NO. 19-3

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MIKAL D. MAHDI,

Petitioner-Appellant,

v.

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

Respondents-Appellees.

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

RESPONSE IN OPPOSITION TO PETITION FOR REHEARING *EN BANC*

CAPITAL CASE

On December 20, 2021, this Court issued an opinion affirming the district court's judgment that denied habeas relief to Petitioner-Appellant Mikal D. Mahdi ("Mahdi"). (Doc. 66). Mahdi filed a motion for rehearing *en banc* on January 3, 2022. (Doc. 68). This Court called for a response on January 14, 2022. (Doc. 71). Respondents-Appellees (collectively "the State") oppose the petition. The State submits Mahdi has not demonstrated sufficient grounds to warrant a rehearing *en banc* for these reasons:

1. Rehearing *en banc* proceedings are "not favored and ordinarily will not be ordered unless … necessary to secure or maintain uniformity" in the Circuit's case law or to address "a question of exceptional importance." Fed. R. App. P. 35(a). Mahdi does not contend there is a split in the Circuit's case law. Rather, Mahdi asserts that there are "two questions of exceptional importance" decided by the panel that warrant rehearing by the full court. (Doc. 68 at 4). Mahdi's arguments, however, offer disagreement with the resolution of his particular case. While Mahdi does couch the arguments in terms of protecting "a full opportunity to seek federal habeas relief," (Doc. 68), the fact remains he did have such opportunity, he did receive gracious funding from the district court for investigation, and he did not show facts that warranted additional proceedings in district court on his defaulted claim. The "function of en banc hearings is not to review alleged errors for the benefit of the losing litigants." *HM Holdings, Inc. v. Rankin*, 72 F.3d 562, 563 (7th Cir. 1995) (quoting *United States v. Rosciano*, 499 F.2d 173, 174 (7th Cir. 1974)). Yet, that is what Mahdi seeks. The State submits Mahdi has failed to sufficiently alleged a "question of exceptional importance" such that rehearing *en banc* is warranted. Moreover, as for the facts of the case and the application of law, the panel opinion reflects in detail that Mahdi's arguments lack merit.

2. Mahdi first asserts "the district court applied an incorrect standard when" denying his funding request for "an expert in race-based trauma." (Doc. 68 at 4). More precisely, he complains the district court erred in denying the *supplemental* funding. The district court allowed funding for two similar experts.[1] The district court cogently expressed a well-supported, context-based basis for concluding the additional funds were simply not reasonably necessary. (Slip Op. 67-69). Though *Ayestas v. Davis*, 138 S.Ct. 1080 (2018) was decided after the district court's denial of supplemental funding, rather than contrasting with its dictates, the district court's decision structure complements the form of review announced in *Ayestas*. Moreover, the district court did consider *Ayestas* in denying Mahdi's motion to alter or amend. (Slip Op. 67). There was simply nothing to show an abuse of discretion in the denial of additional funding and Mahdi was not entitled to any relief. (Slip. Op. 67-68). However, as a beginning point of the review, the majority rightly noted that Mahdi's offered factual premise for making his funding request was rebutted by the record. (Slip Op. 66).

[1] Mahdi requested and received "$34,500 in funding for a mitigation investigator and social historian" and requested "$25,000 *in addition* to the $34,500 he had already received," though he apparently did not use the $12, 500 for a social historian. (Slip. Op. 68 and n. 31) (emphasis in original). Further, Mahdi presented, and the district court considered, an affidavit from his mitigation specialist in support of the race-based trauma claim. (J.A. 514-15). He was not without expert assistance in developing background information.

In making his request, while Mahdi claimed "recently discovered evidence" for a potential claim based upon evidence that "his father was descended from the union between a slave and his owner," the record confirmed that such a fact was not only previously "discovered," but actually presented to the postconviction ("PCR") court. (Slip. Op. 66). The majority reasoned "[t]he district court could not have abused its discretion by denying a motion for supplemental funding that, on its face, was premised entirely on" facts "already developed and presented to the PCR court." (Slip Op. 67). In short, the state court already heard the evidence. Consequently, "a *Martinez* [2] claim had little chance of bearing fruit…." (Slip Op. 67). Mahdi does not attempt to explain or distinguish this "disqualifying defect." (Slip. Op. 67). Rather, he simply asks the Court to look past the facts firmly against him and settle on a theoretical way he could have been entitled to supplemental funding.

