No. 19-6181

IN THE
Supreme Court of the United States

MARK ROBERTSON,
Petitioner,

v.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

1. Should a writ of certiorari issue where the lower court properly affirmed the district court's exercise of its broad discretion to deny Robertson's funding request to help develop claims adjudicated on the merits in state court or, alternatively, claims that are unexhausted, procedurally barred, and wholly without any plausible merit?

2. Should a writ of certiorari issue where reasonable jurists would not debate that Robertson's motion for leave to file an amended habeas petition, five years after he filed his original amended habeas petition and two years after habeas relief had been denied, was an impermissible second or successive habeas petition?

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BRIEF IN OPPOSITION

Petitioner Mark Robertson was properly convicted and sentenced to death for the murder of eighty-one-year-old Edna Brau in the course of a robbery. After filing a federal habeas petition in the district court, Robertson sought funding in the amount of $25,000 under 18 U.S.C. § 3599 to pay for the services of a mitigation investigator to develop his ineffective-assistance-of-trial-counsel (IATC) claim. The district court denied Robertson's request and ultimately denied Robertson federal habeas relief. Robertson appealed the district court's denial of funding, but while that appeal was pending, this Court issued its decision in *Ayestas v. Davis*, 138 S. Ct. 1080 (2018). The Fifth Circuit then remanded Robertson's case to the district court for the limited purpose of allowing that court to reconsider its prior funding denials in light of *Ayestas*. On remand, the district court found that, even under *Ayestas*, Robertson was not entitled to funding. Robertson then filed a motion requesting leave to file an amended federal habeas petition, five years after he filed his first amended petition and two years after the district court denied him federal habeas relief. The district court denied this motion, finding that

it amounted to an impermissible second or successive habeas petition. The Fifth Circuit affirmed the district court's decisions.

Robertson now seeks this Court's review of the Fifth Circuit's affirmance. But Robertson fails to identify any compelling reasons for this Court to review the decision of the court below. Notably, the Fifth Circuit did not err in finding that the claim that Robertson requests funding for is wholly meritless. Nor did the Fifth Circuit err in finding that, given the limited remand and the fact that Robertson's substantive claims had been adjudicated and appealed, Robertson's motion for leave to amend represents a successive filing. Thus, this Court should deny Robertson's petition.

STATEMENT OF THE CASE

I. Facts of the Crime

The Texas Court of Criminal Appeals (TCCA) summarized the facts of the double homicide as follows:

> Several days after the murder at issue in this case, an officer of the Las Vegas, Nevada police department, running a routine license check on a blue Cadillac with Texas plates, was informed that the car was stolen and that the subjects should be considered armed and dangerous. [Robertson] and another man were observed approaching the car, which was now parked and unoccupied. The two were apprehended as soon as [Robertson] placed his key in the ignition. [Robertson]

was read his Miranda rights, after which he began a series of confessions.

[Robertson] first informed the two officers who arrested him that they were lucky to have approached the Cadillac so quickly, because he had not had time to retrieve a gun which was under the seat. [Robertson] then inquired as to where the television cameras were, believing that by now he would be on the television program "America's Most Wanted."

When Las Vegas Police Department Sergeant Mark Medina arrived at the scene, [Robertson] bragged to him that he was famous. Unaware of what [Robertson] was speaking of, Sergeant Medina inquired further. [Robertson] responded, "I figured I'd be on America's Most Wanted TV show by now." Sergeant Medina asked [Robertson] if he had been read his Miranda rights, and if he still wanted to talk. [Robertson] said yes, and then stated that he was on probation in Dallas for robbery and that he had shot a boy and his grandmother. [Robertson] informed Sergeant Medina that he had gone to the house of a friend, Sean Hill, who lived with his grandmother, Edna Brau, in Dallas. Hill had previously sold [Robertson] drugs so the two were acquainted. [Robertson] and Hill ingested some crystal methamphetamine, commonly referred to as "crank," and went outside to fish. While Hill was fishing, [Robertson] shot him in the back of the head with a .38 caliber pistol. He told Sergeant Medina that he went back inside to steal Hill's drugs. Once inside he saw Ms. Brau in the den watching television and shot her in the head.

[Robertson] similarly confessed orally to two other officers. In each of those confessions, [Robertson] indicated he shot Hill, went back inside the house, shot Ms. Brau, and began searching the house for valuables, drugs, and the title to Ms. Brau's car, the blue Cadillac.

[Robertson] also signed a written confession[.]

Robertson v. State, 871 S.W.2d 701, 704–05 (Tex. Crim. App. 1993). Evidence presented at the punishment phase of Robertson's first capital murder trial in 1991 also showed that, about ten days before the Hill and Brau murders, Robertson had fatally shot a store clerk during a robbery. ROA.10099–104.[1]

II. Course of State and Initial Federal Proceedings

Robertson was originally convicted and sentenced to death in 1991 for the murder of Edna Brau, in the course of committing a robbery, in Dallas County, Texas. ROA.13411–16. After obtaining *Penry*[2] relief in the TCCA on a subsequent state habeas application, Robertson was granted a new punishment trial in 2009, wherein he was again sentenced to death. *Ex parte Robertson*, No. AP-74720, 2008 WL 748373, at *1 (Tex. Crim. App. Mar. 12, 2008) (unpublished). Robertson's sentence was affirmed on appeal. *Robertson v. State*, No. AP-71224, 2011 WL 1161381 (Tex. Crim. App. Mar. 9, 2011) (unpublished).

While his direct appeal was pending, Robertson filed a state application for writ of habeas corpus raising the sole claim of IATC for

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[1] "ROA" refers to the record on appeal filed in the United States Court of Appeals for the Fifth Circuit. It includes the pleadings, orders, and other documents filed with the district court clerk, and the state-court record for Robertson's capital murder trial, resentencing trial, and direct appeal.

