No. 19-569

In the Supreme Court of the United States

CARLOS MANUEL AYESTAS, PETITIONER

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE (INSTITUTIONAL DIVISION)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

KYLE D. HAWKINS
Solicitor General
Counsel of Record

JASON R. LAFOND
Assistant Solicitor General

ABIGAIL M. FRISCH
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Kyle.Hawkins@oag.texas.gov
(512) 936-1700

QUESTIONS PRESENTED

The Fifth Circuit affirmed the denial of Petitioner's funding request under 18 U.S.C. § 3599 after expressly applying the "reasonably necessary" standard from the mandate of this Court. The Fifth Circuit concluded that, because Petitioner had no credible chance of showing the ineffectiveness of state-habeas counsel needed to overcome procedural default of his underlying ineffective-assistance claim, funding is not "reasonably necessary" in this case. App. 3a.

The questions presented are:

1. Did the Fifth Circuit correctly conclude that Petitioner stands no credible chance of showing that state-habeas counsel unreasonably "failed to investigate or raise" a "*Wiggins* claim" in 1998, Pet. 4, five years before this Court decided *Wiggins v. Smith*, 539 U.S. 510 (2003)?

2. Is the new evidence Petitioner seeks barred by AEDPA because the state court adjudicated Petitioner's ineffective-assistance claim on the merits?

3. By invoking *Martinez v. Ryan*, 566 U.S. 1 (2012), thereby insisting that state-habeas counsel unreasonably failed to develop Petitioner's current ineffective-assistance claim, has Petitioner pleaded himself into AEDPA's statutory bar on new evidence not diligently developed in state court?

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BRIEF IN OPPOSITION

INTRODUCTION

When it last encountered this case, this Court faulted the Fifth Circuit for employing a standard "arguably more demanding" than 18 U.S.C. § 3599 requires. *Ayestas v. Davis*, 138 S. Ct. 1080, 1093 (2018). This Court remanded with instructions on the proper application of section 3599's "reasonably necessary" standard without addressing the result in the Fifth Circuit. On remand, the Fifth Circuit faithfully applied this Court's instructions and held that Petitioner's requested funds were not reasonably necessary because of the "evidence that state-habeas counsel was not deficient" and "the unlikelihood of locating" evidence otherwise, App. 19a, which established that Petitioner stood no "credible chance

of . . . overcom[ing] the obstacle of procedural default," *see Ayestas*, 138 S. Ct. at 1094.

Petitioner received the relief ordered by this Court. That should end the matter. Nothing in the Petition counsels otherwise. Petitioner quibbles with the result reached by the Fifth Circuit, but that provides no reason for review by this Court, which "does not sit as an error-correction instance." *Halbert v. Michigan*, 545 U.S. 605, 611 (2005). In any event, the Fifth Circuit could not have reached any other result. State-habeas counsel made significant efforts to challenge the results of Petitioner's trial, raising novel claims and attacking trial counsel's preparation for sentencing. Petitioner has no hope of showing his state-habeas counsel's performance fell outside the "wide range of professionally competent assistance." *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

And Petitioner's request for funds would fail regardless, all the more reason to deny review. For one, the ineffective-assistance claim he now presses is not new at all. Petitioner contends that his trial counsel unreasonably failed to develop mitigating evidence. State-habeas counsel made the same contention on Petitioner's behalf in state court, where it was adjudicated and rejected. Petitioner's "new" claim is just his old claim bolstered by new arguments and evidence. AEDPA bars both. Thus, section 3599 funds are not reasonably necessary because the evidence Petitioner pursues is not "admissible" and "stand[s] little hope of helping him win relief." *Ayestas*, 138 S. Ct. at 1094.

The same result holds even if Petitioner's claim is truly new. AEDPA—specifically, 28 U.S.C.

§ 2254(e)(2)—applies to new claims, and bars any evidence not diligently developed in state court by Petitioner or his counsel. If Petitioner overcomes procedural default because his state-habeas counsel unreasonably failed to raise his new claim in state court, AEDPA necessarily bars any new evidence to support that new claim in federal court. Again, the evidence Petitioner pursues is not "admissible" and "stand[s] little hope of helping him win relief." *Ayestas*, 138 S. Ct. at 1094.

STATEMENT

1. As recounted by this Court, Petitioner was sentenced to death following a crime spree during which he violently murdered an elderly woman, Santiaga Paneque; brutalized several other victims; and solicited the murder of his accomplices. *Ayestas*, 138 S. Ct. at 1085.

2. In 1998, Petitioner's state-habeas counsel began developing evidence for a claim challenging trial counsel's preparation for the sentencing phase of Petitioner's trial. During sentencing, trial counsel's case for mitigation consisted of three letters from a Houston Community College System instructor stating that Petitioner was enrolled in an English-as-a-Second-Language course in the Harris County jail. R.5486. The instructor asserted that Petitioner was a serious and attentive student. R.5486.

State-habeas counsel met with, interviewed, and obtained affidavits from Petitioner's mother and two of his sisters who had traveled to Houston from Honduras. R.699. They described Petitioner's "stable, middle class background" in which his parents had no marital

problems and ran a small business in Honduras. R.5295-97. They also stated that Petitioner had no major injuries or illnesses, no discernable learning disorders, and no past trouble with the law. *See* R.5295-97. Instead, he received above-average grades and attended church. *See* R.5295-97.

State-habeas counsel filed investigative funding motions on many issues, including alcoholism. R.725-42. State-habeas counsel hired Tena Francis to investigate both guilt and punishment issues. R.702, 717-21. As for punishment, she recommended obtaining a full social history, including information on Petitioner's family, character, life experiences, possible mental illness, substance abuse, education, and possible physical and psychological trauma. R.720. Specifically for substance abuse, Francis recommended interviewing Petitioner and the individuals with whom Petitioner stayed in Louisiana around the time of the murder. R.721. Francis assigned the investigation to Gerald Bierbaum, who met with witnesses in Louisiana, various jurors, and Petitioner's accomplices. R.700.

Eleven months after being appointed, state-habeas counsel filed a petition raising ten ineffective assistance of trial counsel (IATC) issues and six other constitutional claims. R.5270-73. As relevant here, counsel raised an IATC claim arguing insufficient mitigation investigation by trial counsel. *See* R.5294. To support this claim, counsel relied on significant evidence from Petitioner's family, who averred that they would have testified that Petitioner's recent violence was out of character for Petitioner, who grew up in a loving, stable, middle-class home and who exhibited no trouble in his youth or young

adulthood. *See, e.g.*, R.5353-76. State-habeas counsel considered raising trial counsel's failure to pursue Petitioner's substance abuse as a mitigating factor but decided against it. App. 12a-13a.

