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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15-70015

United States Court of Appeals
Fifth Circuit
FILED
July 31, 2019
Lyle W. Cayce

CARLOS MANUEL AYESTAS, also known as Dennis Zelaya Corea,

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court for the Southern District of Texas

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before SMITH, SOUTHWICK, and HO, Circuit Judges.

LESLIE H. SOUTHWICK, Circuit Judge:

Carlos Manuel Ayestas is a prisoner on death row in Texas. We previously affirmed the district court's denial of his request under 18 U.S.C. § 3599(f) for investigatory funding because he had not shown a "substantial need" that made the funds "reasonably necessary" to the representation. The Supreme Court

held the statute does not require a showing of "substantial need" and remanded with instructions to consider only whether funding is "reasonably necessary."

We conclude that investigatory funding is not reasonably necessary because nothing would establish the ineffectiveness of state-habeas counsel, a gateway requirement for him to overcome the procedural default of his claim that his trial counsel was ineffective for failing to present certain mitigating evidence of substance abuse and mental illness. AFFIRMED.

FACTUAL AND PROCEDURAL BACKGROUND

In 1997, Carlos Manuel Ayestas was convicted of murdering Santiaga Paneque, a 67-year-old Houston woman, after he and two accomplices broke into her home one morning. Paneque's son discovered her body when he returned home for lunch. He testified at sentencing that it had been important to his mother that he become a United States citizen, and that he had wanted her at his naturalization ceremony, which occurred two days after her death. The Texas Court of Criminal Appeals affirmed Ayestas's conviction and death sentence in 1998; that court denied his application for a writ of habeas corpus in 2008.

We have previously described in detail Ayestas's federal-habeas proceedings. *Ayestas v. Stephens*, 817 F.3d 888, 892-94 (5th Cir. 2016), *vacated sub nom. Ayestas v. Davis*, 138 S. Ct. 1080 (2018). We explain here some recent developments. In 2014, the district court denied Ayestas's federal habeas application as well as his *ex parte* motion for additional investigatory funding pursuant to 18 U.S.C. § 3599(f). With respect

to the Section 3599(f) motion, the district court recited then-controlling precedent that Ayestas was required to show a "substantial need" for investigative assistance, as well as the statutory requirement that the assistance be "reasonably necessary" to the representation. *See Brown v. Stephens*, 762 F.3d 454, 459 (5th Cir. 2014); § 3599(f).

The district court then denied multiple post-judgment motions, including some based on a newly discovered "Capital Murder Summary memorandum, prepared by the prosecution, stating that Ayestas's lack of citizenship was an 'aggravating circumstance[].'" *Ayestas*, 817 F.3d at 894. On appeal, we affirmed the denial of Ayestas's motions for investigatory funding, to stay proceedings to allow exhaustion of new claims in state court, and to supplement his habeas application with new evidence. *Id.* at 892. We also denied Ayestas's request for a certificate of appealability to appeal the denial of his habeas application. *Id.*

The Supreme Court granted certiorari on the denial of investigatory funding under Section 3599(f), then vacated and remanded for further proceedings. *Ayestas*, 138 S. Ct. 1080. The Court rejected that an applicant must show a "substantial need" or present "a viable constitutional claim that is not procedurally barred." *Id.* at 1093 (citation omitted). Instead, funding may be reasonably necessary when it "stands a credible chance of enabling a habeas petitioner to overcome the obstacle of procedural default." *Id.* at 1094. The Court instructed that "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.*

Ayestas contends that investigatory funding is reasonably necessary to develop claims that his trial counsel was ineffective for failing to present mitigating evidence of his substance abuse and mental illness at sentencing. *See Wiggins v. Smith*, 539 U.S. 510 (2003). A prison psychologist first diagnosed Ayestas as schizophrenic in 2003 when his state-habeas application was still pending.

DISCUSSION

We review the district court's denial of a Section 3599(f) motion for an abuse of discretion. *Hill v. Johnson*, 210 F.3d 481, 487 (5th Cir. 2000). "A district court abuses its discretion if it bases its decision on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Perez v. Stephens*, 745 F.3d 174, 177 (5th Cir. 2014) (citation omitted). When reviewing for abuse of discretion, the "underlying conclusions of law are reviewed *de novo* and conclusions of fact are reviewed for clear error." *Aguilar-Ayala v. Ruiz*, 973 F.2d 411, 416 (5th Cir. 1992) (citation omitted).

Since the Supreme Court's *Ayestas* decision, we have remanded some Section 3599(f) denials for reconsideration by the district court. *E.g.*, *Sorto v. Davis*, 716 F. App'x 366 (5th Cir. 2018). Remand is not required "if the judgment is sustainable for any reason." *Af-Cap, Inc. v. Republic of Congo*, 462 F.3d 417, 425 (5th Cir. 2006). For that reason, other panels have affirmed pre-*Ayestas* denials where "the reasons the district court gave for its ruling remain sound."

Jones v. Davis, 927 F.3d 365, 374 (5th Cir. 2019) (citation omitted).

I. Section 3599(f) Motion for Investigatory Funding

The district court denied the Section 3599(f) motion for these reasons: Ayestas "fail[ed] to demonstrate that [1] trial counsel was deficient, [2] that there [was] a reasonable probability that his claimed evidence of substance abuse would have changed the outcome of either his trial or his state habeas corpus proceeding, or [3] that his state habeas counsel was ineffective."

Whether the district court's reliance on the first two reasons abused its discretion under the standard described in the Supreme Court's *Ayestas* decision are close questions because of the district court's emphasis on *existing* as opposed to *potential* evidence. The district court's third reason for denying funding was that state-habeas counsel was not ineffective. Ayestas must establish that his state-habeas counsel was ineffective to overcome the procedural default of claims based on failures to present mitigating evidence of substance abuse and mental illness. See Trevino v. Thaler, 569 U.S. 413 (2013). If the district court's assessment of effectiveness is valid, then the district court did not abuse its discretion by denying funding regardless of any potential error in the other stated reasons.

We previously concluded that Ayestas's state-habeas counsel was not constitutionally ineffective. *Ayestas*, 817 F.3d at 898. Nonetheless, the Supreme Court has informed us to consider "the prospect that the applicant will be able to clear any procedural hurdles standing in the way." *Ayestas*, 138 S. Ct. at 1094. This means assessing whether the investigation

"stands a credible chance of enabling a habeas petitioner to overcome the obstacle of procedural default." *Id.* If no credible chance exists, then the investigation is not reasonably necessary regardless of the *Wiggins* claims' viability or the likelihood of uncovering admissible evidence. That is because "it would not be reasonable — in fact, it would be quite unreasonable — to think that services are necessary to the applicant's representation if, realistically speaking, they stand little hope of helping him win relief." *Id.*

A. State-Habeas Counsel's Effectiveness

The question then is whether state-habeas counsel's decision not to bring these specific claims fell outside of "prevailing professional norms" given any signs that mental illness and substance abuse went uninvestigated by trial counsel and in light of the post-conviction claims that were advanced instead. *See Strickland v. Washington*, 466 U.S. 668 (1984).

i. Prevailing Professional Norms

Capital defense practices have changed significantly over the past 30 years.[1] The Supreme Court, though, has made clear that counsel's performance is to be evaluated based on "the professional norms prevailing when the

[1] *See* Russell Stetler & W. Bradley Wendel, *The ABA Guidelines and the Norms of Capital Defense Representation*, 41 HOFSTRA L. REV. 635, 695 (2013) ("Counsel's duty to conduct thorough mitigation investigation in death penalty cases must be understood in terms of the evolving standards of the specialized capital defense bar — a bar that has been increasingly successful in avoiding death sentences.").

representation took place." *Bobby v. Van Hook*, 558 U.S. 4, 7 (2009).

Scrutiny of mitigation investigations did not take shape until well after Ayestas's state-habeas application was filed in 1998. At that time, the ABA guidelines spoke only briefly to the duties for post-conviction counsel. ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES 11.9.3, p. 126 (1989).[2] Ayestas's current request for funding closely tracks supplementary ABA guidelines, but their "probative value . . . is diminished by the fact that they were adopted" a decade after the state-habeas application was filed. *Druery v. Thaler*, 647 F.3d 535, 541 n.2 (5th Cir. 2011); *see* ABA SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES (2008).

Ayestas's state-habeas attorney in 1998 would not have found much in the case law for claims based upon mitigating evidence of substance abuse and

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[2] GUIDELINE 11.9.3 DUTIES OF POSTCONVICTION COUNSEL

A. Postconviction counsel should be familiar with all state and federal postconviction remedies available to the client.

B. Postconviction counsel should interview the client, and previous counsel if possible, about the case. Counsel should consider conducting a full investigation of the case, relating to both the guilt/innocence and sentencing phases. Postconviction counsel should obtain and review a complete record of all court proceedings relevant to the case. With the consent of the client, postconviction counsel should obtain and review all prior counsel's files.

C. Postconviction counsel should seek to present to the appropriate court or courts all arguably meritorious issues, including challenges to overly restrictive rules governing postconviction proceedings.

mental illness. In 1998, the most relevant authority was likely *Strickland* itself, which held that "[t]rial counsel could reasonably surmise from his conversations with [his client] that character and psychological evidence would be of little help." *Strickland*, 466 U.S. at 699.