The majority found that if a court should excuse that failing, the record further shows that Mahdi failed to show how his requested expert's "services were warranted" or "hint" of what "themes" may have been missed in presentation of mitigation. (Slip Op. 69 and 71). (See also Slip Op. 56-59). The dissent disagreed with the majority's view of the record in this respect, accusing the majority of overlooking "the expertise that mental health clinicians bring to the table,"

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[2] *Martinez v. Ryan*, 566 U.S. 1 (2012).

however, the majority logically countered, "we cannot ignore what wasn't presented to the district court or to this Court." (Slip Op. at 69). In light of Mahdi's failures, the majority concluded: "We cannot say that the district court abused its discretion by denying Mahdi carte blanche to pursue any theory he wished based on nothing more than his vague request." (Slip Op. 71). (See also Slip Op. 58-59). Thus, simply requesting the funding is still not enough. The Supreme Court left district courts with discretion in these matters. *Ayestas*, 138 S. Ct. at 193-94.

In contrast, the dissent would simply give little effect to the still-required responsibility to exercise discretion, and the still-required responsibility to consider, not simply if a claim is defaulted, but whether a procedural bar may be avoided. The dissent attempts to recast the exercise of discretion as actually "[r]equiring" a petitioner to "prove that it was impossible to develop his claim without expert assistance," which it then reasons is "tantamount to imposing and *absolute* need requirement" which it then relates to the "substantial need" requirement." (Slip Op. at 113). That is, respectfully, a very strained interpretation that does not square with the statute and the holding in *Ayestas*. The majority wisely rejected the dissent's loosening of all restrictions: "To adopt this reading of 18 U.S.C. § 3599 as compelling courts to grant funding requests whenever counsel subjectively deems them necessary would eviscerate any semblance of their

discretionary function. The Supreme Court did not establish such a broad construction in *Ayestas.* And we decline to do so here." (Slip Op. at 73).

Further there is no good argument that even the later-established spirit of *Ayestas* was ignored or misapplied. At issue was 18 U.S.C. § 3599's requirement that services for an indigent defendant be found "reasonably necessary." The Fifth Circuit had developed a requirement of "substantial need," which the Supreme Court found was not a "great" difference from "reasonably necessary," but that the standard was "arguably more demanding." 138 S.Ct. at 1093. The Supreme Court, though finding the differences in proceeding terms "small," soundly rejected the Fifth Circuit's further requirement that a petitioner "present 'a viable constitutional claim that is not procedurally barred.'" *Id.* at 1093 (emphasis added).[3] The Court determined that "rule is too restrictive." *Id.* "In those cases in which funding stands a credible chance of enabling a habeas petitioner to overcome the obstacle of procedural default, it may be error for a district court to refuse funding." *Id.* at

[3] The dissent appears to have overlooked the Supreme Court's reasoning of why this particular requirement was a bridge too far but held fewer concerns with the rejected "substantial" phrasing. (*See* Slip Op. 113). Nevertheless, the dissent does not contend that the district court inappropriately applied a similar heightened requirement in this regard. In fact, the record shows that the district court neither before *Ayestas* nor after required this plainly wrong restriction. Nor did the district court attempt to apply a too strict "substantial test." Rather, the district court "reiterated its own duty to determine 'what [was] reasonably necessary for adequate representation" to warrant funding under 18 U.S.C. § 3599(a)(2).'" (Slip Op. 57). As the majority correctly found, the logic used in denial of funding pre-*Ayestas* may still be found adequate for fair resolution regardless of the particular phrasing (sometimes inaccurately so) of the test. (See Slip. Op. at 72).

1094. While "a funding applicant must not be expected to *prove* that he will be able to win relief if given the services he seeks … the "reasonably necessary" test requires an assessment of the likely utility of the services requested, and § 3599(f) cannot be read to guarantee that an applicant will have enough money to turn over every stone." *Ayestas*, 138 S. Ct. at 1094.

Here, the district court did not pre-judge the procedural bar, and did otherwise carefully consider the argument Mahdi presented in light of the established state court record. In short, the district court did not abuse its discretion. The majority noted with favor a post-*Ayestas* Fifth Circuit case, *Jones v. Davis*, that similar showed sound reasons for finding no abuse of discretion in a pre-*Ayestas* ruling. (Slip. Op. 72). *See Jones v. Davis*, 927 F.3d 365, 374 (5th Cir. 2019) ("*Ayestas* did not disturb the long-settled principle that district courts have discretion to separate 'fishing expedition[s]' from requests for funding to support plausible defenses.").

