No. 16-6795

In the Supreme Court of the United States

CARLOS MANUEL AYESTAS, PETITIONER

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
(INSTITUTIONAL 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 Court has held that a federal habeas proceeding should not be stayed to allow a habeas petitioner to exhaust an unexhausted claim when that claim is plainly meritless. *Rhines v. Weber*, 544 U.S. 269, 277 (2005). The Fifth Circuit determined that petitioner's new, unexhausted claims would be procedurally barred by Texas's abuse-of-the-writ statute and, therefore, lacked merit. Consequently, the Fifth Circuit denied a certificate of appealability regarding petitioner's request for a stay to pursue the claims further.

1. Would reasonable jurists debate whether to grant a *Rhines* stay when the petitioner has failed to show that his unexhausted claim would avoid being procedurally defaulted under Texas's abuse-of-the-writ statute?

Pursuant to 18 U.S.C. § 3599(f), district courts may authorize funding for investigative services in federal habeas cases when the services sought are "reasonably necessary" to the representation of the habeas petitioner. The Fifth Circuit determined that funding was not "reasonably necessary" when the claim sought to be investigated would fail on the merits regardless of the outcome of the investigation.

2. Is investigative funding "reasonably necessary" under § 3599(f) when a court has determined that the underlying ineffective-assistance claim will ultimately fail on the merits?

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Neither question presented warrants the Court's consideration. The lower courts denied petitioner's request for a *Rhines* stay only after determining that petitioner's new claims would be procedurally defaulted. The courts' rulings do not implicate a circuit split or an important federal question, but only a correct application of Texas law. As for his request for funding to perform a mitigation investigation, the Fifth Circuit determined that, even if petitioner was able to further investigate evidence of his substance abuse and mental illness, his ineffective-assistance claim would still fail under the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984). Petitioner has not established that a circuit split exists regarding whether to fund investigations of meritless claims.

Moreover, there are numerous vehicle problems. In order to grant petitioner relief on either issue, the Court would have to address other threshold jurisdictional questions—

whether petitioner's request to add new claims is a second or successive habeas petition, and whether appellate courts have jurisdiction over appeals of § 3599(f) rulings. Likewise, petitioner has not explained how he will overcome the limitations on federal review of state habeas decisions imposed by the Antiterrorism and Effective Death Penalty Act. The Court should therefore deny the petition.

STATEMENT

I. TRIAL AND CONVICTION

On September 5, 1995, petitioner Carlos Manuel Ayestas and two others entered and ransacked the home of Santiaga Paneque, a 67-year-old woman.[1] Pet. App. C2-3; Pet. App. F3. They bound Paneque with duct tape on her ankles and wrists and beat her, causing multiple lacerations and broken bones in her elbow, neck, and face. Pet. App. C3-4. They then strangled her to death, which would have taken three to six minutes. Pet. App. C4.

Petitioner was identified by a neighbor as having visited Paneque two weeks earlier, and petitioner's fingerprints were on the duct tape used to bind Paneque. Pet. App. C2-5. Petitioner also confessed to Henry Nuila that he had been involved in murdering a woman in Houston and asked Nuila to help him kill his two accomplices because "they had spoken too much." Pet. App. C5. Petitioner threatened to kill Nuila if he refused to help. Pet. App. C5. A Harris County jury convicted petitioner of capital murder—specifically, intentionally committing murder in the course of committing or attempting to commit a burglary or robbery. Pet. App. C5; *see also* Tex. Penal Code § 19.03(a)(2).

[1] Petitioner's real name is Dennis Zelaya Corea, but he was charged and convicted under the name Carlos Manuel Ayestas. Pet. App. A2.

At the punishment phase, the State presented evidence that petitioner served prison sentences in California and Texas for possession and purchase for sale of narcotics, burglary, and misdemeanor theft and that he was the subject of a California arrest warrant for illegal transportation of aliens. Pet. App. C5. The State also called Candelario Martinez, who testified that, three days after the murder of Paneque, petitioner pulled a gun on him, took his personal belongings, and announced that he or one of his accomplices was going to kill Martinez. Pet. App. C5-6. Petitioner eventually released Martinez, but threatened to kill Martinez's family if he told the police. Pet. App. C6.

As evidence of mitigation, petitioner's counsel presented three letters from an instructor at the Houston Community College System, indicating that petitioner was enrolled in an English-as-a-second-language course in the Harris County Jail and was a serious and attentive student. R.5219-24.[2]

Petitioner's trial counsel, Diana Olvera, explained during state habeas proceedings that petitioner affirmatively told her before trial that he did not want her to contact his family in Honduras, and only later did he acquiesce to her contacting his family after a jury had been chosen. Pet. App. C8-9. At that point, counsel sent multiple letters to petitioner's family (on May 29, June 10, and July 2, 1997) and had multiple phone conversations with them beginning on June 3. Pet. App. C9. Counsel also contacted the American Embassy in Honduras to try to expedite any travel arrangements and informed the Honduran consulate of the upcoming trial. Pet. App. C9; R.510. Petitioner's mother, however, did not appear concerned for her son and seemed evasive in her responses. Pet. App. C9. Petitioner's sister

[2] The Fifth Circuit's paginated record on appeal is cited as "R.[page]."

said it would be difficult to travel due to their father's illness and for economic reasons. Pet. App. C9. Trial counsel was ultimately unable to obtain the family's presence at the punishment phase of petitioner's trial.

The jury found that there was a likelihood that petitioner would commit future acts of criminal violence and that the mitigating evidence did not warrant a sentence of life imprisonment. Pet. App. C6; *see also* Tex. Code Crim. Proc. art. 37.071, § 2. The trial court sentenced petitioner to death. Pet. App. C6. The Texas Court of Criminal Appeals affirmed petitioner's conviction and sentence on November 4, 1998. R.1702-21.

II. State Habeas Proceedings

Petitioner was given new, state-appointed counsel for his state habeas proceedings. R.706, 5696. State habeas counsel filed a state habeas application that alleged ten instances of ineffective assistance of trial counsel, in addition to raising five other constitutional issues, R.5269-73. As relevant here, state habeas counsel argued that trial counsel Olvera was ineffective, in part, because she failed to adequately investigate mitigation evidence by talking to petitioner's family. R.5294-5301. State habeas counsel obtained affidavits from petitioner's mother and two of his sisters. R.5353-76. They described petitioner's "stable, middle class background" in which his mother and father had no marital problems and ran a small business in Honduras. R.5357, 5365, 5373. They also stated that petitioner had no major injuries or illnesses, no discernable learning disorders, and never got into any trouble with the law. R.5358, 5366, 5373-74. Instead, he received above average grades and attended church. R.5358, 5366, 5374.