Opposing Petitioner's claim of inadequate mitigation investigation by trial counsel, the State produced an affidavit from Petitioner's trial counsel averring that she had many conversations with Petitioner about his family, and he continually stated that he did not want them contacted. R.5483, 6050-51. She further asserted that Petitioner relented shortly before trial, and she began reaching out to Petitioner's family members, none of whom were available to testify. R.5483-84, 6051.

In reply, Petitioner's state-habeas counsel refuted trial counsel's version of events, pointing out inconsistencies in her account and producing an affidavit from Petitioner denying that he ever told her not to contact his family. R.5559-60. State-habeas counsel also argued that a defendant's reluctance to cooperate does not excuse counsel's failure to make a mitigation investigation. R.5561-62.

In 2003, following *Atkins v. Virginia*, 536 U.S. 304 (2002), state-habeas counsel had a psychologist examine Petitioner. R.5558. Petitioner's IQ was in the "high average range" and there was "no evidence for mental retardation." R.776, 5582. The psychologist noted, however, concerns about Petitioner's "psychological pattern" and that Petitioner was "developing some delusional thinking." R.776. Counsel filed the psychologist's findings in state court but redacted the portion about potential mental illness. R.5582. This redaction reflected state-habeas counsel's strategic use of the findings to support an

argument that trial counsel should have had Petitioner testify in the guilt phase of his trial. *See* R.5558.

In 2008, the state district court recommended rejecting Petitioner's claims, and the Texas Court of Criminal Appeals adopted all relevant findings and conclusions. R.92, 5911-39. Regarding trial counsel's failure to obtain the testimony of Petitioner's family, the court credited trial counsel's testimony and found that "trial counsel made reasonable, diligent efforts to secure the attendance of [Petitioner]'s family at [Petitioner]'s trial, notwithstanding [Petitioner]'s initial decision not to have his family contacted." R.5922. The court ultimately held that it could not find trial counsel ineffective for following Petitioner's wishes not to contact his family. R.5933.

3. In 2009, after obtaining new counsel, Petitioner filed a federal-habeas petition. R.8-67. Just like his state-habeas IATC claim based on inadequate mitigation investigation, Petitioner's federal claim faulted trial counsel for failing to conduct a meaningful investigation into Petitioner's background. *Compare* R.14-31, *with* R.5294-5301. Petitioner's federal claim relied on all the same evidence that his state claim did, plus new evidence and allegations suggesting Petitioner suffered from mental illness, had once injured his head, and had drug and alcohol problems. *See* R.28-30. Petitioner also sought to gather still more new evidence to support his claim. *See* R.31, 479-90.

For the next ten years, Petitioner's claim traveled through the federal courts. *See Ayestas*, 138 S. Ct. at 1087-88. In 2018, this Court disapproved of the Fifth Circuit's "substantial need" gloss on section 3599(f)'s "reasonably necessary" standard. This Court explained that

although the difference between the statutory standard of "reasonably necessary" and the Fifth Circuit's articulation "may not be great," the latter is "arguably more demanding" than required. *Ayestas*, 138 S. Ct. at 1092-93. This Court instructed that courts judging funding requests must "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.* at 1094. This Court remanded to the Fifth Circuit to reconsider Petitioner's funding request and expressly left open the legal question whether funding is ever "reasonably necessary" when "a habeas petitioner seeks to present a procedurally defaulted ineffective-assistance-of-trial-counsel claim that depends on facts outside the state-court record." *Id.* at 1095.

On remand, the Fifth Circuit concluded that "nothing would establish the ineffectiveness of state-habeas counsel"—meaning that there was no credible chance Petitioner could overcome the procedural default of his "new" IATC claim based on mitigation investigation of mental illness and substance abuse. App. 2a. The court determined that it was not unreasonable for state-habeas counsel to raise an IATC claim based on failure to pursue mitigating evidence in the form of family testimony, rather than in the form of mental illness and substance abuse history. The court relied on state-habeas counsel's contemplation and rejection of an IATC claim based on substance abuse in favor of other stronger claims, App. 15a, 17a, as well as an initial lack of notice of facts suggesting mental illness—and a later reasonable judgment

not to present those facts, App. 15a. The court also considered the fact that this Court's "major mitigation decisions" relevant to Petitioner's claims were brand new or nonexistent during state-habeas counsel's representation, and determined that it was not unreasonable for state-habeas counsel "to stay the course" rather than "respond to a new trend and pivot to a *Wiggins*-centric strategy." App. 8a, 16-17a (citing *Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003)).

REASONS FOR DENYING THE PETITION

I. The Fifth Circuit Correctly Concluded that Petitioner Stood No Credible Chance of Overcoming Procedural Default.

There is no real dispute that the Fifth Circuit reviewed Petitioner's request for section 3599 funds under the standard set forth by this Court. Indeed, applying that standard was the entire thrust of the Fifth Circuit's opinion. Petitioner seeks review of that decision because he disapproves of the result. But this is not an error-correction court, and, in any case, there is no error to correct.

Petitioner seeks funds under 18 U.S.C. § 3599 to gather evidence that he claims state-habeas and trial counsel should have found. But this Court has instructed that section 3599 funds are appropriate only if a petitioner stands a "credible" chance of overcoming procedural default. As the Fifth Circuit correctly held, Petitioner does not.

Petitioner's state-habeas counsel made significant efforts to challenge the results of Petitioner's trial.

Counsel employed an investigator and a mitigation specialist to show that trial counsel's punishment-phase preparation fell below the constitutional floor established by *Strickland*. At the time, in 1998, this strategy was unproven. This Court had never overturned a death sentence on ineffective-assistance grounds, let alone faulted trial counsel for a constitutionally inadequate mitigation investigation. Even so, state-habeas counsel pressed this theory, challenging trial counsel's failure to pursue evidence that Petitioner's violence was an aberration from an otherwise stable and law-abiding life.

Petitioner now purports to bring a new mitigation-IATC claim that state-habeas counsel supposedly failed to raise. To overcome that alleged procedural default, Petitioner claims that his state-habeas counsel did not function as counsel at all. He contends that state-habeas counsel should have pursued an IATC claim arguing that trial counsel incompetently failed to pursue double-edged evidence of Petitioner's mental illness and substance abuse. This Court would not grant relief on such a theory until five years later—reversing the court of appeals in that case over a dissent. *See Wiggins*, 539 U.S. 510.