No authority cited now by Ayestas that addresses mitigating evidence even existed when his state-habeas application was filed in December 1998. *See Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374, 393 (2005); *Porter v. McCollum*, 558 U.S. 30, 39 (2009).

"Starting with *Williams v. Taylor* in 2000, and then continuing with *Wiggins v. Smith* in 2003, and *Rompilla v. Beard* in 2005, the Court launched a series of decisions emphasizing the importance of thorough mitigation investigation in capital defense cases." Emily Hughes, *Mitigating Death*, 18 CORNELL J.L. & PUB. POL'Y 337, 352 (2009) (citations omitted). In fact, the 2000 decision in *Williams* was "the first time [the Supreme Court] overturned a death sentence under the *Strickland* standard." Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283, 353 (2008) (citation omitted). Importantly, none of these cases established *retroactive* constitutional rules.

In 1998, then, there was little to indicate to state-habeas counsel that the failure to develop substance abuse and mental illness evidence was an egregious omission, particularly when compared to the failure to secure testimony from his family. Ayestas's counsel pursued that evidence. In fact, just a year before the state-habeas application was filed, we explicitly characterized an ineffective assistance claim "for

failing to present mitigating lay testimony from family or friends" as a "stronger argument" than a claim premised on "failing to locate an expert who would conclude that [the defendant] was retarded or suffered from mental illness." *Williams v. Cain*, 125 F.3d 269, 278 (5th Cir. 1997). The "double-edged" nature of substance abuse and mental illness evidence and the state of the law before 2000 would have likely made those claims seem unlikely to succeed. *See, e.g.*, *Boyle v. Johnson*, 93 F.3d 180, 187-88 (5th Cir. 1996); Jonathan P. Tomes, *Damned If You Do, Damned If You Don't: The Use of Mitigation Experts in Death Penalty Litigation*, 24 AM. J. CRIM. L. 359, 360-61 (1997).

In one representative case, the petitioner had argued his counsel "failed to present significant mitigating evidence that was either known to his counsel or should have been known to his counsel" including "evidence of his mental illness, violent family background, economic deprivation, voluntary intoxication, drug and alcohol addictions, and testimony as to his many positive traits." *Boyle*, 93 F.3d at 187. We held he "failed to establish that his counsel was deficient at trial" given trial counsel's testimony in state-habeas proceedings that this "would have been aggravating," and because "all the evidence that [the applicant] maintain[ed] should have been presented at the punishment phase of his capital murder trial had a double-edged quality." *Id.* at 187-88.

We acknowledge that evaluating performance against prevailing professional norms is complicated when standard practices raise constitutional concerns. As one Fifth Circuit judge observed, "[i]n

Texas, the most active state in the carrying out of death sentences, we have often failed to live up to our ideal of justice. The failure of lawyers, judges, prosecutors, and defense counsel to perform as professionals is now well-documented." Patrick E. Higginbotham, *A Reflection on Furman*, 34 AM. J. CRIM. L. 199, 204 (2007).

In this instance, though, the record shows that state-habeas counsel provided aggressive, competent, and professional representation.

ii. Analysis

Ayestas's state-habeas counsel, J. Gary Hart, has never been publicly disciplined for any reason. In December 1998, eleven months after being appointed, Ayestas's state-habeas counsel filed a 70-page application for relief raising several constitutional claims:

> Claims 1–10. That ten distinct actions or omissions by Ayestas's trial counsel, including the failure to present mitigating evidence, each denied Ayestas effective assistance in violation of the Sixth Amendment;
>
> Claims 11–13. That the failure to inform Ayestas of his right, under an international treaty, to consult with the Honduran Consul prevented him from presenting mitigating evidence in violation the Eighth Amendment, the Fourteenth Amendment, and the Sixth Amendment's compulsory process clause;
>
> Claims 14–15. That the state knowingly presented false testimony from a witness at the guilt phase of the trial in violation of the Fourteenth Amendment, and at the

punishment phase in violation of the Eighth Amendment;

Claim 16. That the state suppressed impeachment evidence in violation of the Fourteenth Amendment due process clause.

Hart did not merely repeat claims raised in the direct appeal. In fact, there is virtually no overlap between them. Hart's independent efforts are also represented in the extra-record evidence that he developed and attached to the initial state-habeas application, which included affidavits from a forensic pathologist, Ayestas himself, three of Ayestas's family members, and one of the jurors that sentenced Ayestas to death, as well as documents from the Honduran government and a letter from an independent fingerprint examiner.

In summary, state-habeas counsel raised ten ineffective assistance of trial counsel ("IATC") claims, including multiple claims premised on a failure to present certain mitigating evidence. Specifically, state-habeas counsel argued that Ayestas was prejudiced by the failure to present mitigating testimony from family members that he had no criminal record in Honduras and that he had lived a normal life. In other words, this claim was the *opposite* of what would likely be shown by evidence of mental illness and substance abuse, which as mentioned already had little support in the case law at the time.

The omission of these claims was not because state-habeas counsel was unaware of the mental illness and substance abuse. State-habeas counsel had access to the psychological and disciplinary records subpoenaed by trial counsel's investigator.

That trial investigator provided Ayestas with a questionnaire, and state-habeas counsel had Ayestas's responses where he identified a history of head traumas and "admitted to drinking alcohol since he was 16 years old and to doing cocaine at least once a week, which became more frequent as he slipped into the grips of addiction."

Despite the relative novelty of mitigation specialists,[3] state-habeas counsel hired one shortly after being appointed. That specialist advised:

> It is clear the defendant had a history of substance abuse. What we know from reviewing the trial evidence is that Ayestas probably abused heroine and/or cocaine while in California: that he had what appeared to be a drug-related run-in with alleged victim Martinez in Houston days after this murder, and that he had gotten so drunk he "passed out" on the day of his arrest. Would there have been a defense to his conduct due to some sort of addiction? We should look at substance abuse as mitigation.

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[3] Judge Berrigan, who "as a lawyer, handled the penalty phase of a number of capital cases in the 1980s and early 1990s on a pro bono basis" has written that she "had never heard of a mitigation specialist." Helen G. Berrigan, *The Indispensable Role of the Mitigation Specialist in A Capital Case: A View from the Federal Bench*, 36 HOFSTRA L. REV. 819, 819 n.a1 (2008). "She did her own investigation and . . . [f]or witnesses, she generally had only family members and a psychologist." *Id. See also Murphy v. Davis*, 737 F. App'x 693, 705 (5th Cir. 2018) ("Before *Wiggins*, counsel said lawyers still had to conduct a mitigation investigation, but it was not incumbent upon lawyers to retain a mitigation expert.").

Hart commented in his handwritten notes: "Ayestas's drinking and/or drug consumption as a possible mitigating fact. How could this have been developed at trial?"

Prior to filing the initial state-habeas application, Hart requested investigatory funding based on his mitigation specialist's recommendations that he estimated would cost $15,000.[4] However, recognizing an existing "policy to authorize no more than $2,500.00 for investigative expenses to begin with," Hart requested only that amount. The state court granted only $1,500. State-habeas counsel managed to obtain only an additional $1,000 in investigatory funding before he filed the initial application, after which further requests were denied. *See* TEX. CODE CRIM. PROC. ANN. art. 11.071 § 3(b) (requiring prepayment requests to be filed no later than 30 days before filing of initial application).

"Although courts may not indulge '*post hoc* rationalization' for counsel's decisionmaking that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions." *Harrington v. Richter*, 562 U.S. 86, 109 (2011) (citation omitted). We are constrained to interpret the omission of a mitigation claim based on substance abuse as a strategic decision given the evidence in the record that state-habeas counsel contemplated the possibility but decided against it. *See Hopkins v. Cockrell*, 325 F.3d 579, 586 (5th Cir. 2003) ("As for the

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[4] The Texas Court of Criminal Appeals capped fees for habeas counsel at $15,000 until 2000, when it was raised to $25,000. *See Shamburger v. Cockrell*, 34 F. App'x 962, at *3 n.9 (5th Cir. 2002).

alcohol and drug abuse, this Court has repeatedly denied claims of ineffective assistance of counsel for failure to present 'double edged' evidence where counsel has made an informed decision not to present it."). We therefore "conclude that counsel's decisions" about the substance abuse "were objectively reasonable based on the double-edged nature of the evidence involved." *Kitchens v. Johnson*, 190 F.3d 698, 703 (5th Cir. 1999).

With respect to Ayestas's mental illness, neither trial counsel nor state-habeas counsel could have been expected to explore it given that there was no evidence he was schizophrenic until 2000, two years after his state-habeas application was filed.

State-habeas counsel had access to prison medical records. They document that Ayestas was examined on September 22, 2000, at which time he complained of delusions that inmates could read his mind. The handwritten notes also indicate that Ayesteas "report[ed] no psy problems until 2 months ago." In other words, there is evidence that he did not begin exhibiting any symptoms of schizophrenia until July 2000. That is consistent with the absence of any evidence of Ayestas's mental illness prior to that point and with the multiple indicators of it afterwards.

