No. 19-6465

In the Supreme Court of the United States

QUINTIN PHILLIPPE JONES, PETITIONER

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION
(CAPITAL CASE)

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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QUESTIONS PRESENTED

The Fifth Circuit affirmed the denial of Petitioner's request for funding under 18 U.S.C. § 3599 in an opinion that expressly applied the "reasonably necessary" standard that this Court articulated in *Ayestas v. Davis*, 138 S. Ct. 1080 (2018). In doing so, the Fifth Circuit acknowledged that the district court denied funding before *Ayestas*, but it explained that the district court's reasons "remain sound after *Ayestas*" and require affirmance. *Jones v. Davis*, 927 F.3d 365, 374 (5th Cir. 2019). The questions presented are:

1. Should this Court review the Fifth Circuit's straightforward and correct application of the "reasonably necessary" standard to the specific facts of this case?

2. Should this Court grant review on a question the answer to which will not change the judgment below?

3. Is Petitioner's ineffective-assistance claim time-barred?

4. Did Petitioner's state-habeas counsel unreasonably fail to raise an ineffective-assistance claim challenging trial counsel's mitigation investigation where the legal and factual landscape at the time suggested the claim would not succeed?

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

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INTRODUCTION

In *Ayestas v. Davis*, this Court faulted the Fifth Circuit for employing a standard "arguably more demanding" than 18 U.S.C. § 3599(f) requires. 138 S. Ct. 1080, 1093 (2018). Section 3599(f) provides funds for services that are "reasonably necessary," which this Court explained "requires courts" considering funding requests "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.* at 1094. The Fifth Circuit applied *Ayestas* here and held that the district court correctly denied Petitioner funding to pursue an ineffective-assistance claim because Petitioner failed to show that the claim had potential

merit. The Fifth Circuit also held that Petitioner had failed to satisfy an additional section-3599 requirement not examined in *Ayestas*.

The Petition challenges the former holding. The Petition does not, however, dispute that the Fifth Circuit applied the correct legal standard. It complains rather of the outcome. But this Court does not grant review merely to correct errors in the application of properly stated legal rules. In any case, there is no error to correct. Petitioner's ineffective-assistance claim challenged trial counsel's mitigation investigation but never acknowledged the investigation that trial counsel conducted. On top of that, Petitioner sought funding to explore the very mitigation topics for which trial counsel presented substantial evidence during the punishment phase of Petitioner's trial. Rather than explain what he thought his trial counsel missed, Petitioner simply ignored the mitigation case presented to the jury. As Petitioner made no attempt to show the potential merit of his claim, *Ayestas* requires that Petitioner not receive funding.

Review is also unwarranted because adopting Petitioner's arguments will not alter the Fifth Circuit's judgment. The Petition complains of the Fifth Circuit's application of section 3599(f)'s "reasonably necessary" standard. But the Fifth Circuit also faulted Petitioner for failing to address in his funding motion section 3599(g)(2)'s independent requirement that funds over $7,500 are "necessary to provide fair compensation for services of an unusual character or duration." Petitioner does not challenge this holding and thus granting his Petition would offer nothing but the opportunity for an advisory opinion.

Review is unwarranted for the additional reason that even if this Court overturns the Fifth Circuit, *Ayestas* will still bar Petitioner's requested funds. *Ayestas* held that services

are reasonably necessary only if a petitioner "stands a credible chance of" overcoming procedural obstacles and if the evidence a petitioner seeks is "admissible." 138 S. Ct. at 1094. Two procedural bars—AEDPA's statute of limitations and the doctrine of procedural default—stand in the way of Petitioner's claim. And AEDPA—specifically 28 U.S.C. § 2254(e)(2)—makes the evidence Petitioner seeks inadmissible. No matter how this Court might rule on Petitioner's present challenge, he will never be entitled to section-3599 funding.

STATEMENT

1. Petitioner confessed to the murder of his great aunt Berthena Bryant. 31RR162-71.[1] Notwithstanding his confession, Petitioner pleaded not guilty to the charge of capital murder. 29RR12. During trial, in addition to the substantial evidence linking Petitioner to the murder of Bryant, *see*, *e.g.*, 29RR51-52, 54-55, 268-71, 306-08; 30RR44-48, 55-57, 190-93; 31RR70-79, 162-71, the jury heard evidence demonstrating the brutality of the murder, *see*, *e.g.*, 29RR104-05, 156-57; 30RR114-38, including evidence that Petitioner beat Bryant with such force that he crushed her skull, splattering her blood and brain matter on her floor, furniture, and ceiling, and shattering the bat he used in the attack, 29RR80-81, 147-49, 254-55.

The jury convicted Petitioner of capital murder. 33RR51. Petitioner was 20 years old at the time. 36RR179-80.

2. For the punishment phase, the State put on evidence that Petitioner had a long history of violence. The State linked Petitioner to the murders of two men—Marc Sanders and

[1] *_RR_* refers to the Reporter's Record of Petitioner's trial.

Clark Peoples. *See, e.g.*, 35RR91-97, 201-03; 36RR84-85. The State showed that Petitioner is a member of a street gang and has committed violent acts as part of his gang membership. 34RR31-38; 35RR80-81. The State also showed that Petitioner committed multiple violent acts at his educational institutions. 33RR79-80, 97-99; 36RR70-71.

In mitigation, Petitioner's trial counsel put on four witnesses whose testimony was aimed at reducing Petitioner's moral blameworthiness, showing Petitioner's remorse, and establishing Petitioner's prospects for rehabilitation. The first witness was Paula Freeman, Petitioner's girlfriend. Freeman testified that she and Petitioner had lived together for four years prior to Petitioner's arrest for the murder of Bryant. 34RR208. Freeman testified that Petitioner was never violent towards her or her children, for whom he was a father figure. 34RR208; 35RR7-8. Freeman explained that Petitioner struggled with substance abuse and mental illness, which often manifested itself in self-harm. 35RR5-6, 19-29. Freeman testified that Petitioner exhibited signs of a dissociative personality and would burn himself with cigarettes, choke himself with a coat hanger, and bash himself in the head with heavy objects. 35RR19-25. Freeman also testified that Petitioner's substance abuse and behavior worsened after he fell under the influence of Riky "Red" Roosa, a coworker who used Petitioner to obtain drugs. 35RR11; *see* 35RR74-75. Roosa is currently serving two life sentences for his participation in the murders of Sanders and Peoples. *See* Pet. for a Writ of Habeas Corpus, *Roosa v. Dretke*, No. 4:04-CV-784 (N.D. Tex. Oct. 27, 2004).