Whatever evidence might turn up in his fishing expedition, Petitioner can never show that state-habeas counsel unreasonably failed to pursue the IATC claim Petitioner now presses. Put simply, one cannot fault state-habeas counsel for "fail[ing] to investigate or raise" a "*Wiggins* claim," Pet. 4, before this Court decided *Wiggins*. *Strickland* does not require pursuit of cutting-edge legal theories, let alone *all* cutting-edge theories. Petitioner's effort to overcome procedural default is the

height of the Monday morning quarterbacking *Strickland* precludes.

Assuming Petitioner has raised a new, procedurally defaulted mitigation-IATC claim, he cannot overcome the alleged procedural default by showing ineffective assistance of state-habeas counsel. Petitioner does not even consider whether his "new" claim was clearly stronger than the claims his state-habeas counsel raised—a necessary showing to prove that failure to raise his "new" claim amounted to ineffective assistance.[1] Instead, Petitioner insists that the Fifth Circuit misapplied *Strickland* by relying on three erroneous rules: (1) that professional norms do not exist until recognized by this Court, *see* Pet. 3, 18; (2) that counsel may

[1] The Fifth Circuit did not hold Petitioner to this standard because he could not overcome *Martinez* under any plausible standard. Even so, this is the standard Petitioner ultimately must meet. As this Court explained in *Martinez*, for IATC claims, "the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal." *Martinez*, 566 U.S. at 11. Like appellate counsel, who "should not raise every nonfrivolous argument on appeal, but rather only those arguments most likely to succeed," *Davila v. Davis*, 137 S. Ct. 2058, 2067 (2017), effective state-habeas counsel need not raise every possible claim and may reasonably pick stronger claims over weaker ones. The upshot is that only if "the issues counsel omitted were . . . clearly more persuasive than those he discussed" could "their omission . . . only be attributed to a professional error of constitutional magnitude." *Yarborough v. Gentry*, 540 U.S. 1, 9 (2003) (per curiam). Thus, to show that his state-habeas counsel was deficient, Petitioner must show that in 1998 "a particular nonfrivolous issue was clearly stronger than issues that counsel did present." *Smith v. Robbins*, 528 U.S. 259, 288 (2000).

constitutionally forego a mitigation investigation, Pet. 23; and (3) that all mental-illness and substance-abuse evidence is double-edged and unworthy of investigation, Pet. 26-27. The Fifth Circuit applied none of these rules. The Fifth Circuit appropriately surveyed the legal and factual landscape faced by state-habeas counsel, and correctly concluded that state-habeas counsel made a reasonable and strategic choice to not expend resources on an unproven legal theory. Even if a mistaken application of *Strickland* could merit review by this Court, it would not do so here.

A. The Fifth Circuit correctly considered the timing of this Court's decisions.

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Those circumstances include "the . . . state of the law" at the time, which informs what claims are "worth pursuing." *Smith v. Murray*, 477 U.S. 527, 536 (1986). It is not deficient performance for counsel to avoid a claim that "counsel reasonably could have determined . . . would have failed." *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2559 (2018) (per curiam). Thus, the legal landscape when a habeas petition is filed is of paramount importance. The Fifth Circuit properly considered the existing legal landscape in determining that Petitioner's state-habeas counsel's performance was not constitutionally deficient.

1. As the Fifth Circuit accurately reported, when Petitioner's state-habeas counsel drafted the state petition, there was a dearth of case law suggesting that an IATC claim based on failure to investigate mitigating evidence of mental illness and substance abuse would succeed. App. 8a-9a, 16a. "Viewed in the light of [the] law at time . . ., the decision not to pursue" such a claim "fell well within the 'wide range of professionally competent assistance.'" *Smith*, 477 U.S. at 536 (quoting *Strickland*, 466 U.S. at 690).

Petitioner twists the Fifth Circuit's reasoning, portraying the court as treating the timing of the decisions by this Court as the sole indicator for when a professional norm exists for trial counsel. Pet. 3. Of course a decision concluding that trial counsel violated a professional norm means that the norm existed before the decision. The Fifth Circuit did not dispute that fact, which was beside the point.[2] The point was that this Court's decisions were vital pieces of information for *state-habeas* counsel considering what types of IATC claims have the best chance of overcoming *Strickland* deference and establishing prejudice. The existence of a professional norm is relevant to trial counsel's choice to investigate. But courts *recognizing constitutional error* as to a particular norm is the primary concern of a state-habeas counsel evaluating potential claims. *See Strickland*, 466 U.S. at 688 ("Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are

[2] Indeed, the Fifth Circuit discussed ABA guidelines and scholarship that observed a period of development of professional norms for mitigation investigations. *See* App. 7a-8a.

guides to determining what is reasonable, but they are only guides.").

Petitioner's argument reflects his recurring conflation of (1) analyzing *trial* counsel's mitigation investigation and (2) analyzing *state-habeas* counsel's evaluation of *Strickland* claims based on trial counsel's mitigation investigation. By conflating the choices of state-habeas counsel and trial counsel, Petitioner tries to evade a fundamental problem: this Court has the last word on what norms support a claim of constitutionally inadequate representation. And given the threshold barrier of procedural default, the focus of the inquiry at this stage is the reasonableness of state-habeas counsel's choice from among several possible IATC strategies "at the time" the state petition was filed in 1998. *Id.* at 689.

In 1998, before this Court had ever vacated a death sentence on IATC grounds, state-habeas counsel could have reasonably concluded that mitigation-IATC claims had long odds of success. Scholars have observed that not until 2000 did this Court and others begin "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). *Cf. Burger v. Kemp*, 483 U.S. 776, 788-96 (1987) (holding that counsel's failure to offer any "mitigating evidence at all" was not ineffective). The situation was no different in Texas—in 1998, the Court of Criminal Appeals had never applied *Strickland* to vacate a death sentence based on trial counsel's failure to investigate mitigating evidence. It had, however, affirmatively rejected such claims. *See, e.g.*, *Rosales v. State*, 841 S.W.2d 368, 376 (Tex. Crim. App. 1992) (rejecting an IATC claim

based on counsel's "fail[ure] adequately to investigate evidence that could have been used to [defendant's] advantage in mitigation of punishment"). Counsel cannot be ineffective for failing to anticipate legal developments. *See, e.g.*, *Maryland v. Kulbicki*, 136 S. Ct. 2, 4 (2015) (per curiam); *Smith*, 477 U.S. at 536-37.