In October 2000, Hart accompanied the Honduran Consul General and the Honduran Ambassador to the United States on a visit to Ayestas in prison. After meeting with Ayestas, Ambassador Hugo Pino told Hart he believed that Ayestas was delusional. In May 2003, in the wake of the Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), Hart arranged for a psychologist to evaluate Ayestas's intellectual status. The psychologist concluded that there was no

evidence of mental retardation but did express concerns about his mental state and delusional thinking.

While this evaluation concluded there was not a viable *Atkins* claim, state-habeas counsel nonetheless leveraged it to support the IATC claim premised on the failure to present evidence Ayestas was only guilty of lesser included felony murder. State-habeas counsel used the psychologist's finding that Ayestas was not intellectually disabled to support his argument that trial counsel should have called Ayestas to testify. State-habeas counsel filed the psychologist's letter in the habeas proceedings but redacted the discussion of Ayestas's delusional thinking. Delusional thinking, of course, was arguably inconsistent with state-habeas counsel's attempt to portray Ayestas as a viable witness who should have been called at trial. Ayestas was formally diagnosed with schizophrenia in October 2003.

State-habeas counsel cannot have been ineffective for failing to investigate mental illness because the record establishes that there "was nothing to *factually* put counsel on notice of any reasonable likelihood that any such condition existed" at trial or when the state-habeas application was filed. *West v. Johnson*, 92 F.3d 1385, 1409 n.46 (5th Cir. 1996). This is not a *Wiggins* fact-pattern. Counsel's failure to present evidence of mental illness "did not result from pure inattention, and this is not a case like *Porter*, where counsel wholly ignored multiple avenues of investigation," nor is it like *Rompilla* where there was "a readily available file that the prosecution tipped-off to defense counsel." *Charles v. Stephens*, 736 F.3d 380, 391 (5th Cir. 2013). Nothing counsel "uncovered prior to trial had led

them to any family history of mental illness." *Smith v. Davis*, 927 F.3d 313, 337 (5th Cir. 2019).

At the same time, state-habeas counsel's awareness and active redaction of this "double-edged" evidence after it emerged further constrains us to interpret the omission of a claim premised on the failure to present evidence of mental illness as a strategic decision because "not to present evidence of [his] volatile mental state, especially given counsel's decision to emphasize [his] non-violent history, was clearly reasonable." *Nobles v. Johnson*, 127 F.3d 409, 422 (5th Cir. 1997).

To repeat, when Hart filed the initial habeas application none of these major mitigation decisions existed. Even thereafter, Texas's limitations on subsequent applications would have prevented Hart from adding additional mitigation claims premised on mitigating evidence of substance abuse and mental illness. TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5. The earliest cite to *Wiggins* by a Texas court considering a habeas application apparently was in 2005, and the court rejected the claim as procedurally barred:

> The decisions of the Supreme Court of the United States in *Wiggins v. Smith*, 123 S. Ct. 2527 (2003), and *Rompilla v. Beard*, 125 S. Ct. 2456 (2005), were subsequent to and unavailable at the time of the initial application in this cause. However, neither decision creates a new legal basis for a review of the factual allegations which were presented and reviewed on applicant's initial writ application.

Ex parte Ramirez, No. WR-52,775-02, 2005 WL 2659443, at *1 (Tex. Crim. App. Oct. 18, 2005) (unpublished).

Deciding whether to respond to a new trend and pivot to a *Wiggins*-centric strategy or to stay the course was surely its own strategic decision. Avoiding claims likely to be barred as successive was more than reasonable. "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983).

While Hart failed to anticipate the arrival of *Wiggins* claims, the record does demonstrate his own innovative efforts. State-habeas counsel argued that the failure to inform Ayestas of his right under the Vienna Convention on Consular Relations ("VCCR") to consult with the Honduran Consul prevented him from presenting mitigating evidence in violation of the Eighth, Fourteenth, and Sixth Amendments. Texas rightly describes these as "cutting edge" claims that would not be rejected by the Supreme Court until 2008. *See Medellin v. Texas*, 552 U.S. 491 (2008).

A 1998 issue of the journal published by the National Association of Criminal Defense Lawyers makes the sophistication of this effort by state-habeas counsel obvious:

> The use of state post-conviction proceedings for VCCR violations is even more in its infancy than the use of federal *habeas* proceedings since, until recently, the treaty violations were not discovered until the cases had progressed into federal court. Although unsuccessful

> because the Ohio court found its state habeas proceedings limited to "constitutional" issues, which excluded a treaty issue, *State v. Loza* represents the first reported case where the VCCR issue was raised in state *habeas*. Despite the scarcity of reported cases, a state post-conviction proceeding is the most promising forum for litigating a violation of the VCCR post-trial, since in that context it is much less likely that procedural barriers will foreclose efforts to raise the treaty violation.
>
> In addition, state *habeas* proceedings provide an opportunity to make a record on the effect of the treaty violation. Lawyers who represent defendants in state *habeas* proceedings should develop evidence through declarations, documents, and live testimony that establishes what actions the consulate would have taken and what prejudice the defendant suffered as a result of the failure to notify.

John Cary Sims & Linda E. Carter, *Representing Foreign Nationals: Emerging Importance of the Vienna Convention on Consular Relations As A Defense Tool*, THE CHAMPION, Sept./Oct. 1998, at 28, 56.

Ayestas wants us to find his state-habeas counsel was ineffective, or potentially ineffective, for not undertaking an investigation that Ayestas himself described as "unusual" because it would "touch[] two central American countries and three States," require interviewing dozens of witnesses, "involve[] extraordinarily complex investigatory tasks to piece together the manifestations of [petitioner's] mental

illness in the years leading up to the commission of this crime," include attempts at "identifying percipient witnesses, probing their memories for clues whether [Ayestas] manifested signs of mental illness and the nature of his ability to function," and "encompass complex cultural issues that must be addressed and accounted for."

This would go well beyond the prevailing professional norms for post-conviction capital representations in 1998, and state-habeas counsel was not ineffective for not conducting such an investigation given the limited time and resources available. "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence." *Wiggins*, 539 U.S. at 533.

It is not disputed that Ayestas had a history of substance abuse nor that Ayestas was diagnosed with a mental illness after conviction. Ayestas, though, has not explained how state-habeas counsel was ineffective, or even how his proposed investigation might uncover evidence that differs not only in degree but in kind from the facts known to state-habeas counsel. Investigations are not reasonably necessary "when the sought-after assistance would only supplement prior evidence." *Smith v. Dretke*, 422 F.3d 269, 288 (5th Cir. 2005).

Given the evidence that state-habeas counsel was not deficient, joined with the unlikelihood of locating new information suggesting otherwise, funding for investigatory services cannot be reasonably necessary.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CARLOS AYESTAS, Petitioner,	§	
v.	§	
WILLIAM STEPHENS, Director, Texas Department of Criminal Justice-Correctional Institutions Division, Respondent.	§	CIVIL ACTION NO. H-09-2999

MEMORANDUM OPINION AND ORDER

Petitioner Carlos Ayestas filed a petition for a writ of habeas corpus under 28 U.S.C. § 254 challenging his state court conviction and death sentence for capital murder. On January 26, 2011, this court granted the respondent's motion for summary judgment and entered judgment for the respondent. On February 28, 2011, this court denied petitioner's motion to alter or amend the judgment. On February 22, 2012, the Fifth Circuit denied Ayestas' request for a certificate of appealability. Ayestas v. Thaler, No. 11-70004 (5th Cir., Feb. 22, 2012).

On June 6, 2013, the Supreme Court granted certiorari and remanded the case to the Fifth Circuit for reconsideration in light of the Supreme Court's decisions in Martinez v. Ryan, 132 S. Ct. 1309 (2012) (holding that ineffective assistance of state habeas counsel could, in certain circumstances, constitute cause to excuse a procedural default of an ineffective

assistance of trial counsel claim), and Trevino v. Thaler, 133 S. Ct. 1911 (2013) (holding that Martinez is applicable to the Texas capital postconviction process). The Fifth Circuit subsequently remanded the case to this court.

The parties have filed supplemental briefing on the effect of Martinez on this case. Having carefully considered Ayestas's petition, the state court record, the parties' submissions, and the applicable law, the court finds that Ayestas fails to establish cause and prejudice to excuse the procedural default of his claims of ineffective assistance of trial counsel. Therefore, the court will deny Ayestas's petition for a writ of habeas corpus on these claims. The reasons for these rulings are set out in detail below.

I. Background[1]

Ayestas was convicted of capital murder for murdering Santiaga Paneque during the course of committing or attempting to commit robbery or burglary. About two weeks before the murder Ayestas and a friend went to look at a car offered for sale by Anna McDougal, who lived across the street from Paneque. McDougal went inside her house for about 15 minutes while the men inspected the car. When she came back outside, McDougal saw the two men leaving Paneque's house. When she asked what they were doing, the men told McDougal that Paneque called them over to look at some furniture she was trying to sell.

