No. 16-6795

IN THE

Supreme Court of the United States

CARLOS MANUEL AYESTAS,

Petitioner,

v.

LORIE DAVIS, Director, Texas Department of Criminal Justice (Institutional Division),

Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE* [1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958, and has a nationwide membership of many thousand direct members, and up to 40,000 members when affiliates are included. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. Each year, NACDL files numerous briefs as *amicus curiae* in the United States Supreme Court and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

This case presents a question of great importance to NACDL and the clients its attorneys represent. NACDL's members depend on adequate expert and investigative resources in order to develop claims in

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[1] Petitioner and Respondent have both filed with this Court blanket letters of consent to the filing of *amicus* briefs. No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

habeas proceedings that may have been ignored, overlooked, or unavailable during a habeas petitioner's trial. And the clients NACDL's members represent similarly depend on the fair disbursement of those funds, in order to guarantee that their convictions and sentences were constitutionally imposed. In order to guarantee the just and fair administration of justice, NACDL has a strong interest in ensuring that habeas claims—particularly in capital cases—are adequately investigated.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 1.5 million members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In furtherance of those principles, the ACLU has appeared in numerous cases before this Court, both as direct counsel and as *amicus curiae*.

This case implicates several issues of importance to the ACLU's members, including guaranteeing the fair, non-discriminatory administration of justice and the adequate representation of poor or disadvantaged criminal defendants.

Together, NACDL and the ACLU urge this Court to reject the onerous standard the Fifth Circuit applies to funding requests under 18 U.S.C. § 3599(f)—a standard that, in practice, frustrates effective habeas investigations, and consequently representation.

SUMMARY OF ARGUMENT

The ability of counsel for a capital habeas petitioner to obtain investigative and expert resources during federal post-conviction proceedings is often essential to vindicating a meritorious claim and avoiding the imposition of an unconstitutional death sentence. Access to funding can mean the difference between life and death. This is not merely a theoretical point. In this brief *amici* canvass a number of representative cases in which post-conviction investigations conducted in federal and state court uncovered critical evidence supporting a meritorious claim that was previously overlooked or undeveloped at trial or on appeal. Adequate funding for investigations during habeas proceedings has prevented an intellectually disabled person from being unconstitutionally executed after trial counsel failed to establish the disability. It has uncovered critical mitigation evidence that the jury should have had the benefit of considering. And it has led to the discovery of exculpatory evidence unlawfully withheld by the prosecution. In each instance, evidence that was previously undeveloped substantiated a meritorious claim and thereby prevented an unconstitutional execution.

Congress recognized the importance of funding when it enacted 18 U.S.C. § 3599(f) and provided that funding would be available whenever "reasonably necessary for the representation" of a habeas petitioner in federal court. The Fifth Circuit's outlier "substantial need" standard for obtaining funding under Section 3599(f) severely limits counsel's access to the resources Congress intended to provide, thereby frustrating the

provision's express purpose and hindering the protection of constitutional rights. Once again, this is not merely a theoretical point. As *amici* discuss herein, the Fifth Circuit's standard is changing how counsel approach habeas representation in that Circuit—a Circuit in which both a significant number of capital convictions arise and a significant number of people are wrongly convicted and sentenced to death.[2] Some counsel refuse to ask for funding because they know the odds of obtaining it are so low. And still others will not take on habeas cases because they know they will not be able to do an adequate job without funding for investigators and experts.

Section 3599(f) applies to the whole country; there is no exception for the Fifth Circuit. To preserve access to critical representation-related resources under Section 3599(f), this Court should reaffirm that Congress meant precisely what it said: those resources should be available whenever "reasonably necessary for the

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[2] A large number of death-row exonerations have come from states under the jurisdiction of the Fifth Circuit. *See Innocence and the Death Penalty*, Death Penalty Information Center, https://deathpenaltyinfo.org/innocence-and-death-penalty (last updated May 12, 2017) (listing 13 exonerations in Texas, 11 exonerations in Louisiana, and 4 exonerations in Mississippi as of April 19, 2017). In recent years this Court has also reversed or vacated the lower courts' denial of relief in a number of death penalty cases arising from the Fifth Circuit or state courts in that circuit. *See, e.g.*, *Moore v. Texas*, 137 S. Ct. 1039 (2017); *Buck v. Davis*, 137 S. Ct. 759 (2017); *Brumfield v. Cain*, 135 S. Ct. 2269 (2015).

representation" of a petitioner in federal habeas proceedings. 18 U.S.C. § 3599(f).

ARGUMENT

I. Federal Habeas Case Law Is Replete With Examples Showing The Importance Of Funding For Investigation And Experts—Funding That Is All But Impossible To Obtain Under The Fifth Circuit's Approach.

When Congress enacted Section 3599(f) and its predecessor statute, it expressly provided that counsel seeking to set aside or vacate a death sentence in Section 2254 and Section 2255 collateral proceedings could request funding for investigative and expert resources. *See* 18 U.S.C. § 3599(a)(2); *see also* 21 U.S.C. § 848(q)(4)(b) (1988 ed.). In doing so, Congress recognized that such resources play a critical role in guaranteeing the adequate representation of capital petitioners in habeas proceedings. That recognition aligns with the established professional consensus that factual and expert investigation are essential during collateral post-conviction proceedings. *See, e.g.*, *ABA Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases*, Guideline 10.15.1 (rev. ed. 2003).

