

No. 19-____ (CAPITAL CASE)

IN THE
Supreme Court of the United States

CARLOS MANUEL AYESTAS,
Petitioner,

v.

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

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

This Court has found constitutionally deficient performance of counsel based on “prevailing professional norms” that precede the Court’s own decisions. *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984). The questions presented here are as follows:

1. Whether “prevailing professional norms” required counsel in a capital case to investigate potential mitigation evidence, including red flags for mental health and substance abuse, before this Court decided *Wiggins v. Smith*, 539 U.S. 510 (2003), *Rompilla v. Beard*, 545 U.S. 374 (2005), and *Porter v. McCollum*, 558 U.S. 30 (2009)—as the Third, Sixth, Ninth, and Tenth Circuits have held, in conflict with the decision below.

2. Whether, under 18 U.S.C. § 3599(f), a reasonable attorney would regard the pursuit of services to investigate a capital defendant’s mental health as “sufficiently important,” *Ayestas v. Davis*, 138 S. Ct. 1080, 1093 (2018), where it is plausible that the failure to investigate that aspect of petitioner’s background on state postconviction review could, given substantial authority recognizing counsel’s duty to do so, excuse the procedural default of an ineffective assistance of trial counsel claim.

PARTIES TO THE PROCEEDING

Petitioner is Carlos Manuel Ayestas, appellant below.

Respondent is Lorie Davis, Director, Texas Department of Criminal Justice (Institutional Division).

RELATED PROCEEDINGS

A direct appeal, *Ayestas v. Texas*, CCRA Case No. 72,928, Texas Court of Criminal Appeals, in which judgment was entered on November 4, 1998.

Texas postconviction proceedings, *Ex parte Ayestas*, Application No. 69,674-01, CCRA Case No. 72,928, Texas Court of Criminal Appeals, in which judgment was entered on September 10, 2008.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Carlos Manuel Ayestas respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the court of appeals on remand from this Court is reported at 933 F.3d 384, and reprinted in the Appendix to the Petition (“App.”) at 1a-19a. The Fifth Circuit’s prior opinion in this case is reported at 817 F.3d 888 and reprinted at App. 35a-55a. The judgment of the district court is unreported and reprinted at App. 20a-34a.

JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. §§ 2241 and 2254. The court of appeals had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. The judgment of the court of appeals was entered on July 31, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reprinted in the Appendix to the Petition at 58a-62a.

INTRODUCTION

In 2018, this Court unanimously vacated the Fifth Circuit’s decision affirming the denial of petitioner Carlos Manuel Ayestas’s application for investigative services under 18 U.S.C. § 3599(f). The Court held

that the Fifth Circuit had applied too demanding a test in evaluating that request, and that § 3599(f), correctly construed, requires a court to determine only “whether a reasonable attorney would regard the services as sufficiently important.” *Ayestas v. Davis*, 138 S. Ct. 1080, 1093 (2018).

Ayestas seeks funding to develop evidence (i) to support his ineffective assistance of trial counsel claim under *Wiggins v. Smith*, 539 U.S. 510 (2003), and (ii) to allow him to overcome state habeas counsel’s procedural default of that claim, per *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), by showing that state habeas counsel also was deficient.

A reasonable attorney would regard these services as sufficiently important to pursue. At trial, *Ayestas*’s counsel called no mitigation witnesses and gave a mitigation presentation lasting only two minutes, having conducted a meager investigation into potential mitigation evidence that ignored major red flags. An appropriate investigation into *Ayestas*’s mental health and substance abuse history could easily have unearthed valuable mitigation evidence, as *Ayestas* was diagnosed with schizophrenia soon thereafter and had long suffered from substance abuse problems. State habeas counsel similarly failed to pursue those issues, ignoring his own mitigation expert’s pleas to investigate *Ayestas*’s mental health and substance abuse history.

No district court has evaluated *Ayestas*’s § 3599 request under the correct statutory standard, however. Instead, on remand from this Court the Fifth Circuit held as a matter of law that no reasonable at-

torney would pursue the requested services and reinstated its judgment affirming the denial of Ayestas’s § 3599(f) application. The court reasoned that there was no point pursuing Ayestas’s ineffective assistance claims now because state habeas counsel had no duty to investigate mental illness or substance abuse, and therefore no deficiency on his part could excuse the default of Ayestas’s ineffective assistance of trial counsel claim. That conclusion is as erroneous as the Fifth Circuit’s prior disposition, and it demands this Court’s intervention once again.

The decision below conflicts with other authority in two ways, each of them independently requiring reversal.

First, the court of appeals fundamentally misapplied this Court’s Sixth Amendment decisions, in conflict with the decisions of other courts of appeals, in holding that a 1998-era attorney did not violate prevailing professional norms for capital representations by failing to investigate potential red flags for mitigation evidence related to substance abuse and mental health. The court of appeals held that if no decision of this Court had explicitly recognized that duty by 1998, then the duty did not exist. App. 8a-9a. But the professional norms of the day do not arise only when stated in this Court’s cases, as *Wiggins* itself recognized in holding, in 2003, that “well-defined norms” *in 1989* required the preparation of a social history report and “efforts to discover all reasonably available mitigating evidence.” 539 U.S. at 524 (quotation omitted). Other decisions of this Court—and of numerous courts of appeals—underscore the scope of the duty at the time of the representation here and the

proper analysis for discerning it. Once the fundamental professional obligation to perform a mitigation investigation is established, the Fifth Circuit's proffered justification for state habeas counsel's failure to investigate disappears.

Second, to obtain § 3599(f) services under the standard articulated by this Court in *Ayestas*, it was necessary only to show that a reasonable attorney would find it "plausible" that state habeas counsel had a duty to investigate Ayestas's mental health background, such that there was a "credible chance" he would be able to overcome the procedural default of the *Wiggins* claim his state habeas counsel failed to investigate or raise. Here, where substantial authority recognizes the contemporaneous duty that state habeas counsel is claimed to have neglected, a reasonable attorney could easily conclude that evidence of state habeas counsel's deficiency offered a "credible chance" of overcoming the default of Ayestas's *Wiggins* claim, such that the evidence merited investigation. Certainly it cannot be true as a matter of law that no reasonable attorney would explore this evidence, as the Fifth Circuit held. The decision below erases the reasonable attorney standard set forth by this Court in its prior *Ayestas* decision, in favor of a vanishingly narrow interpretation of § 3599 that the Court already rejected.