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[1] This statement of facts is repeated from this court's January 26, 2011, Memorandum Opinion and Order granting the respondent's motion for summary judgment.

Paneque's son, Elin, left the house at about 8:30 a.m. on September 5, 1995. He returned home for lunch at 12:23 p.m.[2] and rang the doorbell, but there was no response. He put his key in the doorknob, but noticed that the door was unlocked. Upon entering, he saw that the room was ransacked and items were missing. The rest of the house was in much the same condition. Elin went to the house of a neighbor, Maria Diaz, and called 911. Upon returning to his house, he found his mother's body on the floor of the master bathroom. She had silver duct tape on her ankles. Elin returned to Diaz's house and asked her to go make sure that his mother was dead. Diaz entered the Paneque house and called Ms. Paneque's name. She found Ms. Paneque lying face down on the floor. Her face was a dark color and she was not breathing.

Detective Mark Reynolds of the Harris County Sheriff's Department testified that the house was ransacked but bore no signs of forced entry. Paneque's body was face down in a pool of blood and vomit. Her wrists were bound with the cord from an alarm clock and then wrapped in silver duct tape. She also had duct tape over her eyes and around her neck. Reynolds also testified that it was apparent that Paneque was beaten. Her face was swollen and covered with cuts and bruises. Reynolds showed neighbors photographs of two suspects, and McDougal identified them as the same two men who were in Paneque's house about two weeks before the murder. One of the suspects was Petitioner and the other was Frederico Zaldivar.

An autopsy conducted by Dr. Marilyn Murr, an assistant medical examiner for Harris County,

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[2] He stated that he specifically noted the time.

revealed that Paneque suffered multiple blows while she was still alive, resulting in numerous bruises and lacerations. She had fractured bones in her right elbow and neck, and bruises on each side of her pelvic area, just above the hips. An internal examination revealed extensive hemorrhaging in the neck and head. She had another fracture, caused by a "significant amount of force," in the roof of the orbit containing her right eye. Dr. Murr determined that none of these injuries was substantial enough to kill Paneque. The cause of death was asphyxiation due to continual pressure applied to her neck for three to six minutes. Dr. Murr testified that her initial report indicated asphyxiation by ligature strangulation, but she reexamined the evidence shortly before trial at the request of the prosecutor. She then changed her conclusion to "asphyxiation due to strangulation," which allowed for the possibility that a hand or hands might have caused the asphyxia.

Police recovered fingerprints from the crime scene. Two prints recovered from the tape around Paneque's ankles, and two recovered from the roll of tape, matched Ayestas. On cross- examination the defense brought out that the two prints on the tape around Paneque's ankles were only discovered shortly before trial, approximately 20 months after the murder, based on a reexamination undertaken at the prosecutor's request.

Henry Nuila testified that he met Ayestas in mid-September 1995 at Ayestas's sister's house in Kenner, Louisiana. On September 20 an intoxicated Ayestas told Nuila that he was involved in the murder of a woman in Houston. Ayestas asked Nuila for help in killing the other two participants in the murder

because "they had spoken too much." Ayestas told Nuila that, if he declined, Ayestas would kill him. Ayestas brandished a gun. Nuila kept Ayestas talking until Ayestas passed out. Nuila then called the police. They arrested Ayestas, still in possession of the gun. Based on this evidence the jury found Ayestas guilty of capital murder for murdering Paneque during the commission or attempted commission of a burglary, robbery, or both.

During the penalty phase the State presented evidence that Ayestas served time in prison in California and Texas for possession and purchase for sale of narcotics, burglary, and misdemeanor theft. He was also the subject of a California warrant for illegal transportation of aliens. Candelario Martinez testified that three days after the murder Ayestas approached him outside a motel where he was waiting for a friend. After a brief conversation, Ayestas pulled a gun on Martinez and ordered him into one of the rooms. Martinez's friend was also in the room. Ayestas ordered Martinez onto the floor and threatened to kill him. Ayestas and two others took Martinez's personal belongings and forced him into the bathroom, where they again told him that they would kill him. Martinez begged for his life as the three discussed who would kill him. Ayestas finally said that he would let Martinez live, but threatened to kill his family if Martinez told the police. Ayestas and his accomplices left in Martinez's truck.

Based on this evidence, along with the evidence of the brutality of Paneque's murder, the jury found that there is a likelihood that Ayestas would commit future acts of criminal violence posing a continuing threat to society, that Ayestas actually caused

Paneque's death or intended to kill her or anticipated that a human life would be taken, and that the mitigating evidence did not warrant a sentence of life imprisonment. Accordingly, the trial court sentenced Ayestas to death.

The TCCA affirmed Ayestas's conviction and sentence, Ayestas v. State, No. 72,928 (Tex. Crim. App. Nov. 4, 1998), and denied his application for habeas corpus relief, Ex parte Ayestas, No. WR-69,674-01 (Tex. Crim. App. Sept. 10, 2008). Ayestas filed a petition for a writ of habeas corpus in this court on September 11, 2009. As discussed above, this court denied the petition and the Fifth Circuit denied a certificate of appealability. This case is now back before this court of remand for reconsideration of several procedurally defaulted claims in light of the Supreme Court's decision in Martinez.

II. The Applicable Legal Standards

In Martinez the Supreme Court carved out a narrow equitable exception to the rule that a federal habeas court cannot consider a procedurally defaulted claim of ineffective assistance of counsel.

> [W]hen a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim . . . where appointed counsel in the initial-review collateral proceeding . . . was ineffective under the standards of Strickland v. Washington, 466 U.S. 668 . . . (1984). To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the

> prisoner must demonstrate that the claim has some merit.

Martinez, 132 S. Ct. at 1318.

To prevail on a claim for ineffective assistance of counsel, Petitioner

> must show that . . . counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the [petitioner] by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). In order to prevail on the first prong of the Strickland test, Petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness. Id. at 687-88. Reasonableness is measured against prevailing professional norms, and must be viewed under the totality of the circumstances. Id. at 688. Review of counsel's performance is deferential. Id. at 689.

In the context of a capital sentencing proceeding, "the question 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, 465 U.S. at 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

III. Analysis

A. Ineffective Assistance of Counsel

Ayestas contends that his counsel rendered ineffective assistance during the penalty phase by failing to investigate and present mitigating evidence of Ayestas's history of mental illness and substance abuse. He argues that trial counsel was ineffective for failing to investigate and develop this evidence, and that habeas counsel was ineffective for failing to investigate the evidence and argue that trial counsel rendered ineffective assistance.

As discussed in this court's original Memorandum Opinion and Order denying Ayestas's petition (Docket Entry No. 19), the state habeas court found that Ayestas did not agree to let counsel contact his family until after jury selection was complete. The court also found that counsel made every effort to contact the family after Ayestas permitted her to do so. The court further found that the defense investigator sent a letter to the family in Honduras on May 29, 1997, six weeks before the penalty phase began. Counsel sent a second letter on June 10, 1997, stating that Ayestas finally agreed to let counsel contact his family. Counsel sent a third letter on July 2, 1997, and faxed a letter to the United States Embassy in Honduras to expedite the family's travel to the United States. Counsel informed the embassy of the need for the family's presence at trial, arranged a July 3, 1997, meeting for the family at the embassy, and included a copy of the June 10, 1997, letter. The court also found that counsel communicated with the Ayestas family by phone beginning on June 3, 1997. She spoke with Ayestas's mother, explained the situation, and requested the family's presence at trial. Ayestas's mother said she would call back. Counsel heard from

the family on June 25, when Ayestas's sister, Somara Zalaya, informed counsel that the family would have difficulty leaving Honduras for the trial. Among the reasons stated were their father's illness and economic reasons. Counsel called the family again on June 26 and 27, and July 2. Ayestas's mother appeared unconcerned and gave evasive responses. Counsel's assistants also noted the mother's apparent lack of concern. The state habeas court further found that counsel informed the Honduran consulate of Ayestas's arrest, indictment, and upcoming trial on June 9, 1997.

Counsel has a duty to investigate possible mitigating evidence. Wiggins v. Smith, 539 U.S. 510 (2003). The record establishes, however, that counsel did attempt to investigate and develop evidence concerning Ayestas's background.