State habeas counsel also hired an investigator who planned to pursue evidence of substance abuse by "conducting a thorough interview" of petitioner and interviewing individuals with whom petitioner was staying at the time of the crime. R.721. The investigator also suggested obtaining a psychological history of petitioner as part of creating a full social history, but did not note any specific mental-health issues. R.720.

In response, the State provided an affidavit from trial counsel Olvera who explained, as noted above, that petitioner repeatedly told her not to contact his family, that she made multiple attempts to contact his family when he changed his mind, and that she was unable to secure their presence at trial. R.5516-18.

At the request of state habeas counsel, petitioner was examined by a psychologist in 2003 (six years after his trial) for purposes of determining his intellectual functioning. R.776. The doctor determined he had an IQ in the "high average range," but did note that petitioner was "developing some delusional thinking" and had been placed on "antipsychotic medication." R.776.[3]

In 2008, the state district court recommended findings and conclusions that rejected petitioner's ineffective-assistance claim, and the Texas Court of Criminal Appeals adopted those findings and conclusions. R.5254-55. The district court specifically found that trial counsel Olvera

> spoke with [petitioner] numerous times about his family attending the trial; that [petitioner] repeatedly told counsel that [he] did not want his family contacted because of problems he and his family had in their home country of Honduras; that, to the best of counsel's recollection, [petitioner] did not agree

[3] Although state habeas counsel included this letter as an exhibit to one of petitioner's state habeas filings, counsel redacted the portion regarding delusional thinking and antipsychotic medication, R.5582, as counsel was using the letter to argue that petitioner should have been permitted to testify in his own defense, R.5558.

> to having his family contacted until after jury selection was completed; and that trial counsel made every effort to contact [petitioner]'s family once [he] agreed.

R.5919. The court made other findings regarding specific attempts by Olvera to contact petitioner's family and their ambivalent response, R.5920-22, and ultimately concluded that Olvera could not be considered ineffective for failing to contact petitioner's family, given petitioner's instructions to the contrary. R.5933 (citing *Sonnier v. State*, 913 S.W.2d 511, 522 (Tex. Crim. App. 1995) (holding that counsel was not ineffective for following defendant's express wishes not to present punishment evidence)). After adopting the relevant findings and conclusions, the Texas Court of Criminal Appeals denied habeas relief. R.5254-55.

III. Federal Habeas Proceedings

A. Petitioner filed his federal habeas petition in 2009 with new counsel. R.8-68. Pertinent here, petitioner raised an ineffective-assistance claim regarding the alleged failure of trial counsel Olvera to adequately investigate potentially mitigating evidence. R.14-33; *see Wiggins v. Smith*, 539 U.S. 510 (2003). Petitioner's allegations fell into two categories: (1) mitigation evidence that he believed could have been provided by his family, R.21-28; and (2) evidence relating to drug and alcohol use and mental illness, R.28-30.

The information that petitioner asserts would have been provided from his family is the same as that identified in his state habeas petition. R.21-28, 501 (describing petitioner's good character traits, his kindness and reputation for helping the less fortunate, his lack of criminal history in the Honduras, and the "bad influence" of one of his accomplices). Petitioner relied on the affidavits procured by state habeas counsel to argue that this information should have been discovered and presented to the jury as part of a mitigation case. R.21-28.

Petitioner also argued, for the first time, that trial counsel should have discovered and presented evidence to the jury of his substance abuse (alcohol and drugs) as well as his mental illness (psychosis and schizophrenia).[4] R.28. As evidence, petitioner relied on his Texas Department of Criminal Justice prison medical records beginning in 2000. R.28. Those records noted his history of substance abuse, some of his mental-health symptoms, and his diagnosis of psychosis and schizophrenia in 2001. R.28-29.

In response, the respondent Director argued that, as to the mitigation information that would have been provided by petitioner's family, trial counsel Olvera was not ineffective for following petitioner's wishes that she not contact his family. R.113-15. Respondent also argued that petitioner had not exhausted his state court remedies regarding his claims of substance abuse and mental illness. R.101-04.

The federal district court concluded that petitioner had procedurally defaulted his ineffective-assistance claim regarding his substance abuse and mental illness and that there was no cause and prejudice that would excuse the default. R.502-07. The court then rejected petitioner's ineffective-assistance claim as it pertained to the failure to contact his family. R.507-12. The court determined, as did the state habeas courts, that petitioner could not complain that his counsel was ineffective when counsel followed petitioner's affirmative instructions not to contact his family. R.511-12 (citing multiple cases). The court then denied a certificate of appealability. R.525-27.

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[4] The parties have never litigated whether petitioner, in fact, has substance abuse problems or a mental illness. Respondent does not concede either point, but the validity of those assertions does not impact whether the Fifth Circuit acted correctly or whether this Court should grant certiorari.

The Fifth Circuit also denied petitioner's request for a certificate of appealability. *Ayestas v. Thaler*, 462 F. App'x 474 (5th Cir. 2012) (per curiam). The court found no error in the state court's decision that petitioner prevented trial counsel Olvera from conducting a thorough mitigation investigation by telling her that she could not contact his family. *Id.* at 480. The Fifth Circuit also concluded that petitioner's unexhausted claims were procedurally defaulted, noting that "errors by habeas counsel cannot provide cause for a procedural default." *Id.* at 482.

Petitioner then filed a certiorari petition in this Court based on *Martinez v. Ryan*, 566 U.S. 1 (2012). Shortly thereafter, this Court decided *Trevino v. Thaler* and held that, under the Texas habeas system, the ineffectiveness of state habeas counsel can provide cause to overcome a procedural default. 133 S. Ct. 1911 (2013). The Court then granted petitioner's previous certiorari petition, vacated the Fifth Circuit's judgment, and remanded in light of *Trevino*. *Ayestas v. Thaler*, 133 S. Ct. 2764 (2013). The Fifth Circuit remanded to the district court "to reconsider Ayestas's procedurally defaulted ineffective assistance of counsel claims in light of *Trevino*." *Ayestas v. Stephens*, 553 F. App'x 422, 423 (5th Cir. 2014) (per curiam).

