No. 16-

IN THE

Supreme Court of the United States

CHRISTOPHER CHUBASCO WILKINS,
Petitioner,

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

EXECUTION SCHEDULED FOR JANUARY 11, 2017

QUESTIONS PRESENTED

Section 3599(f) of Title 18 of the U.S. Code allows an indigent habeas petitioner in a capital case to obtain funding for investigative, expert, or other services that are "reasonably necessary" for the petitioner's representation.

The questions presented are:

1. Whether services are "reasonably necessary" under § 3599(f) when the petitioner's position on a substantial question would benefit from investigative or expert services, as several circuits have held, or only when the petitioner can demonstrate a "substantial need" by showing the merit of the claim he seeks funding to develop, as the Fifth Circuit and other courts require.

2. Whether the Fifth Circuit erred in holding, in conflict with the Sixth Circuit, that funding under § 3599(f) is not available in the state clemency context to investigate issues already considered in prior judicial proceedings, even when denying funding forecloses the petitioner from ever meaningfully presenting—in any forum—his position on a substantial question.

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PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

The court of appeals' opinion affirming the denial of funding (App. 1a-22a) is published at 832 F.3d 547. The district court's opinion denying petitioner's request for funding (App. 23a-24a) is unreported.

JURISDICTION

The court of appeals entered judgment on August 10, 2016, and denied a timely rehearing petition on October 19, 2016. App. 25a-26a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The text of 18 U.S.C. § 3599 is reproduced in the Appendix. App. 27a-30a.

STATEMENT

All available evidence indicates that Christopher Wilkins received constitutionally ineffective assistance of counsel at his 2008 Texas capital murder trial. Trial counsel's fact investigator and mitigation specialist appear to have stopped work shortly after being retained, having done little to no preparation for trial, but trial counsel waited until shortly before jury selection before hiring replacements. At sentencing, trial counsel called an expert to testify—erroneously and prejudicially—that if sentenced to life in prison, Wilkins might be permitted to work or live outside the prison in as little as ten years. And when a psychologist whom trial counsel had hired to evaluate Wilkins's mental functioning determined that Wilkins was exposed to LSD as a child, has other risk factors for brain damage, and suffers from several cognitive deficits, trial counsel ignored her recommendations to conduct further examinations and did nothing to develop or present any mental-health evidence. Trial counsel later withdrew after it came to light that he had failed to notify the court of a potential conflict of interest.

Despite these red flags, Wilkins has never had a meaningful opportunity to develop and present an inef-

fective-assistance claim. His appellate counsel did not investigate or present any such claim, because Texas law and practice precluded him from doing so. *See Trevino* v. *Thaler*, 133 S. Ct. 1911, 1918-1921 (2013). And state habeas counsel—acting in disregard of his statutory and professional obligations and contrary to Wilkins's instructions—failed to investigate and refused to raise any such claim. Wilkins later learned that his state habeas counsel, before filing Wilkins's habeas application, had accepted a job with the prosecuting District Attorney's office.

In federal habeas proceedings, Wilkins was again prevented from developing his ineffective-assistance claims. Although federal law makes funding available to capital habeas petitioners for "reasonably necessary" investigative and expert services, 18 U.S.C. § 3599(f), Fifth Circuit precedent precludes funding unless a petitioner demonstrates a "substantial need," and further holds that no substantial need can be shown when a claim is procedurally barred. *Riley* v. *Dretke*, 362 F.3d 302, 307 (5th Cir. 2004). Based on an unfunded, preliminary review of case files and billing records, Wilkins's pro bono federal habeas counsel explained how an appropriate investigation would likely demonstrate not only the merits of the claims, but also cause excusing the default under *Martinez* v. *Ryan*, 132 S. Ct. 1309 (2012). But the district court denied funding, and the Fifth Circuit affirmed, on the ground that Wilkins had not *already* produced evidence sufficient to overcome the default and establish a "significant chance for success"—*i.e.*, the very evidence he needed funding to obtain. *Wilkins* v. *Stephens*, 560 F. App'x 299, 302, 315 (5th Cir. 2014). This Court denied review. *Wilkins* v. *Stephens*, 135 S. Ct. 1397 (2015).

Wilkins thereafter sought to prepare a petition for state clemency and to include his trial counsel's ineffectiveness as a basis for relief. Wilkins accordingly moved in the federal habeas proceeding for funding under § 3599 to develop evidence showing that his trial and sentencing were prejudiced by counsel's deficient performance. But the courts again denied funding under the Fifth Circuit's "substantial need" standard, holding that funding was not "reasonably necessary" because Wilkins's similar requests had previously been denied—even though the previous denials rested in part on procedural bars that do not apply in the clemency context. As a result, the State stands ready to execute Wilkins in January 2017, even though there are strong indications that he received constitutionally ineffective assistance of counsel, and even though he has never had a meaningful opportunity at any stage to develop that claim, to have any court address it on the merits, or even to have it considered as part of a petition for executive clemency—the "'fail safe' [of] our criminal justice system." *Harbison* v. *Bell*, 556 U.S. 180, 192 (2009).

Since Wilkins's case was last before this Court, courts have expressly acknowledged a circuit split concerning the standard for determining when services are "reasonably necessary" under § 3599, with the Sixth Circuit criticizing the Fifth Circuit's "substantial need" test as an inappropriately onerous burden and adopting instead the Fourth Circuit's more lenient standard. Moreover, that split arises precisely in the context of state clemency proceedings.

Had Wilkins's case arisen in the Sixth Circuit or any of the other circuits that do not apply the "substantial need" test, he would almost certainly have had an opportunity to conduct a proper investigation in sup-

port of his clemency petition. This Court should grant the petition to resolve the circuit split and to prevent the significant unfairness that will result if Wilkins is denied a meaningful opportunity to develop and present his potentially legitimate ineffective-assistance claims.

A. Trial, Sentencing, And Direct Appeal

Wilkins was arrested for the October 2005 murders of Mike Silva and Willie Freeman in Fort Worth, Texas. The prosecution's evidence indicated that Wilkins decided to kill Freeman after Freeman tricked Wilkins into paying $20 for gravel that Freeman passed off as cocaine. *Wilkins*, 560 F. App'x at 301. Wilkins told Freeman he had a stash of guns and drugs across town, and Silva agreed to drive the two men to retrieve them. *Id.* During that trip, Wilkins shot Freeman in the back of the head and shot Silva three times as he tried to escape. *Id.*

Wilkins was arrested about a week later and made statements to Detective Cheryl Johnson confessing to several murders and suggesting that he might plead guilty. 28 RR 136-149, 164-169, 180-182.[1]

In December 2005, the trial court appointed Wessley Ball to represent Wilkins, assisted by Warren St. John. Wilkins was tried in early 2008. Ball presented no evidence or witnesses at the guilt phase. His sole defense theory, pursued through cross-examination of Detective Johnson, was that Wilkins tended to make false confessions. 26 RR 36-41; 29 RR 140-145. The jury convicted Wilkins of capital murder. *Wilkins* v. *Thaler*, 2013 WL 335998, at *1 (N.D. Tex. Jan. 29, 2013).

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[1] The trial transcript ("Reporter's Record") is cited as "RR" by volume and page.

At sentencing, the prosecution called 24 witnesses to describe prior crimes and acts of violence committed by Wilkins. 30 RR 10 through 33 RR 96. These included the shooting of Ball's former client, Gilbert Vallejo. The prosecution also called a sheriff's deputy to testify about Wilkins's striking tattoos, which the deputy claimed were insignia of the "Confederate Hammerskin" gang. 34 RR 50-81. And the prosecution called three corrections officers to testify about Wilkins's behavior in jail, including an incident in which he obtained and swallowed a handcuff key. *Id.* at 83-163.

In defense, Ball called five of Wilkins's immediate family members, who testified that Wilkins had a fairly stable childhood, despite a mostly absentee father, but that he had been influenced by "drugs and the wrong people." 33 RR 176; *see id.* at 98-188. Five corrections officers also indicated, in less than an hour of testimony, that Wilkins was generally compliant. 34 RR 163-200. Ball's only expert witness was a former prison warden—whom Ball had hired the day before trial, 26 RR 10-13—to testify about the conditions in which Wilkins would be confined if sentenced to life in prison. 35 RR 92-144. She testified—erroneously, and to Wilkins's considerable detriment—that Wilkins could achieve a less restrictive security status, potentially allowing him to work or live outside the main prison buildings, after only ten years. *Id.* at 103-108; *cf.* Petition Ex. 38, at 237; Petition Ex. 39, at 245-246.[2]

Wilkins also testified. 35 RR 10-91. He admitted to shooting Freeman and Silva and took responsibility for his actions. *Id.* at 13, 26-27. Wilkins also admitted to

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[2] Exhibits to Wilkins's Petition for Habeas Corpus, Dkt. 30, No. 12-cv-270 (N.D. Tex. May 22, 2012) ("Petition") are cited as "Petition Ex."

Vallejo's murder and admitted that he had confessed falsely to other crimes. *Id.* at 28-36. Wilkins explained that he "th[ought] subconsciously [he'd] been trying to kill [him]self or get [him]self killed" since his relationship with the mother of his three children ended. *Id.* at 59. When asked if it was his idea to plead not guilty, Wilkins replied, "No, absolutely not." *Id.* at 16; *see also id.* at 14-15. But, Wilkins asserted, his lawyers "didn't want [him] to" plead guilty and "convinced" him to go to trial. *Id.* at 16. Wilkins concluded: "[A]t this point, really, it doesn't matter what I want. … [I]t's no big deal, no big deal. Just do whatever you do." *Id.* at 61.