Certiorari should be granted.

STATEMENT OF THE CASE**A. Trial Counsel's Scant Efforts to Prepare for Trial**

Ayestas was arrested in September 1995 and charged with capital murder. ROA 1611.¹ On January 16, 1996, the state court appointed Diana Olvera to represent Ayestas at his capital trial. ROA 685-86. On February 15, 1996, trial counsel moved for the appointment of an investigator, John Castillo. ROA 686. For nearly fifteen months, trial counsel took no further action to prepare for Ayestas's capital trial. Castillo met with Olvera and Ayestas in January and February 1996, but conducted no investigation until May 7, 1997—about a month before jury selection was to begin. *Id.*

At that point, Castillo had Ayestas complete a questionnaire about his personal history. ROA 686-88. Ayestas indicated that he had experienced multiple head traumas (while playing soccer, in a motorcycle accident in which he wore no helmet, and in a car accident that required X-rays of his head). ROA 687-88. Ayestas reported that he still had bad headaches. ROA 688. He informed Castillo that he had been drinking since he was sixteen years old, and that he regularly used cocaine; he was under the influence of alcohol and cocaine on the day of the murder. *Id.*

Trial counsel did essentially nothing with this information. They did not follow up on any of the red flags about Ayestas's head injuries, potential mental

¹ "ROA" citations refer to the Record on Appeal in *Ayestas v. Stephens*, No. 15-70015 (5th Cir. May 14, 2015).

health issues, and substance abuse. *Id.* They did not meet with a single family member, friend, or acquaintance in California, Mexico, Louisiana, or Texas, where Ayestas spent much of his adult life. They never obtained the records identified in the questionnaire as necessary to a comprehensive assessment of Ayestas's personal, psychological, and social history. ROA 687-88. Nor did they have Ayestas evaluated by any mental health professional.

About two weeks before jury selection began on June 13, 1997, Castillo reached out to Ayestas's family in Honduras for the first time. ROA 5953. On July 2, 1997, five days before trial, Olvera wrote to the family to explain that she needed Ayestas's "mother and two older sisters to testify" during sentencing. ROA 5957-58. Ayestas's mother never received the letter promised by Olvera explaining why she needed to travel to the United States. ROA 867. The family members' visa requests were denied, and none of Ayestas's family appeared at trial. *Id.*

B. Trial and Sentencing

The guilt phase of Ayestas's trial began on July 7, 1997 and lasted two days. ROA 1680-82. Trial counsel presented no witnesses in Ayestas's defense. Ayestas was convicted under Texas's law of the parties, which means that the jury did not have to find that he was actually the killer. Tex. Penal Code § 7.01.

The sentencing phase began on July 10, 1997 and lasted less than a day. Trial counsel again presented no witnesses, and the entire sentencing phase for the defense consisted of three letters from an instructor

who taught Ayestas's English class in prison, attesting that he was a "serious and attentive" student. ROA 5219-24. Trial counsel attempted to introduce evidence that Ayestas had no criminal record in Honduras, but neglected to prepare evidence linking the records to Ayestas. The trial court refused to admit them, and trial counsel's mitigation presentation lasted two minutes. ROA 4709-10.

During closing arguments, the state emphasized the absence of any mitigating evidence, and in particular the absence of any evidence that Ayestas had mental health or substance abuse problems. ROA 4747. The jury found against Ayestas on the three "special issues" required under Texas law, one of which was that there were no mitigating circumstances sufficient to spare Ayestas's life. Tex. Code Crim. Proc. art. 37.071, § 2(e); *Ayestas*, 138 S. Ct. at 1085-86. The court sentenced Ayestas to death. *Ayestas*, 138 S. Ct. at 1086. If a single juror had dissented on a single special issue, no death sentence could have been imposed. Tex. Code Crim. Proc. art. 37.071, § 2(g). The Texas Court of Criminal Appeals ("TCCA") affirmed the conviction and sentence on November 4, 1998. App. 25a.

C. State Habeas Proceedings

Ayestas began the state habeas process while his direct appeal was pending, as Texas law requires. *Ayestas*, 138 S. Ct. at 1086; *see* Tex. Code Crim. Proc. art 11.071 § 4(a). On January 19, 1998, the TCCA appointed Gary Hart to represent Ayestas in the habeas proceedings. ROA 667. In February 1998, Hart retained mitigation specialist Tena Francis and her

colleague Gerald Bierbaum to consult on the representation. ROA 668.

Francis prepared an investigation plan, which noted that the jury had heard virtually no mitigation evidence concerning Ayestas's background. ROA 703, 715-21. Francis reported that trial counsel "had compiled no bio-psycho-social history of Mr. Ayestas," and that this investigation would have to start anew in the postconviction representation. ROA 703. She wrote to Hart:

The jury heard nothing about this defendant's: family, real character, life experiences in Honduras, mental health, possible mental illness, substance abuse history, educational background, physical or psychological trauma he suffered, etc. We must collect this information now to see what his attorneys missed. We will begin by conducting a comprehensive social history interview of the client.

ROA 703, 720. Francis further explained that "a competent social history would have to be comprehensive and include . . . numerous witness interviews" with individuals from Honduras, California, Mexico, and Houston. ROA 703.

The investigation plan also addressed the need to investigate Ayestas's mental health, due to his substance abuse and the "high rate of comorbidity between substance [] abuse and mental illness." ROA 704, 720-21. Francis explained that "[i]n some cases, drug use brings about the symptoms of a mental illness," while "[i]n other cases, drug addiction begins as

a means by the drug user to self-medicate systems of mental illness.” ROA 704. Francis concluded that a “comprehensive investigation into the bio-psycho-social history of Mr. Ayestas was warranted in order to explore the issues related to addiction and mental health.” ROA 703-04, 720-21.

