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 *AMICUS CURIAE* THE CONSTITUTION PROJECT IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The Constitution Project (TCP) is an independent, not-for-profit organization that seeks consensus solutions to challenging constitutional issues. TCP pursues these objectives through scholarship, advocacy, and public education efforts. As part of that effort, TCP testifies before Congress, holds regular

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than the *amicus curiae* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have filed blanket consents to the filing of amicus curiae briefs in this case.

briefings with legislative staff, and frequently appears as *amicus curiae* before this and other courts.

The systemic deprivation of the right to counsel has long been among TCP's primary concerns. To address this issue, TCP assembled a National Right to Counsel Committee comprising independent experts who represent all segments of America's justice system. The Committee's members, listed in an addendum to this brief, include Democrats and Republicans, former judges, prosecutors, defense lawyers, victim advocates, and others.

In 2009, the Committee issued its seminal report, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, which presented the Committee's findings on the state of the constitutional right to counsel nationwide. The report offers 22 consensus recommendations. It calls upon jurisdictions to properly fund and administer indigent defense systems and urges other players—including the federal government, state bar associations, prosecutors, and judges—to address the crisis of indigent representation.

Among its findings, the Committee concluded that a lack of access to and funding for expert and investigative services seriously undermines the ability of appointed counsel to effectively defend indigent clients. Requiring a death-sentenced prisoner to show a "substantial need" for expert and investigative services would both exacerbate these challenges and deepen unacceptable disparities in the administration of justice nationwide. TCP therefore urges this Court to adopt petitioner's standard and reverse the judgment below.

SUMMARY OF ARGUMENT

I. Congress enacted Section 3599 out of a conviction "'that quality legal representation is necessary' in all capital proceedings to foster fundamental fairness in the imposition of the death penalty." *Martel* v. *Clair*, 565 U.S. 648, 659 (2012) (internal quotation marks omitted). Among the "myriad ways" it "seeks to promote effective representation for persons threatened with capital punishment," *id.* at 660, the statute funds "investigative, expert, or other services [that] are reasonably necessary for the representation" of federal defendants and *habeas* petitioners. 18 U.S.C. § 3599(f).

These services are essential to providing constitutionally adequate representation in federal capital trials. Counsel cannot discharge their Sixth Amendment obligations without the means to investigate "reasonably available mitigating evidence" and the facts necessary to rebut the prosecution's case. *Wiggins* v. *Smith*, 539 U.S. 510, 524 (2003) (internal quotation marks and emphasis omitted). And when a lack of resources leads to higher rates of serious error in capital adjudications, the public rightly questions the fundamental fairness and integrity of the adversarial system.

Section 3599's promise of expert and investigative services plays an equally important role in providing an effective remedy for Sixth Amendment violations in *state* courts. Constitutionally deficient representation is endemic in state capital proceedings. Yet ineffective-assistance claims often cannot be raised until collateral review where they are too often defaulted by deficient counsel or *pro se* defendants. When that happens, federal *habeas* proceedings offer

the first meaningful opportunity to challenge trial counsel's performance. Without access to Section 3599 services, however, even skilled counsel may be unable to develop the evidence needed to present a meritorious claim. *See Martinez* v. *Ryan*, 566 U.S. 1, 13 (2012).

II. Petitioner's interpretation of Section 3599 respects the careful balance Congress struck between the need to conserve public funds and an indigent defendant's right to pursue the same claims and defenses that would be available to a non-indigent defendant.

A heightened standard of "reasonable necessity" would directly undercut the statute's purpose. It would aggravate entrenched disparities between indigent defendants and those able to retain their own attorneys, as well as between defendants represented by counsel appointed from the private bar and those represented by federal defenders. A heightened standard would also stunt Section 3599's potential to provide a level playing field for defendants subject to geographic disparities in the quality of representation offered in state courts.

That would not only contravene congressional intent; it would also raise grave constitutional concerns. By making it more likely that the quality of a capital defendant's counsel will turn on factors such as resources and geography, a heightened standard would create a "substantial risk" that the ultimate sanction will be "inflicted in an arbitrary and capricious manner" incompatible with the Constitution. *Gregg* v. *Georgia*, 428 U.S. 153, 188 (1976) (opinion of Stewart, Powell & Stevens, JJ). This Court should reverse.

