No. 18–8845

IN THE

Supreme Court of the United States

ABEL REVILL OCHOA,
Petitioner,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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CAPITAL CASE
QUESTION PRESENTED

In federal district court Ochoa raised a procedurally defaulted ineffectiveness claim under *Wiggins v. Smith*, 539 U.S. 510 (2003), based on his counsel's purported failure to investigate and present mitigating evidence at the punishment phase of Ochoa's capital trial. The district court denied Ochoa funding for additional postconviction mitigation investigation under the "substantial need" standard later abrogated in *Ayestas v. Davis*, 138 S. Ct. 1080 (2018). On appeal and after *Ayestas*, the Fifth Circuit upheld the funding denial because the reasons given by the district court for denying funding remained sound even after *Ayestas*. In doing so, the Fifth Circuit properly identified *Ayestas* as the controlling law and discussed it extensively. Following the instruction in *Ayestas* to "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," 138 S. Ct. at 1094, the Fifth Circuit duly noted that Ochoa's ineffectiveness claim was procedurally defaulted, his state habeas counsel was not ineffective (thereby precluding an equitable exception to the default), and the underlying *Wiggins* claim was meritless in view of the substantial mitigation evidence uncovered by Ochoa's trial attorneys. It then affirmed the district court's denial of funds. Ochoa's petition for certiorari review now raises the following question:

1. Whether the Fifth Circuit—despite correctly articulating the *Ayestas* standard—applied it too stringently?

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INTRODUCTION

Abel Revill Ochoa[1] was convicted and sentenced to death after slaughtering five members of his family—his wife, his sister-in-law, his father-in-law, and his two little daughters—after his wife refused to give him money to buy crack-cocaine. Following unsuccessful direct appeal and state habeas proceedings, Ochoa sought federal habeas relief in district court. He also requested funding for a mitigation specialist to investigate the substantive merits of a procedurally defaulted ineffective-assistance-of-trial-counsel (IATC) claim and establish cause for his default by showing that state habeas counsel ineffectively failed to litigate the claim. *See Martinez v. Ryan*, 566 U.S. 1 (2012). But the district court denied funding, habeas relief, and any certificate of appealability (COA).

As relevant to the instant petition (Pet.), the district court found that Ochoa's underlying *Wiggins* claim was both procedurally defaulted and meritless. Petitioner's Appendix (App.) at App.36–43, 143–46; ROA.846–53,

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[1] Respondent Lorie Davis will be referred to as "the Director." The Director uses the following citation conventions: "ROA" refers to the record on appeal. "CR" refers to the clerk's record of trial documents. "RR" refers to the court reporter's trial transcript. "SX" refers to the State's trial exhibits. "SHCR–01, –02" refer to the clerk's record of documents filed in Ochoa's state habeas proceedings. Since the Texas Court of Criminal Appeals (CCA) did not label Ochoa's writs chronologically, Ochoa's initial writ package bears the cause number WR–67,495–02 (referred to herein as SHCR–02), while Ochoa's subsequent writ package bears the cause number WR–67,495–01 (referred to herein as SHCR–01). All references are preceded by volume number and followed by page number where applicable.

958–62. Concerning the default, the district court found that state habeas counsel was not ineffective because Ochoa did not show a "lack of diligence" and the underlying IATC claim was not substantial (i.e., the underlying IATC claim did not have "any merit"). App.40; ROA.850. Concerning the merits, the district court found that Ochoa failed to show either trial counsel's deficiency or attendant prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). App.40–43, 143–46; ROA.850–53, 958–62. On appeal and after *Ayestas*, the Fifth Circuit upheld the funding denial because the district court's underlying reasons remained sound under the new precedent. App.10–13 (citing *Crutsinger v. Davis*, 898 F.3d 584, 586–87 (5th Cir. 2018) (deciding the funding issue without remanding); *Mamou v. Davis*, 742 F. App'x 820, 823–25 (5th Cir. 2018) (same)).

Ochoa now argues that, contrary to the teachings of *Ayestas*, the Fifth Circuit effectively requires a funding applicant to prove that he will be able to win habeas relief if given the services he seeks. Pet.18–23. Ochoa also asserts that the Fifth Circuit purportedly imposes a "specificity requirement" on funding applicants that is unduly burdensome. Pet.24–26. Finally, Ochoa suggests that the Fifth Circuit raised his burden by misapplying *Strickland* and its progeny. Pet.26–27. In particular, Ochoa claims that the Fifth Circuit inappropriately credited the extensive mitigation work done by his trial attorneys. *Id.*

However, Ochoa's arguments are unavailing. The Fifth Circuit correctly set forth the *Ayestas* standard in its opinion. App.10–11. Thus, Ochoa has the difficult task of showing that, despite acknowledging and articulating the correct standard, the Fifth Circuit somehow failed to apply it. Under Supreme Court Rule 10, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of [. . .] the misapplication of a properly stated rule of law." And while Ochoa correctly notes that a funding applicant is not required to demonstrate that he will prevail if funding is granted, *Ayestas* nevertheless clearly indicates that a "natural consideration" informing the funding analysis is "the likelihood that the contemplated services will help the applicant win relief." 138 S. Ct. at 1094. Accordingly, courts are required "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." *Id.* Here, the court of appeals noted that Ochoa's ineffectiveness claim was procedurally defaulted, his state habeas counsel neither lacked diligence nor failed to raise a meritorious claim, and the underlying claim would fail in view of the substantial mitigation evidence already adduced by trial counsel. App.12–13. Thus, none of the *Ayestas* considerations favored granting funding. And although the Fifth Circuit did not reach this argument, 28 U.S.C. § 2254(e)(2) also operates to preclude the

introduction of new evidence in federal habeas to support Ochoa's defaulted IATC claim.

