

NO. 19-3

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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Jan 28 2022

MIKAL D. MAHDI,

S.C. SUPREME COURT

Petitioner – Appellant,

v.

BRYAN STIRLING, Commissioner, South Carolina Department of Corrections;
MICHAEL STEPHAN, Warden of Broad River Correctional Institution;

Respondent – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

**PETITION FOR REHEARING *EN BANC*
BY PETITIONER-APPELLANT MIKAL D. MAHDI**

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ARGUMENT SUPPORTING REHEARING *EN BANC*

The majority Panel opinion in this capital habeas case involves two questions of exceptional importance—both involving the district court denying Mikal Mahdi “a full opportunity to seek federal habeas relief.” *Mahdi v. Stirling*, No. 19-3, 2021 WL 5997257, at *47 n.1, (4th Cir. Dec. 20, 2021) (Gregory, C.J., dissenting). The majority Panel opinion regarding the first issue—an indigent’s access to expert and investigative funding—conflicts with 18 U.S.C. § 3599 and *Ayestas v. Davis*, 138 S. Ct. 1080 (2018), and imposes an impossible burden. The majority opinion regarding the second issue—which involves two subparts—affirms the district court prematurely granting summary judgment, depriving Mahdi an opportunity to fully investigate his race-based trauma subclaim and a hearing on post-conviction relief (“PCR”) counsel’s failure to uncover evidence of the childhood abuse Mahdi suffered at the hands of his father, Shereef Mahdi.

Regarding the first issue, the district court applied an incorrect standard when it denied Mahdi’s request for funding for Dr. Hope Hill, an expert in race-based trauma. The district court initially relied on this Court’s precedent in *Wright v. Angelone*, 151 F.3d 151 (4th Cir. 1998). While Mahdi’s habeas case was pending in the district court, the Supreme Court decided *Ayestas*, interpreting section 3599 in the context of its decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013). The majority opinion sets an impossible burden for at

funding applicant by requiring a prior showing of success on the merits. The dissent would hold that Mahdi met the *Ayestas* standard and the district court erred by not approving the funding for Dr. Hill. Additionally, the majority opinion on this issue is unfaithful to this Court's holdings in *Gray v. Pearson*, 526 F. App'x 331 (4th Cir. 2013) and *Juniper v. Davis*, 737 F.3d 288 (4th Cir. 2013). *Gray* and *Juniper* require a district court to appoint independent counsel to investigate potential *Martinez* claims without a prior showing of a viable *Martinez* claim. Like *Gray* and *Juniper*, *Ayestas* does not require a funding applicant to establish success on the merits prior to receiving investigative and expert funding.

The second issue involves two subparts: (1) the district court's premature denial of Mahdi's race-based trauma claim without providing him a fair opportunity to investigate and develop that evidence and (2) the district court's denial of a hearing, requested by Mahdi, to develop PCR counsel's deficient performance, for not uncovering trial counsel's failure to investigate and present evidence of the childhood abuse Mahdi suffered at the hands of his father. First, granting summary judgment was premature because Mahdi has not received the requested funding and had an opportunity to investigate. The district court should afford Mahdi an opportunity to demonstrate whether Dr. Hill's testimony would fundamentally alter this subclaim. Second, neither trial counsel nor PCR counsel uncovered evidence of Mahdi's childhood abuse by his father. Trial counsel's ineffectiveness prejudiced

Mahdi by allowing the sentencing judge to draw incorrect conclusions about Mahdi's upbringing. Granting summary judgment is premature because the district court did not convene an evidentiary hearing to allow Mahdi an opportunity to demonstrate PCR counsel's deficient performance.

I. IN AN ISSUE OF FIRST IMPRESSION IN THIS CIRCUIT—INDIGENT FUNDING OF *MARTINEZ* INVESTIGATIONS—THE MAJORITY PANEL OPINION CONFLICTS WITH 18 U.S.C. § 3599 AND *AYESTAS V. DAVIS*, 138 S. CT. 1080 (2018), AND IMPOSES AN IMPOSSIBLE BURDEN.

