

In the Supreme Court of the United States

CHARLES MAMOU, JR., 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 last Term in *Ayestas v. Davis*, 138 S. Ct. 1080 (2018). In doing so, the Fifth Circuit acknowledged that the district court’s pre-*Ayestas* order recited the “arguably more demanding” “substantial need” test. But it explained that, because the district court’s reasons for denying funding did not turn on the difference between the two standards, those reasons “remain sound after *Ayestas*” and require affirmance. App. A at 3. The questions presented are:

1. Did the Fifth Circuit apply the wrong legal standard when it quoted the standard this Court announced last Term in *Ayestas*?
2. Should this Court review the Fifth Circuit’s straightforward and correct application of the “reasonably necessary” standard to the specific facts of this case?

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BRIEF IN OPPOSITION

Petitioner was convicted of the murder of a 17-year-old woman and sentenced to death after a jury heard evidence that he had also killed two other people. On federal habeas review, he filed a scattershot request for funding that prized quantity over quality, as it listed numerous funding requests—*e.g.*, funding for a mitigation expert, for a future-dangerousness expert, and for an investigator—but justified those funding requests with speculation, reasoning that contradicted established precedent, or both. The district court accordingly denied petitioner’s application for funding, and the Fifth Circuit affirmed in an opinion that expressly applied the “reasonably necessary” standard that this Court articulated in *Ayes-tas v. Davis*, 138 S. Ct. 1080 (2018).

There is no reason to review that decision. The Fifth Circuit unambiguously applied the correct legal standard to affirm a decision that in no way “depend[ed]” on the since-rejected

“substantial need” test underlying the district court’s decision. App. A at 3. There is also no reason to summarily reverse. Far from erring in applying the “reasonably necessary” test, the Fifth Circuit correctly affirmed the denial of petitioner’s funding requests because they “stand[] little hope of helping him win relief.” App. A at 3 (quoting *Ayestas*, 138 S. Ct. at 1094).

In short, the Fifth Circuit recognized and applied the same standard this Court adopted in *Ayestas*. And its decision under that standard is correct. The petition should be denied.

STATEMENT

1. Seventeen-year-old Mary Carmouche was found lying face down in the backyard of a vacant house in southwest Houston by a Reliant Energy employee there to read a light meter on December 8, 1998. ROA.3319-20.¹ She had been shot once in the chest, the bullet rupturing her heart, liver, and lungs. ROA.3434.

Petitioner Charles Mamou, Jr. was the last person to see Mary Carmouche alive. Petitioner came to Houston from Sunset, Louisiana in early December 1998 looking to rob Kevin Walter of cocaine. ROA.3174, 3188, 3190. He called Walter and told him that he was “looking [to buy] a whole kilo of cocaine” for \$20,000, when in reality he had hatched a robbery scheme in which he would hand over a bag of cut-up newspaper in lieu of cash. ROA.3174, 3188, 3190, 3395. Walter replied that he was willing to sell the cocaine, but, like Petitioner, he in fact planned to “take [petitioner’s] money” without giving him cocaine. ROA.3174. In short, both sides planned to rob each other.

¹ “ROA” refers to the record on appeal before the Fifth Circuit.

They met on December 6, 1998 at Lantern Point Drive, a dark, isolated street. ROA.3181. The self-styled sellers—Kevin Walter, Dion Holley, Terrence Gibson, and Mary Carmouche were in a blue Lexus; the self-styled buyers—petitioner and Samuel Johnson—were in a separate car. ROA.3181. They parked their cars facing each other to make it look like one car was giving the other a boost. ROA.3182. At that point, Gibson and Holley got out of the Lexus, leaving Walter in the driver’s seat and Carmouche in the backseat. ROA.3182. Petitioner and Gibson also got out of their car, with petitioner going to the back of the Lexus to meet Gibson and Holley, and Johnson going to pop the hood of his own car. ROA.3362-63. Gibson was the only “seller” with a gun, ROA.3184; both petitioner and Johnson were armed. ROA.3468.