B. 1. On remand, petitioner argued that state habeas counsel was ineffective for failing to raise an ineffective-assistance-of-trial-counsel claim with respect to the potentially mitigating evidence of his substance abuse and mental illness. R.647-881.[5] After briefing on re-

[5] Petitioner attached numerous exhibits to his post-remand brief and relies on them in his certiorari petition. R.691-881; Pet. 5-13. But many of those exhibits were not presented to the state courts, R.707-12, 845-63, 887-81, and some of them were not created until after

mand was complete, petitioner moved in an ex parte and sealed motion for funding to conduct a mitigation investigation under 18 U.S.C. § 3599(f). R.942-50; Pet. App. G (filed under seal).[6]

Approximately two weeks later, the district court denied petitioner's habeas petition, concluding that his ineffective-assistance-of-trial-counsel claim concerning his substance abuse and mental illness was procedurally defaulted. Pet. App. C. The district court began by examining trial counsel's actions to determine whether there was an ineffective-assistance-of-trial-counsel claim that state habeas counsel could have raised. To the extent petitioner's mitigating evidence rested on information provided by petitioner's family, the court continued to hold that trial counsel Olvera was not ineffective, given petitioner's instructions to her. Pet. App. C10-11. As for petitioner's arguments regarding mental illness, the court found no evidence that trial counsel Olvera should have known of petitioner's mental illness at the time of trial. Pet. App. C11. The records relied on by federal habeas counsel all post-dated his criminal trial. Pet. App. A10, C11. The court also noted that state habeas counsel had raised many ineffective-assistance claims and was not required to raise every non-frivolous claim. Pet. App. C12. The court explained that "in light of the extremely brutal nature of Ayestas's crime and Ayestas's history of criminal violence, it is highly unlikely that evidence of substance abuse would have changed the outcome of the sentencing phase of trial or of the state habeas corpus proceeding." Pet. App. C12.

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remand, R.698-704, 864-72. Petitioner has not explained how he has satisfied 28 U.S.C. § 2254(e)(2) which limits the introduction of new evidence in a federal habeas proceeding.

[6] That ex parte motion has remained sealed and has not, to date, been provided to counsel for respondent, even though it has been made part of the Petition Appendix and provided to the Court under seal.

The district court also denied petitioner's request for funding for additional investigative services under 18 U.S.C. § 3599(f). Pet. App. C13-14. The court determined that petitioner had not shown that trial counsel Olvera was deficient, that there was a reasonable probability that his substance-abuse evidence would have changed the outcome of his criminal proceedings, or that state habeas counsel was ineffective. Pet. App. C14. Because petitioner's ineffective-assistance-of-trial-counsel claim lacked merit and was procedurally defaulted, the requested funding was not "reasonably necessary" under § 3599(f). Pet. App C14. Finally, the court denied a certificate of appealability and entered a final judgment on November 18, 2014. Pet. App. C14-16; R.968.

On December 16, 2014, petitioner moved to alter or amend the judgment under Federal Rule of Civil Procedure 59(e), arguing that *Martinez* and *Trevino* required further development of the evidence and that the district court had prematurely rejected his ineffective-assistance claim. R.969-1006. While the district court was considering this motion, petitioner's federal habeas counsel reviewed the prosecution's file at the District Attorney's office in Houston and discovered a capital memo prepared in 1995 by Kelly Siegler. R.1135; Pet. App. F. The Siegler memo listed two potential aggravating circumstances: (A) the victim was a helpless 67 year old woman killed in her home; and (B) petitioner was not a citizen. Pet. App. F3. A line was drawn through the second aggravating circumstance regarding petitioner's citizenship. Pet. App. F3. On January 9, 2015, petitioner moved to amend his petition under Federal Rule of Civil Procedure 15 to include an equal-protection claim and an Eighth Amendment claim based on the Siegler memo. R.1132. On January 14, 2015, petitioner also filed a supplemental motion to alter and amend the judgment that argued for inclusion of these new claims, as well as a motion to stay and hold the petition in abeyance

while he exhausted his new claims in state court pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005). R.1143, 1152.[7]

The district court denied the motion to amend petitioner's federal habeas petition and motion for a *Rhines* stay. Pet. App. D. The court noted that a *Rhines* stay is inappropriate when a claim is "plainly meritless." Pet. App. D5 (quoting *Rhines*, 544 U.S. at 277). The court then referenced Texas's abuse-of-the-writ statute, which limits subsequent habeas applications to cases when, as relevant here:

> [T]he current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article of Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application.

Pet. App. D5 (quoting Tex. Code Crim. Proc. art. 11.071 § 5(a)). The court noted that petitioner failed to show that the Siegler memo could not have been previously discovered. Pet. App. D5. Absent that showing, the Texas courts would not consider petitioner's subsequent petition. Pet. App. D5-6.

The district court later denied petitioner's motion to alter or amend the judgment. Pet. App. E. The court also held that petitioner's supplemental motion to alter or amend the judgment regarding the Siegler memo was, in fact, a second or successive petition, given that it fell outside the limited scope of the Fifth Circuit's remand. Pet. App. E3. Consequently, the district court concluded it was without jurisdiction to hear petitioner's new claims unless and until petitioner complied with 28 U.S.C. § 2244(b). Pet. App. E3-4.

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[7] Petitioner makes additional allegations regarding Siegler that he did not make below. Pet. 3-4 n.3. The Court should decline to consider that extra-record evidence.

2. The Fifth Circuit affirmed the denial of funding and declined to grant a certificate of appealability on petitioner's request for a *Rhines* stay. Pet. App. A1. As to the denial of funding, the Fifth Circuit held it was permissible for the district court to determine the viability of petitioner's ineffective-assistance-of-trial-counsel claim before deciding whether to authorize funding. Pet. App. A8. The court further interpreted the district court's ruling "as being that any evidence of ineffectiveness, even if found, would not support relief." Pet. App. A8. The court then turned to whether trial counsel was ineffective and whether that ineffectiveness prejudiced petitioner under *Strickland*, 466 U.S. at 687.

The Fifth Circuit again rejected any arguments based on information that would have come from petitioner's family due to petitioner's request that trial counsel not contact his family. Pet. App. A9-10. The court also agreed that it was highly unlikely that evidence of substance abuse would have changed petitioner's sentence, given the brutality of the crime. Pet. App. A11. Regarding mental illness, the court noted that all evidence of mental illness post-dated petitioner's criminal trial. Pet. App. A10. The court erroneously stated that trial counsel Olvera had petitioner examined by a psychologist and was, therefore, not ineffective. Pet. App. A11. But the court also ruled that evidence of mental illness was not substantially likely to change petitioner's sentence. Pet. App. A11. Consequently, even if petitioner's investigation was funded, he could not have shown prejudice under *Strickland*. As a result, state habeas counsel was not ineffective for failing to raise the same claims and petitioner's ineffective-assistance-of-trial-counsel claim remained procedurally barred. Pet. App. A12. The court, therefore, found no abuse of discretion in the denial of funding for a mitigation investigation under § 3599(f). Pet. App. A12.