But, in fact, Petitioner's state-habeas counsel *did* raise this type of claim, leaving Petitioner an even tougher row to hoe. This case presents only the opportunity to decide if state-habeas counsel reasonably chose to press an IATC claim based on trial counsel's failure to pursue mitigating evidence in the form of positive family testimony, rather than on trial counsel's failure to pursue mitigating evidence in the form of mental illness and substance abuse history—the type of evidence this Court has described as having "questionable mitigating value." *Cullen v. Pinholster*, 563 U.S. 170, 201 (2011); *see also Burger*, 483 U.S. at 793-94. For Petitioner to satisfy *Martinez*, Petitioner must show that state-habeas counsel's choice among long-odd claims was so beyond the pale that he was not acting as counsel at all. But that argument refutes itself. Thus, "it would be quite unreasonable[ ]to think that services are necessary" to pursue Petitioner's new IATC theory, because, "realistically speaking, they stand little hope of helping him win relief." *Ayestas*, 138 S. Ct. at 1094.

2. Properly oriented, Petitioner's subsidiary arguments easily fall away. Petitioner complains, for example, that cases have long held that the Constitution requires trial counsel to investigate a defendant's background for mitigating evidence. *See* Pet. 18-21 (citing *Wiggins* and *Rompilla*). But none of those addresses the

decision that Petitioner challenges here—state-habeas counsel's pursuit of a mitigation-IATC claim based on family testimony, to the exclusion of a mitigation-IATC claim based on mental illness and substance abuse. Both choices involved an IATC claim based on inadequate mitigation investigation, and both were grounded in Petitioner's background. *Wiggins* and *Rompilla* specifically applied *Strickland* in the context of mental illness and substance abuse evidence and changed the landscape for collateral counsel.

Wiggins and *Rompilla* both reversed decisions holding that trial counsel was *not* ineffective and did so over dissents from other members of this Court. None suggest that the judges and justices who saw things differently were unreasonable. *Wiggins* and *Rompilla* clarified the constitutional law of minimally adequate mitigation investigations of mental illness and substance abuse history, increasing the likelihood of success for ineffective assistance claims based on trial counsel's inadequate investigation of that evidence. Before *Wiggins* and *Rompilla*, a lawyer would have taken a greater risk—i.e., made a *less* reasonable choice—to devote resources to an IATC claim grounded in trial counsel's failure to pursue mitigating evidence related to mental illness and substance abuse.

The Fifth Circuit framed its assessment accordingly, properly considering the timing of this Court's decisions in evaluating the reasonableness of state-habeas counsel's choice among possible IATC claims. App. 7-10a.

Petitioner next points to three pre-*Wiggins* Supreme Court cases that describe mental illness and substance abuse as relevant, common mitigating evidence. *See* Pet.

21 (citing *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality op.)). Each of these cases, however, discusses the constitutional problems related to States limiting the ability of juries to consider mitigating evidence at the sentencing stage in a capital case. Not one of these cases addresses the relationship between that sort of mitigating evidence and the Sixth Amendment standard for adequate representation. Naturally, then, none come close to alerting state-habeas counsel that he should undertake a costly international investigation in pursuit of a claim that had never succeeded in the Court of Criminal Appeals or this Court.

In fact, each case undermines Petitioner's attack on state-habeas counsel. In *Lockett*, for example, the petitioner complained that the court excluded *positive* mitigating evidence that would have shown her prospects for rehabilitation. 438 U.S. at 594. Here, state-habeas counsel pursued that very tactic by emphasizing Petitioner's nonviolent history and stable childhood. App. 16a. *Eddings* was similar—the mitigating evidence of the petitioner's troubled youth suggested positive prospects for rehabilitation in adulthood. *See* 455 U.S. at 107-08. *Penry*, meanwhile, confirmed that evidence of mental illness and substance abuse that augurs against a prospect for rehabilitation is, at best, double-edged. *See* 492 U.S. at 324. Counsel reading those cases together could reasonably conclude that a claim focusing on positive mitigating evidence suggesting a prospect for rehabilitation, to the exclusion of a claim focusing on double-edged evidence, was the best course.

Petitioner also points to cases in other circuits evaluating the merits of claims challenging *trial* counsel's mitigation investigation. Pet. 22 (citing *White v. Ryan*, 895 F.3d 641 (9th Cir. 2018); *Mason v. Mitchell*, 543 F.3d 766 (6th Cir. 2008); *Outten v. Kearney*, 464 F.3d 401 (3d Cir. 2006); *Battenfield v. Gibson*, 236 F.3d 1215, 1227 (10th Cir. 2001)). But none of these cases compares to the Fifth Circuit's decision because none evaluates the effectiveness of state-habeas counsel as cause for procedural default of an IATC claim. These cases answer a question not presented here. And none came out well *after* Petitioner's 1998 state petition, so they add nothing to state-habeas "counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

Besides offering apples-to-oranges comparisons of trial and state-habeas counsel, the facts showing unreasonableness in those cases simply do not exist here. Petitioner's state-habeas counsel hired a mitigation specialist, "despite the relative novelty" of doing so. *Compare* App. 12a, *and* Pet. 7-8, *with White*, 895 F.3d at 663, *and Poindexter v. Mitchell*, 454 F.3d 564, 579 (6th Cir. 2006). State-habeas counsel requested and obtained investigatory funding—three times. *Compare* R.725-42, *with Mason*, 543 F.3d at 777, *and Poindexter*, 454 F.3d at 579.

As the Fifth Circuit said, state-habeas counsel independently pursued information about Petitioner's background from his mother and sisters, who described his stable childhood, his parents' marriage and occupation, his medical history, his criminal record in Honduras, and his religious and educational upbringing, and state-habeas counsel's investigator met with associates of Petitioner. *Compare* App. 11a; R.699-700, 5295-97, *with*

White, 895 F.3d at 666; *Battenfield*, 236 F.3d at 1228; *Outten*, 464 F.3d at 415-16; *Sowell v. Anderson*, 663 F.3d 783, 791 (6th Cir. 2011) (neglecting to interview any immediate family); *and Wilson v. Sirmons*, 536 F.3d 1064, 1087 (10th Cir. 2008) (same).

The type of information obtained shows that state-habeas counsel explored mitigating evidence when interviewing these potential witnesses, including Petitioner's family members. *Cf. Mason*, 543 F.3d at 778. State-habeas counsel reviewed the mitigation specialist's finding that "[i]t is clear [Petitioner] had a history of substance abuse" and considered substance abuse as a "possible mitigating fact"—we know this occurred because state-habeas counsel wrote it down. App. 13a; R.675.

As Petitioner's mental illness—and new cases emphasizing the legal significance of mental illness, *e.g.*, *Atkins*—began to emerge, state-habeas counsel had a psychologist examine Petitioner. R.776, 5582. The report told a mixed story. Petitioner displayed intelligence and no signs of mental retardation, but Petitioner also demonstrated delusional thinking. *Id.* State-habeas counsel chose to redact the portion related to delusional thinking to avoid contradicting another basis for relief in the state petition: that trial counsel was ineffective for failure to have Petitioner testify during the guilt phase of his trial. *See* App. 15a; R.5558, 5582.