The dissent recognized:

We typically defer to district courts' funding decisions, only finding error when faced with an abuse of discretion. [*Ayestas*'] at 1094. But when a court applies the wrong legal standard, we're called to withhold that deference, *Koon v. United States*, 518 U.S. 81, 100, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996)—a call that only rings clearer when the error impedes a defendant's ability to challenge the most permanent sentence a state may impose. Heeding that charge, I would vacate the district court's denial of Mahdi's funding request and remand for the district court to apply the correct legal standard.

Mahdi, 2021 WL 5997257, at *48 (Gregory, C.J., dissenting).

In 2012, *Martinez* held, "Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." 566 U.S. at 9. This Court recognized the new considerations *Martinez* created for district courts and appointed counsel. Applying "basic legal ethics principles," *Gray* held "a clear conflict of interest exists in requiring [state habeas counsel also appointed as federal habeas] counsel to identify

and investigate potential errors that they themselves may have made in failing to uncover ineffectiveness of trial counsel while they represented [the client] in his state post-conviction proceedings.” *Gray*, 526 F. App’x at 334 (remanding for appointment of independent counsel). This Court reaffirmed *Gray* in *Juniper*:

To be clear, if a federal habeas petitioner is represented by the same counsel as in state habeas proceedings, and the petitioner requests independent counsel in order to investigate and pursue claims under *Martinez* in a state where the petitioner may only raise ineffective assistance claims in an “initial-review collateral proceeding,” qualified and independent counsel is *ethically required*. A district court must grant the motion for appointment of counsel without regard to whether the underlying motion identifies a ‘substantial’ ineffective assistance claim under *Martinez*.

737 F.3d at 290. Both *Juniper* and *Gray* expressly rejected a requirement that federal habeas petitioners must identify “any sufficiently substantial claim under *Martinez*” to justify a “request that independent counsel be appointed to explore [their] *Martinez* claims.” *Juniper*, 737 F.3d at 290 (internal quotations and alterations omitted) (quoting *Gray*, 526 F. App’x at 334–35).

Against this backdrop, Mikal Mahdi entered the district court in his federal habeas case in September 2016. The district court considered the implication of *Martinez*, *Gray*, and *Juniper* at the appointment of counsel stage and appointed independent counsel. *See, e.g.*, J.A. at 1 n.1; ECF No. 10, at 4 n.1; ECF Nos. 15, 17, 19, 22, 26. The district court directed newly appointed “counsel shall submit a confidential proposed litigation budget within 30 days of the appointment of second

chair counsel.” ECF No. 19. Thus, as they began the arduous process of reviewing the state court record and prior counsel files, counsel predicted the resources necessary to investigate *Martinez* claims, and the district court “approved \$34,500 in funding for a mitigation investigator and social historian.” *Mahdi*, 2021 WL 5997257 at *31.

The *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913 (2003) (“ABA Guidelines”), informed counsel’s mitigation investigation. *See, e.g., Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (“The ABA Guidelines provide that investigations into mitigating evidence ‘should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.”) (citing ABA Guideline 11.4.1(C), p. 93 (1989) (emphasis supplied by Court)). “Post-conviction counsel should . . . continue an aggressive investigation of all aspects of the case.” ABA Guidelines, *supra*, at 1079–80. Counsel “have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.” *Id.* at 1015. “Because the sentencer in a capital case must consider in mitigation, anything in the life of a defendant which might militate against the appropriateness of the death penalty for that defendant, penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history.” *Id.* at 1022

(internal quotations omitted). “The circumstances of a particular case will often require specialized research and expert consultation.” *Id.* at 1026.¹

Counsel “later realized [they] did not require the assistance of a social historian,” and they “did not use any portion of the \$12,500 allocated for that expert.” *Mahdi*, 2021 WL 5997257, at 48 n.3 (Gregory, C.J., dissenting). Instead, counsel’s investigation revealed the need for an expert in race-based trauma, and they moved for the district court to approve funding for Dr. Hope Hill.² J.A. at 11–36. The district court denied this motion, relying on this Court’s pre-*Ayestas* opinion in *Wright*. J.A. at 37–41.