ARGUMENT

I. ACCESS TO EXPERT, INVESTIGATIVE, AND OTHER SERVICES IS ESSENTIAL TO THE INTEGRITY OF CAPITAL PROCEEDINGS

Section 3599 "aims in multiple ways to improve the quality of representation afforded to [both] capital petitioners and defendants alike." *Martel* v. *Clair*, 565 U.S. 648, 659 (2012). Among these measures, the statute's provision for "investigative, expert, or other reasonably necessary services" is especially significant. 18 U.S.C. § 3599(a).[2]

For indigent defendants standing trial in federal court, the statute's guarantee of funding for "reasonably necessary" services, *id.* at § 3599(f), enables counsel to carry out their constitutional duty to thoroughly investigate their client's guilt and "discover all reasonably available mitigating evidence." *Wiggins* v. *Smith*, 539 U.S. 510, 524 (2003) (internal quotation marks and emphasis omitted). For petitioners convicted in state courts, access to Section 3599 services plays a crucial role in cases where federal *habeas* proceedings offer the first meaningful

[2] Before the passage of the provisions now codified at Section 3599, the Criminal Justice Act of 1964, 18 U.S.C. § 3006A, "governed the appointment of counsel in *all* federal criminal cases and habeas litigation." *Martel*, 565 U.S. at 658. The CJA also provides for "reasonably necessary" services, but Section 3599 tripled the amount of money a judge can authorize for such services without making an additional finding that the services are "necessary to provide fair compensation for services of an unusual character or duration." *Compare* 18 U.S.C. § 3006A(e)(3), *with id.* § 3599(g)(2).

opportunity to raise ineffective-assistance claims. *See Martinez* v. *Ryan*, 566 U.S. 1, 10-11 (2012).

A. Section 3599 Services Are Indispensable To Effective Representation In Federal Capital Trials

This Court has repeatedly recognized that "the right to counsel is the foundation of our adversary system." *Martinez*, 566 U.S. at 12; *see Gideon* v. *Wainwright*, 372 U.S. 335, 344-345 (1963); *Powell* v. *Alabama*, 287 U.S. 45, 68 (1932). Indeed, "[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." *United States* v. *Cronic*, 466 U.S. 648, 654 (1984) (internal quotation marks omitted).

But the Constitution requires more than a reasonably competent attorney. Defendants are "entitle[d] * * * to an adequate opportunity to present their claims fairly within the adversary system." *Ake* v. *Oklahoma*, 470 U.S. 68, 77 (1985) (internal quotation marks omitted). And that means they must have "access to the raw materials integral to the building of an effective defense." *Id.*; *see Griffin* v. *Illinois*, 351 U.S. 12, 18-20 (1956) (holding that indigent defendants must have access to trial transcripts at no cost in an as-of-right appeal). Marshaling these "raw materials" in a capital case requires the help of experts, investigators, and other specialists. Integral as they are to counsel's ability to effectively present a defense, such services "are necessities, not luxuries." *Gideon*, 372 U.S. at 344.

Section 3599 aims to provide these necessary services "in light of what it calls 'the seriousness of the possible penalty and the unique and complex nature

of the litigation.'" *Martel*, 565 U.S. at 659 (quoting 18 U.S.C. § 3599(d) (ellipses omitted)). But the statute's guarantees are not only good legislative policy; they are also compelled by the Constitution and the public's overriding interest in the integrity of the adversarial system.

1. The constitutional right to expert and investigative services is rooted in the Fifth and Sixth Amendments. In *Wiggins*, for example, this Court held that the Sixth Amendment requires counsel in a capital case to undertake a reasonable investigation of the defendant's background. 539 U.S. at 522-524. The Court based its assessment of the attorneys' efforts in that case in part on the American Bar Association's guidelines for appointed counsel in capital cases. *Id.* at 524; *see also Rompilla* v. *Beard*, 545 U.S. 374, 387 (2005) (similarly analyzing reasonableness in light of ABA Guidelines); *Strickland* v. *Washington*, 466 U.S. 668, 688-689 (1984) (same). The Court concluded that the investigation was constitutionally deficient in light of the "well-defined" norm that counsel should seek to "'discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" *Wiggins*, 539 U.S. at 524 (quoting ABA, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* 11.4.1(C), at 93 (1989)).

