson's testimony, none of which were either eye-witnesses or "cumulative." Also notable is the Director's argument that Baldwin's testimony "was cumulative of other ballistics evidence" by citing *Baldwin's own testimony* [ROA.3449] as the alleged "other" ballistics testimony.

The Director ignores the word "refute." Refuting the State's case is not merely challenging the sufficiency of the State's case, it is contradicting it by new evidence, which is not prohibited. The Director, like the courts below, attempts to shoe-horn this request into *Jackson v. Virginia* (443 U.S. 307 (1979), which does not fit, because obviously new evidence cannot be adduced in a sufficiency challenge to the evidence presented at trial. If Mamou were just challenging the sufficiency of the evidence presented at trial, there would be no need for an expert, and the Director's argument and the district court and the Fifth Circuit's *Jackson*-based holding essentially make no sense.[13]

V. Conclusion.

The Director's argument focuses on what the Fifth Circuit said the district court did, not on what the district court actually did. This is not only superficial, it is disingenuous. A life is at stake here. The Director should not be allowed, through misrepresentations, omissions, and distortions of the record, to achieve her aim of having the Court decline review of Mamou's meritorious petition. This is a straightforward application of *Ayestas*, which was handed down by this Court to prevent the same overly-restrictive misapplications of the funding statute the

[13] Under this reasoning, virtually *all* claims would be *Jackson* claims, as virtually all claims go to either "refute or challenge the limitations of the State's evidence." Perhaps sensing this, the Director tries to cover her bases in arguing that "even if this request could be construed to support some other claim cognizable on federal habeas review, he has not identified it." (BIO at 20-21). This again misrepresents, as the claim was clearly identified in the district court as "ineffective assistance of counsel for failure to coherently address the future dangerousness special issue." (Funding reconsideration motion at 8 [ROA.209]) ("This is an extra-record claim and funding is needed for the future dangerousness expert who could address the utter failure of defense counsel to properly address this issue.") The Director's argument that this is an "unidentified claim" and forfeited is specious, as not only was the claim identified, and that ruling appealed in the Fifth Circuit, the alleged "unidentified claim" is not being "presented to this Court" as the Director mistakenly asserts. (BIO at 21). What *is* presented to this Court is the denial of funding for specific identified purposes.

courts engaged in here. 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.

Dated: January 31, 2019.

Respectfully Submitted,

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