The court also denied petitioner's request for a certificate of appealability regarding his motion for a *Rhines* stay. Pet. App. A13-17. The court agreed with the district court's conclusion that a stay would be futile because Texas courts would not have considered petitioner's second habeas application. Pet. App. A15 (citing Tex. Code Crim. Proc. art. 11.071 § 5(a)(1)). Because petitioner had not explained why the Siegler memo was unavailable to him at the time his initial state habeas application was filed, he could not meet the state standard for a second application. Pet. App. A15-17.

Petitioner moved for panel and en banc rehearing. The court denied rehearing en banc, and the panel issued a short opinion on rehearing. Pet. App. B. The court recognized that it had incorrectly stated that petitioner was examined by a psychologist in 1997. Pet. App. B2. The court, however, held that its result was unchanged because petitioner had not proven prejudice under *Strickland*. Pet. App. B2.

Petitioner filed the instant certiorari petition on November 7, 2016.

ARGUMENT

I. REASONABLE JURISTS WOULD NOT DEBATE WHETHER TO GRANT A *RHINES* STAY TO PURSUE A CLAIM THAT WILL BE PROCEDURALLY DEFAULTED.

The first issue that petitioner raises—whether he should have received a *Rhines* stay—does not warrant the Court's review. The lower courts were correct to deny this stay, and petitioner has not identified a circuit split or a significant federal question. Beyond that, petitioner faces a jurisdictional hurdle: his new equal-protection and Eighth Amendment claims are a second or successive petition that the district court is without jurisdiction to consider. Petitioner has also not explained how his new claims will avoid AEDPA's statute of limitations.

A. The Fifth Circuit's ruling that habeas proceedings should not be stayed to exhaust procedurally barred claims does not implicate a circuit split.

Petitioner's *Rhines* issue is presented in the framework of a certificate of appealability. A certificate of appealabilty may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Because the district court denied petitioner's request to amend and stay on procedural grounds, he must show that reasonable jurists would debate whether the district court was correct in that procedural ruling and whether he stated a valid claim on the merits. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Petitioner's specific complaint is that the lower courts applied an "anticipatory default" to his new claims when they concluded that Texas's abuse-of-the-writ statute would bar petitioner from exhausting those claims in state court. Pet. 18-20. Petitioner has not identified a circuit split on this issue, has not explained his conclusion that Texas's abuse-of-the-writ statute is not an adequate and independent state-law ground for denying a habeas petition, and has not demonstrated that the lower courts erred.

1. *Rhines* held that district courts faced with "mixed" habeas petitions—petitions containing both exhausted and unexhausted claims—may stay the litigation in certain circumstances to allow the habeas petitioner to exhaust unexhausted claims in state court. 544 U.S. at 277. But the Court cautioned that the stay and abeyance procedure should be available "only in limited circumstances." *Id.* The district court must determine that there was "good cause" for the petitioner's failure to exhaust claims in state court. *Id.* The Court also concluded that it would be an abuse of discretion to grant a stay when the "unexhausted claims are plainly meritless." *Id.*

The Fifth Circuit accurately identified this legal standard and correctly concluded that "[w]hen a petitioner is procedurally barred from raising [his] claims in state court, his unexhausted claims are plainly meritless." Pet. App. A14. The court then applied the Texas abuse-of-the writ statute to petitioner's new claims, concluded that they would be procedurally defaulted, and denied a *Rhines* stay to pursue the claims further. Pet. App. A15-17.

Despite his argument that the Fifth Circuit wrongly relied on an "anticipatory" procedural default, petitioner has not identified any other circuit court that has held differently in these circumstances. Pet. 17-20. To the contrary, several circuits have, in the context of addressing mixed petitions, considered whether a procedural bar would ultimately prevent the petitioner from presenting unexhausted claims in federal court. *See, e.g.*, *Gray v. Gray*, 645 F. App'x 624, 626 (10th Cir. 2016) (per curiam) (stating that a district court may, among other options, choose to apply an "anticipatory procedural bar" to unexhausted claims in a mixed petition or it may choose to stay the case under *Rhines*); *Jaffe v. Brown*, 473 F. App'x 557, 559 (9th Cir. 2012) (requiring the district court to determine "whether any California procedure remains available" to a petitioner with unexhausted claims and stating that procedurally defaulted claims must be dismissed); *Grundy v. Pennsylvania*, 248 F. App'x 448, 452 (3d Cir. 2007) (affirming denial of a *Rhines* stay when the unexhausted claim would have been procedurally barred).

The Fifth Circuit's conclusion—that claims that would be procedurally defaulted are "plainly meritless" and, thus, do not warrant a *Rhines* stay—is not unusual or unprecedented. AEDPA is designed to "further the principles of comity, finality, and federalism," to "reduc[e] piecemeal litigation," and to "streamlin[e] federal habeas proceedings." *Panetti v. Quarterman*, 551 U.S. 930, 945-46 (2007). There is no need to prolong petitioner's

federal habeas proceedings with a *Rhines* stay if his unexhausted claims will be procedurally defaulted. *See Rhines*, 544 U.S. at 277 (noting that granting a stay "frustrates AEDPA's objective of encouraging finality").

2. Petitioner incorrectly argues that the Fifth Circuit erred in applying Texas's abuse-of-the-writ statute. As relevant here, Texas's abuse-of-the-writ statute prohibits successive habeas petitions when "the current claims and issues have not been and could not have been presented previously in a timely initial application . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application." Tex. Code Crim. Proc. art. 11.071 § 5(a)(1). To avoid this procedural bar, petitioner asserts that § 5(a)(1) is not an "adequate" procedural ground for denying a habeas petition. Pet. 24; *see also* Pet. i (stating that the procedural bar was "not actually grounded in state law"). But he provides no citation or explanation for this argument.