Ayestas instructed counsel not to call his family. Neither the Supreme Court nor the Fifth Circuit has ever held that a lawyer provides ineffective assistance by complying with the client's clear and unambiguous instructions to not present evidence. In fact, the Fifth Circuit has held on several occasions that a defendant cannot instruct his counsel not to present evidence at trial and then later claim that his lawyer performed deficiently by following those instructions. In Autry v. McKaskle, 727 F.2d 358 (5th Cir. 1984), the defendant prevented his attorney from presenting any mitigating evidence during the punishment phase of his capital trial. The Fifth Circuit rejected Autry's claim that counsel was ineffective for heeding his instructions: "If Autry knowingly made the choices, [his lawyer] was ethically bound to follow

Autry's wishes." Id. at 362;[3] see also Nixon v. Epps, 405 F.3d 318, 325-26 (5th Cir. 2005) (finding that counsel was not ineffective for failing to present additional mitigating evidence over client's objection: "A defendant cannot block his counsel from attempting one line of defense at trial, and then on appeal assert that counsel was ineffective for failing to introduce evidence supporting that defense."); Roberts v. Dretke, 356 F.3d 632, 638 (5th Cir. 2004) (noting that defendant may not obstruct attorney's efforts, then claim ineffective assistance of counsel); Dowthitt v. Johnson, 230 F.3d 733, 748 (5th Cir. 2000) (finding that counsel was not ineffective for failing to call family members during punishment phase where defendant stated that he did not want family members to testify).[4]

Ayestas now contends that a properly conducted investigation would have uncovered evidence of mental illness and substance abuse. Respondent points out, however, that Ayestas has not presented any medical records supporting his claim that he suffered from mental illness before his trial. While he submits some medical records from TDCJ, these records were created after Ayestas's conviction. Therefore, Ayestas fails to demonstrate that counsel had any reason to believe that Ayestas suffered from

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[3] The Autry court also rejected the defendant's claim that counsel was required to request a competency hearing before agreeing to comply with the client's decisions. Id.

[4] Cf. Schriro v. Landrigan, 550 U.S. 465, 475-77 (2007) (stating that, if defendant instructed counsel not to present mitigating evidence, "counsel's failure to investigate further could not have been prejudicial under Strickland"); Amos v. Scott, 61 F.3d 333, 348-49 (5th Cir. 1995) (denying ineffective assistance claim for want of prejudice where defendant "strongly opposed" presenting any witnesses during punishment phase of trial).

mental illness, or was deficient for failing to conduct an investigation into Ayestas's alleged mental illness.

The record also shows that state habeas counsel retained two investigators. Petitioner's Brief on Remand (Docket Entry No. 40) at Exhibits A and B. In addition to speaking with Ayestas's family, counsel obtained Ayestas's birth certificate and school records, and was aware of his criminal history and history of substance abuse. Id. at 26, Exhibit V. Habeas counsel also had Ayestas evaluated by a psychologist. Habeas counsel raised 16 claims for relief, including 10 claims of ineffective assistance of trial counsel. SH at 2-195. While it may be possible that habeas counsel could have raised an ineffective-assistance-of-trial-counsel claim regarding trial counsel's failure to investigate Ayestas's history of substance abuse, it cannot be said that the failure to do so constituted deficient performance. As the Supreme Court has noted in addressing an ineffective-assistance-of-appellate-counsel claim, counsel are not required to raise every possible non-frivolous claim. "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52 (1983). Moreover, in light of the extremely brutal nature of Ayestas's crime and Ayestas's history of criminal violence, it is highly unlikely that evidence of substance abuse would have changed the outcome of the sentencing phase of trial or of the state habeas corpus proceeding. Therefore, Ayestas fails to demonstrate ineffective assistance of state habeas counsel and cannot show cause for his procedural

default of his claims of ineffective assistance of trial counsel.

B. Investigative Funding

Ayestas contends that Martinez entitles him to time and funding to investigate and further develop his ineffective assistance claims, and he filed a motion for funding to hire an investigator to develop additional evidence in support of his ineffective assistance claim. Martinez did not create any new claims for relief or new rights. The decision, by its own terms, serves only to create a limited equitable exception to the longstanding procedural default rule articulated in Coleman v. Thompson, 501 U.S. 722 (1991). Thus, to qualify for investigative funding a petitioner must satisfy the conditions of the funding statute, 18 U.S.C. § 3599(f).

That statute provides that "[u]pon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant[.]" 18 U.S.C.A. § 3599(f). Neither the Supreme Court nor the Fifth Circuit has defined the phrase "reasonably necessary" beyond the statute's plain language. The Fifth Circuit, however, requires a petitioner to show "that he ha[s] a substantial need" for investigative or expert assistance. Clark v. Johnson, 202 F.3d 760, 768 (5th Cir.), cert. denied, 531 U.S. 831 (2000); see also Fuller v. Johnson, 114 F.3d 491, 502 (5th Cir.), cert. denied, 522 U.S. 963 (1997) ("In light of the statutory language, we first note that Fuller did not show a substantial need for expert assistance."). The Fifth Circuit upholds the

denial of funding "when a petitioner has (a) failed to supplement his funding request with a viable constitutional claim that is not procedurally barred, or (b) when the sought-after assistance would only support a meritless claim, or (c) when the sought after assistance would only supplement prior evidence." Smith v. Dretke, 422 F.3d 269, 288 (5th Cir. 2005); see also Woodward v. Epps, 580 F.3d 318, 334 (5th Cir. 2009), cert. denied, 130 S. Ct. 2093 (2010).

As discussed above, Ayestas fails to demonstrate that trial counsel was deficient, that there is a reasonable probability that his claimed evidence of substance abuse would have changed the outcome of either his trial or his state habeas corpus proceeding, or that his state habeas counsel was ineffective. Therefore, he fails to demonstrate that the funding he requests is reasonably necessary. Accordingly, Ayestas's motion (Docket Entry No. 49) will be denied.

IV. Certificate of Appealability

Although Ayestas has not requested a certificate of appealability ("COA"), the court may nevertheless determine whether he is entitled to this relief in light of the court's rulings. See Alexander v. Johnson, 211 F.3d 895, 898 (5th Cir. 2000) ("It is perfectly lawful for district court's [sic) to deny fa) COA *sua sponte*. The statute does not require that a petitioner move for a COA; it merely states that an appeal may not be taken without a certificate of appealability having been issued."). A petitioner may obtain a COA either from the district court or an appellate court, but an appellate court will not consider a petitioner's request for a COA until the district court has denied such a request. See Whitehead v. Johnson, 157 F.3d 384, 388 (5th Cir. 1988); see also Hill v. Johnson, 114 F.3d 78,

82 (5th Cir. 1997) ("the district court should continue to review COA requests before the court of appeals does").

A COA may issue only if the petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); see also United States v. Kimler, 150 F.3d 429, 431 (5th Cir. 1998). A petitioner "makes a substantial showing when he demonstrates that his application involves issues that are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are suitable enough to deserve encouragement to proceed further." Hernandez v. Johnson, 213 F.3d 243, 248 (5th Cir.), cert. denied, 531 U.S. 966 (2000). The Supreme Court has stated that

> When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484 (2000).

The court has carefully considered Ayestas's argument and concludes that his ineffective assistance of trial claims are foreclosed by clear, binding precedent. The court concludes that under such precedents Ayestas has failed to make a "substantial showing of the denial of a constitutional right."28 U.S.C. 2253(c)(2). The court therefore

concludes that Ayestas is not entitled to a certificate of appealability on his claims.

V. Conclusion and Order

For the foregoing reasons, it is **ORDERED** as follows:

1. Ayestas's ineffective assistance of counsel claims are denied as procedurally defaulted;
2. No Certificate of Appealability shall issue in this case;
3. Petitioner's Motion for Funding for Ancillary Services in Accordance with 18 U.S.C. § 3599(f) (Docket Entry No. 49) is **DENIED;** and
4. Petitioner's Motion for Leave to File *Ex Parte* and Under Seal a Motion for Funding for Ancillary Services in Accordance with 18 U.S.C. § 3599(f) (Docket Entry No. 48) is **MOOT.**

SIGNED at Houston, Texas, on this 18th day of November, 2014.

/s/ Sim Lake
SIM LAKE
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15-70015

FILED
March 22, 2016
Lyle W. Cayce
Clerk

CARLOS MANUEL AYESTAS, also known as Dennis Zelaya Corea,

Petitioner-Appellant

v.

WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court for the Southern District of Texas

Before DAVIS, SMITH, and SOUTHWICK, Circuit Judges.

PER CURIAM:

The district court denied Carlos Manuel Ayestas relief from his capital sentence under 28 U.S.C. § 2254. It then denied him investigative assistance under 18 U.S.C. § 3599(f) to develop evidence that might prove his previous attorneys were ineffective. Ayestas appeals these decisions. We AFFIRM.

Separately, after these district court rulings, Ayestas discovered new evidence suggesting his prosecution was based improperly on his national

origin. He moved to amend his Section 2254 application to raise this new claim. The district court denied the motion. The court also denied a certificate of appealability, and so do we.

FACTUAL AND PROCEDURAL BACKGROUND

Carlos Manuel Ayestas[1] was sentenced to death for the murder of Santiaga Paneque, who was killed during a robbery in her home in Houston, Texas, in August 1995. The Texas Court of Criminal Appeals affirmed his conviction and sentence on November 4, 1998.

In December 1998, Ayestas sought state habeas relief. His two court- appointed lawyers raised several claims, including an ineffective assistance of trial counsel ("IATC") claim. Ayestas, through his state habeas lawyers, argued that his trial counsel was ineffective because he failed to secure the attendance of Ayestas's family members from Honduras for sentencing mitigation. According to Ayestas, they "could have testified to [his] good character traits, positive upbringing, good scholastic record, and lack of juvenile or criminal record while growing up in Honduras." Ayestas did not claim that his trial counsel failed to conduct a reasonable investigation into all potentially mitigating evidence.