The second witness was Judge Allan Butcher, the magistrate who arraigned Petitioner on the charge of murdering Bryant. Judge Butcher testified that he was struck by the remorse shown by Petitioner at the arraignment. 35RR40-41.

The third witness was Petitioner's sister, Keisha Jones, who described Petitioner's traumatic childhood. Jones testified that Petitioner's father was absent and that his mother was addicted to crack. 35RR51-52. As a result, Petitioner was shuffled among various extended family members, rarely staying in one place for a long period of time. *See* 35RR221. Jones also testified that Petitioner suffered multiple instances of sexual abuse at the hands of family members. 35RR68-69. According to Jones, Petitioner began abusing heroin at age thirteen and unsuccessfully sought treatment for his substance abuse problem. 35RR69-70. Jones also corroborated Freeman's testimony that (1) Petitioner frequently resorted to self-harm, including shooting himself twice; (2) Petitioner showed signs of a dissociative personality; and (3) Petitioner's behavior worsened under the influence of Roosa. 35RR71-77.

The final witness was Dr. Raymond Finn, a clinical psychologist who evaluated Petitioner for mental illness, competency, intellectual functioning, and potential for violence. 35RR113-17. To evaluate Petitioner, Dr. Finn performed a series of tests; interviewed Petitioner, Petitioner's family members, and Petitioner's girlfriend; and reviewed Petitioner's school records, Petitioner's medical records, and police reports. 35RR123-24, 138-41. Dr. Finn opined that Petitioner has low-average intelligence and suffers from a dissociative personality disorder caused by childhood trauma and resulting in substance abuse and increased aggression. 35RR148, 150-54. According to Dr. Finn, Petitioner's mental illness and resulting anti-social behavior could be successfully treated through psychotherapy. 35RR161-62. Dr. Finn further opined that Petitioner showed signs of remorse. 35RR158. Finally, Dr. Finn explained that, even apart from Petitioner's mental illness, Petitioner's

unstable and abuse-filled childhood had a profound effect on Petitioner's value system and knowing right from wrong. 35RR212, 221-22.

Petitioner's trial counsel used the testimony of these four witnesses to make an impassioned plea to the jury to spare Petitioner's life:

> Quintin Jones is not like you and I. Every doctor that testified told you that. There's disagreement over what exactly is wrong with him, but everybody up here that was a psychologist told you that he isn't like you and I. And they also told you that it is not a conscious decision on his part. You don't become a dissociative personality, you don't suffer from a dissociative personality disorder because you wake up one day and decide, you know, I think I need another personality, this one ain't working out so good, so I'll manifest me another personality. You do that because your circumstances are so horrific and your life is so unendurable that you cannot stand the pain one more minute. That's how you do it.
>
> . . .
>
> [T]he testimony that you heard in regard to Quintin's background and what's occurred to him . . . is important . . . for you to understand how he gets to be where he is today and understand the person that he is. . . . What on this particular occasion brought him to the point that he would do what you see in those photographs? [I]t ain't drugs, and it ain't because he wanted money. It is because he is sick. . . . The guy that did this doesn't think the way we think. And you need to consider that, and you have to consider that in deciding what to do with Quintin.

36RR180-82; *see also* 36RR183-89.

On the jury's verdict, the trial court sentenced Petitioner to death. 36RR203.

3. On direct appeal, Petitioner raised various points of error, all of which the Court of Criminal Appeals rejected. *Jones v. State*, 119 S.W.3d 766 (Tex. Crim. App. 2003).

4. This Court denied Petitioner's petition for a writ of certiorari on June 14, 2004. *See Jones v. Texas*, 542 U.S. 905 (2004). From that point, Petitioner had one year to file his

federal-habeas petition, a time period that could be tolled by the pendency of a state petition. 28 U.S.C. § 2244(d). Petitioner filed a state petition on November 10, 2004, after 149 days of the limitations period had elapsed. R.1675 n.5.[2]

Jack Strickland was counsel of record for Petitioner's state petition. Strickland was appointed to be Petitioner's counsel on December 3, 2003, after Petitioner's second post-conviction counsel was removed (his first withdrew). R.1675 n.5. Strickland was also counsel of record for Petitioner's untimely federal petition. *See* R.84-705, 1675 n.5. A dispute between the two arose because Strickland refused to include in Petitioner's state petition claims challenging Petitioner's eligibility for the death penalty, *see Atkins v. Virginia*, 536 U.S. 304 (2002), and alleging ineffective assistance of trial counsel, *see Wiggins v. Smith*, 539 U.S. 510 (2003). Strickland concluded that those claims lacked merit. *See, e.g.*, R.75-76, 1353-54, 1368-72, 1374-76, 1575-77, 1579-80; *cf.* R.1484 (state bar guideline placing the responsibility for evaluating the merits of potential claims with habeas counsel).

The state petition drafted and filed by Strickland on November 10, 2004, raised eight claims. *See* 1SHCR18-19.[3] Strickland filed the state petition late but showed good cause for his delay, and the filing was accepted. R.1366-67. On September 14, 2005, the Court of Criminal Appeals denied habeas relief. R.209-10. At this point, the clock on the federal-habeas statute of limitations began to run again. *See* 28 U.S.C. § 2244(d)(2). Petitioner had 216 days, or until April 18, 2006, to file a timely petition. Twelve days later, Strickland sent a letter to Petitioner informing him of the denial. R.1534. Petitioner responded by asking Strickland not to get appointed as Petitioner's federal-habeas counsel. R.1389.

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[2] *R._* refers to the record on appeal in the Fifth Circuit.

[3] *_SHCR_* refers to the Clerk's Record for Petitioner's state-habeas proceeding.

5. Having failed to obtain relief on direct appeal or state-habeas review, Petitioner turned to federal court.

a. As required by Texas law, *see* Tex. Code Crim. Proc. art. 11.071, § 2(e), upon the denial of Petitioner's state petition, Strickland filed a motion to appoint counsel on Petitioner's behalf in federal court. *See* R.23-26. One week later, Petitioner filed his own motion to appoint counsel, asking that Strickland not be appointed because of their disagreement over the *Wiggins* and *Atkins* claims. R.33-36. Although neither Petitioner nor Strickland desired to continue their relationship, the district court ordered Strickland appointed as Petitioner's counsel because it found "Strickland's familiarity with the case" to be the most important factor. R.38-39, 79. The district court also ordered "that Petitioner shall timely file his federal petition." R.39.