Moreover, with specific regard to Ochoa's assertion that the Fifth Circuit misapplied *Strickland*, it is clear that trial counsel is not ineffective for failing to present cumulative mitigation evidence. *See*, *e.g.*, *Wong v. Belmontes*, 558 U.S. 15, 23 (2009) (per curiam) ("[a]dditional evidence on these points would have offered an insignificant benefit, if any at all."). Similarly, *Ayestas* itself stressed that 18 U.S.C. § 3599 "cannot be read to guarantee that an applicant will have enough money to turn over every stone." 138 S. Ct. at 1094.

In sum, Ochoa's petition does not demonstrate any special or important reason for this Court to review the court of appeals' decision, and this Court typically does not engage in routine error correction. Judicial restraint is further warranted in this case because Ochoa does not show that a split exists among the circuit courts regarding any relevant issue. No writ of certiorari should issue on Ochoa's funding claim.

STATEMENT OF THE CASE

I. Facts of the Crime

In describing the facts of the crime, the district court and the Fifth Circuit pointed to the following findings[2] of the state habeas court:

[2] State court findings are presumed correct on federal habeas review. 28 U.S.C. § 2254(e)(1).

> 1. [. . .][T]hirty-year-old Ochoa shot several family members after smoking crack cocaine on Sunday, August 4, 2002. [38.RR.112.] The record reflects that, twenty minutes after smoking a ten-dollar rock of crack, Ochoa entered his living room and systematically shot his wife Cecilia, their nine-month-old[3] daughter (Anahi), Cecilia's father (Bartolo), and Cecilia's sisters (Alma and Jackie). [33.RR.32–36.] Ochoa reloaded his []9mm Ruger and chased his 7–year-old daughter, Crystal, into the kitchen where he shot her four times. [SX.2A; RR-Examining Trial: 14]. Of the six victims, only Alma survived. [33.RR.40–41.]
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> 2. The record reflects that, minutes after the shooting, the police stopped Ochoa while driving his wife's Toyota 4Runner. [33.RR.97–98.] Ochoa told the arresting officer that the gun he used was at his house on the table, that he could not handle the stress anymore, and that he had gotten tired of his life. [33.RR.105–06.] In a search conducted after arrest, the police found a crack pipe, steel wool, and an empty clear baggie on Ochoa's person. [33.RR.109–10.] Ochoa gave the police a detailed written statement recounting his actions in the shootings. [34.RR.35–46; SX.2A.]

App.2, 17; *see also Ochoa v. State*, AP–74,663, 2005 WL 8153976, at *1–4 (Tex. Crim. App. Jan. 26, 2005) (unpublished).

II. Evidence Relating to Punishment

At punishment, the State introduced firearm and autopsy evidence concerning the killings of Ochoa's daughter Anahi, his sister-in-law Jackie, and father-in-law. 35.RR.29–33, 42, 50, 57. The State also recalled Ochoa's other

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[3] Anahi's age at the time of her death is inconsistently listed in the record as both nine and eighteen months. [footnote added]

sister-in-law Alma Alvizo, who explained that she lost a kidney and was in the hospital for three months after Ochoa shot her. 35.RR.58. Alviso stated that Ochoa had become aggressive towards Cecilia after finding out that Cecilia had previously had a son by another man and concealed the fact from him. 35.RR.58–60. In 1997, he threatened to shoot his wife. 35.RR.60. Alviso also once witnessed Ochoa grab Cecilia by the hand and pull her toward him when she was trying to leave Alvizo's house. 35.RR.65–66. Alviso suspected that Ochoa was the cause of bruising that she saw on Cecilia. 35.RR.88–89. Ochoa also pointed a gun at Cecilia three weeks before the murder. 35.RR.90. The State rested after Alviso's testimony. 35.RR.96.

The state habeas court made the following factual findings relevant to the defense's case at punishment:

> 56. [. . .]Ochoa's defensive theory was that Ochoa committed this offense in a cocaine-induced delirium and had brain damage in his frontal lobes from cocaine abuse which affected his impulse control and made him more susceptible to a state of delirium. [36.RR.40–103; 39.RR.10–34].
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> 57. [. . .][T]he jury knew, from Ochoa's confession and testimony, that he had a long-standing addiction to crack, that he financed his crack habit with an illegal small-loan scheme, and that the offense was drug-related. [34.RR.43–46; 38.RR.69–135]. The jury heard additional evidence of his crack addiction through the testimony of his brothers, Gabriel and Javier [35.RR.139, 145–47, 151; 36.RR.175–77], his brother-in-law, Victor [(37.RR.166–68)], and the director of a drug rehabilitation center he once attended. [37.RR.102–

> 11]. The jury heard Ochoa's father testify that he was an alcoholic and abusive toward Ochoa's mother in front of the children. [35.RR.113–15, 128–29].
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> 58. [. . .][T]he defense presented sixteen witnesses at the punishment phase, including relatives, neighbors, coworkers, church acquaintances, and law enforcement personnel, to discuss Ochoa's difficult childhood, his relatively crime-free life prior to his addiction to crack, his mild brain damage from crack abuse, his work ethic, his lack of disciplinary problems in jail, and the conditions under which he would live if given a life sentence at TDCJ-ID.
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> 59. [. . .][T]he defense had a well-presented theory of long-term crack addiction and rehabilitation attempts by an otherwise law-abiding person to offer in mitigation of punishment.

SHCR–02.360–61. In rebuttal, the State presented Dr. Richard Coons, who "provided testimony from which a jury could infer that [Ochoa] would be a continuing threat to society. Coons also attributed the murders to [Ochoa]'s frustration and anger and not to a 'cocaine-induced delirium.'" *Ochoa v. State*, 2005 WL 8153976, at *5. To counter Dr. Coons's testimony, the defense recalled expert Dr. Edgar Nace, who disputed Dr. Coons's opinions concerning drug-induced delirium, Ochoa's lack of a conscience, and the possibility that Ochoa's brain damage would render him more violence prone. 39.RR.11–12, 19, 21–22.