Hart did not follow Francis’s recommendation to conduct a thorough background investigation. He did nothing to investigate issues of Ayestas’s mental health or substance abuse. Nor did he pursue mitigating (or any other) evidence in the places where Ayestas had spent significant time—California, Mexico, and Texas, along with Honduras. *Id.* Francis, who had worked with Hart on other cases, later attested that Hart generally was not “concerned about conducting a comprehensive mitigation investigation” and did not “seek adequate funding for them.” ROA 702. Francis was concerned that Hart was overworked, and that his solution when overextended was to “limit[] investigation and ... rais[e] mostly record-based claims.” *Id.* As a result, Hart did not assert any claim related to trial counsel’s failure to develop mitigating evidence other than a narrow claim regarding the failure to “secure the attendance at the punishment phase of trial of any of [Ayestas’s] family members from Honduras.” ROA 5270. On September 10, 2008, the TCCA denied Ayestas’s application for state habeas relief. App. 25a.

While Ayestas’s state habeas application was pending, additional evidence of his mental illness emerged. In July of 2001, Ayestas suffered a serious psychotic episode. ROA 770-74. A psychiatrist diagnosed him with schizophrenia, undifferentiated

type during an outpatient psychiatric follow-up. *Id.* In 2003, a psychologist reported to Hart that Ayestas showed signs of “delusional thinking that clearly needs to be monitored. He told [Hart] that [Ayestas] ha[d] been placed on antipsychotic medication recently and clearly his mental status need[ed] to be evaluated closely.” ROA 776.

D. Federal Habeas Petition

On September 11, 2009, Ayestas filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Southern District of Texas, through new counsel appointed under the Criminal Justice Act. *Ayestas v. Thaler*, No. 09-Civ-02999 (S.D. Tex. Sept. 11, 2009), ECF No. 18. He pleaded eight claims, including, for the first time, a Sixth Amendment ineffective-assistance-of-trial-counsel (“IATC”) claim under *Wiggins v. Smith*, 539 U.S. 510 (2003). *Id.* at 7-26. The *Wiggins* claim asserted that trial counsel did not conduct a reasonable sentencing investigation, resulting in the failure to discover and present mitigating evidence regarding Ayestas’s mental health and substance abuse. *Id.* Ayestas filed his first § 3599(f) motion seeking funding to conduct a mitigation investigation on January 25, 2011. *See Ayestas v. Thaler*, No. 09-Civ-02999 (S.D. Tex. Jan. 25, 2011), ECF No. 18.

The district court entered judgment for respondent on all issues raised by Ayestas’s habeas petition. *Ayestas v. Thaler*, No. 09-Civ-02999 (S.D. Tex. Jan. 26, 2011), ECF No. 19. The court held that Ayestas’s *Wiggins* claim was unexhausted and procedurally barred. *Id.* at 11-16. The court also

denied the § 3599(f) motion. The Fifth Circuit denied a certificate of appealability (“COA”).

After Ayestas’s federal habeas petition was denied, this Court decided *Martinez v. Ryan*, 566 U.S. 1 (2012), holding that deficient state habeas representation can excuse the default of an IATC claim. On October 9, 2012, Ayestas filed a petition for a writ of certiorari. Pet., *Ayestas v. Thaler*, No. 12-6656 (U.S. Oct. 9, 2012). While that petition was pending, the Court decided *Trevino v. Thaler*, 569 U.S. 413 (2013), confirming that *Martinez* applies in Texas. On June 3, 2013, the Court granted Ayestas’s petition for certiorari, vacated the Fifth Circuit’s judgment, and remanded the case for further consideration in light of *Trevino*. See *Ayestas v. Thaler*, 569 U.S. 1015, 1015 (2013).

E. Proceedings on the First Remand from This Court

On remand, Ayestas again filed a § 3599(f) motion for a mitigation specialist. *Ayestas v. Thaler*, No. 09-Civ-02999 (S.D. Tex. Oct. 6, 2014), ECF No. 47. The motion detailed how the type of background investigation recommended by Hart’s mitigation expert was necessary to evaluate Ayestas’s mental health. It identified changes in Ayestas’s behavior and demeanor that suggested the presence of mental illness at the time of the crime, and described many areas of his background that trial counsel had failed to explore, including childhood poverty and dysfunction. *Id.* at 11-16.

The district court denied Ayestas’s habeas petition and declined to issue a COA on the underlying claims.

App. 21a, 33a-34a. Applying the Fifth Circuit’s then-existing standard, the district court also held that Ayestas could not show a “substantial need” for § 3599(f) funding and denied his request. App. 31a-32a.

The Fifth Circuit refused to issue a COA on the underlying constitutional claims and affirmed the district court’s order denying funding for services under § 3599(f). App. 45a-49a. The Fifth Circuit agreed with the district court’s conclusion that the underlying *Wiggins* claim was neither viable nor meritorious. *Id.* In holding that trial counsel was not deficient, the Fifth Circuit noted—incorrectly—that Ayestas was “examined by a psychologist” before trial. App. 46a.

As for Ayestas’s § 3599(f) motion, the court concluded that the district court had not abused its discretion in denying it. App. 48a. The court explained that Ayestas was required to establish a “substantial need’ for [] services to pursue a claim that is not procedurally barred.” *Id.* at 43a. The court held that § 3599(f) investigative resources were properly denied because Ayestas’s *Wiggins* claim was “meritless” and thus not “viable.” *Id.* On rehearing, the court revised its decision, acknowledging that its no-deficiency holding depended on its erroneous belief that Ayestas had been examined by a psychologist before trial, but again affirmed. App. 57a.