Attorneys cannot be and are not expected to carry out such investigations entirely on their own. On the contrary, the ABA's revised Guidelines instruct that "[c]ounsel *must* promptly obtain the investigative resources necessary to prepare for both [the penalty and guilt] phases, including *at minimum* the assistance of a professional investigator and a mitigation

specialist, as well as all professional expertise appropriate to the case." ABA, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 925 (2003) (emphases added); *see id.* at 999-1000, 1003-04; ABA, *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 Hofstra L. Rev. 677, 677 (2008). This Court's precedents teach that such assistance, made possible in federal cases by Section 3599, is not only a practical necessity; it is a constitutional imperative.

Other services are required as a matter of due process. This Court held in *Ake* that an indigent defendant is entitled to the appointment of a "competent psychiatrist" where "his sanity at the time of the offense is to be a significant factor at trial." 470 U.S. at 83. State and lower federal courts have since extended *Ake*'s reasoning to "[n]on-psychiatric experts" where the evidence they would provide "is both critical to the conviction and subject to varying expert opinion." *United States* v. *Snarr*, 704 F.3d 368, 405 (5th Cir. 2013) (internal quotation marks omitted); *see also, e.g.*, *Scott* v. *Louisiana*, 934 F.2d 631, 633 (5th Cir. 1991) (ballistics experts); *Bright* v. *State*, 455 S.E.2d 37, 51 (Ga. 1995) (toxicologists); *Missouri* v. *Huchting*, 927 S.W.2d 411, 419 (Mo. Ct. App. 1996) (DNA experts).

2. Guaranteeing access to expert and investigative services at trial is also essential to the public's overriding interest in the fundamental fairness and integrity of the adversarial system. *See Justice Denied*, *supra* at 6, 44-47.

The failure to conduct a proper investigation is a leading cause of constitutionally deficient representation—that is, representation in which there is a reasonable probability that the *outcome would have been different* but for counsel's performance. *See* Laurence A. Benner, *The Presumption of Guilt: Systemic Factors That Contribute to Ineffective Assistance of Counsel in California*, 45 Cal. W. L. Rev. 263, 277, 321-324 (2009) (finding that the failure to conduct a proper investigation was a factor in 44% of ineffective assistance of counsel decisions in a study of California cases); *Strickland*, 466 U.S. at 687.

By contrast, when appointed counsel have the resources to conduct adequate investigations and develop mitigation cases, capital proceedings produce verdicts that are less likely to be overturned on review. *See* Norman Lefstein, *Reform of Defense Representation in Capital Cases: The Indiana Experience and its Implications for the Nation*, 29 Ind. L. Rev. 495, 505-512 (1996) (suggesting, in a study of capital prosecutions in Indiana, that enhanced resources for appointed counsel reduced the number of cases resulting in death sentences); James S. Liebman et al., *A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It* 302-303, 413-414 (2002) (finding a correlation between reduced state capital-sentencing rates and reduced rates of errors in capital cases).[3]

When counsel's inability to access needed resources leads to higher rates of serious error in capital cases,

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[3] *Available at* http://www2.law.columbia.edu/brokensystem2/report.pdf.

the inevitable effect is to erode the public's confidence in the fairness and reliability of our justice system. That is precisely the result Section 3599 is intended to prevent.

B. Section 3599 Services Also Play A Crucial Role In Enforcing The Right To Counsel In State Courts

While Section 3599 directly addresses the quality of representation at trial only in federal capital prosecutions, the statute also assists federal *habeas* petitioners denied effective counsel in state courts. In some cases, federal proceedings will offer state prisoners their first meaningful opportunity to raise ineffective-assistance claims. *See, e.g.*, *Martinez*, 566 U.S. at 14; *Trevino* v. *Thaler*, 133 S. Ct. 1911, 1918, 1921 (2013). And because such claims "often depend on evidence outside the trial record," *Martinez*, 566 U.S. at 13, Section 3599 services are essential to developing and presenting meritorious claims.