Petitioner shot and killed Gibson. ROA.3469.² When Holley heard the shots, he sprinted towards a nearby field only to be shot en route by petitioner. ROA.3299. In the commotion and confusion, Walter stepped out of the car, where petitioner immediately shot him in the stomach. ROA.3183; ROA.3363. Walter pleaded with petitioner: “whatever you do, don’t hurt the girl.” ROA.3183. Petitioner responded by shooting him in the chest. ROA.3183. Now twice wounded, Walter ran from the Lexus and petitioner shot him a third time in the back as he fled. ROA.3183. Walter then turned around to see petitioner speed off in the Lexus with Carmouche still in the back of the car. ROA.3184. Johnson, having seen petitioner shoot Walter and take off in the Lexus with Carmouche, jumped into his car and headed after them for a short way before heading home by himself. ROA.3363-64.³ No one

² Petitioner was indicted for the capital murder of Gibson, but the State abandoned that charge before trial. ROA.547.

³ Holley and Walter survived their wounds.

saw Carmouche alive again, and the Lexus was later found near the home where petitioner had been staying. ROA.3354.

The day after he kidnapped Carmouche, petitioner called his friend Terrence Dodson and confessed to killing her. Dodson testified that petitioner admitted not only to shooting multiple people in the failed robbery and fleeing the scene with Carmouche in the blue Lexus, but also to receiving oral sex from Carmouche and then shooting her “because she was looking at him funny, like she was going to tell.” ROA.3398. This is perfectly consistent with the testimony of Anthony Trail, petitioner’s cousin, who recalled petitioner both asking questions “about what had been on the news about a missing person, Mary Carmouche,” and taking him to a dead-end street where petitioner said he had received oral sex and left his glasses. ROA.3423-25.

Physical evidence further corroborated this eye-witness testimony and petitioner’s confession. Specifically, the State put on ballistics testimony from Robert Baldwin, a criminalist in the Houston Police Department firearms lab. ROA.3446. He determined that the bullets recovered from Gibson’s body (the person petitioner admitted shooting, ROA.3468-69) and Carmouche’s body were consistent in that they were all 9-millimeter caliber bullets with eight “lands and grooves” and a right twist. ROA.3449. Separate from this analysis based on the fired bullets, Baldwin opined that the unfired cartridge found next to Carmouche’s body “was cycled at some time through the same magazine as the fired cartridge case,” because it had tool-markings—scrapes and cuts on the wall of the cartridge caused when a bullet moves from a magazine to the chamber in a firearm—that matched the cartridges found at Lantern Point. ROA.3448.

Based on this evidence, the jury needed less than four hours to return a guilty verdict. ROA.3528.

2. For the punishment phase, the State reoffered all the evidence admitted during the guilt-innocence phase of the trial. ROA.3541. The prosecution also produced various types of testimony going to establish petitioner's future dangerousness and moral culpability.

The prosecution first introduced evidence that petitioner had a history of violence and a disregard for human life. Most critically, it offered evidence that petitioner murdered Anthony "Bruiser" Williams on Labor Day in a plot like the one that took Carmouche's and Gibson's lives mere months later. ROA.3556-58. Joseph Melancon, a former classmate of petitioner's, testified that he had driven with petitioner on Labor Day to a store where they met Williams. ROA.3557. Petitioner went into the store, came out with two brown paper bags, and then got into the driver's seat of another car and drove off with Williams. ROA.3558. Melancon then heard a gunshot and saw Williams lying on the ground saying, "My boys shot me." ROA.3558. And just as petitioner brought cut-up paper to Lantern Point to pass off as money, ROA.3395, Houston police officers testified that there were rectangular newspaper clippings in the shape of dollar bills in the parking lot where Williams was killed. ROA.3550; ROA.3553.

The prosecution also offered victim-impact testimony. Carmouche's father testified about his daughter and how her death affected him and other family members. He spoke of a daughter who was very close with her family, especially her grandfather, as they would go on family outings every weekend. ROA.3577. And he explained that for almost two days he was tortured with worry, not knowing what had happened to her. ROA.3576. When he learned about a body being found in the backyard of an abandoned house, he drove over

and desperately tried to see the body to determine whether it was his daughter. ROA.3576. He could not see the body at the scene, but still identified his daughter by describing her clothes to police; he also later identified her through a photograph from the medical examiner's office. ROA.3576-77. The funeral was so large—"[a]bout fifteen hundred" people—that the family had to move the service from their home church to a larger church. ROA.3577.