While *Mahdi*’s habeas case was pending in the district court, the Supreme Court decided *Ayestas*. *Ayestas* considered the “reasonably necessary” standard for expert services found in 28 U.S.C. § 3599(a), noting the common use of the term “necessary” refers to something that is “merely important or strongly desired.” 138 S. Ct. at 1093. As a legal term, “necessary” does not mean “*absolutely* necessary” and “may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the

¹ “The Legal Representation Plan should provide for counsel to receive the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation at every stage of the proceedings.” ABA Guidelines, *supra*, at 952.

² The dissent summarized Dr. Hill’s qualification “in child development and social policy.” *Mahdi*, at 48 (Gregory, C.J., dissenting) (citing J.A. 13–16).

end sought.” *Id.* (quoting *Black’s Law Dictionary* 928 (5th ed. 1979)). The Court held:

Section 3599 appears to use the term “necessary” to mean something less than essential. The provision applies to services that are “reasonably necessary,” but it makes little sense to refer to something as being “reasonably essential.” What the statutory phrase calls for, we conclude, is a determination by the district court, in the exercise of its discretion, as to whether a reasonable attorney would regard the services as sufficiently important.

Id. Significantly, the Court decided *Ayestas* after its decisions in *Martinez* and *Trevino*. *Ayestas* observed these cases permit a petitioner to overcome the failure to raise a substantial ineffective-assistance claim in state court by showing that state habeas counsel was ineffective, and it is possible that “investigation might enable a petitioner to carry that burden.” *Ayestas*, 138 S. Ct. at 1093–94. *Ayestas* further held, “To be clear, a funding applicant must not be expected to *prove* that he will be able to win relief if given the services he seeks.” *Id.* at 1094.

Relying on *Ayestas*, Mahdi renewed his request for funding for Dr. Hill in his Federal Rule of Civil Procedure 59(e) motion. J.A. 545–74. The district court denied the motion. J.A. 903–25. This majority opinion affirmed, noting the district court “determined the services were not ‘reasonably necessary’ because they were cumulative, unlikely to generate additional useful and admissible evidence, and lacked merit,” Mahdi did not “identify any themes that he intended to pursue through this supplemental funding request,” and he did not “forecast what Dr. Hill's report

would contribute beyond the information his previously approved \$34,500 in funding for a mitigation investigator and social historian had already yielded.” *Mahdi*, 2021 WL 5997257, at *31; *but see, id.* at *48 n.3 (Gregory, C.J., dissenting) (stating that Mahdi “did not use any portion of the \$12,500 allocated for that expert”).

The dissent “would vacate the district court’s denial of Mahdi’s funding request and remand for the district court to correctly apply *Ayestas*,” reasoning, “[t]he standard that the district court applied—both in its original denial of supplemental funding and its Rule 59 order—is outdated and asks too much of petitioners seeking funds under § 3599(f).” *Id.* at *52 (Gregory, C.J., dissenting). The dissent criticized the district court and the majority opinion for being “unable to see what ‘additional value’ Dr. Hill could provide” and for “either ignor[ing] or misapprehend[ing] the expertise that mental health clinicians bring to the table.” *Id.* at *51 (citing ABA Guideliens, *supra*, at 956–57 (“Counsel’s own observations of the client’s mental status, while necessary, [] can hardly be expected to be sufficient to detect the array of conditions [parenthetical omitted] that could be of critical importance.”)).