In sum, "[p]roper application of the 'reasonably necessary' standard … requires courts to consider the potential merit of the claims that the applicant wants to pursue, the likelihood that the services will generate useful and admissible evidence, and the prospect that the applicant will be able to clear any procedural hurdles standing in the way." *Ayestas*, at 1094. The district court's ruling shows no departure from that logic. However, review in this case need not involve

detailed resolution of any subtlety in the legal structure. Mahdi's offered factual premise for the funding request was rebutted by the record. (Slip Op. 66). That failing in a factual basis does not present a question of exceptional importance for *en banc* review.

3. Mahdi next complains the district court did not provide him fair opportunity to develop his case for a race-based trauma claim because of the failure to grant the supplemental funding motion, and also erred in summarily dismissing his defaulted ineffective assistance claim based on failure to discovery childhood abuse. (Doc. 68 at 5). He begins by again complaining that the district court's ruling offending *Ayestas*, thus, his potential race-based trauma claim was not fairly heard. (Doc. 68 at 13-15). For the reasons asserted above, Mahdi is wrong. Further, he fails to show a question of exceptional importance for *en banc* review.

As to the remainder of his second question, Mahdi asserts because his defaulted claim of ineffective assistance in "failing to uncover and present evidence of childhood abuse" was substantial, then he should have been allowed to develop whether PCR counsel was deficient. (Doc. 68 at 15). The short answer is that nothing prevented Mahdi from offering documents or even affidavits. In fact, Mahdi offered an affidavit from habeas mitigation expert, Dworkin. In fact, "the dissent" on which Mahdi heavily leans, "relies entirely on Nate's allegedly

'substantial insight into the family dynamics,' as contained *in a single sentence in Dworkin's ten-page affidavit*." (Slip Op. at 90)(emphasis added). But that reference was a note of one individual who related Mahdi's father beat the children, "the *sole reference* in the approximately 8,800-page record suggesting that Shareef physically abused Mahdi." (Slip Op. 90). The majority noted that "[t]he dissent concedes as much. Diss. Op. 916 ("In fact, *all evidence* was to the contrary [i.e. that Shareef had not abused Mahdi]." (emphasis added))." (Slip Op. 90). From that single entry, the dissent enhanced the reference as evidence of "severe" and "extreme" abuse and "profound and chronic trauma." (Slip Op. at 90-91). The problem, as the majority points out, is the dissent's "portrayal has *no* basis in the record." (Slip Op. at 91) (emphasis in original). There is no explanation or "context to" this one "isolated claim." (Slip Op. at 91). In sum, "[t]he fact of this case is that there is *no* evidence of childhood abuse for us to give credence to." (Slip Op. 91) (emphasis in original). PCR counsel could not be deficient "for failing to elicit this claim" of ineffective assistance against trial counsel, especially where the record showed that "to the extent trial counsel reached the conclusion that Shareef had not abused Mahdi, they did so after multiple interviews of family members, teachers, community members, and the review of reams of Mahdi's medical, school, and court records. None of these raised even a scintilla of physical abuse, much less that Nate was a witness to

anything." (Slip. Op. 91-92). Further, again as the majority correctly points out, one of PCR counsel's experts, Dr. Cooper-Lewter, "reached the same answer after conducting an extensive investigation. *See* J.A. 2953–54 (detailing each of the records he reviewed and the family members and teachers he interviewed); J.A. 2541–42 (testifying that there was "no evidence in this case" of "physical violence from his father")." (Slip Op. 92).

Though the failure to investigate claim is often raised in capital cases, that claim, like any other, must still have a basis in fact. Through all the levels of investigation here, the factual basis for this claim is sorely lacking. But again, this moves Mahdi's claim squarely in the column of asking for fact review, which should not be enough to warrant *en banc* review.

CONCLUSION

For the foregoing reasons, Mahdi has not offered sufficient reasons for this Court to grant rehearing by the full court. His petition should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing complies with this Court's type-volume limits, as it is in total 2,461 words as calculated by the undersigned's word processing program, which is below the permissible limit of 3,900 words as set out in Rule 35(b)(2), Federal Rules of Appellate Procedure.

By: *s/ Melody J. Brown*

January 24, 2022
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