Petitioner then filed another motion to appoint counsel. R.42-51. In this motion, Petitioner raised the dispute regarding the *Wiggins* and *Atkins* claims and falsely claimed that Strickland had (1) been held in contempt for untimely filing Petitioner's state petition and (2) sought appointment of himself against Petitioner's wishes. *See* R.42-43, 1578 & n.5. The district court ordered Strickland to respond, which he did, giving his view of the dispute and setting the record straight regarding the filing of the state petition and his appointment. R.74-81. Finding Petitioner's "objections to Mr. Strickland['s] representation" to be "without merit," the district court kept Strickland as Petitioner's attorney. R.82.

Strickland misunderstood AEDPA's statute of limitations and, as a result, filed Petitioner's federal petition late. *See* R.1675 n.5. Respondent moved to dismiss Petitioner's petition as time-barred. R.708-62. The district court dismissed Petitioner's petition as time-

barred on three separate occasions before reversing course. R.763-70, 1223-37.[4] After the original dismissal, the district court replaced Strickland with new counsel. R.772-73. The district court concluded that Strickland provided effective representation before he missed the filing deadline, R.1592-93, that there was no "'overall' failure to communicate" by Strickland, and that "there is no factual support to conclude that any attorney action—other than Strickland's negligence in calculating the due date—caused the untimeliness of the petition," R.1679-80. Despite those findings, the district court refused to dismiss the untimely petition. The district court reasoned that the rule holding a petitioner responsible for the negligence of his counsel "should not be applied because the negligence" here "occurred during the course of a mutually undesired attorney-client relationship," and "the agency rule that makes a client responsible for [his] lawyer's acts or omissions is founded on, at least, a voluntary relationship." R.1676-77, 1679-80. The district court further reasoned that Petitioner's lack of diligence was excused by the court's instruction in its appointment order that Petitioner's petition be timely filed. R.1679, 1682.

b. The district court ordered Petitioner to file any amended petition in 90 days. R.1684. A week later, the district court granted Petitioner's motion for the appointment of co-counsel to assist in meeting the 90-day deadline. R.1692-93. Petitioner let 45 of the 90 days granted by the district court elapse, then he sought to extend the deadline, asking for an entire year to file his amended petition. R.1694. The district court rejected Petitioner's request as unreasonable given how the long the case had already been pending, but nonetheless gave Petitioner an extra six weeks to file his amended petition. ROA1713-16.

[4] A prior Fifth Circuit opinion explained this sequence. *See Jones v. Davis*, 922 F.3d 271, 276 (5th Cir. 2019), *opinion withdrawn and superseded on reh'g*, 927 F.3d 365.

A month before his amended petition was due, Petitioner's counsel sought $30,000 in funds for "mitigation investigative services," which they planned to use to support a procedurally defaulted ineffective-assistance claim challenging trial counsel's mitigation investigation. Counsel asserted that, to support this claim, they needed to investigate "whether [Petitioner] suffered from: 1. severe, long-standing, and involuntary alcohol addiction; 2. traumatic, physical and sexual childhood abuse; 3. severe, long-standing, and involuntary addiction to polysubstances, beginning as early as age 12; and 4. dissociative disorder as a result of traumatic, physical and sexual childhood abuse." R.1757. Counsel insisted that this information "would have been reasonably discoverable by trial counsel had they not unreasonably narrowed the scope of their [mitigation] investigation." R.1757. Counsel did not explain how they would complete their proposed investigation in time to file an amended petition by the deadline set by the district court.

The district court denied Petitioner's motion for funding on the following grounds:

- Petitioner failed to "identify the existence of a lead that trial counsel failed to follow or demonstrate what [Petitioner] expects to find with a new investigation." R.1939-44. The district court observed that most of what Petitioner sought to investigate had been identified and evaluated by his experts at trial. R.1941-42.

- Petitioner failed to make any effort to show, as required by statute, that funding in excess of $7,500 was "necessary to provide fair compensation for services of an unusual character or duration." R.1944 (quoting 18 U.S.C. § 3599(g)(2)).

- Petitioner failed to demonstrate that there was a reasonable expectation that he would be able to overcome procedural default. R.1945-46.

- Petitioner's ineffective-assistance claim is time-barred because the district court's tolling decision applied only to Petitioner's original petition, which did not include any ineffective-assistance claims. R.1946-47.

Later, the district court added an additional reason: Petitioner's counsel had several years between her appointment and the deadline for Petitioner's amended petition to investigate

Petitioner's claims, yet apparently did nothing but a self-described "due diligence" review during that time and did not ask for funding until shortly before Petitioner's amended petition was due. R.2517-20.

c. Petitioner filed an amended habeas petition asserting five grounds for relief, including the ineffective-assistance claim for which he had sought funding. R.1951-2069. The district court rejected each of Petitioner's claims. R.2424-2521. Notwithstanding the district court's earlier conclusion that Petitioner's ineffective-assistance claim was time-barred, the district court went on to also reject Petitioner's claim on the merits. R.2475-2515.

6. The Fifth Circuit affirmed. *Jones v. Davis*, 927 F.3d 365 (5th Cir. 2019). In affirming the denial of funding under 18 U.S.C. § 3599, the Fifth Circuit recognized that this Court rejected the Fifth Circuit's "'substantial need' requirement" for section 3599(f) funding because it "was more demanding than the statute's requirement that the services sought be 'reasonably necessary' to a defendant's post-conviction challenge." 927 F.3d at 373. The Fifth Circuit then set forth the standard articulated by this Court:

> Proper application of the 'reasonably necessary' standard thus requires courts to consider the potential merits 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. (quoting *Ayestas*, 138 S. Ct. at 1094) (alteration omitted).

Applying that standard, the Fifth Circuit held the district court acted within its discretion to deny funding because "it viewed [Petitioner's] request for additional funding as effectively seeking a full retrial of the issues already litigated in the state court," and "*Ayestas* did not disturb the long-settled principle that district courts have discretion to separate 'fishing expedition[s]' from requests for funding to support plausible defenses." *Id.* at 374

(quoting *Ayestas*, 138 S. Ct. at 1094-95). The Fifth Circuit also held that the district court was justified in denying Petitioner's request for $30,000 because Petitioner "wholly failed to address" section 3599's requirement that funding "in excess of $7,500 . . . was 'necessary to provide fair compensation for services of an unusual character or duration.'" *Id.* (quoting 18 U.S.C. § 3599(g)(2)).