1. Constitutionally deficient representation is endemic in state capital trials. *See*, *generally*, Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L. J. 1835, 1841-66 (1994). Indeed, one comprehensive study of state death sentences from 1973 to 1995 concluded that "the largest single reason why courts reverse capital verdicts is egregiously incompetent representation of capital defendants by mainly state-funded lawyers—prompting close to 40% of all state post-conviction reversals, and close to 30% of all federal habeas reversals." *A Broken System*, *supra* at 370; *see generally Justice Denied*, *supra* at 47 (noting the role of inadequate representation in wrongful convic-

tions). And data on exonerations suggests that inadequate representation was an issue in more than a quarter of capital cases in which the defendant was eventually cleared. *See* Nat'l Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/about.aspx (last visited June 16, 2017). To make matters worse, the quality of representation is lowest in some of the jurisdictions that account for the lion's share of capital sentences. *See* Robert J. Smith, *The Geography of the Death Penalty and its Ramifications*, 92 B.U. L. Rev. 227, 260-265 (2012).

A variety of practical and procedural barriers can make it difficult or impossible to raise a Sixth Amendment violation on direct review from a conviction, however. Among other things, ineffective-assistance claims "normally require a different attorney." *Trevino*, 133 S. Ct. at 1917. The "[a]bbreviated deadlines" of direct appeals may not allow a defendant to investigate the factual basis for the claim. *Martinez*, 566 U.S. at 13. And the lack of an evidentiary hearing on appeal may make it more difficult to establish the necessary record. *See id.*

As a result, some States bar or effectively prevent defendants from raising ineffective-assistance challenges on direct review. That is the case in Arizona, California, Pennsylvania, and Texas—four of the eight States responsible for the vast majority of death sentences returned from 2004 to 2009. *See* Smith, 92 B.U. L. Rev. at 230-231; *Trevino*, 133 S. Ct. at 1921 (Texas); *Martinez*, 566 U.S. at 6 (Arizona); *Cox* v. *Horn*, 757 F.3d 113, 124 n.8 (3d Cir. 2014) (Pennsylvania); *People* v. *Lopez*, 175 P.3d 4, 12 (Cal. 2008) (California). Defendants in these States must wait until state post-conviction proceedings to raise ineffective-assistance claims.

The shortage of resources available to indigent petitioners in these *state* collateral review proceedings means that ineffective-assistance claims may themselves fall victim to ineffective counsel. *See* Eve Brensike Primus, *Effective Trial Counsel After* Martinez v. Ryan*: Focusing on the Adequacy of State Procedures*, 122 Yale L. J. 2604, 2609-11 (2013). Some of the States most active in imposing death sentences appoint post-conviction counsel only in limited circumstances. *See*, *e.g.*, ABA, *The Alabama Death Penalty Assessment Report* 111 (2006) (finding that counsel are "infrequently" appointed under Alabama's discretionary system);[4] ABA, *The Missouri Death Penalty Assessment Report* 184 (2012) (explaining that Missouri provides counsel only after an indigent death row inmate has filed a facially sufficient motion for relief *pro se*).[5] Others provide counsel without requiring that the counsel be effective. *See* Eric M. Freedman, Giarratano *is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 Cornell L. Rev. 1079, 1086-87 (2006) (noting that only fourteen of the thirty-seven States that have capital punishment have such a requirement). In Texas, where "competent counsel" *is* required by statute, courts have refused to look beyond "counsel's qualifications, experience, and abilities at the time of his appointment," regardless

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[4] *Available at* https://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/alabama/report.authcheckdam.pdf.