The victim-impact testimony included not only testimony from Carmouche's father, but testimony from family members of petitioner's other murder victims: Williams and Gibson. Williams's sister, Yolanda, briefly testified about the effect that Williams's death has had on his immediate family. ROA.3570. Gibson's mother, Patricia, testified that she last saw her son the day before the murder, when they got together for church. ROA.3572. She told the jury that it was difficult to bury her son, that she raised him right, and that she does not blame herself for his death. ROA.3573. Petitioner, in turn, used these witnesses to emphasize that his victims were themselves involved in the drug world and thus should bear at least some responsibility for putting themselves in dangerous situations. *See, e.g.*, ROA.3655-56 (asking jury in closing argument to consider the role of drugs and the victim's responsibility for their own choices).

In his defense, petitioner produced a clinical psychologist who testified that his lack of gang involvement predicts less future dangerousness; that propensity for violence is highest in a person's late teens and early twenties, and that prisons are specifically equipped to minimize any danger petitioner poses. ROA.3581-83. Petitioner's mother also testified, explaining that, although he had a difficult childhood, he's been a good father and older brother. ROA.3615-19. His sister confirmed this, testifying to his generosity and kindness

to her. ROA.3624-25. Petitioner's uncle (ROA.3631-32), his father (ROA.3636-37), and the mother of one of his children (ROA.3626-27) told similar tales.

At the conclusion of the punishment-phase, the jury was instructed to answer two special issues: (1) whether there is a probability that petitioner was a future danger to society, and (2) whether there "is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed." ROA.586-87. The jury answered "yes" to the first special issue and "no" to the second, and the trial court accordingly sentenced petitioner to death. ROA.586-87.

3. On direct appeal, petitioner raised eight points of error, ROA.1754-55, but the Court of Criminal Appeals ("CCA") found no reversible error and affirmed the trial court's judgment, ROA.1807; ROA.4541.

4. On state collateral proceedings, the State appointed Roland Moore as petitioner's new counsel. ROA.4574. Counsel spent over 140 hours developing petitioner's claims (ROA.4694-95), hired an investigative agency (ROA.4688-89), and explored extra-record issues such as other theories of the crime and petitioner's mental health, (ROA.4654). He eventually filed a habeas application raising nine points of error that can be lumped into three categories: (1) seven claims, including an ineffective-assistance-of-trial-counsel claim, related to the admission of victim-impact testimony on uncharged crimes, ROA.4604-23, 27-28; (2) a due process claim related to his parole eligibility, ROA.4628-32, and; (3) a due process claim related to the instructions given to the jury, ROA.4632-42.

After approximately a decade, the state habeas court recommended that relief be denied. ROA.4846. The Court of Criminal Appeals agreed, denying relief on petitioner's initial application for the reasons stated by the state habeas court, and dismissing the claims

raised in a supplemental application as an abuse of the writ without considering the merits. ROA.5051-52.⁴

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

a. Petitioner filed an application under 18 U.S.C. § 3599 in the district court for \$29,020 to retain the services of numerous investigators and experts to aid his claims for habeas relief. ROA.113-34. The district court denied this request in a thorough and comprehensive order that cited the then-governing standard for funding in the Fifth Circuit—whether the applicant had shown a “substantial need” for funding—but explained the denial of funding in detail and with reasoning equally applicable under the “reasonably necessary” standard later announced in *Ayestas*. ROA.186-96. Specifically, the district court denied funding for:

- an investigator to develop an actual innocence claim because there is no free-standing actual innocence claim, and to the extent petitioner was using an actual innocence claim to overcome procedural default, his asserted need for an investigator was built purely on “speculation” that prosecutors colluded with witnesses to produce perjured testimony, ROA.191;
- an investigator to develop exhausted ineffective-assistance-of-counsel claims because *Cullen v. Pinholster*, 563 U.S. 170 (2011), barred new evidence on his exhausted claims, ROA.192;
- an investigator to develop unexhausted ineffective-assistance-of-counsel claims because he not only failed to provide “information about whether [he] possesses

⁴ The Court of Criminal Appeals also dismissed as an abuse of the writ petitioner’s pro se application filed in 2003. ROA.5023-46 (application); ROA.5051-52 (dismissal).

a viable argument to overcome any procedural bar,” but, even if he had, he failed to “identify any of the witnesses who need to be interviewed or what he expects the interviews will uncover” regarding the merits of his claim, ROA.193;

- a ballistics and firearms expert to “render an opinion on the reliability of [the State’s] testimony” because that claim is procedurally defaulted, ROA.194;
- for a mitigation expert because petitioner simply wanted to go on a “fishing expedition[,]” ROA.194;
- a future-dangerousness expert that petitioner intended to use to make a sufficiency-of-the-evidence challenge because *Jackson v. Virginia*, 443 U.S. 307 (1979), “precludes consideration of new factual evidence” on sufficiency claims, ROA.195; and
- a legal expert because “the determination of whether trial counsel’s representation complied with constitutional standards is an issue for the courts to decide, not an attorney, and an attorney affidavit is not relevant.” ROA.195.

Shortly thereafter, petitioner filed a motion for reconsideration that largely rehashed the same funding arguments that the district court had already rejected. ROA.197-226. The district court first summarized its prior order as denying funding because “(1) [petitioner] provided speculative or cursory statements about the reason for any proposed investigation; (2) he proposed investigating some procedurally deficient claim[s]; and (3) he wanted to expand the record beyond the limits of federal habeas practice.” ROA.327. The district court then denied the motion for reconsideration because it “still suffers from the[se] same procedural and substantive defects.” ROA.327-28.

b. After filing a skeletal petition, petitioner filed an “Amended Petition for Writ of Habeas Corpus.” ROA.955. This petition asserted 14 claims for relief, including ineffective-assistance-of-trial-counsel claims for the failure to object to certain victim-impact testimony and for the failure to challenge Robert Baldwin’s testimony regarding magazine markings on bullet cartridges. ROA.938-44. The district court denied all relief. ROA.1598. First, it held that the state court reasonably concluded that trial counsel’s strategic decision not to object to victim-impact testimony did not amount to deficient performance and did not prejudice petitioner. ROA.1624-27. Next, the district court held that petitioner’s ineffective-assistance claim regarding magazine-mark testimony was procedurally barred because it was raised only in his supplemental state habeas application and he could not overcome his procedural default under *Martinez v. Ryan*, 566 U.S. 1 (2012).

6. The Fifth Circuit affirmed in an unpublished opinion. *Mamou v. Davis*, 742 F. App’x 820 (5th Cir. 2018); App. A. In affirming the denial of funding under 18 U.S.C. § 3599(f), the Fifth Circuit recognized that, “[w]hile this appeal was pending, the Supreme Court rejected the ‘substantial need’ language we had been using in applying this statute” because that language “arguably created a greater burden than the text’s ‘reasonably necessary’ language.” App. A at 3. Moreover, it “recognize[d] that in two other cases since *Ayestas* [it had] remanded for reconsideration of the funding decision” under the revised standard. App. A at 3 n.1. But, applying *Ayestas* to the facts of this case, the Fifth Circuit declined to remand and instead affirmed because “the reasons the district court gave for its ruling remain sound after *Ayestas*.” App. A at 3. As the Fifth Court succinctly stated, “none of the district court’s reasons depend on the heightened standard that *Ayestas* rejected.” App. A at 3 n.1.