REASONS FOR DENYING THE PETITION

Review is unwarranted for several independent reasons: Petitioner seeks mere error correction; there is no error to correct; accepting Petitioner's arguments would not affect the Fifth Circuit's judgment below; and even if this Court overturns the Fifth Circuit's judgment, Petitioner would not still not qualify for section-3599 funding.

I. Review Is Unwarranted Because the Fifth Circuit Explicitly and Unambiguously Applied the Correct Legal Standard.

This Court "does not sit as an error-correction instance." *Halbert v. Michigan*, 545 U.S. 605, 611 (2005). This Court's rules warn that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Supreme Court R. 10. And this Court is "particularly" reluctant to accept petitions alleging the misapplication of a properly stated rule of law if this Court "has recently addressed an issue and the lower courts are just beginning to apply the rule it has declared." Stephen M. Shapiro, et al., *Supreme Court Practice* 507 (10th ed. 2013).

Such is the case here. The Petition challenges the Fifth Circuit's application of section 3599(f)'s requirement that the services for which a petitioner seeks funds are "reasonably necessary." Pet. 26-37. None dispute, however, that the Fifth Circuit correctly identified

Ayestas as controlling the court's application of the "reasonably necessary" standard. *See* Pet. 25. The Fifth Circuit said:

> In *Ayestas v. Davis*, the Supreme Court rejected our prior "substantial need" standard for reviewing challenges to denials of § 3599 funding. It held that the "substantial need" requirement was more demanding than the statute's requirement that the services sought be "reasonably necessary" to a defendant's post-conviction challenge. It also made clear, however, that "[a] natural consideration informing the exercise of [the district court's] discretion is the likelihood that the contemplated services will help the applicant win relief." Therefore, "[p]roper application of the 'reasonably necessary' standard thus requires courts to consider the potential merits 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."

Jones, 927 F.3d at 373 (quoting *Ayestas*, 138 S. Ct. at 1092-94) (footnotes omitted). In *Ayestas*, this Court explained that courts must "consider the potential merit of the claims that the applicant wants to pursue" with the requested funds. 138 S. Ct. at 1094. The Fifth Circuit agreed with the district court that Petitioner had failed, in his request for funding, to demonstrate the potential merit of his ineffective-assistance claim. 927 F.3d at 373-74.

Petitioner's effort to make his case about something more than error correction falls short. For instance, Petitioner complains about something he terms the "*Robertson* procedure," allows adversarial testing of funding motions and "evaluate[s] federal habeas funding requests against what investigation had been done by the trial attorneys in state court." Pet. 32-37. But the Fifth Circuit never mentioned any such procedure, and Petitioner's only authority is a 2013 district court opinion in a different case *See* Pet. 32 (citing *Robertson v. Stephens*, No. 3:13-CV-0728, 2013 WL 2658441 (N.D. Tex. June 13, 2013)). The Fifth Circuit's silence is not surprising, as Petitioner never asked the court to evaluate this supposed procedure. In any case, the subject of Petitioner's complaint—procedures used by trial

courts considering funding requests—is within the ken of *Ayestas*, which held "that district courts have broad discretion in assessing requests for funding." 138 S. Ct. at 1094.[5] Petitioner objects to the district court's exercise of that discretion, but that plea for error correction does not justify this Court's review.

Petitioner also argues that "lower courts need guidance on how to properly apply *Ayestas*," Pet. 37, but his only evidence of this need is *his* disagreement with lower courts' application of *Ayestas*, *see* Pet. 38-39. He seeks nothing more than error correction. *Ayestas* is not even two years old. Courts are just beginning to apply its reasoning and there is no split of authority on its meaning or application. Review is unwarranted.

II. Review Is Unwarranted Because the Fifth Circuit Correctly Applied *Ayestas*.

Even if this Court were eager to correct errors, review is unwarranted because the Fifth Circuit's application of *Ayestas* was clearly correct. Petitioner sought funding for an investigation to support an ineffective-assistance claim challenging trial counsel's mitigation investigation. R.1749-57. But the only areas Petitioner sought to explore—substance abuse, childhood trauma, and mental illness, *see* R.1757; Pet. 27-28—were the very areas the record showed trial counsel *did* investigate; *see supra* pp. 4-6 (discussing mitigation evidence put on by trial counsel, including evidence of substance abuse, childhood trauma,

[5] *Ayestas* also made clear that section-3599 funding requests *are* adversarial. 138 S. Ct. 1090-91. Petitioner misquotes a report supposedly opining that funding requests "should not impose a great burden on counsel." Pet. 32 (emphasis omitted) (quoting 2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act 209 (June 2018)). What the report actually said was that "[i]n theory," section 3599's requirement that a petitioner make "a proper showing . . . *concerning the need for confidentiality*" of a funding request in order to proceed *ex parte* "should not impose a great burden on counsel." CJA Report at 209 (emphasis added). Whether the report's supposition is correct, it does not help Petitioner here.

and mental illness). As *Ayestas* held, courts must "consider the potential merit of the claims that the applicant wants to pursue" and "the likelihood that the services will generate useful . . . evidence." 138 S. Ct. at 1094. A claim faulting trial counsel for "unreasonably narrow[ing] the scope of their investigation," R.1757, is not meritorious if it relies only on subjects that were, in fact, investigated by trial counsel.

The district court and Fifth Circuit applied this reasoning. The district court faulted Petitioner's funding motion for ignoring the mitigation case made by the trial counsel. R.1941-44. For example, Petitioner's funding motion cited the record from the guilt phase of Petitioner's trial as giving clues to Petitioner's history of substance abuse but failed even to acknowledge the extensive testimony on the same topic during the punishment phase. R.1757 n.2. The motion further relied on "medical records recently collected by present counsel," noting "a referral for 'addiction' counseling at age 16 (several years before the age of majority), raising a question of involuntary intoxication." R.1757 n.2. But the mitigation testimony already established that Petitioner started using heroin at age 13. *See* 35RR69-70. And a medical evaluation commissioned by trial counsel reported that Petitioner "began using alcohol at the age of 11." R.1080.