The jury's sentencing verdict found that Wilkins "would commit criminal acts of violence that would constitute a continuing threat to society" and that there were not sufficient mitigating circumstances to warrant a sentence of life imprisonment without parole rather than death. *Wilkins*, 2013 WL 335998, at *2. The court imposed the death sentence. *Id.*

The trial court then appointed Ball as Wilkins's appellate counsel. 2013 WL 335998, at *2. Wilkins learned, however, that Ball's previous representation of Vallejo presented a potential conflict of interest—a point Ball had never explained to Wilkins or disclosed to the trial court. MSO Ex. K at 6-16.[3] After a hearing, the court found no conflict, but accepted Ball's offer to withdraw and substituted David Richards as appellate counsel. *Id.* at 22-24, 27-28.

Consistent with Texas law and practice, *see Trevino*, 133 S. Ct. at 1918-1920, Richards raised no ineffective-assistance claims, limiting the appeal to record-

[3] Exhibits to Wilkins's Motion for Scheduling Order, Dkt. 10, No. 12-cv-270 (N.D. Tex. May 1, 2012) ("MSO") are cited as "MSO Ex."

based issues and constitutional challenges to Texas's death-penalty scheme. *Wilkins* v. *State*, 2010 WL 4117677 (Tex. Crim. App. Oct. 20, 2010). The Court of Criminal Appeals affirmed Wilkins's conviction and sentence. *Id.* Richards submitted a petition for certiorari to this Court, but failed to attach the required *in forma pauperis* affidavit, and his petition was never docketed. *See* Petition Ex. 1. Wilkins separately filed a pro se petition for certiorari attempting to raise claims of ineffective assistance of counsel, MSO Ex. XX, which this Court denied. *Wilkins* v. *Texas*, 131 S. Ct. 2901 (2011).

B. State Habeas Proceedings

Pursuant to Texas law, Wilkins's state habeas application proceeded simultaneously with his direct appeal. *See* Tex. Code Crim. Proc. art. 11.071 § 4; 43B Dix & Schmolesky, *Texas Practice* § 58.64 (3d ed. 2011). The trial court appointed Jack Strickland as Wilkins's state habeas counsel. *Wilkins*, 2013 WL 335998, at *2.

Strickland was obligated by Texas law 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 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, 976-977 (2006). And Wilkins repeatedly asked Strickland to pursue claims that he had been denied the effective assistance of counsel. *See*, *e.g.*, MSO Ex. I. But Strickland did no such thing. He waited a year before hiring an investigator and did not even collect the appellate record until nearly six months after it became available. MSO Ex. E at 126; MSO Ex. F at 130. And although Strickland had secured funding

for a mitigation specialist and a psychologist, he never retained anyone to fill those roles. MSO Ex. H at 167. Strickland's investigator did not interview any witnesses until ten days before Strickland filed the habeas application. MSO Ex. G at 154-156. Each claim in the application either rested on the trial record or challenged Texas's death-penalty system and procedures. MSO Ex. A. None reflected any extra-record investigation, and none raised any ineffective-assistance issue. *Id.*

In late 2010, while his habeas application was pending, Wilkins learned that Strickland had accepted a job with the District Attorney's office that had prosecuted Wilkins. Strickland had previously worked there, and it was announced publicly in May 2010—*before* Strickland filed Wilkins's habeas application—that Strickland would be returning. MSO Ex. N. Yet Strickland never told Wilkins he had accepted employment with Wilkins's adversary, and he did not withdraw from Wilkins's case until February 2011—after he returned to the District Attorney's office, and after habeas relief had been denied. MSO Ex. O. When Wilkins learned of the conflict, he tried to raise the issue in the Court of Criminal Appeals, MSO Ex. UU at 538, but received no response.

In February 2011, on the trial court's recommendation, the Court of Criminal Appeals denied Wilkins's habeas application. *Ex Parte Wilkins*, 2011 WL 334213 (Tex. Crim. App. Feb. 2, 2011).

C. Federal Habeas Proceedings

Because Strickland had returned to the District Attorney's office, a new attorney, John Stickels, moved for appointment as Wilkins's federal habeas counsel

under 18 U.S.C. § 3599(a)(2). *See* Mot. for Appointment, Dkt. 2, No. 11-cv-72 (N.D. Tex. Feb. 8, 2011).

Before ruling on the motion, District Judge McBryde informed Wilkins and Stickels that Stickels's appointment would be conditioned on Wilkins's filing his habeas petition within 45 days. Transcript, Dkt. 12, No. 11-cv-72 (N.D. Tex. Apr. 17, 2012). At that point, this Court had not yet denied certiorari on direct review of Wilkins's conviction and sentence, so the one-year period under 28 U.S.C. § 2244(d) for filing a federal habeas petition had not yet begun to run. Forced to choose between his statutory right to appointed counsel and his statutory right to a one-year period to prepare his claims, Wilkins opted for more time. *Id.* at 5. Stickels acquiesced to the court's 45-day rule (*id.* at 5-6), withdrew his motion (Order on Mot. for Misc. Relief, Dkt. 10, No. 11-cv-72 (N.D. Tex. Mar. 8, 2011)), and took no further action on Wilkins's behalf.

Without counsel, progress on Wilkins's case halted for a year. Finally, in March 2012—ten weeks before Wilkins's federal habeas petition was due—Wilkins obtained pro bono counsel. Using her own resources, Wilkins's new attorney, Hilary Sheard, tried to investigate potential claims, including ineffective assistance of trial counsel.

Based largely on her review of case files and billing records submitted by Wilkins's state-court attorneys, Sheard discovered that the feeble mitigation case Ball had presented at sentencing reflected an investigation that was abandoned soon after it began and resumed only on the eve of trial. Ball waited three months after

his appointment to hire an investigator. 1 CR 14-16.[4] That investigator apparently did no work on the case, but Ball did not replace him until two days before jury selection. *Id.* at 212-214. Similarly, although Ball had hired a mitigation specialist in 2006, Ball let that investigation languish and did not even learn until shortly before trial that the mitigation specialist had been ill and "unable to work going on almost a year." Petition Exs. 5-6.

To the extent Ball's limited investigation revealed any leads, Sheard learned, he failed to pursue or present them. For example, Dr. Kelly Goodness, a psychologist hired to evaluate Wilkins's mental functioning, determined that Wilkins had been exposed to LSD as a child and suffered from "a number of cognitive deficits indicative of some form of brain pathology." Petition Ex. 28, at 178. Dr. Goodness also reviewed a 1983 psychological assessment indicating that Wilkins had abused drugs since the age of eight and that he had sustained several head injuries and other factors conducive to brain damage. Petition Ex. 26, at 165-171; Petition Ex. 27, at 174-175; Petition Ex. 28, at 178-179. Dr. Goodness accordingly recommended a full neuropsychological investigation, explaining that, "[t]he question is not whether or not Wilkins has some neuropsychological deficits—he does." Petition Ex. 28, at 178. Ball never followed up on Dr. Goodness's recommendation and presented no mental-health evidence to the jury.

Apart from mitigation, Sheard also learned that Ball permitted his prison-classification expert to testify, prejudicially, that Wilkins could achieve a relatively low level of security ten years into a life sentence when

[4] The "Clerk's Record" of trial-court docket entries are cited as "CR" by volume and page.

in fact he could not. *Supra* p. 6. And Ball failed to prepare to address Wilkins's striking tattoos, even though they had attracted negative media attention after Wilkins's arrest. Petition Ex. 17. Ball could have sought an expert to explain prisoners' propensity to acquire tattoos. Instead, Ball waited until the end of the sentencing phase to seek a continuance to obtain the services of a "symbologist" to "interpret[]" the tattoos. 34 RR 47-49. The continuance was denied. *Id.* at 49.

On May 1, 2012, Sheard entered a notice of appearance and moved on Wilkins's behalf for a scheduling order that would allow for filing and amendment of the federal habeas petition after proper development of the claims. MSO at 3-42. Sheard also moved for leave to file an ex parte request for investigative funds under § 3599(f). *Id.* at 42-56. Supported by three volumes of exhibits, the motion recounted the numerous red flags Sheard had uncovered concerning Ball's deficient performance and Strickland's refusal to investigate or raise any ineffective-assistance claims. Sheard acknowledged that the ineffective-assistance-of-trial-counsel claims were procedurally barred because Strickland had failed to raise them in the state habeas proceeding. Citing this Court's decision in *Martinez*, 132 S. Ct. at 1315-1320, however, Sheard argued that Wilkins could likely overcome the procedural default if given the time and resources he needed to demonstrate the inadequacy of his trial and state habeas counsel and resulting prejudice. MSO at 34-42.

The next day, the district court entered a scheduling order that ignored Sheard's motion and ordered Sheard to include in Wilkins's habeas petition only those claims that had been exhausted in state court. Order on Mot. for Misc. Relief, Dkt. 14, No. 12-cv-270 (N.D. Tex. May 2, 2012).

On May 25, 2012, the district court denied leave to submit the funding request ex parte, and Sheard filed an unsealed application stating Wilkins's specific need for funds. *See* Application, Dkt. 34, No. 12-cv-270 (N.D. Tex. May 25, 2012). Sheard set out a plan for conducting the investigation that Strickland had failed to do, *id.* at 4-18, and requested funding for an investigator and a mitigation specialist, *id.* at 9, 13, as well as a neuropsychological evaluation and an expert in prison classification who could explain the inaccuracies in the testimony Ball elicited at sentencing, *id.* at 14-15, 17-18.