Experience from a number of cases demonstrates that habeas counsel who have access to resources to undertake an effective investigation are frequently able to substantiate their clients' meritorious claims, even if that investigation is conducted for the first time in federal court. This should come as no surprise. This Court has emphasized that "[t]he services of investigators and other experts may be critical in the

preapplication phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified." *McFarland v. Scott*, 512 U.S. 849, 855 (1994). And since this Court's decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), holding that ineffectiveness of counsel in initial-review state collateral proceedings can provide cause to excuse procedural default of an ineffectiveness of trial counsel claim, expert and investigative resources have become even more important for some defendants. *See id.* at 9.

The cases *amici* detail below show that proper investigative resources and procedures can literally make the difference between life and death. In each case, federal courts granted death-row inmates habeas relief or permitted petitioners to return to state court to advance their claim. And in each case, that outcome turned entirely on evidence that was only developed during post-conviction proceedings. Although the evidence in these cases was not developed with Section 3599(f) funds and was instead developed with resources provided by Federal Public Defenders' offices, legal defense organizations, or by counsel themselves, when each case arrived in federal or state post-conviction proceedings, there was insufficient evidence to substantiate a meritorious claim. Thus, had petitioners or their counsel been required to rely on Section 3599(f) as interpreted by the Fifth Circuit, they might very well have been denied funding.

The cases discussed herein demonstrate that counsel with the resources to undertake proper investigations are able to substantiate their clients' meritorious claims, while counsel without such resources may not be able to

make the same showing—even if the clients have similar claims at the outset of the proceedings. A death-row inmate's chance to present his meritorious claims should not depend on the circuit in which he is convicted, or whether his counsel has the luxury of funding an investigation out of his own pocket.

1. *Brumfield v. Cain*. The case of Kevan Brumfield, which this Court considered just two terms ago, is a prototypical example. *See Brumfield v. Cain*, 135 S. Ct. 2269 (2015). As his case arrived in federal court, Brumfield possessed limited evidence to demonstrate that he was intellectually disabled and thus could not constitutionally be executed. Yet, investigative and expert funding provided for the first time at the federal level dramatically changed the outcome. Brumfield and his counsel were able to prove his intellectual disability with the aid of a newly conducted IQ test and expert. The district court that granted Brumfield's petition emphasized that without the evidence the investigation uncovered, Brumfield's claim might never have been successful.

Brumfield was sentenced to death by the state of Louisiana. *Brumfield*, 135 S. Ct. at 2273. This Court subsequently decided *Atkins v. Virginia*, 536 U.S. 304 (2002), which held that the execution of intellectually disabled persons violates the Eighth Amendment. Brumfield amended his then-pending state petition for post-conviction relief to raise an *Atkins* claim, and sought an evidentiary hearing to explore that claim. *Brumfield*, 135 S. Ct. at 2273. While his original sentencing hearing, conducted before *Atkins*, had not focused on proving Brumfield's intellectual disability,

testimony from that hearing indicated that he had an IQ of 75, read at a fourth-grade level, and had been placed in special education classes.[3] *Id.* at 2274-75. To further develop this evidence, Brumfield repeatedly requested funding for expert witnesses and other investigative resources. *Brumfield v. Cain*, No. 04-CV-787, 2008 WL 2600140, at *13 (M.D. La. June 30, 2008) (describing state post-conviction proceedings). But the state court never ruled on those requests, and Brumfield was therefore unable to develop his *Atkins* claim. *Id.* The state habeas court ultimately denied Brumfield's request for an evidentiary hearing and dismissed his petition, finding he had not "demonstrated impairment based on the record." *Brumfield*, 135 S. Ct. at 2275.

After the Louisiana Supreme Court denied review, Brumfield petitioned for habeas corpus in federal court. The district court appointed new *pro bono* counsel, and Brumfield was able to develop the facts necessary to substantiate his *Atkins* claim for the first time after the Federal Public Defender Board provided funding for additional fact and expert discovery. *See Brumfield*, 2008 WL 2600140, at *3. Armed with these resources, counsel was able to procure and develop several sources of additional evidence that established Brumfield's intellectual disability.

First, counsel retained a neuropsychologist who, after administering a new IQ test (on which Brumfield scored a 69.9) and interviewing witnesses, concluded that Brumfield was intellectually disabled. *Id.* at *14.

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[3] In Louisiana, an IQ score of 70 or below generally indicates an intellectual disability. *See Brumfield*, 135 S. Ct. at 2277.

Two other psychologists (also provided for by the Public Defender Board) also testified that the prior IQ scores presented during Brumfield's initial sentencing hearing were inflated, and that Brumfield had been intellectually disabled since childhood. *Id.* On the basis of this evidence, the district court granted Brumfield's request for an *Atkins* hearing. And after counsel put forth "extensive evidence" of Brumfield's disability at that hearing, the district court concluded Brumfield was ineligible for execution. *Brumfield*, 135 S. Ct. at 2275-76. The Fifth Circuit ultimately agreed, after this Court vacated the Circuit's initial denial of habeas relief. *See Brumfield v. Cain*, 808 F.3d 1041, 1066 (5th Cir. 2015).