F. The Court’s Decision in *Ayestas*

This Court granted Ayestas’s petition for certiorari to decide whether the Fifth Circuit’s standard for evaluating § 3599 requests comported with the statu-

tory “reasonably necessary” test. The Court unanimously held that it did not. *See Ayestas*, 138 S. Ct. at 1093. It concluded that the Fifth Circuit’s “substantial need” standard was “arguably more demanding” than the statutory test, and that the Fifth Circuit “exacerbated the problem” by requiring an applicant to prove that his potential claim is “viable” and not “procedurally barred” prior to investigation. *Id.*

Invoking the “interpretive principles [by] which § 3599’s predecessors were read by the lower courts,” the Court clarified the proper standard. *Id.* at 1093-94. In considering an application for funding, a district court must consider “whether a reasonable attorney would regard the [investigative] services as sufficiently important” to pursue them. *Id.* at 1093. This standard permits courts to deny funding requests where the requested services “stand little hope” of winning the applicant relief, such as where the underlying claim is not even “plausible.” *Id.* at 1094. Yet the Court cautioned that the inquiry into the potential merits of a claim is a limited one: “a funding applicant must not be expected to *prove* that he will be able to win relief if given the services he seeks.” *Id.* The Court also warned that after *Trevino*, “it may be error for a district court to refuse funding” based on the procedural default of the underlying claim where the requested “funding stands a credible chance of enabling a habeas petitioner to overcome the obstacle of procedural default.” *Id.*

In a concurrence joined by Justice Ginsburg, Justice Sotomayor explained that “on the record before this Court, there should be little doubt that *Ayestas* has satisfied § 3599(f).” *Id.* at 1095-96 (Sotomayor, J.,

concurring). The concurring Justices observed that the principle that the applicant need not “*prove*” his underlying claim extends to both the ultimate claim for relief and the basis for overcoming procedural default. *Id.* at 1097 (Sotomayor, J., concurring) (“[T]he inquiry is not whether Ayestas can prove that his trial counsel was ineffective under *Strickland* or whether he will succeed in overcoming the procedural default Rather . . . the focus is on the *potential* merit of these claims.” (emphasis added)). And yet, “[e]ven with the scant evidence” available prior to an investigation, the concurring Justices concluded that Ayestas had made a “strong” showing that both trial and state habeas counsel had been deficient in failing to investigate or introduce mitigation evidence related to mental illness and substance abuse, and that these failures prejudiced Ayestas. *Id.* at 1097-99.

G. Fifth Circuit Proceedings Following the Court’s Decision in *Ayestas*

On remand, the Fifth Circuit reinstated its prior judgment rather than direct the district court to reconsider Ayestas’s funding request under the correct statutory standard. The Fifth Circuit addressed only Ayestas’s prospects of overcoming procedural default based on the ineffectiveness of his state habeas counsel. In contrast with Justice Sotomayor’s view that there was “strong” evidence that Ayestas’s state habeas counsel was deficient, *Ayestas*, 138 S. Ct. at 1099 (Sotomayor, J., concurring), the Fifth Circuit held that “nothing” could conceivably establish state habeas counsel’s deficiency, App. 2a.

The Fifth Circuit started at the right place: with the principle that counsel’s performance is evaluated

based on the professional norms prevailing when the representation took place. But the court denied that the development of mitigation evidence related to mental illness or substance abuse was established as a professional norm in 1998, when Hart filed Ayes-tas's state habeas application, because the representation preceded a number of this Court's decisions "emphasizing the importance of thorough mitigation investigation in capital defense cases"—*Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Rompilla v. Beard*, 545 U.S. 374 (2005). App. 8a-9a. The Fifth Circuit did not consider the independent importance of mitigation evidence under Texas's death penalty statute, irrespective of norms discussed in this Court's cases, in view of the statutory directive that the jury decide whether mitigating circumstances existed sufficient to spare Ayes-tas's life. Tex. Code Crim. Proc. art. 37.071 § 2(e).

The court concluded that Hart's performance was constitutionally adequate. In the Fifth Circuit's view, Hart's failure to investigate Ayestas's social history was reasonable in 1998 "given that there was no evidence he was schizophrenic until 2000." App. 14a. The Fifth Circuit believed that it was "constrained" to conclude that Hart's decision not to investigate Ayestas's social history, including substance abuse and possible mental illness, was a reasonable "strategic" decision, as evidence of Ayestas's mental illness or substance abuse would have been "double-edged," regarded by the jury as aggravating instead of mitigating. App. 9a ("The 'double-edged' nature of substance abuse and mental illness evidence and the state of the

law before 2000 would have likely made those claims seem unlikely to succeed”); *see id.* at 13a-14a.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit misapplied the *Strickland* standard in identifying prevailing professional norms for the investigation of mitigating evidence, in clear conflict with decisions of this Court and other courts of appeals, and failed to honor the standard set forth in the Court’s prior decision in this very case. Each error independently warrants the review of this Court.

The Fifth Circuit held that when Aystas’s state habeas counsel was preparing his habeas petition, prevailing professional norms did not require the investigation of potential mitigation evidence concerning petitioner’s substance abuse and mental health because this court had yet to decide *Wiggins*, *Rompilla*, and *Porter*. This Court’s precedents convincingly demonstrate otherwise, in affirming the constitutional deficiency of mitigation investigations in the very same time period. Decisions of the Third, Sixth, Ninth, and Tenth Circuits likewise hold that the constitutional duty of counsel to investigate potential mitigation evidence involving mental health and substance abuse did not materialize only when discussed in decisions of this Court. Professional norms that prevailed in 1998 required the investigation that state habeas counsel abdicated here.

Even if the professional norms for mitigation investigations in 1998 were not perfectly clear under the foregoing authority, the decision below still would be wrong—and contrary to this Court’s precedent—

because it arises from a request for § 3599(f) services, where the question for the court is whether “a reasonable attorney would regard” the requested services “as sufficiently important.” *Ayestas*, 138 S. Ct. at 1093. The case law—which includes decisions finding counsel of the same vintage as *Ayestas*’s state habeas counsel deficient for failing to perform a mitigation investigation—at the very least supports a reasonable attorney’s conclusion that there is a “credible chance” that the requested services could enable *Ayestas* “to overcome the procedural default” of his underlying *Wiggins* claim. The Fifth Circuit concluded otherwise only by ignoring the authorities in conflict with its new interpretation of *Strickland* and effectively requiring *Ayestas* to “prove” that he will eventually succeed in overcoming the procedural default, contrary to the Court’s decision in *Ayestas*. The objective “reasonable attorney” standard set forth in *Ayestas* does not permit a reviewing court to judge a claim procedurally non-viable at the § 3599 stage when that legal conclusion is open to reasonable dispute and the requested funding could develop the claim’s factual basis.

The Fifth Circuit’s decision undercuts the “bedrock principle” of effective assistance of counsel, *Martinez*, 566 U.S. at 12, as well as the statute that Congress enacted to ensure that attorneys have the resources they need to provide effective representation to individuals facing a penalty of death. The Court should not allow it to stand.