For each funding request, the Court explained exactly why *Ayestas* did not require reversal or even remand. Regarding petitioner’s request for funding for a mitigation expert and an actual-innocence investigator, the Fifth Circuit explained that funding would have been denied under the correct standard because the district court found these requests were based on “speculat[ion].” App. A at 3 (stating that this funding would “stand[] little hope of helping him win relief” (quoting *Ayestas*, 138 S. Ct. at 1094)). Likewise, *Ayestas* did not affect the district court’s conclusion that petitioner was not entitled to funding for an expert on future dangerousness because his sufficiency-of-the-evidence challenge to the jury’s future-dangerousness finding “considers only ‘the record evidence adduced at trial.’” App. A at 3 (quoting *Jackson*, 443 U.S. at 324). Nor did it affect the district court’s conclusion that he was not entitled to funds to develop his exhausted and unexhausted ineffective-assistance claims: no funding was reasonably necessary to develop his exhausted claims because any new evidence would be barred by *Pinholster*, and no funding was reasonably necessary to develop his unexhausted claims because he failed to show how funding could help him overcome procedural default under *Martinez*, 566 U.S. 1. App. A at 3-4. Moreover, the Fifth Circuit held that the district court’s reasons for denying ballistics expert funding survived *Ayestas* because, “even if court-funded investigation might have revealed further weaknesses in the ballistics testimony to show counsel’s mistake in not seeking to exclude or counter it, that could not change the result of the prejudice inquiry as there remained overwhelming evidence of [petitioner’s] guilt.” App. A at 4.

The Fifth Circuit then turned to the two ineffective-assistance-of-trial-counsel claims on which it had granted petitioner a certificate of appealability—his claim that his trial counsel should have objected to punishment phase testimony from victims of the uncharged

murders, and his claim that his trial counsel should have challenged magazine mark testimony by the State's ballistics expert—and denied them both on the merits. App. A at 4-7. Relevant here, the Fifth Circuit affirmed the denial of relief on these claims not only because petitioner failed to establish his trial counsel's deficient performance, but because overwhelming evidence precluded his ability to establish prejudice. App. A at 4-7.

ARGUMENT

I. REVIEW IS UNWARRANTED BECAUSE THE FIFTH CIRCUIT EXPLICITLY AND UNAMBIGUOUSLY APPLIED THE CORRECT LEGAL STANDARD.

Petitioner asks for a writ of certiorari because he claims that the Fifth Circuit applied the wrong legal standard when it affirmed the district court’s denial of funding under 18 U.S.C. § 3599(f). Specifically, he asserts that “the Fifth Circuit relied on the impermissible ‘substantial need’ test,” Pet. 19, “relied on the ban on funding for procedurally defaulted claims which *Ayestas* . . . abrogated,” Pet. 22, and “contravened *Ayestas* in requiring [him] to show that he will be able to win relief if the services were granted,” Pet. 24. But none of this is true. The Fifth Circuit unambiguously applied the correct legal standard this Court announced in *Ayestas*.

A. Even a cursory review of the Fifth Circuit’s opinion dispels any notion that it applied the “substantial need” test instead of the “reasonably necessary” test mandated by *Ayestas*. The Fifth Circuit correctly stated that funding is available “if the services of the proposed expert or investigator are ‘reasonably necessary’ to represent the petitioner.” App. A at 3. As if that were not clear enough, it then expressly stated that *Ayestas* “rejected the ‘substantial need’ language [the Fifth Circuit] had [previously] been using in applying” section 3599(f) because it “arguably created a greater burden.” App. A at 3. Indeed, the only reference in the opinion to “substantial need” comes in this section acknowledging that it is no longer the governing standard. App. A at 3.

B. It is equally obvious that the Fifth Circuit did not categorically bar funding for procedurally defaulted ineffective-assistance-of-trial-counsel claims.⁵

A prisoner may overcome procedural default of an ineffective-assistance-of-trial-counsel claim by establishing (1) that “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) that his state habeas counsel was ineffective for failing to present the trial court ineffectiveness claim in the state habeas proceeding, *id.* at 13. Accordingly, this Court has held that funding may be available when the petitioner shows that the funding “stands a credible chance of enabling [him] to overcome the obstacle of procedural default” by establishing both elements. *Ayestas*, 138 S. Ct. at 1094.