[2] *Penry v. Johnson*, 532 U.S. 782 (2001).

failing to adequately investigate and present mitigation evidence as required by *Wiggins v. Smith*, 539 U.S. 510 (2003). ROA.1568; *Ex parte Robertson*, No. WR-30077-03, 2013 WL 135667, at *1 (Tex. Crim. App. Jan. 9, 2013) (unpublished). Robertson specifically alleged that counsel: 1) mounted essentially the same punishment case that was unsuccessful in the first trial; 2) ignored the advice of the defense mitigation expert, Dr. Kelly Goodness; 3) failed to call Dr. Mark Vigen as a witness to testify about the future-dangerousness issue and the safety of the prison system; 4) failed to depose Doris Jordi, Robertson's prison pen pal; and 5) failed to investigate the clemency petition prepared by Robertson's former counsel, Randy Schaffer. ROA.1576–83.

The convicting court held a four-day hearing and took testimony from numerous witnesses before ultimately issuing findings of fact and conclusions of law recommending denial of relief. *See* ROA.494–749, 1148–1221. After reviewing the record, the TCCA adopted the convicting court's findings of fact and conclusions of law, "except for paragraphs 1, 2, and 3, which indicate that the allegation is procedurally barred." *Robertson*, 2013 WL 135667, at *1.

Robertson then filed a federal habeas petition, alleging only two claims for relief—an IATC claim for failing to investigate and present mitigating evidence at his resentencing proceeding and a false testimony claim. ROA.12356–57. Regarding his IATC claim, Robertson faulted trial counsel for failing to investigate and present evidence of: 1) the paternal side of Robertson's family; 2) the psychological, emotional, and physical health of his mother, which would show that he was at risk for Reactive Attachment Disorder; 3) his early childhood years in California; 4) the trauma of his breakup with his girlfriend Circle Lisa Tallant a few months before the murders; and 5) his treatable mental illness. *See* ROA.12377–93.

In her Answer to Robertson's federal petition, the Director asserted that Robertson's IATC claim as presented in the federal court had not been presented to the state courts and, thus, was unexhausted and procedurally barred. ROA.12596–600. The Director also asserted that Robertson failed to show cause and prejudice to overcome the procedural bar, as required by *Martinez/Trevino*.[3] ROA.12600–09. The Director

[3] *Martinez v. Ryan*, 566 U.S. 1 (2012); *Trevino v. Thaler*, 133 S. Ct. 1911 (2013).

argued that, alternatively, Robertson's claim failed on the merits. ROA.12609–10.

Throughout the federal proceedings, Robertson simultaneously attempted to obtain funding under § 3599. *See, e.g.*, ROA.37–40, 105–10, 12313–17. Many of these attempts occurred ex parte and under seal, culminating in an ex parte motion filed after the submission of his amended federal habeas petition, in which he sought $25,000 for the retention of a mitigation investigator to develop and present his IATC failure-to-investigate claim. *See* ROA.12637–64. Robertson relied, in part, on the Director's exhaustion argument to argue that the district court's prior denials of funding—based on its determination that Robertson had raised an IATC claim for failure to investigate and present that was adjudicated in state court—were incorrect. ROA.12653–54. Robertson alleged that both he and the Director were "in agreement" that his federal IATC claim—which Robertson characterized as only a failure-to-*investigate*, not failure-to-*present*, claim—was unexhausted, and he was thus entitled to funding to further develop the unexhausted failure-to-investigate claim or to excuse the procedural default. *Id*.

The Director filed a response to Robertson's motion, acknowledging that, because the Director was not privy to the court's prior orders denying funding, she had mounted an affirmative defense to Robertson's federal IATC claim that was inconsistent with the court's orders. ROA.12766–67 n.4. The Director argued, however, that, because the district court considered Robertson's *Wiggins*-related claim to have been reviewed on the merits in state court, the court should not allow funding for the development of evidence that it cannot consider pursuant to *Cullen v. Pinholster*, 563 U.S. 170, 185 (2011). ROA.12764, 12766–67 n.4. The Director alternatively argued that the claim was in fact defaulted, and as such, the court should deny funding. ROA.12766–67.

The district court subsequently denied both Robertson's petition for writ of habeas corpus and his request for funding. ROA.12816–26, 12828–73. Regarding Robertson's funding request, the district court noted that it had previously denied funding because the claim had been adjudicated on the merits in state court, and further evidentiary development was precluded under *Pinholster*. ROA.12820. The court noted that Robertson now asserted that, based on the Director's answer, both parties agreed that the claim was unexhausted and, thus, not subject to *Pinholster*. *Id.*

However, regardless of whether the parties "agreed" that the claim was unexhausted—which the court noted was not clear given the Director's statements in her response to Robertson's motion for funding[4]—the court was still obligated to make an independent determination of exhaustion. ROA.12820–21 (citing *Ward v. Stephens*, 777 F.3d 250, 257 n.3 (5th Cir. 2015)). The court found that, in order to show he was presenting an unexhausted claim in federal court, Robertson appeared willing to entirely abandon all those portions of his claim that *were* actually presented to the state court, i.e., those related to a failure to *present* evidence. ROA.12824. But whether Robertson was seeking funds for additional evidence for an exhausted claim that cannot be considered under *Pinholster* or whether Robertson was seeking funds for a fishing expedition to support an unexhausted claim that would be procedurally barred, the court found that Robertson failed to show that such funds were reasonably necessary. ROA.12825.

Regarding the lower court's denial of habeas relief, the court found that Robertson had expressly abandoned his exhausted claim.

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[4] Indeed, as argued in her Answer and her response to Robertson's funding motion, the Director believes that Robertson's claim can be fairly construed as either unexhausted or exhausted, respectively. *See* Reasons for Denying the Writ II.C, *infra*.

ROA.12857. Indeed, in Robertson's reply, he had not only expressly disavowed any failure-to-present element of the IATC claim, but he had also refused to reassert the factual allegations that had been raised in the state court. ROA.12858. Thus, while noting that a new and unexhausted claim does not entitle Robertson to funding or evidentiary development in federal court, the court dismissed Robertson's federal IATC claim as unexhausted and procedurally barred.[5] ROA.12858–59. In an extensive discussion of the merits of Robertson's claim, the court alternatively held that Robertson had failed to demonstrate entitlement to relief, notwithstanding any failure to exhaust. ROA.12857 (citing 28 U.S.C. § 2254(b)(2)), ROA.12860. Finally, the court held that, consequently, Robertson had failed to establish a substantial IATC claim sufficient to overcome the procedural bar pursuant to *Martinez/Trevino*. ROA.12859.