On June 19, 2012, the court denied Wilkins's request for investigative and expert funds in its entirety. Order, Dkt. 42, No. 12-cv-270 (N.D. Tex. June 19, 2012). The court stated it was "unable to find that the requested investigative, expert, and other services" were "reasonably necessary," as required under § 3599(f). *Id.*

On May 22, 2012, while the request for funding remained pending, Sheard filed Wilkins's habeas petition. In it, Sheard presented the ineffective-assistance claims as best she could given the lack of funding to develop the necessary extra-record evidence. Among other things, the petition addressed Ball's minimal mitigation investigation, his failure to obtain the neuropsychological evaluation recommended by Dr. Goodness, and his introduction of erroneous testimony. *See* Petition 24-92.[5]

Sheard again acknowledged that Wilkins's ineffective-assistance claims had been defaulted. But she argued that *Martinez* potentially applied to excuse the

[5] Sheard also challenged Ball's potential conflict of interest, his insistence that Wilkins plead not guilty, and his failure to question Wilkins's competence to stand trial. Petition 92-101, 105-127.

default because Strickland had labored under a conflict of interest and categorically refused to raise and failed to investigate any ineffective-assistance claims. Petition at 3-15. Sheard accordingly renewed the requests for funding and an opportunity to demonstrate cause and prejudice and to develop through full investigation and an evidentiary hearing the claims Strickland had ignored. *Id.* at 191-193.[6]

On January 29, 2013, without holding an evidentiary hearing, the district court denied relief. *Wilkins*, 2013 WL 335998. The court first reaffirmed its earlier ruling denying funds, holding that Wilkins was not entitled to any funding because he "failed to provide in his motion for additional funds any meaningful specificity as to the precise information he would expect to develop." *Id.* at *5.

The court then rejected Wilkins's ineffective-assistance claims as procedurally defaulted under then-current circuit precedent, and held in the alternative that even if Wilkins could establish cause and prejudice, Wilkins's ineffective-assistance claims were "meritless." 2013 WL 335998, at *10-16. The court held that a petitioner alleging an unreasonable failure to investigate must show "'with specificity what the investigation would have revealed and how it would have altered the outcome of the trial.'" *Id.* at *11 (quoting *United States* v. *Green*, 882 F.2d 999, 1003 (5th Cir. 1989)). Wilkins, however, had "failed to provide any evidence as to what his trial counsel would have discovered by further investigation"—*i.e.*, the very evidence his re-

[6] On November 7, 2012, Sheard moved to stay adjudication of Wilkins's petition pending this Court's decision in *Trevino*. The district court denied the stay. Order on Mot. to Stay, Dkt. 59, No. 12-cv-270 (N.D. Tex. Nov. 30, 2012).

quest for funding was designed to produce. *Id.* at *12; *see also, e.g.*, *id.* at *15 ("[Wilkins] fails to provide any evidence as to what his trial counsel should have discovered").

On March 25, 2014, the U.S. Court of Appeals for the Fifth Circuit denied a certificate of appealability. *Wilkins*, 560 F. App'x at 301. Although the court "assum[ed] *arguendo*" that Strickland "was deficient for failing to bring the [ineffective-assistance] claims during state habeas proceedings," *id.* at 314, the court held that Wilkins had "failed to state any substantial [ineffective-assistance] claims," *id.* at 306.

Like the district court—and despite the evidence Sheard had submitted below—the Fifth Circuit characterized Wilkins's allegations as "conclusory," faulting him for failing to present the extra-record evidence of deficiency and prejudice he had never had the opportunity to obtain. 560 F. App'x at 307-308, 314-315; *see also, e.g.*, *id.* at 311 ("[n]o evidence was presented" to show reasonable probability of different result); *id.* at 312 ("Wilkins offered no support to the district court that his actions are the result of brain damage and mental health problems or that he was unable to consult with counsel or understand the proceedings."); *id.* ("Based on the lack of probative evidence …, we cannot say that reasonable jurists would find the district court's decision debatable or wrong.").

The court acknowledged Sheard's argument that "the impact of Ball's unreasonable pretrial mitigation investigation can only be known 'if the federal habeas courts provide the means to investigate and present the case that should have been developed prior to trial.'" 560 F. App'x at 307-308. But the court nonetheless also upheld the denial of funds. *Id.* at 315. Under

circuit precedent, the court stated, the "reasonably necessary" standard of § 3599(f) required Wilkins to demonstrate a "'substantial need'" for the requested assistance. *Id.* That standard, the court asserted, could not be met when, among other things, a petitioner "fail[s] to supplement his funding request with a viable constitutional claim that is not procedurally barred" or "when the sought after assistance would only support a meritless claim." *Id.* (internal quotation marks omitted). Because "Wilkins offered little to no evidence that the investigative avenues counsel proposed to take hold any significant chance for success," Wilkins was "not entitled to investigative funds." *Id.*

Wilkins sought this Court's review, arguing that the Fifth Circuit's approach to § 3599 conflicts with this Court's interpretation of that statute in *McFarland* v. *Scott*, 512 U.S. 849 (1994), and flouted this Court's decisions in *Martinez* and *Trevino*, which contemplate that a death-sentenced prisoner with a potentially meritorious ineffective-assistance claim should have a meaningful opportunity to develop and present that claim and have it considered on the merits. In opposition, the State asserted that the Fifth Circuit's "application of [§ 3599(f)] was consistent with other circuits," Opp. 17, *Wilkins* v. *Stephens*, No. 14-276 (U.S. Jan. 16, 2015), and doubled down on the Fifth Circuit's view that "[u]nless [a] petitioner satisfies *Martinez*'s requirements to excuse his procedural default"—*i.e.*, unless the petitioner can already present sufficient evidence to support a substantial ineffective-assistance claim—then the petitioner is not entitled to funding under § 3599(f) to develop and establish that claim, *id.* at 21. On February 23, 2015, this Court denied review. *Wilkins* v. *Stephens*, 135 S. Ct. 1397 (2015).

D. Denial Of § 3599(f) Funding To Support State Clemency

On July 6, 2015, the Texas trial court set an execution date of October 28, 2015.[7] Sheard, who had been appointed as Wilkins's counsel by the Fifth Circuit, promptly filed a renewed motion on Wilkins's behalf for investigative and expert assistance under § 3599(f). The motion sought funding to establish the merits of the ineffective-assistance claim, among other claims, in support of a state petition for executive clemency, as well as a successive state habeas application or petition for further federal review under Rule 60(b). Mot. for Misc. Relief, Dkt. 82, No. 12-cv-270 (N.D. Tex. Sept. 9, 2015).

The district court denied the motion "essentially for th[e] reasons given by respondent." App. 25a. As respondent's opposition had argued, "the Fifth Circuit has construed 'reasonably necessary' to mean that a 'substantial need' for the requested services must be demonstrated." Opp. 3, Dkt. 88, No. 12-cv-270 (N.D. Tex. Sept. 17, 2015). And under that standard, "Wilkins [wa]s not entitled to funding for expert assistance because his allegations ha[d] already been determined to lack merit" in his federal habeas proceeding, and because the court had previously denied a similar request for funding. *Id.* at 5-6, 9-11. The requested funding was thus not "reasonably necessary" under § 3599(f). *Id.* at 9.

The Fifth Circuit affirmed the denial of funding. App. 1a-22a. In large part, the court relied on the fact that Wilkins had sought funding for similar purposes during his federal habeas proceedings, and that those requests had been denied. For example, the court

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[7] The trial court later withdrew the October 2015 execution date.

agreed with the district court that "expert funding to hire a neuropsychologist" was "not reasonably necessary for Wilkins's clemency petition," because it had been previously determined that the funding was "not reasonably necessary for his federal habeas petition." *Id.* 13a-14a (internal quotation marks omitted). Similarly, the court rejected Wilkins's request for funding for an expert who could establish the prejudice arising from trial counsel's introduction of erroneous testimony about prison security conditions because the district court had previously found that such evidence "was not reasonably necessary" for purposes of his federal habeas petition. *Id.* 14a-15a (internal quotation marks omitted).

On September 21, 2016, the Texas trial court rescheduled Wilkins's execution for January 11, 2017. On October 19, 2016, the Fifth Circuit denied Wilkins's petition for panel rehearing or rehearing en banc. App. 25a-26a. The court denied Wilkins's motion for a stay of the mandate and for a stay of execution. Order Denying Mot. to Stay Issuance of the Mandate & Denying Mot. to Stay Execution, Nov. 2, 2016. Over the course of these events, the prior execution date had been withdrawn.

REASONS FOR GRANTING THE PETITION

The courts of appeals are divided on the standard for determining whether investigative or expert services are "reasonably necessary" under 18 U.S.C. § 3599(f). The Fifth Circuit holds that services are not reasonably necessary, and a defendant is not entitled to funding, unless the defendant demonstrates a "substantial need" by showing the ultimate merit of the claim he seeks funding to develop. The Ninth and Eleventh Circuits have applied similar approaches. In contrast, the Fourth and Sixth Circuits require only that the defend-

ant's position on a substantial question would benefit from investigative or expert services. The Eighth Circuit follows a similar test. Reflecting these disparate approaches, the courts have divided on the specific question whether funding is available under § 3599(f) to support a state clemency petition when the issues to be investigated were already considered in prior judicial proceedings. These conflicts—which had not been expressly acknowledged when Wilkins previously sought this Court's review—create intolerable discord in the proper application of § 3599. Because this case presents an optimal vehicle for resolving both conflicts, the petition for a writ of certiorari should be granted.

I. AN EXPRESS CIRCUIT CONFLICT HAS EMERGED AS TO THE PROPER APPLICATION OF § 3599(f)

A. Courts Are Divided On The Test For Evaluating Whether Services Are "Reasonably Necessary"

Section 3599 grants capital defendants and habeas petitioners "enhanced rights of representation, in light of what it calls 'the seriousness of the possible penalty and … the unique and complex nature of the litigation.'" *Martel* v. *Clair*, 132 S. Ct. 1276, 1284-1285 (2012) (quoting 18 U.S.C. § 3599(d)). The statute "'reflect[s] a determination that quality legal representation is necessary' in all capital proceedings to foster 'fundamental fairness in the imposition of the death penalty.'" *Id.* at 1285 (quoting *McFarland* v. *Scott*, 512 U.S. 849, 855, 859 (1994)).[8] In accordance with that determination,

[8] *McFarland* interpreted 21 U.S.C. § 848(q)(4)(B). In 2006, Congress transferred this provision and its neighbors to § 3599. *Rosenfield* v. *Wilkins*, 280 F. App'x 275, 277 (4th Cir. 2008) (citing USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 222, 120 Stat. 192, 231-232 (2006)). The sub-

§ 3599(a)(2) provides that any indigent federal habeas petitioner under sentence of death "shall be entitled" to the appointment of adequate counsel. Section 3599(e) further requires that, unless replaced by similarly qualified counsel, the appointed attorney must continue to represent the petitioner "throughout every subsequent stage of available judicial proceedings" and "in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant." That requirement extends to representation in state clemency proceedings, a "'fail safe' in our criminal justice system." *Harbison* v. *Bell*, 556 U.S. 180, 192 (2009).