Without investigative and expert funding, Brumfield would remain on death row today. As the district court observed, the existing evidence of intellectual disability available during the state post-conviction hearing was insufficient to "put at issue the fact of mental retardation." *Brumfield*, 2008 WL 2600140, at *11. Only the "newly-presented evidence"—uncovered with the resources provided by the Federal Public Defender Board—substantiated Brumfield's *Atkins* claim and entitled Brumfield to an evidentiary hearing. *Id.* at *15.

2. *Williams v. Taylor*. In the case of Michael Wayne Williams, serious evidence of potential jury bias was only uncovered once his case reached collateral review in federal court. Virginia courts had denied his requests for funding. But an investigator hired by appointed federal habeas counsel discovered that the jury foreperson who had sentenced Williams to death had previously been married to a prosecution witness, and

had been represented by a prosecutor. Discovery of this evidence spared Williams his life.

Williams had been sentenced to death in Virginia in 1994 for the murders of Mary Elizabeth Keller and Morris Keller. *Williams v. Taylor*, 529 U.S. 420, 426 (2000). Bonnie Stinnett, the foreperson of the jury that convicted Williams and sentenced him to death, had previously been married to and had four children with a prosecution witness, Deputy Sheriff Claude Meinhard. During her divorce from Meinhard, Stinnett had also been represented by one of Williams's prosecutors. *Id.* at 440-41. But when asked during *voir dire* whether she was related to any of the witnesses or had previously been represented by any of the prosecuting attorneys, Stinnett failed to disclose these clear sources of potential bias. *Id.* The Court ultimately held that Stinnett's failure to honestly answer entitled Williams to an evidentiary hearing, and the district court thereafter found that Williams was entitled to a new trial. *See Williams*, 529 U.S. at 442; *Williams v. Netherland*, 181 F. Supp. 2d 604, 617 (E.D. Va.), *aff'd sub nom. Williams v. True*, 39 F. App'x 830, 834 (4th Cir. 2002) (per curiam).

Because the trial record contained no evidence suggesting that Stinnett's responses were misleading, her misrepresentations did not come to light during Williams's trial or direct appeal. *Williams*, 529 U.S. at 442. State habeas counsel—prompted by concerns about a different juror—filed a motion with the Virginia Supreme Court to fund an investigator "to examine all circumstances relating to the empanelment of the jury and the jury's consideration of the case." *Id.* That court, however, denied counsel's motion, and dismissed

Williams's habeas petition without any development or consideration of the factual circumstances. *Id.*

Only after Williams filed a habeas petition in federal court did his court-appointed federal habeas counsel hire an investigator (at counsel's own expense) to interview the jurors from Williams's trial. Brief for Petitioner at 13 n.11, *Williams v. Taylor*, 529 U.S. 420 (2000) (No. 99-6615). During those interviews, two jurors referred to Stinnett by her former married name—"Meinhard"—revealing Stinnett's prior marriage. *Id.* That revelation prompted counsel to petition for an evidentiary hearing on the issue of juror bias. Although the district court denied the petition, and the Fourth Circuit affirmed, this Court unanimously concluded that an evidentiary hearing was warranted. *Williams*, 529 U.S. at 444.[4] On remand, the district court held an evidentiary hearing and granted Williams's habeas petition, voiding his conviction and death sentence. *Williams*, 181 F. Supp. 2d at 619. Before his second trial, Williams pleaded guilty, and he is currently serving a life sentence.[5]

As this Court observed in its opinion, Williams's counsel "had no reason to believe Stinnett had been

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[4] Williams had eaten his last meal and was less than an hour away from execution when this Court granted certiorari and a stay of his execution. *See* Frank Green, *Miscues Rule Out Execution for Killer*, Richmond Times-Dispatch, Apr. 21, 2003, at A1; *Williams v. Taylor*, 528 U.S. 960 (1999) (mem.).

[5] *See* Green, *supra* note 4; *see also Virginia Courts Case Information*, Cumberland County Circuit–Criminal Division, http://ewsocis1.courts.state.va.us/CJISWeb/circuit.jsp (indicating that Michael Wayne Williams pleaded guilty to all charges on August 22, 2003).

married to Meinhard or been represented by" Williams's prosecutor because "the factual basis [for Williams's jury bias claim] was not reasonably available to petitioner's counsel during state habeas proceedings." *Williams*, 529 U.S. at 443, 442. Without the funds for an investigator, this constitutional violation would never have been discovered and redressed, and Williams likely would have been executed.

3. *Campbell v. Johnson*. Robert James Campbell was also spared the death penalty once evidence of his intellectual disability was developed during federal habeas review. Counsel discovered previously withheld IQ tests from Campbell's academic and incarceration records and, based on those disclosures and with out-of-pocket funding, counsel was able to develop evidence of Campbell's disability. Ultimately, even the State conceded that Campbell was ineligible for the death penalty after its own expert agreed that Campbell was intellectually disabled.