[5] *Available at* https://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/final_missouri_assessment_report.authcheckdam.pdf.

of actual performance. *Ex parte Graves*, 70 S.W.3d 103, 114 (Tex. Crim. App. 2002).[6]

Indeed, the ABA has observed that "the intertwined realities of chronic underfunding, lack of standards, and a dearth of qualified lawyers willing to accept appointment have resulted in a disturbingly large number of instances in which attorneys have failed to provide their clients meaningful assistance" in post-conviction proceedings. 31 Hofstra L. Rev. at 932 n.47 (citation omitted); *see* John B. Gould & Lisa Greenman, *Report to the Committee on Defender Services of the Judicial Conference of the United States: Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases* 87-97 (2010) (noting that "[a]mong the problems resulting from the appointment of inexperienced post-conviction counsel was a failure to fully investigate potential post-conviction claims").[7]

When post-conviction counsel is absent or ineffective, federal *habeas* proceedings offer the first meaningful opportunity to challenge trial counsel's performance. *Cf. Martinez*, 566 U.S. at 10 ("When an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim."); *Trevino*, 133 S. Ct. at 1918

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[6] Federal law offers certain procedural benefits to States certified by the Attorney General as having "a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by indigent prisoners who have been sentenced to death." 28 U.S.C. § 2265; 28 C.F.R. § 26.23. To date, no State has obtained the necessary certification.

[7] *Available at* http://www.uscourts.gov/sites/default/files/fdpc2010.pdf.

(similar). In such cases, Section 3599 services play a central role in ensuring the fairness and integrity of state proceedings.

2. This Court has recognized that "[i]neffective-assistance claims often depend on evidence outside the trial record." *Martinez*, 566 U.S. at 13. In capital cases, developing that evidence frequently requires undertaking the investigation of the defendant's background that trial counsel was allegedly unreasonable in failing to perform. Expert and investigative services are essential to that effort.

This very case illustrates the problem, but there are others. Take *Wiggins*. The defendant's post-conviction counsel in that case established trial counsel's ineffectiveness by commissioning an expert report from a licensed social worker that set forth defendant's "dysfunctional background." 539 U.S. at 516-517. In *Trevino*, the defendant's federal *habeas* counsel relied on the "mitigating matters that his own investigation had brought to light" to argue that trial counsel's efforts were deficient. 133 S. Ct. at 1916.

Without access to expert and investigative services, even highly-skilled and fairly-compensated *habeas* counsel may be unable to present meritorious claims. Indeed, "the prevailing national standard of practice *forbids* counsel from shouldering primary responsibility for the investigation" precisely because counsel will ordinarily lack the time to devote to the effort while simultaneously litigating the case. 31 Hofstra L. Rev. at 958 (emphasis added). And experts such as mitigation specialists may "possess clinical and information-gathering skills and training that most lawyers simply do not have." *Id.* at 959.

For indigent state prisoners prevented from raising Sixth Amendment claims until federal *habeas* review, Section 3599 funding is therefore essential to fulfilling the Constitution's guarantee.

II. A HEIGHTENED STANDARD OF REASONABLE NECESSITY WOULD EXACERBATE DISPARITIES IN CAPITAL CASES

A private attorney retained by a defendant of means need not seek court approval before hiring an expert or investigator. She need not make a special showing to preserve the confidentiality of her budget or to obtain additional funding when that budget exceeds a set amount. She is free, in short, to act on her professional judgment within the limits of the resources available.

Properly construed, Section 3599 gives the same deference to the judgment of appointed counsel in a capital case. *See* Pet. Br. 25. The statute protects the public fisc by requiring that counsel satisfy a court that the requested services are necessary and that any exceptional expenses are justified. 18 U.S.C. § 3599(f), (g)(2). But it balances those constraints against an indigent defendant's right to pursue the same claims and defenses that would be available to non-indigent defendants.

The "substantial need" standard applied by the Fifth Circuit here distorts that balance. Petitioner has explained how that standard contradicts the statute's text, ignores its history, and runs counter to its purpose. Pet. Br. 27-43. By making it relatively harder for indigent defendants to access needed services, the Fifth Circuit's heightened standard also risks increasing the effect on capital sentences of

factors that have nothing to do with a defendant's culpability or the integrity of the proceedings, such as the defendant's resources and geography. Congress cannot have intended and the Constitution cannot countenance that result.