A state rule is "adequate" when it is "firmly established and regularly followed." *Walker v Martin*, 562 U.S. 307, 316 (2011). Texas has regularly applied § 5(a)(1) to bar subsequent habeas petitions. *See, e.g.*, *Ex parte Hines*, Nos. WR–40,347–01, WR–40,347–03, 2012 WL 4928863, at *1 (Tex. Crim. App. Oct. 15, 2012); *Ex parte Reed*, Nos. WR–50,961–04, WR–50,961–05, 2009 WL 97260, at *1 (Tex. Crim. App. Jan. 14, 2009); *Ex parte Staley*, 160 S.W.3d 56, 63-66 (Tex. Crim. App. 2005). The Fifth Circuit has also routinely recognized § 5(a)(1) as providing an adequate and independent state-law ground for denying a habeas claim. *See, e.g.*, *Butler v. Stephens*, 625 F. App'x 641, 657-59 (5th Cir. 2015) (per curiam); *Aguilar v. Dretke*, 428 F.3d 526, 533 (5th Cir. 2005) ("This court has consistently held that Texas' abuse-of-writ rule is ordinarily an 'adequate and independent' procedural ground on which to base a procedural default ruling."); *see also Johnson v. Lee*, 136 S. Ct. 1802 (2016)

(per curiam) (reversing Ninth Circuit's decision that California's bar on subsequent habeas petitions was not adequate and independent).[8]

Texas's abuse-of-the-writ statute is an adequate and independent bar to habeas relief. As a result, it was not erroneous for the Fifth Circuit to consider whether petitioner's new claims would be procedurally defaulted under § 5(a)(1).

3. Because petitioner would need to file a subsequent habeas petition in state court, he would have to demonstrate that the Siegler memo (the "factual basis" for his claim) was "unavailable" at the time his original state habeas petition was filed in order to avoid the procedural bar of § 5(a)(1).[9] He has not done so.

The key question that petitioner has failed to answer was why it took until December 2014, after he had been denied federal habeas relief, before any of his attorneys discovered the Siegler memo. It is possible that the memo, written in 1995 and approved in 1997, has been in the prosecution's file and available to petitioner's counsel for over fifteen years. *See* Pet. 23 (explaining that the State permits defense counsel to review its files after trial and after redacting any work product). Petitioner has not demonstrated otherwise, and it is his burden to show that the factual basis for his new claim was previously unavailable. Simply

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[8] There is an exception to this general rule: when a Texas court determines that the legal or factual basis of the subsequent petition *was* unavailable but then denies the petition on its merits, the decision is no longer "independent." *Rocha v. Thaler*, 626 F.3d 815, 835 (5th Cir. 2010). That scenario is not presented in this case, as the lower courts were concerned with the availability of petitioner's new evidence, not the merits of his constitutional claims.

[9] Respondent does not concede that the Siegler memo would have established a constitutional violation.

stating that the memo was not found until 2014 does not explain whether it was unavailable until 2014.[10]

Absent an explanation of the Siegler memo's unavailability, Texas courts would apply the abuse-of-the-writ statute to bar petitioner's subsequent habeas application, and federal courts would determine the new claims were procedurally defaulted. Reasonable jurists would not debate whether a *Rhines* stay was appropriate for this meritless claim, and the Fifth Circuit properly denied a certificate of appealability.

B. Jurisdictional and statutory questions make this case a poor vehicle to address the first question presented.

This case is also a poor vehicle for addressing the first question raised by petitioner. First, petitioner's request to add equal-protection and Eighth Amendment claims should be treated as a request to file a second or successive petition that has not been authorized by the Fifth Circuit. Second, petitioner has not explained how he would overcome AEDPA's statute of limitations.

1. Petitioner's request to add new claims is a second or successive petition that has not been authorized by the Fifth Circuit.

The district court properly denied petitioner's request to add new claims based on the Siegler memo to his existing habeas petition because his new claims are a second or successive petition that was never authorized by the Fifth Circuit. The district court was, therefore, without jurisdiction to consider petitioner's new claims. *See Burton v. Stewart*, 549

[10] That the memo is privileged is of no moment at this juncture. Pet. 22-24. The fact that it is privileged explains why it was not voluntarily turned over to petitioner's counsel during the criminal trial. But it does not explain how it ended up in the publicly available file of the prosecutor, when it was placed there, or whether petitioner could have found it sooner.

U.S. 147, 157 (2007) (per curiam) (holding that a district court is without jurisdiction to entertain second or successive habeas petitions that have not been authorized by the court of appeals).

Because the district court had already denied his habeas petition and entered a final judgment, petitioner sought to add his new claims through a Rule 59(e) motion to alter or amend the judgment. *See supra* pp. 9-11. A Rule 59(e) motion that seeks to add new claims should be treated as a second or successive habeas petition. *See Williams v. Thaler*, 602 F.3d 291, 303-05 (5th Cir. 2010); *United States v. Pedraza*, 466 F.3d 932, 934 (10th Cir. 2006). Petitioner was therefore required to seek authorization from the Fifth Circuit before adding his new claims. *See* 28 U.S.C. § 2244(b).

Even so, petitioner's "supplemental" Rule 59(e) motion, raising the Siegler-memo claims, was not filed until January 14, 2015, R.1143—fifty-seven days after the district court's final judgment. The Federal Rules of Civil Procedure prohibit courts from extending the deadline to file motions under Rule 59(e). Fed. R. Civ. P. 6(b)(2). Because the issues raised in his supplemental Rule 59(e) motion are entirely distinct from those in his timely filed motion, his supplemental motion should not relate back to the filing of his original motion. *See Feldberg v. Quechee Lakes Corp.*, 463 F.3d 195, 197 (2d Cir. 2006) (per curiam); *see also* Fed. R. Civ. P. 7(b)(1)(B) (motions must "state with particularity the grounds" for seeking relief). The circuit courts typically treat untimely Rule 59(e) motions as Rule 60(b) motions seeking relief from a final judgment. *See, e.g.*, *Lora v. O'Heaney*, 602 F.3d 106, 111 (2d Cir. 2010); *Mahone v. Ray*, 326 F.3d 1176, 1177 n.1 (11th Cir. 2003). Thus, petitioner's untimely supplemental Rule 59(e) motion should be considered as a Rule 60(b) motion.

In *Gonzalez v. Crosby*, the Court held that Rule 60(b) motions that seek to add entirely new constitutional grounds to a habeas petition must be treated as second or successive habeas petitions. 545 U.S. 524, 532 (2005). Consequently, petitioner must comply with § 2244(b) and first seek authorization to file a second habeas petition from the Fifth Circuit. He has not done so and, until he does, the district court will lack jurisdiction over his claims.