In sum, there can be no plausible assertion that state-habeas counsel "flat didn't think of" using mental illness or substance abuse evidence in support of an IATC claim, or that state-habeas counsel "failed to investigate *any* mitigating circumstances relating to [Petitioner's] background." *White*, 895 F.3d at 667 (emphasis added).

B. State-habeas counsel made a reasonable, strategic choice not to further investigate mental illness and substance abuse.

Petitioner characterizes the investigation by state-habeas counsel as both nonexistent, Pet. 25, and incomplete, Pet. 23-24. It cannot be both. In fact, it is neither. As the Fifth Circuit found, state-habeas counsel conducted a thorough investigation and made a (correct) strategic choice to focus on positive, not negative, mitigating evidence. App. 16a.

1. The Fifth Circuit did not purport to address whether counsel may constitutionally forego a mitigation investigation of mental illness and substance abuse as a matter of strategy. *Strickland* already answered yes to that question. *See* 466 U.S. at 680-91. The court addressed matters of strategic choice only after evaluating record evidence showing that state-habeas counsel knew about Petitioner's emerging mental illness issues and substance abuse history. The court evaluated evidence showing that state-habeas counsel handled those possibly mitigating facts in a manner consistent with other claims for relief in the state petition; specifically, that trial counsel was ineffective for failing to put Petitioner on the stand during the guilt phase and failing to put his family on the stand during the punishment phase. In fact, the court made clear that this case does not present a complete failure to investigate caused by "pure inattention," or "ignor[ing] multiple avenues of investigation" or "readily available" records. App. 15a (quotations omitted).

Petitioner asserts that, based on the report of the mitigation specialist, state-habeas counsel was aware of "red flags" consisting of the "possibility" that Petitioner's background included substance abuse and mental illness issues. Pet. 24. This assertion contradicts the notion that no investigation occurred, revealing that Petitioner's real claim is that state-habeas counsel's investigation was incomplete.

Petitioner cites *Wiggins*, in which this Court determined counsel unreasonably relied on only a psychologist's report, which showed a low IQ, a personality disorder, and "nothing . . . of petitioner's life history"; reports from presentence investigation, and social services records showing a traumatic childhood. *Wiggins*, 539 U.S. at 523. This Court later summarized that the lack of reasonableness in cases like *Wiggins* stems from the "fail[ure] to act while potentially powerful mitigating evidence stared [counsel] in the face . . . or would have been apparent from documents any reasonable attorney would have obtained," *Bobby v. Van Hook*, 558 U.S. 4, 11 (2009) (per curiam), such as an available file counsel "knows the prosecution will cull for aggravating evidence," *Rompilla*, 545 U.S. at 389. Here, Petitioner himself concedes that the investigation he claims state-habeas counsel should have undertaken is "unusual" and "involve[s] extraordinarily complex investigatory tasks." App. 18a. We are far afield from the precedent Petitioner relies on.

2. Petitioner manages to identify only one supposed red flag: the mitigation specialist's statement that Petitioner had a history of substance abuse and corresponding recommendation for further exploration on that

point.[3] But Petitioner points to no decision of this Court finding constitutionally unreasonable representation based on only the conclusion of a mitigation specialist that a defendant has a history of substance abuse and the corresponding recommendation—that is, based on only the conclusion of a non-lawyer who has an incentive to recommend further investigation, always.

Petitioner points to cases from other circuits that discuss specific red flags as a basis for concluding that following up on those flags was not reasonable. Pet. 24. But these cases suffer from the same apples-to-oranges defect discussed above. That is, these cases discuss failures by trial counsel in the mitigation investigation, not failures by collateral-review counsel in selecting among several possible claims that trial counsel's mitigation investigation was constitutionally inadequate.

In any event, in none of these cases is the supposed red flag merely substance abuse. One case discusses failing to obtain further evaluations after notice of personal and family histories of substance abuse, "mental illness, suicide, and physical and emotional abuse," and a previous head injury. *Earp v. Ornoski*, 431 F.3d 1158, 1179 (9th Cir. 2005); *see also Lambright v. Stewart*, 241 F.3d 1201, 1207 (9th Cir. 2001) (failing to follow up on knowledge of wartime experience, mental breakdown,

[3] Petitioner later implies that further investigation could have revealed additional red flags, in the form of evidence that Petitioner displayed symptoms of schizophrenia earlier than his diagnosis in 2000. Pet. 33-34. The possibility that one may discover a red flag with further investigation cannot, without more, itself be a red flag.

two suicide attempts, and drug abuse). Another case: failing to explore fetal alcohol syndrome after multiple family members stated the defendant's mother drank while pregnant with him, and a psychological evaluation revealed brain damage and a diagnosis of bipolar and obsessive-compulsive disorder. *Williams v. Stirling*, 914 F.3d 302, 307 (4th Cir. 2019). Another: failing to follow up on a mitigation report noting a troubled childhood, unstable and physically abusive parents, depression, and substance abuse. *Sowell*, 663 F.3d at 792.[4] Another: failing to follow up when family members gave inconsistent accounts of abuse and drug activities in the defendant's childhood home. *Mason*, 543 F.3d at 779.

One case discussed only evidence that a thorough investigation would have discovered, without identifying any red flags that counsel ignored. *Dickerson v. Bagley*, 453 F.3d 690, 696 (6th Cir. 2006). But *Dickerson* proves too much. The rule cannot be that counsel unreasonably "refuse[s] to investigate when the investigator does not know the relevant facts the investigation will uncover," *see id.*, because that has no limiting principle. That rule also conflicts with *Strickland*. Consistent with this reasoning—hardly "on other grounds," Pet. 24—this Court in *Van Hook* abrogated *Dickerson*.

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[4] *See also Haliym v. Mitchell*, 492 F.3d 680, 710 (6th Cir. 2007) (failing to follow up on reports that the defendant used drugs, was abused as a child, had a father who died of a drug overdose, and had head injuries including a self-inflicted gunshot); *Kenley v. Armontrout*, 937 F.2d 1298, 1305 (8th Cir. 1991) (failing to follow up on reports revealing a family history of mental illness, an unstable childhood, military service, a drug overdose, and two potential suicide attempts).

