No. 19-569 (CAPITAL CASE)

IN THE

Supreme Court of the United States

CARLOS MANUEL AYESTAS,

Petitioner,

v.

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

Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Carlos Ayestas was sentenced to death after a two-minute mitigation presentation. We now know Ayestas suffers from mental illness, and that state habeas counsel, against the advice of his own investigator, ignored signs of that mitigating factor. Ayestas has requested funding under 18 U.S.C. § 3599 to investigate what his trial and state habeas attorneys did not, to show that their failure to develop evidence about his mental illness prejudiced his case against death. A reasonable attorney would investigate those facts now.

In 2018, a unanimous Court held that the Fifth Circuit erred in requiring Ayestas to show that he was investigating a "viable constitutional claim that is not procedurally barred" before he could obtain services under § 3599. *Ayestas v. Davis*, 138 S. Ct. 1080, 1093 (2018) (quoting Pet. App. 42a). Claims with "*potential* merit," and a "credible chance" of surmounting procedural default, can warrant § 3599 funding. *Id.* (emphasis added).

On remand, the Fifth Circuit did not apply the standard the Court announced. Instead, the court improperly required Ayestas to *prove* the very issue Ayestas asks to develop under § 3599, deciding itself that Ayestas had not shown his state habeas counsel's deficiency. That is the same analysis this Court already rejected. The Fifth Circuit's refusal to implement the Court's mandate is reason alone for review.

A second aspect of the decision below also warrants review, however. The panel's conclusion that

state habeas counsel performed effectively creates a circuit split. Trial counsel was not required to investigate red flags for mental illness before *Wiggins v. Smith*, 539 U.S. 510 (2003), the logic goes, so state habeas counsel was not deficient for failing to investigate a Sixth Amendment claim on that basis. That holding squarely conflicts with the decisions of this Court and other courts of appeals recognizing that trial counsel at the time of Ayestas's prosecution had a Sixth Amendment obligation to investigate mitigation. Pet. 18-23.

The State now concedes that trial counsel in the 1990s had a duty to investigate mitigating evidence, including evidence relating to mental illness. The State defends the decision below on different grounds: Whatever trial counsel's duties, the State argues, state habeas counsel could not have known a Sixth Amendment mitigation challenge would be viable before this Court ordered relief on such a claim in a specific case.

That defense of the decision below only deepens the conflict with this Court's deficiency precedents. As this Court held in the identical context in *Trevino v. Thaler*, 569 U.S. 413 (2013), state habeas counsel may be deficient for failing to investigate trial counsel's violation of the norm requiring a reasonable mitigation investigation. While the Sixth Amendment may not directly apply to the state habeas representation, *Strickland v. Washington*, 466 U.S. 668 (1984), still supplies the deficiency analysis that excuses a procedural default. And under *Strickland*, it is the *norm* that calls counsel to action. A state habeas counsel can therefore discern trial counsel's dis-

regard for it, and the resulting Sixth Amendment violation.

The State argues in the alternative that state habeas counsel was aware of trial counsel's deficiency, but made a "strategic" decision not to investigate it. This defense of the judgment below is easily dismissed. Counsel cannot make an informed decision to forgo a claim he himself has failed to investigate. And here, the overlooked IATC claim was compatible with the claims actually advanced. There could be no strategic reason to give it up—and no way to resolve that question *in the State's favor* without factual submissions.

The purported vehicle problems the State interposes did not convince the Fifth Circuit below and have been rejected as a matter of law by other courts.

Certiorari should be granted.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH OTHER SIXTH AMENDMENT DECISIONS

This Court and others reviewing capital representations have recognized that prevailing professional norms as far back as the 1980s required trial counsel to investigate mitigation evidence relating to substance abuse and mental illness. Courts have repeatedly granted relief under the Sixth Amendment based on those norms. Pet. 22-23. By definition, the norms themselves were well-established before this Court issued decisions finding counsel con-

stitutionally ineffective for violating them. Pet. 18-21.

The Fifth Circuit nevertheless held below that "[s]crutiny of mitigation investigations did not take shape until well after Ayestas's state-habeas application was filed in 1998," Pet. App. 7a, excusing state habeas counsel's failure to investigate trial counsel's deficiency, *id.* at 8a. But the Fifth Circuit could not logically conclude that state habeas counsel had no duty to investigate the sufficiency of trial counsel's mitigation investigation without believing that the trial representation met constitutional standards. After all, the same norms that required the trial investigation of mental illness in the first place required state habeas counsel to investigate that evident deficiency. The court's analysis of the prevailing professional norms of the day under *Strickland*, and the result it reached, squarely conflict with the decisions of other courts. Pet. 19-23.