III. Conviction and Postconviction Proceedings

A Texas jury convicted Ochoa of capital murder for killing his wife and one of his daughters. CR.2, 390. Pursuant to the jury's answers to Texas's

punishment-phase special issues, the trial court sentenced Ochoa to death. *Id*. The CCA upheld Ochoa's conviction and sentence on automatic direct appeal. *See generally Ochoa v. State*, 2005 WL 8153976; Tex. Code Crim. Proc. art. 37.071, § 2(h). Ochoa did not file a petition for certiorari.

Ochoa sought state habeas review of his conviction, filing an initial habeas application, to which he added a pro se supplement. SHCR–02.2–55, 158–62. Ochoa also filed a subsequent pro se application. SHCR–01.2–13. With respect to Ochoa's initial application, the CCA adopted the trial court's findings and conclusions and denied relief. *Ex parte Ochoa*, Nos. WR–67,495–01, –02, slip op. at 2, 2009 WL 2525740 (Tex. Crim. App. Aug. 19, 2009) (per curiam) (unpublished). With respect to Ochoa's subsequent pro se application, the CCA denied it as an abuse of the writ under Texas Code of Criminal Procedure Article 11.071, Section 5. *Id*.

Ochoa then filed a federal habeas petition. ECF No. 8; ROA.24. The Director answered (ECF No. 14; ROA.272), and Ochoa replied (ECF No. 19 ROA.418). On Ochoa's motion, the lower court stayed proceedings pending the Court's decision in *Trevino v. Thaler*, 569 U.S. 413 (2013). ECF Nos. 33, 38; ROA.566, 617. Following the decision in *Trevino*, the lower court reopened proceedings and ordered supplemental briefing, which the parties supplied. ECF Nos. 40, 43, 44; ROA.624, 631, 649.

In conjunction with his federal habeas petition, Ochoa filed a motion under 18 U.S.C. § 3599 seeking funding to further investigate his *Wiggins* claim. ECF Nos. 56–57; ROA.783, 804. The district court denied funding (ECF No. 58; ROA.819) and later habeas relief in a memorandum opinion and order. ECF No. 59; ROA.825. The district court also denied a COA. *Ochoa v. Davis*, 3:09–CV–2277–K, 2016 WL 5122107 (N.D. Tex. Sept. 21, 2016); App.81; ROA.891.

On appeal, Ochoa asked for a COA challenging the federal district court's denial of funding related to his *Wiggins* claim. Appl. for a COA at 28–35. In response, the Director argued that such decisions are not subject to a COA, asserted that the district court did not abuse its discretion when it denied funding, and asked the Fifth Circuit to affirm the ruling. Resp. in Opp. to COA at 3, 15–35. During the Fifth Circuit appeal, this Court issued its decision in *Ayestas*, in which it rejected the Fifth Circuit's "substantial need" test for determining whether investigative funds are "reasonably necessary" under § 3599(f). 138 S. Ct. 1080, 1085, 1095. Following *Ayestas*, Ochoa filed a reply. As it related to the funding issue, he urged the Fifth Circuit to remand his case to the district court for further consideration of his funding request in light of *Ayestas*; he also outlined his argument for why the district court abused its discretion under the new framework. Reply Br. in Support of Appl. COA at 2–13. Both parties submitted supplemental briefs, and the Fifth Circuit held oral

argument. Ultimately, the Fifth Circuit denied COA on all of Ochoa's claims and upheld the district court's denial of funding. App.1–14. Ochoa petitioned for rehearing en banc, but the Fifth Circuit denied his request. App.82. The instant petition for a writ of certiorari followed.

REASONS FOR DENYING THE WRIT

The question that Ochoa presents for review is unworthy of the Court's attention. Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." An example of such a compelling reason would be if the court of appeals below entered a decision on an important question of federal law that conflicts with a decision of another court of appeals or with relevant decisions of this Court. Ochoa offers no circuit conflict, and he fails to show that the Fifth Circuit's decision conflicts with the relevant holdings of the Court. Pursuant to Supreme Court Rule 10, Ochoa provides no basis to grant his petition for a writ of certiorari.

I. The Fifth Circuit Properly Set Forth and Applied the *Ayestas* Standard.

Ochoa argues that the Fifth Circuit conducted an unduly rigorous and burdensome examination of his application for funding. Pet.14–26. But the Fifth Circuit correctly set forth this Court's ruling in *Ayestas* and analyzed Ochoa's request under it. App.10–13. The Fifth Circuit acknowledged that

Ayestas had rejected the Circuit's "substantial need" formulation of the statute. App.11. The Fifth Circuit then quoted *Ayestas* for the proposition that, when evaluating reasonable necessity, "'[a] natural consideration [. . .] is the likelihood that the contemplated services will help the applicant win relief' and that "'[p]roper application of the 'reasonably necessary' standard thus 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." *Id*. (quoting *Ayestas*, 138 S. Ct. at 1094). The Fifth Circuit also took note of the Court's statement that the reasonably necessary test requires assessment of "'the likely *utility* of the services requested'" and that "'§ 3599(f) cannot be read to guarantee that an applicant will have enough money to turn over every stone.'" *Id*. (quoting *Ayestas*, 138 S. Ct. at 1094). Returning to the core holding of *Ayestas*, the Fifth Circuit concluded that "funding is not reasonably necessary" in this case. App.13.