Campbell was sentenced to death in 1992 by a Texas jury for the murder of Alexandra Rendon. *In re Campbell*, 750 F.3d 523, 526 (5th Cir. 2014). After *Atkins* was decided, habeas counsel began investigating the grounds for a potential *Atkins* claim. Counsel subpoenaed Campbell's schools for his academic records, which "show[ed] generally that Campbell had performed poorly in his academics [but] did not reflect any standardized intelligence testing." *Id.* at 527. Campbell also subpoenaed the Texas Department of Criminal Justice for any intellectual functioning tests, but was informed no such testing had been conducted upon incarceration. *Id.* Nonetheless, Campbell petitioned for

habeas in state court, relying on the school records and affidavits from Campbell's relatives and friends to assert that Campbell was intellectually disabled. *Id.* at 528. Finding the affidavits and "sparse school records" insufficient, the state court dismissed the petition. *Id.*

The Fifth Circuit thereafter denied Campbell's attempt to file a successive federal habeas petition,[6] because it found that Campbell failed to adequately make out an *Atkins* claim. *In re Campbell*, 82 F. App'x 349, 351 (5th Cir. 2003). Campbell then sought funding for intellectual-function testing from the district court under 21 U.S.C. § 848(q), Section 3599(f)'s predecessor statute, but the district court denied the motion in light of the Fifth Circuit's decision. Order at 1-2, *Campbell v. Johnson*, No. 00-CV-3844 (S.D. Tex. Dec. 5, 2003), ECF No. 42, *aff'd sub nom. Campbell v. Dretke*, 117 F. App'x 946, 959 (5th Cir. 2004). Campbell's execution was set for May 13, 2014. *Campbell*, 750 F.3d at 526.

The state, however, had never disclosed that it was in possession of three tests that suggested Campbell was intellectually disabled. *Id.* at 528. In 1991 the Texas district attorney's office had independently subpoenaed Campbell's school records and specifically requested "psychological testing." *Id.* at 527. The district attorney's office received records showing that Campbell had scored a 68 on an IQ test when he was nine years old and had scored in the "lowest range" on another IQ test when he was seven. *Id.* But that office never informed Campbell of the testing. *Id.* at 526–27.

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[6] Campbell had previously filed an unrelated, unsuccessful federal petition.

The Texas Department of Criminal Justice had also administered an IQ test to Campbell upon his incarceration, on which he had scored a 71, but those results were not produced in response to Campbell's subpoena. *Id.* at 527. Due to the state's omissions and misrepresentations, Campbell's counsel never had knowledge of these three IQ tests, all of which suggested that Campbell was intellectually disabled.

Two months before Campbell's execution date, newly obtained habeas counsel learned that the district attorney's office had independently subpoenaed Campbell's school records, and therefore learned of the prior testing. *Id.* at 528–29. Counsel then retained Dr. Leslie Rosenstein, a psychologist, to conduct a full evaluation of Campbell's intelligence (apparently at counsel's own expense).[7] *Id.* at 529. Dr. Rosenstein concluded that Campbell had an IQ of 69 and diagnosed him with "mild mental retardation." *Id.*

With this new evidence in hand, counsel successfully petitioned the Fifth Circuit for a stay of execution and authorization to file a successive federal habeas petition. *Id.* at 535. The state then retained its own expert, who agreed that Campbell was intellectually disabled. *See* Joint Advisory Concerning Campbell's Intellectual Disability Claim at 1-2, *Campbell v. Davis*, No. 00-CV-3844 (S.D. Tex. May 10, 2017), ECF No. 138. The state then joined Campbell in filing an advisory with the district court conceding that Campbell was

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[7] The district court made clear that counsel received neither federal nor state funding. *Campbell v. Stephens*, No. 00-CV-3844, slip op. at 5 n.4 (S.D. Tex. May 11, 2015), ECF No. 90.

"categorically excluded from execution." *Id.* at 7 (quoting *Atkins*, 536 U.S. at 318). As a result, the court found Campbell ineligible for execution. Order Conditionally Granting Writ of Habeas Corpus, *Campbell v. Davis*, No. 00-CV-3844 (S.D. Tex. May 10, 2017), ECF No. 139. Campbell was taken off death row and will be resentenced to life in prison.[8]

Based on the limited evidence available when counsel first sought funding in 2003, counsel was unable to substantiate Campbell's *Atkins* claim. This was not only because counsel had been misled about Campbell's prior IQ testing, but also because counsel lacked the resources to retain an expert to conduct a new IQ test. *Campbell*, 750 F.3d at 528. That doomed his request for funding, because the Fifth Circuit's "substantial need" standard demanded more. But ultimately, after new counsel learned of the prior testing and found resources to obtain new testing, the Fifth Circuit held that the newly developed evidence of intellectual disability was "more than sufficient to satisfy Campbell's burden." *Id.* at 532. Thus, the Fifth Circuit's imposition of its own heightened standard for expert funding left Campbell's fate up to sheer chance. If new habeas counsel had not fortuitously discovered evidence of Campbell's prior IQ testing or did not have the resources to obtain new

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[8] *See* Jolie McCullough, *Texan on Death Row Will Face Parole Review Instead of Execution*, Tex. Trib. (May 10, 2017), https://www.texastribune.org/2017/05/10/death-sentenced-man-will-instead-face-parole-after-supreme-court-rulin/.

testing, Campbell could very well have been wrongfully executed.

4. *Gonzalez v. Wong*. In the case of Jesse Gonzales,[9] significant impeachment evidence came to light only after his habeas petition arrived in federal court. That evidence destroyed the credibility of the jailhouse informant who was key to the prosecution's aggravation case and resulted in a second chance for Gonzales to present his claims in state court.