A. A Heightened Standard Contravenes Congress' Intent To Assure Fairness In Capital Litigation

Section 3599 "grants federal capital defendants and capital habeas petitioners enhanced rights of representation" in order "to foster fundamental fairness in the imposition of the death penalty." *Martel*, 565 U.S. at 659 (internal quotation marks omitted). The "substantial need" standard undermines that purpose by aggravating resource disparities faced by capital defendants in federal proceedings and thwarting the statute's potential to mitigate the disparities that affect state-court proceedings.

1. Start with the obvious disparity between defendants who can hire counsel—any counsel—and those who cannot. This Court has long recognized that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin*, 351 U.S. at 19. Yet studies of state-court cases suggest that the kind of trial a capital defendant gets does indeed depend on his ability to hire counsel, even if he can only afford to retain an attorney for a portion of the proceedings. A heightened standard for reasonable necessity risks making that problem worse.

A study of one of the nation's most active death penalty jurisdictions found that relying on retained counsel for just part of the proceedings dramatically reduced the chances that an individual defendant

would ultimately be sentenced to death. Scott Phillips, *Legal Disparities in the Capital of Capital Punishment*, 99 J. Crim. L. & Criminology 717, 732, 741-743 (2009); *see also* James C. Beck & Robert Shumsky, *A Comparison of Retained and Appointed Counsel in Cases of Capital Murder*, 21 Law & Hum. Behav. 525 (1997) (drawing similar conclusions from a study of Georgia cases from the 1970s); Bright, 103 Yale L. J. at 1837-66 (providing anecdotal evidence). The 129 defendants in the study who were able to rely entirely on retained counsel fared even better: not one of them was sentenced to die, even though they "were just as likely to have been indicted for the most heinous murders." Phillips, 99 J. Crim. L. & Criminology at 741. Notably, the study found that defendants who hired private attorneys did not enjoy higher socioeconomic status than those who did not; indeed, many had to have counsel appointed at some other point in the proceedings. *Id.* at 722, 733, 748. In short, defendants with appointed counsel are at a disadvantage even controlling for socioeconomic status and the nature of the offenses charged.[8]

Access to expert and investigative services is crucial to providing effective representation to indigent defendants. *See supra* pp. 6-10. And it is also necessary to a defendant's ability to exercise other core trial rights, such as the right to cross-examine prosecution experts. *Cf. Melendez-Diaz* v. *Massachusetts*,

[8] While *amicus* is not aware of any similar empirical comparison of retained and appointed counsel in federal capital trials, the experience of state-court defendants illustrates the problems that arise when some defendants must rely on counsel conscripted by the courts, while others are able to engage counsel privately.

557 U.S. 305, 320-321 (2009) (holding that the Confrontation Clause requires giving a defendant the opportunity to cross-examine expert witnesses on their "judgment" and "methodology"). It stands to reason that a standard that constrains such services for defendants with appointed counsel is likely to contribute to the disparate outcomes faced by defendants unable to retain their own attorneys.

2. Even among defendants with appointed counsel, the choice of appointment can create inequities. Under the Criminal Justice Act of 1984, 18 U.S.C. § 3006A, counsel for indigent defendants may be appointed either from a pre-selected "panel" of private attorneys or from a federally-funded public defender organization. *See* David E. Patton, *The Structure of Federal Public Defense: A Call for Independence*, 102 Cornell L. Rev. 335, 352 (2017).[9] Unlike their private counterparts, public defender organizations typically have investigators on staff and have budgets to cover the costs of hiring experts for indigent clients. *Id.* at 353. Defendants fortunate enough to be appointed an Assistant Federal Defender are thus unlikely to find themselves in the dilemma petitioner faced in this case. By contrast, private counsel appointed to represent capital defendants must rely on Section 3599(f) requests to access services, creating the potential for "[t]wo tiers of representation." Nat'l Ass'n of Crim. Def. Lawyers, *Federal Indigent Defense 2015: The Independ-*

[9] The Administrative Office of the U.S. Courts oversees two kinds of "defender organizations": Federal Public Defender Organizations staffed by federal employees and federally funded, non-profit Community Defender Organizations. 18 U.S.C. § 3006A(g).

ence Imperative 43 (2015) (discussing access to services under 18 U.S.C. § 3006A(e)(2)).[10] Requiring panel attorneys to meet the heightened "substantial need" standard would only aggravate that entrenched disparity.