The State concedes that trial counsel had a duty to investigate mitigating evidence related to mental illness and substance abuse. *See* Brief in Opposition ("BIO") 12 (agreeing that the Court's decisions "concluding that trial counsel *violated* a professional norm means that the norm *existed* before the decision" (emphases added)). The State argues, however, that state habeas counsel either did not know he could challenge trial counsel's deficiency, or just relinquished the claim strategically. Both arguments lack merit.

1. The State posits that the Fifth Circuit accepted trial counsel's duties and simply held state habeas counsel to a different standard. On this reading, the

court concluded only that state habeas counsel cannot be faulted for missing petitioner's IATC-mitigation claim before this Court's decisions recognizing the claim's constitutional magnitude. BIO 12-13.

There is no daylight, however, between the existence of a professional norm binding trial counsel under the Sixth Amendment and state habeas counsel's ability and obligation to identify a violation of it. The very same norms that required constitutionally effective trial counsel to conduct a mitigation investigation during this period would have alerted state habeas counsel to the constitutional violation. If the norm binding trial counsel existed—as this Court's decisions have said it did—then state habeas counsel could perceive the need to investigate it.

In fact, this Court has already held that reasonable state habeas counsel could not ignore mitigation-based IATC claims before the line of Sixth Amendment cases that began with *Williams v. Taylor*, 529 U.S. 362 (2000). In *Trevino*, state habeas counsel in Texas filed a petition in 1999 that omitted an IATC-mitigation claim. The petitioner sought to excuse the procedural default of that claim based on habeas counsel's deficient failure to investigate it. *See* 569 U.S. at 418. The Court recognized the default could be excused by counsel's deficient failure to investigate the IATC claim. *See id.* at 418, 423, 429. For this purpose, the standards of *Strickland* apply to the state habeas counsel's performance, even if the Sixth Amendment does not. *Martinez v. Ryan*, 566 U.S. 1, 14 (2012). If the Fifth Circuit applied a different standard to state habeas counsel's perfor-

mance in this case, it only heightens the conflict warranting review.

The notion that state habeas counsel can wait for a decision of this Court before acting to vindicate constitutional violations is dangerous, unprecedented, and wrong. The professional norm this Court's mitigation decisions recognize can be traced at least to the 1980s. Pet. 20; *see Williams*, 529 U.S. at 395-96 (representation in the 1980s); *Wiggins*, 539 U.S. at 514-15, 524 (same); *Rompilla v. Beard*, 545 U.S. 374 (2005) (same); *Porter v. McCollum*, 558 U.S. 30 (2009) (same). The existence of a potentially meritorious IATC claim becomes evident as soon as a professional norm is established and violated. When postconviction counsel fails to perform any investigation into that potential claim, his own representation is drawn into question.

2. The State argues alternatively that state habeas counsel was aware of petitioner's IATC-mitigation claim, but simply made a "strategic" decision not to pursue it. BIO 23. This argument is in obvious tension with the State's argument that counsel could not have identified this claim. It also contravenes the record and established law.

The State contends that state habeas counsel reasonably pursued other IATC claims to the exclusion of the defaulted IATC-mitigation claim given the "dearth of case law" addressing mental illness or substance abuse as mitigating factors at the time. BIO 12-15. But counsel could not reasonably decide to abandon IATC-mitigation claims without first investigating them. *See Strickland*, 466 U.S. at 690-91.

Counsel's limited investigation into *other* issues did not relieve him of his obligation to look into his client's mental health and substance abuse before making a strategic judgment about which claims to pursue. BIO 17; *see Earp v. Ornoski*, 431 F.3d 1158, 1175 (9th Cir. 2005) (citing *Wiggins*, 539 U.S. at 527). Nor is his review of his mitigation specialist's investigation plan—which recommended a comprehensive investigation—a substitute for actually *conducting* the recommended investigation. BIO 18. As counsel's investigator advised, the investigation not conducted before was critical here given the red flags for mental illness. *See* ROA.703-04, 720-21. Without it, Hart could not have made an informed, strategic choice to pursue other claims to the exclusion of this one.