Ochoa's complaint is therefore a textbook example of a purported "misapplication of a properly stated rule of law," Sup. Ct. R. 10, and is, thus, not compelling. The Fifth Circuit clearly identified and acknowledged the proper standard of review, and Ochoa merely disputes the lower court's application of it. Pet.14 ('This Court should grant certiorari to address the Fifth

Circuit's *improper application* of the 'reasonably necessary' standard in light of *Ayestas*.") (emphasis added and formatting omitted).

Ochoa asserts that "there is no material difference between the Circuit's current standard and the one that the [ ] Court struck down in *Ayestas*." Pet.28. However, the Fifth Circuit has remanded cases to the district court for reconsideration of funding issues under *Ayestas* when warranted. *Robertson v. Davis*, 729 F. App'x 361, 362 (5th Cir. 2018); *Sorto v. Davis*, 716 F. App'x 366 (5th Cir. 2018). These remands show that the Fifth Circuit is giving *Ayestas* its due and petitioners who are potentially impacted are being allowed to make their case. Ochoa thus merely quarrels because the circuit's careful, case-specific analysis shows that he does not benefit from the *Ayestas* decision. Indeed, Ochoa's case was straightforward and easily decided, whereas *Sorto* and *Robertson* presented more complex issues. In *Robertson*, the Fifth Circuit denied a COA as to the petitioner's grounds for relief but reserved judgment on the denial of funding issue. 729 F. App'x at 362. While the COA denial was on appeal to this Court, *Ayestas* was handed down. Sometime after *Ayestas* was released, and without requesting further briefing from the parties, the Fifth Circuit simply remanded for reconsideration. *Id*. In *Sorto*, the Fifth Circuit had previously remanded the lower court's denial of funding based on a finding that the state habeas procedures did not afford Sorto an opportunity to raise a new intellectual-disability claim. *Sorto v. Davis*, 859 F.3d 356, 358 (5th Cir. 2017)

(citing 28 U.S.C. § 2254(b)(1)(B)(ii)). However, the Fifth Circuit later granted the Director's petition for rehearing on that issue. *Sorto v. Davis*, 881 F.3d 933 (5th Cir. 2018). While the case was under reconsideration, Court released *Ayestas*. Seven days later, and without briefing on this issue, the Fifth Circuit remanded the case back to the district court for further consideration. *Sorto*, 716 F. App'x at 366.

In his petition, Ochoa also complains that his case and two others demonstrate that the Fifth Circuit is employing an improper two-part test requiring that a petitioner seeking funding demonstrate that (1) he is likely to win relief, (2) using specificity and without relying on speculation. Pet.18–21. However, the Fifth Circuit has not explicitly endorsed this two-part test—it is merely Ochoa's (erroneous) interpretation of the precedent.

Ochoa asserts that his own case reveals the Circuit's requirement that it be "likely" that a petitioner's proposed investigation yield relief. Pet.20. But in the court below, the panel simply observed that it was "unlikely" that Ochoa's contemplated services would "help" Ochoa obtain relief—it was not mandating a "proof standard." Pet.21; App.13. Furthermore, when the Fifth Circuit said that a reviewing court should consider the "likely utility of the services requested" and that Ochoa was not entitled to "money to turn over every stone"—it is quoting directly from *Ayestas*. App.11.

Regarding Ochoa's second purported requirement, it is not apparent that the Fifth Circuit rejected Ochoa's funding request as speculative and lacking specifics—Ochoa derives these requirements from other circuit cases. Pet.18–20, 24 (citing *Mamou* and *Crutsinger*). Below, the Fifth Circuit mostly relied on the fact that substantial investigation had already been conducted. App.13 ("Ochoa does not explain how further investigation would yield evidence that was different from what was available at the time of his trial."). Nevertheless, it is worth noting that even the petitioner in *Ayestas* conceded that "an applicant must 'articulat[e] specific reasons why the services are warranted.'" 138 S. Ct. at 1094; *Crustinger*, 898 F.3d at 587. While it does not appear that *Crustinger* and *Mamou* were wrongly decided, in Ochoa's case, at least, there is no question that the Fifth Circuit has accurately cited and applied the controlling *Ayestas* precedent.

II. Ochoa's IATC Claim Lacks Any Possibility of Success, and His Proposed Investigation Would Have Been Unhelpful and Simply Duplicated Previous Efforts.

Apprehending the hopelessness of Ochoa's IATC claim, the Fifth Circuit's decision largely focuses on its merits.[4] App.10–13. Specifically, the

[4] In the court below, Director also argued that the Ochoa had waived any challenge to the district court's "substantial need" application by failing to specifically contest it in that forum and, further, that 28 U.S.C. § 2254(e)(2) would preclude the introduction of further evidence to support Ochoa's procedurally defaulted claim. The Director reurges both arguments here to preserve them in case certiorari is granted, and she elaborates on the § 2254(e)(2) bar further in Section III, *infra*.

Fifth Circuit determined that trial counsel had done substantial mitigation investigation and presented significant mitigation evidence. *Id.* at 13 ("Because extensive mitigation evidence was available to Ochoa's defense and later presented to the jury, it is unlikely that the contemplated services will help Ochoa win relief on the *Wiggins* claim.") (citing *Ayestas*, 138 S Ct. at 1094). The Fifth Circuit found that Ochoa failed to demonstrate how his proposed investigation would not simply be duplicative. App.13 ("Ochoa has not explained how further investigation would yield evidence that is different from what was available at the time of his trial."). Indeed, this is not a case where counsel wholly abdicated their responsibility to investigate and present mitigation. To the contrary, the record reflects, if anything, a robust mitigation case. "'Ochoa's complaint does not identify an area or subject that was not generally covered by the evidence trial counsel presented to the jury.'" App.12 (quoting the district court). Ochoa is therefore asking for what *Ayestas* precludes—money to turn over every stone.

