No. _____ (CAPITAL CASE)

In the Supreme Court of the United States

MARK ROBERTSON,
Petitioner,
vs.

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

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

PETITIONER'S APPENDIX

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
April 3, 2019
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Clerk

No. 19-70006

MARK ROBERTSON,

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 Northern District of Texas
USDC No. 3:13-CV-728

Before SMITH, CLEMENT, and HIGGINSON, Circuit Judges.

PER CURIAM:*

This is a review of a limited remand. On December 21, 2017, this court issued an opinion denying a certificate of appealability with respect to Mark Robertson's claim that his death sentence was based on materially inaccurate evidence. *Robertson v. Davis*, 715 F. App'x 387 (5th Cir. 2017) (*per curiam*).

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

The panel reserved judgment on whether the district court abused its discretion in denying funding requests under 18 U.S.C. § 3599(f).

On March 21, 2018, the Supreme Court issued *Ayestas v. Davis*, which rejected our Circuit's standard for determining whether investigative funds pursuant to § 3599(f) are "reasonably necessary." 138 S. Ct. 1080 (2018). Because the district court had not had the opportunity to consider how *Ayestas* might apply to Robertson's requests for funding, we remanded for the district court to consider this issue in the first instance. *Robertson v. Davis*, 729 F. App'x 361, 362 (5th Cir. 2018) (*per curiam*). Having carefully considered Robertson's arguments under the new standard, the district court again rejected his funding request. We detect no error in this conclusion.

"We review the denial of funding for investigative or expert assistance for an abuse of discretion." *Wilkins v. Davis*, 832 F.3d 547, 551 (5th Cir. 2016) (quoting *Brown v. Stephens*, 762 F.3d 454, 459 (5th Cir. 2014)).

The funding statute at issue provides:

> 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 . . . .

18 U.S.C. § 3599(f) (emphases added). In *Ayestas*, the Supreme Court recently struck down the Fifth Circuit's standard that "[r]easonably necessary in this context means 'that a petitioner must demonstrate 'a substantial need' for the requested assistance.'" *Ward v. Stephens*, 777 F.3d 250, 266 (5th Cir. 2015) (quoting *Riley v. Dretke*, 362 F.3d 302, 307 (5th Cir. 2004)). The Court reiterated that "Congress has made it clear . . . that district courts have broad discretion in assessing requests for funding." *Ayestas*, 138 S. Ct. at 1094. In directing lower courts on the funding determination, the Court explained:

> [T]he proposed services must be "*reasonably* necessary" for the applicant's representation, and 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. Proper application of the "reasonably necessary" standard thus requires courts to consider the potential merit of the claims that the applicant wants to pursue, the likelihood that the services will generate useful and admissible evidence, and the prospect that the applicant will be able to clear any procedural hurdles standing in the way.

Id.

Robertson argues that the failure of his 2009 trial counsel to adequately investigate the mitigating circumstances surrounding his mental health and baleful life story rose to the level of ineffective assistance under the familiar standard announced in *Strickland v. Washington*, 466 U.S. 668 (1984), as construed by the Supreme Court in *Wiggins v. Smith*, 539 U.S. 510 (2003). He seeks funding for further investigation into these issues.

In the context of penalty phase mitigation in capital cases, the Supreme Court has held that it can be unreasonable for counsel not to conduct further investigations when he has information available to him that suggests additional mitigating evidence may be available. *See Porter v. McCollum*, 558 U.S. 30, 39–40 (2009); *Wiggins*, 539 U.S. at 524–26; *Williams v. Taylor*, 529 U.S. 362, 395–96 (2000). But unlike the defense counsel described in *Wiggins*, *Porter*, and *Williams*, and as explained in excruciating detail in the district court's nearly fifty pages of record-specific analysis, Robertson's 2009 trial counsel undertook an extensive investigation into Robertson's background searching for mitigating evidence and also made strategic decisions as to what to present during the 2009 retrial. A substantial case in mitigation was in fact then presented.