Gonzales was convicted for first degree murder of a police officer during a drug raid on Gonzales's parent's home. *See People v. Gonzalez*, 800 P.2d 1159 (Cal. 1990). The penalty phase of his capital case focused largely on whether Gonzales had known that the victim was a police officer. While Gonzales maintained that he had mistaken the officers as rival gang members, the state presented the testimony of William Acker, a jailhouse informant, who claimed that Gonzales had admitted that he had been warned that police would raid the home, and that he planned in advance to "bag a cop." *Gonzalez v. Wong*, 667 F.3d 965, 973, 1002 (9th Cir. 2011). Gonzales's first sentencing ended in a hung jury, but a second jury sentenced Gonzales to death, apparently finding Acker's testimony credible. *Id.* at 976.

Following Gonzales's sentencing, a Los Angeles County grand jury investigation into then-recent perjury indictments of jailhouse informants revealed that the prosecutor's office had used fabricated

[9] As noted by the Ninth Circuit, it appears that Gonzales's name has been spelled incorrectly in the case caption since his original trial. *See Gonzalez v. Wong*, 667 F.3d 965, 972 n.1 (9th Cir. 2011).

confessions from jailhouse informants in a number of cases between 1979 and 1988. *See Maxwell v. Roe*, 628 F.3d 486, 499 (9th Cir. 2010). That revelation prompted Gonzales's post-conviction counsel to seek additional discovery related to Acker's testimony. *Gonzalez*, 667 F.3d at 967. The California state courts denied those requests, *id.*, and so the facts about Acker's testimony went undeveloped.

Gonzales filed for federal habeas relief and the district court granted counsel's request for additional discovery. *Id.* Counsel then obtained evidence that cast serious doubt on Acker's credibility, including six psychological reports prepared by prison psychologists revealing that Acker "had a severe personality disorder, was mentally unstable, possibly schizophrenic, and had repeatedly lied and faked attempting suicide in order to obtain transfers to other facilities." *Id.* Because this evidence had not been presented in state court, the Ninth Circuit stayed the case to allow Gonzales to present his potentially meritorious claim in state court in the first instance. *Id.* at 984. To *amici*'s knowledge, the petition remains pending in state court.[10]

But for the additional resources federal habeas counsel dedicated to investigating the potential impeachment issues, counsel would never have learned about Acker's mental health history. Absent that

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[10] *See* Case No. S208922, Docket, California Supreme Court, http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=2038864&doc_no=S208922 (last updated June 13, 2017, 2:09 PM).

investigation, Gonzales would have been deprived of a chance to challenge his death sentence in state court.

5. *Porter v. McCollum*. Although the statutory provision at issue in this case applies only to habeas cases in federal court, examples of successful post-conviction investigations are not limited to those that occur in federal court. Instances of similar investigations that have been conducted in state habeas proceedings reinforce the basic point: when counsel has an objectively reasonable basis to investigate a claim, investigative and expert resources can be essential to substantiating that claim.

For instance, in *Porter v. McCollum*, 558 U.S. 30 (2009), this Court summarily reversed the Eleventh Circuit's denial of habeas relief, based on substantial mitigation evidence that was developed for the first time during state post-conviction proceedings. George Porter was sentenced to death for the murders of Evelyn Williams and Walter Burrows. His trial counsel conducted a very minimal mitigation investigation in which counsel "failed to explore, investigate, or even consider" several potential ground for mitigation, and presented only a single (ultimately harmful) witness during the sentencing hearing. *Porter v. Crosby*, No. 6:03-CV-1465, 2007 WL 1747316, at *23, *26 (M.D. Fla. June 18, 2007).

During state post-conviction proceedings, counsel from the Capital Collateral Regional Counsel office—a state-funded agency that provides legal services for post-conviction collateral proceedings in capital cases, *see, e.g.*, Fla. Stat. Ann. §§ 27.701, 27.711—investigated previously ignored circumstances of Porter's

background. That investigation revealed details about Porter's troubled childhood (which included routine beatings by his father), his placement in remedial classes, his traumatic military service during the Korean War, his struggles with Post-Traumatic Stress Disorder thereafter, and a forensic neuropsychologist's expert assessment that Porter had a low IQ and suffered from a brain condition that could manifest in impulsive and violent outbursts. *See Porter*, 558 U.S. at 33-34; *Porter*, 2007 WL 1747316, at *27.

On the basis of this evidence, this Court summarily reversed the Eleventh Circuit's denial of petitioner's habeas claim, and concluded that trial counsel had been ineffective in failing to conduct an adequate mitigation investigation under *Wiggins v. Smith*, 539 U.S. 510 (2003). The Court found it "objectively unreasonable to conclude there was no reasonable probability the sentence would have been different if the sentencing judge and jury had heard the significant mitigation evidence that Porter's counsel neither uncovered nor presented." 558 U.S. at 31. On remand, the Eleventh Circuit vacated Porter's death sentence. *Porter v. Att'y Gen.*, 593 F.3d 1275, 1275 (11th Cir. 2010).

Other federal courts have granted similar claims based on evidence first uncovered by investigations conducted in state post-conviction proceedings. For example, in one case the Eleventh Circuit granted habeas relief based on expert testimony demonstrating the petitioner's limited intellectual functioning, testimony about petitioner's childhood beatings at the hands of family members, and other evidence that was only discovered during post-conviction proceedings.