3. Finally, a heightened standard would undercut Section 3599's potential to mitigate geographic disparities that affect state-court proceedings.

States vary widely in their approaches to providing indigent defense. *See Justice Denied*, *supra* at 52-64. Not all ensure ready access to expert and investigative services. Alabama, for example, requires an indigent defendant to "show, with reasonable specificity, that the expert is *absolutely necessary* to answer a substantial issue or question raised by the state or to support a critical element of the defense." *Ex parte Moody*, 684 So. 2d 114, 119 (Ala. 1996) (per curiam) (emphasis added). In Arizona, "public defender offices, especially in rural counties, have to beg for more money for experts and investigators." ABA, *The Arizona Death Penalty Assessment Report* 156 (2006) (internal quotation marks and brackets omitted).[11] And in Texas, the State funds investigators and mitigation specialists in its public defender offices, but list-qualified appointed counsel in the most active death penalty jurisdictions must seek funding from elected judges in a system that the ABA has warned "invites uneven treatment." ABA,

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[10] *Available at* www.nacdl.org/federalindigentdefense2015 (last visited June 12, 2017).

[11] *Available at* https://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/arizona/Report.authcheckdam.pdf.

The Texas Capital Punishment Assessment Report 154 (2013).[12] Other States, like Florida and Missouri, make expert and investigative services more readily available to indigent defendants. *See* ABA, *The Florida Death Penalty Assessment Report* 178-179 (2006);[13] *The Missouri Death Penalty Assessment Report*, *supra* at 177-179. But that just underscores the extent of the disparity.

Congress extended Section 3599's enhanced protections to state prisoners because it recognized "that federal habeas corpus has a particularly important role to play in promoting fundamental fairness in the imposition of the death penalty." *McFarland v. Scott*, 512 U.S. 849, 859 (1994). And while the federal courts cannot assume the States' constitutional obligations, they can in some cases serve as an essential backstop. *See supra* pp. 10-15. When a defendant deprived of adequate expert or investigative assistance in state court is able to invoke Section 3599 in federal court, a "reasonable attorney" standard may help mitigate the disparity between States that offer appointed counsel the services they need to provide constitutionally sufficient representation and those that do not.

* * *

Section 3599 "seeks to promote effective representation for persons threatened with capital punish-

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[12] *Available at* https://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/tx_complete_report.authcheckdam.pdf.

[13] *Available at* https://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/florida/report.authcheckdam.pdf.

ment" in "myriad ways." *Martel*, 565 U.S. at 660. "With all those measures pointing in one direction," it would make no sense to think Congress meant the reasonable necessity standard in Section 3599(f) to "head the opposite way." *Id.* at 659-660. As petitioner has explained, the "substantial need" standard makes it *more* difficult for a capital defendant to obtain services than it would be for an ordinary federal defendant proceeding under the CJA. Pet. Br. 30-39. This Court rejected a similarly retrograde reading of Section 3599 in *Martel*. It should do so again here.

B. Adopting A Heightened Standard Would Raise Serious Constitutional Concerns

Even if Section 3599's text, history, and purpose did not foreclose the "substantial need" standard, petitioner would have the better reading of the statute. This Court has long "insiste[d] that capital punishment be imposed fairly, and with reasonable consistency, or not at all." *Eddings* v. *Oklahoma*, 455 U.S. 104, 112 (1982). A reading of Section 3599 that exacerbates the entrenched disparities among capital defendants would run directly counter to that admonition.

When a capital defendant's ability to develop the factual basis of his claims and defenses turns on whether he is indigent or able to retain a lawyer, whether his appointed counsel is a private attorney or a federal employee, or on whether he was tried in Alabama or Florida, there is a "substantial risk" that the ultimate sanction will be "inflicted in an arbitrary and capricious manner" incompatible with the Constitution. *Gregg* v. *Georgia*, 428 U.S. 153, 188

(1976) (opinion of Stewart, Powell, and Stevens, JJ). This Court cannot abide that risk.