That is exactly what the Fifth Circuit required petitioner to show. Citing both *Trevino* and *Martinez*, the Fifth Circuit explicitly acknowledged that “a petitioner may show cause to excuse the procedural default of ineffective-assistance-of-trial-counsel claims if he received ineffective assistance from his state counsel.” App. A at 4 (citing *Martinez* and *Trevino*). But it nevertheless denied funding because petitioner made no showing whatsoever that the funding would give him a credible chance to overcome his default. Addressing both

⁵ The Fifth Circuit did, by contrast, categorically bar funding for *exhausted* ineffective-assistance-of-trial-counsel claims. App. A at 4 n.3. That is not because the Fifth Circuit applied a standard “even more stringent than the ‘substantially necessary’ standard,” as petitioner contends (Pet. 21), but because *Cullen v. Pinholster*, limits federal habeas review “to the record that was before the state court that adjudicated the claim on the merits.” 563 U.S. at 181. Since new evidence “would be inadmissible in a federal habeas court” adjudicating an exhausted claim, developing that evidence cannot be reasonably necessary. *Ayestas*, 138 S. Ct. at 1095; App. A at 4 n.3 (holding that “further factual development [on exhausted claims] was not reasonably necessary as AEDPA limits federal review to the existing state record”). Petitioner makes no argument to the contrary, and, even if he did, he waived that argument by failing to raise it below. *See* App. A at 4 n.3 (stating that petitioner “does not appear to challenge this ruling”).

elements of the *Martinez* test for overcoming procedural default, the Fifth Circuit explained that petitioner not only failed “to provide ‘sufficient detail’ about what the basis of his underlying ineffective assistance” claims would be (the first *Martinez* element), but he also failed to “explain how state habeas counsel’s representation fell below expected standards” (the second *Martinez* element). App. A at 4. Petitioner asserts that this put him in a Catch-22 where he had to produce evidence to overcome his default in order to obtain funding to discover that very evidence (*see* Pet. 30), but that is not correct. As the Fifth Circuit explained, he did not need evidence to obtain funding; he merely needed “to show how [funding] would help him” overcome his default. App. A at 4. That the Fifth Circuit denied his funding request for failure to make that showing establishes both that he was not in a Catch-22 and that funding was not categorically barred.⁶

C. Similarly, the Fifth Circuit did not “contravene[] *Ayestas*” by requiring petitioner to show he “will be able to win relief if the services were granted.” Pet. 24. This Court in *Ayestas* stated that “a funding applicant must not be expected to *prove*” he will obtain relief if granted funding. *Ayestas*, 138 S. Ct. at 1094. At the same time, however, it stressed that “[p]roper application of the ‘reasonably necessary’ standard . . . requires courts to consider the potential merit of the claims that the applicant wants to pursue, the likelihood that the

⁶ Petitioner makes a half-hearted attempt to conjure a circuit split by citing decisions by two other circuits that he contends “have given meaning to *Martinez* by providing habeas petitioners some opportunity to prove cause and prejudice and develop their defaulted ineffective-assistance claims before rejecting them on their merits.” Pet. 30 (citing *Sasser v. Hobbs*, 735 F.3d 833, 851-54 (8th Cir. 2013); *Dickens v. Ryan*, 740 F.3d 1302, 1321 (9th Cir. 2014) (en banc)). Neither of these cases involves funding, and both are entirely consistent with the Fifth Circuit’s holding that, while some applicants may receive funding to develop procedurally defaulted claims if they show how that funding may reasonably lead to relief, petitioner has not come close to making that showing.

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.* This is the standard the Fifth Circuit applied. It never suggested that petitioner needed to prove that his claims would be successful if funding were granted. It instead quoted *Ayestas* for the proposition that “funding is not appropriate when it ‘stand[s] little hope of helping [the applicant] win relief,’” and denied funding because petitioner’s funding requests do meet that threshold. App. A at 3 (quoting *Ayestas*, 138 S. Ct. at 1094). It is petitioner’s belief that he need not show how funding will help him—not the Fifth Circuit’s decision—that is contrary to *Ayestas*.

* * *

The Fifth Circuit’s faithful application of the correct governing legal standard does not warrant review.