DeBruce v. Comm'r, Ala. Dep't of Corr., 758 F.3d 1263, 1272 (11th Cir. 2014). Because of the "paucity of mitigating evidence actually presented" at trial, the jury had been provided with "almost no reason to spare [petitioner's] life." *Id.* The reason this evidence was not developed during trial was because trial counsel "did not have the funds to pay for" a mitigation investigator, and trial counsel failed to conduct his own investigation because he "just didn't have time." *Id.*

6. *Milke v. Ryan*. Debra Milke was sentenced to death by the state of Arizona for the murder of her four-year-old son, Christopher, based largely, if not exclusively, on the testimony of Police Detective Armando Saldate, Jr. *Milke v. Ryan*, 711 F.3d 998, 1001 (9th Cir. 2013). Saldate asserted that Milke had confessed to him shortly after the murder. *Id.* Milke denied the confession and proclaimed her innocence. *Id.* Saldate's testimony was the only direct evidence of Milke's confession: there was no recording, written statement, or any other evidence of the confession. *Id.* at 1018.

Prosecutors relied on Saldate's testimony to convict Milke and sentence her to death without disclosing that Saldate had a long history of "habitually" lying under oath and ignoring the constitutional rights of interviewees. *Id.* at 1001, 1019. It was not until state post-conviction proceedings that this evidence, and the state's withholding of it in violation of due process, came to light. As the Ninth Circuit described:

> Milke was able to discover the court documents detailing Saldate's misconduct only after a team of approximately ten researchers in post-

> conviction proceedings spent nearly 7000 hours sifting through court records. Milke's post-conviction attorney sent this team to the clerk of court's offices to search for Saldate's name in every criminal case file from 1982 to 1990. The team worked eight hours a day for three and a half months, turning up 100 cases involving Saldate. Another researcher then spent a month reading motions and transcripts from those cases to find examples of Saldate's misconduct.

Id. at 1018.

Although the state courts and the federal district court initially rejected her petition, the Ninth Circuit found a prejudicial *Brady* violation and granted habeas relief. *Milke*, 711 F.3d at 1018. Today, Milke lives in the suburbs of Phoenix.[11]

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These cases demonstrate that when counsel has an objectively reasonable basis for exploring a habeas claim, funding for investigative and expert resources are critical to developing that claim. Although the cases above largely involve investigations funded by Federal Public Defenders' offices, legal defense organizations, or counsel themselves, the results prove that subjecting prisoners to the heightened standard applied by the Fifth Circuit could lead to a miscarriage of justice. Had

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[11] *See* Michael Kiefer, *Debra Milke's New World After a Half-Life on Death Row*, Ariz. Republic (Aug. 1, 2015 8:26 AM), http://www.azcentral.com/story/news/local/phoenix/2015/08/03/debra-milkes-new-world-half-life-death-row/30974639/.

counsel in each case above requested resources under Section 3599(f), funding likely would not have been forthcoming under the Fifth Circuit's "substantial need" test, and evidence of the constitutional violations that ultimately spared the lives of the defendants would not have come to light.

Indeed, in several of these cases, courts commented on the similarly onerous standards state courts had applied to requests for funding in state collateral proceedings—which, like the Fifth Circuit, effectively required a showing of a meritorious claim *before* allowing funding to explore such a claim. For instance, in Brumfield's case, the district court lamented the "particularly cruel and unreasonable catch-22" applied by the state habeas court, which required a *prima facie* showing of an *Atkins* claim before funding would issue. As the district court explained, "without expert funding, no *prima facie* showing is likely possible, yet without a *prima facie* showing, no expert funding is forthcoming." *Brumfield v. Cain*, 854 F. Supp. 2d 366, 378 (M.D. La. 2012). Similarly, in Williams's case, although state habeas counsel petitioned the Virginia Supreme Court for investigative resources, that court denied the request because of Williams's "vague allegations." *Williams*, 529 U.S. at 442. But as this Court later explained, that vagueness "was not the fault of [Williams]"; instead "[t]he underdevelopment of these matters was attributable to," if anyone, the jury foreperson and prosecutor. *Id.* at 442–43.

In each case, counsel had an objectively reasonable basis to dedicate investigative and expert resources to pursuing meritorious habeas claims, even though those

claims could not be fully substantiated without additional resources. Each case thus would satisfy Section 3559(f)'s requirement that funding be "reasonably necessary." 18 U.S.C. § 3599(f); *see* Pet'r Br. at 24 (explaining that Section 3599(f) is satisfied whenever "a reasonable private attorney allocating limited resources would use them").

II. The Fifth Circuit's Standard Discourages Attorneys Who Rely On The Criminal Justice Act From Seeking Resources Or Even Accepting Capital Habeas Cases Altogether.

The Fifth Circuit's "substantial need" standard does more than prevent the discovery of critically important evidence that can support a meritorious habeas claim. It also poses several practical barriers for federal habeas attorneys in the Fifth Circuit. These roadblocks may discourage counsel from even seeking funding to undertake an investigation. And, in some cases, counsel decline to represent federal habeas petitioners in the Fifth Circuit altogether because they know they will not be able to do an adequate job without resources for investigations and experts.