3. Petitioner relies on cases that, unlike this case, feature unconvincing assertions that the investigative efforts ceased based on a strategic choice. *See, e.g., Stirling*, 914 F.3d at 314 (failing to recognize a possible avenue of mitigating evidence does not amount to a strategic choice); *White*, 895 F.3d at 666 (deciding not to challenge aggravating evidence "based on a misunderstanding of the law is not sound trial strategy"); *Sowell*, 663 F.3d at 790 (relying on strategy of "perfunctory" mitigating witness testimony about "good deeds Sowell had done as an adult"); *Outten*, 464 F.3d at 415 ("[D]efense counsel's penalty-phase strategy was to argue to the jury—which had convicted Outten of murder unanimously and beyond a reasonable doubt—that he was a good guy and that his life should be spared because he was actually innocent."). Similarly, it was unreasonable for counsel not to follow up on a diagnosis of past schizophrenia, prescriptions for anti-psychotic medication, and a psychology report indicating lapses in lucidity, when "the defense strategy was to prove that Pruitt did not deserve the death penalty because of his intellectual disability, his *serious mental illness*, and his brain damage." *Pruitt v. Neal*, 788 F.3d 248, 272 (7th Cir. 2015).

Here, state-habeas counsel's notes show he considered the angle Petitioner now pursues. App. 13a. Petitioner has alleged no facts and suggested no evidence that could overcome the presumption that his state-habeas counsel exercised reasonable professional judgment in deciding to focus as he did. *Cf. Pinholster*, 563 U.S. at 196 (requiring reviewing courts "not simply to give the attorneys the benefit of the doubt, but to affirmatively entertain the range of possible

reasons . . . counsel may have had for proceeding as they did") (cleaned up). Nor could he. State-habeas counsel raised many claims over hundreds of pages, including IATC claims addressing all stages of trial and a novel claim based on the Vienna Convention on Consular Relations, an issue that would eventually make it to this Court—twice. R.5269-5461, 5552-5677, 5707-94; *see Medellin v. Texas*, 552 U.S. 491 (2008); *Medellin v. Dretke*, 544 U.S. 660 (2005) (per curiam). This shows state-habeas counsel put careful thought into the claims he raised. Viewed as whole, state-habeas counsel's performance was well "within the wide range of reasonable professional assistance." *Bell v. Cone*, 535 U.S. 685, 702 (2002).

Moreover, any claim based on an inadequate mitigation investigation faced long odds, given the aggravating evidence against Petitioner. This fact further supports state-habeas counsel's strategy.

In judging prejudice, "*Strickland* asks whether" there is "substantial" "likelihood of a different result." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011). Petitioner senselessly and violently murdered an elderly woman. *See* R.6004 (describing the murder). The horrific facts of Petitioner's crime make it particularly difficult to show prejudice. *See Wong v. Belmontes*, 558 U.S. 15, 27-28 (2009) (per curiam).

On top of the heinous facts of the crime lay the significant aggravating evidence that Petitioner would be a future danger. Three days after murdering Paneque, Petitioner robbed two individuals at gunpoint, threatened to kill them both, and then threatened to kill one victim's family if he went to the police. R.956-57. Shortly after

that, Petitioner threatened to kill an acquaintance if that acquaintance did not help Petitioner kill his accomplices. R.956.

Because it is not deficient performance to avoid a claim that "counsel reasonably could have determined . . . would have failed," *Sexton*, 138 S. Ct. at 2559, Petitioner's state-habeas counsel would have been justified in avoiding IATC claims based on inadequate mitigation investigation altogether.

Having decided to pursue such a claim, however, state-habeas counsel focused his effort on a theory that had the best chance of ensuring some success—counsel accentuated the positive aspects of Petitioner's background while avoiding double-edged evidence that would portray Petitioner as a drug-addicted, mentally unstable predator, and counsel did so in a way that dovetailed with other claims raised in the state petition.

When state-habeas counsel first looked at the trial record, the lack of family testimony or evidence would have jumped out. When state-habeas counsel's investigation uncovered the positive things Petitioner's family had to say—Petitioner came a from a good home and nice family, was smart, and did not get into trouble, *see* R.5294-97—a line of attack would have been clear: show that trial counsel should have tried to prove that Petitioner was a good candidate for rehabilitation and not a future danger to society. This tactic is evident in the state petition, which argued that the lack of positive testimony and evidence:

> must surely have left an impression with the jury that [Petitioner] is a very dangerous character indeed, with no redeeming qualities whatsoever . . . . [H]ad

> trial counsel also been able to produce testimony from the family, along with official corroborating documentation, attesting to [Petitioner's] long history of studiousness and good citizenship in Honduras, they might well have been able to convince the jury that [Petitioner] was not an incorrigibly dangerous man after all, and that his life might be worth sparing.

R.5301; *see also* R.5320 (arguing that "this character evidence could have gone a long way to convince the jury either that Paneque's death was an anomaly, and that Applicant would not likely pose a continuing threat to society, or that he was deserving of a life sentence notwithstanding any conclusion that he would be a future danger").

In contrast, there were good reasons—apart from the dearth of case law—not to expend time and effort pursuing a mental-illness-substance-abuse angle. First, the information state-habeas counsel discovered and included in the state-habeas record showed that petitioner had (1) an above-average IQ, (2) no major injuries or illnesses as a child, and (3) a stable background and good performance at school. R.5295-97, 5582. So any evidence of mental illness would have been conflicting at best.

Second, evidence that Petitioner was mentally unstable and a drug abuser would have undermined state-habeas counsel's argument that trial counsel could have shown that Petitioner "was not an incorrigibly dangerous man." R.5301. This, in turn, would have undermined the Vienna-Convention claim raised by state-habeas counsel, which focused heavily on how the Honduran consulate could have helped gather positive evidence about Petitioner. *See* R.5324-25, 5328-29. Likewise, by the time

state-habeas counsel learned of Petitioner's mental illness, counsel had already argued that trial counsel was ineffective for failing to put Petitioner on the stand during the guilt phase. R.5558. Evidence of a developing mental illness would have undercut that argument as well.

Third, and finally, counsel considering evidence of mental illness and drug abuse in 1998 could reasonably conclude that this evidence was at least as likely to hurt Petitioner's punishment case as help. *See Penry*, 492 U.S. at 324; *Burger*, 483 U.S. at 793-94.

C. The Fifth Circuit's decision did not turn on any conclusion that mental illness and substance abuse evidence is inherently double-edged and unworthy of investigation.

The Fifth Circuit considered the specific nature of the aggravating and mitigating evidence at issue before correctly concluding that Petitioner's state-habeas counsel could have reasonably determined that evidence of mental illness and substance abuse would be double-edged. "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." App. 9a. Petitioner badly misreads the Fifth Circuit's conclusion as a "one-size-fits-all" rule deeming all mental illness and substance abuse evidence double-edged and unworthy of investigation. Pet. 27. This Court need not read any such rule into the Fifth Circuit's holding.