It is no answer to argue that this line of mitigation evidence would have conflicted with the other claims that Hart pursued. BIO 15. To start, there is no inconsistency between the positive mitigating evidence—Ayestas's nonviolent history, stable childhood, intelligence, "normal life," and normal intellectual capacity—and Ayestas's mental illness, particularly as schizophrenia often presents in adulthood. Pet. App. 11a, 18a. And of course, with no investigation, state habeas counsel was not in a position to make a reasonable, informed decision about whether the evidence the investigation would have uncovered was inconsistent with other potential avenues of mitigation or, if it was, which claim was stronger.[1]

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[1] Hart's redaction of the psychologist's letter documenting Ayestas's delusional thinking (BIO 18) thus cannot evince the

The Fifth Circuit's analysis and the State's defense of it are incompatible with over twenty years of precedent analyzing counsel's duty to investigate mitigation. The Court's review is warranted.

II. THE COURT SHOULD GRANT CERTIORARI TO ENFORCE *AYESTAS*

On remand, the court of appeals failed to apply the "reasonable attorney" standard announced by this Court when it vacated the prior panel decision. The State dismisses this problem as a mere plea for "error correction." BIO 8. In fact, the Fifth Circuit's indifference to the Court's mandate in this very case directly implicates the Court's authority to enforce its judgments. *See, e.g.*, *Moore v. Texas*, 139 S. Ct. 666, 670 (2019); S. Ct. Rule 10(c). And the reinstatement of a flawed § 3599(f) standard in the circuit with the most death sentences presents an issue of exceptional importance, as it will thwart Congress's judgment that resources should be dedicated to the effective representation of capital inmates.

In *Ayestas*, this Court held that § 3599(f) requires a district court to award funding when a hypothetical "reasonable attorney" would regard the services as important. 138 S. Ct. at 1093. The Court unequivocally instructed that—contrary to the Fifth Circuit's erstwhile "substantial need" test—a court may not deny funding based on its own prejudgment of the claim being investigated: "a funding applicant must not be expected to prove that he will be able to win relief if given the services he seeks." *Id.* at 1093-

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exercise of appropriate strategic judgment—and particularly not as to the postconviction petition he filed five years earlier.

94; *see also id.* at 1097 (Sotomayor, J., concurring) ("[T]he inquiry is not … whether he will succeed in overcoming the procedural default under *Martinez* and *Trevino*.").

The Fifth Circuit's remand decision pours old wine into a new bottle. As before, the court denied funding based on its conclusion that petitioner's state habeas counsel was not ineffective for failing to raise petitioner's IATC-mitigation claim—the very issue Ayestas sought to investigate. *Compare* Pet. App. 48a (affirming § 3599(f) denial because "the district court correctly rejected the assertion that Ayestas's trial and state habeas attorneys were ineffective"), *with* Pet. App. 19a (citing "evidence that state-habeas counsel was not deficient, joined with the unlikelihood of locating new information suggesting otherwise," to deny § 3599(f) services). The court again decided disputed factual issues against Ayestas, weaving a guesswork narrative about state habeas counsel's possible thinking, even though there had been no discovery, no testimony from habeas counsel about his strategy, and no submissions about the applicable standard of care. Pet. App. 11a-17a. The court even *cited its abrogated § 3599 caselaw* to hold Ayestas's claim unworthy of investigation. Pet. App. 19a (quoting *Smith v. Dretke*, 422 F.3d 269, 288 (5th Cir. 2005)).

Worse, instead of remanding to the district court to consider the issue in the first instance, the Fifth Circuit opted to decide Ayestas's § 3599 application itself, necessarily concluding that a district court would have *abused its discretion* in awarding § 3599(f) resources. *See* Pet. App. 4a-5a. The panel's

disposition of Ayestas's § 3599(f) request thus imposes gatekeeping even *narrower* than the standard the Court previously rejected.

Justice Sotomayor has already laid out the "strong" evidence of state habeas counsel's ineffectiveness. *See* Pet. 32-34. A reasonable attorney plainly would investigate whether Ayestas could excuse the default of his *Wiggins* claim. By refusing to analyze Ayestas's request from the perspective of a reasonable attorney, the court of appeals has effectively nullified the holding of *Ayestas*.