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[5] Contrary to Robertson's assertions, Petition at 15, the district court did not "reverse" its prior holdings denying investigative services by dismissing the claim as unexhausted. Rather, the district court was faced with Robertson's strategic decision to disavow any failure-to-present element of his *Strickland v. Washington*, 466 U.S. 668 (1984), claim and to abandon the factual allegations presented to the state court. *See* ROA.12848–49. Thus, when it denied Robertson funding, the court found that funding was not reasonably necessary in both instances: whether the claim was exhausted—as it had previously held—or unexhausted, if Robertson was willing to abandon his exhausted claim as indicated in his reply. *See* ROA.12824–25.

Shortly thereafter, Robertson noticed his intent to appeal both the district court's denial of habeas relief and its denial of funding. ROA.12880. Following this, Robertson filed two separate briefs—one in which he requested a certificate of appealability (COA) on only the false testimony claim and the other which was an appeal-as-of-right of the district court's denial of funding. Br. of Robertson In Supp. of COA on Claim 2 (Warden Nelson Testimony), *Robertson v. Davis*, 715 F. App'x 387 (5th Cir. 2018) (No. 17-70013); Merits Br. of Robertson, *Robertson v. Davis*, 729 F. App'x 361 (5th Cir. 2018) (No. 17-70013). Although the lower court had denied Robertson's IATC claim alternatively on the merits, ROA.12860, Robertson did not seek a COA of this claim. On December 21, 2017, the Fifth Circuit denied Robertson a COA on his false testimony claim but did not rule on Robertson's funding appeal. *See Robertson*, 715 F. App'x at 388.

III. Post-*Ayestas* Proceedings

On March 21, 2018, while the funding issue was still pending before the Fifth Circuit, this Court issued its decision in *Ayestas*, which clarified the appropriate standard for evaluating § 3599 funding requests. 138 S. Ct. at 1092–95. The Fifth Circuit then vacated the district court's denial

of funding and remanded the case for reconsideration in light of *Ayestas*. *Robertson*, 729 F. App'x at 362. Following this Court's denial of Robertson's petition for writ of certiorari on the false testimony claim, *see Robertson v. Davis*, 139 S. Ct. 58 (2018), and the state trial court's setting of Robertson's execution date for April 11, 2019, the district court issued an order to the parties to submit supplemental briefs. ROA.12923–24.

The parties submitted their supplemental briefs and replies, ROA.12925–66, 12977–13063, and Robertson filed a separate motion for a stay of execution. ROA.12967–76. On February 19, 2019, the district court issued a sealed order in which it found: Robertson was not entitled to funding, even under *Ayestas*; Robertson was not entitled to a stay of execution; and Robertson was not entitled to a COA; but Robertson was entitled to the appointment of co-counsel. Pet'r App. C, at 1. The parties filed a joint motion to unseal the court's order, ROA.13070–72, but the motion was denied. *See* Sealed Order Denying Mot. to Unseal Docket Entry 98, ECF No. 101.

Nearly two weeks after the district court denied funding, Robertson filed a motion for leave to file an amended federal petition and for a stay of execution. ROA.13073–76. The lower court denied both of Robertson's

motions, finding that his request for leave to amend amounted to a second or successive habeas petition for which Robertson needed the Fifth Circuit's permission to file. Pet'r App. B, at 6–9. Yet another two weeks after that, Robertson filed a notice of appeal, appealing the district court's denial of funding, denial of a stay of execution, denial of a COA, denial of the parties' motion to unseal, and denial of leave to file an amended habeas petition. ROA.13081–82. The Fifth Circuit then denied Robertson a COA on his motion for leave to file an amended petition, affirmed the district court's denial of funding, and denied Robertson a stay of execution.[6] Pet'r App. A, at 1–5; *Robertson v. Davis*, 763 F. App'x 378, 380 (5th Cir. Apr. 3, 2019) (unpublished).

On April 8, 2019, the TCCA stayed Robertson's April 11 execution pending consideration of an unrelated issue. *Ex parte Robertson*, No. WR-30,077-01, 2019 WL 1529466, at *1 (Tex. Crim. App. Apr. 8, 2019) (unpublished). In June, Robertson filed the instant petition for writ of certiorari. This proceeding follows.

[6] The Fifth Circuit also granted Robertson's motion to file the pleadings—but not its order—under seal, based on the district court's order remaining under seal.

REASONS FOR DENYING THE WRIT

I. Robertson Provides No Compelling Reason to Expend Limited Judicial Resources on This Case.

The questions Robertson presents for review are unworthy of the Court's attention. Robertson has failed to provide a single "compelling reason" to grant review. Indeed, no conflict among the circuits has been supplied, no important issue proposed, nor has a similar pending case been identified to justify this Court's discretionary review. Despite an overwhelming failure to demonstrate a plausible claim worthy of funding, Robertson contends that the Fifth Circuit misapplied the *Ayestas* standard when it affirmed the district court's denial of funding. Similarly, Robertson bases his complaint about the Fifth Circuit's denial of COA on his motion for leave to amend on a misunderstanding of that Court's remand order. These are, at best, simply requests for error correction, and this Court's limited resources would be better spent elsewhere. *See* Sup. Ct. R. 10 ("A petition for writ of certiorari is rarely granted when the asserted error consists of . . . misapplication of a properly stated rule of law."); *Citibank, N.A. v. Wells Fargo Asia Ltd.*, 495 U.S. 660, 674 (1990) (Rehnquist, C.J., concurring) (questioning why certiorari was granted when the opinion decided "no novel or undecided

question of federal law" and merely "recanvasse[d] the same material already canvassed by the Court of Appeals").

Even more importantly, this case is a poor vehicle to address the questions on which Robertson seeks review. First, neither the district court nor the Fifth Circuit erred in their straightforward—and proper—application of *Ayestas*, particularly where Robertson's IATC is wholly without merit. Indeed, even if this Court were to agree with Robertson that his claim has some plausible merit, Robertson would still not be able to overcome the procedural hurdle presented by 28 U.S.C. § 2254(e)(2).