**I. THE FIFTH CIRCUIT MISAPPLIED
STRICKLAND AND ITS PROGENY, IN
CONFLICT WITH DECISIONS OF THIS
COURT AND OTHER COURTS OF APPEALS**

**A. In 1998, the Sixth Amendment Required
Counsel to Investigate Mitigation Evi-
dence Involving Mental Health and Sub-
stance Abuse, as Other Decisions Clearly
Hold**

1. *Strickland* instructs that “[t]he proper measure of attorney performance” under the Sixth Amendment is “reasonableness under prevailing professional norms.” *Strickland*, 466 U.S. at 688; see *Hinton v. Alabama*, 571 U.S. 263, 273 (2014) (deficiency standard “is necessarily linked to the practice and expectations of the legal community” (quotation omitted)). This Court has recognized—multiple times—that “prevailing professional norms” required counsel to conduct a robust mitigation investigation, including examination of such issues as substance abuse and mental health, well before 1998.

The Fifth Circuit reasoned that because *Wiggins v. Smith*, 539 U.S. 510 (2003), *Rompilla v. Beard*, 545 U.S. 374 (2005), and *Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam), were issued *after* Hart filed Ayes-tas’s state habeas application and did not “establish[] retroactive constitutional rules,” Hart could not have appreciated the significance of trial counsel’s failure to investigate Ayestas’s substance abuse and mental health and the need to perform an investigation of his own. See App. 8a-9a. Those very cases, however, concern attorneys who fell short of prevailing profes-

sional norms at or before the time that Hart represented Ayestas, and they confirm that capital attorneys throughout the 1980s and 1990s performed below prevailing standards if they failed to adequately pursue red flags for potential mitigation evidence. Consistent with those norms, attorneys at the time pursued ineffective assistance of counsel claims based on the failure to investigate mitigating evidence. *See infra* pp. 19-21. The Texas death penalty statute makes this evidence a critical part of the jury’s sentencing determination. Tex. Code Crim. Proc. art. 37.071 § 2(e). Hart therefore had reason to investigate potential mitigation evidence, and trial counsel’s failure to do the same, before the Court specifically applied *Strickland*’s “reasonableness under prevailing professional norms” standard to claims involving this specific deficiency.

For example, in 2003—while Ayestas’s state habeas proceedings were ongoing—the Court in *Wiggins* held that the petitioner’s counsel performed deficiently (and provided constitutionally ineffective assistance) because they had not performed an adequate mitigation investigation. *See* 539 U.S. at 522-34. If no professional norm required such an investigation before the Court’s decision in *Wiggins*, the petitioner in that case obviously could not possibly have prevailed on his ineffective assistance claim. But as the Court’s decision in *Wiggins* makes plain, “professional standards that prevailed *in 1989*”—long before Hart’s representation of Ayestas—called for investigation of potential mitigating evidence. *Id.* at 534 (emphasis added). Indeed, the Court explained that

“well-defined norms” in 1989 required that “investigations into mitigating evidence ‘should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.” *Id.* at 524 (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (“1989 ABA Guidelines”) 11.4.1(C), at 93 (1989), and citing 1 ABA Standards for Criminal Justice (2d ed. 1989)).²

Similarly, in *Rompilla*, the Court held that counsel’s incomplete mitigation investigation, which failed to uncover evidence pointing to organic brain damage, extreme mental disturbance, and schizophrenia, fell below the prevailing professional standards of 1989. 545 U.S. at 385-90 & n.6 (citing ABA Guidelines). And in *Porter*, this Court held that trial counsel was deficient in 1988 for failing to conduct a mitigation investigation and present evidence of the defendant’s mental health, mental impairment, and social history. 558 U.S. at 30, 39-40; *see also Williams*, 529 U.S. at 395-96 (counsel failed to uncover evidence of defendant’s “nightmarish childhood” and that he was “borderline mentally retarded,” falling below professional standards in the 1980s). In light of this case law, Justice Sotomayor concluded when concurring in the Court’s first *Ayestas* opinion that “[i]t is unquestioned that under the prevailing professional norms

² The Court identified those norms with reference to the ABA Guidelines, which it has “long ... referred” to “as ‘guides to determining what is reasonable’” in a capital representation. *Wiggins*, 539 U.S. at 524 (quoting *Strickland*, 466 U.S. at 688, and citing *Williams*, 529 U.S. at 396).

at the time of [Ayestas’s] trial, counsel had an obligation to conduct a thorough investigation of [his] background.” *Ayestas*, 138 S. Ct. at 1097 (Sotomayor, J., concurring) (quoting *Porter*, 558 U.S. at 39).

It is not, at any rate, correct that the Court “first” recognized the constitutional importance of mitigation evidence generally and mitigation evidence related to mental health specifically only after Ayestas filed his state habeas application. The Court’s precedent recognizing the centrality of such evidence to a capital representation dates back decades earlier. See generally *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (the “Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record”); *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) (court erred in refusing to consider evidence of defendant’s difficult family history, that he was emotionally disturbed, and had a personality disorder); *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (“[E]vidence about the defendant’s background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse” (internal quotation marks omitted)), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002). If state habeas counsel is bound to investigate only failures of representation by trial counsel that have an explicit basis in the Court’s cases, there was ample basis here.