After reviewing *Ayestas*, the dissent recognized:

By its own explanation, the district court denied Mr. Mahdi’s funding request because he failed to prove that he *could not* develop his *Martinez/Trevino* claim without the assistance of Dr. Hill. J.A. 40. Requiring that Mahdi prove that it was impossible to develop his claim

without expert assistance was tantamount to imposing an *absolute* need requirement—a burden akin to, if not greater than, the “substantial need” requirement that *Ayestas* rejected.

Id. at *50. Ultimately, “Dr. Hill's recently discovered evidence is reasonably necessary in this case because it would have explained the impact of his race-based trauma and lineage on Mahdi’s psychological well-being, in context of his traumatic upbringing with his father, who indoctrinated Mahdi to have separatist, anti-government, and antagonistic views against whites.” *Id.* at *52.

The majority opinion is unfaithful to this Court’s precedent in *Gray* and *Juniper*. Just as a federal habeas petitioners should not be required to identify a “sufficiently substantial claim under *Martinez*” to justify a “request that independent counsel be appointed to explore [their] *Martinez* claims,” *Gray*, 526 F. App’x at 334–35, “a funding applicant must not be expected to *prove* that he will be able to win relief if given the services he seeks.” *Ayestas*, 138 S. Ct. at 1094. The majority opinion imposes such an impossible standard. Because the majority opinion conflicts with section 3599 and *Ayestas* and imposes an impossible burden, this Court should grant rehearing *en banc* and reverse the district court.

II. THE DISTRICT COURT ERRED WHEN IT GRANTED THE WARDEN SUMMARY JUDGMENT ON TWO OF MIKAL MAHDI’S FAILURE TO INVESTIGATE SUBCLAIMS: (1) THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND PRESENT MITIGATING EVIDENCE OF MAHDI’S RACE-BASED TRAUMA, AND (2) THAT TRIAL COUNSEL WERE INEFFECTIVE FOR FAILING TO INVESTIGATE AND PRESENT

EVIDENCE OF THE CHILDHOOD ABUSE MAHDI SUFFERED AT THE HANDS OF HIS FATHER.

The district court erred when it granted the Warden summary judgment on two of Mikal Mahdi's failure to investigate subclaims. First, "[t]he district court's error in adjudicating Mahdi's funding request precludes full review of his race-based trauma subclaim." *Mahdi*, 2021 WL 5997257, at *52 (Gregory, C.J., dissenting). Second, the district court erred in holding that Mahdi's childhood-abuse subclaim did not present a 'substantial' claim of attorney ineffectiveness." *Id.*

A. Race Based Trauma.

As seen, "the district court applied the wrong legal standard to Mahdi's request for funding." *Id.* The dissent further recognized, "Dr. Hill's testimony might have fundamentally altered Mahdi's failure-to-investigate claim." *Id.* The additional funding would allow Mahdi "to develop and effectively present the arguments for this subclaim" because "Dr. Hill would be able to examine the impact of these traumatic events and stress factors on Mahdi in the context of his unique ancestry and extrinsic and intrinsic racial identity." *Id.* This "in-depth examination of [Mahdi's] lineage would stand in stark contrast to the very generally pieced together family biographies that PCR counsel presented in the initial postconviction proceeding." *Id.* (internal quotations and brackets omitted).

The dissent disagreed with the majority opinion's conclusion that the PCR testimony of social historian Dr. Nicholas Cooper-Lewter and affidavit of mitigation

investigator Samuel Dworkin supplied the same information that Dr. Hill would provide. “While it is true that Dr. Cooper-Lewter examined *some* of Mahdi’s family socio-history, Dr. Cooper-Lewter did not conduct an in-depth examination of Madhi's family lineage of the kind proposed by Dr. Hill to understand how Mahdi’s inter-generational family trauma impacted him and his crimes.” *Id.* (citing J.A. 2955–64 (discussing Madhi’s grandparents and parents’ history); J.A. 31–33 (proposing that Dr. Hill will investigate Mahdi’s “unique ancestry and extrinsic and intrinsic racial identity” and how these experiences “emboldened his ‘survivalist mentality’”). The dissent noted:

Mahdi identified some key gaps in Dr. Cooper-Lewter's investigation that are reasonably necessary to painting a complete picture of his psychological well-being leading up to this crime. For example, while Dr. Cooper-Lewter noted that Mahdi's father was “anti-government,” constantly “raved about the ‘New World Order’ and ‘white folks coming to kill them[,]’ [and . . .] taught [Mahdi and his brother] how to shoot guns, fight with knives, and how to fist-fight and box.” J.A. 2978. Mahdi noted Dr. Hill would fill in a gap of detailing how “he struggled with the inherent contradiction of his father’s black separatist beliefs and his father’s complete and utter inability to provide for Mr. Mahdi’s most basic needs.” J.A. 32.

Id.

The dissent recognized Dworkin’s “affidavit details some of the facts underlying Mahdi’s race-based trauma in a way that PCR counsel did not.” *Id.* at *53. Yet, “at its core, Dworkin’s affidavit, like the PCR testimony [of Dr. Cooper-Lewter], reflects only the existence of segregation, racial animus, and self-loathing

in Mahdi's lineage—not their effects,” which “strengthens but does not change ‘[t]he heart of the claim.’” *Id.* (quoting *Gray v. Zook*, 806 F.3d 783, 799 (4th Cir. 2015)).

The dissent recognized:

Dr. Hill's testimony was likely to do what Dworkin's affidavit cannot. We don't know what we don't know. But Dworkin's affidavit gives me good reason to believe that, aided by Dr. Hill's expertise, Mahdi would have had a compelling argument that his race-based trauma subclaim was “new.”

Id. (quoting *Wise v. Warden*, 839 F.2d 1030, 1033 (4th Cir. 1988)). Likewise, Mahdi would have a compelling argument “that *Martinez* excused the procedural default that resulted from Mahdi's failure to timely exhaust this claim.” *Id.*

Because the district court's *Ayestas* error precludes meaningful review, this Court should grant rehearing *en banc*, “vacate the district court's grant of summary judgment on the race-based-trauma subclaim and remand for further proceedings.”

Id.

B. Childhood Abuse by Mikal Mahdi's Father.

The dissent would hold:

The district court also erred in holding that Mahdi could not overcome the procedural default on his subclaim that trial counsel were ineffective for failing to uncover and present evidence of his childhood abuse. This subclaim is new and presents a substantial claim of ineffective assistance. The only remaining issue is whether PCR counsel performed deficiently by failing to raise this claim in the state postconviction proceedings—an issue that, on this record, should not have been resolved with summary judgment.

Id. at *53.

The dissent recognized that both trial and PCR counsel “painted Shareef [Mahdi] as a loving and doting father—affectionate—who particularly favored Mahdi.” *Id.* at *54. Neither trial nor PCR counsel interviewed “Mahdi’s first cousin, Nate Burwell, IV,” who provided “substantial insights into the family dynamics, recalling Mikal and [his brother] being beaten by their father as children.” *Id.* at *53 (internal quotations omitted). “The only evidence of Shareef’s physical abusiveness related to [his wife] Vera and [mother] Nancy.” *Id.* Because trial and PCR counsel failed to discover and present any evidence of Mahdi’s childhood abuse, “a factfinder would believe that Shareef was specifically *not* physically abusive toward his children.” *Id.* at *54. The dissent correctly concluded, “Given that Mahdi ‘presented *no evidence*’ on this issue in both the PCR and trial courts, I see no way to view this subclaim as anything but new.” *Id.* (citing *Winston v. Kelly*, 592 F.3d 535, 550 (4th Cir. 2010)).