Second, the lower courts' determinations that Robertson's motion for leave to file an amended petition was a successive filing were also straightforward applications of the prohibition against successive petitions, particularly where Robertson's initial habeas proceedings were affirmed on appeal by the Fifth Circuit and did not merit review by this Court. That Robertson did not avail himself of the opportunity to appeal the denial of his IATC claim does not mean that he may now file a second federal petition without running afoul of the successiveness statute. Moreover, the lower court's determination of successiveness was dependent, in part, on the particular procedural posture of the case and,

thus, the question presented is fact-specific to this case. Respondent therefore respectfully suggests that certiorari be denied.

II. The Fifth Circuit's Straightforward Application of *Ayestas* Does Not Warrant Review.

Robertson alleges that the Fifth Circuit erred in affirming the district court's denial of funding because it misapplied *Ayestas* when it found that Robertson's IATC claim was "inane." Petition at 27–35. Robertson relies on the 2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act and his assertion that district courts have not granted funding post-*Ayestas* as evidence that the lower courts—and the Fifth Circuit in particular—need guidance in how to properly review § 3599 requests, under the principles enumerated in *Ayestas*. Petition at 22–27.

But Robertson failed to proffer this evidence in any of the lower courts, and any such arguments are therefore waived. Moreover, Robertson wholly fails to demonstrate that the funding he seeks *in this case* was reasonably necessary. Indeed, whether or not Robertson's IATC claim is considered exhausted or unexhausted, funding cannot be reasonably necessary where it would only support a wholly implausible claim. To be sure, there is no further investigation that could show that

counsel performed deficiently in light of the substantial mitigation investigation conducted at trial. And, even if the Court were to consider that the claim was in any way plausible, Robertson would still not be able to overcome the procedural hurdle presented in § 2254(e)(2). Thus, even under *Ayestas*, Robertson is not entitled to funding, and the Fifth Circuit did not err in affirming the district court's denial. This Court should therefore deny Robertson's petition.

A. Applicable law

In *Ayestas*, this Court abrogated the Fifth Circuit's precedent that required a petitioner under § 3599 to show a "substantial need" for requested investigatory funds or services. 138 S. Ct. at 1092–95. This Court unanimously made clear that the appropriate standard to apply is "reasonably necessary," i.e., "whether a reasonable attorney would regard the services as sufficiently important." *Id.* at 1093. The Court enumerated three "considerations" to guide the "[p]roper application" of this standard: "[1] the potential merit of the claims that the applicant wants to pursue, [2] the likelihood that the services will generate useful and admissible evidence, and [3] the prospect that the applicant will be able to clear any procedural hurdles standing in the way." *Id.* at 1094.

The key to this analysis is "the likelihood that the contemplated services will help the applicant win relief." The Court explained:

> After all, the 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.

Id. The Court stressed that this inquiry turns on "the likely *utility* of the services requested, and § 3599 cannot be read to guarantee that an applicant will have enough money to turn over every stone."[7] *Id*. (emphasis added); *see also Crutsinger v. Davis*, 898 F.3d 584, 586 (5th Cir. 2018) ("[T]he touchstone of the inquiry is 'the likely *utility* of the services requested."), *cert. denied*, 139 S. Ct. 801 (2019); *Ochoa v. Davis*,

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[7] Robertson argues, as he did in the court below, that because the Court noted that the interpretive principles it espoused were "consistent with the way in which § 3599's predecessors were read by the lower courts," *Ayestas*, 138. S Ct. at 1094, those lower courts' rules were somehow adopted by this Court. *See* Petition at 22 (defining the "reasonable-attorney standard" as the Seventh Circuit did in the pre-*Ayestas* case *United States v. Alden*, 767 F.2d 314 (7th Cir. 1984), and stating that, because *Alden* was cited by the Court in *Ayestas*, *Alden*'s approach was "unanimously adopted"). But this Court provided explicit guidance for determining whether a "reasonable attorney" would deem a particular service "sufficiently important." *See Ayestas*, 138 S. Ct. at 1093 (holding that "reasonably necessary" means "a determination by the district court, in the exercise of its discretion, as to whether a reasonable attorney would regard the services as sufficiently important, *guided by the considerations we set out more fully below*." (emphasis added)). And there is certainly no indication that, by citing to the lower court cases, the Court intended for its explicit guidance to be usurped by the lower courts' previous interpretations.

750 F. App'x 365, 373 (5th Cir. 2018) (unpublished), *cert. denied*, --- S. Ct. ---, 2019 WL 4921551 (Mem.) (Oct. 7, 2019) (finding that "[b]ecause extensive mitigation evidence was available to [petitioner]'s defense and later presented to the jury, it is unlikely that the contemplated services will help [petitioner] win relief on the *Wiggins* claim"). Importantly, however, *Ayestas* confirmed that § 3599 grants a district court broad discretion to deny funding even if a petitioner shows a reasonable need for it. 138 S. Ct. at 1094; *accord* § 3599(f) (upon a finding that services are reasonably necessary, "the court *may* authorize the defendant's attorneys to obtain such services.") (emphasis added).

B. Robertson's arguments that the Fifth Circuit and Texas courts have broadly misapplied *Ayestas* are waived and without merit.

Robertson first attempts to cast doubt on the lower courts' application of *Ayestas* by referencing a 2017 Judicial Conference report analyzing the Criminal Justice Act. *See* Petition at 20–25. Robertson alleges that the report identified large disparities in the quality of representation appointed by the judiciary and alleges that the report faulted Texas and the Fifth Circuit in particular. Petition at 24. Robertson then attempts to bolster the findings made in the report by

arguing that, because he is unaware of any Texas district court granting funding post-*Ayestas*, the courts must be misapplying that standard and now require guidance to do so correctly. Petition at 25–27.