In the case-at-bar, the district court correctly set forth the governing standard for IATC claims and found that Ochoa's underlying claim failed to meet either prong of *Strickland*'s test. ROA.837–38; *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010) ("Surmounting *Strickland*'s high bar is never an easy task."). In fact, the district court found that the mitigation presented in this case was "extensive" and Ochoa failed to show that counsel did not make

strategic decisions regarding the investigation and presentation of evidence. ROA.851–52. As explained by the district court:

> In the instant case, even if the claim comes within the exception to procedural bar, the alternative merits analysis is correct. Ochoa does not complain that trial counsel did not present evidence of his background, but merely that he did not present enough of it. But this was not a case where an abusive background could help to explain a long criminal history or other pattern of misbehavior that inexorably led to the crime. This was a case where the defendant was a hard-working, family man who did not have as much as a traffic ticket before the afternoon when he murdered five people, including his wife, her family members and their children. Trial counsel chose to focus on the power of Ochoa's cocaine addiction to explain this sudden anomaly that occurred after his wife refused to buy him more drugs. [39.RR.55–65.]
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> At trial, counsel presented evidence from multiple expert and lay witnesses touching on Ochoa's life, background, character, culpability, potential for rehabilitation, and projected conditions of confinement if sentenced to life. [ROA.850–53.] Ochoa's complaint does not identify an area or subject that was not generally covered by the evidence trial counsel presented to the jury. Instead, he points to additional evidence of Ochoa's background that may have been cumulative of what was already presented or less relevant than the evidence actually presented. For example, he argues that additional evidence should have been presented regarding his early life in Mexico. [ROA.110–11.] Ochoa's father testified about their poor living conditions there [35.RR.106–10], but Ochoa testified at trial that his earliest memories were living on a farm in Texas. [38.RR.5–6.] Ochoa also now argues that additional testimony should have been provided regarding Ochoa's father, specifically regarding his alcoholism and abuse of Ochoa's family. [ROA.110–11.] But Ochoa and his brother testified that their father was an alcoholic that would beat their mother, requiring the assistance of Ochoa and his brothers to get their father off of her, and that this upset Ochoa greatly. [38.RR.8–9; 36.RR.159–60.] Ochoa's father also testified about the history of alcohol abuse in their family, and that he used to get drunk and beat his family, but that he stopped after he had an accident while driving intoxicated.

> [35.RR.113–16.] Defense expert Dr. Edward Nace also testified about the addiction problem in Ochoa's family, including his father's alcoholism and its impact on Ochoa. [36.RR.64–65.]
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> Not only is this allegation insufficient to warrant habeas relief, it would be insufficient to grant investigative funding.

App.12–13; ROA.959–60. The Fifth Circuit agreed with this "astute[]" and "persuasive" analysis. *Id*.

Ochoa continues to assert that the trial testimony was inadequate, but the record clearly shows that his witnesses related the pertinent facts of Ochoa's childhood. Further testimony would have been redundant/cumulative. *Murray v. Maggio*, 736 F.2d 279, 282 (5th Cir. 1984) (counsel's decision not to present cumulative and redundant testimony does not constitute IATC). As noted by the district court, "[c]ontrary to Ochoa's current allegation, this Court did not merely find that trial counsel presented 'some' mitigation evidence. This Court found, and Ochoa previously acknowledged[5], that trial counsel presented an extensive mitigation case before the jury."[6] App.145. Ochoa

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5 Ochoa's previous acknowledgment of counsel's efforts, as well as the work done in federal habeas (Pet.9–10), undermine his current assertion that "no stones [ ] have been turned over." Pet.i.

6 Based largely on affidavit testimony from mitigation specialist Tena Francis, Ochoa alleges that counsel delayed the mitigation investigation and failed to timely request a continuance. Pet.6–8. However, Ochoa acknowledges counsel requested a continuance to further pursue the mitigation investigation and that continuance was denied. *Id*. at 7. Counsel also apparently (and rightfully, based on the treatment of the actually-filed motion) believed continuances were unlikely to be granted by the trial court. App.85. And Francis concedes that there were three months from when

claims that his purported evidence of counsel's deficiencies should have spurred the courts to grant him funding, but he ignores that the district court found no deficiency. App.42.

Indeed, Ochoa's petition effectively rebukes trial counsel for not employing an everything-and-the-kitchen-sink approach to the punishment phase, an approach whereby no fact—no matter how minor—should not be presented to the jury, irrespective of any similar evidence already presented or trial counsel's defensive strategy. However, in contrast to this shotgun approach, trial counsel—very prudently—decided to confront the bad facts of the case head on and focused their efforts on contextualizing Ochoa's unusually heinous crime as an aberration and the product of heavy drug use, while concurrently offering Ochoa's personal history and background as further mitigation and explanation for what he had done.[7] SHCR–02.360–61. Trial counsel's strategy was thus tailored neatly to their client's crime and

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she was initially contacted by Ochoa's attorneys to her appointment and then sixty-eight days from when she was formally appointed until the conclusion of punishment—not an unreasonable amount of time to perform an investigation. App.85, 94.

[7] Ochoa suggests that the lower courts wrongly condoned trial counsel's performance because counsel presented an addiction expert and "the right kind of evidence." Pet.26–27. However, this is a mischaracterization of the holdings below, which hardly rested on the addiction expert or presenting "the right kind of evidence." Rather, it was the breadth and quality of counsel's evidence-gathering (as demonstrated by the trial presentation) that impressed the courts. App.12–13.

circumstances while still presenting the ample mitigating facts uncovered by their investigation.[8]

Furthermore, even if Ochoa could show the lower court erred in finding no deficiency, he almost certainly cannot show error in the district court's no-prejudice finding. With respect to errors at the sentencing phase of a death penalty trial, the relevant inquiry is "whether there is a reasonable probability that, absent the errors, the sentencer [. . .] would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695; *see also Riley v. Cockrell*, 339 F.3d 308, 315 (5th Cir. 2003) ("If the petitioner brings a claim of ineffective assistance with regard to the sentencing phase, he has the difficult burden of showing a reasonable probability that the jury would not have imposed the death sentence in the absence of errors by counsel." (internal quotation marks and citation omitted)).