CONCLUSION

The judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

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ADDENDUM

Members Of The Constitution Project's National Right To Counsel Committee*

Co-Chairs

Rhoda Billings. Professor Emeritus, Wake Forest Law School; Chief Justice, North Carolina Supreme Court, 1985-1986, Judge, State District Court, 1968-1972.

Robert M. A. Johnson. District Attorney, Anoka County, Minnesota; former President, National District Attorneys Association.

Hon. Timothy K. Lewis. Co-Chair, Appellate Practice Group, Schnader Harrison Segal & Lewis LLP; Judge, United States Court of Appeals for the Third Circuit, 1992-1999; Judge, United States District Court for the Western District of Pennsylvania, 1991-1992; Assistant United States Attorney, Western District of Pennsylvania, 1983-1991; Assistant District Attorney, Allegheny County, Pennsylvania, 1980-1983.

Walter Mondale (Honorary Co-Chair). Senior Counsel, Dorsey & Whitney LLP; Vice President of the United States, 1977-1981; United States Senator (D-MN), 1964-1977; Minnesota Attorney General, 1960-1964, who organized the amicus brief of 22 states in favor of Clarence Gideon in *Gideon* v. *Wainwright*.

* Affiliations are listed for identification purposes only.

William S. Sessions (Honorary Co-Chair). Partner, Holland and Knight LLP; Director, Federal Bureau of Investigation, 1987-1993; Judge, United States District Court for the Western District of Texas, 1974-1987, Chief Judge, 1980-1987.

Members

Shawn Marie Armbrust. Executive Director, Mid-Atlantic Innocence Project; former Northwestern journalism student who helped exonerate death row inmate Anthony Porter.

Jay W. Burnett. Adjunct Law Professor South Texas College of Law: Texas Criminal Procedure' Former Judge, 351st Criminal District Court, Harris County Texas, appointed 1984; Judge, 183rd Criminal District Court, Harris County, Texas, 1986-1998; Visiting Criminal District Judge, 2nd Judicial Administrative Region of Texas, 1999-2000.

Tony Fabelo. Director of Research, Justice Center of the Council of State Governments; Senior Associate The JFA Institute, 2003-2005; Executive Director, Texas Criminal Justice Policy Council, 1991-2003.

Norman S. Fletcher. Of Counsel, Brinson, Askew, Berry, Seigler, Richardson & Davis; Justice, Supreme Court of Georgia, 1989-2005, Chief Justice, 2001-2005.

Stephen F. Hanlon. Professor of Practice, Saint Louis University School of Law.

Susan Herman. Associate Professor of Criminal Justice and Human Services, Pace University; former Executive Director, National Center for Victims of Crime.

Bruce R. Jacob. Dean Emeritus and Professor of Law, Stetson University College of Law; former Assistant Attorney General for the State of Florida, represented Florida in *Gideon* v. *Wainwright*.

Abe Krash. Retired Partner, Arnold & Porter LLP; former Visiting Lecturer, Yale Law School; Adjunct Professor, the Georgetown University Law Center; represented Clarence Gideon in *Gideon* v. *Wainwright*.

Norman Lefstein. Professor of Law and Dean Emeritus, Indiana University School of Law, Indianapolis.

Charles J. Ogletree, Jr. Founding and Executive Director, Jesse Climenko Professor of Law, Charles Hamilton Houston Institute for Race and Justice, Harvard Law School.

Bryan Stevenson. Director, Equal Justice Initiative of Alabama; Professor of Law, New York University School of Law.

Larry D. Thompson. Senior Vice President & General Counsel, PepsiCo, Inc.; Deputy Attorney General of the United States, 2001-2003; United States Attorney, Northern District of Georgia, 1982-1986.

Hubert Williams. President, Police Foundation; former New Jersey Police Director; former Special Advisor to the Los Angeles Police Commission.