But Robertson never raised a broad challenge to Texas federal court operations when he was before those very courts. Indeed, the 2017 report was not even cited to in his COA application before the lower court, despite the final version of the report having been released seven months prior to the briefing schedule being issued in the district court. *Compare* Petition at 23 (stating that the judicial committee "issued its final revised report detailing its findings in April 2018"), *with* ROA.12924 (briefing schedule issued November 27, 2018). Robertson's failure to raise these broad challenges to the lower courts' application of *Ayestas* in the lower court should preclude consideration of his argument in this Court. "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Pennsylvania Dept. of Corr. v. Yeskey*, 524 U.S. 206, 212–13 (1998); *Meyer v. Holley*, 537 U.S. 280, 292 (2003) ("But in the absence of consideration of that matter by the Court of Appeals, we shall not consider it."); *Muhammad v. Close*,

540 U.S. 749, 755 (2004). Therefore, this case does not warrant the exercise of the Court's discretion.

However, even if these arguments are properly before this Court, they do not warrant review. Indeed, the Judicial Conference publishes "suggestions and recommendations," *see* 28 U.S.C. § 331 ("[The Judicial Conference] shall also submit suggestions and recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business."), which, although entitled to "respectful consideration," are not binding on the courts. *See Hollingsworth v. Perry*, 558 U.S. 183, 193 (2010) ("While the policy conclusions of the Judicial Conference may not be binding on the lower courts, they are 'at the very least entitled to respectful consideration.'"). At best, Robertson's reliance on the report is merely an attempt to manufacture an important question by pointing to what amounts to character evidence of the courts generally that has little bearing on the lower courts' application of *Ayestas* in *this* case. This is particularly true where, as explained further below, the Fifth Circuit correctly identified and properly applied the standard of review. This Court should therefore decline to review Robertson's petition.

C. Whether Robertson's claim is exhausted or not, funding cannot be reasonably necessary to develop evidence for a claim that is plainly meritless.

As a preliminary matter, and as noted by the court below, the parties have extensively briefed in both lower courts the question of whether Robertson's instant IATC claim is exhausted and the effect of that determination on his funding request. Pet'r App. A, at 4 n.1. But, while the Director maintains that Robertson's IATC claim was adjudicated in state court and is therefore exhausted,[8] the Fifth Circuit correctly noted that, in either case, Robertson cannot demonstrate that he is entitled to funding because he wholly fails to allege a plausible

[8] Indeed, as argued in much greater detail in her opposition before the Fifth Circuit, Robertson raised a *Wiggins* failure-to-investigate claim before the state court, *see* ROA.1568 (alleging IATC for "failure to adequately investigate and present mitigation evidence as required by *Wiggins*[.]"), ROA.1569–72 (citing to case law, American Bar Association Guidelines, and State Bar of Texas Guidelines regarding counsel's duty to investigate), and a *Wiggins*-based IATC claim was adjudicated by that court, *see, e.g.*, ROA.1207 ¶¶ 173–74 (finding that counsel was not deficient for failing to investigate but "even if trial counsel were considered deficient for *failing to adequately investigate*," Robertson does not demonstrate prejudice (emphasis added)). *See* Resp't–Appellee's Resp. Opp'n to Appl. COA at 28–35, *Robertson v. Davis*, 763 F. App'x 378 (5th Cir. Apr. 3, 2019) (No. 19-70006) (unpublished). This Court has made clear that such adjudication has the consequence of prohibiting factual development or consideration of new evidence in federal court given the reasonableness of the state court decision. *See Pinholster*, 563 U.S. at 185. Thus, under *Ayestas*, no matter how "useful" the evidence Robertson seeks to develop would be in the abstract, it would never be "admissible" to undermine a state court's adjudication in a federal habeas proceeding. 138 S. Ct. at 1094 (emphasis added). Therefore, the district court could not have abused its discretion in denying funding under *Ayestas*.

Wiggins claim. *See id.* Robertson's petition therefore does warrant this Court's review.

To briefly review, the familiar two-prong test set out in *Strickland v. Washington* requires an inmate attacking the constitutional adequacy of counsel's representation to prove both deficient performance and prejudice arising from the alleged deficiency. 466 U.S. at 687. "Surmounting *Strickland's* high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). "Judicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689. And "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight." *Id.* Defense counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 690–91. When assessing the reasonableness of an attorney's investigation, a federal habeas court must "consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527. Counsel's decision not to investigate a particular matter "must be directly assessed for reasonableness in all the

circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* at 521–22. Regarding prejudice, reviewing courts "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534. In order to answer that question, it is necessary to consider all the relevant evidence a jury would have had before it if counsel pursued a different path—not just the mitigation evidence counsel should have presented, but also any potentially damaging aggravating evidence that would come along with it. *See Wong v. Belmontes*, 558 U.S. 15, 20 (2009).

Robertson's request for funding to retain a mitigation expert is tied to an IATC claim that, at its core, is an assertion that Robertson's trial counsel chose not to investigate mitigation evidence that Robertson's current counsel, in hindsight, would have investigated. But assuming Robertson can and did expressly abandon the *failure-to-present* element of this claim in order to raise an unexhausted claim in federal court, *see* Statement of the Case II, *supra*, then—as pointed out by the district court in its denial of habeas relief—he does not even allege any prejudice, as the jury's verdict could not have been altered if it had not been presented with the alleged evidence counsel should have discovered, and a

reviewing court cannot reweigh the evidence in aggravation against the totality of the allegedly available mitigating evidence. *See* ROA.12850 ("Without any corresponding allegation regarding how this failure to investigate impacted trial counsel's presentation to the jury deciding his punishment, Robertson does not say how any such failure could have resulted in harm or prejudice."); *Wiggins*, 539 U.S. at 536 (reweighing the alleged mitigating evidence with the aggravating evidence and finding that "had the *jury been confronted* with this considerable mitigating evidence, there is a reasonable probability that it would have returned with a different sentence" (emphasis added)).