2. Numerous court of appeals decisions have likewise recognized that prevailing professional norms in the 1980s and 1990s required counsel to conduct a mitigation investigation examining a capital defendant's background, including his mental health and social history. For instance, in *White v. Ryan*, 895 F.3d 641 (9th Cir. 2018), the Ninth Circuit held that it was “unquestioned that under the prevailing professional norms [in 1988], counsel had an ‘obligation to conduct a thorough investigation of the defendant’s background,’” noting that “[m]edical history, including any mental illness, is the first category that the 1989 ABA Guidelines direct counsel to consider presenting at a mitigation hearing.” *Id.* at 668. In *Mason v. Mitchell*, 543 F.3d 766 (6th Cir. 2008), the Sixth Circuit held that counsel’s investigative efforts in preparation for sentencing in 1994 were “woefully inadequate” where counsel failed to learn about his client’s history, character, or background, including abuse and drug activities. *Id.* at 776, 780. And in *Outten v. Kearney*, 464 F.3d 401 (3d Cir. 2006), the Third Circuit concluded that counsel’s failure in 1993 “to investigate potentially mitigating evidence, especially the effect of his [client’s] troubled personal and psychiatric background,” fell below prevailing professional norms, as characterized by the ABA four years earlier. *Id.* at 418; *see id.* (“It was standard practice at the time of Outten’s trial for a death-eligible defendant’s penalty-phase investigation to include his medical history, educational history, family and social history, employment history, and adult and juvenile correctional records.”); *see also Battenfield v. Gibson*, 236 F.3d 1215, 1229 (10th Cir. 2001) (counsel’s failure to investigate

defendant's background, including speaking to mental health experts, fell short of prevailing professional norms in 1985). The Fifth Circuit's restriction of *Strickland* conflicts with these decisions.

B. Counsel Could Not Constitutionally Make a Strategic Choice to Forgo a Mitigation Investigation

The Fifth Circuit's error in construing *Strickland*'s "prevailing professional norms" standard is not superseded by its subsidiary conclusion that state habeas counsel's decision not to investigate Ayestas's background may be defended as "strategic." App. 13a-14a.

1. As *Strickland* itself recognizes, counsel cannot make a reasonable strategic decision to stop investigating potential mitigation evidence without having sufficient information to justify that approach. *Strickland*, 466 U.S. at 690-91. While "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91. When counsel chooses "to abandon their investigation at an unreasonable juncture," it is "impossible" for them to make a "fully informed" decision about what strategy to pursue. *Wiggins*, 539 U.S. at 527-28. Hart did not defensibly terminate an investigation he never began, and that no one else had ever conducted.

It is similarly insufficient that state habeas counsel pursued other leads, and thus had *some* information about *some* aspects of Ayestas’s background; the duty to investigate required, *in addition*, an investigation of Ayestas’s mental health and substance abuse history when red flags exist, as they did here. While counsel need not “investigate every conceivable line of mitigating evidence,” *Wiggins*, 539 U.S. at 533-34, counsel is in “no position to decide, as a tactical matter, not to present mitigating evidence or not to investigate further just because they have some information about their client’s background,” *Earp v. Ornoski*, 431 F.3d 1158, 1175 (9th Cir. 2005) (citing *Wiggins*, 539 U.S. at 527). The presence of “red flags”—factors in a defendant’s background that suggest the possibility of mental health issues, such as a history of drug use, childhood abuse, or emotional problems—triggers an affirmative duty to inquire further before ending an investigating. *Id.* at 519. Courts of appeals have repeatedly recognized this basic principle and held that counsel who failed to follow up on such red flags performed deficiently. As the Sixth Circuit has put it, “[i]t is not reasonable to refuse to investigate when the investigator does not know the relevant facts the investigation will uncover.” *Dickerson v. Bagley*, 453 F.3d 690, 696 (6th Cir. 2006), *abrogated on other grounds by Bobby v. Van Hook*, 558 U.S. 4, 8 (2009).³ The Fifth Circuit’s reasoning that some investigation is enough is out of step with this Court’s precedent and that of other circuits.

³ See also, e.g., *Williams v. Stirling*, 914 F.3d 302, 315 (4th Cir. 2019) (counsel’s “fail[ure] to conduct *any* investigation despite ... red flags” amounted to deficient performance), *as*

Here, Hart had no basis on which to make an informed strategic decision not to pursue a claim based on previously uncovered mitigation evidence related to Ayestas’s substance abuse and potential mental health issues because he conducted *no* investigation into those issues in the first place. He simply ignored the warnings of his own mitigation expert that he should follow up on red flags that trial counsel had ignored.⁴ When no one has ever conducted the type of

amended (Feb. 5, 2019), *cert. denied*, 2019 WL 4921411 (U.S. Oct. 7, 2019); *Sowell v. Anderson*, 663 F.3d 783, 790 (6th Cir. 2011) (counsel who presented evidence of defendant’s redeeming qualities nonetheless deficient for failing to pursue other mitigation evidence given leads in court-appointed mental health expert’s report regarding an abusive childhood); *Mason*, 543 F.3d at 779 (counsel’s limited investigation—speaking to defendant and his wife, obtaining a limited psychiatric examination, and reviewing Mason’s criminal history records, involvement with Children’s Services, drug treatment programs, and educational records—underscored the unreasonableness of counsel’s decision not to investigate potential abuse and drug activities); *Lambright v. Stewart*, 241 F.3d 1201, 1207 (9th Cir. 2001) (remanding for evidentiary hearing and noting that “[c]ounsel’s alleged failure to obtain a psychiatric evaluation of [the petitioner], despite knowing of his wartime experience and extensive drug abuse, is the type of performance courts have labeled deficient under *Strickland*”); *Kenley v. Armontrout*, 937 F.2d 1298, 1308 (8th Cir. 1991) (“Counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when s/he has not yet obtained the facts on which such a decision could be made.” (quotation omitted)).

⁴ Inasmuch as the Fifth Circuit suggested that there “was nothing to *factually* put counsel on notice of any reasonable likelihood” that Ayestas suffered from mental illness, the court was demonstrably wrong. App. 15a. It is undisputed that Hart was aware of Ayestas’s substance abuse—a classic “red flag” for mental illness, as this Court has observed, *Wiggins*, 539 U.S. at

mitigation investigation “prevailing professional norms” require, counsel cannot possibly know what such an investigation would reveal, and therefore cannot make an informed “strategic” choice not to pursue the investigation.

2. A failure to investigate mitigating evidence also cannot be justified based on “[t]he ‘double-edged’ nature of substance abuse and mental illness evidence” that might be discovered. App. 9a. Strategic decisions about whether to *present* evidence must come after the *investigation* of such evidence. Only then can counsel make a strategic judgment about the potential use and risks of the evidence that actually exists.