II. THE FIFTH CIRCUIT DID NOT ERR IN APPLYING THE “REASONABLY NECESSARY” TEST TO THE FACTS OF THIS CASE.

Petitioner also asks this Court to correct the Fifth Circuit’s allegedly erroneous application of law to fact by summarily reversing the denial of funding because he has shown funding is reasonably necessary. Pet. 33 (stating that “[s]ummary reversal is . . . the necessary and appropriate relief,” and that “[t]his Court has not shied away from summarily deciding fact-intensive cases”). But there is no error to correct. The Fifth Circuit correctly affirmed the denial of each of petitioner’s funding requests because it recognized that those requests cannot possibly “help [him] win relief.” *Ayestas*, 138 S. Ct. at 1094.

The Fifth Circuit correctly affirmed the denial of petitioner’s request for funding to develop a claim of actual innocence by interviewing trial witnesses. For one, the court explained that any evidence supporting actual innocence cannot “by itself help him win relief because “there is no freestanding actual innocence claim on federal habeas review.” App. A at 3 (citing *Herrera v. Collins*, 506 U.S. 390, 404 (1993)). For another, it explained that “to the extent such a claim could be used to overcome a procedural default of an independent constitutional claim, [petitioner] was only speculating” that these interviews would produce useful evidence. App. A at 3 (internal quotation marks omitted). Despite petitioner’s assertion that he has “reason to believe” that the prosecution induced certain witnesses to testify against him and concealed this arrangement from the defense, ROA.125 (application for funding), for example, he has never identified a basis for this serious charge, App. A at 3; ROA.191 (district court stating that applicant “is speculating that agreements actually existed”). Similarly, while he alleges that a specific witness—Dodson, to whom petitioner confessed—fabricated his testimony (Pet. 21), he not only “offer[ed] *no details* about what testimony . . . [was] fabricated,” ROA.191 (emphasis added), but failed to raise or brief this argument to the Fifth Circuit. Given that only speculation undergirded his request for funding to develop actual-innocence evidence, the Fifth Circuit had no choice but to affirm the denial of funding.

The Fifth Circuit also correctly affirmed the denial of mitigation expert funding. As with his actual innocence funding request, petitioner “provid[ed] no detail about what mitigating evidence his trial attorneys ignored or neglected, or what additional evidence is likely to affect the outcome.” ROA.194. And petitioner does not disagree in this petition to this Court. *See* Pet. 21, 24 (arguing only that the district court effectively required him to

prove his case before obtaining funding). The Fifth Circuit was not required to “subsidize a fishing expedition.” *Ayestas*, 138 S. Ct. at 1094 (internal quotation marks omitted).

The same is true for petitioner’s request for funding to develop wholly amorphous and procedurally defaulted ineffective-assistance-of-trial-counsel claims. Despite having to show that funding “stands a credible chance of enabling [him] to overcome the obstacle of procedural default,” *id.*, all he does is complain generally about the number of hours his habeas counsel spent investigating. Pet. 27-28. He does not explain how his habeas counsel’s performance was defective and fails even to identify specific claims that, if investigated now, could help him both overcome his default and obtain relief. *Id.* That is why the Fifth Circuit correctly affirmed the denial of funding as not “reasonably necessary.” *See* App. A at 4 (finding that petitioner failed “to ‘explain how state habeas counsel’s representation fell below expected standards,’” and “to provide ‘sufficient detail’ about what the basis of his underlying ineffective assistance of counsel claim[s] would be”).⁷

Petitioner does identify one procedurally defaulted ineffective-assistance-of-trial-counsel claim that he believes will benefit from funding: his claim that his trial counsel was ineffective for not objecting to magazine mark testimony. Pet. 24, 25. But the Fifth Circuit still properly affirmed because that claim cannot possibly benefit from funding. To show even

⁷ Moreover, 28 U.S.C. § 2254(e)(2) bars federal courts from considering evidence not presented to the State courts when deciding a procedurally-defaulted ineffective-assistance-of-counsel claim. *Id.* (“If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim”). Because new evidence supporting petitioner’s procedurally-defaulted ineffective-assistance-of-counsel claims cannot be considered, funds to develop that evidence are not “reasonably necessary.”