As this Court emphasized in *McFarland*, "the right to counsel necessarily includes the right for that counsel meaningfully to research and present" a petitioner's claims. 512 U.S. at 858. Section 3599(f) accordingly 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.

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stance of the statute was last modified in 1996, after *McFarland*, to allow courts discretion whether to grant funding for services that have been found "reasonably necessary." *See Smith* v. *Dretke*, 422 F.3d 269, 289 (5th Cir. 2005) (citing AEDPA § 108, Pub. L. No. 104-132, 110 Stat. 1214, 1226 (1996)). In this case, however, the courts denied funds not in the exercise of any discretion, but based on their conclusion that the requested services were "not reasonably necessary" and that Wilkins was therefore not legally "entitled" to funding. App. 15a; *see also supra* pp. 17-18.

See also id. § 3599(a)(2) (indigent capital defendant "shall be entitled to" the furnishing of "investigative, expert, or other reasonably necessary services"). As this Court has explained, the purpose of that funding is to assist the prisoner in "research[ing] and identif[ying]" his "possible claims and their factual bases." *McFarland*, 512 U.S. at 855.

The courts of appeals take conflicting approaches to determining whether services are "reasonably necessary" under § 3599(f). The Fifth Circuit interprets "reasonabl[e] necess[ity]" in an exacting manner that contravenes the statute's purposes. The Eleventh Circuit has adopted the Fifth Circuit's test, and the Ninth Circuit takes a similar approach. In contrast, the Fourth, Sixth, and Eighth Circuits have embraced less stringent readings under which Wilkins would almost certainly have been entitled to funding.

The Fifth Circuit's interpretation of "reasonabl[e] necess[ity]" is demanding: An indigent defendant "must demonstrate 'a substantial need' for the requested assistance." *Riley* v. *Dretke*, 362 F.3d 302, 307 (5th Cir. 2004). Under that standard, the Fifth Circuit consistently requires defendants to show a considerable upfront chance of success before the court will find services to be "reasonably necessary." *See, e.g.*, *Ayestas* v. *Stephens*, 826 F.3d 214, 215 (5th Cir. 2016) (denying funding for ineffective-assistance-of-trial-counsel claim—while acknowledging potential deficient performance in trial counsel's failure to hire psychologist—because defendant "did not show prejudice, that is, a 'substantial, not just conceivable, likelihood of a different result'"), *petition for cert. filed*, *Ayestas* v. *Davis*, No. 16-6795 (U.S. Nov. 7, 2016); *see also Ward* v. *Stephens*, 777 F.3d 250, 266 (5th Cir. 2015) (affirming denial of funds under "substantial need" test where peti-

tioner could not already demonstrate the claim's merit); *Crutsinger* v. *Stephens*, 576 F. App'x 422, 431 (5th Cir. Aug. 4, 2014) (affirming denial of funding; "a prisoner cannot show a substantial need for funds when his claim is procedurally barred" and the prisoner cannot already demonstrate the merit of the underlying claim), *cert. denied*, 135 S. Ct. 1401 (2015); *Wilkins*, 560 F. App'x at 315 (affirming denial of funding where petitioner "offered little to no evidence that the investigative avenues counsel proposed to take hold any significant chance for success"); *Sells* v. *Stephens*, 536 F. App'x 483, 499 (5th Cir. 2013) (affirming denial of funding under "substantial need" test where ineffective-assistance claim was procedurally barred and petitioner failed to adduce sufficient evidence to establish cause and prejudice); *cf. Patrick* v. *Cockrell*, 2002 WL 494264, at *3-4 (5th Cir. Mar. 13, 2002) (affirming denial of funding to investigate abuse and mental illness where "counsel may not have provided [adequate] assistance," but petitioner "ha[d] not uncovered significant potentially mitigating evidence … by conducting the type of investigation" trial counsel should have conducted).[9] This standard confronts the defendant with "something of a 'catch 22'": "[H]aving to demonstrate that there is some relevant evidence he could discover without first having the funding to pursue that evidence." Order, Dkt. 56 at

[9] *See also, e.g.*, *Mamou* v. *Stephens*, 2014 WL 4274088, at *1-5 (S.D. Tex. Aug. 28, 2014) (denying funding where petitioner could not already overcome procedural bar); Order 4-7, Dkt. 24, *Thompson* v. *Stephens*, No. 13-cv-1900 (S.D. Tex. May 2, 2014) (denying funding to investigative ineffective-assistance claim where petitioner could not yet "describe[] in detail" the information that "did not come before the jury"); Order 2, Dkt. 5, *Allen* v. *Stephens*, No. 11-cv-1676 (S.D. Tex. June 3, 2011) (denying funds where petitioner "ha[d] not yet shown" that he could overcome procedural default).

4, *Tong* v. *Stephens*, No. 10-cv-2355 (S.D. Tex. Sept. 22, 2014).

Wilkins's case is illustrative. In the ten weeks that Wilkins's pro bono federal habeas counsel had to investigate the case, she uncovered several red flags indicating that trial counsel's performance was constitutionally deficient, including an anemic mitigation investigation and an utter failure to pursue important leads, including Dr. Goodness's recommendation that a neuropsychological examination was necessary to ascertain the effects of Wilkins's obvious cognitive deficits. She also discovered that Wilkins's state habeas attorney had flatly refused to comply with Wilkins's instructions to raise or investigate an ineffective-assistance-of-trial-counsel claim. *Supra* pp. 8-9. It is no wonder that, under these conditions, Wilkins could not prove "that the investigative avenues … proposed" had a "significant chance for success." *Wilkins*, 560 F. App'x at 315. Wilkins needed funding to establish the claim's merit, yet the lower courts denied him funding in his federal habeas proceedings for failure to meet the Fifth Circuit's "substantial need" standard, and then treated that holding as dispositive of his request for funding to support his state clemency petition. *Supra* pp. 17-18.

The Eleventh Circuit has indicated agreement with the Fifth Circuit's approach. *See Gary* v. *Warden*, 686 F.3d 1261, 1268 (11th Cir. 2012); *see also id.* at 1281 (Wilson, J., dissenting) (by "elevating the standard from 'reasonable' [necessity] to 'substantial' [necessity]," majority improperly "implies that the movant must carry a heavier burden than that contemplated by the statute").

And although the Ninth Circuit has not adopted the "substantial need" formulation, its precedent requires a

strict burden of proof closely aligned with the approach of the Fifth and Eleventh Circuits: The defendant must "(1) establish[] that reasonably competent retained counsel would have required the requested services for a habeas petitioner who could pay for them, and (2) demonstrate[] by clear and convincing evidence that the defense was prejudiced by the lack of further investigation." *Bonin* v. *Calderon*, 59 F.3d 815, 837 (9th Cir. 1995). By requiring clear and convincing evidence of prejudice, the Ninth Circuit requires defendants to show a significant upfront chance of success on their underlying claim before funds will be granted. *See, e.g.*, *United States* v. *Brooks*, 62 F.3d 1425, at *2 (9th Cir. 1995) (denying funds on the ground that defendant had to show requested "expert testimony … would likely have affected the outcome of his trial"); *Mason* v. *Arizona*, 504 F.2d 1345, 1353 (9th Cir. 1974) (denying funds because defendant "ha[d] not shown, by clear and convincing evidence, that he was substantially prejudiced at the state trial by the denial of investigative assistance").[10]

In contrast, the Fourth and the Sixth Circuits have held that services are "reasonably necessary" under § 3599(f), and funding is therefore available, when "a substantial question exists over an issue requiring expert testimony for its resolution and … the defendant's position cannot be fully developed without professional assistance.'" *Matthews* v. *White*, 807 F.3d 756, 760 (6th Cir. 2015) (quoting *Wright* v. *Angelone*, 151 F.3d 151, 163 (4th Cir. 1998)).

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[10] The Seventh Circuit has adopted yet a different standard, requiring a defendant to "make a preliminary showing" to establish that a service is reasonably necessary. *Burris* v. *Parke*, 116 F.3d 256, 259 (7th Cir. 1997).

In *Matthews*, the Sixth Circuit explained that its "substantial question" standard "is not the same as the requirement apparently adopted by the Fifth and Eleventh Circuits that a § 3599 movant 'demonstrate a substantial need' for the expert services." *Matthews*, 807 F.3d at 760 n.2. The court noted that "[n]either Circuit has explained why this heightened standard is appropriate," and criticized the heightened standard as inconsistent with § 3599:

> The statute requires a showing that expert assistance is 'reasonably necessary,' so a rule that requires a showing of 'substantial' necessity inappropriately 'implies that the movant must carry a heavier burden than that contemplated by the statute.'"

Id. (citation omitted). The Sixth Circuit further explained that "testimony [or other relief under § 3599(f)] could be 'reasonably' necessary without being 'substantially' necessary." *Id.* The "substantial question" standard requires the defendant to show only that the requested services are "'[f]air, proper, or moderate under the circumstances; sensible,'" whereas the "substantial need" approach demands a showing that the services are "'[i]mportant, essential, and material.'" *Id.*

Had his case arisen in the Fourth or Sixth Circuits, Wilkins would almost certainly have been entitled to funds under the "substantial question" standard. Although he could not already show that his trial and sentencing were prejudiced by trial counsel's deficient performance—*i.e.*, he had not already conducted the full mitigation investigation that trial counsel should have conducted—at a minimum, he presented a substantial question on the issue of prejudice, and his position

could not be fully developed without professional assistance. *Matthews*, 817 F.3d at 760.