Nearly a decade before the state habeas proceedings in this case began, this Court recognized that “evidence about defendant’s background and character is relevant because of the belief ... that defendants who commit criminal acts that are attributable to ... emotional and mental problems ... may be less culpable than defendants who have no such excuse.” *Penry*, 492 U.S. at 319. Courts of appeals frequently find counsel deficient for failing to investigate or present

519—and Hart’s own mitigation expert had informed him of the high rate of comorbidity between substance abuse and mental illness, specifically urging a mental health investigation because of Ayestas’s background. As Justice Sotomayor has already noted, the “absence of a documented diagnosis ... did not excuse trial counsel from their ‘obligation to conduct a thorough investigation of [Ayestas’s] background.’... [T]he obligation to investigate exists in part precisely because it is all too common for individuals to go years battling an undiagnosed and untreated mental illness.” *Ayestas*, 138 S. Ct. at 1098 (2018) (Sotomayor, J., concurring) (citation omitted) (quoting *Porter*, 558 U.S. at 39).

mitigating evidence based on these conditions. *See, e.g., Pruitt v. Neal*, 788 F.3d 248, 272 (7th Cir. 2015) (counsel’s failure to investigate mental illness despite “red flags” fell below objective standard of reasonableness); *Poindexter v. Mitchell*, 454 F.3d 564, 580 (6th Cir. 2006) (concluding that, “had counsel investigated and presented a fuller and more accurate description of Poindexter’s troubled childhood, and paranoid personality disorder, there is a reasonable probability that the jury would not have recommended the death sentence”). They also recognize that a one-size-fits-all approach to mental-health evidence ignores critical differences between treatable illnesses (like schizophrenia) and other conditions, which may be viewed differently by a jury. *See, e.g., Wilson v. Sirmons*, 536 F.3d 1064, 1094 (10th Cir. 2008) (recognizing that “[d]iagnoses of specific mental illnesses such as schizophrenia or bipolar, which are associated with abnormalities of the brain and can be treated with appropriate medication, are likely to [be] regarded by a jury as more mitigating than generalized personality disorders”). The Fifth Circuit’s dismissal of the yet-to-be-investigated potential mental-health evidence as “double-edged” and therefore unworthy even of investigation by state habeas counsel is impossible to square with these otherwise widely accepted principles.

* * *

The Court should grant certiorari to bring the Fifth Circuit’s construction of *Strickland*’s “prevailing professional norms” standard in line with this Court’s precedent and that of other courts of appeals, and to

safeguard counsel’s sacrosanct duty to conduct a professionally competent mitigation investigation for capital defendants.

II. THE DECISION BELOW CONFLICTS WITH THE REASONABLE ATTORNEY STANDARD SET FORTH IN *AYESTAS*

On remand, the Fifth Circuit refused funding because it concluded that Aystas’s IATC claim was procedurally nonviable. App. 19a. That is exactly the same logic the Court previously rejected, and it simply brushes aside this Court’s intervening holding in *Ayestas* that the Fifth Circuit’s viability examination was “too restrictive.” 138 S. Ct. at 1093. The Court held that § 3599 funding may be proper “in cases where [it] stands a credible chance of enabling a habeas petitioner to overcome the procedural default obstacle.” *Id.* at 1094. In reaching a conclusive judgment about the viability of Aystas’s IATC claim—in circumstances where a reasonable attorney could plausibly conclude state habeas counsel may have been deficient—the decision below effectively reinstates the prior standard, restoring the incorrect operation of § 3599 in the Fifth Circuit.

1. In *Ayestas*, the Court explained that the “reasonable attorney” standard permits courts to deny funding where the requested services “stand little hope” of winning the applicant relief, such as where the applicant fails to “articulate specific reasons why the services are warranted” or where the underlying claim is not even “plausible.” *Id.* “Proper application of the ‘reasonably necessary’ standard thus requires courts to consider the potential merit of the claims that the applicant wants to pursue, the likelihood that

the services will generate useful and admissible evidence, and the prospect that the applicant will be able to clear any procedural hurdles standing in the way.” *Id.* But, the Court cautioned, “a funding applicant must not be expected to *prove* that he will be able to win relief if given the services he seeks.” *Id.*; *see id.* at 1097 (Sotomayor, J., concurring) (“[T]he inquiry is not whether Ayestas can prove that his trial counsel was ineffective under *Strickland* or whether he will succeed in overcoming the procedural default under *Martinez* and *Trevino*. Rather, at th[e] § 3599(f) request stage, the focus is on the potential merit of these claims.”).

Importantly, the “reasonable attorney” standard does not allow a court to substitute its own assessment of the merits of a claim for that of a hypothetical reasonable attorney representing a capital client and seeking services under § 3599(f). Rather, under the objective reasonableness standard, the court’s review is keyed to the reactions of a hypothetical actor, *see Stringer v. Black*, 503 U.S. 222, 237 (1992),⁵ and the question whether the evidence that might be developed with requested services has a “credible chance” of demonstrating the ineffectiveness of state habeas counsel therefore depends on whether a hypothetical attorney could reasonably believe that the potential

⁵ *See also, e.g., Air Wisconsin Airlines Corp. v. Hooper*, 571 U.S. 237, 252 (2014) (the objective “reasonable security officer” standard governing immunity under the Aviation and Transportation Security Act involves “the hypothetical significance of an omitted or misrepresented fact to a reasonable security official” (alterations omitted)); *Salazar v. Buono*, 559 U.S. 700, 721 (2010) (the Establishment Clause “reasonable observer” test addresses the “hypothetical construct of an objective observer”).

fruits of the investigation might convince a court to excuse the procedural default.

2. A “reasonable attorney” surely would deem investigation of Ayestas’s social history, substance abuse, and mental health “sufficiently important” at this juncture in light of the case law discussed in Part I above, which at the very least makes it “plausible” that state habeas counsel had a duty to perform the mitigation investigation neglected by trial counsel, such that the requested services “stand[] a credible chance” of enabling Ayestas to overcome the procedural default of his underlying IATC claim. 138 S. Ct. at 1094, 1096. Indeed, when this case was last before this Court, two of its Justices concluded that “there should be little doubt that Ayestas has satisfied § 3599(f).” 138 S. Ct. at 1095 (Sotomayor, J., concurring, joined by Ginsburg, J.).