The Fifth Circuit merely held that state-habeas counsel in 1998 could reasonably conclude that the state-

habeas court would find that a jury would have viewed the mental illness and substance abuse evidence Petitioner seeks as demonstrating future dangerousness more than a mitigating circumstance. App. 16a. *Cf. supra* p. 16 (distinguishing mental illness and substance abuse evidence suggesting the possibility of rehabilitation from evidence increasing the likelihood that a jury would find little chance of rehabilitation). Thus, the Fifth Circuit properly reviewed pre-1998 precedent and made no comment on the current state of the law. *Id.*

II. The Petition Presents a Poor Vehicle to Resolve the Questions Presented.

Funding is not reasonably necessary for a petitioner to pursue evidence that is not "admissible" and "stand[s] little hope of helping him win relief." *Ayestas*, 138 S. Ct. at 1094. In AEDPA, Congress chose to limit not only the claims that a petitioner may bring in federal habeas, 28 U.S.C. § 2254(a)-(b), but also the evidence that a petitioner may use to support those claims, *id.* § 2254(d)-(e); *Pinholster*, 563 U.S. at 181. These complementary limitations impose two independent bars to Petitioner introducing new evidence, making Petitioner's request for funding futile. So even assuming Petitioner could establish ineffective assistance by state-habeas counsel, this Court's review is unwarranted.

First, Petitioner's "new" IATC claim is not new or procedurally defaulted; it was adjudicated on the merits in state court. That means that Petitioner can secure relief only by satisfying 28 U.S.C. § 2254(d), which he must do on the state-court record alone. Funds for

investigative services therefore could not be reasonably necessary to pursue his already-adjudicated claim.

Second, even if Petitioner's claim had not been adjudicated in state court, any new evidence would be barred by 28 U.S.C. § 2254(e)(2), which precludes additional evidence if Petitioner or his counsel did not diligently develop the factual basis of a claim in state court. To excuse his default under *Martinez*, Petitioner must establish that state-habeas counsel was not diligent, but that is the very showing that triggers (e)(2). With no available evidence to support it, Petitioner's IATC claim lacks any "potential merit." *Ayestas*, 138 S. Ct. at 1094.

A. The state court adjudicated Petitioner's IATC claim on the merits, so AEDPA bars new evidence.

Petitioner's only hope of securing funds to investigate and develop new evidence is to show that his IATC claim is new and that he can overcome procedural default. But this Court cannot accept at face value Petitioner's characterization of his claim as new and procedurally defaulted. Section 2254(d) instructs that courts "shall not" grant habeas relief on claims "adjudicated on the merits in State court" unless the claim meets 2254(d)'s conditions. Thus, it is incumbent upon a court to assure itself that it is not treating adjudicated claims as "new" and unadjudicated.[5] The importance of this Court's vigilance

[5] For this same reason, the Director did not forfeit this argument by making it for the first time in the Fifth Circuit. *See EEOC v. Fed. Labor Relations Auth.*, 476 U.S. 19, 23 (1986) (per curiam) (holding that a party's failure to raise a statutory instruction "speak[ing] to courts" does not lead to forfeiture);

has increased since *Martinez*, as a habeas petitioner now has an incentive to "strategically concede[] his IAC claim was unexhausted [and defaulted] to obtain de novo review." *Ward v. Stephens*, 777 F.3d 250, 257 n.3 (5th Cir. 2015), *abrogated on other grounds by Ayestas*, 138 S. Ct. 1080. This antecedent legal question provides another reason for this Court to deny review.

A habeas "claim" is "an asserted federal basis for relief from a state court's judgment of conviction." *Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005). And "identical grounds may often be proved by different factual allegations." *Sanders v. United States*, 373 U.S. 1, 16 (1963); *see also id.* ("[A] claim of involuntary confession predicated on alleged psychological coercion does not raise a different 'ground' than does one predicated on alleged physical coercion."). However many reasons a petitioner may offer why counsel's performance was deficient during a particular stage of a proceeding, those reasons all support a single claim. *See, e.g.*, *Strickland*, 466 U.S. at 675 (treating the petitioner's six complaints about his counsel's "ineffective assistance at the sentencing proceeding" as a single claim); *Babbitt v. Woodford*, 177 F.3d 744, 746 (9th Cir. 1999) (per curiam); *Dansby v. Hobbs*, 766 F.3d 809, 840 (8th Cir. 2014); *Peoples v. United States*, 403 F.3d 844, 848 (7th Cir. 2005) (Easterbrook,

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see also U.S. Nat'l Bank of Ore. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 447 (1993) ("[A] court may consider an issue 'antecedent to and ultimately dispositive of' the dispute before it, even an issue the parties fail to identify and brief.") (alteration omitted).

J.); *Cunningham v. Estelle*, 536 F.2d 82, 83 (5th Cir. 1976) (per curiam).

Petitioner's IATC claim attacking trial counsel's mitigation investigation is not new. In his state petition, Petitioner argued:

> At the punishment phase of [Petitioner's] trial, his attorneys presented almost no evidence to persuade the jury either that [Petitioner] would not be a future threat to society, or that aspects of his character or background warranted imposition of a life sentence, notwithstanding his future dangerousness. . . . [So], trial counsel afforded less than reasonably effective assistance, depriving [Petitioner] of a fair punishment hearing.

R.5294. Petitioner's "new" claim rests on the same complaint, that trial counsel was ineffective for failing to reasonably prepare a case in mitigation. *See* Pet. 10. The only difference between Petitioner's "new" punishment-phase claim and his old one is the specific mitigating evidence that trial counsel purportedly failed to pursue. The underlying claim—that Petitioner's trial counsel should have done more to make a case against the death penalty—remains the same. There would be no end to litigation if every new allegation as to what counsel would have found had he properly investigated a defendant's background constituted a "new" claim.

Petitioner's claim was rejected on the merits by the state court. R.92, 5911-39. As a result, the district court may not consider any of Petitioner's new evidence or arguments in applying AEDPA's relitigation bar. *Sexton*, 138 S. Ct. at 2560; *Pinholster*, 563 U.S. at 181. The

district court has already concluded that Petitioner cannot overcome AEDPA's relitigation bar on the existing record, R.507-12, a decision that is no longer subject to challenge. It follows that the services and funds requested by Petitioner to support this claim are not reasonably necessary.

B. Even if Petitioner's claim were new, AEDPA would bar any new evidence.

Finally, even if Petitioner's claim were new (it is not), and even if he could show ineffective assistance by his state-habeas counsel (he cannot), his new IATC claim would inevitably fail because the evidence he needs to support the merits is inadmissible. So funds and services to develop that evidence are not reasonably necessary. Because ruling in Petitioner's favor will not advance this case, this Court's review is unwarranted.