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[8] Ochoa accuses his counsel of perpetuating racist stereotypes through his examination of Ochoa's father (Pet.8), but, to the extent that one accepts Ochoa's argument that the courts' evaluation should focus on counsel's investigation and not their presentation, these accusations seem irrelevant. Besides, Ochoa does not show that this argument was pressed and passed upon in the court below. *See*, *e.g.*, *Ayestas*, 138 S. Ct. at 1095 ("declin[ing] to decide in the first instance" an issue "neither presented nor passed on below").

Regardless, Ochoa's accusation appears unfounded, since counsel merely asked Ochoa's father, a Hispanic, how he perceived an aspect of the culture in which he himself was raised. This is hardly comparable to the situation in *Buck v. Davis*, 137 S. Ct. 759, 777–78 (2017), which (1) arose in the Rule 60(b) context and (2) involved the unique circumstance of a defendant's own attorney presenting expert testimony that the defendant was statistically more likely to act violently in the future because he was black.

Here, there is no reasonable probability that the verdict would have been any different if Ochoa's additional, allegedly omitted evidence had been before the jury. Even by the sad standards of capital cases, Ochoa's crime is appalling. *Strickland*, 466 U.S. at 700 ("Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion. . ."). While Ochoa frankly admits that his conviction was inevitable (Pet.6), he fails to reckon with the fact that the very same circumstances that confirmed his conviction—the senseless slaughter of five people, including helpless children—also rendered his sentence predetermined. A Texas jury is entitled to consider the heinous facts of the crime during the punishment phase. *See*, *e.g.*, *Williams v. State*, 958 S.W.2d 186, 191 (Tex. Crim. App. 1997). The enormity of Ochoa's slaughter would weigh impossibly heavy against any mitigation evidence. *Wong*, 558 U.S. at 28 (recognizing that commission of an additional murder is "the most powerful imaginable aggravating evidence"). As noted by Ochoa's trial counsel concerning another allegation, "I believe that the jury could not get past the fact that five people died in the same criminal transaction. SHCR–02.263. Counsel's analysis is doubtlessly correct. When any allegedly missing evidence, coupled with the evidence that was actually offered by the defense, is weighed against the aggravating evidence, including the circumstances of the crime,

there is simply no reasonable probability that the outcome of the sentencing proceeding would have been any different in this case.

In truth, Ochoa's purportedly omitted mitigating evidence simply does not compare to the mitigating evidence the Court has found to be prejudicially omitted in other cases. *See*, *e.g.*, *Wiggins*, 539 U.S. at 516–17, 525–26, 534–35 ("Wiggins experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother. He suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster care."); *Rompilla v. Beard*, 545 U.S. 374, 378, 390–95 (2005) (evidence established that Rompilla was reared in a slum, quit school at sixteen, had a series of incarcerations, his mother drank during pregnancy, his father had a "vicious temper," Rompilla and his siblings "lived in terror," he and a brother were locked "in a small wire mesh dog pen that was filthy and excrement filled," their home had no indoor plumbing, and they slept in an attic with no heat); *Williams v. Taylor*, 529 U.S. 362, 395 (2000) (counsel "failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records.").

The weakness of Ochoa's claim on the merits colors the *Martinez* analysis. Ochoa's *Wiggins* claim is unquestionably unexhausted and

procedurally defaulted. ROA.846–53. Ochoa asserts that he can evade his default under *Martinez*/*Trevino*, but the district court correctly found that "Ochoa has not shown a lack of diligence by his original state habeas counsel in those proceedings, but even if he had, such counsel could not be found ineffective for the purpose of the *Martinez* exception for failing to present a meritless claim." App.12, 40; ROA.850 (citing *Garza v. Stephens*, 738 F.3d 669, 676 (5th Cir. 2013); *Beatty v. Stephens*, 759 F.3d 455, 466 (5th Cir. 2014)). As shown below, the district court found Ochoa's IATC lacks "any merit." App.40; ROA.850. Because Ochoa's underlying claim lacks "any merit," there is no way that Ochoa can make the "substantial" showing required by *Martinez* that he was prejudiced by state habeas counsel's alleged deficiencies. 566 U.S. at 14 (requiring IATC claim to have "some merit"). Similarly, even assuming he has successfully shown cause under *Martinez*—Ochoa cannot show accompanying actual prejudice. *Hernandez v. Stephens*, 537 F. App'x 531, 542 (5th Cir. 2013) (unpublished), *cert. denied*, 134 S. Ct. 1760 (2014); *see*, *e.g.*, *Martinez*, 566 U.S. at 18 (remanding to address prejudice). If the state court would not have granted relief on his claim, then it is difficult to see how Ochoa could have been prejudiced by any omission by habeas counsel.

Indeed, to demonstrate that *Martinez*'s equitable exception applies, Ochoa must first show that his state habeas counsel was actually ineffective under the *Strickland* standard. *Martinez*, 566 U.S. at 17. But Ochoa asserts a

different type of grievance against his state habeas attorney than the complaint levied by Martinez. Martinez was convicted in Arizona state court of sexual conduct with a minor, and his conviction was affirmed on direct appeal. *Id*. at 4–8. During the pendency of his appeal, Martinez's appellate counsel initiated collateral review in state court by filing a notice of postconviction relief, but then filed a statement that she could find no colorable claim for postconviction relief. *Id*. The state court gave Martinez the option of filing a pro se petition, but Martinez alleged that his counsel failed to inform him that he needed to do so. *Id*. After the time to file a petition expired, the trial court dismissed the collateral action. *Id*. Later, represented by new counsel, Martinez filed a new request for postconviction relief in state court and alleged that his trial counsel had been unconstitutionally ineffective, but this petition was dismissed because he did not present the claim in the first proceeding. *Id*. In federal habeas proceedings, the district court then denied Martinez's claims as procedurally barred. *Id*.