In any event, the lower courts correctly found that Robertson wholly fails to demonstrate any deficiency in trial counsel's investigation. ROA.12851–57; Pet'r App. A, at 3; Pet'r App. C, at 39–46. Indeed, as the district court noted when it initially denied habeas relief, "this is not a case where trial counsel completely failed to investigate and present mitigating evidence." ROA.12851. Rather:

> Robertson's counsel also sought and obtained the assistance of a team of punishment phase experts including forensic psychologist Kristi Compton; forensic psychologist and prison consultant Mark Vigen; clinical psychologist and substance abuse expert Ari Kalechstein; psychologist and mitigation expert Kelly Goodness; prison expert S.O. Woods; former

> Texas Department of Criminal Justice employee Larry Fitzgerald; and future dangerousness expert Jon Sorenson.[9]

ROA.12851–52 (citing to ROA.1209). And the state habeas court found that "trial counsel utilized these experts to conduct a thorough mitigation investigation that included the review of a wide variety of documents, interviews with numerous individuals, and a time line of Robertson's life."[10] ROA.12852 (citing to ROA.1211). Indeed, as noted by the Fifth Circuit, Pet'r App. A, at 3, the district court exhaustively detailed the mitigation investigation and presentation at both Robertson's 1991 and 2009 retrial, and both courts correctly found that, unlike the petitioners

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[9] Robertson asserts that "[t]he record did not reflect that trial counsel ever sought authorization to retain a person specifically trained to investigate mitigation." Petition at 4. But the state habeas court found that the trial team had in fact hired Dr. Kelly Goodness "as a mitigation consultant," who "worked closely with the defense team, investigated Robertson's background, and suggested salient potentially mitigating factors." ROA.1210. And the state court found credible trial counsel's description of Dr. Goodness's role as being their "mitigation expert" and made findings as to "the thoroughness of the mitigation investigation" conducted by Dr. Goodness and the other trial experts. ROA.1210–11, ¶¶ 185–86.

[10] As correctly found by the district court, even if this claim is not considered adjudicated by the state court—an adjudication which would receive deference under § 2254(d)(1)—the state court's factual findings are entitled to a presumption of correctness under § 2254(e)(1) that Robertson fails to rebut. *See* ROA.12851; *see also Austin v. Davis*, 876 F.3d 757, 778 (5th Cir. 2017) (holding that § 2254(e)(1) deference applies "even if no claims were presented on direct appeal or state habeas"); *cf. (Jedidiah) Murphy v. Davis*, 901 F.3d 578, 596–97 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 1263 (2019) (finding that, even where the TCCA dismissed an application on procedural grounds, § 2254(e)(1) applies to the state court's alternative merits findings).

in *Wiggins*, *Porter*,[11] and *Williams*,[12] Robertson's 2009 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."[13] Pet'r App. A, at 3; Pet'r App. C, at 12–29. Indeed, contrary to Robertson's attempts to underrate counsel's

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[11] *Porter v. McCollum*, 558 U.S. 30 (2009).

[12] *(Terry) Williams v. Taylor*, 529 U.S. 362 (2000).

[13] In its sealed order denying funding, the district court proceeded to analyze specific areas of investigation that Robertson had referenced in his funding requests, ultimately concluding that each had either been contradicted by then-available evidence, was known to counsel, or was so inherently double-edged as to be potentially harmful to their efforts. *See* Pet'r App. C, at 39–43. Robertson takes issue with these findings, alleging that the court made "fact-findings" about the merits of the claim without affording Robertson a hearing, at which he alleges he would have proved that such findings were "clearly erroneous." Petition at 32. Robertson also takes issue with the district court relying on the state court record in making its determination because the court would not have had that record before a habeas petition was filed, when it would most usually be reviewing these type of funding requests. Petition at 31–32. But Robertson's final funding request was filed not only after his habeas petition, but also after the Director's answer, so the court would—and did—have the state court record available to it when initially reviewing Robertson's request. *See* ROA.7 (first amended petition at ECF No. 47, Director's answer at ECF No. 50, and renewed ex parte application for funding at ECF No. 53). And the state court record is certainly "evidence" that a court may, and should, consider if it is available when evaluating the "likely utility" of such requests, as *Ayestas* instructs. In any case, despite his complaints that the district court conducted a fuller merits review than was warranted under *Ayestas*, Robertson's complaint that the court made findings based on the materials proffered in his funding requests contradictorily seems to imply that he would require the courts to "hear evidence" before granting or denying such requests, i.e., conducting a fuller merits review. Such interpretation simply cannot be the case and in no way demonstrates an abuse of discretion.

mitigation presentation, *see* Petition at 4–6, "[a] substantial case in mitigation was in fact then presented." Pet'r App. A, at 3.

Robertson's arguments, in effect, amount to nothing more than mere disagreement with the *degree* to which trial counsel investigated and presented this evidence, and such an argument impermissibly second-guesses counsel's actions. *See Wiggins*, 539 U.S. at 533 ("*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing."); *Rompilla v. Beard*, 545 U.S. 374, 383 (2005) ("[Reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste."); *see also Hummel v. Davis*, 908 F.3d 987, 992 (5th Cir. 2018), *cert. denied*, --- S. Ct. ---, 2019 WL 4921540 (Mem.) (Oct. 7, 2019) (noting that petitioner's argument that counsel failed to investigate and present certain mitigating evidence "boils down to a matter of degree," which is "a difficult route by which to demonstrate ineffective assistance"). And, as the district court correctly held, trial counsel was entitled to rely on their experts. *See* ROA.12856; *see also (Jedidiah) Murphy*, 901 F.3d at 592–93 (finding that "counsel was entitled to 'rely upon the objectively

reasonable evaluations and opinions of'" their expert (citing *Segundo v. Davis*, 831 F.3d 345, 352 (5th Cir. 2016)). Robertson cannot satisfy the deficiency prong of *Strickland*.

Thus, the district court properly found:

> In light of the extensive pretrial investigation undertaken by [Robertson]'s 2009 defense team . . . as well as the extensive case in mitigation actually presented during [Robertson]'s 2009 retrial by his defense team, the unexhausted *Wiggins* claims [Robertson] proposes to investigate in his motions requesting funding under § 3599 are not merely implausible, they are inane.[14]

Pet'r App. C, at 45. The Fifth Circuit agreed. Pet'r App. A, at 4. This is especially true given the overwhelming aggravating evidence presented by the State: "[Robertson] executed three people in connection with a pair of robberies committed less than two weeks apart," and as admitted by even Robertson's own witnesses, Robertson "showed little-to-no remorse for his criminal behavior" in the immediate aftermath of his crimes. Pet'r App. C, at 46.