Martinez provides the vehicle for Mahdi to present this subclaim. In South Carolina, “the state PCR proceeding was the initial review proceeding” for claims of ineffective assistance of counsel, and “state law required [Mahdi] to bring the claim in the initial-review collateral proceeding.” *Id.* (citing *Trevino*, 569 U.S. at 423). To satisfy the remaining requirements of *Martinez*, “Mahdi need only show that there was ‘some merit’ to his claim that he was prejudiced by constitutionally deficient trial counsel, and that PCR counsel ‘performed deficiently, under the first

prong of *Strickland*, by failing to exhaust the underlying ineffective-assistance-of-trial-counsel claim.” *Id.* at *54 (quoting *Owens v. Stirling*, 967 F.3d 396, 423 (4th Cir. 2020)).

The dissent observed, “The district court appears to have rejected Mahdi’s *Martinez* claim based on its conclusion that the underlying [ineffective assistance of counsel] claim did not have even *some* merit.” *Id.* at *55 (emphasis original). Disagreeing with the district court and the majority Panel decision, the dissent reminded “the need to present the profound and chronic trauma of someone’s childhood is at its highest when the alternative is to put forth almost no mitigation presentation at all.” *Id.* at *57 (internal quotations omitted) (citing *Stokes v. Stirling*, 10 F.4th 236, 253 (4th Cir. 2021)).

The dissent analyzed the evidence of deficient performance of trial counsel. “Common sense should have led trial counsel to suspect that Mahdi and Shareef might deny or understate past abuse” because both perpetrators and victims of abuse “are likely to deny it for different, but equally obvious, reasons.” *Id.* at *55. “Trial counsel knew that Shareef was incredibly violent to vulnerable people in his life.” *Id.* Trial counsel “ignored the signs that some of the other adults in Mahdi’s life likely towed the line between discipline and uncontrolled physical force.” *Id.* at *56. They also “ignored the very likely possibility that the violence Mahdi exhibited as a child reflected the violence he saw and experienced firsthand.” *Id.* Additionally,

“[c]ounselors’ belief that the adults in Mahdi’s life were ‘dysfunctional’ should have caused them to seek information from another generation of family members—Mahdi’s cousins—not to abandon his search altogether.” *Id.* at *57 (citing ABA Guidelines 10.7 (detailing the importance of “[a] multi-generational investigation” that “extend[s] as far as possible both vertically and horizontally”). The dissent reasoned, “[h]ad they done so, trial counsel would have easily uncovered the same key witness federal habeas counsel found: Nathan’s son, Nate Burwell, IV.” *Id.* The dissent demonstrated how trial counsel’s deficiencies affected the resulting sentence:

As much is reflected in the trial court’s sentencing decision. The court’s consideration of Mahdi’s “turbulent and transient childhood and upbringing” as a mitigating circumstance spans four sentences. J.A. 1669. It *first* notes that there was “no reference to physical ... abuse suffered by the defendant” and that “defendant’s father ... continually expressed great care and concern for [Mahdi’s well-being].” J.A. 1669–70. Then, viewing Hammock’s testimony as a whole, the court concludes that Mahdi’s upbringing was simply “less than ideal” but bore no relation to his criminal conduct. J.A. 1670. In the end, the trial court gave Mahdi’s upbringing “no weight” as a mitigating circumstance. *Id.*

Id. at *58.

The dissent observed, “For many of the same reasons, there is a good reason to believe that PCR counsel’s failure to investigate Mahdi’s childhood abuse and challenge trial counselors’ effectiveness was deficient.” *Id.* However, the dissent would not reach that question because genuine issues of material fact preclude judgment on the issue,” recognizing a hearing in the district court would be the parties first

opportunity for both parties to present evidence regarding PCR counsel's performance. *Id.* This Court should "vacate the district court's judgment on this subclaim and remand for the district court to hold the evidentiary hearing that Mahdi requested." *Id.*

CONCLUSION

For the reasons stated above, in the dissenting opinion, and in Mikal Mahdi's opening brief (Doc. No. 26) and reply brief (Doc. No. 58), this Court should rehear this case *en banc* to ensure Mahdi has "a full opportunity to seek federal habeas relief." *Mahdi*, 2021 WL 5997257, at *57 n.1 (Gregory, C.J., dissenting).

Respectfully submitted,

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