As Justice Sotomayor’s concurrence in *Ayestas* explains, there was plenty of evidence to lead a reasonable attorney to conclude that trial and state habeas counsel had been deficient by failing to follow up on red flags, and that additional mitigation investigation could reveal evidence whose absence at trial was prejudicial—particularly where, as here, Ayestas was sentenced to death based on a negligible mitigation presentation and the prosecutor specifically emphasized the lack of mitigating mental health evidence. “With a client facing a possible death sentence, [trial] counsel and her investigator did not start looking into Ayestas’ personal history until the eve of trial.” *Id.* at 1097. “The little the investigator uncovered—head trauma and a history of substance abuse—should have prompted further inquiry,” “[y]et trial counsel

did nothing.” *Id.* at 1097, 1099. And Justice Sotomayor found “nothing in the record that would support the conclusion that counsel chose the two-minutes-of-mitigation strategy after careful investigation and consideration of Ayestas’ case.” *Id.* at 1098. Nor did “[t]he absence of a documented diagnosis” of mental illness at the time of trial “excuse trial counsel from their ‘obligation to conduct a thorough investigation of [Ayestas’s] background.’” *Id.* (alteration in original) (quoting *Porter*, 558 U.S. at 39).

Justice Sotomayor found “[t]he evidence concerning the deficiency of Ayestas’ state postconviction counsel ... similarly strong.” *Id.* at 1099. She noted that state habeas counsel retained a mitigation specialist, who prepared an investigation plan flagging Ayestas’ “history of substance abuse” and “noting that it was ‘obvious no social history investigation was conducted’ and that the jury had ‘heard nothing about [Ayestas’s] ... mental health, possible mental illness, [or] substance abuse history.’” *Id.* Yet state habeas counsel did not follow his own mitigation specialist’s recommendation that he perform “a comprehensive investigation into Ayestas’ biological, psychological, and social history to explore, *inter alia*, issues related to addiction and mental health.” *Id.* And given that state habeas counsel “did nothing” to investigate Ayestas’s mental health, the record did not “support ... any ‘strategic justification’” for state habeas counsel’s approach. *Id.*

The state of the law likewise would support a reasonable attorney’s conclusion that Ayestas’s IATC claim stood a credible chance of avoiding procedural

default. While the Fifth Circuit announced a new deficiency standard in this case, when counsel sought § 3599 funding a panoply of courts, including this one, had already concluded that existing professional norms as early as the 1980s required counsel to investigate red flags related to mental health and substance abuse. *Supra* pp. 19-23; *see also, e.g., Haliym v. Mitchell*, 492 F.3d 680, 716-19 (6th Cir. 2007) (counsel ineffective for failing to uncover evidence of petitioner’s troubled childhood and brain impairment); *Lambright v. Schriro*, 490 F.3d 1103, 1127-28 (9th Cir. 2007) (per curiam) (penalty-phase investigation deficient because it overlooked petitioner’s mental health problems, drug dependency, and childhood abuse); *Anderson v. Sirmons*, 476 F.3d 1131, 1143-45 (10th Cir. 2007) (counsel’s failure to locate evidence that the petitioner was physically abused as child, had brain damage and a low IQ, and abused drugs and alcohol was deficient and prejudicial). Against that legal background, a reasonable attorney could easily conclude that Ayestas’s potential ineffective assistance claims were not only “plausible” but strong, and capable of avoiding procedural bars. No more is necessary to secure services under § 3599(f).

3. The Fifth Circuit’s postulation that the requested funding was not “reasonably necessary” because “nothing would establish the ineffectiveness of state-habeas counsel,” App. 2a, looks nothing like the restrained objective standard *Ayestas* prescribes. 138 S. Ct. at 1094. While the “reasonable attorney” standard allows a court to consider the potential merits of a claim for relief at the time a request for § 3599 services is made, the court may demand only a showing

that the underlying constitutional claim is “plausible,” and that there is a “credible chance” the funding will enable the petitioner to overcome the obstacle of procedural default. *Id.* Assessing a claim’s plausibility prior to fact development requires a court to adopt an open posture toward the facts and arguments the applicant might develop. *Cf. Howell v. Town of Ball*, 827 F.3d 515, 521 (5th Cir. 2016) (under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007), a court determines whether the facts, when viewed “in the light most favorable to the plaintiff ... contain ‘enough facts to state a claim to relief that is plausible on its face.’”). The Fifth Circuit simply prejudged the viability of Ayestas’s *Wiggins* claim—exactly what *Ayestas* instructs a court considering a § 3599(f) application not to do. *See* 138 S. Ct. at 1094 (applicant “must not be expected to *prove* that he will be able to win relief if given the services he seeks”).

The decision below did not evaluate the “strong” evidence of state habeas counsel’s ineffectiveness discussed in Justice Sotomayor’s concurrence, such as his neglect of his mitigation expert’s warnings about the necessity of a further mitigation investigation probing Ayestas’s substance abuse and mental health background. 138 S. Ct. at 1099 (Sotomayor, J., concurring). The Fifth Circuit simply ignored the facts supporting Ayestas’s request to explore this claim, and even decided multiple disputed factual issues *against* him—for example, concluding that there was necessarily an “*absence of any evidence* of Ayestas’s mental illness prior to that point” that could have been uncovered through investigation because Ayestas “*reported* no psy[chological] problems” before

2000, App. 14a (alterations omitted) (emphasis added), even though Ayestas had explained to the court that he likely was in the “prodromal” phase of schizophrenia when the murder occurred, with noticeable symptoms that were distinct from the symptoms associated with the advanced phases of the illness. C.A. Br. 30-31.

The Fifth Circuit’s disposition of Ayestas’s § 3599 request was inevitably bound up in its erroneous legal conclusion that state habeas counsel had no duty to investigate mitigating evidence in the late 1990s. But it failed to approach even that question from the perspective of a reasonable attorney, moving up its own determination of an ultimate legal issue instead. The decision below required Ayestas to prove his procedural excuse before he had the opportunity to investigate it, in disregard for this Court’s instruction that an applicant “must not be expected to *prove*” his entitlement to relief at the funding stage. *Ayestas*, 138 S. Ct. at 1084. The Fifth Circuit has restored its own standard instead of honoring the Court’s interpretation and guidance. Review is warranted to effectuate the course correction issued in *Ayestas*.

CONCLUSION

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

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