In contrast, Ochoa's habeas counsel filed a 53-page petition raising nine points of error—just not the points of error that Ochoa now urges in his federal habeas petition. SHCR–02.2–55. This application included several ineffectiveness claims—in particular, claims against both trial counsel and appellate counsel. *Id*. The application is supported by exhibits and affidavits,

including an affidavit from Ochoa discussing his interaction with trial counsel. SHCR–02.67–68. The exhibits totaled 101 pages. SHCR–02.56–157.

In district court, Ochoa submitted state habeas counsel's billing records from Dallas County. ROA.516–21. Without conceding the completeness or validity of these records, the Director observes that they refute the very point that Ochoa is trying to make. *Id*. They show counsel did 244 hours of work on the state writ application. *Id*. To put this number in perspective, 244 hours is over a month-and-a-half of 40-hour workweeks spent on Ochoa's case. *Id*. This number also includes 31 hours of travel and meetings with either Ochoa or other witnesses and attorneys, as well as additional hours of legal research and the review of the record and the court files. *Id*.

Ochoa complains that this was not enough, and that counsel failed to conduct an adequate extra-record investigation. Pet.9, 25. But simply because habeas counsel did not raise the specific IATC allegations that Ochoa, in hindsight, now contends he should have raised does not render counsel's investigation or performance ineffective under *Strickland*. 466 U.S. at 689 ("Even the best criminal defense attorneys would not defend a particular client in the same way."); *cf*. *Jones v*. *Barnes*, 463 U.S. 745, 751–53 (1983) (holding appellate counsel is only constitutionally obligated to raise and brief those issues that are believed to have the best chance of success). Unlike in the *Martinez* case, state habeas counsel did not fail to file or otherwise abandon

his client—instead, he simply did not raise claims that Ochoa now contends he should have. Counsel was thus not deficient. In any event, as noted above, no prejudice could have accrued because the allegedly omitted claim would not have been successful. App.40.

Finally, it is worth noting that, even without the requested funding, Ochoa still submitted a lengthy petition supported by investigation—reinforcing the Fifth Circuit's view that Ochoa was simply attempting to overturn every stone. Despite not receiving investigatory funding, Ochoa filed a 164–page amended petition supported by 16 exhibits. ROA.24–187 (petition), 69–70 (list of exhibits), 167–262 (exhibits). Ochoa acknowledges that he received assistance from the Texas Defender Service in conducting his investigation, including use of a Spanish-speaking mitigation investigator. ROA.797; Pet.9–10. Additional funding for investigation would have only served to supplement this evidence and the already ample mitigation introduced at trial.

III. Funding Is Also Unnecessary Because 28 U.S.C. § 2254(e)(2) Would Preclude the Introduction of New Evidence in District Court to Prove Ochoa's Underlying *Wiggins* Claim.

As the lower courts held, Ochoa's *Wiggins* claim is unexhausted and, thus, procedurally barred. App.12, 40; ROA.849–50. Still, a petitioner may overcome this bar using the exception set forth in *Martinez*. Under Fifth Circuit precedent, a district court *may* order discovery, and even a hearing, on

the limited question of state habeas counsel's representation during the initial collateral appeal. *Washington v. Davis*, 715 F. App'x 380, 385–86 (5th Cir. 2017). However, § 2254(e)(2) precludes a federal court, in adjudicating a petitioner's procedurally-defaulted IATC claim, from considering evidence regarding trial counsel's performance that is outside the state-court record. That is, this section would restrict the discretion of the district court to consider any new evidence when deciding Ochoa's underlying *Wiggins* claim. *See Cullen v. Pinholster*, 563 U.S. 170, 186 (2011); *Williams v. Taylor*, 529 U.S. 420, 427–29 (2000) (applying § 2254(e)(2) to the introduction of evidence that would support an unexhausted *Brady*[9] claim); *see also Holland v. Jackson*, 542 U.S. 649, 653 (2004) (applying this restriction whether petitioner seeks to introduce new evidence through either a live evidentiary hearing or through written submission).

This bar on new evidence is triggered if the habeas petitioner "has failed to develop the factual basis of a claim in State court proceedings." 28 U.S.C. § 2254(e)(2). That opening clause is met if the prisoner "was at fault for failing to develop the factual bases for his claims in state court," *Bradshaw v. Richey*, 546 U.S. 74, 79 (2005) (per curiam), meaning a "lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Williams*,

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9 *Brady v. Maryland*, 373 U.S. 83 (1963).

529 U.S. at 432. Under accepted agency principles, state habeas counsel's lack of diligence is attributed to the prisoner for § 2254(e)(2) purposes. *Holland*, 542 U.S. at 652–53; *Williams*, 529 U.S. at 437, 439–40. Thus, when an IATC claim is unexhausted or procedurally defaulted because it was not raised by state habeas counsel, then there was not a "diligent" attempt, *id*. at 432, "to develop the factual basis of [that IATC] claim in State court proceedings." 28 U.S.C. § 2254(e)(2). Of course, this is the very essence of a *Martinez* argument.

Finally, Ochoa cannot demonstrate that he meets any exception to § 2254(e)(2)'s bar on new evidence. He does not demonstrate a new retroactive rule of constitutional law and does not show diligence plus actual innocence. 28 U.S.C. § 2254(e)(2)(A)–(B). Because any evidence generated by the requested funding cannot be considered in evaluating the merits of the underlying *Wiggins* claim, Ochoa's request for funding could not be considered reasonably necessary. Section 2254(e)(2) is an independent ground for affirmance that *Ayestas* expressly left open. *See Ayestas*, 138 S. Ct. at 1095.