The Eighth Circuit follows a "reasonable probability" standard that is similar to the "substantial question" requirement applied by the Fourth and Sixth Circuits: The defendant must "demonstrate[] a reasonable probability that the requested expert would aid in his defense and that denial of the funding would result in an unfair trial." *United States* v. *Thurmon*, 413 F.3d 752, 755 (8th Cir. 2005) (standard for funding under 18 U.S.C. § 3006A(e)(1)); *see also Nelson* v. *United States*, 297 F. App'x 563, 567 (8th Cir. 2008) (*Thurmon* establishes the "burden of proof" for funding under § 3599(f)). Under this standard, "while a trial court need not authorize an expenditure … for a mere fishing expedition, it should not withhold its authority when underlying facts reasonably suggest that further exploration may prove beneficial to the accused in the development of a defense to the charge." *Thurmon*, 413 F.3d at 756 (internal quotation marks and alteration omitted); *see also United States* v. *Sanchez*, 912 F.2d 18, 21-22 (2d Cir. 1990) (following the Eighth Circuit's "reasonable probability" approach in applying § 3006A(e)(1) and holding that funding should not be withheld "when underlying facts reasonably suggest that further exploration may prove beneficial to the accused in the development of a defense to the charge").

This "reasonable probability" approach conflicts with the Fifth and Eleventh's Circuit's requirement that the defendant must show "substantial need" for the requested services. For example, applying the "reasonable probability" rule, the Eighth Circuit has allowed funding for investigation into a possible insanity defense even though the record already reflected "medical records of … hospitalizations and treatment in

a … mental hospital" and prior competency findings. *United States* v. *Schultz*, 431 F.2d 907, 912 (8th Cir. 1970). Yet the Fifth Circuit has denied funding in comparable circumstances. In *Ayestas*, for example, the court denied funding for an ineffective-assistance-of-trial-counsel claim regarding counsel's failure to explore the possibility of mental illness because—although the defendant had shown that counsel's failure to hire a psychologist was potentially deficient, and that evidence of schizophrenia indicated that a psychological examination may have borne fruit had counsel conducted it—the defendant "did not show prejudice, that is, a 'substantial, not just conceivable, likelihood of a different result.'" *Ayestas*, 826 F.3d at 215 (denying rehearing and noting that panel was incorrect in finding that psychologist had been hired); *see also Ayestas* v. *Stephens*, 817 F.3d 888, 897-898 (5th Cir. 2016) (panel decision).

Similarly, here, Wilkins was denied funding even though, under the Eighth Circuit's standard, "further exploration" would have been no "mere fishing expedition," but would have "prove[d] beneficial … in the development of" his ineffective-assistance claim. *Thurmon*, 413 F.3d at 756.

B. Courts Are Divided On The Application Of § 3599(f) In The State Clemency Context

The Fifth Circuit's decision here also splits from the Sixth Circuit in holding that when a defendant seeks to support a state clemency petition, funding is generally unavailable "[i]f 'the proposed investigation' or expert testimony 'would only supplement prior evidence that had already been considered in the judicial proceedings' preceding the [state] clemency petition." App. 6a. The court invoked this rule to justify its reli-

ance on the previous denial of Wilkins's requests for funding in support of his federal habeas proceeding as a basis for denying funding to develop his state clemency petition. *E.g.*, *id.* 10a-11a (denying funds because "[w]e have already considered and rejected Wilkins's claim" and funding "would serve no purpose other than to rehash claims … this Court already considered and rejected"). The Eleventh Circuit has similarly affirmed the denial of funding where a petitioner pursuing state clemency sought expert services to develop arguments that had already been rejected in prior judicial proceedings. *Gary*, 686 F.3d at 1268-1269.

In contrast, the Sixth Circuit has rejected the idea that funding to develop a state clemency petition may be denied on the ground that the defendant "has already lost in court the argument that he intends to make to the Governor." *Matthews*, 807 F.3d at 762-763. As the Sixth Circuit explained:

> [C]lemency is different than litigation, even if similar issues are raised. The Governor has unfettered discretion to consider a clemency application, and so may decide that clemency is warranted even if [the defendant] could not meet a particular legal standard for mitigation in court. Notwithstanding the State's argument that the standard for clemency is 'extremely high,' it remains unclear why [the defendant]'s prior litigation of [certain] issues alone means that a new evaluation cannot be 'reasonably necessary' for his clemency petition [with regard to the same issues].

Id. at 763 (citations omitted).

II. THE FIFTH CIRCUIT'S ERRONEOUS APPROACH UNDERMINES THE FAIRNESS OF CAPITAL PROCEEDINGS AND IMPAIRS THE ROLE OF CLEMENCY AS THE "FAIL SAFE" OF OUR CRIMINAL SYSTEM

The distinguishing feature of the "substantial need" standard—and what puts it in decided conflict with the approaches of other courts of appeals—is its circular demand that a defendant must produce substantial evidence demonstrating the merit of the underlying claim before funding is available to develop that evidence. As the Fifth Circuit stated in denying Wilkins's request for funding during his federal habeas proceedings, a defendant who fails to marshal evidence showing "that the investigative avenues … proposed" offer a "significant chance for success" on the underlying claims cannot meet the "substantial need" standard and is "not entitled to investigative funds." *Wilkins*, 560 F. App'x at 315. Similarly, a defendant "cannot show a substantial need when his claim is procedurally barred from review," *Riley*, 362 F.3d at 307, and he has failed to demonstrate that the merits of the claim are substantial enough to overcome the procedural default, *Wilkins*, 560 F. App'x at 314.

This requirement is manifestly excessive and contravenes this Court's precedent. Section 3599(f) provides funding to assist a defendant in "research[ing] and identif[ying]" his or her "possible claims and their factual bases" in the first place. *McFarland*, 512 U.S. at 855. Whatever funding might be necessary when a defendant can already establish a "significant chance of success," it is certainly critical when, as here, a defendant has discovered enough evidence to show that there is a colorable issue to be explored, but not enough evidence to succeed on the merits without the requested services. It makes little sense to allow funding only

when defendants can already meet their ultimate burden of proof, or something close to it, on the underlying claim.

The incoherence and unfairness of this approach is amplified where, as here, a request for investigation into an ineffective-assistance-of-trial-counsel claim is at stake. As this Court has recognized, these claims are particularly dependent on "investigative work" and "evidence outside the trial record." *Martinez* v. *Ryan*, 132 S. Ct. 1309, 1317-1318 (2012); *see also Trevino* v. *Thaler*, 133 S. Ct. 1911, 1921 (2013) ("adequate assistance of counsel at trial … is … critically important" and showing violation of this right is tied to a "need to expand the trial court record, and [a] need for sufficient time to develop the claim"). That is especially true of a claim based on trial counsel's failure to conduct a reasonable mitigation investigation. To substantiate such a claim, a prisoner must conduct the investigation trial counsel should have performed and show that the evidence counsel failed to discover could have led the jury to return a different sentence. *See Wiggins* v. *Smith*, 539 U.S. 510, 534-536 (2003); *Strickland* v. *Washington*, 466 U.S. 668, 690-691, 694 (1984); *see also Porter* v. *McCollum*, 558 U.S. 30, 41 (2009) (to assess prejudice, court considers "'the totality of the available mitigation evidence—both that adduced at trial and the evidence adduced in the habeas proceeding"). Such claims can rarely be established without funding for investigative and expert services. As a result, and contrary to this Court's precedent, the Fifth Circuit's approach makes it likely that "no court will review the prisoner's claims" on the merits if—as here—the claim was defaulted due to state habeas counsel's failure to investigate and present the claim, *Martinez*, 132 S. Ct. at 1316,

unless the prisoner has access to another source of funding.

The Fifth Circuit's severe application of § 3599(f) in the clemency context likewise flouts this Court's recognition of state clemency as "the 'fail-safe' of our justice system" and its admonition that § 3599 is designed to "ensure[] that no prisoner would be put to death without meaningful access" to this fail-safe. *Harbison*, 556 U.S. at 194. By foreclosing access to funding during clemency proceedings to develop claims that previously failed during judicial proceedings, the Fifth Circuit contravenes this Court's recognition that clemency proceedings "are a matter of grace" related to but separate from judicial proceedings, *id.* at 192, and that clemency proceedings can thus "consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations," *Ohio Adult Parole Auth.* v. *Woodard*, 523 U.S. 272, 280-281 (1998).

For example, although procedural default plays no role in executive clemency, the Fifth Circuit denied Wilkins's application for funding in the clemency phase based on the prior determination that the procedural default of his ineffective-assistance claims precluded him from satisfying the "substantial need" test. As the dissent correctly observed when the Eleventh Circuit adopted the Fifth Circuit's approach, "[c]lemency proceedings operate unconstrained by the strictures of [federal habeas]," and to deny expert funding for clemency purposes based on determinations made in resolving the habeas petition "is to render § 3599(f) nearly meaningless." *Gary*, 686 F.3d at 1279-1280 (Wilson, J., dissenting); *see also Harbison*, 556 U.S. at 193-194 (although *Brady* claim was procedurally defaulted, counsel appointed under § 3599 could marshal *Brady* material in support of clemency application).

Here, Wilkins presented colorable claims, supported by a preliminary investigation, that his trial counsel's performance was constitutionally ineffective. And he specified avenues of further investigation that could very well have yielded evidence confirming the prejudice caused by that deficient performance—including neuropsychological examinations that Dr. Goodness had urged trial counsel to conduct and that might have affected the jury's (or the clemency board's) evaluation of Wilkins's moral culpability. Under the law of at least three other Circuits, Wilkins would almost certainly have had the opportunity to develop that evidence. The Court should grant the petition to resolve that circuit conflict and ensure that Wilkins has meaningful access to the "'fail safe' [of] our criminal justice system." *Harbison*, 556 U.S. at 192.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-70033
Cons. w/ No. 16-70002

CHRISTOPHER CHUBASCO WILKINS,
Petitioner-Appellant,
v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,
Respondent-Appellee.