The State of Texas presented an affidavit from Ayestas's trial counsel in which he asserted that Ayestas ordered him not to contact Ayestas's family. According to trial counsel, Ayestas later relented and allowed him to contact Ayestas's family, either shortly

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[1] Carlos Manuel Ayestas's true name is Dennis Zelaya Corea. We refer to the defendant as. Ayestas because that is the name under which he was charged and convicted.

before or just after jury selection. The family was unable to attend sentencing. Counsel said Ayestas's mother seemed "unconcerned" about her son's trial. The Texas state district court denied relief, holding that Ayestas's trial counsel made reasonable and diligent efforts to secure the attendance of Ayestas's family and was not ineffective. The Texas Court of Criminal Appeals affirmed in 2008.

In 2009, new counsel for Ayestas filed in federal district court an application under 28 U.S.C. § 2254. For the first time, Ayestas asserted the claim that his trial counsel was ineffective by failing to make a reasonable investigation of all potentially mitigating evidence. Ayestas's federal habeas counsel argued that had trial counsel conducted a thorough investigation, he would have uncovered other mitigating evidence. Examples were Ayestas's lack of criminal history in Honduras, that one of his co-defendants in this case was a "bad influence" on him, that Ayestas suffered from schizophrenia, and that he was addicted to drugs and alcohol.

The district court determined that because this claim was not raised in the Texas state habeas proceeding, Ayestas had procedurally defaulted the claim. The court refused to excuse the default because Ayestas had failed to show "cause," as no factor external to Ayestas's defense impeded his state habeas attorneys' ability to present the broader IATC claim. In 2012, we denied Ayestas's request for a certificate of appealability ("COA"). *Ayestas v. Thaler*, 462 F. App'x 474 (5th Cir. 2012).

Shortly thereafter, the Supreme Court decided *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), which held that the ineffectiveness of state habeas counsel in

failing to claim IATC may provide cause to excuse a default; if so, prejudice would need to be shown. After *Martinez*, Ayestas filed a motion for rehearing, asking us to vacate our prior judgment. We denied that motion, holding that *Martinez* did not apply in Texas because its procedures were distinguishable. The Supreme Court then extended *Martinez* to Texas in *Trevino v. Thaler*, 133 S. Ct. 1911 (2013). The Court vacated and remanded the present case to us for further consideration in light of *Trevino*. *Ayestas v. Thaler,* 133 S. Ct. 2764 (2013). We then remanded to the district court "to reconsider Ayestas's procedurally defaulted ineffective assistance of counsel claims in light of *Trevino*." *Ayestas v. Stephens,* 553 F. App'x 422 (5th Cir. 2014).

On remand, Ayestas filed a motion for investigative assistance under 18 U.S.C. § 3599(f), requesting a mitigation specialist in order to develop his broader IATC claim. On November 18, 2014, the district court entered a memorandum opinion and judgment, denying Ayestas habeas relief, denying a COA, and denying investigative assistance. The district court determined that neither Ayestas's trial counsel nor his state habeas counsel were ineffective, and thus the broader IATC claim was still procedurally defaulted. It then determined that because Ayestas's underlying IATC claim was still without merit, a mitigation specialist was not "reasonably necessary." On December 16, 2014, Ayestas filed a Federal Rule of Civil Procedure Rule 59(e) Motion to Alter or Amend the Judgment, re-urging many of his prior arguments.

Issues that arose after the district court's November 18 decision are also before us. On

December 22, 2014, Ayestas's counsel, while reviewing portions of the prosecution's file at the Office of the District Attorney in Houston, discovered a Capital Murder Summary memorandum, prepared by the prosecution, stating that Ayestas's lack of citizenship was an "aggravating circumstance[]." Ayestas argues this indicates that the prosecution, at least in part, sought capital punishment on the improper basis of national origin.

On January 9, 2015, Ayestas filed a "Motion for Leave to Amend Original Petition for Writ of Habeas Corpus" where he, through Rule 15(e), sought to amend his Section 2254 application to add claims based on this newly discovered memorandum. He argued the state conviction and sentence violated the Equal Protection Clause and the Cruel and Unusual Punishment Clause of the Constitution. On January 14, 2015, Ayestas supplemented his December 16 Rule 59(e) motion to expand the basis upon which the district court should grant the motion.

Realizing the district court would not be able to review his new claims even if it were to grant his Rule 59(e) motion because they were not exhausted in state court, Ayestas, on the same day, filed a motion to stay the federal proceedings until the new claims could be exhausted. Ayestas argued that he had good cause for not presenting these claims previously in state court. On February 17, 2015, the district court denied Ayestas's motions for leave to amend and for a stay. The district court then denied the Rule 59(e) motion on April 1, 2015, and again denied a COA.

DISCUSSION

The procedural posture requires Ayestas to appeal multiple aspects of the district court's decisions in

order for us to reach the merits of his habeas appeal and his new claims.

First, because the district court rendered final judgment by denying Ayestas habeas relief in the November 18 decision and then entered the April 1 order denying Ayestas's Rule 59(e) motion, the final judgment must be vacated before Ayestas may amend his petition and add new claims. *See Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 597 n.1 (5th Cir. 1981). Ayestas asks us to vacate the judgment so he may amend his petition to include these new claims. Second, Ayestas appeals the part of the February 17, 2015 order denying his motion for leave to amend under Rule 15. Finally, because Ayestas's new claims are unexhausted in state court, he appeals the part of the February 17 order denying his motion for a stay and abeyance.

Generally, under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), we do not have jurisdiction to review a district court's "final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court" denying an inmate habeas relief unless the inmate first obtains a COA. 28 U.S.C. § 2253(c)(1)(A). While both the district court judge and the relevant court of appeals may issue a COA, the inmate must first seek a COA from the district court. *Gonzalez v. Thaler*, 132 S. Ct. 641, 649 n.5 (2012). The district court denied Ayestas a COA in both its November 18, 2014 and April 1, 2015 decisions. For Ayestas to appeal these two decisions, therefore, we must first grant him a COA. We grant a COA only upon "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court

denies an applicant's constitutional claims on procedural grounds, as the case here, a COA will issue only if the applicant shows that reasonable jurists would debate whether the district court was correct in its procedural ruling and whether the petition states a valid claim on the merits. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Somewhat separately, however, Ayestas appeals an aspect of the district court's November 18 decision denying him investigative assistance. We do have jurisdiction to review this without first requiring a COA. This is because a COA is only required of appeals of "final orders that dispose of the *merits* of a habeas corpus proceeding." *Harbison v. Bell*, 556 U.S. 180, 183 (2009) (emphasis added). "An order that merely denies a motion to enlarge the authority of appointed counsel (or that denies a motion for appointment of counsel [or assistance]) is not such an order and is therefore not subject to the COA requirement." *Id*. As such, as to the district court's decision to deny Ayestas investigative assistance, we review for abuse of discretion. *See Hill v. Johnson,* 210 F.3d 481, 487 (5th Cir. 2000). "A trial court abuses its discretion when its ruling is based on an erroneous view of the law or a clearly erroneous assessment of the evidence." *United States v. Ebron*, 683 F.3d 105, 153 (5th Cir. 2012).

We will discuss first the issues arising from the denial of Ayestas's request for investigative assistance. We will then address the merits of Ayestas's IATC claim. Finally, we address Ayestas's claim that new evidence required some form of relief.

I. Investigative Assistance

As mentioned above, an appeal of a denial of investigate assistance does not require a COA and is reviewed for abuse of discretion. For this particular claim, Ayestas argues the district court should not have examined the merits of his IATC claims until it provided him with a mitigation specialist and allowed the results of that investigation to be presented. Ayestas argues that under *Martinez* and *Trevino*, in order to prove that his prior lawyers were ineffective, he must be allowed to develop and discover what his prior lawyers should have developed or discovered. As Ayestas explains:

> By prematurely deciding that [Ayestas's] IATC claims were facially meritless, without affording resources for factual development under 18 U.S.C. § 3599(f). . . . the district court summarily dismissed [Ayestas's] petition based solely on its review of the allegations contained in the original petition filed in 2009.

Ayestas argues that the merits of the IATC claim cannot rest on the record from the state habeas proceeding, which allegedly is infected with the work of ineffective counsel. Instead, he must be allowed to develop new evidence to support his factual allegations. The argument, at least in part, is foreclosed by circuit precedent. A district court is within its discretion to deny an application for funding "when a petitioner has [] failed to supplement his funding request with a viable constitutional claim that is not procedurally barred." *Brown v. Stephens*, 762 F.3d 454, 459 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 1733 (2015). Though *Brown* dealt with a

defendant bringing an initial federal habeas claim and Ayestas's current appeal is before us on remand from the Supreme Court, the difference in procedural postures is not significant. The district court properly considered the procedural default prior to approving Section 3599(f) funding for this federal habeas claim.