This same result is reached by applying the mandate rule, as both lower courts did. Pet. App. A13-14, E3-4; *see Henderson v. Stalder*, 407 F.3d 351, 354 (5th Cir. 2005). Petitioner's request to add new claims falls outside the mandate of the Fifth Circuit, which instructed the district court to consider the unexhausted ineffective-assistance claim. *Ayestas*, 553 F. App'x at 423. And, again, petitioner has not explained why he could not have raised his new claims before the Fifth Circuit's ruling on his initial appeal. *See United States v. Husband*, 312 F.3d 247, 250 (7th Cir. 2002) ("[A]ny issue that could have been but was not raised on appeal is waived and thus not remanded.").

2. Petitioner's new claims would be barred by AEDPA's statute of limitations.

Petitioner also fails to explain how he would avoid AEDPA's statute of limitations. Any federal habeas petition must be filed, as relevant here, within one year of "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review" or "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(A), (D). Time spent pursuing state habeas relief is not counted against this limitation. *Id.* § 2244(d)(2).

This Court has held that "[a]n amended habeas petition . . . does not relate back (and thereby escape AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." *Mayle v. Felix*, 545 U.S. 644, 650 (2005). Petitioner's new equal-protection and Eighth Amendment claims are different in time and type from those raised in his original federal habeas petition and, therefore, would not relate back. Should petitioner be permitted to amend his petition and assert his new claims, those claims would be well outside the one-year limitations period. Petitioner would, therefore, have to prove that the factual predicate of his claims (the Siegler memo) could not have been discovered through the exercise of due diligence until less than one year before bringing his claim. As noted above, petitioner has not established that the Siegler memo could not have been discovered earlier. Consequently, petitioner has not shown that his claim would satisfy AEDPA's statute of limitations.

These jurisdictional and statutory obstacles would prevent the Court from reaching the merits of petitioner's *Rhines* arguments and present additional reasons why the Court should not grant certiorari.

II. THE LOWER COURTS PROPERLY DENIED INVESTIGATIVE FUNDING AFTER DETERMINING THAT PETITIONER'S UNDERLYING CLAIM WOULD STILL LACK MERIT.

In the second question presented, petitioner urges the Court to find that the Fifth Circuit unreasonably interpreted and applied 18 U.S.C. § 3599(f), which states:

> Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so

> authorized, shall order the payment of fees and expenses therefor under subsection (g).

Petitioner's arguments miss the point. The Fifth Circuit determined that, *even if* petitioner conducted the investigation for which he sought funding, his ineffective-assistance claim would still fail to meet the prejudice prong of *Strickland*. Having concluded that petitioner's underlying ineffective-assistance claim lacked merit, the court denied funding to further develop it. Moreover, there are significant vehicle problems: In order to address petitioner's second question presented, the Court would first have to confront whether it has jurisdiction over appeals of § 3599(f) decisions and whether petitioner would be able to overcome AEDPA's standards for introducing additional evidence.

A. There is no circuit split regarding whether to authorize funding to investigate claims that will ultimately fail.

1. Because petitioner seeks to prove ineffective assistance, he must show not only that trial counsel Olvera's representation "fell below an objective standard of reasonableness," but also that "there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 688, 695. Petitioner sought funding under § 3599(f) to assist him in investigating the alleged ineffectiveness of both trial counsel and state habeas counsel. R.942-49.

The Fifth Circuit has explained that "reasonably necessary" under § 3599(f) means a showing of "substantial need." Pet. App. A7-8. In other words, the habeas petitioner must be investigating "a viable constitutional claim, not a meritless one," and cannot be searching

for "evidence that is supplemental to evidence already presented." Pet. App. A8.[11] Petitioner erroneously asserts that the Fifth Circuit's application of § 3599(f) required him to prove his *Strickland* claim before gaining access to funding. Pet. 32. The Fifth Circuit did not impose such a standard.

Instead, the Fifth Circuit recognized that petitioner had offered a "substantiated argument" regarding the need to investigate the omissions of prior counsel. Pet. App. A8. But the court determined that it was "highly unlikely" that substance abuse evidence would have altered the outcome of the sentencing phase and "conceivable, but not substantially likely," that evidence of petitioner's mental illness would have altered the outcome. Pet. App. A9; *see also* Pet. App. B2; *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (stating that, when assessing prejudice under *Strickland*, "[t]he likelihood of a different result must be substantial, not just conceivable"). Having concluded that petitioner's ineffective-assistance claim would fail to meet *Strickland*'s prejudice prong, the court affirmed the denial of funding. The denial of funding, therefore, did not come down to some undefined gap between "reasonably necessary" and "substantial need," as there was no need to authorize funding to develop a meritless claim. *Cf. Martel v. Clair*, 565 U.S. 648, 666 (2012) ("The court was not required to appoint a new lawyer [under § 3599] just so [habeas petitioner] could file a futile motion.").

[11] Moreover, the language in § 3599(f) states that a district court "may" authorize funding, suggesting that district courts have some discretion to deny funding even upon a showing of reasonable necessity.

The Fifth Circuit's decision to consider the merits of petitioner's ineffective-assistance claim at this stage of the proceedings is not at odds with the Court's precedent, *see Martinez*, 566 U.S. at 15-16 (anticipating that the States would argue that the underlying ineffective-assistance claim lacked merit), or with AEDPA, *see* 28 U.S.C. § 2254(b)(2) (allowing district courts to deny a petition on the merits even if the petitioner failed to exhaust his state court remedies). *Cf. Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) ("[I]f the record . . . precludes habeas relief, a district court is not required to hold an evidentiary hearing.").

The Court has already denied multiple certiorari petitions raising this issue. *See Wilkins v. Davis*, No. 16-723, 2017 WL 103565 (Jan. 11, 2017); *Crutsinger v. Stephens*, 135 S. Ct. 1401 (2015); *Newbury v. Stephens*, 135 S. Ct. 1197 (2015). It should deny this petition as well.

2. Petitioner attempts to manufacture a circuit split where there is none. Pet. 33-37. The cases he cites concern different circumstances and, often, different statutes or rules. He does not cite any case in which funding under § 3599(f) was authorized for a claim the court determined was meritless.

First, the Sixth Circuit cases that petitioner cites involve clemency proceedings, and, as the Sixth Circuit has recognized, "[c]lemency proceedings present different issues" than federal habeas proceedings. *Matthews v. White*, 807 F.3d 756, 760 (6th Cir. 2015); *see also Foley v. White*, 835 F.3d 561 (6th Cir. 2016). Relying on a Fifth Circuit opinion, *Brown v. Stephens*, 762 F.3d 454, 460 (5th Cir. 2014), the Sixth Circuit has explained that "[c]lemency 'proceedings are a matter of grace entirely distinct from judicial proceedings.'" *Matthews*, 807 F.3d at 760 (also quoting *Harbison v. Bell*, 556 U.S. 180, 192 (2009)). What is "necessary" in a clemency proceeding that is concerned with executive grace is, therefore, very

different from what is "necessary" in a federal habeas case that is concerned with legal standards, evidence, and burdens of proof. Consequently, the Sixth Circuit cases did not consider whether to fund an investigation into a habeas claim that lacked merit.