Appeals from the United States District Court
for the Northern District of Texas

Filed August 10, 2016

MEMORANDUM OPINION

Before JOLLY, DAVIS, and PRADO, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

The State of Texas sentenced Petitioner-Appellant Christopher Chubasco Wilkins to death for the murders of Willie Freeman and Mike Silva. Having unsuccessfully pursued federal habeas corpus relief, Wilkins now requests investigative and expert funding to support a state clemency petition and a successive state habeas petition.

The district court denied Wilkins's motion for funding. The district court also denied Wilkins's attorney compensation for her work on Wilkins's case.

For the reasons discussed below, we affirm the district court's order denying Wilkins's motion for investigative and expert funding. However, we vacate the district court's order denying Wilkins's counsel compensation and remand for further proceedings consistent with this opinion.

I.

A.

A jury found Wilkins guilty of capital murder. The facts of Wilkins's crime are set forth in our prior opinion in this case.[1]

After unsuccessfully pursuing relief in state court, Wilkins sought habeas corpus relief in federal district court. Wilkins also asked the district court for funding for investigative and expert services to support his federal habeas petition. Specifically, Wilkins requested "nearly $92,000 in funding to pay for a fact investigator, a mitigation specialist, a neuropsychologist, and a prison expert to help develop his claims for relief."[2]

The district court denied Wilkins's federal habeas petition. The court also denied Wilkins's motion for investigative and expert funding.

Wilkins sought a certificate of appealability ("COA") from this Court. Wilkins also appealed the district court's order denying his motion for funding.

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[1] *See Wilkins v. Stephens*, 560 F. App'x 299, 301-02 (5th Cir. 2014) (per curiam).

[2] *Id.* at 302.

We appointed Hilary Sheard to represent Wilkins in connection with his appeal.

We ultimately denied Wilkins's COA petition.[3] We further ruled that the district court did not abuse its discretion by denying Wilkins's motion for expert and investigative funding.[4]

B.

Having failed to obtain federal habeas relief, Wilkins asked the district court for investigative and expert funding to support a state clemency petition and a successive state habeas petition. Wilkins seeks funding to hire the following investigators and experts:

Fact Investigator:	$10,500
Mitigation Specialist:	$15,000
Neuropsychologist:	$12,000
Prison Expert:	$1,000
GRAND TOTAL:	$38,500

The district court denied Wilkins's motion. Wilkins now appeals.

C.

After Wilkins filed his notice of appeal, Sheard sought compensation from the district court "for work performed in both the district court and in state court since the State announced its intention, in June 2015, to seek an execution date."[5] Sheard accordingly submit-

[3] *Id.* at 303-15.

[4] *Id.* at 315.

[5] Specifically, Sheard sought payment for legal services rendered in connection with (1) the instant motion for federal funding

ted two Criminal Justice Act ("CJA") vouchers to the district court—one for compensation for work performed in the federal district court, and another for work performed in state court.

The district court denied payment on both vouchers. The district court concluded that our order appointing Sheard to represent Wilkins on appeal did not authorize her to represent Wilkins in subsequent federal or state proceedings. The district court therefore concluded that it had no "obligation to pay Sheard for any legal work or expenses incurred by her in her representation of Wilkins."

Sheard now appeals the district court's order denying payment on her two CJA vouchers. We have consolidated the two appeals.

II.

We first address whether the district court erred by denying Wilkins's motion for investigative and expert funding to support Wilkins's state clemency petition.[6]

A.

"We review the denial of funding for investigative or expert assistance for an abuse of discretion."[7] "[A]

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for investigative and expert services; (2) a state court motion for appointment of a DNA/toolmark expert; (3) a state court motion for retention of juror information; (4) a hearing in state court to set an execution date; and (5) a federal court motion to stay Wilkins's execution.

[6] We reject the State of Texas's argument that we lack appellate jurisdiction to decide this issue. *See Brown v. Stephens*, 762 F.3d 454, 458-59 (5th Cir. 2014) (rejecting identical argument).

[7] *Id.* at 459 (citing *Woodward v. Epps*, 580 F.3d 318, 334 (5th Cir. 2009); *Smith v. Dretke*, 422 F.3d 269, 288 (5th Cir. 2005)).

COA is not necessary to appeal the denial of funds for expert assistance" or investigative services.[8]

B.

18 U.S.C. § 3599 authorizes federal funding for indigent petitioners charged with a crime punishable by death. "Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant," the district 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."[9]

As relevant here, the district court may, in the exercise of its sound discretion, authorize federal funding for investigative and expert services in subsequent state clemency proceedings.[10]

> [W]hen a petitioner requests funds for investigative services for the purpose of clemency proceedings, the petitioner must show that the requested services are reasonably necessary to provide the Governor and Board of Pardons

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[8] *Smith*, 422 F.3d at 288 (citing *Hill v. Johnson*, 210 F.3d 481, 487 n.3 (5th Cir. 2000)).

[9] 18 U.S.C. § 3599(f).

"Fees and expenses paid for investigative, expert, and other reasonably necessary services authorized under" 18 U.S.C. § 3599(f) are ordinarily limited to $7,500. *Id.* § 3599(g)(2). Fees and expenses may exceed $7,500 only if "payment in excess of that limit is certified by the court," the payment is "necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit." *Id.*

[10] *See Brown*, 762 F.3d at 459-61.

> and Paroles the information they need in order to determine whether to exercise their discretion to extend grace to the petitioner in order to prevent a miscarriage of justice.[11]

If "the proposed investigation" or expert testimony "would only supplement prior evidence that had already been considered in the judicial proceedings" preceding the clemency petition, it is generally not an abuse of discretion to deny funding because the requested investigative and expert services would not "provide the Board of Pardons and Paroles and the Governor with material information beyond that already adduced."[12] The district court may also consider "the merits of the proposed investigation" when deciding whether to grant or deny funding.[13]

C.

For the following reasons, we conclude that the district court did not abuse its discretion by denying Wilkins's motion for funding. We shall discuss each category of funding requested by Wilkins in turn.

1.

Wilkins first requests funding for further investigation into his background and social history. He claims that he must "interview[] both family members and also non-family members such as neighbors, teachers, case workers, doctors, correctional, probation or parole officers" in order to compile a "full and accurate family and social history that was not created during

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[11] *Id.* at 460.

[12] *Id.* at 460-61.

[13] *Id.* at 460.

the trial or state habeas corpus proceedings." Wilkins's proposed investigation "would include areas such as [his] substance abuse and head traumas—matters relevant to his mental health—and the apparent failure of the Texas Youth Commission to provide him with needed services when he was incarcerated in his teens."

The district court was entitled to conclude that the proposed investigation into Wilkins's background and social history "would only supplement prior evidence that had already been considered in the judicial proceedings."[14] First, to the extent Wilkins seeks funds to investigate his problems with substance abuse, any evidence the investigator uncovered would likely be cumulative of evidence introduced at trial. Several of Wilkins's family members testified at the sentencing phase that Wilkins struggled with substance abuse. The jury heard testimony from multiple witnesses that, although Wilkins was considerate, protective of his family, and hard-working before he became involved with drugs, his drug use "destroyed his life" and transformed him into a "very mean" person.

Likewise, the defense called five of Wilkins's family members to testify regarding Wilkins's turbulent childhood and social history. Wilkins's mother testified that Wilkins was a product of divorce, and that she became remarried multiple times during Wilkins's youth. Wilkins's often-absent biological father, who frequently failed to pay child support and had serious drug problems and a lengthy criminal history of his own, once committed automobile theft and tried to get Wilkins to "take responsibility for the stolen car because he was a minor and the penalty would be less significant." The

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[14] *See id.*

jury also heard testimony that, during Wilkins's teenage years, he was involved in a serious motorcycle accident which left him critically injured and claimed the life of one of his friends. Thus, the district court was entitled to conclude that any information regarding Wilkins's background and social history which might be uncovered during the course of his proposed investigation would likely be cumulative of evidence introduced at trial.

2.

Wilkins confessed not only to the capital crimes for which he was convicted, but also to additional murders and other offenses. The State introduced evidence of Wilkins's multiple confessions at trial.[15]

Wilkins insists, however, that at least some his confessions were false. He claims he has a "known propensity to make false, but damaging, admissions." He therefore argues that "the evidence supposedly corroborating his confessions need[s] to be investigated, with that work including eyewitness interviews and examination and evaluation of the physical and forensic evidence."

The district court did not abuse its discretion by denying funding to investigate the veracity of Wilkins's numerous confessions. As the Texas Court of Criminal Appeals explained in its opinion affirming Wilkins's conviction on direct appeal, the State introduced crime scene photographs which "corroborated details of [Wilkins's] confession with respect to the manner of killing the victims and disposing of their bodies. The photo-

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[15] *See Wilkins v. State*, No. AP-75878, 2010 WL 4117677, at *2 (Tex. Crim. App. Oct. 20, 2010) ("The trial court permitted [Detective Cheryl] Johnson to testify on cross-examination that [Wilkins] had also claimed responsibility for several murders and other offenses in a variety of states.").

graphs therefore rebutted the defensive theory that [Wilkins] gave a false confession."[16] Moreover, Wilkins does not argue that his confessions were coerced; he merely claims he has a tendency to make "self-defeating choices." The district court could therefore reasonably conclude that further investigation into the facts underlying Wilkins's confessions would be fruitless.

3.

At sentencing, the prosecution introduced evidence that Wilkins murdered an additional victim named Gilbert Vallejo.[17] Wilkins claims that "several known alternative suspects for the murder of Gilbert Vallejo need[] to be investigated."

The district court was entitled to conclude this investigation would also be fruitless. Wilkins confessed to Vallejo's murder,[18] and, as explained above, Wilkins does not argue that this confession was coerced. Thus, any investigation into alternative suspects for Vallejo's murder would probably not uncover any exculpatory evidence which could support Wilkins's clemency petition.

4.

Wilkins next claims that:

> Witnesses who merited further investigation included a convicted prostitute who may have been under the influence of alcohol at the time of her testimony and a witness who had recently received the minimum sentence for a felony

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[16] *Id.* at *5.