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[14] Robertson spends much of his argument quibbling over the lower courts' use of the word "inane." *See* Petition at 18–19, 26, 32, 34 n.15. But the use of this word was clearly intended to highlight the meritless nature of the claim, as both courts explicitly also found that the claim was "not merely *implausible*," but inane. Pet'r App. A, at 4 (emphasis added); Pet'r App. C, at 45 (emphasis added). This was a direct application of both the language and guiding principles of *Ayestas*.

The Fifth Circuit thus appropriately held that Robertson's claim was plainly meritless, and as such, even under *Ayestas*, the investigation that Robertson sought to fund was simply not reasonably necessary. Pet'r App. A, at 4. Indeed, contrary to Robertson's assertions, "it would not be reasonable—in fact, it would be quite unreasonable—to think that services are necessary to [Robertson]'s representation if, realistically speaking, they stand little hope of helping him win relief."[15] *Ayestas*, 138 S. Ct. at 1094. Consequently, this Court should not exercise its discretion to review Robertson's case.

D. Robertson was not denied his right to representation.

Perhaps acknowledging that he is not entitled to funding for the specific facts of the claim he wishes to investigate, Robertson instead alleges that a district court's denial of funding deprives him of his right to quality representation under § 3599. *See* Petition at 19–22. But

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[15] Robertson attempts to cast doubt on the thoroughness of the district court's opinion on remand by faulting the court for taking "almost eight months from the date of remand to produce its 57-page opinion order," a duration which Robertson alleges would have run afoul of the limitations period had the court taken the same approach when it initially received Robertson's funding request. Petition at 31. But the district court issued its briefing schedule on remand from the Fifth Circuit in late November 2017 and produced its opinion affirming its prior funding denials in February 2018, *see* ROA.12924; Pet'r App. C, at 57, and there is nothing beyond speculation to indicate exactly how long the district court would have taken had it needed to apply *Ayestas* when it initially received his request. Robertson's complaint is therefore not well-taken.

Robertson's insinuation that the lower court's entirely discretionary denial of funding amounts to a deprivation of his right to representation has no basis in law. *See Ayestas*, 138 S. Ct. at 1092 ("Here we are concerned not with legal representation but with services provided by experts, investigators, and the like."), 1094 (affirming that district courts have broad discretion in assessing funding requests). Robertson cites to *McFarland v. Scott*, 512 U.S. 849 (1994), but *McFarland* is inapposite. In that case, this Court held that an indigent capital defendant, who had not yet filed an initial state habeas application, was entitled to the appointment of qualified legal counsel once a federal postconviction proceeding has commenced and that an attendant stay of execution was warranted to allow newly appointed counsel to investigate claims and file a federal habeas petition. 512 U.S. at 857–59. And, while *McFarland* certainly does contemplate that legal counsel will need investigative funding, *see id.* at 855, it does not mandate that funding must always be granted and does not undermine the discretionary nature of the funding statute.

Indeed, Robertson has had the same qualified counsel representing him for six years, as *McFarland* requires. And the lower court's docket

indicates that, although Robertson was not granted the additional funds he requested, counsel for Robertson was given at least $53,000 in order to investigate and present a federal petition on Robertson's behalf. *See* ROA.6–7 (ECF Nos. 24, 48–49). And counsel did just that, filing a well-briefed petition raising two points of error (including the IATC claim at issue here), supported by thirteen exhibits. *See* ROA.12354–426. Thus, Robertson has certainly received his statutory right to representation.

Robertson resists this straightforward proposition by implying that, under the "reasonable attorney" standard espoused in *Ayestas*, a district court's decision *not* to grant funding would necessarily mean that the attorney requesting such funding was unreasonable in doing so. *See* Petition at 33–34 n.15, 16. Robertson makes this argument presumably in an attempt to undermine the quality of federal habeas representation that he believes he is entitled to under § 3599. But to so hold would be to transform that discretionary decision into a mandatory one. And such a conclusion is directly contradictory to both the language of the statute and this Court's clear intent to affirm the entirely discretionary nature of a district court's funding decision. *See Ayestas*, 138 S. Ct. at 1094 ("Then, as part of the Antiterrorism and Effective Death Penalty Act of

1996 . . . Congress changed the verb from 'shall' to 'may,' and thus made it perfectly clear that determining whether funding is 'reasonably necessary' is a decision as to which district courts enjoy broad discretion."). Surely this Court did not intend to affirm a district court's broad exercise of discretion at the cost of the effectiveness of a federal capital habeas defendant's right to quality representation. Therefore, Robertson's attempts to impugn this Court's standard for reviewing funding requests under § 3599 is unavailing. And, regardless, Robertson fails to demonstrate that the claim for which he sought funding has any plausible merit. He, therefore, cannot show that "a reasonable attorney would regard the services as sufficiently important." *Ayestas*, 138 S. Ct. at 1093. This Court should decline to exercise its discretion to review Robertson's case.

E. In any event, 28 U.S.C. § 2254(e)(2) would prohibit the introduction of new evidence.

Robertson's funding request faces one final obstacle: *Ayestas* explains that a court faced with a funding request should consider "the prospect that the applicant will be able to clear any procedural hurdles standing in the way." 138 S. Ct. at 1094. Even assuming Robertson's underlying IATC claim is unexhausted, 28 U.S.C. § 2254(e)(2) presents

an additional procedural hurdle that he would not be able to overcome.[16] Indeed, § 2254(e)(2) "restricts the discretion of federal courts to consider new evidence when deciding claims that were not adjudicated on the merits in state court." *Pinholster*, 563 U.S. at 186; *(Michael) Williams v. Taylor*, 529 U.S. 420, 427–29 (2000) (applying § 2254(e)(2) to the introduction of evidence that would support an unexhausted *Brady*[17] claim); *see also Holland v. Jackson*, 542 U.S. 649, 653 (2004) (applying this restriction whether petitioner seeks to introduce new evidence through either a live evidentiary hearing or through written submission).