Even so, application of the Sixth Circuit's test would not have resulted in a different outcome. The Sixth Circuit requires the petitioner to show that "'a substantial question exists over an issue requiring expert testimony for its resolution and the defendant's position cannot be fully developed without professional assistance.'" *Id.* (quoting *Wright v. Angelone*, 151 F.3d 151, 163 (4th Cir. 1998)). Here, the Fifth Circuit essentially determined that there was no substantial question regarding the prejudice prong of *Strickland* and, therefore, no need for funding. Pet. App. A11; *see also Foley*, 835 F.3d at 564 (finding no need to hire a neuropsychologist when the petitioner's arguments "have consistently been found to be without merit"). Under the circumstances of this case, then, the difference in language between the Fifth and Sixth Circuits would not have altered the result.[12]

Second, petitioner cites multiple cases that concern investigative assistance under 18 U.S.C. § 3006A(e)(1), which permits courts to authorize investigative or expert funding in criminal cases. Pet. 36-37 (citing *United States v. Pitts*, 346 F. App'x 839 (3d Cir. 2009); *United States v. Thurmon*, 413 F.3d 752 (8th Cir. 2005); *United States v. Parker*, 4 F. App'x 111 (2d Cir. 2001); *United States v. Brandon*, 17 F.3d 409 (1st Cir. 1994)). But § 3006A(e)(1) contains mandatory language (a court "shall" authorize funding when it is "necessary for adequate representation") and applies in an entirely different context—criminal trial. A court handling a criminal matter could not conclude that a criminal defendant was guilty

[12] For the same reason, the Fourth Circuit's identical wording of the test also does not present a circuit split. *See Wright*, 151 F.3d at 163.

and deny investigative funding. Cases concerning § 3006A are not, therefore, instructive in these collateral habeas circumstances in which petitioner's claim lacked merit.

Third, petitioner cites several district court cases that he claims apply a "good cause" standard for investigative assistance. Pet. 34. But those cases concern discovery under Rule 6(a) of the Rules Governing Section 2254 Cases, which allows a judge to authorize discovery in habeas cases for "good cause." *Lee v. Humphrey*, No. CV 510-017, 2013 WL 4482461 (S.D. Ga. Aug. 20, 2013); *Wilson v. Humphrey*, Civil Action No. 5:10-CV-489, 2011 WL 2709696 (M.D. Ga. July 12, 2011). Those district courts concluded that, absent a threshold determination that good cause exists to conduct discovery, there was no need to fund investigative assistance. *Lee*, 2013 WL 4482461, at *2; *Wilson*, 2011 WL 2709696, at *4. Indeed, in *Lee*, the court found good cause for discovery but still declined to fund investigative services, demonstrating that the court was not applying a "good cause" standard to § 3599(f). 2013 WL 4482461, at *6-7.

The remaining cases cited by petitioner do not establish a circuit split. The Tenth Circuit has simply referred to the language of § 3599(f), *Rojem v. Gibson*, 245 F.3d 1130, 1139 (10th Cir. 2001), and has elsewhere indicated that it lacks jurisdiction over appeals of § 3599(f) decisions, *Rojem v. Workman*, 655 F.3d 1199, 1202 (10th Cir. 2011). The Ninth Circuit case cited by petitioner concerns when the denial of funds can be reversed and requires proof that the lack of funding prejudiced the petitioner. *Cooper v. Calderon*, 255 F.3d 1104, 1112 (9th Cir. 2001). There is no reason to conclude that the Ninth Circuit would require funding of meritless claims. Finally, the Seventh Circuit requires a "preliminary showing" before funding may be authorized, *Burris v. Parke*, 130 F.3d 782, 784 (7th Cir.

1997), but there is no indication that a determination that an underlying claim lacks merit would still result in funding.

B. Petitioner's funding claim also faces jurisdictional and statutory obstacles.

1. To reach the second question presented, the Court would have to confront the predicate question whether there is appellate jurisdiction over appeals of the denial of funding under § 3599(f). *See Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 740 (1976) (stating that the Court has an obligation to question its own appellate jurisdiction). Section 3599 closely circumscribes the review available for funding determinations and does not itself provide for appellate review of the denial of funds. 18 U.S.C. § 3599(f), (g)(2).

Congress has granted courts of appeals jurisdiction to review "final decisions" of the district courts. 28 U.S.C. § 1291. The courts of appeals, however, have held that § 1291 "necessarily refers to final decisions of a judicial character, not to administrative actions . . . outside the scope of the litigative function." *In re Baker*, 693 F.2d 925, 926-27 (9th Cir. 1982); *see, e.g.*, *Wilkins v. Davis*, 832 F.3d 547, 558-59 (5th Cir. 2016); *In re Pickett*, 842 F.2d 993, 995 (8th Cir. 1988); *Bense v. Starling*, 719 F.2d 241, 244 (7th Cir. 1983). Thus, for example, the courts of appeals are unanimous that fee determinations made under the Criminal Justice Act (18 U.S.C. § 3006A) are administrative acts not reviewable under § 1291. *United States v. French*, 556 F.3d 1091, 1093 (10th Cir. 2009) ("Every circuit court of appeals to consider this jurisdictional question has held that CJA fee compensation determinations made by the district court are not appealable."); *Landano v. Rafferty*, 859 F.2d 301, 302 n.2 (3d Cir. 1988) (per curiam) ("The provision for limited review by the Chief Judge of the Circuit of vouchers approved by a district judge may be read to exclude by negative implication other forms of review of district judge action.").