The Fifth Circuit found the same fault. 927 F.3d at 373-74. As the Fifth Circuit correctly reasoned, "*Ayestas* did not disturb the long-settled principle that district courts have discretion to separate 'fishing expeditions' from requests for funding to support plausible [claims]." *Id.* at 374 (alteration omitted); *see Ayestas*, 138 S. Ct. at 1094 (favorably citing lower court holding "that it is not proper to use the funding statute to subsidize a 'fishing expedition'").

Petitioner insists that the district court and Fifth Circuit erred by evaluating the merits of the ineffective-assistance claim for which he sought funding. Pet. 32-35, 37. But *Ayestas* confirmed that courts *must* consider the merits of a claim before approving funding. 138 S. Ct. at 1094. Neither the district court nor the Fifth Circuit required Petitioner to "*prove* that he will be able to win relief." *Id.* They held merely that Petitioner was not entitled to funds because he made no effort to show the merits of his claim but rather relied on the false premise that his new investigation would cover ground ignored by trial counsel.

Petitioner also argues that his attorneys' belief that the requested investigation was necessary "was a professionally formed opinion that a reasonable attorney would form." Pet. 28. But the test for reasonableness under section 3599 "is the likelihood that the contemplated services will help the applicant *win relief*." *Ayestas*, 138 S. Ct. at 1094 (emphasis added). It follows that it is not reasonable to investigate a meritless claim. *Id.* Just like Petitioner's funding motion, the Petition contends that trial counsel needed to investigate Petitioner's substance abuse, childhood trauma, and mental illness, Pet. 27-28, while ignoring that those subjects were, in fact, investigated by trial counsel and presented to the jury. As before, Petitioner offers no plausible explanation for why trial counsel's investigation of the very same areas Petitioner now wants his federal-habeas counsel to investigate was "unreasonably narrow[]." Pet. 27. As a result, Petitioner's ineffective-assistance claim continues to be meritless and does not warrant funding for any investigative services.

III. Review Is Unwarranted Because the Fifth Circuit's Judgment Is Supported by an Unchallenged Holding.

Even assuming the Fifth Circuit misapplied section 3599's "reasonably necessary" requirement in a way that merited correction by this Court, review would be still be unwarranted because the Fifth Circuit also found that Petitioner failed to meet an additional, independent requirement imposed by section 3599. Petitioner does not challenge this part of the Fifth Circuit's opinion, so nothing that happens here can alter the Fifth Circuit's judgment.

This Court has long stated that it "reviews judgments, not statements in opinions." *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (quoting *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956)). On review, the question before this Court "is, was the *judgment* correct, not the *ground* on which the judgment professes to proceed." *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598, 603 (1821). This Court's focus on "correct[ing] wrong judgments, not . . . revis[ing] opinions" arises from its concern that it is "not permitted to render an advisory opinion, and if the same judgment would be rendered . . . after [this Court] corrected its views of federal laws, [this Court's] review could amount to nothing more than an advisory opinion." *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945). Thus, this Court decides cases only "in the context of meaningful litigation," and when the challenged issue will not affect the judgment of the court below, that issue "can await a day when [it] is posed less abstractly." *The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959).

Petitioner challenges a holding of the Fifth Circuit that, even if reversed, will not alter the court's judgment in his case. Petitioner challenges the Fifth Circuit's holding that the funds he requested were not reasonably necessary, as required by section 3599(f), arguing

that *Ayestas* compels reversal. Pet. 25-39. But subsection (f) is not section 3599's only requirement. For requests that exceed $7,500, like Petitioner's, a petitioner must also show that the funds are "necessary to provide fair compensation for services of an unusual character or duration." 18 U.S.C. § 3599(g)(2). As the district court and Fifth Circuit found, Petitioner made no effort to make this showing. R.1944; *Jones*, 927 F.3d at 374. Petitioner's "fail[ure] to address this requirement," *Jones*, 927 F.3d at 374, was an independent basis to deny funding. R.1944.

On certiorari, Petitioner does not challenge this independent basis of the Fifth Circuit and district court judgments. Review by this Court is thus inappropriate because "the same judgment would be rendered" even if this Court agreed with Petitioner on the issues for which he seeks reversal. *Herb*, 324 U.S. at 126.

IV. Review Is Unwarranted Because *Ayestas* Provides Additional Reasons Why Petitioner's Requested Funding Is Not Reasonably Necessary.

The Fifth Circuit relied on two defects in Petitioner's funding request to affirm the district court: Petitioner failed to offer anything suggesting the ineffective-assistance claim he sought to investigate had merit and he failed to show that the amount he requested was "necessary to provide fair compensation for services of an unusual character or duration." 18 U.S.C. § 3599(g)(2). But these are not the only reasons why Petitioner does not satisfy section 3599. "Proper application of the 'reasonably necessary' standard . . . requires courts to consider" not just the merits of a claim, but also "the likelihood that the services will generate . . . admissible evidence, and the prospect that the applicant will be able to clear any procedural hurdles standing in the way." *Ayestas*, 138 S. Ct. at 1094. The funds Petitioner requested are also not reasonably necessary because his ineffective-assistance claim

is subject to two different procedural bars—statute of limitations and procedural default—and the evidence he seeks is not admissible. Because overturning the Fifth Circuit's judgment will not advance Petitioner's case, this Court's review is unwarranted.

A. Petitioner's ineffective-assistance claim is time-barred.

Among other reasons, the district court denied funding because Petitioner's ineffective-assistance claim is time-barred. R.1946-47. None dispute that Petitioner's original federal-habeas petition was filed beyond AEDPA's one-year limitations period. The district court, however, equitably tolled the limitations period just long enough to prevent dismissal of that petition. *See* R.1684, 1946-47. The upshot of the district court's tolling decision is that any new claim subsequently raised would be untimely unless it related back to the original petition. Petitioner's ineffective-assistance claim was not in his original petition and does not relate back to that petition. So it is time barred. And even if Petitioner's ineffective-assistance claim could relate back, it would still be untimely because the district court's grant of equitable tolling was erroneous.