[17] *Id.* at *2.

[18] *Id.*

> in another county and was released just over a month before he testified at trial.

Wilkins therefore requests funding to investigate these two witnesses.

Wilkins does not explain why further investigation of these witnesses might uncover evidence which could support his clemency petition. This argument is therefore meritless.

5.

Wilkins next requests funding to investigate allegations that his trial attorney and his state habeas attorney labored under conflicts of interest. For the reasons we explain below, the district court did not err by denying Wilkins's request.

a.

As noted above, Wilkins confessed to murdering Gilbert Vallejo.[19] Wilkins's trial counsel, Wes Ball, represented Vallejo in an unrelated probation revocation proceeding twenty years before representing Wilkins.[20] Wilkins requests funds to investigate any alleged conflict of interest resulting from Ball's prior representation of Vallejo.

We have already considered and rejected Wilkins's claim that Ball's prior representation of Vallejo created a conflict ofinterest.[21] As we explained when denying Wilkins a petition for COA, Ball's "representation of Vallejo had been unequivocally terminated; the facts

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[19] *Id.*

[20] *Wilkins v. Stephens*, 560 F. App'x at 309.

[21] *Id.* at 308-10.

and issues of the prior representation had no relation to Ball's representation of Wilkins. No evidence was produced by Wilkins to show that Ball even remembered representing Vallejo."[22] It is clear that further investigation of this issue would be fruitless and would serve no purpose other than to rehash claims which this Court already considered and rejected.

b.

Wilkins also complains that his state habeas counsel, Jack Strickland, accepted a job with the District Attorney's office that had prosecuted Wilkins shortly before Strickland filed Wilkins's state habeas petition. Wilkins therefore requests funds to investigate Strickland's connections to the District Attorney's office.

Once again, we have already considered and rejected Wilkins's argument that Strickland labored under a conflict of interest.[23] In our opinion denying Wilkins's COA petition, we emphasized that "Strickland never missed a filing deadline and filed a lengthy petition which raised eighteen points of error on Wilkins's behalf. The record reflects that Strickland actively represented" Wilkins and "did not abandon his client."[24]

Thus, granting funds to investigate Strickland's connections to the District Attorney's office would serve little purpose other than to rehash arguments this Court has already rejected. The district court therefore did not abuse its discretion by declining to do so.

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[22] *Id.* at 309.

[23] *Id.* at 304.

[24] *Id.*

6.

Next, Wilkins seeks funds to interview trial jurors "with regard to the possibility of ineffective assistance during jury selection, jury misconduct, and whether the security measures employed at trial were obvious to the jury."

Wilkins offers no explanation regarding how trial counsel rendered ineffective assistance during jury selection. Nor does Wilkins explain how interviewing jurors regarding that issue could conceivably produce evidence to support his clemency petition. The district court therefore did not abuse its discretion by denying funding to explore this entirely speculative avenue.

Nor does Wilkins identify the basis for his speculation that the jury engaged in misconduct. We therefore reject this argument as well.

Nor did the district court abuse its discretion by declining to allocate funds to investigate whether the security measures employed at trial were obvious to the jury. Wilkins previously argued in his COA petition that "there was an excessive number of guards in close proximity to him while he testified at the sentencing phase, and that the use of a taser belt as a restraint with a guard holding the remote nearby and visible to the jury impaired his defense."[25] We rejected that argument:

> The record in the instant case makes clear that Wilkins had attempted escape multiple times: he broke both ankles after falling thirty feet from the outer wall of a prison basketball court; at one point, he was discovered to have swal-

[25] *Id.* at 314.

> lowed a handcuff key; one of the key events which led to his encounter with murder victims Freeman and Silva was an escape from a Texas halfway house. The record also indicates a history and propensity for violence. We therefore conclude that … the trial court was well within its discretion to impose increased security measures during the penalty phase given Wilkins's personal history …[26]

It is purely speculative whether any of the jurors knew Wilkins was wearing a concealed taser belt,[27] and, if so, whether that fact would have mattered to any of the jurors. The district court therefore did not abuse its discretion by denying funding to interview the jurors regarding this issue.

7.

Wilkins next seeks to hire a neuropsychologist to perform "[a] full neuropsychological evaluation … in light of [his] past head injuries, identified cognitive deficits and risk factors for brain damage." Wilkins claims that even though his trial counsel hired a psychologist to evaluate his mental functioning and develop a mitigation case, trial counsel did not pursue that psychologist's recommendation to conduct a full neuropsychological examination.

The district court did not abuse its discretion by denying this funding request either. Wilkins previously requested expert funding to hire a neuropsychologist

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[26] *Id.*

[27] As we stated in our previous opinion in this case, "the record does not demonstrate that the presence of the taser belt was open and obvious to the jury." *Id.*

when he filed his federal habeas petition.[28] The district court concluded that "that the funding was not 'reasonably necessary,'"[29] and we agreed.[30] Thus, the district court could once again reasonably conclude that the requested funding was not "reasonably necessary" for Wilkins's clemency petition, just as it was not reasonably necessary for his federal habeas petition.

8.

Although Wilkins hired a prison expert to testify on his behalf at trial, Wilkins now claims that this expert "inaccurately and prejudicially" testified during sentencing that Wilkins could achieve a less restrictive prison security status after ten years. In actuality, claims Wilkins, the Texas Department of Corrections had recently made its security policies more restrictive to reduce the likelihood that inmates like Wilkins could successfully escape. Wilkins therefore requests funds to hire a second "prison classification and conditions expert" to "review the testimony of the defense 'expert' at trial, … review Mr. Wilkins' incarceration records and assess the likely security conditions to which he be [sic] subject if serving a life sentence."

The district court did not abuse its discretion by denying Wilkins's request to hire a second prison expert. Wilkins previously sought federal funding to hire an additional prison expert, the district court concluded "that the funding was not 'reasonably necessary,'" and

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[28] *Id.* at 302.

[29] *Id.*

[30] *Id.* at 315.

we affirmed.[31] Wilkins is therefore attempting to relitigate an issue he has already lost.

9.

In sum, the district court was entitled to conclude that none of the requested funds are reasonably necessary for the preparation of Wilkins's clemency petition. Consequently, the court did not abuse its discretion by denying Wilkins's motion for expert and investigative funding.

III.

In addition to his plan to file a state clemency application, Wilkins also plans to file a successive state habeas petition which would raise the following claims:

- A claim that his "former counsel failed to plead specific facts, which, if proven true, might call for relief;"[32]
- "[A] subsequent Application urging reconsideration of *Ex Parte Graves*;"[33] and
- A claim that habeas counsel did not have Wilkins's informed consent to file his habeas petition, which was filed "without [his] permission and against [his] will."[34]

Wilkins therefore asked the district court for expert and investigative funding to support his proposed suc-

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[31] *Id.*

[32] *See Ex Parte Medina*, 361 S.W.3d 633, 642-43 (Tex. Crim. App. 2011).

[33] *See Ex Parte Graves*, 70 S.W.3d 103, 105 (Tex. Crim. App. 2002).

[34] *See Ex Parte Gallo*, 448 S.W.3d 1, 2 (Tex. Crim. App. 2014).

cessive state habeas petition. The district court denied Wilkins's request.

Neither Wilkins's appellate briefs nor the brief he filed in the district court explain why investigative or expert funding is necessary to develop the arguments he intends to raise in his successive state habeas petition. As a result, we cannot conclude that the district court abused its discretion by denying the requested funds.[35]

IV.

We next consider whether the district court erred by denying payment on Sheard's CJA vouchers for work she performed on Wilkins's behalf in state and federal court.

A.

As noted above, this Court appointed Sheard to represent Wilkins on appeal. After that appeal concluded, Sheard continued to represent Wilkins in subsequent federal and state proceedings.[36] Sheard thereafter submitted two CJA vouchers to the district court requesting compensation for services rendered on Wil-

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[35] Wilkins also wishes to file a FED. R. CIV. P. 60(b) motion based on *Ruiz v. Quarterman*, 504 F.3d 523, 532 (5th Cir. 2007) in the event the state court denies his successive habeas petition. Wilkins does not explain why investigative or expert funding is necessary to develop this argument either.

[36] Among other legal services rendered on Wilkins's behalf, Sheard (1) filed the instant motion for federal funding for investigative and expert services; (2) filed a state court motion for appointment of a DNA/toolmark expert; (3) filed a state court motion for retention of juror information; (4) participated in a hearing in state court to set an execution date; and (5) filed a federal court motion to stay Wilkins's execution.

kins's behalf. The district court concluded that the subsequent proceedings in the district and state courts exceeded the scope of Sheard's appointment, so it denied Sheard's requests for compensation in their entirety.

On appeal, Sheard argues that, once this Court appointed her to represent Wilkins, she was authorized—and, indeed, obligated—to continue representing him in subsequent federal and state proceedings until relieved by court order. She argues that she was not required to seek reappointment by the district court after we appointed her as counsel. Thus, argues Sheard, she is potentially entitled to compensation for her work in the federal and state courts.

We agree with Sheard. This Court appointed Sheard to represent Wilkins pursuant to 18 U.S.C. § 3599. Once a court appoints an attorney under § 3599, that attorney "*shall represent the defendant throughout every subsequent stage of available judicial proceedings*" unless that attorney is "replaced by similarly qualified counsel."[37] Appointed counsel must represent the defendant throughout "all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures," as well as "competency proceedings and proceedings for executive or other clemency."[38]

Nothing in the text of § 3599(e) requires counsel to reapply for reappointment in the district court after the appeal concludes. Thus, generally speaking, when this

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[37] 18 U.S.C. § 3599(e) (emphasis added).

[38] *Id.*

The Supreme Court has interpreted this provision to apply to subsequent state and federal proceedings alike. *Harbison v. Bell*, 556 U.S. 180, 188 (2009).