Section 2254(e)(2) "restricts the discretion of federal habeas courts to consider new evidence when deciding claims that were not adjudicated on the merits in state court." *Pinholster*, 563 U.S. at 186. Section 2254(e)(2)'s bar on new evidence is triggered if the habeas petitioner "has failed to develop the factual basis of a claim in State court proceedings." That opening clause is met if the petitioner "was at fault for failing to develop the factual bases for his claims in state court." *Bradshaw v. Richey*, 546 U.S. 74, 79 (2005) (per curiam).

To overcome procedural default, Petitioner asserts that his state-habeas counsel was ineffective in failing to develop his IATC claim in state court. Pet. 23–24. That position, if accepted, necessarily means that state-habeas counsel was not diligent in developing the factual

basis for this "new" IATC claim. And this Court has held multiple times when addressing section 2254(e)(2)'s bar on new evidence that Congress intended the word "failed" in "failed to develop," 28 U.S.C. § 2254(e)(2), to mean a "lack of diligence, or some greater fault, attributable to the prisoner *or the prisoner's counsel*." *Williams v. Taylor*, 529 U.S. 420, 432 (2000) (emphasis added); *accord Holland v. Jackson*, 542 U.S. 649, 652-53 (2004) (per curiam) (applying section 2254(e)(2) to an IATC claim). Thus, if Petitioner succeeds in overcoming procedural default, he will be barred from relying on new evidence.

Nothing in *Martinez* alters this conclusion. *Martinez* created a "narrow exception" to the court-created rules of procedural default, to excuse the bar against considering a defaulted, substantial IATC claim if state-habeas counsel unreasonably failed to raise that claim. 566 U.S. at 9. A holding that limits a court-created rule has nothing to do with AEDPA's independent statutory bar on what evidence federal habeas courts may consider.

In no event did *Martinez* overrule any part of *Williams* or *Holland*: This Court concluded that its holding raised no stare decisis concern. 566 U.S. at 15. And *Davila* later affirmed the Fifth Circuit's refusal to extend *Martinez*, confirming that "[e]xpanding the narrow exception announced in *Martinez* would unduly aggravate the 'special costs on our federal system' that federal habeas review already imposes." 137 S. Ct. at 2070. So *Williams* and *Holland* remain the controlling precedent on the meaning of "failed" in section 2254(e)(2).

Nor can *Martinez* be used to undermine section 2254(e)(2). "The rules for when a prisoner may establish cause to excuse a procedural default are

elaborated in the *exercise of the Court's discretion*." *Martinez*, 566 U.S. at 13 (emphasis added). But congressional directives in federal statutes like AEDPA are not subject to discretionary elaboration by courts. As this Court recently explained in *Ross v. Blake*:

> No doubt, judge-made . . . doctrines, even if flatly stated at first, remain amenable to judge-made exceptions. . . . But a statutory exhaustion provision stands on a different footing. There, Congress sets the rules—and courts have a role in creating exceptions only if Congress wants them to. For that reason, mandatory exhaustion statutes like [AEDPA] establish mandatory exhaustion regimes, *foreclosing judicial discretion*.

136 S. Ct. 1850, 1857 (2016) (emphasis added); *see also Williams*, 529 U.S. at 436-37 (describing section 2254(e)(2) as an exhaustion requirement).

Before AEDPA, the Supreme Court had developed equitable rules outlining what evidence federal habeas courts could consider in resolving claims undeveloped in state court—specifically, the cause-and-prejudice rules from the procedural-default context. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 6 (1992). But in AEDPA, Congress pointedly eliminated that judicially developed cause-and-prejudice standard for receiving new evidence and replaced it with section 2254(e)(2), which "raised the bar" for federal habeas petitioners. *Williams*, 529 U.S. at 433.

In interpreting section 2254(e)(2), *Williams*, unlike *Martinez*, made no equitable judgment; this Court gave effect to what "Congress intended." *Id.* And *Williams*

concluded that section 2254(e)(2) codified the rule that state-habeas counsel's lack of diligence is attributed to the petitioner. *Id.* at 437, 439-40. *Williams* reached the conclusion because, when Congress enacted AEDPA in 1996, Congress would have understood—relying on this Court's 1991 and 1992 decisions in *Coleman* and *Keeney*—that any lack of diligence by state-habeas counsel would be attributed to the prisoner under "well-settled principles of agency law." *Coleman v. Thompson*, 501 U.S. 722, 754 (1991); *see Davila*, 137 S. Ct. at 2065. This Court applied *Coleman*'s rule to this very context in *Keeney*, when it disallowed new evidence based on post-conviction "counsel's negligent failure to develop the facts." *Keeney*, 504 U.S. at 4; *see id.* at 7-11.

When Congress "raised the bar" in AEDPA, it could not have intended a weaker rule than the one adopted in *Keeney* just a few years earlier. Thus, *Williams* held that "the opening clause of § 2254(e)(2) codifies *Keeney*'s threshold standard of diligence." *Williams*, 529 U.S. at 434. So section 2254(e)(2)'s trigger—"the applicant has failed to develop the factual basis of a claim in State court proceedings"—uses "fail[]" just as *Keeney* did: as including "attorney error." *Keeney*, 504 U.S. at 10 n.5; *see Williams* 529 U.S. at 433-34.[6]

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[6] There are many trial-record-based IATC claims for which *Martinez* will still do work under a faithful application of section 2254(e)(2). *See Davila*, 137 S. Ct. at 2067-68. To take a few examples: claims based on trial counsel failing to object to inadmissible evidence, trial counsel requesting an incorrect jury instruction, or per se ineffective assistance of counsel under *United States v. Cronic*, 466 U.S. 648 (1984). The rule adopted in *Martinez* saves these claims, for which no new evidence may be needed.

The result is that Petitioner cannot prevail on his "new" IATC claim even if it is new and even if he can show that state-habeas counsel rendered ineffective assistance in failing to develop the underlying evidence. The condition for overcoming procedural default—ineffective assistance of state-habeas counsel—is the same condition that triggers section 2254(e)(2)'s bar on new evidence. Because any evidence he might discover would be foreclosed by (e)(2), Petitioner cannot show that funding to discover that evidence is reasonably necessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant
Attorney General

KYLE D. HAWKINS
Solicitor General
Counsel of Record

JASON R. LAFOND
Assistant Solicitor General

ABIGAIL M. FRISCH
Assistant Attorney General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Kyle.Hawkins@oag.texas.gov
(512) 936-1700

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