The testimony of practitioners and experts during hearings conducted as part of the Ad Hoc Committee to Review the Criminal Justice Act ("CJA") illustrates these facts. That committee, appointed by the Chief Justice of this Court, is composed of several leading federal judges, as well as attorneys, administrators, and scholars. *See CJA Study Committee Begins Accepting*

Comments, United States Courts (June 8, 2015).[12] The committee has been tasked with conducting a comprehensive, impartial study of the CJA and the defense services it provides for indigent criminal defendants. *Id.* While its report is not yet finished, the committee has held public hearings across the country and published the transcripts of those hearings. One hearing, conducted in Birmingham, Alabama, focused particularly on capital cases.[13] Testimony elicited during

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[12] http://www.uscourts.gov/news/2015/06/08/cja-study-committee-begins-accepting-comments; *see also Frequently Asked Questions*, Committee to Review the Criminal Justice Act Program, https://cjastudy.fd.org/frequently-asked-questions (last visited June 15, 2017).

[13] Witnesses who testified before the committee discussed both judicial districts in which a Capital Habeas Unit ("CHU") has been established and those in which no CHU has been established. Those units, when established in the district's Federal Public Defenders' office, afford habeas petitioners with access to appointed counsel that have their own independent appropriation. CHU counsel need not rely on Section 3599(f). But where CHUs do not exist, the majority of federal habeas petitioners must rely on appointed counsel, who must seek resources under Section 3599(f). *See* Ad Hoc Committee to Review the Criminal Justice Act, Public Hearing, Birmingham, Ala., *Transcript: Panel 3—Views on Death Penalty and Capital Habeas Representation*, at 4 (Feb. 18-19, 2016) (testimony of Richard Burr, Member, Tex. Regional Habeas and Assistance Project), https://cjastudy.fd.org/sites/default/files/hearing-archives/birmingham-alabama/pdf/final-cja-birminghampanel-3.pdf.

As of 2016, without support from a CHU, more than half of federal habeas petitions in Texas raised only record-based claims that require no investigation (and that succeed only on very rare occasions). *See* Memorandum from Richard Burr, Member, Tex.

that hearing described the many challenges counsel face in obtaining investigative and expert funding in post-conviction proceedings.

As an initial matter, counsel must devote considerable time and resources solely to litigating the threshold issue of access to funding. That litigation squanders capital habeas counsel's already limited resources. *See* Ad Hoc Committee to Review the Criminal Justice Act, Public Hearing, Birmingham, Ala., *Transcript: Panel 3—Views on Death Penalty and Capital Habeas Representation*, at 5 (Feb. 18-19, 2016) (testimony of Richard Burr, Member, Tex. Regional Habeas and Assistance Project) (hereinafter "Committee to Review CJA Tr.").[14] By necessity, CJA counsel are forced to "engage in extensive advocacy, at a CJA rate of $181.00/hour, to request investigative services that cost half as much." Memorandum from Richard Burr, Member, Tex. Regional Habeas and Assistance Project, to Committee to Review the Criminal Justice Act Program, at 6-7 (Feb. 8, 2016) (hereinafter "Burr Written Testimony").[15] Because

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Regional Habeas and Assistance Project, to Committee to Review the Criminal Justice Act Program, at 2 (Feb. 8, 2016), https://cjastudy.fd.org/sites/default/files/hearing-archives/birmingham-alabama/pdf/dickburrbirminghamwrittentestimony-done.pdf.

[14] https://cjastudy.fd.org/sites/default/files/hearing-archives/birmingham-alabama/pdf/final-cja-birminghampanel-3.pdf.

[15] https://cjastudy.fd.org/sites/default/files/hearing-archives/birmingham-alabama/pdf/dickburrbirminghamwrittentestimony-done.pdf.

counsel typically must also seek to proceed *ex parte* in order to avoid disclosing defense strategy, and because counsel frequently face government opposition in doing so, by the time CJA counsel are able to secure funding, the fees counsel have *already* expended "may be as much or more than the funding sought." *Id.* at 7.

Next, counsel must litigate these threshold issues of access to funding while also contending with the one-year statute of limitations for federal habeas claims. *See* 28 U.S.C. § 2244(d)(1). Delays in the process of litigating and obtaining funding "too often mean[] that, even if the requested services are eventually authorized, they arrive too late for counsel to make effective use of the services." Burr Written Testimony at 7; *cf.* Hon. Helen G. Berrigan, *The Indispensable Role of the Mitigation Specialist in a Capital Case: A View From the Federal Bench*, 36 Hofstra L. Rev. 819, 827 (2008) (explaining that "developing mitigation evidence is time-consuming," because "[i]t takes months to conduct the interviews and amass the information needed and cull it to a presentable form").

Overall, these practical difficulties in obtaining expert and investigative resources pose a direct disincentive to even seeking those resources in the first place. In fact, "CJA panel attorneys are seven times less likely to use experts in habeas corpus proceedings or even ask for them as capital habeas units, where [attorneys] have their own funding and they have their own experts." Committee to Review CJA Tr. at 8 (testimony of Mark Olive, Nat'l Habeas Assistance and Training Counsel).