IV. The Lower Court Correctly Applied *Strickland* and Its Progeny.

Ochoa asserts that the Fifth Circuit misapplied *Strickland* and its progeny because the court excused counsel's purportedly unreasonable investigation by relying on the fact that "trial counsel presented some semblance of a mitigation case." Pet.26–28. However, the lower courts, as shown below, were plainly of the opinion that the investigation into Ochoa's

personal and family backgrounds was thorough, and additional evidence would not have been beneficial. *See*, *e.g.*, *Wong*, 558 U.S. at 28.

Simply because trial counsel did not raise every shred of possible evidence does not mean that counsel's assistance was deficient under *Strickland*. *Cf. Harrington v. Richter*, 562 U.S. 86, 110 (2011) ("*Strickland* does not guarantee perfect representation, only a reasonably competent attorney.") (citation and internal quotation marks omitted). "The defense of a criminal case is not an undertaking in which everything not prohibited is required. Nor does it contemplate the employment of wholly unlimited time and resources." *Smith v. Collins*, 977 F.2d 951, 960 (5th Cir. 1992). A reviewing court "must be particularly wary of arguments that essentially come down to a matter of degrees. Did counsel investigate enough? Did counsel present enough mitigating evidence? Those questions are even less susceptible to judicial second guessing." *Skinner v. Quarterman*, 576 F.3d 214, 220 (5th Cir. 2009) (quotation and citation omitted). When unpresented evidence is not "shocking and starkly different than that presented at trial," the Fifth Circuit has previously held that an ineffectiveness claim is not viable. *Blanton v. Quarterman*, 543 F.3d 230, 239–40 n.1 (5th Cir. 2008).

As discussed above, trial counsel made a reasonable investigation into possible mitigating factors and presented sixteen witnesses at the punishment phase. SHCR–02.360–61. The state court noted that these witnesses testified

that "Ochoa's difficult childhood, his relatively crime-free life prior to his addiction to crack, his mild brain damage from crack abuse, his work ethic, his lack of disciplinary problems in jail, and the conditions under which he would live if given a life sentence at TDCJ-ID." *Id*. Although Ochoa's current IATC claim is unexhausted, the state court nevertheless still noted that counsel submitted "a well-presented theory of long-term crack addiction and rehabilitation attempts by an otherwise law-abiding person to offer in mitigation of punishment." *Id*. These state court findings are all entitled to a presumption of correctness under § 2254(e)(1).

Here, the record clearly shows that the trial witnesses related the important facts concerning Ochoa's personal history and background. *See Pinholster*, 563 U.S. at 200 (finding no reasonable probability that the additional evidence presented in state habeas proceeding would have changed jury's verdict because the "'new' evidence largely duplicated the mitigation evidence at trial"). Moreover, "[c]ounsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies." *Richter*, 562 U.S. at 107.

In support of his argument, Ochoa's petition (Pet.27) cites to *Sears v. Upton*,[10] where the Court stated that evidence of a profound personality

[10] 561 U.S. 945 (2010).

disorder may have assisted the jury to understand Sears and "his horrendous acts." 561 U.S. at 951. But *Sears* is distinguishable. There, Sears's counsel "presented evidence describing his childhood as stable, loving, and essentially without incident." *Id.* at 947. However, postconviction evidence showed "Sears'[s] home life, while filled with material comfort, was anything but tranquil: His parents had a physically abusive relationship, and divorced when Sears was young; he suffered sexual abuse at the hands of an adolescent male cousin; his mother's favorite word for referring to her sons was 'little mother fuckers'; and his father was verbally abusive, and disciplined Sears with age-inappropriate military-style drills." *Id.* at 948 (record citations, quotations, and footnote omitted). *Id.* Moreover, Sears had "significant frontal lobe abnormalities," suffered severe head injuries, and was in the first percentile of cognitive functioning on several tests "'making him among the most impaired individuals in the population in terms of ability to suppress competing impulses and conform behavior only to relevant stimuli.'" *Id.* at 949. Sears's omitted evidence was thus qualitatively different from what the jury actually heard and also far more compelling then Ochoa's.

Indeed, the lower courts did not err by finding that additional testimony would have been cumulative or redundant. "[Ochoa's counsel]'s mitigation strategy failed, but the notion that the result could have been different if only [counsel] had put on more than the [sixteen] witnesses he did, or called expert

witnesses to bolster his case, is fanciful." *Wong*, 558 U.S. at 28. Similarly, in *Van Hook*, the Court concluded that "the minor additional details" of Van Hook's traumatic childhood, which the interviews with additional family members would have revealed, did not prejudice Van Hook because counsel had already presented extensive evidence of Van Hook's traumatic childhood at trial. *Bobby v. Van Hook*, 558 U.S. 4, 11–12 (2009) ("there comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties")

Ochoa's petition merely demonstrates how he now, in hindsight, would have conducted the punishment investigation and the presentation of witnesses. But such backward-looking analysis does little to establish that counsel's thorough investigation and subsequent strategy was anything but sound, and flies in the face of *Strickland*'s mandate that counsels' performance must not be judged through the distorting lens of hindsight. *Strickland*, 466 U.S. at 689. "Reliance on 'the harsh light of hindsight' to cast doubt on a trial that took place . . . years ago is precisely what *Strickland* [. . .] seek[s] to prevent." *Richter*, 562 U.S. at 107 (citing *Bell v. Cone*, 535 U.S. 685, 702 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993)); App.42. The lower courts did not err in their evaluation of Ochoa's IATC claim.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that the Court refuse certiorari review.

Respectfully submitted,

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