that this claim has *some* merit, as *Martinez* requires to overcome procedural default, petitioner would have to show both that his trial counsel's performance was deficient and "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "[T]he magazine mark testimony that [petitioner] attacks," however, "was cumulative of other ballistics evidence, which itself only corroborated eyewitness testimony and a confession strongly implicating [him]. So even if court-funded investigation might have revealed further weaknesses in the ballistics testimony to show counsel's mistake in not seeking to exclude it or counter it, that could not change the result of the prejudice inquiry as there remained overwhelming evidence of [petitioner's] guilt." App. A at 4.⁸

The inability of funding to alter the prejudice inquiry also required the Fifth Circuit to deny petitioner's request for funds to develop his claim that trial counsel was ineffective for failing "to challenge clearly impermissible victim impact evidence regarding non-victims." Pet. 11; *see also* Pet. 25. Developing evidence to show that petitioner's trial counsel should have objected is not "reasonably necessary" because it cannot possibly affect the fact that, even had he objected and the evidence been excluded, it would have made no difference to the punishment outcome. *See Strickland*, 466 U.S. at 694 (prejudice requires that there be a "reasonable probability" of a different result). "The murders of Gibson and Williams likely had a substantial impact at the punishment phase," and the objectionable testimony was

⁸ Petitioner devotes one sentence to respond to this argument, saying only that the "evidence was not cumulative and there were no eyewitnesses to Carmouche's murder." Pet. 24. He has therefore not properly presented the issue to this Court, and, even if he had, he is wrong. Testimony from multiple eyewitnesses that petitioner kidnapped Carmouche, ROA.3184; ROA.3363-64, evidence that the bullets (not the casings with magazine markings) retrieved from Gibson and Carmouche were of consistent caliber, grooves, and twist, ROA.3449, and testimony that petitioner confessed, ROA.3398, all strongly and cumulatively implicate petitioner.

“marginal” at best. App. A at 5. Indeed, the Fifth Circuit did not even consider prejudice a close question, as it went “a step further than AEDPA requires in concluding that the state court not only took a reasonable view but the better one in finding no prejudice” on this claim. App. A at 5.⁹

Finally, the Fifth Circuit correctly affirmed the denial of funds for a proposed future-dangerousness expert. Petitioner argues that the Fifth Circuit affirmed “on the erroneous basis that this would be a re-urged claim of insufficiency of the evidence presented on direct appeal.” Pet. 21-22. But he never explains why the denial was erroneous. As the Fifth Circuit explained, funding to develop new evidence for a sufficiency-of-the-evidence claim cannot be reasonably necessary because *Jackson v. Virginia*, 443 U.S. 307, precludes courts from considering new evidence in adjudicating that claim. Petitioner does not dispute this. He instead tries to circumvent it by asserting in a footnote that the funding will not go to aid a sufficiency-of-the-evidence claim but to “refute and show the limitations of the State’s case for future dangerousness.” Pet. 22 n.12. Of course, refuting and showing the limitations of the State’s evidence *is* a challenge to the sufficiency of the State’s evidence. *See Jackson*, 443 U.S. at 316 (Fourteenth Amendment requires “that no person shall be made to suffer the onus of criminal conviction except upon sufficient proof”); *see also* ROA.195 (district court interpreting need for “expert on future dangerousness who can refute and show the limitations of the State’s case” as supporting sufficiency challenge). But even if this request

⁹ Moreover, funding would not help establish deficient performance. As the Fifth Circuit correctly recognized, “trial counsel made a strategic choice to allow the testimony because he calculated that the marginal benefit it provided the prosecution was outweighed by emphasizing to the jury that all the violence resulted from the drug trade, with its known risks.” App. A at 5.

could be construed as intended to support some other claim cognizable on federal habeas review, he has not identified it. Nor did he identify it in his Fifth Circuit briefing. So the denial of funding for that unidentified claim—whatever it may be—is not properly presented to this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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