In two recent post-*Martinez* and *Trevino* opinions, this court held that Section 3599(f) funding is available if the district court finds that there is a "substantial need" for such services to pursue a claim that is not procedurally barred. *Allen v. Stephens*, 805 F.3d 617, 626, 638–39 (5th Cir. 2015); *Wade v. Stephens*, 777 F.3d 250, 266 (5th Cir.), *cert. denied*, 136 S. Ct. 86 (2015). Ayestas argues the district court, and by extension these two precedents, required an impossibility: proving deficient performance in order to be given resources to discover the evidence of deficient performance. He mischaracterizes the requirement. There must be a viable constitutional claim, not a meritless one, and not simply a search for evidence that is supplemental to evidence already presented. *Brown*, 762 F.3d at 459. The basic point is that a prisoner cannot get funding to search for whatever can be found to support an as-yet unidentified basis for holding that his earlier counsel was constitutionally ineffective. Instead, there must be a substantiated argument, not speculation, about what the prior counsel did or omitted doing. Ayestas indeed offered such an argument. We interpret the district court's ruling as being that any evidence of ineffectiveness, even if found, would not support relief.

The district court did not abuse its discretion when it declined to authorize a mitigation specialist for

Ayestas before it determined the viability of Ayestas's claim. We still must decide if the district court properly denied Ayestas investigative assistance on the basis that a mitigation specialist was not "reasonably necessary" because his claim was meritless. For this, we must briefly analyze the underlying merits of Ayestas's claim. *See id.* We turn now to that question.

II. Overcoming Procedural Default

In order for the *Martinez/Trevino* exception to excuse a prior procedural default, Ayestas must present a viable claim that his trial counsel was ineffective and his state habeas attorneys were ineffective in failing to raise trial counsel's errors. *See Martinez*, 132 S. Ct. at 1321.

Ineffective assistance requires deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). An attorney's performance is deficient if it falls "below an objective standard of reasonableness" based on "prevailing professional norms." *Id.* at 687–88. "[C]ounsel has a duty to make reasonable investigations," *id.* at 691, including an "obligation to conduct a thorough investigation of the defendant's background," *Porter v. McCollum*, 558 U.S. 30, 39 (2009). Nonetheless, there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

The specific deficiencies Ayestas raises concern his trial counsel's alleged failure to investigate and present evidence about his drug use and possible mental illness. Such evidence allegedly would have been discoverable if counsel had contacted family and friends in Ayestas's home country of Honduras.

Ayestas also points out that his trial counsel, for 15 months, stopped pursuing mitigation evidence, only resuming his activities 10 days prior to jury selection. He also claims his counsel in the initial state habeas proceedings should have made an issue of this alleged ineffectiveness by trial counsel.

The district court rejected the claim because Ayestas barred his attorneys from contacting his family, finally relenting around the time of jury selection for his sentencing. Trial counsel then pursued evidence from the family in Honduras and California by sending letters to them and finally seeking the assistance of the United States embassy in Honduras. A few days after Ayestas allowed contact, trial counsel also telephoned Ayestas's mother in Honduras. As we have already discussed and as detailed in the district court's opinion, the mother showed a lack of zeal in assisting the defense. The district court relied on caselaw in which we held that an attorney is not ineffective for failing to present evidence in mitigation at sentencing if the defendant orders counsel not to do so. *See Autry v. McKaskle,* 727 F.2d 358, 362–63 (5th Cir. 1984). We conclude that an attorney's compliance with a capital-case client's demand that contact not be made with his family is similarly permitted.

On appeal now, counsel argues that such interference by the defendant heightens the need for counsel to search for other sources of information about the defendant's background. We do not agree with such a standard. Regardless of the specific problems that arise in the investigation for mitigation evidence, the issue is whether counsel made "reasonable investigations or . . . a reasonable

decision that makes particular investigations unnecessary." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 691). The district court pointed out trial counsel's efforts and discoveries despite the limitations under which counsel worked. Counsel spoke by phone with Ayestas's family. He acquired Ayestas's school records and was aware of the substance abuse. Ayestas was also examined by a psychologist.

The district court's analysis of the argument about Ayestas's mental illness relied in part on the absence of any evidence that medical records existed at the time of trial that would have shown Ayestas was suffering from any mental illness. Therefore, defense counsel were not on notice of the need to pursue this line of inquiry at his initial trial. This analysis injects the question of whether current counsel has shown a need for funding to pursue what evidence might have existed to alert trial counsel of Ayestas's mental state in 1997. The briefing here discusses at great length the progression of schizophrenia, the mental disease with which Ayestas has now been diagnosed. The diagnosis was not made until 2000 while he was in prison after his conviction for this crime. Perhaps, counsel posits, a thorough investigation now would uncover evidence that early-stage symptoms of this disease were exhibiting themselves in 1997, making trial counsel's unawareness of those symptoms constitutionally ineffective representation.

We find no error in the rejection of the claims about mental illness. Trial counsel in 1997 had Ayestas examined by a psychologist. The briefing does not suggest that the examination itself revealed a basis for further investigation. Whatever medical

understandings could be applied now to evidence about Ayestas's mental condition in 1997, with the benefit of hindsight and perhaps additional knowledge about this disease, does not undermine that trial counsel was not constitutionally ineffective in pursuing what appeared at that time to be unproductive lines of inquiry.

Moreover, even if trial counsel had pursued such lines of inquiry, the results would not have been fruitful. A *Strickland* ineffective representation requires deficient performance *and* prejudice. Prejudice means "a reasonable probability . . . the result of the proceeding would have been different." *Hinton v. Alabama*, 134 S. Ct. 1081, 1089 (2014). A reasonable probability is a "substantial, not just conceivable, likelihood of a different result." *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (quotation marks omitted). The district court held that regardless of any deficiencies in the investigation about substance abuse, no prejudice resulted because, in light of the brutality of the crime, it was "highly unlikely that evidence of substance abuse would have changed the outcome of the sentencing phase of trial or of the state habeas corpus proceeding." That finding is valid. Further, even if Ayestas had entered the early stages of an as-yet undiagnosed mental illness, we find it at best to be conceivable, but not substantially likely, that the outcome may have been different.

As to the district court's refusal to fund an investigation into Ayestas's mental condition as it existed almost 20 years ago, we find no abuse of discretion. The arguments about what might be discovered still have to be examined from the perspective of what trial counsel reasonably should

have known and done those many years ago. *See Strickland*, 466 U.S. at 689. The district court did not err in failing to allow this inquiry to proceed.

Because we agree with the district court that there is no basis to hold trial counsel was constitutionally ineffective for failing to investigate further the possible questions of mental illness and substance abuse, Ayestas's state habeas counsel were not ineffective for failing to pursue that line of investigation. Raising every conceivable claim is neither required nor beneficial. Ayestas's state habeas counsel raised 16 claims for relief, including 10 ineffective assistance of counsel arguments. There was no shortage of claims, though mere numbers of claims do not dispel the possibility of constitutional ineffectiveness. Because we have already held that trial counsel was not ineffective in failing to raise these particular claims, at most, Ayestas's arguments deal with the strategic choices the state habeas lawyers had to make. Such choices are not subject to second-guessing by a court. *Strickland*, 466 U.S. at 689.

In summary, the district court correctly rejected the assertion that Ayestas's trial and state habeas attorneys were ineffective. As a result, because Ayestas cannot show that his claim is viable and that assistance was reasonably necessary, the district court properly determined that Ayestas was not entitled to a mitigation specialist under Section 3599(f).

To the extent that Ayestas also appeals the district court's November 18, 2014 memorandum opinion denying habeas relief on the merits, and the April 1, 2015 order denying his Rule 59(e) motion, these

appeals are foreclosed. For these appeals, Ayestas requires a COA. As mentioned above, one requirement for the granting of a COA is a valid claim on the merits. For the same reasons that we have explained above for why Ayestas is not entitled to a mitigation specialist, we also deny Ayestas a COA.

III. Amendment to Section 2254 Application

We now turn to the issues that arise from the district court's denial of Ayestas's motion to supplement his claims with arguments about the Capital Murder Summary memorandum. That is the document that suggested that Ayestas's non-citizen status was one of two factors that led to the recommendation that the death penalty should be sought.

Ayestas's appellate brief supporting his application for a COA acknowledged that in district court, he had "sought to amend with a claim wholly unrelated to the IATC claim litigated under *Trevino*," which was the matter we had remanded to the court. Under what is called the "mandate rule," a district court on remand is limited to consideration of the matters that were the subject of the order from the appellate court. *Henderson v. Stadler*, 407 F.3d 351, 354 (5th Cir. 2005). We have used this articulation of the requirement:

> [T]he mandate rule compels compliance on remand with the dictates of a superior court and forecloses relitigation of issues expressly or impliedly decided by the appellate court.

Id. (quoting *United States v. Lee*, 358 F.3d 315, 321 (5th Cir. 2004)). The district court held that adding the unrelated claims to the subject of the remand

would violate the mandate rule. Ayestas disagrees, first arguing the district court misinterpreted our remand order as limiting its discretion, and then arguing the mandate rule does not preclude the addition of a new claim. We disagree on both fronts.

As to his first argument, Ayestas claims that the last sentence of our remand order shows that we expressly declined to constrain the district court:

> We REMAND to the district court to reconsider Ayestas's procedurally defaulted ineffective assistance of counsel claims in light of Trevino. *We express no view on what decisions the district court should make on remand*.