After considering the district court opinion and the briefs on appeal, we agree with the district court that the *Wiggins* claims Robertson proposes to investigate "are not merely implausible, they are inane." Because Robertson's proposed claims are meritless, they cannot satisfy the *Ayestas* standard—requiring courts "to consider the potential merit of the claims that the applicant wants to pursue [and] the likelihood that the services will generate useful and admissible evidence."[1] *Ayestas*, 138 S. Ct. at 1094, *see, e.g.*, *Ochoa v. Davis*, 750 F. App'x 365, 372 (5th Cir. 2018). Consequently, the district court did not abuse its discretion.

On remand, Robertson also sought to amend his *habeas* petition and the district court held that the amended petition is not meaningfully different from a request to file a second or successive petition. Robertson now seeks a Certificate of Appealability ("COA") on this question.

"A COA will be granted only if the petitioner makes 'a substantial showing of the denial of a constitutional right.'" *Resendiz v. Quarterman*, 454 F.3d 456, 458 (5th Cir. 2006) (*per curiam*) (quoting 28 U.S.C. § 2253(c)). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Our remand was limited—to determine whether Robertson was entitled to funding under *Ayestas*. We did not vacate the district court's judgment denying Robertson federal *habeas* relief and on appeal we now affirm its

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[1] The parties have extensively briefed whether Robertson's claims are exhausted and whether this causes a procedural default. The district court concluded that Robertson's *Wiggins* claims are probably unexhausted and subject to dismissal under the principles of procedural default. This may well be true but given Robertson's inability even to make out a plausible *Wiggins* claim we need not address this conclusion.

decision to once again reject Robertson's funding request. We decline Robertson's invitation to consider what avenues for relief might have been available had his request for funding succeeded. Given the current posture, no jurist of reason would disagree with the district court's conclusion that Robertson's amended petition represents a successive filing. Robertson's request for a COA is DENIED, the district court's funding decision is AFFIRMED, and Robertson's motion to stay his execution is DENIED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MARK ROBERTSON, TDCJ No. 000992, Petitioner, VS. LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, Respondent.	)	CIVIL ACTION NO. 3:13-CV-0728-G (BK) (Death Penalty Case)

ORDER DENYING MOTIONS FOR LEAVE TO FILE AMENDED PETITION AND FOR STAY OF EXECUTION

The matter before the court is the petitioner's motion, filed March 4, 2019 (docket entry 102) requesting a stay of execution and permission to file an amended petition.

Motion for Stay of Execution

For the reasons set forth at length in the court's Sealed Memorandum Opinion and Order issued February 19, 2019 (docket entry 98), petitioner is not entitled to a stay of execution from the court at this juncture.

Motion for Permission to File an Amended Petition

In an opinion issued December 21, 2017, the Court of Appeals denied petitioner's request for a Certificate of Appealability regarding this court's judgment

denying petitioner federal habeas corpus relief. *Robertson v. Davis*, 715 F. Appx. 387 (5th Cir. Dec. 21, 2017), *cert. denied*, 139 S. Ct. 58 (2018). Subsequently, the Court of Appeals vacated this court's denial of petitioner's requests for funding pursuant to 18 U.S.C. § 3599(f) and remanded for reconsideration in light of the Supreme Court's intervening decision in *Ayestas v. Davis*, 138 S. Ct. 1080 (2018). *Robertson v. Davis*, 729 F. App'x 361, 362 ("we VACATE the district court's denial of funding and REMAND for reconsideration in light of *Ayestas.*") (5th Cir. July 5, 2018). The Court of Appeals did not vacate this court's judgment denying petitioner federal habeas corpus relief.

In the Sealed Memorandum and Opinion issued February 19, 2019, the court reconsidered all of petitioner's funding requests under the new standard set forth in *Ayestas* and concluded petitioner is still not entitled to funding under § 3599(f) to investigate potential new ineffective assistance claims -- which claims the court concluded after careful review are either foreclosed by the state court record, procedurally defaulted, or without arguable legal or factual merit.