1. Petitioner's ineffective-assistance claim does not relate back to his original petition.

Like any other civil claim filed outside the limitations period, Petitioner's ineffective-assistance claim is timely only if it "arise[s] from the same core facts as the timely filed claims" in his original federal-habeas petition. *Mayle v. Felix*, 545 U.S. 644, 657 (2005). But Petitioner's original petition made no mention of trial counsel's performance. That petition raised two claims: the State's punishment case relied on an improperly obtained confession and the State failed to timely appoint counsel for Petitioner following his arraignment. R.95-116. Because the "core facts," *Mayle*, 545 U.S. at 657, of those claims are unrelated to trial

counsel's performance, Petitioner's ineffective-assistance claim cannot relate back. *Cf., e.g.*, *United States v. Gonzalez*, 592 F.3d 675, 679 (5th Cir. 2009) (per curiam) ("[O]ne claim of ineffective assistance does not automatically relate back to another simply because the two claims both rest on a violation of the Sixth Amendment."); *United States v. Hernandez*, 436 F.3d 851, 858 (8th Cir. 2006) (same); *United States v. Ciampi*, 419 F.3d 20, 24 (1st Cir. 2005) (same).

In the district court, after funding was denied, Petitioner tried to save his claim by invoking this Court's decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), which provides an excuse to procedural default if a petitioner's state-habeas counsel unreasonably failed to raise a substantial ineffective-assistance claim in state court. R.2347-49. But *Martinez* warned that "[t]he holding in this case does not concern attorney errors in other kinds of proceedings." 566 U.S. at 16. And this Court later affirmed the Fifth Circuit's refusal to extend *Martinez*, confirming that "[e]xpanding the narrow exception announced in *Martinez* would unduly aggravate the 'special costs on our federal system' that federal habeas review already imposes." *Davila v. Davis*, 137 S. Ct. 2058, 2070 (2017). It follows that *Martinez* has no application to mistakes by counsel (here, a late filing) in *federal* court.

2. Petitioner's original petition was not timely.

Petitioner's original petition was itself untimely, so relation back cannot save Petitioner's ineffective-assistance claim in any event.

AEDPA imposes a fixed one-year time limit for federal-habeas petitions seeking relief from state court judgments. 28 U.S.C. § 2244. AEDPA's one-year statute of limitations reflects Congress's goal "to eliminate delays in the federal habeas review process." *Holland*

v. Florida, 560 U.S. 631, 648 (2010); *accord Johnson v. United States*, 544 U.S. 295, 311 (2005) (AEDPA's "clear policy calls for promptness.").

In *Holland*, this Court held that AEDPA's limitations period may be equitably tolled in extraordinary circumstances. 560 U.S. at 653-54. *Holland* considered—but did not decide—whether and when the conduct of a petitioner's attorney could justify equitable tolling. *Id.* In his concurrence, Justice Alito argued for a clear test: AEDPA's time bar may be tolled only for "attorney misconduct that is not constructively attributable to the petitioner" because counsel had "essentially 'abandoned'" the client. *Id.* at 659.

In *Maples v. Thomas*, this Court adopted Justice Alito's view. 565 U.S. 266, 280-83 (2012). Finding support from *Holland*, this Court held that "when a petitioner's postconviction attorney misses a filing deadline, the petitioner is bound by the oversight" *unless* the "attorney abandons his client without notice," because "under agency principles, a client cannot be charged with the acts or omissions of an attorney who has abandoned him." *Id.* at 281-83. This Court "therefore inquire[d] whether Maples ha[d] shown that his attorneys of record abandoned him, thereby supplying the 'extraordinary circumstances beyond his control'" necessary to excuse his late filing. *Id.* at 283.[6] Following *Maples*, every court of appeals to consider the question but one has held that attorney conduct must amount to abandonment to justify equitable tolling. *See Martin v. Fayram*, 849 F.3d 691, 699 (8th Cir. 2017); *United States v. Wheaten*, 826 F.3d 843, 852 (5th Cir. 2016); *Thomas v. Attorney Gen., Fla.*, 795 F.3d 1286, 1291-92 (11th Cir. 2015); *Rivas v. Fischer*, 687 F.3d 514, 538 (2d

[6] *Maples* involved cause to excuse a procedural default, not equitable tolling, but the court saw "no reason . . . why the distinction between attorney negligence and attorney abandonment should not hold in both contexts." 565 U.S. at 282 n.7.

Cir. 2012); *Robertson v. Simpson*, 624 F.3d 781, 785 (6th Cir. 2010). *But see Luna v. Kernan*, 784 F.3d 640, 648-49 (9th Cir. 2015).

The district court found that "there is no factual support to conclude that any attorney action—other than Strickland's negligence in calculating the due date—caused the untimeliness of the petition." R.1680. But "an attorney's negligence . . . miscalculating a filing deadline, does *not* provide a basis for tolling a statutory time limit." *Maples*, 565 U.S. at 282 (emphasis added). The district court nonetheless equitably tolled Petitioner's limitations period because the relationship between Strickland and Petitioner was not "voluntary," R.1676-77, 1679-80, as neither desired the representation. This was wrong for at least three reasons.

First, the district court was wrong that the relationship between Petitioner and Strickland needed to be voluntary to hold Petitioner accountable for Strickland's negligence. Whatever the nature of the typical attorney-client relationship, the relationship established by the appointment of counsel pursuant to 18 U.S.C. § 3599 is not voluntary. This Court has made clear that § 3599 does "not . . . confer[] capital habeas petitioners with the right to counsel of their choice." *Christeson v. Roper*, 135 S. Ct. 891, 893-94 (2015) (per curiam). Not even criminal defendants have that luxury. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006). And "[u]nder § 3599(e), a lawyer appointed to represent a capital defendant is obligated to continue representing his client until a court of competent jurisdiction grants a motion to withdraw." *Battaglia v. Stephens*, 824 F.3d 470, 474 (5th Cir. 2016); *accord* Tex. Disciplinary Rules Prof'l Conduct R. 1.15(c) ("When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.").

When the district court appointed Strickland as Petitioner's attorney, an attorney-client relationship was established whether or not Petitioner and Strickland preferred otherwise. *Cf.* Restatement (Third) of Agency § 3.01 cmt. c (2006) ("Some statutes ascribe the legal consequences of agency to relationships that fall outside the common-law definition of agency."). There is no basis to require that an attorney-client relationship be voluntary before the actions of a petitioner's counsel are attributable to that petitioner. If it were otherwise, *every* capital petitioner with appointed counsel would be entitled to equitable tolling for attorney negligence.

Moreover, discord between appointed counsel and a capital habeas petitioner is hardly an "extraordinary circumstance." *Holland*, 560 U.S. at 649. There will always be tension between the desire of a prisoner facing death to throw everything against the wall and delay as long as possible on the one hand, *see* Lewis F. Powell, Jr., *Capital Punishment*, 102 Harv. L. Rev. 1035, 1039-40 (1989), and counsel's duty to cull meritless arguments and avoid needless delay on the other, *see Jones v. Barnes*, 463 U.S. 745, 751-52 (1983).