Section 3599 is a "spin[] off" of the CJA, *Martel*, 132 S. Ct. at 1285, and provides for a similar process to review funding decisions. Accordingly, § 3599 should read *in pari materia* with the CJA. *See United States v. Stewart*, 311 U.S. 60, 64 (1940). This interpretive principle is especially applicable when, as here, the two statutes adopt a single consistent vocabulary in reference to the same subject matter. *Compare* 18 U.S.C. § 3006A(e)(3), *with id.* § 3599(g)(2). If CJA funding determinations are not appealable, then it follows that § 3599 funding determinations, which were modeled after the CJA, are also not appealable.[13]

The Tenth Circuit reached this very conclusion. In *Rojem*, the district court denied a funding request for investigative assistance under § 3599 because it "determined the requested amounts were *not reasonably necessary for the matter then before it.*" 655 F.3d at 1202. The Tenth Circuit dismissed the petitioner's appeal of this decision, concluding that it was no different than a dispute over a CJA fee determination, which is administrative and not reviewable. *Id.* For the same reason, appellate courts lack jurisdiction to review funding decisions under § 3599(f). At the very least, it is an issue the Court will have to confront and resolve before reaching the second question presented.

2. Petitioner's arguments are premised on the notion that *Martinez* and *Trevino* have opened the door to investigation and discovery in the federal habeas context when the cause for a procedural default is the ineffective assistance of state habeas counsel. Pet. 38-39. But

[13] Notably, Congress enacted the law currently codified in § 3599 in 1988 (*Martel*, 132 S. Ct. at 1284; Pub. L. 100-690, 102 Stat. 4181 (Nov. 18, 1988)), after several circuits had held that fee determinations under the nearly identical § 3006A were not appealable. *See, e.g.*, *Landano*, 859 F.2d at 302; *United States v. Rodriguez*, 833 F.2d 1536, 1537-38 (11th Cir. 1987) (per curiam).

other relevant doctrines still limit these claims. For example, a federal habeas petitioner must still comply with AEDPA's limitations on federal review of state habeas decisions.

To begin, *Martinez* does not require federal courts to await development of a full evidentiary record before determining that a claim is insubstantial or would be rejected on the merits. 566 U.S. at 15-16 (anticipating that States would argue that the underlying claim lacked merit). The Court in *Martinez* believed that addressing cause and prejudice for ineffective assistance of counsel would "not . . . put a significant strain on state resources." *Id.* at 15. Finding cause and prejudice under *Martinez* and *Trevino* simply allows the district court to hear the underlying ineffective-assistance claim. To that extent, petitioner received all the relief he was due under *Martinez* and *Trevino*—the lower courts considered the merits of his ineffective-assistance-of-trial-counsel claim and determined that he would fail *Strickland*'s prejudice prong, even with further investigation. Pet. App. A11, B2, C12.

Even if the district court authorized funding for further investigation, petitioner would still need to meet AEDPA's standards before introducing that evidence. Under 28 U.S.C. § 2254(e)(2), petitioner would have to demonstrate that the "factual predicate . . . could not have been previously discovered through the exercise of due diligence" and that "no reasonable factfinder would have found the applicant guilty." But petitioner's entire ineffective-assistance claim is premised on his belief that the evidence of his substance abuse and mental illness could have and should have been discovered earlier. And he makes no argument that he is not guilty of the underlying offense. *Martinez* and *Trevino* may remove a procedural-default bar in certain circumstances, but they do not negate other limitations on habeas review imposed by AEDPA. If petitioner cannot meet the requirements of

§ 2254(e)(2), he will be unable to introduce his new evidence in court, rendering any further investigation futile.

C. The Fifth Circuit did not err in concluding that petitioner's ineffective-assistance claim lacked merit.

Finally, there was no error in the Fifth Circuit's conclusion that petitioner's ineffective-assistance-of-trial-counsel claim failed on the merits. The court assumed arguendo that petitioner could prove that he was addicted to drugs and alcohol at the time of the murder and that he was in the early stages of schizophrenia, but still concluded that the jury likely would have sentenced him to death regardless.

Although respondent has not seen petitioner's sealed ex parte § 3599(f) motion (Pet. App. G) and cannot therefore comment on it specifically, petitioner's briefing identifies a few topics on which he seeks further investigation.[14] First, much of his information appears to be derived from family members—the very individuals that petitioner affirmatively told his trial counsel not to contact. Pet. 29-30. As the state courts, district court, and Fifth Circuit have held, it is not ineffective assistance to follow a client's wishes with regard to mitigation evidence. *See Schriro*, 550 U.S. at 475 ("If Landrigan issued such an instruction [not to present mitigating evidence], counsel's failure to investigate further could not have been prejudicial under *Strickland*."); *Taylor v. Horn*, 504 F.3d 416, 455 (3d Cir. 2007).

Further, some of the testimony petitioner now seeks to investigate appears contrary to the evidence uncovered by state habeas counsel. *Compare* Pet. 29 (referring to evidence of

[14] Respondent preserves all arguments that could be made based on the contents of this sealed ex parte § 3599(f) motion.

poverty and dysfunction), *and* R.688 (referring to past head injuries), *with* R.5357 (describing a stable, middle-class background with no illnesses or injuries). Also, demonstrating that petitioner had a mental illness would have undermined state habeas counsel's arguments that trial counsel was ineffective for not having petitioner testify during his trial. R.5558 (arguing that trial counsel should not have feared putting petitioner on the stand because he was above average intelligence and an accomplished student).

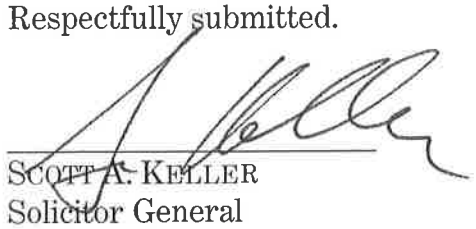
Moreover, evidence of substance abuse and mental illness is often just as likely to be considered an aggravating factor as it is a mitigating factor. *See, e.g.*, *Wackerly v. Workman*, 580 F.3d 1171, 1178 (10th Cir. 2009); *Cannon v. Gibson*, 259 F.3d 1253, 1277-78 (10th Cir. 2001); *Royal v. Taylor*, 188 F.3d 239, 249 (4th Cir. 1999); *Waldrop v. Jones*, 77 F.3d 1308, 1313 (11th Cir. 1996); *Jones v. Page*, 76 F.3d 831, 846 (7th Cir. 1996); *see also Atkins v. Virginia*, 536 U.S. 304, 321 (2002) ("[R]eliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury.").

The Fifth Circuit correctly determined that the presentation of substance abuse evidence or evidence of mental illness would not have had a substantial likelihood of changing the jury's conclusion about petitioner's sentence. Consequently, petitioner cannot prove the prejudice prong of *Strickland*, and his ineffective-assistance-of-trial-counsel claim fails. As a result, his state habeas counsel was not ineffective, and the procedural bar remains firmly in place. It was not therefore "reasonably necessary" to fund any further investigation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.



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