Following the issuance of the Sealed Memorandum Opinion and Order, the court did not issue an amended judgment because there was no need to do so. To draw an analogy, Rule 58(a) of the Federal Rules of Civil Procedure provides in pertinent part that a separate judgment is unnecessary for an order disposing of a motion to amend or make additional findings under Rule 52(b), for a new trial or to

alter or amend the judgment under Rule 59, or for relief from judgment under Rule 60. The Court of Appeals' remand opinion effectively directed this court to make new findings and to reconsider its previous rulings on petitioner's funding requests, nothing more. That is what the court did. The narrow scope of the Court of Appeals' remand authorized this court to take no further action. Because the Court of Appeals has not reversed or vacated the court's previous judgment, and because of the narrow scope of Court of Appeals' remand order, there is no reason for the court to issue a new or amended judgment.

Almost five years have passed since petitioner filed his first amended federal habeas corpus petition. Almost two years have passed since the court issued its judgment denying federal habeas corpus relief -- a judgment which has yet to be reversed, vacated, or otherwise abrogated by any federal appellate court. Equally importantly, almost a decade has passed since a second Dallas County jury answered the Texas capital sentencing special issues and the state trial court imposed a sentence of death upon petitioner for his August 1989 capital offense. Petitioner argues in his motion requesting permission to file an amended petition that "[b]ecause this Court has not issued a judgment since remand, the instant motion is proper." (docket entry 102, at p. 2) Petitioner does not identify any legal authority supporting this proposition. The court has found none.

Petitioner's request for permission to file an amended petition at this juncture is no different from a request to file a second or successive federal habeas corpus petition. Except for the narrow issue of petitioner's funding requests, which the court has reconsidered and once again denied, there is nothing properly before the court. The court lacks the authority to invade the exclusive province of the Court of Appeals under 28 U.S.C. § 2244(b)(3) and grant petitioner permission to file what amounts to a successive federal habeas corpus petition.

Accordingly, it is hereby **ORDERED** that:

1. Petitioner's motion for stay of execution is in all respects **DENIED.**

2. Petitioner's motion for leave to file an amended federal habeas corpus petition is in all respects **DENIED** without prejudice to petitioner's right to request permission from the Court of Appeals pursuant to 28 U.S.C. § 2244(b)(3) for leave to file a successive petition.

SO ORDERED.

March 5, 2019.

A. Joe Fish

A. JOE FISH
Senior United States District Judge

APPENDIX C

Sealed Memorandum Opinion and Order Following Remand. *Robertson v. Davis*, Civ. No. 3:13-CV-0728-G, ECF No. 98 (N.D. Tex. Feb. 19, 2019)

FILED UNDER SEAL

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-70013

United States Court of Appeals
Fifth Circuit
FILED
July 5, 2018
Lyle W. Cayce
Clerk

MARK ROBERTSON,

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 Northern District of Texas
USDC No. 3:13-CV-728

Before CLEMENT, HAYNES, and HIGGINSON, Circuit Judges.

PER CURIAM:*

On December 21, 2017, this court issued a nondispositive opinion denying a certificate of appealability with respect to Mark Robertson's claim that his death sentence was based on materially inaccurate evidence. *Robertson v. Davis*, 715 F. App'x 387 (5th Cir. 2017). The panel reserved

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

judgment on whether the district court abused its discretion in denying funding requests under 18 U.S.C. § 3599(f).

On March 21, 2018, the Supreme Court issued *Ayestas v. Davis*, which rejected our Circuit's standard for determining whether investigative funds pursuant to § 3599(f) are "reasonably necessary." *See* 138 S. Ct. 1080 (2018). Because the district court has not had the opportunity to consider how *Ayestas* might apply to Robertson's requests—and the district court's subsequent denials—for funding, we believe the issue is best considered by the district court in the first instance. *See, e.g.*, *Sorto v. Davis*, 716 F. App'x 366, 366 (5th Cir. 2018); *Frey v. Stephens*, 616 F. App'x 704, 708 (5th Cir. 2015) (noting that we have remanded habeas cases for reconsideration "where relevant binding decisions were issued after the district court ruled").

Accordingly, we VACATE the district court's denial of funding and REMAND for reconsideration in light of *Ayestas*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution provides in relevant part, "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. . . ."

The Fourteenth Amendment to the U.S. Constitution provides in relevant part, "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

18 U.S.C. § 3599 provides in relevant part,

(a) . . .

> (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). . . .

(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 . . . .