Second, "courts have applied equitable tolling only where there was '*wrongful* conduct, either by [government] officials or, occasionally, by the petitioner's counsel.'" 1 Brian R. Means, Postconviction Remedies § 25:35, at 1014 (2016) (quoting *Shannon v. Newland*, 410 F.3d 1083, 1090 (9th Cir. 2005)). But no court has ever found that the district court erred in rejecting Petitioner's efforts to remove Strickland as counsel. For good reason. The district court found Petitioner's complaints about Strickland to be "without merit." R.82. This, combined with Strickland's familiarity with case, puts the district court's decision on firm ground. *See Martel v. Clair*, 565 U.S. 648, 663-66 (2012). A legally correct order by the district court cannot be an "extraordinary circumstance" if the term is to have any meaning.

Third, even if the relationship between Strickland and Petitioner could create an extraordinary circumstance, that circumstance did not stand "in [Petitioner's] way and prevent[] timely filing." *Holland*, 560 U.S. at 649 (quotation marks omitted). The district court expressly concluded that the untimely filing was *not* caused by any problem in the relationship between Strickland and Petitioner. *See* R.1680. There has never been any suggestion that Strickland's diligence was affected by the ongoing dispute between him and Petitioner over what claims to raise. *Cf. supra* p. 22. The two could have had an excellent working relationship and Strickland still would have been mistaken about the deadline to file Petitioner's habeas petition.

B. Petitioner has no credible chance of overcoming procedural default.

Petitioner seeks funds under section 3599 to gather evidence that he claims state-habeas and trial counsel should have found. But this Court has instructed that section-3599 funds are appropriate only if a petitioner stands a "credible" chance of overcoming procedural default. *Ayestas*, 138 S. Ct. at 1094. As the district court found, Petitioner does not. *See* R.1945-46.

A prisoner may overcome procedural default of an ineffective-assistance-of-trial-counsel claim by establishing that (1) "the underlying . . . claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit," *Martinez*, 566 U.S. at 14, and (2) his state habeas counsel was ineffective for failing to present the trial court ineffectiveness claim in the state habeas proceeding, *id.* at 13. Petitioner will not be able to meet that second prong, whatever his requested investigation uncovers. In 2004, Petitioner's state-habeas counsel considered the possibility of raising an ineffective-assistance claim challenging trial counsel's mitigation investigation and concluded that claim lacked

merit. This was a reasonable conclusion at the time based on both existing case law and the facts of this case. It is not deficient performance for counsel to avoid a claim that "counsel reasonably could have determined . . . would have failed." *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2559 (2018) (per curiam).

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). Those circumstances include "the . . . state of the law" at the time, which informs what claims are "worth pursuing." *Smith v. Murray*, 477 U.S. 527, 536 (1986).

Until 2000, this Court had never vacated a death sentence for ineffective assistance of counsel. And in two cases—*Darden v. Wainwright*, 477 U.S. 168 (1986); and *Strickland*—this Court had rejected challenges to very limited mitigation investigations. The investigation by Petitioner's trial counsel was far more extensive than in these pre-2000 cases. In *Strickland*, counsel merely spoke with the defendant as well as the defendant's wife and mother; counsel did not seek out other character witnesses or request a psychiatric examination. 466 U.S. at 672-73. And in *Darden*, trial counsel merely obtained a psychiatric report. 477 U.S. at 185. In contrast, Petitioner's trial counsel obtained extensive testimony from Petitioner's girlfriend and sister describing Petitioner's struggles with substance abuse, his mental illness, self-harm, childhood abuse and trauma, and the deleterious influence of Ricky Roosa. *See supra* pp. 4-6. Petitioner's trial counsel also obtained two experts who reviewed Petitioner's social, educational, and health history. *See supra* pp. 5-6, 15. One of these experts detailed this history to the jury and opined that Petitioner's crime was

connected to his dissociative disorder, which arose from his troubled childhood. *See supra* pp. 5-6. Trial counsel relied on this evidence to make an impassioned plea to the jury that Petitioner lacked the moral culpability necessary for the death penalty and could be rehabilitated. *See supra* p. 6. All of trial counsel's choices were in line with the ABA guidelines in force at the time.[7]

In 2000, the tide of jurisprudence began to shift, but not in any way that would have suggested Petitioner had a meritorious punishment-phase ineffective-assistance claim in 2004. Thus, reasonable counsel at the time could conclude that a punishment-phase ineffective-assistance claim was not worth pursuing. *Williams v. Taylor*, 529 U.S. 362 (2000) (*Terry Williams*), marked the first time this Court vacated a death sentence on ineffective-assistance grounds. Three years later, in *Wiggins*, 539 U.S. 510, this Court once again vacated a death sentence on ineffective-assistance grounds. But neither decision suggested a similar claim by Petitioner would succeed. In *Terry Williams*, this Court found that capital trial counsel failed to meet the "*Strickland* standard" when trial counsel "did not begin to prepare for [the mitigation] phase of the [capital sentencing] proceeding until a week before the trial" and when "[t]hey failed to conduct an investigation that would have uncovered extensive records graphically describing Williams's nightmarish childhood, not because of

[7] The governing ABA Guidelines explained that in preparing for sentencing, counsel should investigate "mental and physical illness or injury"; "alcohol and drug use"; "birth trauma and developmental delays"; "special educational needs including cognitive limitations and learning disabilities"; "physical, sexual or emotional abuse"; and "prior correctional experience." Am. Bar Ass'n, *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* Guideline 11.4.1(2)(C) (1989), http://bit.ly/30OWsWq. The guidelines further instructed that counsel should interview "witnesses familiar with aspects of the client's life history that might" provide "possible mitigating reasons for the offense(s), and/or other mitigating evidence to show why the client should not be sentenced to death." *Id.* Guideline 11.4.1(3)(B).

any strategic calculation but because they incorrectly thought that state law barred access to such records." 529 U.S. at 373, 395. In *Wiggins*, the defendant's attorneys introduced *no* mitigating evidence describing Wiggins' life history, even though their opening statement to the jury at the sentencing phase promised the jury such evidence. 539 U.S. at 526. Counsel did not even put together a social history report. *Id.* at 527-32. *Terry Williams* and *Wiggins* were cases in which defense counsel simply ignored their obligation to find mitigating evidence. They are far afield from this case, in which trial counsel investigated Petitioner's childhood, education, mental health, and substance abuse and presented substantial mitigation evidence to the jury.