Court appoints an attorney to represent a capital defendant, our order automatically authorizes that attorney to represent the defendant in other subsequent post-conviction proceedings as well.[39]

Our recent decision in *Battaglia v. Stephens*[40] further supports Sheard's argument. In that case, as in the instant case, we appointed an attorney to represent a capital defendant on appeal.[41] After the appeal concluded, appointed counsel refused to pursue state competency proceedings on the petitioner's behalf because the attorney "believe[d] that his representation d[id] not extend to state competency proceedings."[42] We disagreed. We explained that, "[u]nder § 3599(e), a lawyer appointed to represent a capital defendant *is obligated to continue representing his client until a court of competent jurisdiction grants a motion to withdraw*."[43] We therefore ruled that, by refusing to represent the defendant in state competency proceedings, the attorney had "abandoned" his client, and the district court therefore "erred

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[39] There are exceptions to the general rule that appointed counsel must continue representing the defendant in subsequent proceedings, but none are applicable here. *See, e.g.*, *Harbison*, 556 U.S. at 189 (explaining that "when a state prisoner is granted a new trial following § 2254 proceedings, his state-furnished representation renders him ineligible for § 3599 counsel until the commencement of new § 2254 proceedings"); *Irick v. Bell*, 636 F.3d 289, 290-93 (6th Cir. 2011) (holding that § 3599 did not authorize federally-funded counsel to represent death-row prisoner in state competency proceedings because prisoner had a statutory right under state law to state-funded counsel).

[40] --- F.3d ----, 2016 WL 3084272 (5th Cir. Mar. 30, 2016).

[41] *Id.* at *2.

[42] *Id.* at *3.

[43] *Id.* (emphasis added).

in declining to appoint new counsel under § 3599."[44] *Battaglia* therefore demonstrates that counsel need not return to the district court for reauthorization before representing a capital defendant in post-appeal proceedings; counsel is authorized—and indeed obligated—to continue representing the defendant until the court permits him to withdraw.

So too here. Sheard acted within the authorized scope of her appointment; she represented Wilkins in "available post-conviction process" in state and federal proceedings, including "applications for stays of execution and other appropriate motions and procedures" and "proceedings for executive or other clemency," as authorized by § 3599.[45] Sheard did not need to seek reauthorization from the district court before representing Wilkins in these subsequent proceedings.

Because Sheard acted within the scope of her appointment, she is potentially entitled to payment for her services. We therefore vacate the district court's order denying Sheard's CJA vouchers and remand to allow the district court to decide whether Sheard's requested fee constitutes appropriate compensation.

B.

The State of Texas explicitly "takes no position on whether the district court erred in denying counsel's payment request." Instead, the State claims that this Court lacks appellate jurisdiction to decide that issue because a "district court's review of a fee request is an administrative act and not an appealable judicial decision."

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[44] *Id.*

[45] *See* 18 U.S.C. § 3599(e).

We generally lack jurisdiction over appeals from orders denying or reducing payment under a CJA voucher to the extent "that counsel disagrees with the amount of the payment."[46] That is because "[t]he specific amount of [a] CJA award is" generally "left to the unreviewable discretion of the district court."[47]

Crucially, however, where the attorney does not merely dispute "the amount of expenses reasonably and necessarily incurred by counsel," but instead challenges the district court's ruling regarding "whether such services are compensable under the [CJA] as a matter of law" at all, then "this Court has appellate jurisdiction as to the district court's order."[48] In other words, where

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[46] *Rojem v. Workman*, 655 F.3d 1199, 1202 (10th Cir. 2011) (quoting *United States v. French*, 556 F.3d 1091, 1094 (10th Cir. 2009)) (emphasis in original, brackets omitted).

Accord, e.g., *In re Carlyle*, 644 F.3d 694, 699 (8th Cir. 2011).

[47] *Hooper v. Jones*, 536 F. App'x 796, 800 (10th Cir. 2013).

[48] *Clark v. Johnson*, 278 F.3d 459, 461 (5th Cir. 2002), *abrogated in non-relevant part by Harbison*, 556 U.S. 180 (emphasis added).

The Supreme Court has overruled *Clark's* holding that federal habeas counsel is not authorized to represent the petitioner in subsequent state clemency proceedings. *Compare Harbison*, 556 U.S. at 182-94 *with Clark*, 278 F.3d at 461-63. *See also Rosales v. Quarterman*, 565 F.3d 308, 312 (5th Cir. 2009) (recognizing that *Harbison* partially overruled *Clark*). However, *Clark*'s jurisdictional holding remains valid after *Harbison*. *See Hooper*, 536 F. App'x at 798-99 (continuing to rely on *Clark*'s jurisdictional holding after *Harbison*).

Clark was decided under 21 U.S.C. § 848(q), which was the predecessor to 18 U.S.C. § 3599. Because § 848(q) contained "essentially the same relevant language" as § 3599, *Clark*'s jurisdictional holding survives the enactment of § 3599. *Kelly v. Quarterman*, 296 F. App'x 381, 381 n.1 & n.2 (5th Cir. 2008).

"the basis for the reduction" or denial of attorney's fees is not "an ad hoc administrative judgment about the appropriate size of counsel's fee," but rather "a decision regarding the proper reach of appointed counsel's authority under the CJA statute," then we may review the district court's order reducing or denying fees.[49]

To illustrate, in *Clark v. Johnson*, the petitioner attempted to appeal "the district court's ruling that counsel was not entitled to compensation and reimbursement … for expenses incurred in connection with [the petitioner's] state clemency proceeding."[50] We ruled that we had appellate jurisdiction over the case because the case "concern[ed] an interpretation of a federal statute by a federal district judge," rather than "an administrative decision about the appropriate amount of fees for an otherwise authorized activity."[51]

Here, too, Sheard is *not* disputing the *amount* of fees to which she is entitled. Instead, she is arguing that the district court misinterpreted § 3599 as a matter of law when it concluded that our order appointing her as appellate counsel did not automatically authorize her to represent Wilkins in subsequent state and federal proceedings as well. As a result, "[t]he decision whether to compensate" Sheard "involves interpreting and applying the provisions in § 3599 governing the authorized scope of a CJA appointment."[52] For that rea-

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[49] *Hooper*, 536 F. App'x at 798.

[50] 278 F.3d at 461.

[51] *Id.*

[52] *Hooper*, 536 F. App'x at 798.

son, we have jurisdiction to adjudicate Sheard's appeal.[53]

V.

Accordingly, we (1) affirm the district court's order denying Wilkins's request for funds; (2) vacate the district court's order denying payment under Sheard's CJA vouchers; and (3) remand for further proceedings.[54]

AFFIRMED in part, VACATED in part, and REMANDED.

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[53] *See id.*

[54] We reject Sheard's request to reassign the case to a different district judge on remand. *See In re DaimlerChrysler Corp.*, 294 F.3d 697, 700 (5th Cir. 2002) (quoting *Johnson v. Sawyer*, 120 F.3d 1307, 1333 (5th Cir. 1997)) (holding that we may reassign a case to a different district judge on remand only in "extraordinary" and "rare[]" circumstances).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

No. 4:12-CV-270-A

CHRISTOPHER CHUBASCO WILKINS,
Petitioner,

v.

WILLIAM STEPHENS, DIRECTOR
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

Entered September 18, 2015

ORDER DENYING MOTION FOR FUNDING

The court has concluded that all relief sought by petitioner, Christopher Chubasco Wilkins, by the document he filed September 9, 2015, titled "Renewed Motion for Funding for Necessary Expert and Investigative Assistance" should be denied essentially for those reasons given by respondent, William Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division, in the opposition he filed September 17, 2015, in response to such motion. Therefore,

The court ORDERS that all relief sought by petitioner by his "Renewed Motion for Funding for Necessary

Expert and Investigative Assistance" be, and is hereby, denied.

SIGNED September 18, 2015.

/s/ John McBryde
John McBryde
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-70033
consolidated with 16-70002

CHRISTOPHER CHUBASCO WILKINS,
Petitioner-Appellant,
v.

LORIE DAVIS, DIRECTOR, TEXAS
DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent-Appellee.

Appeals from the United States District Court
for the Northern District of Texas, Forth Worth

Entered October 19, 2016

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 8/10/16, 5th Cir., ___, ___ F.3d ___)

Before JOLLY, DAVIS, and PRADO, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that

the court be polled on Rehearing En Banc, (FED R. APP. P. and 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED R. APP. P. and 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en bane, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
UNITED STATES CIRCUIT JUDGE

APPENDIX D

STATUTORY PROVISIONS

18 U.S.C. § 3599: Counsel for financially unable defendants

(a)(1) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either—

(A) before judgment; or

(B) after the entry of a judgment imposing a sentence of death but before the execution of that judgment;

shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

(2) In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

(b) If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is

to be tried for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court.

(c) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

(d) With respect to subsections (b) and (c), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

(e) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

(f) Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on

behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under subsection (g). No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

(g)(1) Compensation shall be paid to attorneys appointed under this subsection[1] at a rate of not more than $125 per hour for in-court and out-of-court time. The Judicial Conference is authorized to raise the maximum for hourly payment specified in the[2] paragraph up to the aggregate of the overall average percentages of the adjustments in the rates of pay for the General Schedule made pursuant to section 5305[3] of title 5 on or after such date. After the rates are raised under the preceding sentence, such hourly range may be raised at intervals of not less than one year, up to the aggregate of the overall average percentages of such adjustments made since the last raise under this paragraph.

(2) Fees and expenses paid for investigative, expert, and other reasonably necessary services authorized under subsection (f) shall not exceed $7,500 in any case, unless payment in excess of that limit is certified by the court, or by the United States magistrate judge, if the services were rendered in connection with the case disposed of entirely before such magistrate judge, as necessary to provide fair compensation for services of an

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[1] So in original. Probably should be "section".

[2] So in original. Probably should be "this".

[3] So in original. Probably should be "5303".

unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active or senior circuit judge.

(3) The amounts paid under this paragraph[4] for services in any case shall be disclosed to the public, after the disposition of the petition.

[4] So in original. Probably should be "subsection".