This Court has not hesitated to grant certiorari a second time in capital cases to secure compliance with its prior rulings. *See, e.g.*, *Miller-El v. Cockrell*, 537 U.S. 322 (2003), and *Miller-El v. Dretke*, 545 U.S. 231, 265 (2005) (rejecting Fifth Circuit's "strained" remand decision); *Moore v. Texas*, 137 S. Ct. 1039 (2017), and *Moore v. Texas*, 139 S. Ct. 666, 670 (2019) (rebuking lower court again, having identified "too many instances in which, with small variations, [the remand decision] repeats the analysis we previously found wanting"). Review is warranted again here, too.

III. THE STATE'S AEDPA ARGUMENTS POSE NO VEHICLE PROBLEM

The State also opposes review by arguing that AEDPA will later preclude adjudication of Ayestas's *Wiggins* claim. These arguments failed to persuade the Fifth Circuit below; neither interferes with the Court's ability to reach the questions presented.

The State argues first that petitioner's *Wiggins* claim was "adjudicated on the merits" by the state

court and will thus be barred under § 2254(d), as construed in *Cullen v. Pinholster*, 563 U.S. 170 (2011). Until the remand proceedings, however, the State consistently argued that the *Wiggins* claim was raised "for the first time on federal habeas corpus review." ROA.102. The district court, the Fifth Circuit, and this Court all accepted the State's contention that the claim was "never raised … in state court." *Ayestas*, 138 S. Ct. at 1087. Principles of waiver and judicial estoppel bar the contrary contention now. *See, e.g.*, *Sniado v. Bank Austria AG*, 378 F.3d 210, 213 (2d Cir. 2004) (courts will "normally … not consider a claim raised for the first time on appeal, *let alone on remand from the Supreme Court*" (emphasis added)).

The State's § 2254(d) argument is also wrong. A claim is new when new allegations or evidence "fundamentally alter" a prior claim. *Ward v. Stephens*, 777 F.3d 250, 258 (5th Cir. 2015); *see Vasquez v. Hillery*, 474 U.S. 254, 260 (1986). The State effectively concedes that petitioner meets this standard. *See* BIO 6 ("Petitioner's federal claim relied on … new evidence and allegations suggesting Petitioner suffered from mental illness ….."). Petitioner's claim that trial counsel failed to investigate signs of mental illness is obviously different from his state habeas claim regarding the absence of his family members from trial. ROA.5281. As in *Trevino*, petitioner's "postconviction claims included a claim that his trial counsel was constitutionally ineffective … [but] *did not include a claim that trial counsel's ineffectiveness consisted in part of a failure adequately to investigate and to present mitigating circumstances.*"

Trevino, 569 U.S. at 418 (emphasis in original). Only by incompletely describing the new claim—in terms of the constitutional principle in play (the effective assistance of trial counsel), not the allegations concerned—can the State contend the two claims resemble each other at all.

The State alternatively argues that, if the *Wiggins* claim is new, § 2254(e)(2) will bar petitioner from introducing any evidence that his deficient state habeas counsel failed to develop. This argument is also forfeited and also was not accepted by the Fifth Circuit below. It has been rejected on its merits elsewhere. *See Sasser v. Hobbs*, 735 F.3d 833, 853-54 (8th Cir. 2013) (§ 2254(e)(2) does not bar new evidence in support of a claim whose default by deficient state habeas counsel is excused); *Jones v. Shinn*, 943 F.3d 1211, 1221-22 (9th Cir. 2019) (same); *see also Barrientes v. Johnson*, 221 F.3d 741, 771 (5th Cir. 2000) (§ 2254(e)(2) does not preclude "an evidentiary hearing on any claim for which cause and prejudice exists").

As courts have uniformly concluded, the Court did not mistakenly issue dead-letter decisions in *Martinez* and *Trevino*, as the State necessarily implies. Read together with § 2254(e)(2) and the Court's cases establishing that an inmate who shows cause for defaulting a claim has not "failed to develop" its factual basis, *see, e.g.*, *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8-10 (1992), *Martinez* and *Trevino* provide that an inmate is not at "fault" within the meaning of § 2254(e)(2) for failing to exhaust a claim overlooked by ineffective state habeas counsel. *Martinez*, 566 U.S. at 17; *Trevino*, 569 U.S. at 423; *see,*

e.g., *Sasser*, 735 F.3d at 854. Section 2254(e)(2) will not preclude consideration of the claim that petitioner seeks to develop under § 3599 and therefore does not independently excuse the Fifth Circuit's legal errors below.

The downstream arguments raised by the State present no obstacle to this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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