When this happens, an attorney is left to conduct an investigation of potential mitigating or exculpatory evidence, petitioner's intellectual capacity, or other matters, entirely on her own. But attorneys are ill-equipped to conduct these types of specialized investigations on their own. *See*, *e.g.*, *DeBruce*, 758 F.3d at 1272 (noting that, without funding, trial counsel explained he "just didn't have time" to conduct a mitigation investigation); Emily Hughes, *Arbitrary Death: An Empirical Study of Mitigation*, 89 Wash. Univ. L. Rev. 581, 620 (2012) (explaining, based on interviews with thirty mitigation specialists, that when courts denied motions to fund mitigation specialists, "defense counsel were left to conduct the mitigation investigation themselves, even though they had no experience conducting mitigation investigations and admitted they did not know how to conduct a mitigation investigation").

The September 2010 Report to the United States Judicial Conference's Committee on Defender Services echoes concerns about counsel with limited funding or experience. *See* Jon B. Gould & Lisa Greenman, *Report to the Committee on Defender Services Judicial Conference of the United States Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases*, at 88-89 (Sept. 2010).[16] If counsel with

[16] http://www.uscourts.gov/sites/default/files/fdpc2010.pdf. This report was an update to the so-called "Spencer Report" released in 1998. The Spencer Report was prepared by the Judicial Conference's Subcommittee on Federal Death Penalty Cases, composed of three federal district judges, and was "prompted by

limited or no capital habeas experience are appointed in capital habeas proceedings, the report noted, a failure "to fully investigate potential post-conviction claims, particularly those requiring investigation outside the trial record and relating to the penalty phase" can follow. *Id.* at 88. Post-conviction specialists interviewed for the report emphasized "the number of instances in which viable claims of [intellectual disability] and other mental conditions were either overlooked or insufficiently developed," and stated that the "inadequacy of post-conviction mitigation investigation in general was a focal point of concern." *Id.* However, the report noted that judges may be "reluctant to grant the resources necessary to fulfill post-conviction counsel's duty to conduct an independent outside-the-record investigation." *Id.* at 88-89.

These are generally not investigations that counsel can conduct on his or her own. Take, for example, the investigation Petitioner in this case seeks to conduct. *See* Pet'r Br. at 19-20. Among other things, developing and drawing out potential mitigating evidence,

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judicial and congressional concerns about the costs involved in providing defense services in federal death penalty cases." Hon. James R. Spencer, Hon. Robin J. Cauthron & Hon. Nancy G. Edmunds, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation*, at 6 (May 1998), http://www.uscourts.gov/sites/default/files/original_spencer_report.pdf (citing to unpaginated pages of PDF). The Report studied the "cost, quality and availability" of representation in federal capital cases, and made a number of recommendations to "contain[] costs while ensuring high quality defense services in capital cases," which the Judicial Conference approved in September 1998. Gould & Greenman, *supra*, at viii.

establishing trust with family members and potential witnesses, and remaining alert to potential intellectual or psychological conditions requires a unique and specialized set of professional skills. *See* Berrigan, *supra*, at 825, 828. For this reason, mitigation specialists typically hold psychology or social work degrees and, unlike attorneys, are "trained in uncovering family trauma and screening for often subtle mental and psychological disorders." *Id.* at 828; *see also* Pamela Blume Leonard, *A New Profession for an Old Need: Why a Mitigation Specialist Must be Included on the Capital Defense Team*, 31 Hofstra L. Rev. 1143, 1149 (2003) (explaining that mitigation specialists' analyses often "lead[] to the identification of issues requiring assessments by psychologists, psychiatrists and other experts"). Moreover, the sort of investigation conducted by a mitigation specialist "falls outside the expertise of the traditional fact investigator whose job is to assist the attorneys in determining 'what' happened" and focuses, instead on evidence that reveals "'why' the offense occurred and reasons why the death penalty is not the appropriate punishment." Leonard, *supra*, at 1151.

In light of these daunting realities, attorneys may decide that the inability to secure adequate funding for investigators and experts precludes them from undertaking a capital habeas petitioner's representation in the first place. During his testimony before the Ad Hoc Committee to Review the CJA, Richard Burr emphasized this consequence. Mr. Burr was invited to testify based on his extensive experience with capital defense litigation, including as the Director of the NAACP Legal Defense Fund's Capital Punishment

Project, Litigation Director of the Texas Resources Center, and counsel of record in *Ford v. Wainwright*, 477 U.S. 399 (1986). Mr. Burr observed that qualified in-state lawyers who "could do a great job" nevertheless do not take on a case until "they know they can get the funding" for an adequate investigation and experts. Committee to Review CJA Tr. at 32 (testimony of Richard Burr). Moreover, "the battle to get funding for resources for investigation and experts" serves as a "huge deterrent" for out-of-state lawyers interested in taking a Texas habeas case. *Id.* Those counsel understand that "without those resources they cannot do their job." *Id.*

Ultimately, in addition to foreclosing the discovery of critical evidence, applying the Fifth Circuit's "substantial need" standard hinders habeas investigations in that Circuit by increasing the costs necessary to obtain that funding, discouraging counsel from seeking it, and even leading counsel to decline to take on representation altogether. These results cannot be reconciled with Congress's intention that investigative and expert resources be available in post-conviction proceedings whenever "reasonably necessary for the representation." 18 U.S.C. § 3599(f).

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit should be reversed.

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Respectfully submitted,

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