Existing case law in 2004 not only suggested Petitioner's trial counsel were not deficient, it suggested that showing prejudice would be particularly difficult. For instance, as trial counsel had already investigated what Petitioner posits were the most relevant areas of mitigation, state-habeas counsel could reasonably conclude that any additional evidence found would be cumulative and therefore of little value. In *Terry Williams* and *Wiggins*, for example, this Court found prejudice because the jury had heard *no* evidence from the areas trial counsel was faulted for not investigating. *See Wiggins*, 539 U.S. at 534-35; *Terry Williams*, 529 U.S. at 398. And the Fifth Circuit had held that a defendant is not prejudiced from trial counsel's failure to present mitigation evidence "of his childhood trauma and history of mental illness" when that evidence "was cumulative of other evidence actually presented during the punishment phase." *Nobles v. Johnson*, 127 F.3d 409, 423 (5th Cir. 1997). This Court has since held the same. *Cullen v. Pinholster*, 563 U.S. 170, 200-01 (2011); *Wong v. Belmontes*, 558 U.S. 15, 22-23 (2009).

In 2004, state-habeas counsel reasonably concluded that Petitioner's ineffective-assistance claim lacked merit. Therefore, Petitioner cannot satisfy *Martinez*, and procedural default bars his claim.

C. AEDPA bars the new evidence Petitioner seeks.

Finally, even if Petitioner could overcome procedural default based on negligence by his state-habeas counsel, AEDPA would preclude Petitioner from relying on any new evidence in federal court to win relief on his ineffective-assistance claim. So section-3599 services would remain unnecessary because the evidence Petitioner pursues is not "admissible" and "stand[s] little hope of helping him win relief." *Ayestas*, 138 S. Ct. at 1094.

Section 2254(e)(2) "restricts the discretion of federal habeas courts to consider new evidence when deciding claims that were not adjudicated on the merits in state court." *Pinholster*, 563 U.S. at 186. Section 2254(e)(2)'s bar on new evidence is triggered if the habeas petitioner "has failed to develop the factual basis of a claim in State court proceedings." That opening clause is met if the petitioner "was at fault for failing to develop the factual bases for his claims in state court." *Bradshaw v. Richey*, 546 U.S. 74, 79 (2005) (per curiam). And this Court has held multiple times when addressing section 2254(e)(2)'s bar on new evidence that Congress intended the word "failed" in "failed to develop," 28 U.S.C. § 2254(e)(2), to mean a "lack of diligence, or some greater fault, attributable to the prisoner *or the prisoner's counsel*." *Williams v. Taylor*, 529 U.S. 420, 432 (2000) (*Michael Williams*) (emphasis added); *accord Holland v. Jackson*, 542 U.S. 649, 652-53 (2004) (per curiam) (applying section 2254(e)(2) to an ineffective-assistance-of-trial-counsel claim).

To overcome procedural default, Petitioner asserts that his state-habeas counsel was ineffective in failing to develop his ineffective-assistance claim in state court. Pet. 18. That

position, if accepted, necessarily means that state-habeas counsel was not diligent in developing the factual basis for Petitioner's ineffective-assistance claim. And under *Michael Williams* and *Holland*, counsel's lack of diligence means that Petitioner "failed to develop" the claim for purposes of § 2254(e)(2). Thus, if Petitioner succeeds in overcoming procedural default, he will be barred from relying on new evidence.

Nothing in *Martinez* alters this conclusion. *Martinez* created a "narrow exception" to the court-created rules of procedural default, allowing state prisoners to pursue a substantial ineffective-assistance-of-trial-counsel claim if state-habeas counsel unreasonably failed to raise that claim in state court. 566 U.S. at 9. In modifying the court-created rules of procedural default, *Martinez* did not purport to change AEDPA's independent statutory bar on what evidence federal habeas courts may consider. In no event did *Martinez* overrule any part of *Michael Williams* or *Holland*: This Court in *Martinez* concluded that its holding raised no stare decisis concern. 566 U.S. at 15. And *Davila* later confirmed that "[e]xpanding the narrow exception announced in *Martinez* would unduly aggravate the 'special costs on our federal system' that federal habeas review already imposes." 137 S. Ct. at 2070. So *Michael Williams* and *Holland* remain the controlling precedent on the meaning of "failed" in section 2254(e)(2).

Nor can *Martinez* be used to undermine section 2254(e)(2). "The rules for when a prisoner may establish cause to excuse a procedural default are elaborated in the *exercise of the Court's discretion*." *Martinez*, 566 U.S. at 13 (emphasis added). But congressional directives in federal statutes like AEDPA are not subject to discretionary elaboration by courts. As this Court recently explained in *Ross v. Blake*:

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

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

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

In interpreting section 2254(e)(2), *Michael Williams*, unlike *Martinez*, made no equitable judgment; this Court gave effect to what "Congress intended." *Id.* And *Michael Williams* concluded that section 2254(e)(2) codified the rule that state-habeas counsel's lack of diligence is attributed to the petitioner. *Id.* at 437, 439-40. *Michael Williams* reached this conclusion because, when Congress enacted AEDPA in 1996, Congress would have understood—relying on this Court's 1991 and 1992 decisions in *Coleman* and *Keeney*—that any lack of diligence by state-habeas counsel would be attributed to the petitioner under "well-settled principles of agency law." *Coleman v. Thompson*, 501 U.S. 722, 754 (1991); *see Davila*, 137 S. Ct. at 2065. This Court applied *Coleman*'s rule to this very context in *Keeney*,

when it disallowed new evidence based on post-conviction "counsel's negligent failure to develop the facts." *Keeney*, 504 U.S. at 4; *see id.* at 7-11.

When Congress "raised the bar" in AEDPA, it could not have intended a weaker rule than the one adopted in *Keeney* just a few years earlier. Thus, *Michael Williams* held that "the opening clause of § 2254(e)(2) codifies *Keeney*'s threshold standard of diligence." *Michael Williams*, 529 U.S. at 434. So section 2254(e)(2)'s trigger—"the applicant has failed to develop the factual basis of a claim in State court proceedings"—uses "fail[]" just as *Keeney* did: as including "attorney error." *Keeney*, 504 U.S. at 10 n.5; *see Michael Williams* 529 U.S. at 433-34.[8]

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

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

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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