Ayestas v. Stephens, 553 F. App'x 422, 423 (5th Cir. 2014) (emphasis added). Ayestas reads too much into this sentence. As the penultimate sentence clearly reads, the remand was limited to the reconsideration of the defaulted IATC claim. The last sentence simply indicates that we express no view as to how the district court should decide or approach this IATC claim.

As to his second argument, Ayestas relies heavily on a Supreme Court case as standing for the proposition that "the circuit court may consider and decide any matters left open by the mandate of this court." *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 256 (1895). But as explained above, our remand order did not leave open any matter other than the defaulted IATC claim. If anything, *Sanford Fork* supports our decision in this case. The district court did not err in its interpretation of our remand order or its application of the mandate rule.

Additionally, Ayestas's new constitutional claims are unexhausted in state court and therefore cannot now be reviewed here on the merits. 28 U.S.C. § 2254(b)(1)(A). Realizing the need for exhaustion, Ayestas filed a motion to stay and hold the proceedings in abeyance in order to return to state court to exhaust the new claims. "When a petitioner brings an unexhausted claim in federal court, stay and abeyance is appropriate when the district court finds that there was good cause for the failure to exhaust the claim; the claim is not plainly meritless; and there is no indication that the failure was for purposes of delay." *Williams v. Thaler*, 602 F.3d 291, 309 (5th Cir. 2010). "[W]hen a petitioner is procedurally barred from raising [his] claims in state court, his unexhausted claims are plainly meritless." *Id.* (quotation marks omitted).

Hence, we turn to examining whether Ayestas would be barred under Texas law from bringing his new claims.

In Texas, subsequent petitions for writ of habeas corpus in a death penalty case based upon newly available evidence, are handled as follows:

> (a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:
>
> (1) the current claims and issues have not been and could not have been presented previously in a timely

> initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application . . . .

TEX. CRIM. PROC. CODE art. 11.071 § 5(a)(1). Section 5(e) further provides that "[f]or purposes of Subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date." *Id.* art. 11.071 § 5(e).

Thus, Ayestas must show he exercised reasonable diligence in trying to obtain evidence such as the memorandum. Ayestas's briefing in this court and in the district court never suggests he sought to examine the prosecution's file prior to the December 22 search that uncovered the memorandum. A defense counsel's "duty to investigate" includes "efforts to secure relevant information in the possession of the prosecution [and] law enforcement authorities." ABA STANDARDS FOR CRIMINAL JUSTICE: DUTY TO INVESTIGATE AND ENGAGE INVESTIGATORS 4-4.1(c) (4th ed. 2015); *Rompilla v. Beard*, 545 U.S. 374, 385–89 (2005) (explaining that counsel's failure to look at a "readily available" prosecution file was deficient performance for the purposes of *Strickland*). Moreover, Ayestas makes no claim "that [the memorandum] was unavailable to [his] trial counsel through a reasonably diligent examination of the case file the prosecution had made available." *Amador v.*

Dretke, No. Civ.SA-02-CA- 230-XR, 2005 WL 827092, at *18 (W.D. Tex. Apr. 11, 2005).

Ayestas offers two explanations for his failure to investigate the prosecution's file. First, he argues that the state was under an affirmative duty to turn the memorandum over to him. Second, he argues he properly assumed a search of the folder would not uncover information as material as this document.

The first explanation is based on Ayestas's having made two demands under *Brady v. Maryland,* 373 U.S. 83 (1963). Under *Brady*, the state must disclose exculpatory evidence upon a proper demand by the defendant. *Id*. at 87. While the state was under an obligation to turn over such evidence in this case, there is no *Brady* violation if counsel, "using reasonable diligence, could have obtained the information." *Williams v. Scott*, 35 F.3d 159, 163 (5th Cir. 1994). Though Ayestas is not asserting a *Brady* claim, the fact that there would be no *Brady* violation unless Ayestas were reasonably diligent in discovering evidence suggests to us that any alleged failings on the part of the state in not turning over the memorandum do not mitigate Ayestas's own responsibility to undertake a reasonably diligent investigation for the purposes of Section 5 of Article 11.071. Hence, even though Ayestas filed two *Brady* demands, Ayestas was under an independent obligation to use reasonable diligence in attempting to discover exculpatory evidence, which, as explained above, he failed to do.

Ayestas's latter justification is that he "rightly assume[d] that the District Attorney would redact its file of all privileged work product, such as the capital murder summary." This justification is circular and

without merit. Ayestas essentially argues that he assumed no material information was contained in the file, and that had he known such material information was in the file, he would have investigated the file. Of course, had Ayestas known the memorandum was in the file he would have no doubt searched it, but the point of reasonable diligence is to ensure that such evidence is found when it is unclear where such evidence may lie. Ayestas's assumption does not serve to excuse his duty to secure information in the possession of the prosecution. ABA STANDARDS FOR CRIMINAL JUSTICE: DUTY TO INVESTIGATE AND ENGAGE INVESTIGATORS 4-4.1(c) (4th ed. 2015).

Additionally, as discussed above, even if not procedurally defaulted, Ayestas's claims are not likely to succeed on the merits. The district court did not err in concluding Ayestas's trial counsel and his state habeas attorneys were not ineffective. Hence, even if Ayestas could prove he exercised reasonable diligence in discovering the memorandum, he still cannot exhaust his new claims in the Texas courts because his claims are not meritorious.

Ayestas did not exercise reasonable diligence in attempting to discover the memorandum earlier. Therefore, he is unable to prove under Section 5 of Article 11.071(a) of the Texas Code of Criminal Procedure that he would be entitled to a subsequent state habeas hearing to exhaust his new claims that are based on the newly discovered memorandum. Hence, Ayestas has not exhausted, and will not be able to exhaust, these claims in state court. Because we are unable to review unexhausted claims, the

district court did not abuse its discretion in denying Ayestas's motion for a stay and abeyance.

The request for certificate of appealability is DENIED. The judgment rejecting Ayestas's Section 2254 application is AFFIRMED.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15-70015

CARLOS MANUEL AYESTAS, also known as Dennis Zelaya Corea,

Petitioner-Appellant

v.

WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING AND REHEARING EN BANC

Before DAVIS, SMITH, and SOUTHWICK, Circuit Judges.

PER CURIAM:

No member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, the Petition for Rehearing En Banc is DENIED. *See* Fed. R. App. P. 35; 5th Cir. R. 35.

The Petition for Panel Rehearing is also DENIED.

In the petitions, Ayestas makes two arguments to which we will respond. First, he alleges errors with our holding under *Rhines v. Weber*, 544 U.S. 269 (2005). Specifically, he claims we held that "because federal habeas counsel did not locate the Siegler Memo sooner, it was insufficiently diligent under" Article 11.071 § 5(a)(1) of the Texas Code of Criminal Procedure. We were not, though, referring to the diligence of federal habeas counsel in locating the memo. It was the diligence of Ayestas's trial counsel that we were describing. Our analysis is consistent with *Rhines*.

Ayestas also points out that he was not in fact examined by a psychologist in 1997, but we stated he had been in our opinion. Our analysis is nonetheless unchanged. In our opinion, we held that even if Ayestas had shown there had been deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984), he did not show prejudice, that is, a "substantial, not just conceivable, likelihood of a different result." *Ayestas v. Stephens*, No. 15-70015, 2016 WL 1138855, at *6 (5th Cir. Mar. 22, 2016) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011)). Ayestas does not challenge this aspect of our panel opinion. Our conclusion that *Strickland* ineffectiveness was not shown remains unchanged.

FILED June 10, 2016

APPENDIX E

U.S. CONST. AMEND. VI

Jury Trials for Crimes, and Procedural Rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

APPENDIX E

18 U.S.C. § 3599

Counsel for Financially Unable Defendants

(a)(1) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either–

> **(A)** before judgment; or
>
> **(B)** after the entry of a judgment imposing a sentence of death but before the execution of that judgment;

shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

> **(2)** In any post-conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

(b) If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had not less than three years

experience in the actual trial of felony prosecutions in that court.

(c) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

(d) With respect to subsections (b) and (c), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

(e) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

(f) Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's

attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under subsection (g). No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

(g)(1) Compensation shall be paid to attorneys appointed under this subsection at a rate of not more than $125 per hour for in-court and out-of-court time. The Judicial Conference is authorized to raise the maximum for hourly payment specified in the paragraph up to the aggregate of the overall average percentages of the adjustments in the rates of pay for the General Schedule made pursuant to section 5305 of title 5 on or after such date. After the rates are raised under the preceding sentence, such hourly range may be raised at intervals of not less than one year, up to the aggregate of the overall average percentages of such adjustments made since the last raise under this paragraph.

(2) Fees and expenses paid for investigative, expert, and other reasonably necessary services authorized under subsection (f) shall not exceed $7,500 in any case, unless payment in excess of that limit is certified by the court, or by the United States magistrate judge, if the services were rendered in connection with the case disposed of entirely before such magistrate judge, as necessary to provide fair compensation for services of an unusual character or duration, and the

amount of the excess payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active or senior circuit judge.

(3) The amounts paid under this paragraph for services in any case shall be disclosed to the public, after the disposition of the petition.