AEDPA'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." 28 U.S.C. § 2254(e)(2). That opening clause is met if the prisoner "was at fault for failing to develop the factual bases for his claims in state court," *Bradshaw v. Richey*, 546 U.S. 74, 79 (2005) (per curiam), meaning a "lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Williams*, 529 U.S. at 432. Under accepted agency principles, state habeas counsel's lack of diligence

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16 The *Ayestas* Court did not pass on this issue. 138 S. Ct. at 1096.

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

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

Here, Robertson alleges that he reasonably determined that state habeas counsel's investigation was deficient. Petition at 30–31. Robertson's argument expressly admits that state habeas counsel was not diligent in developing the factual basis for this IATC claim. Thus, § 2254(e)(2)'s opening clause is satisfied. And Robertson cannot demonstrate that he meets any exception to § 2254(e)(2)'s bar on new evidence: he does not demonstrate a new retroactive rule of constitutional law and does not show diligence plus actual innocence. 28 U.S.C. § 2254(e)(2)(A)–(B). In sum, funding an investigation to procure additional evidence would be pointless since it would not allow Robertson to circumvent this procedural hurdle. Therefore, the Fifth Circuit appropriately applied the *Ayestas* standard in affirming the district

court's denial of funding, and Robertson's petition does not warrant this Court's review.

III. The Fifth Circuit's Straightforward Application of Successiveness Principles Does Not Warrant Review.

Robertson alleges that the lower court erred in denying COA on his request for leave to amend his federal habeas petition because it erroneously concluded that, when it reversed the district court's funding denial and remanded the case for further consideration in light of *Ayestas*, the district court's final judgment was undisturbed, and any request to amend the underlying federal habeas petition was therefore undebatably successive. Petition at 35–38. But Robertson is mistaken as to the Fifth Circuit's remand order.

Indeed, Robertson's argument is premised, at least in part, on the mistaken assertion that the proceedings before the district court on remand were somehow part of "initial habeas proceedings" such that a *live* IATC claim still existed. *See id.* at 39 ("Generally, amendment of an initial habeas application is not a successive habeas corpus application."). But the district court issued final judgment as to his substantive federal claims on March 30, 2017, ROA.12874, and Robertson's appeal of those substantive claims terminated on October 1, 2018, when this Court

declined to grant Robertson's petition for writ of certiorari. *Robertson*, 139 S. Ct. at 58. That Robertson has not at any point sought a COA on the underlying IATC claim for which he sought funding does not mean that initial federal review as to his substantive claims has not been completed.

Further, the Fifth Circuit's order remanding the case for reconsideration in light of *Ayestas* was expressly for a limited purpose: the district court had "not had the opportunity to consider how *Ayestas* might apply to Robertson's requests—and the district court's subsequent denials—for funding," and the court therefore "believe[d] the issue is best considered by the district court in the first instance." Pet'r App. D, at 12. Thus, as the Fifth Circuit made clear when it affirmed the district court's denial of the motion for leave to amend, the court did not "vacate the district court's judgment denying Robertson federal *habeas* relief," Pet'r App. A, at 4; rather, it vacated only the district court's funding determinations and in no way passed on or undermined the lower court's

denial of the substantive IATC claim, which Robertson never appealed.[18] The district court's final judgment therefore still stands.[19] ROA.12874.

Robertson's arguments that he can amend his finally-adjudicated habeas petition with a new claim therefore have no purchase. That is, a district court's "[f]inal judgment marks a terminal point." *See Phillips v. United States*, 668 F.3d 433, 435–36 (7th Cir. 2012) (finding a Rule 60(b) motion filed while an underlying § 2255 petition was on appeal to be second or successive). As a result, under 28 U.S.C. § 2244(b), Robertson's motion was clearly successive, as it was an explicit attempt to present a

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[18] Indeed, the Fifth Circuit's order was analogous to this Court's orders granting certiorari, vacating the judgment below, and remanding the case (GVR), which is not an order that purports to rule on the merits. *See Wellons v. Hall*, 558 U.S. 220, 225 (2010) ("But the standard for [a GVR] remains as it always has been: A GVR is appropriate when 'intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome' of the matter."); *see also Kenemore v. Roy*, 690 F.3d 639, 641 (5th Cir. 2012) ("When the Supreme Court utilizes its GVR power, however, it is not making a decision that has any determinative impact on future lower-court proceedings.")

[19] Robertson argues that the Fifth Circuit must have necessarily vacated the final judgment or, if the district court had found that funding was warranted, it would have been left without an avenue to reopen the judgment. Petition at 36–38. But Robertson's attempts to rely on a hypothetical outcome to undermine the Fifth Circuit's explicit statement about its intent on remand do not avail him because the fact remains that funding is not warranted in Robertson's case, *see* Section II, *supra*. Therefore, this Court, like the Fifth Circuit, should "decline Robertson's invitation to consider what avenues for relief might have been available had his request for funding succeeded." Pet'r App. A, at 5.

new claim after his initial petition was adjudicated in federal court. *See Gonzalez v. Crosby*, 545 U.S. 524, 530–32 (2005) ("Using Rule 60(b) to present new claims for relief from a state court's judgment of conviction-even claims couched in the language of a true Rule 60(b) motion-circumvents AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts."). Indeed, Robertson's argument that simply because the Fifth Circuit remanded the case for a very limited issue, he can freely amend his underlying habeas petition, "is . . . entirely incompatible with the purpose of AEDPA."[20] *Ramos v. Davis*, 653 F. App'x 359, 364 (5th Cir. 2016) (unpublished) (denying COA on the claim that the district court erred in denying petitioner's motion to amend his second-in-time petition to add an IATC claim which would have been successive had it been filed in its own petition). Thus, the Fifth Circuit appropriately found that

[20] It should be noted that Robertson's motion for leave to file an amended habeas petition was filed even *after* the district court *again* denied funding. *Compare* Pet'r App. C, at 57 (entered February 19, 2019), *with* ROA.13073 (filed March 4, 2019). Thus, even if the limited remand could have been read to somehow open up the lower court's final judgment denying relief, then even that proceeding was completed by the time Robertson sought to add a new claim.

reasonable jurists would not debate that Robertson's motion was a successive filing, and this Court should deny Robertson's petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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